



**Citation: Liu v. Aviva General Insurance Company, 2022 ONLAT 20-009583/AABS**

**Licence Appeal Tribunal File Number: 20-009583/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:

**Wei Zhuo Liu**

**Applicant**

and

**Aviva General Insurance Company**

**Respondent**

**DECISION [AND ORDER]**

**ADJUDICATOR: Tavlin Kaur**

**APPEARANCES:**

**For the Applicant:** Wei Zhuo Liu, Applicant  
Mary Tran, Paralegal

**For the Respondent:** Aviva General Insurance Company  
Lauren Kolarek, Counsel

**HEARD: In Writing**

## REASONS FOR DECISION AND ORDER

### BACKGROUND

- [1] The applicant was involved in an automobile accident on **August 17, 2018**, and sought benefits pursuant to the Statutory Accident Benefits Schedule - *Effective September 1, 2010 (including amendments effective June 1, 2016)* (“*Schedule*”). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“*Tribunal*”).

### ISSUES

- [2] I have been asked to decide the following issues:
1. 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 **Minor Injury Guideline**?
  2. Is the applicant entitled to the following amounts for **chiropractic treatments** proposed by Dan Shlepakov as follows:
    - (a) \$2,925.60 submitted on December 20, 2018 and denied on December 21, 2018?
    - (b) \$2,907.68 submitted on April 17, 2019 and denied on April 23, 2019?
    - (c) \$1,923.04 submitted on August 28, 2019 and denied on August 28, 2019?
  3. Is the applicant entitled to **interest** on any overdue payment of benefits?

### ANALYSIS

#### Issue i: The Minor Injury Guideline

- [3] Section 3(1) of the *Schedule* defines a “minor injury” 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 and includes any clinically associated sequelae to such an injury.”<sup>1</sup>

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<sup>1</sup> *Statutory Accident Benefits Schedule*, O Reg 34/10 as amended.

- [4] Section 18(1) of the *Schedule* prescribes a \$3,500.00 limit on medical and rehabilitation benefits payable for any one accident.
- [5] The onus is on the applicant to show that his injuries fall outside of the MIG.<sup>2</sup>

## RESULT

- [6] Based on the evidence and submissions, I find that the applicant sustained predominantly minor injuries as defined under the *Schedule* for the reasons that follow.

### ***Did the applicant have a pre-existing condition?***

- [7] Section 18(2) of the *Schedule* provides that insured persons with minor injuries who have a pre-existing medical condition may be exempt from the \$3,500.00 cap on benefits. In order to be removed from the MIG, the applicant must provide compelling evidence meeting the following requirements:
- i. There was a pre-existing medical condition that was documented by a health practitioner before the accident; **and**
  - ii. The pre-existing condition will prevent maximal recovery from the minor injury if the person is subject to the \$3,500.00 limit on treatment costs under the MIG.
- [8] The standard for excluding an impairment on the basis of pre-existing condition(s) is well-defined and strict. A pre-existing condition will not automatically exclude a person's impairment from the MIG.
- [9] I find that the applicant did not have any pre-existing conditions that would remove him from the MIG.
- [10] The applicant did not provide submissions as to whether he had any pre-existing conditions that would remove him from the MIG. The respondent submitted that the applicant has repeatedly denied any significant past medical or surgical history.
- [11] The applicant's pre-existing medical history is unremarkable. A review of the clinical notes and records ("CNRs") of Dr. Ching, family physician, reveal a history of asymptomatic hepatitis B, frequent burns to his forearms due to hot oil and eczema.

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<sup>2</sup> *Scarlett v. Belair Insurance*, 2015 ONSC 3635 at para. 24

- [12] The disability certificate (OCF-3) dated September 18, 2018 also noted that the applicant does not have any pre-existing conditions.
- [13] Based on the totality of the evidence before me, I do not find that the applicant has a pre-existing condition that would remove him from the MIG.

