



FSCO A14-009905

BETWEEN:

(BLAZE) SKYLER MANDAMIN

Applicant

and

PAFCO INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Marcel D. Mongeon

Heard: By telephone conference held on June 12, 2017

Appearances: Mr. Alex Demeo participated for Mr. (Blaze) Skyler Mandamin
Mr. David Murray participated for Pafco Insurance Company

Issues:

The Applicant, Mr. (Blaze) Skyler Mandamin, was injured in a motor vehicle accident on July 4, 2005 and sought accident benefits from Pafco Insurance Company (“Pafco”), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and the Applicant, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

By letter, dated May 1, 2017, a Preliminary Issue Hearing in this matter was directed.

The issue in this Preliminary Issue Hearing is:

¹ *The Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

1. Does the Financial Services Commission of Ontario [...] have the jurisdiction pursuant to s. 280 of the *Insurance Act*, R.S.O. 1990, c. I.8 and the *Financial Services Commission of Ontario Act*, 1997, c. 28, to determine whether an individual has sustained a catastrophic impairment where the Application for Arbitration does not seek payment of any benefits?

Result:

1. In the absence of a claim for any benefits in this matter, a finding of a determination of catastrophic impairment cannot be made.

EVIDENCE AND ANALYSIS:

Background

By Pre-Hearing Letter, dated November 30, 2015, the issues for the hearing in this matter were established as follows:

1. Is Mr. Mandamin entitled to a determination of catastrophic impairment pursuant to s. 2(2) or s. 45 of the *Statutory Accident Benefits Schedule* and the benefits that flow from this designation?
2. Is Pafco liable to pay Mr. Mandamin's expenses in respect of the arbitration?
3. Is Mr. Mandamin liable to pay Pafco's expenses in respect of the arbitration?
4. Is Mr. Mandamin entitled to interest for the overdue payment of benefits?

Facts

The Applicant was injured in a motor vehicle accident on July 4, 2005. His date of birth is January 9, 2003, making him 2 ½ years old at the time of the accident.

An Application for Determination of Catastrophic Impairment (OCF-19) was submitted in May 2010. An Explanation of Benefits responding to the OCF-19 was sent on August 14, 2013 denying

the determination. This issue was mediated and an Application for Arbitration (Form C) was submitted on December 10, 2014.

A Treatment and Assessment Plan (OCF-18) proposing cognition therapy, learning and medical assessments for \$5,594.75 was made on May 19, 2016 and denied by the Insurer fax back on June 6, 2016. By an additional Explanation of Benefits of the same date, Pafco provided the reason for denial as:

Medical documentation on file would suggest Mr. Mandamin does suffer from mental and behavioral impairments, however these impairments are related to a developmental disorder and are unrelated to the motor vehicle accident.

I note that this Treatment and Assessment Plan is not in dispute in this action. I have advised the parties that given the transition to the Licence Appeal Tribunal (LAT) system since April 1, 2016 (s. 14 of Schedule 3 of the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, S.O. 2014, c. 9), it would not be appropriate to add a consideration of the denial of this plan to this Preliminary Issue Hearing.

Submissions

The Applicant submits that the denied Treatment and Assessment Plan for \$5,594.75 can be considered as the benefit underlying the need for a designation. The Applicant further submitted that a catastrophic impairment designation relates generally to entitlement to benefits under the *Schedule* and, therefore, it is appropriate that a finding of catastrophic impairment can be made even in the absence of a denial of benefits.

Pafco submitted that a designation of catastrophic impairment is not a benefit in itself but is rather a designation allowing expanded benefits. With respect to the denied Treatment and Assessment Plan, Pafco further submitted that it was not denied due to a lack of catastrophic impairment designation, but based on the merits of the issues proposed.

Finally, Pafco submitted that making a declaration of catastrophic impairment would be in the nature of declaratory or equitable relief which is in the sole authority of the Superior Court and Court of Appeal as provided in the *Courts of Justice Act*.

Analysis

In *Machaj v RBC General Insurance Company*,² the Court of Appeal followed the decision of the Divisional Court in *The Guarantee Company v Dong Do et al.*³ In paragraph 6 of *Machaj*, the Court of Appeal sums up the situation as follows:

We agree ... that the line of authority culminating in *Do* establishes that there is a clear distinction to be drawn between the claim for determination of catastrophic status and a claim for the specific benefits to which an injured person is entitled if found to have suffered a catastrophic injury.

Do establishes that a denial of a designation of catastrophic impairment is not a benefit. Therefore, its denial does not invoke the two-year limitation period under the *Schedule*.

This case is a clear application of *Do*: since there was no claim for specific benefits at the time of this application, the denial of the designation of catastrophic impairment does not cause a limitation period to run. The Applicant continues to be free in the future to apply for the designation.

This application for the designation has no practical effect. If this matter proceeds and a designation was not made, the Applicant is free to make another application in the future. If the designation was made, no additional benefits are payable under this application. Either way, there is no practical impact.

² 2016 ONCA 257 (CanLII).

³ 2015 ONSC 1891 (CanLII).

The Applicant has a Denial of Benefits, dated June 6, 2016. The reason for the denial is other than reaching the limit of benefits without a designation of catastrophic impairment. If this application were to proceed to Hearing, the Hearing Arbitrator would not be able to consider the payment of that benefit due to the transition to the LAT system. In addition, the designation of catastrophic impairment would not make that benefit payable as it had been denied for a reason other than having reached the normal limits without a designation.

This application asks a question that will have no current impact on the Applicant's benefits. As a result, the question is merely academic or moot and need not be answered.

I note that the Applicant may seek to arbitrate the denial of benefits, dated June 6, 2016, under the LAT system. To the extent that the denial was based on the lack of a designation of catastrophic impairment, the Applicant will be free to ask for such a designation as no limitation period is applicable.

Conclusion

Based on the foregoing analysis, as there is no claim for benefits which underlie the application for a designation of catastrophic impairment, the determination cannot be made.

EXPENSES:

If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Marcel D. Mongeon
Arbitrator

July 31, 2017
Date



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ARBITRATION ORDER

Under section 282 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 Ontario *Regulation 664*, as amended, it is ordered that:

1. In the absence of a claim for any benefits in this matter, a finding of a determination of catastrophic impairment cannot be made.

Marcel D. Mongeon
Arbitrator

July 31, 2017
Date