



Citation: Balakarnan v. Allstate Canada, 2021 ONLAT 19-011513/AABS

Released Date: 04/30/2021

Tribunal File Number: 19-011513/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:

Kaneswary Balakarnan

Applicant

and

Allstate Canada

Respondent

DECISION

ADJUDICATOR: **Brian Norris**

APPEARANCES:

For the Applicant: Davide V. Cortinovis, Counsel

For the Respondent: Evan A. Argentino, Counsel

HEARD: **By way of written submissions**

OVERVIEW

- [1] Kaneswary Balakarnan, (“the applicant”), was injured in an automobile accident on **November 24, 2018** and sought benefits from the respondent pursuant to *Statutory Accident Benefits Schedule - Effective September 1, 2010, O. Reg. 34/10* (the “*Schedule*”). Allstate Canada, (“the respondent”), characterized the applicant’s injury as a minor injury and refused to pay for certain benefits and the applicant 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:
- i. Did the applicant sustain a minor injury as defined under the *Schedule*?
 - ii. Is the applicant entitled to receive a medical benefit in the amount of \$1,619.10 for physiotherapy services recommended by Trillium Rehab Physiotherapy Inc. in a treatment plan submitted May 23, 2019 and denied by the respondent on May 29, 2019?
 - iii. Is the applicant entitled to receive a medical benefit in the amount of \$1,477.19 for chiropractic services recommended by Trillium Rehab Physiotherapy Inc. in a treatment plan submitted September 5, 2019 and denied by the respondent on September 30, 2019?
 - iv. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] The applicant sustained a minor injury as a result of the accident and is subject to the \$3,500.00 funding limit. She is not entitled to the disputed treatment plans because she has exhausted the funding available medical and rehabilitation benefits. No interest is payable as no payments went overdue.

BACKGROUND

- [4] The applicant was a front-seat passenger of a vehicle which was struck on the driver’s side in a perpendicular fashion. She was transported from the scene of the accident to hospital where x-rays were performed on her left elbow and shoulder, but showed no fracture. She was given pain medication and discharged. She met with her family physician a few days later and was diagnosed with strains and tendinitis and referred to physiotherapy.

- [5] The applicant received treatment pursuant to the Minor Injury Guideline (the “MIG”), which the respondent funded. She exhausted the \$3,500.00 funding provided by the MIG and then sought funding for further treatment. The respondent denied funding for further treatment and maintained that the applicant sustained a minor injury as defined by the *Schedule* and is subject to the MIG funding limit.
- [6] The applicant seeks a determination that she is not subject to the MIG and the \$3,500.00 funding limit and is entitled to the goods and services proposed in the two disputed treatment plans.

THE MINOR INJURY GUIDELINE

- [7] The Minor Injury Guideline establishes a treatment framework available to injured persons who sustain a minor injury as a result of an accident. A “minor injury” is defined in 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. Minor injuries are subject to the treatment methodologies outlined in the MIG and, under section 18 of the *Schedule*, injuries that are defined as minor are subject to a \$3,500.00 funding limit on treatment.
- [8] If an insurer deems an applicant’s injuries to be minor in nature, the responsibility is on the applicant to establish that the MIG, and the related funding limit, should not apply.
- [9] The applicant submits that her pre-existing medical condition precluded her recovery within the MIG and, pursuant to section 18(2), the MIG funding limit should not apply. She also submits that her family physician recommended ongoing physiotherapy and chiropractic treatment, that she experienced prolonged pain symptoms, and was diagnosed with chronic pain, which is an injury that involves treatment that cannot fit into a program like the MIG.

Pre-Existing Medical Condition

- [10] The applicant submits that her pre-existing back and shoulder issues were exacerbated as a result of the accident and implies that such issues preclude her recovery if subject to the MIG and the \$3,500.0 funding limit. The respondent submits that the applicant provides no evidence that her pre-existing condition will prevent maximal recovery if subject to the MIG.

- [11] I have reviewed the submissions and evidence and find that the applicant's pre-existing medical condition had no measurable impact on her recovery from her accident-related injuries. The applicant's predominant accident-related complaint is left-side pain in her shoulder, neck, and back. However, her pre-existing medical conditions, documented by a healthcare provider, are predominantly related to her right side. The most recent documented condition is right-sided neck and shoulder pain which is was believed to be myofascial muscle pain and possible degenerative disc disease as discussed in a consultation letter from Dr. L. Tsang, physiatrist, dated May 6, 2017. Prior to that, the applicant was diagnosed with mild multiple level degenerative disc disease of the cervical spine, with no or mild lateral foraminal stenosis, and without any mass effect on the spinal cord as noted in an MRI report dated April 26, 2015.
- [12] Following the accident and according to the clinical notes and records, the applicant's family physician, Dr. Srinivasan, appeared to show no concern that the applicant would have a difficult recovery due to a pre-existing condition. There was no record of any concern or discussion between the applicant and Dr. Srinivasan regarding a pre-existing condition and its impact on the applicant's recovery during a consultation on November 26, 2018, less than a week following the accident. The applicant's first recorded complaint of post-accident right shoulder pain occurred during her next visit with Dr. Srinivasan, on December 17, 2018. During that visit Dr. Srinivasan only prescribed Mobicox, an anti-inflammatory, made no alterations to the applicant's treatment, and recommended she continue with her current treatment. Another visit occurred on January 7, 2019 where Dr. Srinivasan again recommended that the applicant continue physiotherapy and any concern regarding a pre-existing condition is absent from the records.