### ***Post-Concussive Syndrome***

- [14] Concussions and post-concussive syndrome, if established, fall outside the MIG because the MIG relates only to “minor injuries”, as defined in section 3(1) of the *Schedule*. However, in order to be removed from the MIG, the applicant must present evidence that demonstrates that as a result of the accident, he suffered a concussion or post-concussive syndrome.
- [15] The applicant is relying on comments that were made to Dr. Fabio Salerno, psychologist, regarding symptoms that he was facing such as difficulties in concentration when driving, experiencing tiredness when watching videos on his phone and experiencing forgetfulness. The applicant submitted that these are symptoms consistent with a concussion type injury.
- [16] The respondent submitted that the applicant has never been diagnosed with a concussion although he continuously self-reported that he sustained a concussion. The hospital records note a diagnosis of “head injury” which referred to a laceration of his scalp. Moreover, the applicant reported that the symptoms related to his head resolved four to five days after the accident.
- [17] The applicant did not submit any evidence that supports that he suffered a concussion or post-concussive syndrome. Nor is there a formal diagnosis of such. Dr. Ching’s CNRs do not make any mention of a concussion. Rather, there is a note regarding the laceration on his head. The Toronto Paramedic Services report shows that there was no loss of consciousness. The CT scan of the applicant’s head conducted by Dr. Eugene Yeung, radiologist, dated August 17, 2018 found that there were no concerning intracerebral findings.
- [18] Based on the totality of the evidence before me, I do not find that the applicant has sustained a concussion or post-concussive syndrome as a result of the accident that would remove him from the MIG.

### ***Did the applicant sustain a predominantly minor injury?***

- [19] I find that the applicant has not provided the evidence necessary to establish on a balance of probabilities that his injuries fall outside of the MIG.

- [20] The applicant submitted that his physical impairments are not considered as minor injuries and cannot be treated within the MIG. He has not achieved maximal medical recovery and the duration of his functional limitations fall well outside the expected timelines for recovery for a minor injury.
- [21] The respondent submitted that the applicant did not meet his onus. He has sustained some sprains/strains as related to his musculoskeletal system and has been unable to establish chronicity of any of his alleged injuries as a result of the accident.
- [22] In the OCF-3 dated September 18, 2018, Dr. Shlepakov, chiropractor, listed the following injuries: open wound of scalp, superficial injury of head, sprain and strain of cervical spine, thoracic spine, lumbar spine, and sacroiliac joint, injury of muscle and tendon at neck level, non-organic insomnia, acute pain, malaise, fatigue, restlessness, agitation, nervousness and stress (not elsewhere classified). In my view, diagnosing psychological conditions is outside of the scope of practice of a chiropractor. All of the other injuries that are listed fall within the definition of a minor injury.
- [23] The applicant did not submit any records or diagnostic imaging to show that his injuries were more than a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae to such an injury.
- [24] The CNRs of Dr. Ching do not support anything other than a minor injury. For example, on December 4, 2018, Dr. Ching diagnosed the applicant with right trapezius strain. The applicant has not provided any CNRs beyond this date. The respondent submitted that an adverse inference must be drawn. I agree and draw an adverse inference from the applicant's failure to produce the CNRs of Dr. Ching beyond December 4, 2018. In the complete absence of any explanation for this failure, I conclude that either CNR's beyond this date do not exist, or if they do they do not support the applicant's position.
- [25] The respondent is relying on the orthopaedic surgery assessment of Dr. Justin Hodgins, orthopaedic surgeon, dated March 19, 2019. Dr. Hodgins opined that the applicant sustained isolated myofascial strains to the cervical and lumbar spinal columns, all minor injuries. Dr. Hodgins found that the applicant sustained predominantly minor injuries as a result of the subject accident and found no compelling evidence of a pre-existing medical condition that would prevent the applicant from achieving maximal medical recovery if subject to MIG limits.

- [26] As such, I find that the applicant's physical injuries are predominantly minor injuries as per the definition set out in the *Schedule*.

