LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Date: 2018-11-07
Tribunal File Number: 18-001406/AABS
Case Name: 18-001406 v. Certas Home and Auto Insurance Company

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act,* RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

J. M.

Applicant

and

Certas Home and Auto Insurance Company

Respondent

DECISION

ADJUDICATOR: **Rebecca Hines**

APPEARANCES:

For the Applicant: Matthew Cino, Counsel

For the Respondent: Heather Kawaguchi, Counsel

HEARD In Writing: **September 10, 2018**

OVERVIEW

[1] This case has a long history. On January 29, 1997, J.M. (the "applicant"), was injured when she was struck by a car in her driveway driven by her four year old son. As a result, she suffered a fractured left leg which required surgical intervention, including the insertion of rods and pins that remained in place for one year. She sought benefits from Certas Home and Auto Insurance Company (the "respondent"), pursuant to the *Statutory Accident Benefits Schedule* - O. Reg.403/96 - Accidents on or after November 1, 1996 (the 1996 "*Schedule*").

[2] In 2007, the applicant filed an application for a catastrophic (CAT) determination (OCF-19) under Criteria 7, Whole Person Impairment (WPI) which requires at least 55% under the *Schedule* and can combine physical and psychological impairments. In response, the respondent completed a CAT insurer examination (IE), which found the applicant suffered a 1% WPI on the basis of physical impairments and no psychological impairment. The applicant conducted her own CAT assessment. The applicant's rebuttal assessors found the applicant suffered a 44% WPI, which did not meet the threshold of 55% to qualify as catastrophically impaired pursuant to the *Schedule*. The applicant's assessment found a mild psychological impairment, but no impairment rating was provided. The dispute ended there.

[3] In November 2016, the applicant submitted a second OCF-19 under both Criteria 7, the WPI, as well as under Criteria 8. Under Criteria 8, an individual meets the threshold for a CAT determination if they have an impairment that results in a Class 4 impairment (marked impairment) or Class 5 impairment (extreme impairment) due to mental or behavioural disorder in one out of four areas of functioning.[1] In response, the respondent completed a second round of CAT IEs in September 2017, for Criteria 7 and 8. Under Criteria 7, the IE found a WPI of 12%, (consisting of 2% for physical and 10% for psychological) and under Criteria 8, a Class 2 mild impairment across the 4 spheres. The results of the CAT IE support that the applicant did not qualify as catastrophically impaired under either criteria.

[4] The applicant then submitted a treatment plan (OCF-18) for a CAT assessment in September 2017,[2] which was denied by the respondent on November 10, 2017. This hearing arises from the respondent's denial of this OCF-18.

[1] The four areas of function include: 1) Activities of Daily Living; 2) Social Functioning; 3) Concentration, Persistence and Pace; and 4) Adaptation: Work Functioning.

[2] In their submissions both parties refer to the issue to be decided as a CAT rebuttal report. However, the OCF-18 in dispute lists a CAT assessment not a rebuttal report. Therefore, this is how I have defined the issue throughout the decision.

ISSUES IN DISPUTE

[5] I have been asked to decide the following issues:

(i) Is the applicant time barred from submitting an OCF-18 for a CAT assessment due to the 10 year expiry to claim medical/rehabilitation benefits pursuant to the *Schedule*?

(ii) Which version of the *Schedule* governs the applicant's entitlement to a CAT assessment?

(iii) Is the applicant entitled to payment for a cost of examination for a CAT assessment (plus interest), in the amount of $22,200.00 recommended in an OCF-18 by Novo Medical Services Inc. and denied on November 10, 2017?

(iv) Is the applicant entitled to an award under *Ontario Regulation 664, R.R.O. 1990?*

(v) Is the applicant entitled to costs pursuant to Rule 19 of *Licence Appeal Tribunal's Rules of Practice and Procedure (LAT Rules)*?

RESULT

[6] For the reasons that follow, I find:

(i) The applicant is not barred from submitting an OCF-18 for a CAT rebuttal assessment.

(ii) The 2010 *Schedule* governs the applicant's claim for a CAT rebuttal assessment.

(iii) The applicant is not entitled to the OCF-18 for a CAT rebuttal assessment as I do not find it reasonable or necessary.

(iv) The applicant is not entitled to an award or costs.

Is the applicant time barred from submitting an OCF-18 for a CAT assessment as the 10 year time period for claiming medical and rehabilitation benefits has expired?

