Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Appeal P16-00044

OFFICE OF THE DIRECTOR OF ARBITRATIONS

A.G.

Appellant

and

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

BEFORE: David Evans

REPRESENTATIVES: Nicole Corriero for A.G.
J. Claude Blouin for Wawanesa Mutual Insurance Company

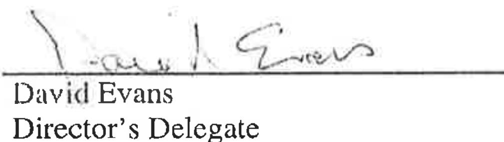
HEARING DATE: July 6, 2017

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The Arbitrator's Order of May 12, 2016 is confirmed and this appeal is dismissed.

2. If the parties are unable to agree about the legal expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.



David Evans
Director's Delegate

February 12, 2018
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

A.G. appeals the order of Arbitrator Kowalski dated May 12, 2016, wherein she dismissed A.G.'s claims under the *SABS–2010*[1] for income replacement benefits (IRBs) and various treatment and assessment plans outside of the Minor Injury Guideline (MIG).

The Arbitrator did not believe A.G. stopped working because of the accident – indeed, he worked for months after it. She also found that he was not entitled to the claimed treatments or assessments.

Although A.G. submits the Arbitrator made a number of errors in her decision, the reasons turned on A.G.'s lack of credibility. There was evidence to support the Arbitrator's assessment of A.G.'s credibility, including his misrepresentations to both his doctors and his insurer about his inability to work immediately after the accident. The same issues about credibility affected the other claims. There is thus no reason for me to intervene.

II. BACKGROUND

A.G. was injured in a motor vehicle accident on May 28, 2011 and claimed benefits from Wawanesa in March 2012. Wawanesa terminated IRBs effective July 14, 2012 on the basis that A.G.'s injuries did not prevent him from working and denied funding of certain treatment and assessment plans because the injuries were predominantly minor. On that latter point, the extent of injuries and the existence of pre-existing injuries can affect whether the MIG applies.

With respect to the injuries from the 2011 accident, the emergency department doctors at Scarborough Hospital, where he was taken after the accident, treated him for soft tissue injuries,

[1] *The Statutory Accident Benefits Schedule — Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

gave him a prescription for Percocet, and took X-rays of his neck, back and chest that were normal.

With respect to pre-existing injuries, A.G. had been in an accident in 2006, but had returned to work despite residual pain in his neck, shoulders and back without pain medication. He claimed the 2011 accident exacerbated his pre-accident pain, especially the unresolved back pain, and left him anxious, depressed and in too much pain to work. He said his accident-related impairments made him an undesirable partner to his wife in Kosovo, causing the breakdown of their marriage. He also disputed the categorization of his impairments as a "minor injury," as defined in the *SABS*, saying that his injuries were not predominantly minor, or that, if they were, he had compelling evidence of pre-existing physical and psychological impairments that would take him out of the MIG.

The Arbitrator summarized her findings as follows:

> There is no doubt that A.G. has significant health challenges, many owing to a post-accident diagnosis relating to a compromised immune system that is unrelated to the accident itself. By the time of the hearing, A.G. presented as a person who is suffering. However, I find that he has failed to prove that the 2011 accident caused an inability to perform the essential tasks of his employment, a complete inability to do any work for which he is reasonably suited, or that his accident-related impairments are not predominantly a minor injury.

Under the heading Income Replacement Benefits, the Arbitrator noted that A.G. had been working as a box labeler at the time of the May 2011 accident. The Arbitrator also set out the pre-104 week and post-104 week tests she referred to in the paragraph above, the own-job test in s. 5(1), a substantial inability to perform the essential tasks of the pre-accident employment, and the any-job test in s. 6(2), a complete inability to engage in any employment for which he was reasonably suited by education, training or experience.

A.G. first applied for IRBs in March 2012, certifying that his injuries from the May 2011 accident prevented him from working from the day of the accident. Wawanesa paid IRBs from February 2012 until July 14, 2012, when it terminated benefits on the basis of a multidisciplinary insurer examination (IE) report by Life Mark Assessments dated June 27, 2012, which concluded

that A.G. was not disabled from working. The same IE determined that the injuries A.G. sustained in the accident were minor soft tissue ones.

