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**

Citation: Michael Carbone vs. Aviva Insurance Canada, 2020 ONLAT 19-004871/AABS

Released Date: 07/22/2020
File Number: 19-004871/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:

Michael Carbone

Applicant

And

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **Rebecca Hines**

APPEARANCES:

For the Applicant: Alex Nikolaev, Counsel

For the Respondent: Sonya M. Katrycz, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Michael Carbone (the “applicant”) was involved in an automobile accident on May 5, 2017, and sought benefits from Aviva Insurance Company of Canada (the respondent”) pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).

[2] The parties participated in a case conference but were unable to resolve the issues in dispute. The matter proceeded to this written hearing.

ISSUES IN DISPUTE

[3] I have been asked to decide the following issues:

i. Are the applicant’s injuries predominantly minor as defined in s. 3 of the *Schedule*, subject to treatment within the $3,500.00 limit in the **Minor Injury Guideline (“MIG”)**?

ii. If the answer to the first question is no, is the applicant entitled to the following:

a) a medical benefit in the amount of $3,246.90 for physiotherapy treatment recommended by Galatea Medical and Rehab Centre (“Galatea”) in a treatment plan (OCF-18) submitted on May 8, 2018, and denied on June 8, 2018?

RESULT

[4] The applicant sustained a minor injury as defined under the *Schedule* and is subject to the $3,500.00 funding limit. The applicant is not entitled to the disputed treatment plan as the MIG limit has been exhausted.

ANALYSIS

Do the applicant’s impairments fit within the MIG?

[5] I find the applicant’s impairments fall within the MIG.

[6] Section 3 of the *Schedule* provides the following definition of a minor injury:

> "a "minor injury" means one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae."

[7] Pursuant to s. 18 of the *Schedule*, the sum of medical and rehabilitation benefits payable to an insured person who sustains a predominantly minor injury is limited to $3,500.00. The $3,500.00 limit does not apply if the insured person provides compelling evidence that he or she has a pre-existing medical condition that will prevent maximum medical recovery if he or she is subject to the $3,500.00 limit. In addition, certain accident related medical impairments can remove an individual from the MIG. For example, a diagnosis of chronic pain or a psychological impairment. The onus is on the applicant to prove that his impairments are not minor and not subject to the $3,500.00 cap.

[8] The applicant argues that his impairments do not fit within the definition of the MIG because he suffers from chronic pain as a result of the accident. Further, he argues that his accident related impairments remain unresolved and he requires further treatment. The applicant relies on an initial chiropractor assessment of Galatea and a disability certificate (OCF-3), completed by Dr. Brar, chiropractor, dated May 8, 2017 to support that his accident-related impairments are not minor. He also relies on the CNRs of Dr. Kamouna, his family doctor, and an x-ray dated September 19, 2018.

[9] The respondent submits that the applicant's impairments fit within the MIG. It maintains that the CNRs of Dr. Kamouna do not support that he suffers from chronic pain as a result of the accident. The respondent also relies on the CNRs of Dr. Kamouna and decoded OHIP summary in support of its position that the applicant's accident related impairments are minor. For the following reasons, I agree with the respondent and find the applicant sustained a minor injury.

[10] The applicant did not submit any evidence that he had any pre-existing health issues that would prevent him from achieving maximum medical recovery within the MIG, so he is not removed from the MIG as a result of a pre-existing condition.

[11] The applicant relies on a disability certificate prepared by Dr. Brar, chiropractor, of Galatea dated May 8, 2017. The disability certificate diagnosed the applicant with mild cognitive disorder; chronic post-traumatic headaches; injury to the neck, thoracic and lumbar spine; insomnia, anxiety, pain in sternum and sprain and strain of his elbow. I did not find the disability certificate compelling evidence that the applicant suffers from chronic pain as the physical impairments listed on the disability certificate fit within the MIG. Secondly, in my view, it is beyond the

scope of a chiropractor's expertise to diagnose cognitive disorders or anxiety and these impairments are not supported by objective medical evidence. Further, I did not find the initial chiropractic assessment dated May 8, 2017 compelling evidence that the applicant suffers from chronic pain as a result of the accident. This assessment was completed less than three days post-accident, and nothing referenced in it supports that the applicant suffers from chronic pain or any impairment that would remove him from the MIG.

