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

Ontario

Tribunal File Number: 16-003617/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:

Raymond Fogerty

Applicant

and

The Guarantee Company of North America

Respondent

DECISION - AWARD AND COSTS

PANEL: **Lori Marzinotto, Vice Chair**

APPEARANCES:

For the Applicant: Robert H. Littlejohn, Counsel
Ryan Hurst, Counsel

For the Respondent: Hermina Nuric, Counsel

HEARD: **In Writing on: September 14 & 28, 2018 & October 5, 2018**

PROCEDURAL HISTORY – POST DECISION – AWARD AND COSTS

[1] The applicant was injured in an automobile accident on February 27, 2014. The applicant applied for benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*") which were denied by the respondent.

[2] The applicant disagreed with the denials and submitted an application to the Licence Appeal Tribunal – Accident Benefits Service (the "Tribunal").

[3] This matter proceeded to a five-day hearing. There were eleven treatment plans in dispute: four for chiropractic treatment, four for physiotherapy treatment, two for occupational therapy (one described as an in-home assessment and the other for the balance of a partially approved treatment plan for occupational therapy) and one for driver rehabilitation.

[4] At the commencement of the hearing, the parties confirmed that the applicant's injuries were no longer considered to fall within the Minor Injury Guideline (the "MIG"). However, *when* the applicant's injuries were no longer considered to fall within the MIG by the respondent was still at issue.

[5] At the hearing, the applicant brought a motion to add an award. The respondent objected and also questioned the Tribunal's jurisdiction to grant an award. At the hearing, I ordered that in the event the applicant was successful, I would request submissions on the jurisdiction issue as well as entitlement to an award.

[6] The applicant was successful at the hearing and a decision was rendered by the Tribunal on August 27, 2018 ("Hearing Decision"). I made orders requiring the parties to file submissions on the award as well as costs and set timelines for the submissions. The parties filed submissions as ordered.

[7] This decision deals with the claims for an award and costs.

AWARD

[8] In its submissions, the respondent no longer challenged the Tribunal's jurisdiction to grant an award and, therefore, I will not address the jurisdiction issue.

[9] Section 10 of *Ontario Regulation 664*, R.R.O. 1990 ("O. Reg. 664") states that if the Tribunal finds that the insurer unreasonably withheld or delayed payments, the Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled under the *Schedule,* may award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award

together with interest .... at a rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

[10] The maximum that may be awarded under s.10 of O. Reg. 664 is 50 per cent of the amount to which the person was entitled at the time of the award, together with interest. A 50 per cent award should be reserved for the most egregious conduct,[1] should relate to the circumstances of the case, should deter misconduct and be proportionate to the misconduct.[2]

[11] I find that the applicant is entitled to an award for issues listed in the Hearing Decision as 4(a) and 4(e) in a lump sum of 50 per cent of the amount owed that the applicant was entitled to at the time of the award and a lump sum of 30 per cent of the amount owed for issues listed in the Hearing Decision as 4 (b) (c) (d) (e) (f) (g) and (h). I find that the applicant is not entitled to an award for issue 4(j).

[12] I find the following actions of the respondent demonstrate that it unreasonably withheld or delayed payments:

(i) It failed to respond in a timely manner to treatment plans (4a and 4e);

(ii) It failed to advise the applicant when and why his injuries were no longer considered to be within the MIG;

(iii) It failed to continually adjust the file by relying on conclusions in insurer examination ("IE") reports that were questionable given some of the findings the practitioners made in those IE reports.

[13] As stated in *17-006757 v. Aviva Insurance Canada,* (citing *Persofsky v. Liberty Mutual Insurance Co.*[3]) the amount of the special award should be considered within the context of the *Insurance Act* but according to principles of rationality and proportionality. The award should be proportionate to the following factors:

(i) the blameworthiness of the insurer's conduct;

(ii) the vulnerability of the insured person;

(iii) the harm or potential harm directed at the insured person;

(iv) the need for deterrence;

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[1] *16-003306 v. Coachman Insurance Company,* 2018 CarswellOnt, 14544 (ON LAT), at para 88.
[2] *Id.*
[3] *Persofsky v. Liberty Mutual Insurance Co.,* 2003 CarswellOnt 6359.