The main reason the Arbitrator found that A.G. failed the IRB tests was the inconsistency between what he told his family doctor, Dr. Jill Blakeney, at the time of the accident and afterwards about his employment, and the employment records. For instance, he told her that he had been working in construction cleaning, had been laid off three months before the accident, and could not look for work after it. However, the employment records of Direct Staffing Solutions Inc. showed that he had been working continuously since August 2010 as a box labeler and returned to work immediately following the accident with increased hours. The Arbitrator noted that A.G. worked through the end of June 2011, returned to work after an eight week break (during which time he did not seek treatment), and then stopped work for twelve weeks to travel to Kosovo from October 2011 to January 2012, before returning to work for three more weeks.

The Arbitrator noted that on January 30, 2012, A.G. went to see Dr. Blakeney, his first visit with her in six months. Regarding the earlier visits at Dr. Blakeney's office, A.G.'s first visit shortly after the accident was with Dr. Blakeney's colleague, Dr. Rosemarie Lall, followed by a couple of visits with Dr. Blakeney in June and July 2012. Regarding his employment and the effect of the accident on it, I have already noted that A.G.'s employment records did not match what the doctors were told. The Arbitrator also noted that both Dr. Lall and Dr. Blakeney encouraged A.G. to return to regular daily activities and to work – even though the work he claimed to have done was more strenuous than what he had actually been doing.

The Arbitrator noted that both doctors referred A.G. to physiotherapy that he hardly attended. According to the notes, A.G. would only go for treatment if he did not have to change buses. However, the Arbitrator observed that A.G. was able to fly 10 hours to Kosovo and visit for three months without first seeing Dr. Blakeney or requiring medication or treatment in advance.

The Arbitrator also pointed out that, while A.G. testified the accident caused the breakdown of his marriage, over a year earlier he reported to Dr. Blakeney that his new wife in Kosovo wanted a divorce because of immigration delays.

By late 2012, A.G. was diagnosed with HIV and was being treated for various secondary infections. However, his primary focus, according to his testimony and his reports to Dr. Blakeney, was his back pain and the accident. Nonetheless, the Arbitrator noted, Dr. Blakeney did not think A.G. was disabled from work, as she continued to encourage him to work and stay active. Finally, throughout 2012 to 2014, the Arbitrator noted, A.G. himself continued to report to Dr. Blakeney that he was looking for work, suggesting he felt able. The Arbitrator found that such comments to Dr. Blakeney called into question his testimony that he was unable to engage in any employment for which he was reasonably suited by education, training or experience.

The Arbitrator concluded:

> In a case that turns on credibility, discrepancies in A.G.'s reports to his family doctor, and between his testimony and employment-related records take on greater significance because they are at the heart of the IRBs in dispute. These discrepancies make A.G.'s testimony unreliable where it is not corroborated by other evidence. In this case, the documented evidence relating to A.G.'s employment directly contradicts his oral representations. I find that A.G.'s testimony is unreliable and contradicted by his family doctor's records and employment and income tax documents; and that he therefore has not proved that, on balance, the accident left him unable to perform the essential tasks of his pre-accident employment or completely unable to engage in any employment for which he is reasonably suited.

Under the heading **Minor Injury Guideline (the "MIG")**, the Arbitrator considered A.G.'s submission that his injuries were not predominantly minor, or that, if they were, he had compelling evidence of pre-existing physical and psychological impairments that made him vulnerable before the accident and took him out of the MIG.

The Arbitrator then set out the law, noting that an insured person's impairment comes within the MIG if the impairment is *predominantly* a minor injury, in which case the insured person can only receive a maximum of $3,500 for medical treatment and rehabilitation.

The *SABS* and the MIG define "minor injury" as:

> A sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae. This term is to be interpreted to apply where a person sustains any one or more of these injuries.

The exception for a pre-existing condition set out in s. 18(2) of the *SABS* and para. 4 of the MIG applies if the impairment is predominantly a minor injury but, based on compelling evidence provided by the insured person's health practitioner, the insured person has a pre-existing medical condition that will prevent the insured person from achieving maximal recovery from the minor injury if he or she is subject to the $3,500 limit referred to in section 18(1) of the *SABS*. The compelling evidence should be provided using a treatment and assessment plan (OCF-18) with attached documentation, and the MIG further provides that this exception should only apply in extremely limited instances.

The Arbitrator found that A.G.'s impairments were predominantly a "minor injury" because the only diagnoses were of sprains and muscle pain. There were no tears, and Dr. Blakeney testified that A.G. did not even have whiplash as a result of the accident.

