Dear Parties,

RE: Tribunal File No: 21-009313/AABS
John Lembesis vs. Economical Insurance

Please see the attached AABS Decision related to your Automobile Accident Benefits Service dispute.

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Should you have any other concerns regarding this file, ***please contact*** *Renesha Bridgewater* ***the assigned Case Management Officer,*** or the Tribunal via telephone at **416-326-1356** or via email at LATregistrar@ontario.ca.

Thank you,

Navjot Sahdra (she/her)
Case Management Officer
Licence Appeal Tribunal | Tribunal d’appel en matière de permis
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Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Lembesis v. Economical Insurance, 2023 ONLAT 21-009313/AABS

Licence Appeal Tribunal File Number: 21-009313/AABS

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

Between:

John Lembesis

Applicant

and

Economical Insurance

Respondent

DECISION

ADJUDICATOR: **Ludmilla Jarda**

APPEARANCES:

For the Applicant: Tony Lafazanis, Counsel

For the Respondent: Melanie Malach, Counsel

HEARD: **By Written Submissions**

OVERVIEW

[1] John Lembesis (the "applicant") was involved in an automobile accident on December 16, 2019 and sought benefits pursuant to *the Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*"). The applicant was denied benefits by Economical Insurance (the "respondent") and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

i. Are the applicant's injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 Minor Injury Guideline ("MIG") limit?

ii. Is the applicant entitled to income replacement benefits ("IRB") in the amount of $400.00 per week from December 23, 2019 to April 1, 2020?

iii. Is the applicant entitled to the treatment proposed by Durham Ortho as follows:

a) $3,361.72 for physiotherapy and massage therapy in a treatment plan/OCF-18 submitted on June 18, 2020 and denied July 2, 2020?

b) $2,518.52 for physiotherapy and massage therapy in a treatment plan/OCF-18 submitted on July 16, 2021 and denied August 4, 2021?

iv. Is the applicant entitled to interest on any overdue payment of benefits?

v. Is the respondent liable to pay an award under s. 10 of Reg. 664 because it unreasonably withheld or delayed payments to the applicant?

RESULT

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

i. The applicant's injuries are predominantly minor and therefore subject to treatment within the $3,500.00 limit of the MIG.

ii. The applicant is not entitled to IRB for the period of December 23, 2019 to April 1, 2020.

iii. The applicant is not entitled to the treatment plans in dispute because they propose goods and services outside of the MIG and the $3,500.00 funding limit.

iv. The applicant is not entitled to interest.

v. The respondent is not liable to pay an award.

ANALYSIS

The Minor Injury Guideline (“MIG”)

[4] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured person sustains impairments that are predominantly a minor injury. Section 3(1) defines a “minor injury” as “one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury.”

[5] An insured person may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under s. 18(2), that they have a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition precludes recovery from their minor injury if they are kept within the confines of the MIG. The Tribunal has also determined that chronic pain with functional impairment or a psychological condition may warrant removal from the MIG. In all cases, the burden of proof lies with the applicant.

[6] The applicant submits that he should be removed from the MIG on three grounds:

i. he sustained a head injury;

ii. he sustained a left shoulder injury; and

iii. he suffers from chronic pain.

[7] In response, the respondent submits that the applicant’s accident-related injuries were all sprains and strains that can be treated within the MIG, and the applicant has failed to provide compelling medical evidence to support that he should be

removed from the MIG. The respondent further denies that the applicant was diagnosed with a head injury, chronic pain, or any functional impairment.

The applicant did not sustain injuries that warrant removal from the MIG

[8] I find that the applicant has failed to prove, on a balance of probabilities, that he suffers from injuries that are not predominantly minor in nature as defined in the *Schedule*. Therefore, he remains within the MIG and its $3,500.00 limit on treatment.

a. Head Injury

[9] The applicant submits that he sustained a head injury as a result of the accident and that he should be removed from the MIG. The respondent submits that the medical evidence tendered by the applicant does not support a diagnosis for a head injury.

[10] I agree with the respondent. The applicant failed to demonstrate that he sustained a head injury as a result of the accident.

