



Citation: Velautham v. Allstate Insurance Company, 2021 ONLAT 19-014209/AABS

**Released Date: 02/19/2021
File Number: 19-014209/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:

Tharmiya Velautham

Applicant

and

Allstate Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: Avril A. Farlam

APPEARANCES:

For the Applicant: Nashmil Mamresuli, Paralegal

For the Respondent: Dale J. Stuckless and Nathan M. Fabiano, Counsel

Heard By Way of Written Submissions

REASONS FOR DECISION AND ORDER

OVERVIEW

- [1] Tharmiya Velautham (“applicant”), was involved in an automobile accident on April 26, 2017 (“accident”) and suffered injuries. The applicant sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (the “Schedule”)*.¹ The applicant was denied certain benefits by Allstate Insurance Company (“respondent”) and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).
- [2] The respondent determined that the applicant’s injuries fit the definition of “minor injury” prescribed by s. 3(1) of the *Schedule* and, therefore, fall within the Minor Injury Guideline (“MIG”).² The respondent also submits that, even if the MIG is found not applicable, the applicant has not established that the disputed treatment plans are reasonable and necessary. The applicant’s position is the opposite.

ISSUES

- [3] The issues to be decided in this hearing are:
- i. Are the applicant’s injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the \$3,500.00 limit and in the MIG?
 - ii. Is the applicant entitled to \$2,718.76 for psychological treatment recommended by Oshawa Physio and Rehab in a treatment plan (OCF-18) dated March 29, 2019?
 - iii. Is the applicant entitled to \$2,198.79 for psychological assessment recommended by Dr. F. Aghamohseni in a treatment plan dated February 9, 2019?
 - iv. Is the respondent liable to pay an award under Regulation 664 (“award”) because it unreasonably withheld or delayed payments to the applicant?
 - v. Is the applicant entitled to interest on any overdue payment of benefits?

¹ O. Reg. 34/10.

² Minor Injury Guideline, Superintendent’s Guideline 01/14, issued under s. 268.3(1.1) of the *Insurance Act*.

RESULT

- [4] The applicant sustained minor injuries as defined under the *Schedule* and is subject to the \$3,500.00 funding limit. The applicant is not entitled to \$2,198.79 for psychological assessment or to \$2,718.76 for psychological treatment. The applicant is not entitled to an award. No interest is payable.

LAW

- [5] The MIG establishes a treatment framework available to an injured person who sustains a “minor injury” as a result of an accident. A “minor injury” is defined in s. 3(1) 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”. Under s. 18(1) of the *Schedule*, injuries that are defined as a “minor injury” are subject to a \$3,500.00 funding limit on treatment.
- [6] To request treatment above the \$3,500.00 funding limit, the applicant must prove that his or her injuries do not fall within the definition of “minor injury”. The applicant can establish that by:
- i. Producing compelling evidence, provided by a health practitioner, that a pre-existing condition documented before the accident will prevent the applicant from achieving maximal recovery from the minor injury if subject to the funding limit; or
 - ii. Establishing that an impairment sustained in the accident is not a predominantly minor injury.
- [7] The onus is on the applicant to show, on a balance of probabilities, that his or her injuries fall outside of the MIG.³
- [8] Sections 14, 15 and 16 of the *Schedule* provide that an insurer is only liable to pay for medical and rehabilitation expenses that are reasonable and necessary as a result of the accident. The applicant has the onus of proving on a balance of probabilities that the benefits he or she seeks are reasonable and necessary.

³ *Scarlett v. Belair*, 2015 ONSC 3635 (Div. Ct.) para 24.

ANALYSIS

Are the Applicant's Injuries In the MIG?

- [9] I find that the applicant's physical injuries are minor injuries because the weight of the medical evidence indicates that the applicant did not suffer any physical injuries other than soft tissue injuries resulting from the accident.
- [10] The applicant relies on the records of her family physician Dr. Shariff who diagnosed whiplash when she saw Dr. Shariff several months after the accident. Whiplash falls squarely within the MIG.
- [11] I find that the applicant's physical injuries from the accident within the definition of "minor injury". However, the applicant argues that her pre-existing back injury and pain as well as her psychological injury remove her from the MIG.

Does the Applicant have a Pre-existing Back Injury That Would Remove her from the MIG?

