



Citation: Akenten v. The Personal Insurance Company, 2022 ONLAT 20-010673/AABS

Licence Appeal Tribunal File Number: 20-010673/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:

Perry Akenten

Applicant

and

The Personal Insurance Company

Respondent

DECISION

ADJUDICATOR: Christopher Evans

APPEARANCES:

For the Applicant: Safiyyah Ferouz, Paralegal

For the Respondent: Yann Grand-Clement, Counsel

HEARD: By Way of Written Submissions

BACKGROUND

- [1] Perry Akenten (the “applicant”) was injured in an automobile accident on December 18, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “*Schedule*”)¹ from The Personal Insurance Company (the “respondent”).
- [2] The applicant rear-ended a car when it braked unexpectedly on an icy road. He suffered strains of his thoracic and lumbar spine, and experienced pain in his neck, back, and hand over the following months.
- [3] The respondent took the position that the applicant had sustained predominantly minor injuries as defined in s. 3 of the *Schedule*, and that he was therefore entitled to up to \$3,500.00 in medical and rehabilitation benefits under the Minor Injury Guideline (the “MIG”).
- [4] The applicant received benefits for chiropractic services under the MIG. The respondent denied a treatment plan (OCF-18) for further chiropractic services to the extent it exceeded the \$3,500.00 limit, and a subsequent OCF-18 for acupuncture and chiropractic services in full. As a result, the applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service.
- [5] A case conference was held on January 13, 2021, and the matter proceeded to a written hearing.

ISSUES

- [1] The following issues are to be decided:
 - 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 MIG?
 - 2. Is the applicant entitled to \$200.00 (\$1,329.19 less \$1,129.19 approved) for chiropractic services,² recommended by Physiomotiv in an OCF-18 dated July 16, 2020?

¹ O Reg 34/10.

² In the Case Conference Report and Direction of January 15, 2021, Issues 2 and 3 are stated in error as involving physiotherapy services.

3. Is the applicant entitled for \$2,218.10 for acupuncture and chiropractic services, recommended by Physiomotiv in an OCF-18 dated August 6, 2020?
4. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?
5. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [6] I find that the applicant has not established that he suffered a non-minor injury that removes him from the MIG. Because he has exhausted the \$3,500.00 in medical and rehabilitation benefits available to him, he is not entitled to the benefits proposed in the treatment plans of July 16 and August 6, 2020, an award, or interest.

ANALYSIS

- [7] Section 18(1) of the *Schedule* states that an insured person who sustains an impairment that is primarily a minor injury is limited to \$3,500.00 in medical and rehabilitation benefits. A “minor injury” is defined in s. 3(1) 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.” Minor injuries are subject to the treatment framework in the MIG.
- [8] The onus is on the applicant to establish that he has sustained a non-minor injury that would remove him from the MIG.³

The Applicant’s Injuries

- [9] The applicant was taken to the Etobicoke General Hospital immediately after the accident. Diagnostic imaging of his lumbar spine showed no fractures and determined that its alignment was normal.
- [10] On January 8, 2020, the applicant visited Dr. A. Jairath, his family doctor, who diagnosed him with strains of the thoracic and lumbar spine.⁴ On June 11, 2020, the applicant and Dr. Jairath had a phone consultation regarding his injuries from

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

⁴ Dr. Jairath’s clinical note of January 8, 2020 states “Diagnosis: Thoracic lumb[a]r spine” without identifying the injury (Written Submissions of the Applicant, Tab B4). In a Disability Certificate (OCF-3) dated June 22, 2020, Dr. Jairath specified that the applicant had suffered thoracic and lumbar strains (Written Submissions of the Applicant, Tab B3).

the accident. In his clinical note from that consultation, Dr. Jairath diagnosed the applicant with headaches, neck pain, chronic whole back pain, and left hand pain.

[11] Strains of the thoracic and lumbar spine are minor injuries subject to the MIG. The applicant argues that he is not subject to the MIG on three grounds:

1. He has a pre-existing condition within the meaning of s. 18(2) of the *Schedule*;
2. He suffers from chronic pain; and
3. He suffers from a psychological impairment.

1. Pre-existing Medical Condition

[12] Section 18(2) of the *Schedule* provides that an insured person with a predominantly minor injury is not subject to the \$3,500.00 limit on benefits if they have a documented pre-existing medical condition that will prevent them from achieving maximal recovery from the minor injury if they are subject to the limit.

[13] I find that the applicant has not established that his prior hand fracture from 2011 is a pre-existing condition that removes him from the MIG.

[14] On June 11, 2020, Dr. Jairath recorded that the applicant was experiencing pain in his left hand, and noted that the applicant had fractured his third metacarpal⁵ in 2011. Dr. Jairath made the same observation in a Disability Certificate (OCF-3) of June 22, 2020. However, I find no evidence that demonstrates that the prior hand fracture prevented the applicant from achieving maximal recovery from his injuries. Beyond the June 11, 2020 clinical note and the June 22, 2020 OCF-3, there is no evidence about the nature of a hand injury or how it relates to his pre-existing metacarpal fracture.

2. Chronic Pain

[15] The applicant may be removed from the MIG if he suffers from chronic pain syndrome or pain that is continuous and of a severity that it causes suffering and distress accompanied by functional impairment or disability.⁶ The pain must be

⁵ The note uses the term “metatarsal” (Written Submissions of the Applicant, Tab B4), but given that Dr. Jairath was relating this injury to the applicant’s left hand pain, he surely meant to say “metacarpal,” as he did in the OCF-3 of June 22, 2020 (Written Submissions of the Applicant, Tab B4).

