Citation: Orahim v. Allstate Insurance Company of Canada, 2022 ONLAT 20-005246/AABS

File Number: 20-005246/AABS

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:

Riva Orahim

Applicant

and

Allstate Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **Brian Norris**

APPEARANCES:

For the Applicant: Maurice Benzaquen, Counsel

For the Respondent: Greg Specht, Counsel

Written Hearing: **Heard by way of written submissions**

OVERVIEW

[1] Riva Orahim, (“the Applicant”), was involved in an automobile accident on August 2, 2018, and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule").

[2] Allstate Insurance Company of Canada, (“the Respondent”), determined that the Applicant’s injuries fell within the *Minor Injury Guideline*, (“the MIG”), and refused to pay for certain medical benefits. The Applicant submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“the Tribunal”) for resolution of this dispute.

ISSUES

[3] The disputed claims in this hearing are:

1) Are the Applicant’s injuries predominantly minor as defined in section 3 of the *Schedule* and therefore subject to the MIG and the $3,500.00 limit on medical benefits?

2) Is the Applicant entitled to $2,456.00 for physiotherapy services recommended by HealthPro Wellness in a treatment plan (OCF-18) dated April 18, 2019?

3) Is the Applicant entitled to $3,130.76 for physiotherapy services recommended by HealthPro Wellness in a treatment plan (OCF-18) dated September 3, 2019?

4) Is the Respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the Applicant?

5) Is the Applicant entitled to interest on any overdue payment of benefits?

RESULT

[4] I find that the Applicant sustained a minor injury as a result of the accident. He is subject to the MIG and the $3,500.00 funding limit on treatment.

[5] The Applicant is not entitled to the disputed treatment plans because he has exhausted the funding limit on medical benefits.

[6] No award or interest are payable.

PRELIMINARY ISSUE

[7] The October 7, 2020 Order for this hearing states that a third treatment plan was in dispute but was withdrawn by the Applicant at the case conference. Despite this, the Applicant seeks entitlement to it in his written submissions. The Respondent asks that submissions pertaining to that treatment plan be disregarded because it is not an issue in dispute.

[8] I agree with the Respondent and disregard the Applicant's submissions pertaining to a third treatment plan in dispute. The Order notes that the issue was withdrawn and there is no evidence before me to show that the Applicant sought permission or consent from the Respondent, or the Tribunal, to add the issue to this hearing.

BACKGROUND

[9] The Applicant was the driver of a vehicle which was struck from behind while stopped at a suburban intersection. Throughout his submissions for this hearing, he claims that he was extricated from his vehicle, placed on a stretcher, provided a cervical collar, and transported to hospital. However, the medical records confirm that Emergency Medical Services attended at the scene of the accident and treated him for a minor cut near his left eye. He denied transportation to the hospital from the scene of the accident. The Applicant went to the hospital later that night and complained of neck pain and the laceration near his left eye. He reported no loss of consciousness, and no nausea or vomiting. Neck x-rays were negative, the Applicant's laceration was treated, and the Applicant was discharged.

[10] The Applicant claims that he sustained a concussion, was diagnosed with chronic pain and psychological sequelae, and that these injuries fall outside the "minor injury" definition.

[11] The Respondent submits that the Applicant has failed to meet his burden to disprove that he sustained a minor injury. I agree with the Respondent.

THE MINOR INJURY GUIDELINE

[12] The MIG establishes a treatment framework available to injured persons who sustain a minor injury as a result of an accident. A "minor injury" is defined in the *Schedule* and includes sprains, strains, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae. The MIG provides that a strain is an injury to one or more muscles and includes a

partial tear. Minor injuries are subject to the treatment methodologies outlined in the MIG and, under section 18 of the *Schedule*, injuries that are defined as minor are subject to a $3,500.00 funding limit on treatment.

[13] If an insurer deems an Applicant's injuries to be minor in nature, the responsibility is on the Applicant to establish that the MIG, and the related funding limit, should not apply.

[14] I find that the evidence shows that the Applicant sustained a minor injury as a result of the accident. Thus, he is bound by the MIG and the $3,500.00 funding limit.

Evidence

[15] The evidence fails to support the Applicant's claims that he sustained a concussion and other non-minor injuries. He relies on the motor vehicle collision report ("the MVC Report"), hospital records, a disability certificate by Dr. R. Tarulli, chiropractor ("the OCF-3"), three treatment and assessment plans, and the adjuster's log notes. I will address each exhibit in turn.

