Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Naval v. Aviva General Insurance, 2021 ONLAT 20-004982/AABS

Released Date: 07/1/2021
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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:

Ramon Naval

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR: **Lindsay Lake, Adjudicator**

APPEARANCES:

For the Applicant: Linda To, Paralegal

For the Respondent: Brendan T. Sheehan, Counsel

HEARD: **By Way of Written Submissions**

OVERVIEW

[1] The applicant, Ramon Naval, was injured in an automobile accident on March 13, 2017 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] from Aviva General Insurance, the respondent.

[2] The respondent denied the applicant's claims for chiropractic services and an orthopaedic assessment because it had determined that all of the applicant's injuries fit the definition of "minor injury" as prescribed by s. 3(1) of the *Schedule* and, therefore, fall within the Minor Injury Guideline (the "MIG").[2] As a result, the applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[3] A case conference was held on September 22, 2020 and the matter was scheduled for a written hearing.

[4] On March 22, 2021, the respondent filed a Notice of Motion requesting that certain portions of the applicant's hearing submissions and evidence be struck from the record, as the evidence was not previously provided to the respondent.

[5] On consent, a motion order was issued on April 8, 2021 which adjourned the written hearing to June 14, 2021, to provide additional time for the respondent to have an addendum report prepared, and to serve and file its hearing submissions.

ISSUES IN DISPUTE

[6] The following issues are to be decided:

(i) Are the applicant's injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the MIG?

(ii) Is the applicant entitled to $1,758.42 for chiropractic services, recommended by Liruma Rehabilitation Centre in a treatment plan ("OCF-18") dated October 17, 2019?

(iii) Is the applicant entitled to $2,460.00 for an orthopedic assessment, recommended by Dr. Pradeep Alexander in an OCF-18 dated June 5, 2018?

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[1] O. Reg. 34/10 (the "*Schedule*").
[2] Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act*.

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

RESULT

[7] I find that the applicant has not met his onus of proving that his accident-related impairments warrant removal from the MIG. The applicant is not entitled to the disputed treatment plans, no interest is payable and the application is dismissed.

ANALYSIS

The Minor Injury Guideline ("MIG")

[8] The MIG establishes a framework available to injured persons who sustain 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 strain, sprain, 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 defined in the *Schedule*.

[9] Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to $3,500.00. An applicant may receive payment for treatment beyond the $3,500.00 cap if they can provide evidence of a psychological impairment or chronic pain.

[10] I find that the applicant has not met his burden[3] of proving that his accident-related impairments require treatment beyond the MIG based on chronic pain and/or a psychological impairment.

Chronic Pain

[11] In analyzing the issue of chronic pain and the MIG, the applicant relied upon the reconsideration decision of *T.S. v. Aviva General Insurance Canada*[4] in which the Executive Chair held that the definition of minor injury in s. 3(1) of the *Schedule* does not encompass an impairment such as chronic pain.[5] The Executive Chair also defined chronic pain as, "ongoing or recurrent pain, lasting beyond the usual course of acute illness or injury or more than 3 to 6 months, and *which adversely affects the individual's well-being* (my emphasis added)."[6]

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[3] *Scarlett v. Belair Insurance,* 2015 ONSC 3635, para. 24 (Div. Ct.).
[4] 2018 CanLII 83520 (ON LAT) ("*T.S. v. Aviva*").
[5] *Ibid*. at para. 20.
[6] *Ibid*. at para. 23.

[12] The respondent submitted that an insured person's claim of chronic pain should be assessed against the six criteria described in the *American Medical Association ("AMA") Guides*,[7] which state that at least three of the following criteria must be met for a diagnosis:

(i) Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances;

(ii) Excessive dependence on health care providers, spouse, or family;

(iii) Secondary physical deconditioning due to disuse and or fear-avoidance of physical activity due to pain;

(iv) Withdrawal from social milieu, including work, recreation, or other social contacts;

(v) Failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family or recreational needs; and

(vi) Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviors.

[13] The applicant did not contest the *AMA Guides* criteria and, in fact, filed no reply submissions for the hearing.

[14] I find that the Executive Chair's comments in *T.S. v. Aviva* and the *AMA Guides* criteria can be read harmoniously, and both are persuasive in determining whether or not the applicant should be removed from the MIG as a result of chronic pain. In *T.S. v. Aviva*, the Executive Chair's description of chronic pain encompassed adverse affects on an individual's well-being and the six criteria set out in the *AMA Guides* can provide helpful guidance as an interpretive tool for understanding how pain is affecting an individual's functional capacity.