(v) the advantage wrongfully gained by the insurer; and

(vi) any other penalties or sanctions that have been or likely will be imposed on the insurer due to its misconduct.[4]

(vii) any other penalties or sanctions that have been or likely will be imposed on the insurer due to its misconduct.[5]

[14] In addition to the six factors in *Persofsky,* the Tribunal, in *17-006757 v. Aviva*[6] added a seventh factor: the overall length of the delay.

Issues 4(a) & 4(e)

[15] The Tribunal found that the insurer was in breach of s.38(8) of the *Schedule*, specifically for failing to respond within 10 days of receiving the first treatment and assessment plan in dispute dated August 20, 2014 (issue 4a). In addition, the Tribunal found that when the Insurer did respond to this treatment and assessment plan, it was not a proper denial.

[16] It was unclear from the denial letter why the treatment plan was being denied. At the time, the applicant had not consumed the $3,500.00 available under the MIG.

[17] The Tribunal found that the entirety of the treatment and assessment plan (issue 4a) was payable.

[18] The Tribunal also found that the entirety of the treatment and assessment plan (issue 4e) was payable because the denial letter dated February 24, 2015 was also not a proper denial. As stated in the Hearing Decision, there was nothing to indicate in the February 25, 2014 denial letter why the insurer "feels" the applicant's injuries fall within the MIG. The applicant did not know why the treatment was being denied. As the Tribunal indicated in paragraph 58 of the Hearing Decision, this was glaring given that the applicant had not exhausted the $3,500.00 MIG treatment limit.

[19] The Tribunal found that the nature of the improper denials undermined the purpose of the MIG which is to provide early and quick access to treatment. This left the applicant vulnerable with potentially harmful consequences if the applicant did not receive treatment.

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[4] *17-006757 v. Aviva Insurance Canada*, 2018 CarswellOnt 14559 (ON LAT), at para 44.
[5] *17-006757 v. Aviva Insurance Canada*, 2018 CarswellOnt 14559 (ON LAT), at para 44.
[6] *Id.*

[20] Although at some point the applicant's injuries were no longer considered within the MIG by the respondent, the issue of *when* the applicant's injuries were no longer considered to fall within the MIG was still at issue.

[21] I find that it was unreasonable for the respondent to have withheld payments of these treatment plans (issues 4a and 4e) and agree with the applicant and order that the maximum amount of 50 per cent of the amount the applicant was entitled to at the time of the award, together with interest under s.10 of O. Reg. 664, is warranted and payable by the respondent.

Issues 4(b), (c), (d), (f), (g), (h), (j)

[22] With respect to the remaining treatment plans the Tribunal found to be payable by the respondent (issues (4b), (c), (d), (f), (g), (h) and (j)), the applicant submits that an appropriate award would be 30 per cent of the benefits in dispute, plus interest.

[23] I agree with the applicant that an award of 30 per cent should be granted for the above noted issues, other than for issue 4(j). I do not find that an award is appropriate for issue 4(j) for Drivers Rehabilitation.

Obligation to Adjust

[24] Insurers have an obligation to continually adjust claims. While I agree with the respondent that claim decisions are to be made on the basis of information available at the time decisions are made, I do not agree that the insurer did not have enough information prior to disclosure to re-evaluate its position prior to the hearing.