[7] The applicant is not barred from submitting an OCF-18 for a CAT assessment for the following reasons:

[8] S.18 (1)(a) of the 1996 *Schedule* provides that no medical or rehabilitation benefit is payable for expenses incurred more than 10 years after the accident.[3]

[9] The respondent argues that January 29, 2007 marked the 10 year anniversary of the subject accident, and since the OCF-18 dated September 25, 2017 is well outside of the 10 year timeline to apply for benefits the applicant is out of time to submit further OCF-18s.

[10] The applicant argues that the 10 year time period applies to non-catastrophic medical and rehabilitation benefits. Furthermore, since the OCF-18 relates to an application for a CAT determination and the case law supports that a CAT determination it is not a benefit it is therefore not subject to the 10 year time period to claim medical and rehabilitation benefits under s.18(1)(a) of the *Schedule.* I agree with the applicant.

[11] I found the Financial Services Commission of Ontario (FSCO) appeal decision submitted by the applicant of *Cook and RBC Insurance*[4] persuasive. Director's Delegate Blackman determined that a catastrophic impairment by itself is a threshold not a benefit. While I am not bound by FSCO decisions, the Court of Appeal has also agreed with the principle that a catastrophic impairment is not a benefit.[5] Therefore, I find it reasonable that an assessment required to determine whether someone is catastrophically impaired is not strictly included as a medical rehabilitation benefit. As a result, it is therefore not subject to the 10 year time period to apply for medical and rehabilitation benefits under the *Schedule.*

Which version of the *Schedule governs the* applicant's entitlement to a CAT assessment?

[12] I find that the applicant's entitlement to a CAT assessment is determined by the 2010 *Schedule*[6]*.*

[13] S. 268(1)[7] of the *Insurance Act* (the "Act") provides that insurance policies and contracts are governed by the *Schedule* which can be amended from time to time. Moreover, the terms of insurance contracts can be impacted by amendments to the *Schedule* subject to any terms, exclusions and limits set out in the regulation.

[3] 1996 Statutory Accident Benefit Schedule, O.Reg.403/96, s.18 (1)(a). Both the 1996 and 2010 *Schedules* provide the same 10 year time period to claim medical and rehabilitation benefits.
[4] *Cook and RBC Insurance Co.* (FSCO Appeal P14-00038, May 4, 2015), pg 9.
[5] *Machaj v. RBC Ins*., 2016 ONCA 257
[6] 2010 Statutory Accident Benefit Schedule, O.Reg 34/10.
[7] Insurance Act, s.268(1)

[14] Prior to September 1, 2010, sections 24(1)(10) and 42.1(3) of the 1996 Schedule[8] provided that an insurer pay the insured person reasonable fees and expenses to have an assessment or examination completed after a benefit was denied. These assessments were termed rebuttal reports. Further, s. 42.1(3) provided that if an insurer determined that a person was not catastrophically impaired, the insured person would have 80 business days to provide the insurer with a rebuttal report, after receiving notice of the insurer's determination.

[15] On September 1, 2010, the *Schedule* was amended and both of the above sections were repealed and replaced with s. 25 (1)(5)[9]. S.25 (1)(5) states that an insurer shall pay an insured "Reasonable fees charged for preparing an application under s.45 for a determination of whether the insured person sustained a catastrophic impairment, including any assessment or examination necessary for that purpose." In addition, the 2010 *Schedule* placed a maximum amount payable at $2,000.00 per assessment, whereas under the 1996 *Schedule* the fees just had to be reasonable.

[16] The applicant argues that her entitlement to a CAT assessment is a substantive right which vested when she signed her insurance contract. Moreover, since this accident occurred in 1997 it falls under the1996 *Schedule* when such reports were fully funded by insurers. Therefore, the provisions of the 1996 *Schedule* apply prospectively. The applicant further asserts that her funding is not subject to the $2,000.00 cap as per the 2010 *Schedule*. Finally, she asserts that not allowing her the opportunity to obtain a CAT assessment is out of line with procedural fairness as it would deny her the ability to participate in the dispute resolution process fairly and present her case adequately.

[17] The respondent maintains that the 2010 *Schedule* governs the applicant's entitlement to a CAT assessment. The respondent contends that this is specifically addressed by the transitional rules in both the 1996 and 2010 *Schedules* and is confirmed by FSCO Superintendent's Bulletin A-04/10. Further, it argues that the 2010 *Schedule* eliminated funding for CAT assessments period. It submits that post September 2010 an insured can conduct their own CAT assessment but may have to fund it out of their own pocket.

