Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: ***Cargnelli v. Aviva Insurance Company,*** **2021 ONLAT 20-001892/AABS**

Released Date: 06/21/2021
File Number: 20-001892/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:

Walter Cargnelli

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce, Vice-Chair**

APPEARANCES:

For the Applicant: Yoni Silberman, Counsel

For the Respondent: Sarah Fasih, Counsel

HEARD: **Via Written Submissions**

OVERVIEW

[1] The applicant was involved in an motorcycle accident on August 29, 2017, and sought benefits from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule* - Effective September 1, 2010 (the "*Schedule*").[1] Aviva paid Non-Earner Benefits ("NEB") in the amount of $185.00 per week from September 26, 2017 to April 15, 2019 before terminating the benefit based on a determination that the applicant no longer suffered a complete inability to carry on a normal life. Aviva denied the treatment in dispute on the basis that it was not reasonable and necessary. The applicant disagreed and applied to the Tribunal for resolution of the dispute.

ISSUES IN DISPUTE

[2] The issues in dispute are as follows:

a. Is the applicant entitled to a NEB in the amount of $185.00 per week for the time period from April 16, 2019 to August 29, 2019?

b. Is the applicant entitled to a medical benefit in the amount of $1,880.50 for physiotherapy and massage services recommended in a treatment plan (OCF-18) submitted on January 30, 2019 and denied by the respondent on April 5, 2019?

c. Is the applicant entitled to a payment in the amount of $460.00 for massage therapy services submitted on an OCF-6 on February 26, 2019 and denied by the respondent on April 5, 2019?

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

e. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

RESULT

[3] The applicant is not entitled to payment of a NEB as he has not demonstrated a complete inability to carry on a normal life during the period in dispute.

[4] The applicant is entitled to payment for the OCF-18 and OCF-6 in dispute, plus interest pursuant to s. 51, as they are reasonable and necessary.

[5] The applicant is entitled to a 10% award under s. 10 of O. Reg. 664 due to Aviva unreasonably withholding and delaying the payment of benefits.

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[1] O. Reg. 34/10, as amended.

ANALYSIS

Non-Earner Benefit

[6] The insurer shall pay a NEB to an insured if they suffer a complete inability to carry on a normal life as a result of and within 104 weeks of the accident. It is well-settled, and the parties agree, that *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391, provides the framework for the NEB analysis into whether an insured suffers a complete inability to carry on a normal life. *Heath* requires a comparison of activities and circumstances pre-and post-accident over a reasonable period of time, allowing for greater weight to be assigned to activities that an insured identifies as important. To meet the test, an insured must be continuously prevented from engaging in substantially all of their pre-accident activities and, where pain is present, it should practically prevent them from engaging in those activities.

[7] Here, there is no dispute that Aviva paid the applicant a NEB in the amount of $185 per week for the period September 26, 2017 to April 15, 2019. Aviva terminated the benefit on the basis of a s. 44 multi-disciplinary report that found the applicant to be independent with his activities of self-care, housekeeping and mobility. Aviva asserts that there is a dearth of compelling medical evidence substantiating a complete inability to carry on a normal life and while pain may be present, it submits that the applicant's pain does not practically prevent him from engaging in his pre-accident activities.

[8] The applicant asserts that he is entitled to payment of the NEB for the remaining post-104 period, being April 26, 2019 to August 29, 2019, because he developed post-traumatic arthritis in his ankle, has left hip pain, post-traumatic shoulder pain and rotator cuff tendonitis. He submits that while his condition improved post-ankle surgery, his activities and life circumstances during the period in dispute have not changed since October 16, 2018, which is the date on which he completed his NEB questionnaire. To this end, he submits that the NEB test does not require total disability and that he continues to have pain and difficulty with sleeping, walking, standing, climbing stairs, completing outdoor and vehicle maintenance tasks and that he can no longer assist with his elderly mother's care. He submits that he has not returned to engagement with his pre-accident social and recreational activities related to classic cars and he rarely rides his motorcycle. For support, he relies on his NEB questionnaire, Dr. Bogoch's reports and his medical records that he submits consistently document that he is unable to engage in substantially all of his pre-accident activities during the period in dispute.