- [12] I find that the applicant has brought forward no compelling evidence provided by a health practitioner that was documented before the accident of a pre-existing back injury that will prevent the applicant from achieving maximal recovery from the minor injury if subject to the funding limit.
- [13] The applicant argues her long standing chronic back pain removes her from the MIG. The respondent submits that this is a complete mischaracterization of the applicant's pre-accident back pains.
- [14] Dr. Shariff's records show that the applicant received medication, massage and physiotherapy for back pain after a fall in December, 2014. In February, 2015 Dr. Shariff noted that the applicant said her pain improved. Dr. Shariff's pre-accident records do not show any significant ongoing complaints of back pain after February, 2015 and prior to the accident more than two years later.
- [15] The only other notable record of back pain in Dr. Shariff's records is on February 4, 2019 when Dr. Shariff notes that the applicant asked him for a letter to say she had back pain before. Dr. Shariff notes "clarification requ'd is back pain has been exacerbated – this is true – she had reported increased upper back/neck pain post MVA – will prepare this letter though limited visits in my office in general - her chiropractor would be better able to substantiate." In his clinical records Dr. Shariff does not clearly state the applicant's back pain is exacerbated by the accident, only that the applicant reported to him increased upper back and neck pain post-accident. As a result, Dr. Shariff's records do not constitute

compelling evidence of a pre-existing back injury that will prevent the applicant from achieving maximal recovery if treated within the MIG.

- [16] On February 7, 2019 the applicant told Dr. Aghamohseni, her psychologist, that she had no pain issues that inhibited her day-to-day functioning prior to the accident.
- [17] I therefore find there is insufficient medical evidence before me that establishes the applicant should not be subject to the MIG because of any pre-existing back injury.

Does the Applicant have Psychological Impairment Caused or Exacerbated by the Accident that would Remove her from the MIG?

- [18] I find that the applicant has not provided sufficient evidence to meet her burden of proof that she suffers from psychological impairment caused or exacerbated by the accident justifying treatment beyond the MIG.
- [19] The applicant submits that Dr. Shariff's requisition for psychotherapy on February 4, 2019 and Dr. Aghamohseni's February, 2019 opinion that the applicant is suffering substantial psychological trauma and emotional accident sequelae from the accident take her out of the MIG.
- [20] The respondent submits that the applicant must prove that her psychological complaints are not merely psychological sequelae but must prove that she sustained an actual psychological impairment as a direct result of the accident.
- [21] Although there are some complaints of anxiety and stress by the applicant in Dr. Shariff's records post-accident, Dr. Shariff does not refer the applicant to a mental health physician any time post-accident until February 4, 2019 when asked for a referral. At that time, Dr. Shariff notes that the applicant would like a referral to a psychologist for anxiety and stress re cars and also for home related stress. Dr. Shariff does not make any psychological diagnosis in February, 2019 or at any time. Dr. Shariff's February 4, 2019 referral is not to any specific mental health physician or professional but "to whom it may concern" and makes only a general statement that the applicant "would benefit from psychotherapy/counselling". As a result, Dr. Shariff's records do not constitute persuasive evidence of psychological impairment exacerbated by the accident that will prevent the applicant from achieving maximal recovery if treated within the MIG.

- [22] I give Dr. Aghamohseni's 2019 opinion little weight. Dr. Aghamohseni does not appear to have reviewed any of Dr. Shariff's records even though she assessed the applicant some 21 months post-accident. Dr. Aghamohseni suggests the applicant should be removed from the MIG because of her pre-existing psychological condition. However, Dr. Aghamohseni appears unaware that Dr. Shariff's records show that at least six months prior to the accident, the applicant's divorce was settled and she felt a "weight lifted off" and made no more psychological complaints to Dr. Shariff until after the accident making it more likely than not that the applicant's temporary anxiety pre-accident had resolved before the accident occurred.
- [23] There has been no persuasive medical evidence put forward by the applicant to support her submission that she suffers from psychological impairment caused or exacerbated by the accident justifying treatment beyond the MIG.

Does the applicant have Chronic Pain as a result of the accident?

- [24] I find that the applicant has not provided sufficient evidence to meet her burden of proof that she suffers from chronic pain justifying treatment beyond the MIG.
- [25] The applicant submits that she has been diagnosed with chronic pain syndrome and has impairments as a result of this condition such that her injuries are not predominantly minor and not subject to treatment within the MIG.
- [26] However, the applicant's medical evidence does not support this submission. The applicant did not point to any records of Dr. Shariff where chronic pain is diagnosed. Dr. Shariff did not make any referrals to any pain specialist for investigation or treatment. Although Dr. Aghamohseni refers to pain in her report, Dr. Aghamohseni is not a physician and cannot diagnose physical chronic pain. The burden of bringing forward persuasive medical evidence of her alleged condition is on the applicant and she has not done so.