[18] I found the respondent's argument with respect to the application of the 2010 *Schedule* more persuasive. I find the transitional rules in both *Schedules* do not allow for the interpretation that the applicant proposes. For example, s.3 of the 1996 Schedule specifically states that s.24 from the 1996 *Schedule* that allows for rebuttal reports does not apply after August 31, 2010. The section further confirms that any amount paid under the regulation shall be paid under the new

[8] O.Reg.403/96, ss.24(1)(10) and 42.1(3)
[9] O.Reg.34/10, s. 25(1)(5)

regulation in an amount to be determined.[10] S.2(2) of the transitional rules of the 2010 *Schedule*[11] confirms this and states that any amounts previously paid under s.24 would now be paid under s.25(1),(3), (4) and (5).[12]

[19] In my view, the fact that the transitional rules provide a cut-off date means that the application of s.24 does not apply to any claim that is made after August 31, 2010, regardless of when the accident happened. I find the point that the legislature specifically states that s.24 no longer applies in the transitional rules of both *Schedules* clearly highlights the intent to eliminate the use of that section and rebuttal reports. Likewise, I agree with the respondent that if s.24 was meant to apply prospectively then the transitional rules would have defined and allowed for that. The same sentiment in the transitional rules is confirmed in FSCO Bulletin A-04/10. While the bulletin is not binding, it demonstrates a consistent approach to interpreting the transitional rules and s. 268 of the *Act*.

[20] I also find the case law submitted by the respondent with respect to vested rights and the retrospective application of legislation more on point. The respondent relied upon the FSCO appeal decision of *Motor Vehicle Accident Claims Fund and Barnes.*[13] I found the *Barnes* decision compelling as when read in conjunction with s.268 of the *Act*, the transitional rules in both *Schedules* and the FSCO bulletin I agree that the Director's Delegate in *Barnes* correctly interprets the law. The Director's Delegate determined that s. 268 opposes the concept that an insurance policy is a private agreement between an insurer and it's insured as the terms are set by the legislation with no input from the parties. Further, since the *Schedule* is a part of every policy, as are any amendments, rights do not crystalize based on the date of the accident. Instead, rights are based on what is set out in the *Act* and regulations at the time of a claim rather than the date of the accident.[14]

[21] In contrast, the applicant asks that I take a creative approach to interpreting vested rights and the prospective application of the legislation without providing any authority for me to do so under the Act or the *Schedule.* The applicant relied on the FSCO decision of *Federico v. State Farm*[15] where Director's Delegate Blackman determined that the contract of insurance between the insurer and insured created rights and obligations as soon as it was formed and those rights crystalized on the date of the accident.[16]

[10] O.Reg.403/96, s.3
[11] O.Reg.403/96,s.2(2)
[12] Ibid, s.25 (1), (3), (4) and (5).
[13] *Motor Vehicle Accident Claims Fund and Barnes* (FSCO Appeal P16-00087, April 6, 2017)
[14] Ibid, pg. 6.
[15] *State Farm Mutual Autombile Insurance Co. and Federico* (FSCO Appeal P12-00022, March 25, 2013)
[16] Ibid, pgs. 13 and 14.

[22] What I find distinguishable between *Federico* and the matter before me is that the decision dealt with interest payable under the old *Schedule.* In my view, a substantive benefit under the 1996 *Schedule* would include benefits such as interest, the calculation of income replacement benefits, attendant care and housekeeping. If these benefits were in dispute they would be payable under the 1996 *Schedule* unless the transitional rules stated otherwise. In this case, it is entitlement to a CAT assessment, which I have already determined is not a benefit and the procedure for claiming funding for this has changed. The applicant's submissions were silent on s.268 of the *Act* and the transitional rules pertaining to the procedure for claiming CAT assessments and/or rebuttal reports.

[23] The applicant relied on numerous FSCO decisions in support of her position that CAT rebuttal reports are a substantive right that should not be interfered with and that the new legislation should not be applied retroactively. I did not find the decisions submitted by the applicant helpful as the issues being considered were distinguishable and the facts of each case were different.[17] In addition, the majority of the FSCO decisions awarded funding for CAT rebuttal assessments as an interim benefit. FSCO arbitrators had the power to grant interim benefits under s.279 which was also repealed when the LAT was granted jurisdiction over accident benefit disputes. To date this power has not been conferred to the LAT. For all of the above reasons I find the procedure for obtaining funding for a CAT assessment changed with the 2010 *Schedule* and the September 2010 *Schedule* applies.