[11] I am not persuaded by the applicant's medical evidence and submissions that he sustained a head injury as much of the medical evidence before me indicates that he did not suffer a head injury as a result of the accident. According to the Lakeridge Health Ajax Pickering Hospital records, the applicant was alert when the emergency medical services arrived at the scene of the accident. As he was unsure whether he lost consciousness after the accident, he underwent a CT of the head that was unremarkable. Although he consulted Dr. H. Al-Ward a few days later, on December 20, 2019, regarding his accident-related injuries, Dr. Al-Ward specifically indicated "no head injury" in his clinical note. Further, neither the Treatment Confirmation Form (OCF-23) dated December 27, 2019 completed by JoAnna Papageorgiou, nor the Disability Certificate (OCF-3) dated January 13, 2020 completed by Dr. Harvey Kaplovitch identified a head injury as one of the applicant's accident-related injuries.

[12] Additionally, there are no medical records indicating that the applicant was diagnosed and treated for a head injury resulting from the accident. While the applicant reported to Dr. Bernard Fogel, on December 24, 2019, that he hit his head on the window and loss consciousness after the accident, Dr. Fogel's diagnosis is unknown as the balance of his clinical note is illegible. Further, Dr. Fogel's subsequent clinical notes and records ("CNRs") are not part of the evidentiary record.

[13] Accordingly, I find that the applicant has not satisfied his onus to prove, on a balance of probabilities, that his injuries warrant removal from the MIG.

b. Left Shoulder Injury

[14] The applicant submits that he sustained a left shoulder injury which warrants his removal from the MIG. The respondent notes that the applicant was treated for his left shoulder injury, and that he has not reported that he continues to suffer any pain. Accordingly, the respondent argues that this left shoulder injury does not warrant removal from the MIG.

[15] I agree with the respondent. The applicant has failed to provide evidence indicating that he has not recovered from his left shoulder injury.

[16] I find that the applicant has not demonstrated that he experienced ongoing issues with his left shoulder. According to the Lakeridge Health Ajax Pickering Hospital records and Dr. Al-Ward's clinical note dated December 20, 2019, the applicant initially reported left shoulder pain and limited range of motion. He consulted Dr. Daniel Avrahamim, an orthopaedic physician's assistant, on April 14, 2020, who diagnosed him with a probable left shoulder impingement and bursitis and recommended that he undergo a corticosteroid injection into the subacromial joint. The applicant later saw Dr. Stephen Gallay, an orthopaedic surgeon, on July 14, 2020, who felt that the applicant likely had an adhesive capsulitis which was in the resolving stages, and that he likely continued to have impingement symptoms. Dr. Gallay gave the applicant a corticosteroid injection and recommended stretches for the applicant to regain his range of motion. Dr. Gallay also informed the applicant that if he did not receive sufficient benefit from the injection in 3-4 weeks that he should return for a follow up assessment. There is no evidence that the applicant returned to Dr. Gallay for a follow up assessment.

[17] Additionally, the applicant was examined by Dr. Hanna on August 27, 2021, who diagnosed him with myofascial sprain/strain of the cervical, thoracic, and lumbar regions, and sprain/strain of the left shoulder. Dr. Hanna also recommended an MRI of the left shoulder, if symptoms persist, which could be arranged through the applicant's family physician. However, there is no evidence that his family physician referred him for an MRI of the left shoulder.

[18] Considering the above, I find that the applicant has not satisfied his onus to prove, on a balance of probabilities, that his injuries warrant removal from the MIG.

c. Chronic Pain

[19] The applicant submits that he suffers from chronic pain as a result of the accident which warrants his removal from the MIG. He claims that he continues to have symptoms in various parts of his body and continues to have functional impairment in virtually all aspects of his life and activities. He relies on *T.S. v. Aviva General Insurance Canada*, 2018 CanLII 83520 (ON LAT).

[20] The respondent submits that the applicant sustained sprains and strain injuries as a result of the accident that meet the *Schedule's* definition of minor injury and should be treated under the MIG. The respondent also submits that there is no evidence of a diagnosis of chronic pain syndrome or evidence of any functional impairment within the evidence disclosed by the applicant. The respondent relies on the report of Dr. Hanna.