### ***Psychological impairment***

- [27] A psychological impairment, if established, may fall outside the MIG, because the MIG only governs "minor injuries" and the prescribed definition does not include accident-related psychological impairments.
- [28] The applicant submitted that he reported feeling anxious in traffic jams and avoids the express lanes on Highway 401. He also worries about being rear ended.
- [29] The respondent submitted that the applicant has not provided any evidence that he has developed psychosocial issues or that he suffered a withdrawal from social milieu as a result of the accident.
- [30] I find that the applicant has not demonstrated that he suffers from a psychological impairment that would remove him from the MIG for the following reasons.
- [31] The OCF-3 completed by Dr. Shlepakov lists the following psychological conditions/impairments: non-organic insomnia, malaise and fatigue, restlessness and agitation, nervousness and stress (not elsewhere classified). I am assigning less weight to this document because psychological conditions are outside of the purview of a chiropractor.
- [32] The CNRs of Dr. Ching do not make reference to any psychological issues. If the applicant were experiencing psychological issues as outlined in the OCF-3, it raises the question why these issues were not discussed with Dr. Ching. Other than the OCF-3, the applicant has not tendered any evidence that supports that he suffered a psychological impairment as a result of the subject accident.
- [33] In denying the applicant, the respondent is relying on a report dated March 19, 2019 by Dr. Fabio Salerno, psychologist. The applicant reported that he did not attend any form of psychological treatment since the accident. He also denied the need for psychological treatment. Dr. Salerno opined the breadth and severity of the applicant's accident-related psychological symptoms fall below a DSM-5 diagnosis. He did not exhibit a psychological impairment as a direct result of the accident.
- [34] I prefer the report of Dr. Salerno over the evidence that the applicant submitted. Dr. Salerno reviewed the applicant's medical history and conducted a series of tests, which showed that the applicant had no psychological issues as a

result of the accident. The applicant did not submit any evidence to refute these findings.

- [35] As such, I find that the applicant has not demonstrated that he has any psychological impairments that warrant removal from the MIG.

### ***Chronic Pain***

- [36] I am not satisfied that the applicant has chronic pain as a result of the accident. The applicant did not provide cogent submissions or an analysis as to whether he suffers from chronic pain as a result of the accident.
- [37] The applicant has not provided a single medical report that has diagnosed him with chronic pain or chronic pain syndrome. The disability certificate does not mention chronic pain or chronic pain syndrome. Dr. Ching did not diagnose him with chronic pain or chronic pain syndrome. Nor did Dr. Ching refer him to see a pain specialist. While a formal diagnosis of chronic pain or a report from a specialist is not mandatory in order to be removed from the MIG, I find that the evidence of chronic pain is lacking.
- [38] The OCF-18 dated August 13, 2019 notes that chronic pain is a barrier to recovery under Part 9. In the additional comments section, Dr. Shlepakov referred to *M.H.E. v. Aviva Insurance Canada* (17-002624/AABS)<sup>3</sup> and stated that it affirmed that chronic pain syndrome is not a minor injury. There are notes in the CNRs of Scarborough Medical Centre which state that chronic pain is a barrier to recovery. While a chiropractor can treat chronic pain, it is my view that it would be beyond the scope of practice of a chiropractor to provide an opinion or diagnosis on chronic pain.
- [39] While I recognize that that the applicant has experienced pain since the accident, I have not been provided with compelling evidence that he should be removed from the MIG on this basis.
- [40] As such, the applicant has not satisfied his onus to establish that he has chronic pain that may remove him from the MIG.

### ***Treatment plans***

- [41] The applicant submitted that all of the treatments that he received to date were reasonable and necessary for his recovery. The respondent submitted that the

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<sup>3</sup> 2018 CanLII 13183 (ON LAT)

treatment plans are not reasonable or necessary and that the applicant has failed to discharge his onus to prove otherwise.

[42] The onus is on the applicant to prove that the treatment plans are reasonable and necessary. The applicant did not direct the Tribunal to any specific references to evidence that support his entitlement to the treatment plans in dispute. The applicant must direct the adjudicator to the relevant evidence in support of his case and explicitly explain why he meets the test based on this evidence. He has failed to do so.

[43] As such, I find that the applicant is not entitled to any of the treatment plans that are in dispute.

### ***Interest***

[44] Interest is not payable as there are no overdue amounts owing.

### **ORDER**

[45] For the reasons outlined above, I find:

- i. The applicant sustained predominantly minor injuries as defined under the *Schedule*;
- ii. The applicant is not entitled to the treatment plans claimed in this application;
- iii. The applicant is not entitled to interest; and
- iv. The application is dismissed in its entirety.

**Released:** June 20, 2022



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**Tavlin Kaur**  
**Adjudicator**