[24] While I agree with the respondent's position that the 2010 Schedule applies, I disagree that the 2010 *Schedule* eliminated an insured's right to CAT assessments period. I agree with the applicant that Section 25(1)(5) of the 2010 *Schedule* still allows for funding for CAT assessments, however, the procedure for seeking funding has changed since the previous *Schedule*. Therefore, what I

[17] For example, *Innes and Intact Insurance Co.* (FSCO A10-003206, April 14, 2011) dealt with whether the insured should attend an IE for a CAT determination. Decision discusses the difference between a post-104 IRB assessment and a CAT assessment.
RJ and Dominion of Canada General Insurance Co. (FSCO A12-001233, September 17, 2013) was a motion for interim benefits pursuant to s.279 (4.1). The arbitrator agreed with Director Delegate Blackman's analysis in *Federico* with respect to contracts and vested rights which I did not find compelling. Other factors were taken into consideration by the arbitrator in awarding entitlement to the rebuttal report which did not exist in this hearing. For example, flaws in the IEs.
Fernandes and Western Assurance Co.(FSCO-A13-06614-PI, September 30, 2014.) also dealt with whether a CAT IE is reasonable and necessary.
Almousawi and TD General Insurance Co. (FSCO A12-000481, July 9, 2015) was also a motion for interim benefits for a rebuttal report and IRBs. The test of urgency and necessity was assessed by the arbitrator as per the test for interim benefits.
Jodoin and Gore Mutual Insurance Co. (FSCOA11-002456, June 20, 2013.) also dealt with whether an IE for a CAT determination is reasonable and necessary.

must determine is whether the CAT assessment in dispute is reasonable and necessary as a result of the applicant's accident related impairments.

Is the OCF-18 for a CAT assessment reasonable and necessary?

[25] I do not find the OCF-18 for a CAT assessment reasonable or necessary for the following reasons:

[26] First, there was a lack of evidence submitted between 2007 to present to demonstrate that the applicant's accident related impairments or functioning has deteriorated since her first OCF-19 and CAT reports completed in 2007. Further, I agree with the respondent that the current OCF-18 for the CAT assessment is vague and incomplete. Under Part 8: Activity Limitations it states "as a result of the motor vehicle accident the applicant faces functional ability limitations and difficulties performing these activities." The OCF-18 is not helpful in supporting that her condition has gotten worse and fails to specify what activities the applicant is limited in. In response to whether these limitations impact her tasks of employment it says "unknown." Under Part 9: the goal states "to examine whether the applicant meets the catastrophic impairment." I find that the applicant did not submit any evidence to support that 20 years post-accident there has been a change in her medical status or function to support the OCF-18 for a CAT assessment.

[27] Second, I disagree with the applicant that the respondent's second CAT IE completed in November 2017 is proof that her condition deteriorated. In her submissions the applicant alleges that imaging has shown progressive deterioration and degeneration of the left knee and left hip as recent as February 2016. The applicant contends that this condition persisted and led to a fall when her knee gave out resulting in a full thickness tear to her right shoulder. The applicant did not submit any x-rays or medical reports to confirm these facts and nothing was submitted to support that her function has deteriorated since the 2007 reports. The applicant contends that the respondent's IE refers to degenerative changes to her knee, hip and back. Further, the fact that the respondent's second CAT IE in 2017 shows a 2% WPI from a physical perspective (a 1% increase from its original report in 2007) and a 10% rating from a psychological perspective proves that her condition deteriorated. I do not find this slight increase proof of the applicant's deterioration resulting in functional limitations that would warrant further assessments such as the one in dispute.

[28] Third, a review of the respondent's 2007 CAT IE, the applicant's 2007 rebuttal report and 2017 CAT IEs do not depict an individual with significant limitations10 to 20 years post-accident. In my view, these reports do not support that the applicant's condition has gotten any worse, nor do they describe someone who has any functional limitations that the OCF-18 for a CAT assessment is meant to

explore. While the applicant reports pain in the left leg, hip and low back in both the 2007 and 2017 assessments, overall, the evidence does not support the applicant's claim for a CAT assessment as reasonable or necessary. For example, the 2007 CAT IEs state the following with respect to the applicant's function:

(a) She attends night school while working full-time – her marks are in the 70s and 80s;[18]

(b) She wakes up at 5:00 a.m., walks the dogs, makes school lunches, goes to work, goes grocery shopping, reads the paper and cleans;[19]

(c) She works 12 hour shifts as a medical clerk in a hospital emergency department;[20]

(d) She had not received any medical treatment in 9 years.[21]

[29] The applicant's own CAT rebuttal report also portrays the applicant as functioning. While there are self-reports of some limitations, her assessors report that she was fully independent with her daily activities, she was able to drive, go grocery shopping, did her own banking, made school lunches, exercised, walked the dogs and worked 12 hour shifts in a busy and demanding work environment.[22]

[30] The applicant's 2007 CAT rebuttal assessment concludes that "several consultants had formed the opinion that an adequate degree of recovery had occurred and the applicant concurred at this evaluation that she had mild ongoing physical difficulties, namely intermittent pain." [23] Regarding psychological issues, the assessment noted that "she had endorsed minimal residual depressive symptoms in a mild form with no significant impairment on functioning across several domains."[24] However, the report does state that she is likely to have progressive osteoarthritis of the left knee resulting in a progressive inability to stand, walk or climb for prolonged periods of time and may affect her ability to work in the future."[25] No evidence was before me to support that the applicant is currently functionally limited in her employment or daily activities to warrant a second CAT assessment.

