**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**

**Tribunal File Number: 18-003435/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:

**P. L.**

**Applicant**

and

**Aviva Insruance Company**

**Respondent**

**DECISION**

**ADJUDICATOR:** **Brian Norris**

**APPEARANCES:**

For the Applicant: Michael Krylov, Counsel

For the Respondent: Paul Irish, Counsel

**HEARD in writing on:** **February 22, 2019**

## OVERVIEW

[1] The applicant was injured in an automobile accident on November 18, 2014 and sought benefits from the respondent pursuant to *Statutory Accident Benefits Schedule - Effective September 1, 2010*, O. Reg. 34/10 (the "*Schedule").* The respondent refused to pay for certain benefits and the applicant has applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of this dispute.

## ISSUES

[2] The disputed claims in this hearing are:

1) Are the applicant's injuries predominantly minor injuries as defined in the *Schedule* and subject to a $3,500.00 funding limit as set out in s. 18 of the *Schedule?*

2) Is the applicant entitled to a medical benefit for services recommended by Toronto Spine & Sports Clinic as follows;

   a. $2,456.00 for a physiotherapy treatment plan dated March 9, 2016;

   b. $3,132.80 for a physiotherapy treatment plan dated July 4, 2016;

   c. $3,020.25 for a physiotherapy treatment plan dated July 29, 2017; and

   d. $3,020.25 for a physiotherapy treatment plan dated July 29, 2017?

3) Is the applicant entitled to interest on any overdue payment of benefits?

## RESULT

[3] The applicant is unsuccessful on all issues.

## BACKGROUND

[4] The applicant was the driver of a vehicle which was struck from behind while in stop-and-go traffic on a highway. Neither police nor emergency medical services attended at the scene and the applicant was able to independently drive to the collision reporting centre. The applicant visited Dr. M Simonik, family physician on the day of the accident and then started treatment at Toronto Spine & Sports clinic on November 26, 2014. Toronto Sports & Spine Clinic characterized the applicant's injuries as falling within the Minor Injury Guideline ("MIG") and started the applicant's treatment under the MIG.

[5] The applicant completed treatment within the MIG and now disagrees with the characterization of the injuries as a result of the accident, and seeks funding for treatment beyond the $3,500.00 limit.

## PRELIMINARY MOTIONS

[6] The respondent motions to exclude the following evidence on account it was delivered in an untimely manner and contrary to the Order dated August 2, 2018; the clinical notes and records of Dr. Simonik and the clinical notes and records from Toronto Spine and Sports Clinic.

[7] The applicant submits the evidence is relevant to the issues in dispute and the exclusion of such evidence would be prejudicial to the applicant's case.

[8] I agree with the applicant and will allow the documents because they are relevant. However, while weighing the evidence, I will consider the untimely delivery and the respondent's inability to have the evidence reviewed by their assessors before the hearing.

## THE MINOR INJURY GUIDELINE

[9] There is a monetary limit available to injured persons who sustain a minor injury as a result of an accident. A "minor injury" is defined in s. 3 of the *Schedule* and includes sprains, strains, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae. The MIG provides that a strain is an injury to one or more muscles and includes a partial tear. Under section 18 of the *Schedule*, injuries that are defined as minor are subject to a $3,500.00 funding limit on treatment.

[10] If the applicant's injuries are deemed to be minor in nature, the responsibility is on the applicant to establish that the MIG, and the related funding limit, should not apply.

[11] The applicant claims a history of back pain and submits this pain has been exacerbated as a result of the accident. In addition, the applicant claims persistent back pain since the accident and submits this pain is chronic and the treatment funding cap provided by the MIG should not apply as a result. The applicant believes the disputed treatment plans should be funded in full by the respondent because the applicant should not be confined to the MIG.

[12] I find the applicant has not met the requisite burden of proof to establish the injuries sustained as a result of the accident are nothing more than minor injuries

as defined by the *Schedule*. The applicant is subject to the $3,500.00 funding cap as a result. My reasons are as follows.

**Pre-existing Injuries**

[13] The applicant does not have a pre-existing injury which would preclude recovery within the MIG. Dr. Simonik's clinical notes and records show the applicant had complaints of back pain prior to the accident, in 2011, but there are no recorded complaints during the period from 2012 to the date of the accident. Similarly, the applicant highlights only one incident post-accident, on July 14, 2015, where Dr. Simonik notes the applicant's pain. This single incident is not indicative of an exacerbation of pre-existing back pain.

[14] The applicant provided the records from Heart Lake Chiropractic clinic to provide evidence of pre-existing back pain but did not discuss how or why the back pain would impact the applicant's recovery within the MIG. I have reviewed the records and find them unhelpful as they are, for the most part, illegible, and unclear as to how or why the applicant's 2011 back pain would impact recovery from soft tissue injuries suffered in a 2014 accident. Dr. Simonik's records pose a similar problem as they are difficult to read and where they are legible, like the other records, do not indicate the applicant suffers from an exacerbation of back pain nor do they opine on how or why the applicant's back pain would impact recovery.

**Chronic Pain**

[15] The applicant claims to suffer from back pain persisting for years following the accident. The applicant characterizes this as chronic pain and submits this is an injury which falls outside the MIG. I disagree.

[16] While the applicant has intermittent complaints of pain for years before and following the accident, I find this pain is not a chronic pain condition as a result of the accident and does not remove the applicant from the MIG.

[17] The applicant's family physician's records are not indicative of a chronic pain condition. There records show the applicant has visited Dr. Simonik only three times in the four years since the accident. Likewise, the clinical notes and records from Toronto Spine & Sport Rehab are also not indicative of a chronic pain condition which would remove the applicant from the MIG. There are recorded complaints of stiffness and soreness in the records however, the pain complaints are mixed with comments stating the pain is improving and, on several occasions, the pain is attributed to the applicant's physical activity around the time of visit, such as playing golf or working out at the gym. The records are absent any complaints which indicate the pain is disabling or affecting the applicant's daily life.

[18] The applicant has not exhibited behaviour indicative of a chronic pain condition. The applicant has not used any prescription drugs as a result of accident-related injuries nor does the applicant appear to be over-reliant on health professionals. The applicant's overall functionality appears to be unaffected following the accident – the applicant is able to independently complete all aspects of personal care, continues to work, exercise at the gym, golf, and vacation.

## THE DISPUTED TREATMENT PLANS AND INTEREST

[19] Considering I have found the applicant to be subject to the funding limits provided by the MIG and the fact the applicant has exhausted this funding, a finding on the applicant's entitlement to the remaining issues in dispute is unnecessary. Likewise, I have found that no payments were due and therefore, no payments went overdue and no interest is payable as a result.

## CONCLUSION

[20] I find that the applicant's injuries as a result of the accident fall within the MIG and the applicant is subject to the funding limit prescribed in the MIG.

[21] The disputed treatment plans are not payable because the applicant has reached the funding limit provided by the MIG.

[22] No interest is owed.

**Released: June 21, 2019**

**Brian Norris**
**Adjudicator**