[21] I agree with the respondent. The applicant has failed to establish that he suffers from chronic pain.

[22] I find that the medical evidence supports that the applicant sustained soft tissue injuries within the definition of minor injury under s. 3 of the *Schedule*. Following the accident, the applicant was examined at the Lakeridge Health Ajax Pickering Hospital and complained of pain to the neck, left shoulder, and left torso. He was diagnosed with multiple soft tissue injuries, prescribed Percocet, and recommended physiotherapy. Further, the OCF-3, OCF-23, and Dr. Al-Ward's records indicate that the applicant's accident-related injuries are all sprains and strains within the MIG.

[23] It is well established that the burden of proof lies with the applicant, and in this case, the applicant has not directed me to a diagnosis of chronic pain in the medical evidence. Correspondingly, I accept Dr. Hanna's diagnosis that the applicant sustained temporary soft tissue impairments to his neck, back, and left shoulder as a result of the accident as this diagnosis is consistent with the medical evidence. Also, these soft tissue injuries meet the *Schedule's* definition of minor injury.

[24] In light of all of the evidence, I find that the applicant has failed to meet his evidentiary burden to demonstrate on a balance of probabilities that his injuries fall outside of the MIG.

Income Replacement Benefits ("IRB")

[25] To receive payment for pre-104-week IRB under s. 5(1) of the *Schedule*, the applicant must be employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffer a substantial inability to perform the essential tasks of that employment. He must identify essential tasks of his employment, which tasks he is unable to perform, and to what extent he is unable to perform them. The applicant bears the burden of proving, on a balance of probabilities, that he meets the test.

[26] Section 7(1) of the *Schedule* establishes that weekly IRB payments are calculated by using 70 per cent of the applicant's base amount less the total of all other income replacement assistance for the particular week the benefit is payable. Section 4(1) sets out that the base amount is the applicant's gross annual employment income divided by 52. Also, in accordance with s. 7(3) of the *Schedule*, the respondent may deduct 70 per cent of any gross employment income from the weekly IRB payable to the applicant received during the period in which he is eligible to receive IRB.

[27] At the time of the accident, the applicant was 45 years old and was employed on a full-time basis as an electrical journeyman at Jay Electrical Ltd. The applicant states that following the accident, he took time off work. He claims that he returned to work on a part-time basis on January 20, 2020, performing modified supervisory duties, and that he returned to work on a full-time basis on April 1, 2020, but still on modified duties.

[28] The applicant submits that he is entitled to IRB at the rate of $400.00 per week for the period of December 23, 2019 to April 1, 2020, for a total of $5,600.00, plus interest. The applicant relies on his Application for Accident Benefits (OCF-1) dated January 13, 2020, an Employer's Confirmation Form (OCF-2) dated January 13, 2020, and an OCF-3.

[29] In response, the respondent submits that the applicant has not met his onus to demonstrate entitlement to IRB.

The applicant is not entitled to IRB for the period of December 23, 2019 to April 1, 2020 at the rate of $400.00 per week

[30] I find that the applicant has not proven, on a balance of probabilities, that he is entitled to IRB for the period of December 23, 2019 to April 1, 2020 at the rate of $400.00 per week.

a. Period of Eligibility

[31] The applicant submits that he was substantially unable to perform the essential tasks of his employment from December 23, 2019 to April 1, 2020. The respondent submits that the applicant failed to demonstrate that he suffered from a substantial inability to perform the essential tasks of his pre-accident employment.

[32] I agree with the respondent. There is insufficient evidence before me to support that the applicant suffered from a substantial inability to perform the essential tasks of his employment as required by s. 5(1) of the *Schedule*.

[33] I am not persuaded by the applicant's medical evidence and submissions that he was substantially unable to perform the essential tasks of his employment. Although Dr. Kaplovitch noted in the OCF-3 dated January 13, 2020 that the applicant was substantially unable to perform the essential tasks of his employment at the time of the accident and within 104 weeks of the accident and that he could not return to work on modified hours and/or duties, for the following reasons, I assign limited weight on this OCF-3. There are no contemporaneous records to substantiate Dr. Kaplovitch's finding, and neither Dr. Al-Ward nor Dr. Fogel endorsed that the applicant was unable to return to work following the accident. Also, Dr. Kaplovitch did not identify the essential tasks of the applicant's employment, which tasks he is unable to perform, and to what extent he is unable to perform them.

