Citation: Myers v. Economical Insurance Company, 2022 ONLAT 20-008293/AABS

Licence Appeal Tribunal File Number: 20-008293/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:

Kim Myers

Applicant

and

Economical Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: **Stephanie Kepman**

APPEARANCES:

For the Applicant: Brendan Sullivan, Counsel

For the Respondent: Matthew Owen, Counsel

HEARD: **By way of written hearing**

REASONS FOR DECISION AND ORDER

BACKGROUND

[1] The applicant was involved in an automobile accident on **June 25, 2019** and sought benefits pursuant to the Statutory Accident Benefits Schedule *Effective September 1, 2010 (including amendments effective June 1, 2016)*[1]. 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] The following issues are in dispute:

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 Minor Injury Guideline?

II. Is the applicant entitled to $2,205.50 for physiotherapy treatment, recommended by Complete Care Physio in a treatment plan (OCF-18) dated November 4, 2019?

III. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

IV. Is the applicant entitled to interest on any overdue payment of benefits?

LAW

[3] Section 3(1) of the *Schedule* states that a minor injury consists of one or more a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury. Section 3(1) of the *Schedule* also establishes the treatment framework regarding minor injuries.

[4] Sections 14 and 15 of the *Schedule* state that an insurer shall pay medical benefits to, or on behalf of an applicant so long as said person sustains an impairment as a result of an accident and that the medical benefit in dispute is a reasonable and necessary expense incurred by the applicant as a result of the accident.

[1] O. Reg. 34/10.

[5] Section 18(1) of the *Schedule* states that when an insured person sustains an impairment that is predominantly a minor injury, the total cost of her medical and rehabilitation benefits payable shall not exceed $3,500.00.

[6] Section 18(2) of the *Schedule* provides that the $3,500.00 funding limit does not apply if an applicant provides compelling medical evidence that she has a pre-existing medical condition that will prevent her from achieving maximal recovery from the minor injury if she is subject to the Minor Injury Guideline ("MIG") funding limit.

[7] Section 38(8) of the *Schedule* states that within 10 business days of an insurer receiving a treatment and assessment plan, it shall give the insured person notice that identifies the goods/services/assessment/examinations described in the treatment and assessment plan that it will pay for or refuses to pay for and provide the medical reasons and all other reasons why said goods/services/assessment/examinations or said costs are not reasonable and necessary.

[8] Section 38(11) of the *Schedule* states that if an insurer fails to give a notice in accordance with section 38(8) of the *Schedule*, related to a treatment and assessment plan, the insurer is prohibited from taking the position that the insured person has an impairment where the MIG applies. The insurer shall pay for all goods/services/assessment/examinations describe d in the plan related to the period, starting on the 11th business day after the day the insurer received the plan, and ending on the day the insurer provides a notice that complies with section 38(8) of the *Schedule.*

[9] Section 51(2) of the *Schedule* states that interest is due on a benefit that is overdue if the insurer does not pay the benefit within the time stated by the *Schedule*.

[10] Section 10 of R.R.O. 1990, Regulation 664, Automobile Insurance states that if the Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Tribunal, in addition to awarding the benefits and interest to the insured person, may award a lump sum of up to fifty percent of the amount to which the insured person was entitled to at the time of the award, with interest, on all amounts owing to the insured person.

[11] In *Scarlett v. Belair Insurance*, 2015 ONSC 3635 ("*Scarlett*"), the Divisional Court reviewed the minor injury provisions in the *Schedule*, finding that they were a limit on an insurer's liability, not an exclusion from coverage, and that the onus of establishing entitlement beyond the cap rests with the claimant. Applying

Scarlett, the applicant must establish her entitlement to coverage beyond the $3,500 cap for minor injuries on a balance of probabilities.

ANALYSIS

Applicability of the Minor Injury Guideline

[12] The applicant argued that her injuries caused by her accident require removal from the MIG.

[13] In her written submissions, the applicant identified that she has a history of pre-existing conditions, meaning she was diagnosed with osteoporosis, which was addressed by surgery in October of 2013.

[14] The applicant also identified her accident-related injuries, which she identified as "pain in her right side of her neck, right shoulder, right torso, right hip, right leg and foot, low back, decreased range of motion, daily headaches, dizziness, disorientation and difficulty breathing as a result of the injuries sustained". The applicant did not identify if these injuries ought to remove her from the MIG, or if these injuries are being argued as a basis of chronic pain.

[15] The respondent submitted that the applicant failed to meet her evidentiary burden based on the principles of *Scarlett*, as her submissions fails to specify the reasons and/or medical basis for her removal from the MIG.