The Arbitrator also found that the exception did not apply because there was no compelling evidence from Dr. Blakeney that A.G.'s residual back pain would have prevented him from achieving maximal recovery were he subject to the MIG treatment limits. She gave more weight to Dr. Blakeney's report than that of a chiropractor who had recommended further treatment. Moreover, the MIG limits could hardly have been insufficient, the Arbitrator noted, "when A.G. did not actually go for treatment, did not tell Wawanesa that CBI Physio was too far to attend for treatment, or ask Wawanesa to transfer the treatment to another clinic."

The Arbitrator then turned to A.G.'s psychological issues. She found that, although A.G. was diagnosed with Post Traumatic Stress Disorder (PTSD) and major depressive disorder following an assessment by psychologist Dr. Judith Pilowsky, these could not be considered his predominant impairment because A.G. remained focused on his pain. She also found there was no compelling evidence that A.G. had pre-existing psychological impairments that would prevent maximal recovery from the minor injury as required under the MIG.

The Arbitrator noted the evidence that A.G. responded to his pain unusually, although all the evidence suggested that there was no organic basis for his pain. The Arbitrator summarized Dr. Blakeney's evidence as showing A.G. exhibited extreme pain behaviour, just as he had after

the 2006 accident, down to a dry cough that he only made when Dr, Blakeney entered the room, not when he was in the waiting area.

Dr. Pilowsky had assessed A.G. in 2007 in relation to the 2006 accident, and made the same diagnosis then as she did in 2012 regarding the 2011 accident: a major depressive disorder and PTSD.

However, given that Dr. Pilowsky had only met A.G. twice for the limited purpose of providing medical/legal opinions, the Arbitrator preferred the evidence of Dr. Blakeney, who had treated A.G. since two days after the 2006 accident. The Arbitrator noted that it appeared that A.G. did not seek psychiatric or psychological involvement consistently or with any regularity. According to Dr. Blakeney, A.G. was not psychiatrically minded and his interest in psychiatric intervention waxed and waned. His evidence was consistent that the primary concern was pain. Based on Dr. Blakeney's evidence, the Arbitrator was not persuaded that psychological issues were A.G.'s predominant injury.

Finally, while two months after the accident, on July 25, 2011, Dr. Blakeney wrote that A.G. had chronic pain, she also testified that the diagnosis was premature vis-à-vis the 2011 accident. The Arbitrator also noted that Dr. Blakeney nevertheless did not see his pain to be a barrier to his ability to function or work, and continuously encouraged him to do so and to stay active because his injuries were minor, not medically significant or dangerous, and would not harm him.

The Arbitrator concluded that the issues regarding A.G.'s credibility affected both the IRB claim and the claim that his impairments fell outside the MIG. The Arbitrator found that A.G. did not present any reliable or credible evidence to support his claim for IRBs. She also found that although there was evidence that A.G. had pre-existing back pain and psychological issues, there was no compelling evidence from his treating family doctor that they would prevent him from achieving maximal recovery if subjected to the MIG limits or that his psychological issues made up his predominant injury. The claims were therefore dismissed.

With respect to other medical evidence, I will add that, in footnote 3, the Arbitrator stated:

> Because I find that A.G. has failed to meet his burden of proof, I find it moot to go on to address Wawanesa's reports and have therefore not gone into an analysis of those reports in this decision.

In a further decision dated April 5, 2017, the Arbitrator found that each party should bear its own expenses of the arbitration and made no order for expenses.

III. ANALYSIS

The Arbitrator's decision largely turned on her assessment of A.G.'s credibility. She had evidence to support her conclusion that he was not credible, so there is no basis for me to intervene.

For instance, with respect to the IRBs, A.G. misrepresented his work history before and after the accident to his doctors and to Wawanesa. The Arbitrator therefore did not believe him when he said he could not work.

A.G. submits that the Arbitrator erred in not applying the correct causation test and should have compared the effects of the accident on his pre-existing and concurrent conditions. A.G. therefore submits she should have applied the "material contribution" test on the basis that it was impossible for him to meet the burden of the "but for" test. However, as I explained in *State Farm Mutual Automobile Insurance Company and Sabadash*, (FSCO P16-00029, September 18, 2017), if an applicant fails the "but for" test, there is no fallback position to turn to a "material contribution" test. The Arbitrator effectively found that A.G. failed the but for test regarding IRBs, so there was no need to consider material contribution.