Was the applicant's pre-existing condition exacerbated by the accident?

- [13] I see no compelling evidence to show that the applicant's pre-existing conditions were exacerbated by the subject accident. The applicant met with healthcare professions about upper right extremity pain at the same rate both pre- and post-accident. She complained of pain to her family physician in October 2016, met with Dr. Tsang, physiatrist, in May 2017, and complained again to her family physician in March 2018. There is no evidence of an increase in complaints to healthcare providers following the accident. Likewise, there is no evidence showing that the applicant had to increase any treatment of her right upper extremity following the accident.

- [14] The family physician's records show no exacerbation of the applicant's pre-existing condition. The applicant first complained of a right shoulder pain to Dr. Srinivasan on December 17, 2018, more than three weeks following the accident. She made a similar complaint again during her next visit on January 7, 2019, but also noted that she wanted to return to work at that time. She met with her new family physician on November 4, 2019 for an introduction and it was recorded that she "feels well" and had "no concerns today". The applicant's next visit to a family physician for right shoulder pain happened on December 2, 2019. The record from that visit noted that the applicant stated that her shoulder was worse since the accident. One complaint of an exacerbation of a pre-existing injury, absent any other evidence to support the claim, is insufficient to make a finding that the applicant's pre-existing shoulder pain was exacerbated by the accident to the point that she requires treatment outside of the MIG.
- [15] I find the orthopaedic assessment report by Dr. J. Theodoropoulos, dated June 3, 2020, to be unconvincing evidence of an exacerbation of the applicant's pre-existing medical condition which would preclude her recovery. First, the report recalls the accident inaccurately. The report states that the applicant had bruising and pain in her right side, leg, arm, shoulder, and neck as a result of the accident and that x-rays of her right side were taken. However, the hospital records, which the assessor had for the purpose of the assessment, clearly state that the applicant's principal complaints were left side pain and the x-rays, which the assessor also had for the report, were of the applicant's left side. The past medical history portion of the report makes no mention of the applicant's pre-existing right shoulder issues which she claims were exacerbated as a result of the accident, despite the assessor reviewing the consultation letter from Dr. Tsang, physiatrist, dated May 6, 2017, discussed previously. Further, Dr. Theodoropoulos incorrectly notes that the applicant complained of neck pain on the left side in Dr. Srinivasan's records on March 13, 2018 – the records clearly state that the pain is on the applicant's right side. Considering these errors, I cannot accept Dr. Theodoropoulos' finding that the accident exacerbated the applicant's pre-existing shoulder injury.
- [16] I prefer the insurer's examination ("IE") report of Dr. J. Auguste, orthopaedic surgeon, dated August 27, 2019, over Dr. Theodoropoulos' report because it is more historically accurate. Dr. Auguste correctly notes that the applicant's primary complaints following the accident were left-side pain and correctly notes that x-rays were performed on the applicant's left elbow and shoulder. Dr. Auguste noted that there was evidence of pre-existing degenerative cervical disease and tendonitis of the right shoulder but found no impairments causally

linked to the subject accident and concluded that there were no residual exacerbations of the applicant's pre-existing conditions.

Did the applicant sustain a non-minor injury?

- [17] The applicant claims that Dr. Theodoropoulos' diagnosis of a possible rotator cuff tear and chronic pain syndrome take her out of the MIG. I disagree.
- [18] As noted above, Dr. Theodoropoulos' report is historically inaccurate and is unpersuasive as a result. In any event, there is no diagnosis of chronic pain syndrome in the report. Instead, it recommends that the applicant consult with a pain specialist. Additionally, a rotator cuff tear is an injury that is included in the minor injury definition, so long as it is not a full tear. The applicant presents no evidence to show that she sustained a full rotator cuff tear as a result of the accident.

What is the impact of the respondent paying for benefits above the funding limit?

- [19] Lastly, the applicant submits that the respondent paid \$3,700.00 in medical benefits, which is above the MIG funding limit, proving that her impairment is beyond a minor injury. The respondent submits that this is evidence that it met its obligations and acted in good faith to ensure it paid fully.
- [20] I agree with the respondent and find that a payment of \$200.00 in medical and rehabilitation benefits beyond the MIG funding limit has no bearing on the characterization of the applicant's injuries. The applicant provides no precedent or legislative authority for her position on the impact of an overpayment.

THE DISPUTED TREATMENT AND ASSESSMENT PLANS

- [21] The applicant sustained a minor injury as defined by the *Schedule*. She has exhausted the funding available to her under the MIG. As a result, the applicant is not entitled to the disputed treatment and assessment plans.

INTEREST

- [22] The applicant is not entitled to any payments and thus, no payments went overdue. No interest is payable pursuant to section 51 of the *Schedule*.

CONCLUSION

- [23] Upon review of the evidence and submissions, I find that the applicant sustained a minor injury as defined by the *Schedule*.
- [24] The applicant is not entitled to the disputed treatment and assessment plans because she has exhausted the \$3,500.00 funding limit provided pursuant to the MIG.
- [25] No interest is payable as no payments went overdue.

Released: April 30, 2021



**Brian Norris
Adjudicator**