LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

Date: 2018-10-09
Tribunal File Number: 17-007961/AABS
Case Name: 17-007961 v The Personal Insurance Company

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act,* RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Applicant

Applicant

and

The Personal Insurance Company

Respondent

DECISION

ADJUDICATOR: **Sandra Driesel**

APPEARANCES:

For the Applicant: Yousef Jabbour, Counsel

For the Respondent: Pamela Vlasic, Counsel

HEARD: Written Hearing: **June 12, 2018**

OVERVIEW

[1] The applicant was injured in an automobile accident ("the accident") on April 24, 2016 and sought insurance benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] *(the "Schedule").* He applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") when his claims for benefits were denied by the respondent.

[2] The respondent denied the applicant's claims because it determined that all of the applicant's injuries fit the definition of "minor injury" prescribed by s. 3(1) of the *Schedule*, and therefore, fall within the Minor Injury Guideline[2] ("the MIG") and is subject to a $3,500.00 cap on medical benefits. The applicant's position is the opposite.

[3] If the applicant's position is correct, then I must address if the medical treatment claimed is reasonable and necessary.

[4] If the respondent's position is correct, then the applicant is subject to a $3,500.00 limit on medical and rehabilitation benefits prescribed by s.18(1) of the *Schedule*, and in turn, a determination of whether claimed benefits are reasonable and necessary will be unnecessary as the $3,500.00 maximum benefit for minor injuries has been exhausted.

ISSUES

[5] Did the applicant sustain predominantly minor injuries as defined by the *Schedule* which means entitlement to medical benefits is limited by the MIG?

[6] If the applicant's injuries are not within the MIG, then I must determine the following issues:

i. Is the applicant entitled to receive a medical benefit in the amount of $3,626.26 for physiotherapy recommended by Mackenzie Medical Rehabilitation, in a treatment plan dated July 20, 2016, denied by the respondent on August 3, 2016?

ii. Is the applicant entitled to payment for the cost of an examination in the amount of $2,460.00 for a psychological assessment recommended by Complete Rehab Centre in a treatment plan dated May 10, 2017 and denied by the respondent on May 17, 2017?

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

iii. Is the applicant entitled to payment for the cost of an examination in the amount of $2, 460.00 for an orthaepedic assessment recommended by Complete Rehab Centre in a treatment plan dated June 6, 2017 and denied by the respondent on June 14, 2017?

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

RESULT

[7] I find that the applicant's injuries fall within the MIG. It is therefore unnecessary to consider the reasonableness of the treatment plans or the issue of interest.

ANALYSIS

The Minor Injury Guideline

[8] 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." The MIG also defines in detail what these terms for injuries mean.

[9] Section 18(1) of the *Schedule* limits the entitlement for medical and rehabilitation benefits for minor injuries to $3,500.

[10] The onus is on the applicant to show that his/her injuries fall outside of the MIG.[3]

[11] The applicant provides the following arguments to support his position that his injuries fall outside of the MIG:

i. His submits the injuries reported in his Disability Certificate ("OCF-3") suggest they are not defined as predominately minor;

ii. He may have a pre-existing injury that has been aggravated by the MVA, he is therefore exempt from the $3,500 cap on benefits;

iii. He has medical evidence that he suffers from ongoing physical pain and psychological impairment that would exclude him from the MIG'; and/or

iv. Because the respondent approved payment that exceeds the limits of the MIG, the respondent is estopped from arguing that the applicant is within the MIG.

[3] *Scarlett v. Belair,* 2015 ONSC 3635 para.24

[12] The respondent's position is that the applicant has not met his onus to establish his injuries are not minor or that he is entitled to benefits outside of the MIG limit. The respondent submits:

i. All injuries listed on the applicant's OCF-3 are soft tissue in nature and fall within the definition of minor injury as per the MIG. Chiropractic treatment was therefore approved.

ii. The applicant's family physician, Dr. Brian Lang, clinical notes and records ("CNR's") dating back to 2013 does not show that the applicant ever reported the MVA.

iii. The applicant did not initiate a claim until July 5, 2016, several weeks after the April 24, 2016 MVA, suggesting he did not suffer other than a minor injury.

[13] I find that there is no evidence that the applicant's MVA related physical injuries were anything but predominately minor, for the reasons that follow.

Did the applicant sustain predominantly minor physical injuries?

[14] As noted above, the applicant relies on his OCF-3 dated July 9, 2016, completed by Dr. B.P. Sabharwal of Mackenzie Medical Rehabilitation Centre to provide evidence that his injuries sustained in the MVA were not minor. The OCF-3 reports injuries as:

i. Sprain and strain of cervical spine

ii. Sprain and strain of right shoulder joint, rotator cuff capsule

iii. Injury of muscle(s) and tendons of the rotator cuff of right shoulder

iv. Sprain and strain of the thoracic spine

v. Sprain and strain of the lumbar spine

vi. Radiculopathy into right upper extremity

vii. Sprain and strain of medical collateral ligament of right knee

[15] In my review of the OCF-3, I find that having listed the symptoms reported by the applicant, the Chiropractor completing the form also included several suggested examinations, investigations or consultations for the applicant to pursue to assess the severity of his injuries. I could not find any evidence that the applicant followed up on any of these suggestions with any urgency. I also could not find any request to the insurer for follow-up treatment and/or any follow up with the

family doctor. Because of this, it is difficult for me to find that the applicant's injuries were anything other the predominately minor.