[9] On balance, I agree with Aviva and find that its termination of the applicant's NEB was appropriate as the applicant has not demonstrated that he continued to suffer a complete inability to carry on a normal life during the period in dispute. I find it clear that the applicant continued to experience accident-related pain during this period as all of the reports in evidence confirm that the applicant continued to experience pain in his ankle, hip and shoulder. However, I agree with Aviva that

where pain is the primary factor preventing an applicant from engaging in pre-accident activities, *Heath* requires the applicant to show that the pain practically prevents them from engaging in those activities. I find the evidence and the applicant's self-reporting does not meet this stringent test.

[10] Indeed, the applicant relies on two reports from Dr. Bogoch that were completed during the period in dispute that I find do not demonstrate that his pain practically prevents him from engagement in his activities. The July 30, 2019 report revealed that the applicant exercises regularly in a swimming pool, is able to mow his lawn, lift heavy items, drive long distances and ride his motorcycle "for longer rides", albeit all with pain. He is capable of performing all of his activities of self-care such as dressing, bathing, toileting and eating. The report states that his injuries have limited his ability to carry out heavy housekeeping and home maintenance activities, that he is limited in his recreational activities and other vigorous activities.

[11] In the August 9, 2019 addendum report, Dr. Bogoch then states that the applicant suffers a "complete inability to carry out some of the activities of his normal life" and that, in his opinion, the applicant "suffers a partial inability to carry on a normal life." While I agree with the applicant's submission that all of the medical evidence needs to be considered, I find this opinion difficult to overlook in assessing whether the applicant has met his burden because, on its face, it falls short of the NEB test. I find this statement, combined with the s. 44 report of Dr. Weisleder that found the applicant did not meet the NEB test, to be a compelling indication that the applicant, despite his pain, is not prevented from engaging in "substantially all of the activities" he did pre-accident. In turn, I find it cannot be said that he suffered a complete inability to carry on a normal life during the period in dispute where it is clear that his pain does not practically prevent him from doing many things.

[12] The applicant is correct that *Heath* provides that certain activities can attract greater weight in the analysis. Here, he points to his inability to assist in his elderly mother's care and asserts that he is unable to pursue his passion for classic cars and the social events that this hobby entails. With regard to his mother's care, he submits that this entailed accompanying her to medical appointments, assisting her with grocery shopping, and visiting her every week, however, based on the reports in evidence, it is unclear how his impairments or pain prevented him from doing these tasks during the period in dispute. With regard to his attendance at classic car cruise nights, the applicant reported in his October 2018 questionnaire—some six months prior to the period in dispute—that he had already attended several events and a special interest show and found that he had to rest at various times and required a cold compress when he got home. While he states that he experienced moderate pain as a result of attending these events, I find it clear that the pain did not practically prevent him from engaging in these social pursuits or that it evidences a complete inability to carry on a normal life over six months later, being the period in dispute here.

[13] I agree with the applicant that *Heath* does not require total disability, but the NEB test remains a stringent one. In this vein, I agree with Aviva that the applicant's

reported ability to perform self-care tasks and basic housekeeping activities, his ability to mow his lawn, lift up to 35 lbs, attend social events, drive a vehicle and, more specifically, ride his motorcycle (even if it is less frequently and over shorter distances) undermines his claim that he suffered a complete inability to carry on a normal life during the four month period in dispute. While he may have lingering pain that limits his ability to complete vigorous activities, I find that his pain does not practically prevent him from engaging in his pre-accident tasks or the activities that he values most. I see no reason to interfere with Aviva's determination that was based on a s. 44 report that found he did not meet the NEB test. I find the applicant has not demonstrated that he is entitled to payment of the NEB in the amount of $185 per week for the period April 16, 2019 to August 29, 2019.