⁶ 16-000438 v *The Personal Insurance Company*, 2017 CanLII 59515 (ON LAT) at para 28.

distinct from ongoing or recurring pain, which on their own are classified as sequelae of a minor injury.

Chronic Pain Syndrome

- [16] The applicant has not established that he suffers from chronic pain syndrome.
- [17] It is unclear whether Dr. Jairath's reference to "chronic whole back pain" in his June 11, 2020 clinical note was meant to be a formal diagnosis of chronic pain syndrome. If so, it carries little weight. Dr. Jairath does not state the basis for the diagnosis or provide any supporting analysis. As the phone consultation involved no physical assessment, it appears that the only evidence available to Dr. Jairath was the applicant's self-report that he was continuing to experience back pain. However, continuing pain on its own does not remove the applicant from the MIG.
- [18] It is also noteworthy that Dr. Jairath did not recommend that the applicant be assessed or treated for chronic pain. He recommended that the applicant continue physiotherapy and prescribed a painkiller to be taken as needed.
- [19] The *American Medical Association Guides to the Evaluation of Permanent Impairment*, 6th edition, require at least three of six criteria to be met for a diagnosis of chronic pain syndrome. This is not a legal test, but a tool for assessing chronic pain claims. The criteria are:
1. Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances.
 2. Excessive dependence on health care providers, spouse, or family.
 3. Secondary physical deconditioning due to disuse and/or fear-avoidance of physical activity due to pain.
 4. Withdrawal from social milieu, including work, recreation, or other social contracts.
 5. 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.
 6. Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviors.

- [20] These criteria strongly suggest that the applicant's pain does not qualify as chronic pain syndrome. There is no evidence that the applicant meets criteria one to four. As discussed below, there is minimal evidence to demonstrate that pain prevents the applicant from pursuing his work, family, or recreational needs, or that he has developed psychosocial sequelae.

Functional Impairment

- [21] There is insufficient evidence to establish that the applicant suffers from a functional impairment that would remove him from the MIG.
- [22] The July 16 and August 6, 2020 treatment plans state that the applicant reported having difficulty with repetitive lifting, carrying and pushing, and prolonged sitting and standing. The only supporting medical evidence is Dr. Jairath's January 8, 2020 clinical note, which states that the applicant felt more pain in his back when standing, bending, walking, and sitting for prolonged periods. This evidence carries little weight because it shows the applicant's condition only three weeks after the injury, and Dr. Jairath's point was to identify the activities that felt more painful, and not to assess the extent to which pain limited those activities.
- [23] The applicant reported to Dr. Jairath on June 11, 2020 that he had stopped working due to pain. However, Dr. Jairath's clinical note of that date and the June 20, 2020 OCF-3 indicate that the applicant may also not have been working due to the COVID-19 pandemic. Furthermore, the July 16, 2020 treatment plan states that the applicant had returned to work.
- [24] The medical records provide no other evidence of functional impairment due to pain.
- [25] The applicant's next appointment with Dr. Jairath was on October 14, 2020. It concerned an issue unrelated to the accident. Dr. Jairath's clinical note of that date does not indicate that there was any discussion of the applicant's injuries from the accident. There are no subsequent entries in Dr. Jairath's clinical notes, which go to December 16, 2020.
- [26] The applicant received chiropractic treatment from Dr. M. Mohsen from December 31, 2019 to August 23, 2020. Dr. Mohsen's notes consistently state that the applicant complained of neck and back pain, but do not indicate any functional impairments.
- [27] In a Statutory Declaration dated June 10, 2020, the applicant stated that pain prevents him from sitting for prolonged periods of time, and that he cannot play

sports like he used to. The document is a generic form of 215 questions, with a few lines at most provided for answers. I note that in the Case Conference Report and Direction of January 13, 2021, it is stated that the parties agreed no affidavits would be submitted as evidence. In any event, these brief, vague statements do not meet the applicant's burden of proof.

- [28] Based on the totality of the evidence, I find that the applicant has not established that he suffers from a chronic pain condition that would remove him from the MIG.

3. Psychological Impairment

- [29] Psychological impairments fall outside the definition of minor injury in s. 3 of the *Schedule*, and can remove a person from the MIG. The July 16 and August 6, 2020 treatment plans both include a long list of psychological symptoms reported by the applicant. However, there is insufficient supporting evidence. The only psychological symptom the applicant reported to Dr. Jairath was insomnia. The only psychological symptom that the applicant identified in the June 10, 2020 Statutory Declaration was feeling anxious while driving. This evidence falls far short of establishing a psychological impairment.

The Treatment Plans in Dispute, Award, and Interest

- [30] Given that I find the applicant is limited to \$3,500.00 in medical and rehabilitation benefits, and that he has exhausted those benefits, I need not consider whether the July 16 and August 6, 2020 treatment plans are reasonable and necessary. Because the respondent is not liable for the benefits proposed in those treatment plans, the applicant is not entitled to an award under s. 10 of Regulation 664 or interest.

CONCLUSION

- [31] In summary, I find that:
1. The applicant has not established that he suffered a non-minor injury that removes him from the MIG;
 2. The applicant is not entitled to the benefits proposed in the treatment plans of July 16 and August 6, 2020; and
 3. No award or interest is payable.

[32] The application is dismissed.

Released: July 19, 2022

A handwritten signature in dark ink, appearing to be 'C. Evans', written above a horizontal line.

**Christopher Evans
Adjudicator**