[25] The *Sinnapu v. Economical Mutual Insurance Co.* case confirms that an insurer has a duty to weigh all available medical evidence and other information in making its decision and cannot abdicate its decision-making responsibilities to its hired examiners.[7]

[26] Treatment plans prepared by the applicant's chiropractor, Dr. Statton, documented that the applicant had less pain and his symptoms improved with treatment. The applicant's treating physiatrist, Dr. Berbrayer, indicated in his August 5, 2016 report that the applicant would benefit from being seen at a Multi-Disciplinary Pain Clinic in order to determine the type and duration of medical treatment required.

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[7] *Sinnapu v. Economical Mutual Insurance Co.*, 2011 CarswellOnt 12227, at para. 135.

[27] Dr. Lazarou, neurologist, conducted the insurer's examinations. He found that the applicant's headaches were related to his neck pain, that the neck pain was alleviated with physiotherapy, and that the applicant had not met maximum medical recovery. Yet, he opined that the treatment plans for physiotherapy and chiropractic treatment were not reasonable and necessary. The Tribunal found these two findings were unreconcilable.

[28] Dr. O'Sullivan, orthopaedic surgeon, conducted insurer's examinations in 2015 and 2017. He opined that there was "objective" evidence of decreased range of motion and that the applicant has chronic pain. In addition, he also found that the applicant had an exacerbation of his pre-existing degenerative disc disease, cervical changes as well as radiculopathy. Dr. O'Sullivan found that the applicant had increased pain and decreased function of his cervical spine which has delayed his recovery from the accident. Even with these findings, Dr. O'Sullivan found the physiotherapy and chiropractic treatment plans not reasonable and necessary and the respondent denied the treatment plans.

[29] Dr. Mathoo conducted a paper review insurer's examination on September 28, 2017. He indicates in his report that the applicant's injuries were properly managed within the MIG. Despite having Dr. O'Sullivan's report, Dr. Mathoo indicates that there was no compelling evidence of a pre-existing condition that would exclude the applicant's injuries from the MIG. This contradicts Dr. O'Sullivan's report as well as the significant evidence of the applicant's pre-existing conditions.

[30] As noted in the Hearing Decision, and of concern to the Tribunal, was Dr. Mathoo's opinion in September 2017 that the applicant's injuries could be properly managed within the MIG. This is concerning given that the respondent indicated that the applicant's injuries were no longer considered to be in the MIG in February 2016. This inconsistency raises questions as to the reasonableness of the respondent's denials. Even with this inconsistency, Dr. Mathoo was called as a witness for the hearing. The Tribunal did not give much weight to Dr. Mathoo's evidence.

[31] The insurer's own IE reports were substantial and, given the assessors findings, their conclusions that the treatment plans were not reasonable and necessary were, in my view, unreconcilable. As of April 2017, Dr. Lazarou confirmed that the applicant had not reached maximum medical recovery, yet, the respondent refused to approve treatment plans. This was also despite Dr. Lazarou confirming that physiotherapy alleviated the applicant's neck pain.

[32] On April 30, 2015, the respondent approved chiropractic treatment recommended by Barrie Core in a treatment plan dated December 10, 2014. This approval was above the MIG limits and the timeframe suggests that the applicant's injuries were still considered to be within the MIG. Yet, the respondent maintained its previous denials for earlier treatment plans in dispute. I question why the respondent would approve a subsequent treatment plan yet did not approve an earlier treatment plan it had denied which was also for chiropractic treatment.

[33] In reply submissions, the respondent agreed that it has an ongoing duty to adjust the applicant's file but submits that this does not require the respondent to reconsider every treatment plan it previously denied. Even if the respondent is not required to reconsider past denials[8], having received subsequent IE assessments and corresponding reports, it would have been reasonable to scrutinize the reports which may have, and should have, and as my Hearing Decision found, triggered the respondent to re-evaluate its position.

[34] The treatment plans at issue in the hearing were from 2014, 2015 and the latest being from September 2016. The hearing was held in August and October 2017. By this time, some of the treatment plans were two to three years old. In my view, there was ample time to re-evaluate the file and possibly settle outstanding treatment plans. Instead, the respondent dug in its heels.