Does the applicant have any pre-existing conditions?

[16] I find that there is no evidence that the applicant has a pre-existing condition that would take him MIG. I base this finding on the following:

[17] Section 18(2) of the *Schedule* provides that insured persons with minor injuries who have a pre-existing medical condition may be exempted from the $3,500 cap on benefits. In order to do so, the applicant must provide compelling evidence that meets the following requirements in order to be exempted from the MIG:

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 on treatment costs under the MIG.[4]

[18] The standard for excluding impairment on the basis of pre-existing condition(s) is well-defined. A pre-existing condition will not automatically exclude a person's impairment from the MIG: it must be shown to prevent maximal recovery within the cap imposed by the MIG

[19] The applicant argues that he should be removed from the MIG because evidence of a July 9, 2014 ultrasound shows the he suffered from mild tendinopathy of his right shoulder and that this condition was aggravated by the MVA. Because of this, he cannot reach maximal recovery under the limits of the MIG.

[20] I refer to the OCF-3 dated July 9, 2016, in Part 8 question a): "*Prior to the accident, did the applicant have any disease, condition or injury that affected his/her ability to perform the activities listed in Part 6?*[5]" The response given was "yes" and the explanation was "had a hairline fracture of skull a few years ago". There was no reference to any pre-existing shoulder injury.

[21] Regardless of whether the mild tendinopathy or hairline fracture is the pre-existing condition alleged to exempt the applicant from the MIG, the is no medical opinion that explains how any pre-existing condition has been impacted by the MVA nor how that pre-existing condition would stop maximal recovery under the MIG.

[4] Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act* page 5, heading 4, "Impairments that do not come within this Guideline".
[5] Part 6 of the OCF-3 "Disability Tests and Information" indicates activities the applicant is having problems with as a result of the MVA.

Does the applicant have a psychological impairment?

[22] Psychological injuries, if established, fall outside the MIG, because the MIG only governs “minor injuries” and the prescribed definition does not include psychological impairments.

[23] I find the applicant failed to prove he has a psychological injury that would take him out of the MIG for the following reasons:

[24] The applicant relies on a May 20, 2017 psychological assessment supervised by Dr. Jon Mills and assessed by Amrrita Naula, MSW, RSW. That assessment opines the applicant should be taken out of the MIG because of ongoing physical pain, and psychological impairment as a result of the MVA. The assessment concludes that the applicant’s ongoing headaches and interruption in cognitive functioning following the MVA is as a result of the accident, and a consultation with the neurologist is recommended.

[25] In weighing the assessment by Dr. Mills and Ms. Naula, I considered the following:

i. I found no evidence that the applicant in 12-13 months after the MVA, until this assessment, has ever had reported any psychological or cognitive problems nor requested any treatment for same.

ii. The respondent submits the psychological assessment conducted October 31, 2017 by insurance examiner Dr. Janet Clewes, psychologist, claims the applicant stated that he had never in his life consulted with a mental health professional.

iii. I have no evidence that the applicant reported any psychological issues to his family physician.

Is the respondent estopped from arguing the applicant’s injuries fall within the MIG because it approved payment that exceeds the $3,500.00 limit?

[7] The applicant takes the position that because the respondent approved the following treatment plans in the total amount of $4,371.98 – more than $800 over the $3,500 limit - that the respondent concedes the applicant’s injuries fall outside of the MIG:

i. August 18, 2016 the respondent approved treatment with Mackenzie Medical Rehabilitation Centre in the amount of $2,200.00.

ii. September 28, 2016 the respondent approved treatment with Mackenzie Medical Rehabilitation Centre in the amount of $1,069.50.

iii. April 8, 2017 the respondent approved treatment with Physical Therapy One – MLG in the amount of $1,102.48.

[26] The respondent's evidence shows that the treatment plans for Mackenzie Medical Rehabilitation Centre were approved for a total of $3,269.50 (a combination of the first two treatment plans listed above). In April 2017, the applicant advised the respondent that he was changing service providers. The respondent confirmed with the original service provider that the entire approved amount had not been incurred and no amounts were outstanding. Based on this information, the respondent approved the OCF-18 in the amount of $1,102.48 from the new service provider. The respondent's evidence shows that the $1,102.48 and the approved and incurred amounts from the old provider together do not exceed $3,500.

[27] Given the above, the respondent did not approve payment that would exceed the MIG limit. Further to this, the respondent's submission includes a "Standard Benefit Statement" from The Personal Insurance Company for the applicant's file. This statement covering the period ending January 25, 2018 shows not only the policy limit to be $3,500.00 (MIG), it shows the applicant has been paid only $3,309.95 to that date.

CONCLUSION

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

i. The applicant sustained predominantly minor injuries that fall within the MIG. Accordingly, he not entitled to the treatment plan(s) claimed in this application. His application is dismissed.

Released: October 9, 2018

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Sandra Driesel, Adjudicator