[15] Based on all of the evidence before me, and in consideration of both *T.S. v. Aviva* and the *AMA Guides* criteria, I find that the applicant has failed to prove on a balance of probabilities that his injuries are outside of the MIG as a result of chronic pain.

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[7] American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 6th Edition, 2008, pages 23-24.

[16] On August 11, 2020, Dr. Sofian Al-Samak, one of the applicant's treating physicians with Rivlin Medical Group – Chronic Pain Management, diagnosed the applicant with, among other conditions, myofascial pain and chronic mechanical cervical and lumbar spine pain "following [the] motor vehicle accident [that] happened during 2017."[8]

[17] In her April 28, 2021 s. 44 Insurer's Examination ("IE") Physician Addendum report,[9] Dr. Sabrina Ming-Wai Tu, general practitioner, confirmed that the musculoskeletal diagnosis from the Rivlin Chronic Pain Management group, specifically the diagnoses of chronic mechanical cervical and lumbar spine pain and myofascial pain, were consistent with her diagnoses in her earlier December 19, 2019 report.[10]

[18] Therefore, while one of the applicant's treating practitioners and Dr. Tu agree that the applicant has chronic pain, this alone does not automatically entitle an applicant to treatment outside of the MIG. For chronic pain to take someone out of the MIG, there must be an affect on their functionality that adversely affects their well-being.

[19] I find that the applicant has failed to prove on a balance of probabilities that his functionality was impaired such that his chronic pain caused by the accident adversely affected his well-being for several reasons.

[20] First, the clinical notes and records ("CNRs") of Dr. Joonseong Park, the applicant's family physician, show a lack of pain complaints and only indirectly mention the accident once in a January 21, 2020 CNR entry between April 11, 2017 and July 21, 2020. On January 21, 2020, the applicant complained of neck and back pain and Dr. Park noted that the applicant's physiotherapy was denied by his insurer. While the applicant made other pain complaints to Dr. Park between April 11, 2017 and July 21, 2020, these reports of pain were, in my opinion, not related to the accident. For example, on July 9, 2018, the applicant report left neck pain for only a few months, on February 26, 2019, the applicant was diagnosed with a back strain after lifting 40 pounds of salt the day before

[8] Clinical notes and records ("CNRs") of Rivlin Medical Group Pain Management Clinic, Applicant's Submissions, tab J.
[9] Written Submissions of the Respondent, tab 12.
[10] *Ibid*. at page 3. In Dr. Tu's December 19, 2019 Section 44 Examination Report Physician Assessment Report, Dr. Tu noted that the applicant reported ongoing neck and low back pain and she opined that the applicant sustained a cervical strain and a lumbar strain as a result of the accident (pages 5-6). Dr. Tu also found that the applicant did not have any objective musculoskeletal impairments at the time of this assessment (page 7).

and on September 17, 2019, the applicant was diagnosed with a neck strain as a result of looking up at work.

[21] Second, the applicant has no functional limitations affecting his employment. The accident occurred when the applicant was on vacation from his full-time employment as a forklift operator for Metro Inc. After his holidays ended, he returned to his regular hours and duties as a forklift operator.[11] Therefore, I find that he did not withdraw from or fail to pursue employment post-accident as a result of any functional limitation due to his pain.

[22] Third, I find that there was no change in the applicant's participation in household chores pre- and post-accident. In the undated Orthopaedic Assessment – Chronic Pain report by Dr. Pradeep J. Alexander, orthopaedic surgeon,[12] the applicant reported that his ability to perform household tasks such as laundry, cleaning, vacuuming and yard work were limited as a result of his neck, right shoulder and low back pain.[13] Dr. Alexander, however, did not compare the applicant's pre- and post-accident level of participation in household tasks. The only evidence that contains information regarding the applicant's pre-accident participation in household chores is the December 19, 2019 s. 44 Examination Physician IE Assessment Report by Dr. Tu.[14] In this report, Dr. Tu noted that prior to the accident, the applicant did not do any of the household chores as his wife and daughter did all of the cooking, cleaning, laundry and errands.[15] After the accident, his wife and daughter continued to complete all of the household chores.[16]