[35] The deterrence and blameworthy factors as listed in *Persofsky* are applicable in this case. The applicant underwent several IEs yet, it does not appear that the reports obtained from those IEs were carefully reviewed by the respondent.

[36] As stated in *17-006757 v. Aviva*, the longer the delay, the more likely prejudice to the applicant may be inferred.[9] Despite receiving additional medical evidence from the applicant as well as from IE assessments, the respondent refused to pay for the treatment plans that were from 2015 and 2016.

[37] Luckily, the applicant has been able to continue to receive treatment, albeit inconsistently. The applicant has incurred a significant account with the treatment provider, which was stressful for the applicant who stated that he felt abandoned by the respondent. The applicant gave evidence that he was forced to take early retirement as a result of his injuries because he physically could not

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[8] I make no decision on whether the respondent is correct in its submission that an insurer is not required to reconsider past denials.
[9] *Id.*, at para 45.

fully perform his work duties. On these facts, I find 30 per cent to be a reasonable award.

Issue 4(j)

[38] The OCF-18 for Driver's Rehabilitation was in the amount of $3,153.76. The respondent partially approved this treatment plan in the amount of $1,777.59. The applicant argued that the full amount of the treatment plan was payable.

[39] I agreed with the respondent that the fees were excessive but did not agree with the respondent's calculation and assessed that the applicant was entitled to $2,205.63 rather than the respondent's partially approved amount of $1,777.59.

[40] I do not find that the respondent's withholding or delaying payment of the partially approved treatment plan was unreasonable to the extent that would attract an award. The fees suggested in the treatment plan for the services of an occupational therapist were more in line with psychologist fees.[10] It was reasonable that the respondent questioned the amount of the treatment plan.

Amount of Award

[41] In my Hearing Decision I awarded interest on the overdue payments in accordance with s.51 of the *Schedule*.

[42] The total lump sum amount of the award is calculated as follows, in addition to any interest on all amounts then owing to the applicant (including unpaid interest) at the rate of 2 per cent per month, compounded monthly from the time the benefits first became payable under the *Schedule* in accordance with O. Reg. 664:

Issue in dispute	Amount Awarded	Special award % = Lump Sum
4(a)	$1,285.00	50% = $642.50
4(b)	$4,212.13	30% = $1,263.64
4(c)	$1,646.75	30% = $494.03
4(d)	$1,850.00	30% = $555.00
4(e)	$1,397.00	50% = $698.50
4(f)	$1,340.00	30% = $402.00
4(g)	$1,397.00	30% = $419.10
4(h)	$790.00	30% =$237.00
4(j)	$2,205.63	0%
Total		**$4,711.77**

[10] As noted in paragraph 160 of the Hearing Decision, psychologist fees are the highest available fees in the Professional Services Guideline of September 2014.

[43] I leave the calculation of the interest to the parties and if there is disagreement in the calculation of the interest amount, either party may schedule a case conference before me within 30 days of the release of this decision.

COSTS

[44] Both the respondent and the applicant seek costs in this matter. *Rule* 19.1 states that a party may request costs where they believe that the other party has acted unreasonably, frivolously, vexatiously or in bad faith. [11]

[45] Although there were several preliminary issues and motions raised at the hearing, I did not find the preliminary issues or motions were unreasonable, frivolous, vexatious or in bad faith and therefore I do not find they attract costs for either party.

Respondent's Request for Costs

[46] In its submissions, the respondent requests costs against applicant's counsel personally and not against the applicant.

[47] The respondent submits that costs be paid by applicant's counsel personally due to his misconduct during the course of the hearing.

[48] *Rule 19.1* is clear in that it states "a party may request costs...".

[49] "Party", a defined term in the *Rules,* means a person, association or corporation who has the right to participate in a proceeding. Counsel for a party is not included in the definition and therefore I decline to award costs against applicant's counsel personally. Even if I did have authority to award costs against counsel personally, I do not find that the conduct of applicant's counsel rose to a level warranting costs against him personally.