[16] The MVC Report documents a rear-end collision at a suburban intersection. It notes that the Applicant was seen by paramedics and refused to attend the hospital. It says that first aid was provided for a minor cut to the head. This document incudes no record of a concussion or any other non-minor injury.

[17] The hospital records show that the Applicant sustained a minor injury. The records note complaints of neck pain and a minor laceration near the left eye. The records include a note that the Applicant had a minor headache in one instance, but he denies a headache on two other occasions. The records include no diagnosis of a concussion, chronic pain, or any symptoms of a psychological injury. Physicians sought no referrals or imaging related to any head trauma. While the records state that concussion care was discussed, I find that this is not the equivalent of a concussion diagnosis and, considering the headache denials and lack of further investigation, the note is most likely reference to a discussion regarding what to do if symptoms develop.

[18] The Assessment of Attendant Care Needs Form-1, dated August 28, 2018, includes no evidence of a non-minor injury. The form is absent any diagnosis, or even a suggestion, of a non-minor injury. The document, completed by a registered nurse, notes that the Applicant is independent with almost all of his self-care but needs assistance with toenail care, preparing meals, cleaning the bathroom, changing and making the bed, and ensuring comfort, safety and

security in his environment. Requiring assistance with some self-care tasks does not remove the Applicant from the MIG.

[19] The OCF-3 holds no weight when assessing whether the Applicant sustained a minor injury. Up front I must point out that an OCF-3 is used to apply for a specified benefit and is not a comprehensive assessment of the injuries sustained in the accident, particularly in the absence of any supporting clinical notes and records. Here, the OCF-3, completed by a chiropractor, anticipates a 9-12 week disability period and lists concussion, headache, acute pain, and sleep disorder before listing other sprain and strain injuries. The document lacks credibility because no clinical notes and records from the treatment facility were provided to determine why or how the chiropractor concluded that the Applicant sustained these injuries. As stated earlier, emergency room physicians never diagnosed a concussion, no diagnostic imaging was conducted, and he denied headaches two out of three times while at the hospital.

[20] The three treatment and assessment plans share the same issue as the OCF-3. The plans list concussion and chronic pain as injuries but no clinical notes and records are provided to support the diagnosis. It is entirely unclear why the chiropractors involved in the Applicant's care would diagnose injuries when no physician has ever done so.

[21] The Adjuster's Log Notes are not medical evidence. The Applicant suggests that notes recorded while adjusting his claim are evidence that he sustained a concussion, chronic pain, or a psychological injury. They are not. Rather, the notes are a collection of records documenting the adjusting of the Applicant's claim. Here, they have no value from a medical perspective.

[22] The Applicant's employment records are not medical evidence but suggest that he suffers no functionality limitation. The Applicant is employed as a machine operator and his job duties include lifting and drilling components with a weight of 10 kg. He was unable to work immediately following the accident but returned to his regular 12 hour shifts on a full-time and unrestricted basis on September 28, 2018.

The Respondent is not obliged to conduct an insurer's examination ("IE")

[23] The Applicant highlights that the Respondent produced no medical reports to support its conclusion. He suggests that the lack of an IE report tips the scales of justice in his favour but fails to consider that he holds the responsibility to prove that he sustained an injury that falls outside the definition of a "minor injury".

[24] I find that the absence of an IE report is not fatal to the Respondent's position because the Applicant has provided no credible evidence of a non-minor injury. He has failed to discharge his onus and thus, it is not incumbent on the Respondent to conduct an IE to defend its position.

THE DISPUTED TREATMENT PLANS

[25] The Applicant sustained a minor injury and is subject to the $3,500.00 funding limit on treatment. He has exhausted this funding limit. Thus, there is no need for an analysis of whether the disputed treatment plans are reasonable and necessary.

IS THE APPLICANT ENTITLED TO AN AWARD?

[26] Pursuant to section 10 of O. Reg. 664, the Applicant may be entitled to an award if the Respondent unreasonably withheld or delayed payment of a benefit.

[27] The Applicant claims entitlement to an Award because, to him, the Respondent ignored the facts of the collision, the fact that the Applicant was extricated from the scene of the accident in a stretcher and cervical collar and that the hospital records indicate that the Applicant sustained a concussion, chronic pain and psychological symptomology. The Respondent submits that there are no grounds for an Award because the insurer made all decisions based on the available medical documentation.