[23] Fourth, Dr. Alexander's undated report noted that the applicant was having difficulties with his activities of daily living ("ADLs") and personal hygiene post-accident. Dr. Alexander noted that the applicant reported difficulties with making coffee using a kettle, washing his hair and shaving.[17] Dr. Al-Samak's CNRs also noted "significant" and "moderate" limitations on the applicant's ADLs in his August 11, 2020 CNR entry but provided no further details. In contrast, Dr. Tu's December 19, 2019 report noted that the applicant was independent with his personal hygiene activities post-accident.[18] I place greater weight on Dr. Tu's post-accident reported level of the applicant's function regarding his personal

[11] December 19, 2019 Section 44 Examination Report Physician Assessment Report by Dr. Sabrina Ming-Wai Tu, general practitioner, Written Submissions of the Respondent, tab 3, page 4.
[12] Applicant's Submissions, tab F.
[13] *Ibid*. at page 4.
[14] Supra note 11.
[15] *Ibid*. at page 4.
[16] *Ibid*.
[17] *Supra* note 12 at page 4.
[18] Supra note 11 at page 4.

hygiene than the reports provided by Dr. Alexander and Dr. Al-Samak. Dr. Tu's December 19, 2019 report explained that as a forklift driver, the applicant was required to stand and drive a forklift for the duration of his shift using a joystick to operate the forklift.[19] The applicant's ability to use a joystick control with his hands to drive a forklift for 40 hours per week in his employment is, in my opinion, inconsistent with the reports that he was, for example, unable to make coffee using a kettle.

[24] Finally, the applicant did not use prescription medication for any accident-related impairments beyond the recommended duration and/or abuse. He also did not form a dependence upon any prescription medication. The applicant was prescribed Flexeril by Dr. Park on March 20, 2017 and Botox on November 5, 2018, although it is not clear if the applicant received any Botox injections at that time. The next pain medication prescribed by Dr. Park was Vimovo following the applicant's February 26, 2019 diagnosis of a back strain that was unrelated to the accident. He was later prescribed baclofen on June 12, 2020 following a few months of neck pain and Vimovo on July 7, 2020. The applicant also received an injection of ropivacaine from Dr. Al-Samak on August 18, 2020. Therefore, while the applicant continued to use pain medication and injections into 2020, I find that the almost two year gap in time from the applicant's initial pain medication prescription on March 20, 2017 until his next pain medication prescription on February 26, 2019 and the intervening events leads me to conclude that the applicant's use of pain medication from February 26, 2019 onward was not related to the accident.

Psychological Impairment

[25] The applicant submitted that his self-reported insomnia to Dr. Park on July 7, 2020 and to Dr. Al-Samak on August 11, 2020 is evidence that he sustained a psychological impairment and/or psychological sequelae post-accident. I disagree.

[26] Dr. Park's CNRs are clear that the applicant's insomnia was as a result of pain, not due to any nightmares, flashbacks, etc. of the accident. Additionally, there were no other notes of any psychological complaints in Dr. Park's CNRs and the applicant has not provided any evidence of being prescribed any medication post-accident to address any psychological complaints.

[27] Furthermore, although Dr. Al-Samak noted that the applicant reported several psychological symptoms in his August 11, 2020 CNR entry and Dr. Alexander's

[19] *Ibid*.

undated report noted that the applicant reported anxiety and decreased mood,[20] neither physicians made any recommendations for treatment for the applicant's reported psychological symptoms or suggested a psychological assessment.

[28] On the evidence, I find that the applicant did not sustain a psychological impairment and/or psychological sequelae as a result of the accident.

Treatment Plans

[29] I find that the applicant is not entitled to the disputed treatment plans. While neither party provided information on whether the maximum of $3,500.00 for medical and rehabilitation benefits available under the MIG have been exhausted in this matter, page 2 of each disputed OCF-18s proposes treatment outside the MIG framework. As I have found that the applicant has failed to prove that his accident-related impairments warrant treatment beyond the MIG limits, it follows that the applicant is not entitled to treatment proposed outside of the MIG framework.

Interest

[30] As there are no benefits owing, no interest is payable.

CONCLUSION

[31] For the reasons outlined above, I find that:

(i) The applicant has not met his burden of proving that his accident-related impairments require treatment beyond the MIG based on chronic pain and/or a psychological impairment;

(ii) The applicant is not entitled to the disputed treatment plans;

(iii) No interest is payable; and

(iv) This application is dismissed.

Released: July 15, 2021

Lindsay Lake
Adjudicator

[20] *Supra* note 12 at page 4.