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[11] Rule 19.1 of the *Licence Appeal Tribunal (LAT) Rules of Practice and Procedure, Version 1 (April 1, 2016)* (the "*Rules*") are applicable in this case as the application to the Tribunal was filed prior to the in-force date of the *Common Rules of Practice & Procedure, Licence Appeal Tribunal, Animal Care Review Board, Fire Safety Commission,* October 2, 2017 (the "*Common Rules*").

Applicant's Request for Costs

[50] The applicant seeks costs and alleges that the respondent acted unreasonably, vexatiously and in bad faith and therefore is entitled to costs. The conduct of the respondent alleged by the applicant may be summarized as follows:

(i) The respondent's insistence on settling the matter on a full and final basis rather than discuss settlement of the issues in dispute;

(ii) The respondent's lack of success at the hearing; and

(iii) The respondent's actions which complicated and/or prolonged the process.

[51] I am not persuaded that the respondent's conduct rose to a level that warrants costs. I will address each of the applicant's allegations below.

(i) **Offers to Settle**

[52] This was a case where both applicant's and respondent's counsel were content to argue this case to the end. While parties are entitled to have their matters adjudicated, it is prudent to assess and re-assess the case at all stages of the process.

[53] At any stage prior to the release of my decision, the parties had the opportunity to settle this case. While the issues in dispute were not insignificant, I did not see the necessity of the case taking what turned out to be five hearing days (in-person and by teleconference) to adjudicate. This case was vigorously fought by both sides, to a level disproportionate to the complexity of the issues in dispute.

[54] The number of experts that attended this hearing and the costs associated, I am sure, are not proportionate to the monetary amount that was at stake. At the end of each hearing day, I encouraged the parties to discuss settlement. Both parties were represented by experienced counsel who were aware of the Tribunal's *Rules,* as well as the Tribunal's decisions on costs. I am confident that counsel were fully aware that it is rare that the Tribunal awards costs and when it has, the cost awards have been nowhere in the range of the anticipated costs of this hearing. It is a very high bar to meet in order to be successful in seeking costs.

[55] By their very nature, offers to settle are strategic. While it does appear that the respondent was unwilling to settle the issues in dispute and wanted to settle the file on a full and final basis only, the applicant wanted the opposite. Each party had their own reasons for taking the approach that they did.

[56] I do not find that the respondent's conduct regarding settlement was such that it would attract costs.

(ii) **Respondent's lack of success**

[57] This Tribunal does not award costs based on the degree of success of the parties. Although the applicant was close to 100% successful, this is not a ground in the Tribunal's *Rules* upon which to award costs.

(iii) **Complicating and/or prolonging the process**

[58] The applicant alleges that the respondent complicated and/or prolonged the process in a number of ways.[12] I do not intend to address all nine allegations individually, as I find that both parties are responsible for complicating and/or prolonging this process in their own ways.

[59] *Regarding the method/form of hearing,* while the respondent may have mistakenly indicated that the in-person portion of the hearing was for cross-examination only, I do not find that the respondent's error should attract costs.

[60] *With respect to the adjournment / constitutional challenge,* any delay due to the constitutional challenge was not the fault of the respondent. In fact, the respondent indicated that it would not be taking a position on the constitutional challenge.[13]

[61] *Extra day of hearing:* The applicant requested that the hearing be extended to three days (from the original two days) to allow time for the constitutional question. The respondent consented to the request which was indicated in the applicant's Notice of Motion dated July 21, 2017.

[62] The hearing was further extended by me to October 10, 2017, as a result of a preliminary motion brought by the respondent, who objected to the addendum report of Dr. Berbrayer dated August 11, 2017 being admitted into evidence. The applicant served the report on August 14, 2017, which was the day before the deadline to serve all evidence indicated in the Motion Order of Vice Chair Hunter on August 3, 2018. In order to balance any prejudice the respondent may have had as a result of allowing the addendum report into evidence, I extended the hearing to October 10, 2017 to allow the respondent to seek instructions on whether it would be obtaining a responding report as well as cross-examine Dr.

