

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Tribunal File Number: 17-006163/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:

Semion Brodsky

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR:

Sandeep Johal

APPEARANCES:

Representative for the Applicant:

Kateryna Vlada, Paralegal

Counsel for the Respondent:

Meredith A. Harper

Heard in writing on:

April 3, 2018

OVERVIEW

- [1] The applicant was injured in an automobile accident on September 16, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the "Schedule").
- [2] The applicant applied for medical benefits that were denied by the respondent because he was placed into the Minor Injury Guideline (the "MIG"). The applicant disagreed with this decision and submitted an application for dispute resolution to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

ISSUES TO BE DECIDED

- [3] The following are the issues to be decided as per the Tribunal's case conference direction of February 9, 2018:
 - i. Do the applicant's injuries fall within the MIG?
 - ii. If the answer to issue one is no, then:
 - iii. Is the applicant entitled to receive medical benefits recommended by Dr. Andrea Giaschi as follows:
 - (a) \$3,219.56 for a chiropractic and massage treatment plan submitted March 1, 2016 and denied by the respondent March 14, 2016; and
 - (b) \$2,147.38 for a physiotherapy treatment plan submitted May 25, 2016, denied by the respondent June 8, 2016?
 - iv. Is the applicant entitled to payments for the cost of examinations in the amount of \$1,999.28 for a psychological assessment recommended by Dr. Eugene Hewchuk, in a treatment plan submitted on March 21, 2016, denied by the respondent on April 6, 2016?
 - v. Is the applicant entitled to payments for the cost of examinations in the amount of \$2,000.00 for a chronic pain assessment, recommended by Dr. Igor Wilderman, in a treatment plan submitted on June 20, 2016, denied by the respondent on June 27, 2016?
 - vi. Is the applicant entitled to an award for unreasonably withheld or delayed payments under section 10 of *Ontario Regulation 664*?

¹ O. Reg. 34/10.

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

RESULT

- [4] Based on the totality of the evidence before me, I find:
- i. The applicant has predominately minor injuries as defined in the *Schedule* and, therefore, it is unnecessary to consider the reasonableness of the disputed treatment plans, the issue of interest or an award.

ANALYSIS

Applicability of the Minor Injury Guideline

- [5] The MIG establishes a framework for the treatment of minor injuries. The term “minor injury” is defined in section 3 of the *Schedule* 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.” The terms “strain,” “sprain,” “subluxation,” and “whiplash associated disorder” are also defined in section 3. Section 18(1) limits recovery for medical and rehabilitation benefits for such injuries to \$3,500.
- [6] Section 18(2) of the *Schedule* provides for injured persons who have a pre-existing medical condition to receive treatment in excess of the \$3,500 cap. To access the increased benefits, the injured person’s healthcare provider must provide compelling evidence that the person has a pre-existing medical condition, documented prior to the accident, that will prevent the injured person from achieving maximal recovery if benefits are limited to the MIG’s monetary cap.
- [7] In the decision of *Scarlett v. Belair Insurance*,² the Divisional Court found that the onus of establishing entitlement beyond the MIG limits rests with the claimant. Applying *Scarlett*, the applicant must establish his entitlement to coverage beyond the \$3,500 cap for minor injuries on a balance of probabilities.

Did the applicant sustain a predominately minor injury?

- [8] I find that the medical evidence before me indicates the applicant sustained an impairment that is predominantly a minor injury.
- [9] The clinical notes and records from the applicant’s medical practitioners immediately after the accident state that he has soft tissue injuries from the

² 2015 ONSC 3635.

motor vehicle accident and an MCL strain to his left knee,³ as well as a left heel spur and a post-knee injury.⁴

- [10] On February 11, 2016, Dr. Hendrick diagnoses the applicant with plantar fasciitis and, on February 22, 2016, notes that the applicant has persistent left knee pain which was initially showing instability but it has since improved.
- [11] On April 13, 2016, the applicant attended an insurer examination before General Practitioner, Dr. Pravesh Jugnundan. Dr. Jugnundan's report opines that the applicant sustained soft tissue injuries to his left knee, left foot and low back which he goes on to state would be minor injuries as defined under the *Schedule*.⁵
- [12] The applicant submits that he suffers from chronic pain, flashbacks and anxiety and, therefore, his injuries are not subject to the MIG. Submissions alone are not evidence and the applicant has not directed me to any evidence from any medical practitioners that note any psychological symptoms or diagnosis and I am not directed to any references of chronic pain or a chronic pain diagnosis.
- [13] Based on the evidence from the applicant's medical practitioners and from the insurer examining doctor, Dr. Jegnundan, I find the applicant's injuries to be predominantly minor and within the definition of section 3(1) of the *Schedule*.

Requirements to be removed from the MIG

- [14] If the applicant's injuries fall within the definition of the MIG, the applicant can still be considered to be out of the MIG in accordance with section 18(2) of the *Schedule*. In order to do so, the applicant must meet all three of the following requirements in order to escape the MIG under this section:
 - (a) There was a pre-existing medical condition;
 - (b) The pre-existing medical condition was documented by a health practitioner before the accident; and
 - (c) The pre-existing condition will prevent maximal recovery from the minor injury if the person is subject to the \$3,500 limit under the MIG.
- [15] I find that the applicant has not satisfied his onus. The applicant has not directed me to any evidence of a pre-existing injury that was documented prior

³ Dr. Chao, Clinical Notes and Records entry dated October 6, 2015.

⁴ Dr. Hendricks Clinical Notes and Records entry dated November 19, 2015.

⁵ Dr. Jugnundan IE Report dated April 22, 2016 at page 6.

to the motor vehicle accident. The only reference based on a review of the evidence provided to a pre-existing injury is from Dr. Goldenberg, however the letter was not prior to the accident. The letter, notes the applicant injured his left knee from the accident and it has resulted in weight gain and aggravated his left subcalcaneal heel pain. However, it does not state whether the pre-existing injury will prevent maximal recovery if the applicant is subjected to the monetary limits within the MIG as is required by s.18 of the *Schedule*.

- [16] The applicant is entitled up to the \$3,500 monetary limit under the MIG, however he has not satisfied his onus on a balance of probabilities with medical evidence in accordance with s 18(2) of the *Schedule* that his injuries fall outside the MIG therefore, the reasonableness or necessity of the disputed treatment plans need not be considered.
- [17] As I have found there are no benefits owing to the applicant outside of the monetary amount of the MIG, therefore the applicant is not entitled to the treatments plans in dispute, the cost of examinations, interest or an award.

CONCLUSION

- [18] For the reasons outlined above, I find that:
- (a) The applicant sustained predominately minor injuries as defined in the *Schedule*; and
 - (b) The applicant has not established that he has a pre-existing medical condition that prevents recovery under the MIG and therefore the applicant is not entitled to the treatment plans, the cost of examinations, interest or an award that is in dispute for this application and the application is dismissed.

Released: September 28, 2018



Sandeep Johal, Adjudicator