[16] The respondent also argued that despite the Case Conference Report and Order issued prior to this hearing, the applicant did not make specific reference to the evidence she wished to rely on and instead, made general submissions to medical evidence which sometimes included a specific date to a clinical note and record. The applicant did not address these arguments.

[17] Upon review of the Case Conference Report and Order at paragraph 18, I note the following:

> "a. Submissions shall make specific reference to the evidence and law by tab and page number. Evidence not so referenced may not be reviewed."

[18] After reviewing the applicant's submissions, I find that the applicant did not refer to the evidence she wishes to rely on by tab or page number. With respect, this Order reflects the Tribunal's role as a neutral arbiter, not an advocate for any party. The Tribunal cannot presume to know which evidence or portion thereof, if any, that a party intends to rely on in advancing her case. By contrast, a party's argument may be no more than a bald assertion and without evidentiary support.

All parties were expressly advised of this requirement in the Order and the consequences for failing to adhere to it. Therefore, in considering the above, I exercise my discretion to not review any evidence that is not specifically referenced.

[19] As noted above, the applicant has the onus to prove that her accident-related injuries require removal from the MIG. In this case, it is unclear as to the specific reason(s) she is arguing.

[20] Nonetheless, based on a balance of probabilities, I find no basis to remove the applicant from the MIG.

[21] From the perspective of physical injuries, the applicant made no specific arguments that said injuries required removal from the MIG nor referred to any specific evidence, therefore, the applicant has not met her onus.

[22] Though the applicant made reference to some clinical notes and records, as she failed to direct the Tribunal to the page number or even tab, as per the Case Conference Report and Order discussed above, she did not meet her evidentiary burden.

[23] From the perspective of the applicant arguing her pre-existing condition prevents her from reaching maximal medical recovery if confined to the monetary limit of the MIG, I find that the applicant has not met her onus, as the applicant did not direct me to any evidence supporting this argument. Though the applicant referred to her hip and spinal surgery and diagnosis of cauda equina, she did not direct me to a tab or page number, as explained above, that explained why her pre-existing conditions would prevent her from reaching maximal medical recovery, thus justifying treatment beyond the MIG.

[24] I noted that the applicant referred to the clinical notes and records of her family doctor, Dr. James Leggett. However, as the applicant failed to direct the Tribunal to a specific page or date of these records, I will not be undertaking the task of searching through the 211 pages of such.

[25] Therefore, I rejected the applicant's argument regarding pre-existing conditions warranting removal from the MIG.

[26] From the perspective of the applicant arguing that she may suffer from chronic pain as a result of the accident, again, I find that the applicant has not met her onus and therefore, this argument also failed. As the applicant did not make any specific reference to chronic pain evidence in her submissions nor did she

specifically draw my attention to any evidence which supported this position, she has not met her onus.

[27] Furthermore, I agreed with the respondent's argument that the applicant simply referring to her remote medical conditions and symptoms does not fulfil the definition of "compelling evidence provided by a health practitioner" and does not satisfy the applicant's burden of proof.

[28] Therefore, the applicant's injuries are found to be within the MIG.

Section 38(8) Issues

[29] The applicant also argued that she should be removed from the MIG on the basis of section 38(11) of the *Schedule* and the respondent's failure to provide medical reasons with its denial.

[30] The applicant argued that she submitted a treatment plan ("OCF-18") for physiotherapy in the amount of $2,205.50, which was denied by the respondent.

[31] The applicant relied on the respondent's denial letter[2], which stated:

> We have compared the information in these documents to the definition of a "minor injury" as defined in the Statutory Accident Benefits Schedule (SABS) and believe you have sustained minor injuries to which the Minor Injury Guideline applies.
>
> The only medical documentation received is a prescription from Dr. MacDougall that states "MVC R trapezius / R back pain. Physiotherapy. Please assess and treat as appropriate to decrease pain, increase mobility." No further clinical notes and records have been received to support your accident related injuries.
>
> We have not been provided with compelling evidence that you have a pre-existing medical condition that was documented by a health practitioner before the accident and that will prevent you from achieving maximal recovery, if your claim is restricted to the minor injury monetary limit of $3500.
>
> As such, we have determined that there is insufficient medical documentation to support that the injuries you have sustained fall outside of the minor injury definition, and therefore it is our belief that the Minor

[2] Letter from Economical Insurance to Kim Myers, dated November 18, 2019.

Injury Guideline applies to your claim, and the treatment claimed in the above-referenced OCF-18 is not reasonable or necessary. Should clinical records be received we can further review at that time.