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[12] Applicant's Costs Submissions, paragraphs 9-17
[13] Applicant's Document Brief for Costs Submissions, Tab 14

Berbrayer. The hearing was further extended to October 11, 2017 in order to hear closing submissions.

[63] I do not attribute the extra day(s) of hearing to the respondent and therefore find costs against the respondent on this basis are not warranted.

[64] *Witness List*: It is clear from the record that the applicant expanded its witness list from what was originally contemplated at the case conference in March 2017. I do not find the respondent's comments about the applicant's "expanding" witness list unjustified or a collateral attack on the Tribunal. The fact is, at the case conference, the applicant contemplated calling three witnesses, as did the respondent. On July 21, 2017, the applicant advised the respondent that it would be calling six witnesses and requested that an additional three witnesses for the respondent be made available for cross-examination.[14] I do not find the respondent's characterization of the witness list as "expanding", as a result of a motion or otherwise, as a reason to award costs.

[65] *Records of Insurer's Experts / Insurer's July 21, 2017 Submissions / Applicant's Causation Factum / Dr. Berbrayer's Addendum Report / Joint Document Brief:* The applicant pointed to the above as examples of how the respondent complicated or prolonged the process. I do not find that these were attributable to the respondent. Rather, I find the applicant's characterization of some of these allegations as "misleading" or a "collateral attack" on the Tribunal's decision to be disingenuous.

[66] The applicant brought a motion on July 21, 2017 requesting an adjournment of the hearing and to extend the hearing from two days to three days in order to allow the Ministry of the Attorney General of Ontario time to respond to the applicant's Notice of Constitutional Question. The respondent consented.

[67] The applicant brought a motion to discuss outstanding procedural and service issues and to relocate the hearing to Barrie. The Tribunal Order released on August 15, 2017 indicates that the parties consented to the relocation of the hearing. Again, the parties consented to the new timelines for production of materials to be relied on for the hearing and due dates for submissions as well as the exchange of evidence.[15]

[68] *July 21, 2017 Submissions*: There was no prejudice to either party as a result of the submissions. As counsel know, and as I made clear at the hearing,

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[14] Applicant's Document Brief for Costs Submissions, Tab 30
[15] Applicant's Document Brief for Costs Submissions, Tab 52

submissions are not evidence but are a useful roadmap for the hearing adjudicator.

[69] I place no weight on the applicant's submission regarding the causation factum. I do not find the respondent's response misleading

[70] The parties were not ordered to submit a joint document brief. While it is often more convenient to have a joint book of documents, the respondent advised the applicant that it would not agree to a joint document brief and stated its reasons.[16]

[71] Accordingly, I do not find the respondent's conduct unreasonable, vexatious or in bad faith and therefore decline to award costs.

Notice of Constitutional Question

[72] The applicant is to advise the Tribunal and copy respondent's counsel and the Ministry of the Attorney General within 10 days of the release of this decision whether it intends to proceed with the Constitutional Challenge and if so, to provide three dates within 30 days of the release of the decision for a case conference to be held before me to discuss submission dates.

[73] If the applicant advises he wishes to proceed with the constitutional challenge, the respondent and the Ministry of the Attorney General are to advise if they will be responding and if so, to provide their availability for a case conference from the dates the applicant provides.

ORDER

[74] Having considered the submissions of the parties, I order:

i. The applicant is entitled to an award of $4,711.77, plus interest, according to s. 10 of O. Reg. 664; and,

ii. The applicant is not entitled to costs.

Released: August 28, 2019

L. Marzinotto

Lori Marzinotto
Vice Chair

[16] Applicant's Document Brief for Costs Submissions, Tab 19