[18] Respondent's Document Brief, Tab B, Psychological CAT IE of Dr. Young
[19] Idem, pg 5.
[20] Idem, pg 5.
[21] Respondent's Document Brief, Tab C, Functional Medicine Evaluation CAT IE, pg 25.
[22] Respondent's Document Brief, Tab F, Applicant's CAT Rebuttal, pgs 14, 21, 26 & 27.
[23] Idem, pg 34.
[24] Idem, pg 35.
[25] Idem, pg 39.

[31] The 2017 CAT IEs state the following with respect to the applicant's activities 20 years post-accident:

(a) She has made significant strides over 20 years. Walking, light jogging and working out on the treadmill. She also participates in orangetheory a high intensity fitness class;[26]

(b) She is independent with activities of daily living. She attends ballet twice a week, yoga and spinning and avoids riding her bike on the street[27];

(c) She has not received any treatment for the past decade and has not been seen by any specialist;[28]

(d) She travels twice a year;[29] and

(e) She works as a medical secretary in an emergency department in a hospital. She works 40 hours a week (12 hour shifts) with no modifications. Her job requires excellent concentration, memory and communication skills. [30]

[32] The applicant did not dispute any of the above facts in her initial or reply submissions or claim that the above are misrepresentations by the IE assessors. In fact, the applicant did not submit any evidence for the period between 2007 and 2017 to demonstrate ongoing functional limitations or the need for more medical treatment that the OCF-18 is meant to assess. The applicant relied on case law to make her case. However, I find the cases submitted by the applicant distinguishable as they mostly focused on flaws in insurers' IEs which were important factors in the decision maker's analysis in awarding funding for rebuttal reports. In this case, as mentioned above, the applicant did not present such an argument.

[33] For all of the above-reasons I find that the applicant has not met her onus in proving that the OCF-18 for a CAT assessment is reasonable or necessary as a result of her accident related impairments.

AWARD

[34] The applicant requests that the Tribunal order an award arguing that the respondent unreasonably withheld and delayed payment of the benefit. Ontario Regulation 664, R.R.O. 1990 (O. Reg. 664) states that if the Tribunal finds that

[26] Respondent's brief, Tab H, Neurological CAT IE 2017, pg 4
[27] Idem, pg 5.
[28] Respondent's brief, Tab J: In-Home Occupational Therapy CAT Assessment 2017, pgs 3 &4.
[29] Idem, pg 7
[30] Respondent's brief, Tab L: CAT Psychiatry Exam 2017, pg 4.

an insurer had unreasonably withheld or delayed payments, the Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled, may award a lump sum of up to 50 percent of the amount to which the person was entitled at the time of the award with interest.

[35] The basis for the applicant's claim for an award is based on the respondent's conduct in denying her CAT rebuttal assessment because it is a direct contravention of the *Schedule* in that rebuttal reports are substantive rights. As noted above, I disagree with the applicant's legal argument on this issue. I also find that the respondent's conduct does not resemble the type of conduct that merits such an award. The applicant is not entitled to an award.

COSTS

[36] The applicant also requested costs under Rule 19 of LAT's *Rules of Practice and* Procedure*.* The Tribunal may make an award of costs, where a party has proven that the other has acted unreasonably, frivolously, vexatiously or in bad faith during the course of the hearing. The threshold for costs is a high one. I found the applicant's submissions with respect to costs insufficient as she did not explain how the respondent's behavior during this proceeding met the threshold for unreasonable conduct that merits costs. Therefore, the applicant is not entitled to costs.

CONCLUSION

(i) The applicant is not barred from submitting an OCF-18 for a CAT rebuttal assessment.

(ii) The 2010 *Schedule* governs the applicant's claim for a CAT rebuttal assessment.

(iii) The applicant is not entitled to the OCF-18 for a CAT rebuttal assessment as I do not find it reasonable or necessary.

(iv) The applicant is not entitled to an award or costs.

Released: November 7, 2018

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Rebecca Hines,
Adjudicator