[34] Further, it is unclear on what basis the applicant gradually returned to work on modified supervisory duties as the applicant did not identify the essential tasks of his employment. The applicant did not indicate which tasks he was still unable to perform, and to what extent he was unable to perform them. The applicant did not direct me to any evidence to support his gradual return to work. Further, his family physician's CNRs for the period of the gradual return to work are not part of the evidentiary record.

[35] As such, the applicant did not demonstrate, on a balance of probabilities, that he is eligible to receive IRB for the period of December 23, 2019 to April 1, 2020.

b. Weekly Amount of IRB

[36] The applicant submits that the weekly amount of IRB is $400.00. The respondent submits that the applicant failed to provide sufficient evidence to calculate the weekly amount of IRB as he failed to produce his post-accident pay stubs up to April 1, 2020. I agree with the respondent.

[37] I find that the applicant has failed to provide sufficient evidence to determine the weekly amount of IRB as it is unclear what amount, if any, of post-accident employment income is deductible from the weekly amount of IRB. As noted by the respondent, the gross amount of any post-accident employment income is deductible from the weekly amount of IRB pursuant to s. 7(3)(a) of the *Schedule*. Although the respondent's production chart indicates that the applicant provided the respondent with his paystubs from December 21, 2019 to February 1, 2020, these paystubs were not included in the evidentiary record. Also, the applicant's employment file and his paystubs from February 2, 2020 to April 1, 2020 do not appear to have been produced, despite the Tribunal's order requiring the applicant to produce these within 90 calendar days from the case conference.

[38] I further grant the respondent's request that I draw a negative inference against the applicant for failing to provide particulars of his return to work and of his post-accident income in accordance with the Tribunal's order. The respondent relies on *Darteh v. Wawanesa Insurance*, 2022 CanLII 57400 (ON LAT) at para 19, where the Tribunal held that "[t]he Tribunal has discretion to draw a negative inference where, in the absence of a reasonable explanation, a party fails to produce evidence that is within its control (or is equally available to all parties) and such evidence is material to the dispute." Here, the applicant did not comply with the Tribunal's order as he did not provide his employment file and his paystubs for the period of February 2, 2020 to April 1, 2020, and the applicant has not provided an explanation as to why he failed to comply with the Tribunal's order.

[39] Based on the evidence as a whole, I find that the applicant has not satisfied his onus to prove, on a balance of probabilities, that he is entitled to IRB at the rate of $400.00 per week for the period of December 23, 2019 to April 1, 2020. As such, no IRB is payable for this period.

The Treatment Plans

[40] Having determined that the applicant is within the MIG, the applicant is not entitled to the treatment plans in dispute as they propose treatment outside of the MIG and the $3,500.00 limit for minor injury.

Interest

[41] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. Given that no benefits are overdue, no interest is payable.

Award

[42] Pursuant to s. 10 of Reg 664, the respondent may be liable to pay an award if the Tribunal finds that it unreasonably withheld or delayed the payment of a benefit. As I have concluded that the applicant remains in the MIG and is not entitled to IRB and the treatment plans in dispute, it follows that no benefits were unreasonably withheld or delayed. Accordingly, the respondent is not liable to pay an award.

ORDER

[43] For the reasons outlined above, I find that:

i. The applicant's injuries are predominantly minor and therefore subject to treatment within the $3,500.00 limit of the MIG.

ii. The applicant is not entitled to IRB for the period of December 23, 2019 to April 1, 2020.

iii. The applicant is not entitled to the treatment plans in dispute because they propose goods and services outside of the MIG and the $3,500.00 funding limit.

iv. The applicant is not entitled to interest.

v. The respondent is not liable to pay an award.

Released: November 27, 2023

Ludmilla Jarda
Adjudicator