A.G.'s other submissions stated that the Arbitrator improperly treated Dr. Blakeney's evidence, misrepresented it and failed to deal with it fairly, and improperly interpreted the IRB test. However, these submissions also fail due to the credibility findings.

With respect to the treatment of Dr. Blakeney's evidence, A.G. submits that the Arbitrator relied on the doctor's "opinion" that A.G. could work, whereas Dr. Blakeney was never allowed to offer such an opinion. However, the credibility finding turned on the contrast between what A.G. told Dr. Blakeney versus what she had in her notes. That key finding did not rely on any opinion evidence but rather simply supported the Arbitrator's conclusions on credibility.

With respect to the weight given to the evidence, A.G. sets out over a number of pages how, he submits, the Arbitrator ignored the doctor's evidence that she had no reason to believe A.G.'s presentation was insincere. However, there is no contradiction between an arbitrator finding that a doctor believes an insured and the arbitrator finding that the insured was nonetheless insincere and not credible. It was up to the Arbitrator to determine A.G.'s credibility, and her conclusion is entitled to deference.

With respect to the IRBs, since the Arbitrator did not find A.G. credible, it was not necessary to even consider the relevant tests. She was also not required to consider the IE reports because, as the Arbitrator noted, she found A.G. failed to meet the burden of proof. In other words, he did not even make out a *prima facie* case. In those circumstances, it was not necessary for the Arbitrator to recite all the reports in her decision: *Brookes and Aviva Canada Inc.*, (FSCO P09-00004, February 9, 2012).

Basically, the bulk of A.G.'s submissions consist in stating that the Arbitrator gave improper weight to certain evidence. However, it was the Arbitrator's role to weigh the evidence, and her key findings were all based on evidence before her. I have no reason to intervene.

As for the MIG, as noted earlier, s. 3(1) of the *SABS* provides that "minor injury" means 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.

A.G. submits that the Arbitrator erred in relying on Dr. Blakeney's "opinion" that he suffered a minor injury. However, what the Arbitrator relied on was the doctor's evidence that A.G. had no tears to any ligaments or tendons and that he did not even have whiplash as a result of the accident. From that evidence, the Arbitrator found that, on the face of it, A.G.'s injuries were

minor. Other evidence, like the normal X-Rays taken shortly after the accident and the normal MRI taken in February 2012 supported this view.

As to the residual back pain before the accident, the Arbitrator found that Dr. Blakeney provided no compelling evidence that it would have prevented A.G. from achieving maximal recovery within the MIG treatment limits. Thereafter, however, A.G. continued to work, took a lengthy vacation in Kosovo, and returned to work. Given all that, the Arbitrator was justified in finding that there was no chronic pain that took A.G. out of the MIG.

As to the residual back pain before the accident, the Arbitrator found that there is no compelling evidence from A.G.'s treating health practitioner, Dr. Blakeney, that A.G.'s residual back pain would have prevented him from achieving maximal recovery were he subject to the MIG treatment limits. The Arbitrator also found that A.G. had not provided compelling evidence that his pain was such that it was not a clinically associated sequelae of the sprains he suffered in the accident. She was entitled to rely on the evidence that A.G. did not actually go for treatment, did not tell Wawanesa that CBI Physio was too far to attend for treatment, or ask Wawanesa to transfer the treatment to another clinic to support her findings.

Finally, with respect to the psychological issues, an insured person's impairment comes within the MIG if the impairment is predominantly a minor injury, in which case the insured person can only receive a maximum of $3,500 for medical treatment and rehabilitation. The Arbitrator had evidence before her that the injury was predominantly minor, despite the diagnoses by Dr. Pilowsky, For instance, she had evidence that A.G. did not seek psychiatric or psychological involvement consistently or with any regularity, A.G. was not psychiatrically minded and his interest in psychiatric intervention waxed and waned. A.G.'s evidence was consistent that the primary concern was pain. The Arbitrator therefore had evidence that the injury was predominantly minor.

While the Arbitrator may not have engaged in a detailed analysis of each and every aspect of the major points in issue, her reasons refer to the principal evidence she relied upon and provide a justification for her conclusions, as required by *Kanareitsev and TTC Insurance Company Limited*, 2008 CanLII 26262 (ON SCDC).

Accordingly, the appeal is denied, and the arbitration decision is affirmed.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

David Evans
Director's Delegate

February 12, 2018
Date