[28] I find that the Applicant is not entitled to an award because no benefits were unreasonably withheld or delayed.

[29] As noted above, there is no evidence to support the Applicant's claim that he was extricated from the vehicle and placed on a stretcher at the scene of the accident. Instead, he denied transportation to the hospital and then went to the hospital later that night. The Applicant's evidence shows that he sustained a "minor injury" as defined by the *Schedule*. I recognize that certain records in the Adjuster's Log Notes contemplate IEs, however, IEs are unnecessary here because the Applicant produced no credible evidence to show he sustained a concussion, psychological injury, or developed chronic pain syndrome as a result of the accident, as was his burden to do.

COSTS

[30] Pursuant to Rule 19.1 of the *Common Rules of Practice and Procedure, October 2, 2017* ("the Rules"), costs may be requested where a party believes another party has acted unreasonably, frivolously, vexatiously, or in bad faith.

[31] The Applicant seeks costs in the amount of $1,500.00. He submits that the Respondent acted in bad faith by redacting information in the Adjuster's Log Notes ("the redaction"). He submits that the Respondent is not entitled to redact information it considered important enough to include in the Adjuster's Log notes.

[32] The Respondent submitted, initially, that there has been no conduct during the proceeding which warrants a cost award. It further submitted that it properly redacted irrelevant information from the Adjuster's Log Notes.

[33] Later, by way of motion, the Respondent submitted that it is entitled to costs of an unspecified amount because the Applicant's reply submissions were improper. In the motion, it submits that the Applicant used his reply submissions to repeat several arguments in his initial submissions, seek new relief from the Tribunal by requesting "direction" from the Tribunal regarding the redaction, and to submit new evidence.

[34] The Applicant, in response to the motion, submits it made an accurate and entirely appropriate Reply to the Respondent's submissions and requests $1,500.00 in costs.

[35] I find that neither party is entitled to costs for the following reasons.

[36] I find that the redaction was improper, but the action warrants no cost award. The redaction was with respect to the property damage claim. While the entry has no relevance to this proceeding, I fail to see how it falls under the excluded categories of litigation privilege or reserves. I also fail to see why the Respondent would make the effort to redact it and find no underlying motive for it. This behaviour does not warrant a cost award.

[37] The redaction was addressed appropriately. Counsel for the Applicant brought the concern to the Respondent's attention and the Respondent provided the unredacted document. The redaction, and subsequent correction a day later, caused no prejudice to the Applicant. The Respondent served submissions and evidence on the Applicant on March 4, 2021. Counsel for the Applicant noted a concern over the redaction that day, was given the unredacted document the following day, and made Reply submission on March 8, 2021. The deadline for Response and Reply submissions were, respectively, March 8 and March 15, 2021. Further, the Applicant fails to appreciate that the redacted log notes were in his possession for about two months prior to his request to have them unredacted. It was only after receiving Response submissions that the Applicant sought relief of the issue and, as noted above, it was addressed appropriately by the parties.

[38] While the Applicant repeated some arguments in Reply and provided two articles on concussions that were not previously submitted, it does not warrant that the submissions be struck. There is no prejudice to the Respondent in allowing the Applicant's Reply submissions. Instead, I give no weight to the articles on concussions and the submissions related to the articles because they represent new evidence introduced in reply.

[39] However, I recognize that the Respondent's motion has merit. It is correct in that reply submissions are not the opportunity to split a case, reargue positions, or introduce new evidence. Thus, although the Motion failed, its merits provide that the Respondent's actions warrant no costs award.

[40] The parties must bear their own costs for this matter. Neither party has behaved perfectly, and it is clear to me that the parties experienced some animosity between them during the proceeding. While animosity can be foreseeable, it is incumbent on the parties, or their counsel, to put those differences aside and work together to facilitate a fair and efficient process.

CONCLUSION

[41] The Applicant sustained a "minor injury" as defined by the *Schedule*. He is not entitled to the disputed treatment plans because he has exhausted the funding available to him provided by section 3 of the *Schedule*. No interest or award is payable because no payments were delayed.

[42] Neither party is entitled to costs.

Released: March 10, 2022

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Brian Norris
Adjudicator