Are the treatment plans reasonable and necessary?

[14] In order to receive payment for a treatment and assessment plan under the *Schedule*, that applicant bears the burden of demonstrating that they are reasonable and necessary.

[15] First, the applicant claims entitlement to 18 sessions of physiotherapy in the amount of $1,880.60 as recommended by his physiotherapist. He submits that the plan is reasonable and necessary to reduce his hip, shoulder and ankle pain, increase his strength, improve his function and return to his physical activities. He relies on the progress notes from treatment and the opinions of Dr. Bogoch and Aviva's own s. 44 assessor, Dr. Weisleder, that he would benefit from further treatment as he had not achieved maximal medical recovery.

[16] Second, the applicant seeks payment of $460 for massage therapy submitted in an OCF-6 dated February 26, 2019. He submits that it was reasonable that he sought treatment for his persistent ankle, shoulder and hip pain and that even though Ms. Shulman reported that it was a temporary benefit and that he had plateaued, it provided him with relief as it made him less dependent on a cane, helped with his balance, strength and range of motion.

[17] I find the applicant is entitled to payment for both the physiotherapy treatment plan and the massage therapy expenses as they were reasonable and necessary to help reduce his pain and improve his recovery. As noted, I find it clear that the applicant continued to experience pain when these claims were denied between January and April 2019. While I do not find that he is entitled to the NEB claimed, I do find that it would have been reasonable and necessary to address his ongoing pain complaints during this time as pain reduction is a legitimate goal for treatment and his complaints were consistent. The goals of the treatment are reasonable and can easily be met and the costs associated with the goals is not exorbitant. Further, I find treatment was supported by Dr. Bogoch, who stated that the applicant had a medical need for massage and physiotherapy, and by Dr. Weisleder, who stated in his s. 44 report that the applicant would benefit from further treatment of his right shoulder and left hip, as he had not reached maximum medical improvement.

[18] Accordingly, I find the applicant is entitled to payment for both the OCF-18 and the OCF-6 expenses in dispute, plus interest pursuant to s. 51, as they are reasonable and necessary.

Section 10 Award

[19] Finally, the applicant sought a 50% award under s. 10 of O. Reg. 664, alleging that Aviva unreasonably withheld and delayed benefit payments by taking the inconsistent position that the applicant was entitled to NEBs up until April 15, 2019 but not entitled to the physical treatment he sought prior to that date that he needed to aid in his recovery. Under s. 10, the Tribunal may award up to 50% of the total benefits in dispute if it determines that the insurer unreasonably withheld or delayed the payment of benefits.

[20] I find a 10% award is appropriate as Aviva's behaviour does not rise to the level of egregious conduct that would attract a maximum award. While I agree with Aviva that the applicant failed to demonstrate entitlement to a NEB after April 15, 2019, I agree with the applicant that it is difficult to reconcile Aviva's position that the physical treatments he sought in early 2019 were not reasonable and necessary with its acceptance that he met the complete inability test during the same period of time, even if it was based on a s. 44 examination. Further, I agree that where the applicant's pain complaints were consistent and where NEB payments were still being made at the time of denial, that Aviva's denial of the treatment plan and expense claims led to unreasonably delay in the payment of benefits that I find to be reasonable and necessary here.

ORDER

[21] The applicant is not entitled to payment of a NEB for the period in dispute as he has not demonstrated a complete inability to carry on a normal life.

[22] The applicant is entitled to payment for the OCF-18 and OCF-6 in dispute, plus interest pursuant to s. 51, as they are reasonable and necessary.

[23] The applicant is entitled to a 10% award under s. 10 of O. Reg. 664 due to Aviva unreasonably withholding and delaying the payment of benefits.

Released: June 21, 2021

Jesse A. Boyce
Vice-Chair