[12] Likewise, I do not find that the CNRs of Dr. Kamouna support the applicant's position that he suffers from chronic pain as a result of the accident. The CNRs demonstrate that the applicant did not attend his family doctor's office about any accident related impairment until May 8, 2018 (one-year post-accident). On that date, the applicant complained of low back pain since the accident. Dr. Kamouna does not prescribe any medication or recommend treatment as a result of this visit. The applicant visited again on May 30, 2018 with the same complaints and the doctor indicates "take pain medication as needed." This is the last CNR in which the accident is mentioned. A CNR dated February 26, 2019 references chronic back pain (likely sciatica) and the doctor recommends that the applicant have an MRI. The respondent submitted a copy of the MRI which did not reveal any impairment. The doctor refers to chronic back pain again in May 2019, however, the accident is not mentioned in either of the 2019 CNRs.

[13] I do not find these sporadic CNRs of Dr. Kamouna compelling evidence that the applicant suffers from chronic pain as a result of the accident due to the large gap in time between the accident and the applicant's first visit to his family doctor. Further, I find the applicant's complaints of back pain were infrequent and the family doctor does not list the accident as the cause of his back pain in the more recent visits and does not recommend any treatment.

[14] I agree with the respondent that the family doctor's CNRs do not support that the applicant suffered from any significant accident-related impairment. The respondent submitted a more fulsome record of Dr. Kamouna's post-accident CNRs. These CNRs support that the applicant attended his family doctor's office more frequently post-accident about various different issues. In 2018 there are a few references to back pain. However, the majority of the applicant's visits were not accident related. I agree with the respondent that if the applicant suffered from chronic pain as a result of the accident that there would be more references in Dr. Kamouna's CNRs and the doctor would likely recommend treatment.

[15] The respondent also submitted the applicant's decoded OHIP summary for 2017 and 2018. The decoded OHIP summary for 2017 supports that the applicant sought medical attention on four dates and only one reference might be connected to the accident. The 2018 OHIP summary supports that the applicant sought medical attention for numerous different reasons including managing his diabetes, common cold, allergies, smoking cessation and skin issues. The OHIP summary does not support that the applicant sought medical attention regarding any accident-related chronic pain complaints. Regardless, it is not the respondent's onus to prove that the applicant's impairments are in the MIG; the onus is on the applicant to prove that his impairments do not fit within the MIG.

[16] The applicant submitted an x-ray of his lumbar spine dated September 19, 2018 which states "tilt to the left, slight sacroiliitis." Unfortunately, the applicant failed to submit a medical opinion to support that the results of this x-ray would remove him from the MIG.

[17] The applicant relied on the Tribunal's Reconsideration Decision in *T.S. v. Aviva*[1] in support of his position that chronic pain removes him from the MIG. In that decision, the Executive Chair accepted the definition of chronic pain to be "an ongoing recurrent pain, lasting beyond the usual course of acute illness or injury or more than three to six months which adversely affects the individual's well-being. A simpler definition for chronic or persistent pain is pain that continues when it should not."[2] I agree with the applicant that if he suffers from chronic pain or chronic pain syndrome, he is removed from the MIG. However, I find this case distinguishable from the one before me as the insured in *T.S. v. Aviva* was diagnosed with chronic pain syndrome by a medical expert and had objective medical evidence to back up this diagnosis. In the present case, no medical expert has diagnosed the applicant with chronic pain or chronic pain syndrome. In addition, I do not find the sporadic entries in the family doctor's CNRs persuasive evidence that the applicant suffers from chronic pain as a result of the accident.

[18] For all the above-reasons, the applicant has not met his onus in proving on a balance of probabilities that his accident related impairments do not fit within the MIG.

[1] *T.S. v. Aviva General Insurance Canada*, 2018 CanLII 83520 (ON LAT).

[2] The Executive Chair adopted the definition of chronic pain from the American Chronic Pain Association.

Is the applicant entitled to any portion of the disputed treatment plan?

[19] In his submissions the applicant argued that to date the respondent has not approved medical treatment up to the MIG limit. In its reply submissions, the respondent submitted a statement of benefits which establishes that to date, it has approved and paid for $3,590.00 which is above the $3,500.00 MIG limit. The applicant did not file reply submissions disputing this. Therefore, I find that the MIG limit has been exhausted.

[20] Since the MIG limit has been exhausted the applicant it not entitled to the disputed treatment plan.

ORDER

[21] For all the above reasons, I find:

i. The applicant sustained a minor injury as defined under the *Schedule* and is subject to the $3,500.00 funding limit; and

ii. The applicant is not entitled to the disputed treatment plan as the MIG limit has been exhausted.

Released: July 22, 2020

Rebecca Hines
Adjudicator