Are the Treatment Plans for \$2,198.79 for Psychological Assessment and \$2,718.76 for Psychological Treatment Reasonable and Necessary?

- [27] The applicant relies on Dr. Aghamohseni's opinion that both disputed treatment plans are reasonable and necessary. The applicant also submits that both treatment plans were denied by the respondent more than ten business days after the date of the treatment plans, that the respondent did not comply with ss. 38 (8), (11) of the *Schedule* and as a result is prohibited from taking the position that the applicant's impairment falls within the MIG.

- [28] The respondent submits that the applicant has failed to discharge her burden of proof that the disputed treatment plans are reasonable and necessary. The respondent also submits it was fully compliant with s. 38 of the *Schedule*.
- [29] I find that the applicant is not entitled to these two disputed treatment plans for psychological assessment and psychological treatment because the applicant has not provided sufficient evidence to meet her burden of proof that either of them are reasonable and necessary.
- [30] The psychological assessment is not supported by any medical evidence from Dr. Shariff supporting the goals of the treatment plan, or that the proposed psychological assessment is reasonable and necessary, or that its overall cost is reasonable and necessary.
- [31] With respect to the proposed psychological treatment, again, as discussed above, Dr. Shariff does not refer the applicant to a mental health physician any time post-accident until February 4, 2019 when asked for a referral. At that time, Dr. Shariff notes that the applicant would like a referral to a psychologist for anxiety and stress re cars and also for home related stress. Dr. Shariff does not make any psychological diagnosis in February, 2019 or at any time. Dr. Shariff's February 4, 2019 referral is not to any specific mental health physician or professional but "to whom it may concern" and states only that the applicant "would benefit from psychotherapy/counselling" without stating that there is any causal link between the accident and proposed psychotherapy or counselling or explaining why the applicant would benefit. As a result, Dr. Shariff's records do not constitute persuasive evidence that the proposed psychological treatment is reasonable and necessary to treat the applicant's alleged psychological injuries from the accident.
- [32] There is no evidence as to how the proposed treatment will achieve its goals or evidence establishing that the proposed treatment is reasonable and necessary as a result of injuries suffered in the accident, or that the overall cost is reasonable and necessary except from Dr. Aghamohseni, the author of both disputed treatment plans. It is well established that a treatment plan, without more, is not sufficient evidence to establish an applicant's entitlement on the basis of reasonableness and necessity. For the reasons stated above, I give Dr. Aghamohseni's report little weight.
- [33] Further, the respondent's psychologist, Dr. Lau, who assessed the applicant in July, 2019, opined that there is no clear indication of any diagnosable psychological condition as a result of the accident and at most, the applicant experienced sub clinical levels of adjustment disorder. Dr. Lau also opined that

there is no need for psychological treatment and found both disputed treatment plans to be not reasonable and necessary. I prefer the opinion of Dr. Lau because it is more consistent with Dr. Shariff's records and give it more weight than the opinion of Dr. Aghamohseni.

- [34] Contrary to the submissions of the applicant, I also find that the respondent's denials were made in accordance with the ten day time limit in s. 38. The treatment plan for psychological assessment was submitted on April 17, 2018 and denied on April 27, 2018. The treatment plan for psychological services was submitted April 25, 2019 and denied May 9, 2019. The applicant made no submissions based on s. 38 other than as to timeliness.

Is the Applicant Entitled to an Award?

- [35] Section 10 of Ontario Regulation 664 provides that a special award may be granted if the respondent unreasonably withheld or delayed payments. I find that there was no payment unreasonably withheld or delayed. For this reason, there is no award.

Interest

- [36] Interest is not payable as no benefits are payable.

ORDER

- [37] For the reasons outlined above, I find that the applicant sustained minor injuries as defined under the *Schedule* and is subject to the \$3,500.00 funding limit. The applicant is not entitled to \$2,198.79 for psychological assessment or to \$2,718.76 for psychological treatment. The applicant is not entitled to an award. No interest is payable.

Released: February 19, 2021



**Avril A. Farlam
Vice Chair**