[32] The applicant submitted that this denial did not comply with section 38(8) of the *Schedule* as the letter did not provide medical reasons for the denial.

[33] The applicant submitted that she provided the insurer with the clinical notes and records of Dr. Leggett on October 25, 2019, and that this demonstrates the applicant's pre-existing medical conditions such as osteoporosis and Cauda Equina syndrome.

[34] The applicant also relied on the Insurer's Examination ("IE") of Dr. Mohamed Khaled, which noted that the applicant had developed predominantly right sided, mechanical lower back pain, with radiation of the pain into her right leg, a grade II whiplash ("WAD-II) of the neck with right shoulder strain/sprain. The applicant had also complained of foot pain, which was due to plantar fasciitis.

[35] The applicant submitted that Dr. Khaled found that the applicant had a reduced range of motion at her lumbosacral spine due to pain which could be a temporary impairment, likely accident related.

[36] The applicant also took issue with the fact that Dr. Khaled found that the applicant did not have any conditions that would be qualified as significant, pre-existing conditions that would exclude the applicant from the MIG, and Dr. Khaled failed to note or address the applicant's pre-existing osteoporosis and Cauda Equina syndrome.

[37] The applicant also argued that the respondent discovered that it failed to provide the IE assessors with the clinical notes and records of Dr. Leggett, and therefore, Dr. Khaled's diagnosis of being confined to the MIG was based on incomplete information.

[38] The applicant submitted that the respondent received Dr. Leggett's updated clinical notes and records[3] on January 13, 2021 and stated that a paper review with Dr. Khaled was scheduled. The applicant argued that Dr. Khaled's Paper Review found no reason to change his findings regarding the applicant's diagnosis or findings despite the updated information provided.

[3] Of December 2005 to October 16, 2016.

[39] As a result, the applicant submitted that Dr. Khaled was not able to properly assess the applicant physically based on the missing information described above.

[40] The respondent disagreed that the disputed denial was invalid. The respondent argued that the denial informed the applicant that it had considered the applicant's medical evidence and determined her injuries to be within the MIG and arranged an IE to assess this finding.

[41] The respondent submitted that the medical reasons were on the face of the notice and even specifically referred to the applicant's medical issues with her trapezius/back pain as referred to in the applicant's clinical notes and records.

[42] The respondent also took issue with the applicant's submissions regarding Dr. Khaled's findings and argued that said findings are reliable as Dr. Khaled was aware of the applicant's conditions and specifically addressed them in the applicant's medical history.

[43] The respondent acknowledged it made an error regarding the applicant's clinical notes and records, and that these records were not part of the medical brief given to Dr. Khaled prior to the IE.

[44] However, the respondent submitted that this error does not impact the validity of the denial notice, as the clinical notes and records were sent to Dr. Khaled to review and did not change Dr. Khaled's findings[4].

[45] The respondent also submitted that once it discovered its error, the respondent asked Dr. Khaled to review the omitted clinical notes and records to verify if the doctor's opinion would change, which it did not[5].

[46] After considering the submissions and evidence of the parties, based on a balance of probabilities, I find that the denial provided by the respondent is valid for the following reasons:

[47] In terms of the medical reasons for the denial, I agree with the respondent's argument that on its face, the notice provides medical reasons for the applicant's denial, namely that her injuries have been found within the MIG. Specific injuries were listed in the denial.

[4] Based on the Medical Examination Report of Dr. Khaled dated February 25, 2020.
[5] Based on the Medical Examination Report of Dr. Khaled dated December 30, 2020.

[48] Though the applicant's argued little weight should be being given to Dr. Khaled's reports because of the respondent's error in not providing the doctor with the applicant's clinical notes and records, I was not persuaded. If these clinical notes and records proved persuasive to revise his earlier opinion, I expect Dr. Khaled to have said so in his subsequent report. I do not see the rationale in the applicant's arguments.

[49] The applicant also did not provide persuasive case law that supported her position.

[50] Therefore, I find that the respondent's denial notice is valid, and the applicant's injuries are found to be within the MIG.

[51] As the applicant has exhausted the MIG's limits, I do not need to address the disputed treatment plan.

INTEREST AND AWARD

[52] As I have found that the applicant's injuries are within the MIG and no benefits are outstanding, the applicant is not entitled to interest or an award.

CONCLUSION AND ORDER

[53] The applicant's injuries are found to be within the minor injury guideline.

[54] The applicant is not entitled to $2,205.50 for physiotherapy treatment.

[55] The applicant is not entitled to interest.

[56] The applicant is not entitled to an award.

Released: August 25, 2022

Stephanie Kepman
Adjudicator