Citation: Mohammed v. Economical Insurance Company, ~~2023~~ 2024 ONLAT 21-011586/AABS

Licence Appeal Tribunal File Number: 21-011586/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:

Tamim Mohammed

Applicant

and

Economical Insurance Company

Respondent

AMENDED DECISION

VICE-CHAIR: **Brett Todd**

APPEARANCES:

For the Applicant: Miryam Gorelashvili, Counsel

For the Respondent: Kayly Machado, Counsel

HEARD BY WAY OF WRITTEN SUBMISSIONS

OVERVIEW

[1] Tamim Mohammed (the "applicant") was involved in a motor vehicle accident on July 8, 2020 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). Economical Insurance Company (the "respondent") held the applicant within the Minor Injury Guideline ("MIG") and denied certain benefits. The applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES IN DISPUTE

[2] The following issues are in dispute:

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 of the MIG?

2. Is the applicant entitled to $3,069.77 for physiotherapy services, proposed by Prime Physio Plus in a treatment plan/OCF-18 dated July 20, 2020?

3. Is the applicant entitled to $1,998.05 for psychological services, proposed by Revival Rehabilitation Centre in a treatment plan/OCF-18 dated August 6, 2020?

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

[3] In correspondence dated May 19, 2023, the applicant withdrew issue #3 as listed on the case conference report and order ("CCRO") released on November 3, 2022 that set this matter down for a hearing. Accordingly, I have removed it from the issues in dispute.

RESULT

[4] I find that:

i. The applicant is removed from the MIG, as he has met his burden and demonstrated, on a balance of probabilities, that his injuries fall outside of the definition of a minor injury in the *Schedule*.

ii. The applicant is not entitled to the treatment plan for physiotherapy, nor the treatment plan for psychological services, as he has failed to

demonstrate them to be reasonable and necessary. As no benefits are owing or overdue, interest is not applicable.

ANALYSIS

The Minor Injury Guideline ("MIG")

[5] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured person sustains impairments that are predominantly minor injuries. Section 3(1) 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."

[6] An insured person may be removed from the MIG if it can be established that accident-related injuries fall outside of the MIG, or if there is documentation of a pre-existing injury or condition combined with compelling medical evidence stating that the condition precludes recovery if kept within the MIG, pursuant to s. 18(2) of the *Schedule*. The Tribunal has determined that chronic pain with a functional impairment or a psychological condition may warrant MIG removal.

[7] The burden is on the applicant to demonstrate, on a balance of probabilities, that his injuries fall outside of the MIG.

[8] Here, the applicant submits that a concussion, chronic pain with evidence of a functional impairment, and the exacerbation of pre-existing back pain all warrant removal from the MIG. He primarily relies on *T.S. v. Aviva General Insurance Company*, 2018 CanLII 83520 (ON LAT), a past Tribunal reconsideration decision that held a concussion and post-concussive syndrome are not defined in the *Schedule* as minor injuries and therefore do not fall within the MIG. The applicant also references *P.S. vs. Wawanesa Mutual Insurance Company*, 2020 CanLII 87934 (ON LAT) and *Pottayya v. Unica Insurance Inc.*, 2021 CanLII 13195 (ONLAT) in support of his argument that he sustained a concussion and suffered post-concussion symptoms as a direct result of the accident. Lastly, he references *Han v. Wawanesa Mutual Insurance Company*, 2023 CanLII 1465 (ON LAT) to pre-emptively address the respondent's possible argument that the applicant should not be excluded from the MIG as more than three years have passed since the accident and he no longer requires treatment.

[9] In response, the respondent argues that the applicant has failed to adduce compelling medical evidence regarding either a concussion or a pre-existing back injury to support removal from the MIG. It maintains that the applicant's

injuries are minor in nature and treatable within the MIG and that even if the applicant did sustain a concussion as a result of the accident, the issue and any related symptoms have since resolved. The respondent also challenges the applicant's family physician's status as an expert witness under Rule 10.4 of this Tribunal's *Common Rules of Practice & Procedure*.

[10] The respondent relies on a number of Tribunal decisions regarding concussion diagnoses, including *Cruz v. Certas Direct Insurance Company*, 2022 CanLII 120017 (ONLAT); *Nelson v. Coseco Insurance*, 2023 CanLII 50590 (ON LAT); *C.Y. v. Jevco Insurance*, 2020 CanLII 14489 (ON LAT); *Mohammed v. The Co-operators Gen. Ins. Co.*, 2021 CanLII 90549 (ON LAT); *Wadood v. Economical Insurance*, 2023 CanLII 9251 (ON LAT); *Davidenko v. Unifund Assurance Company*, 2021 CanLII 13189 (ON LAT); *Podlovics v. Aviva General Insurance*, 2021 CanLII 96943 (ON LAT); and *Ly v. Aviva General Insurance*, 2022 CanLII 81525 (ON LAT).

The Applicant is Removed From the MIG

[11] I find that the applicant has met his onus and demonstrated that his accident-related injuries and impairments warrant removal from the MIG.

The applicant suffers from a concussion and post-concussion symptoms as a direct result of the accident

[12] The applicant has substantiated his claims of sustaining a concussion in the subject accident as well as suffering from post-concussion symptoms. I further accept the applicant's submissions based on prior decisions of this Tribunal that a concussion and/or post-concussion symptoms are not included in the minor injury definition in s. 3(1) of the *Schedule*. As a result, this warrants the applicant's removal from the MIG.

[13] I am persuaded by the totality of the applicant's medical evidence regarding the concussion. The applicant was consistent in reporting that he struck his head in the accident and the resulting symptoms of this head injury to Dr. E. H. Abdulkarim, family physician, in appointments from the day after the accident into 2021. Dr. Abdulkarim indicated in his CNRs that the applicant reported a "head injury" sustained in the accident along with dizziness, blurred vision, and tiredness at an appointment the day after the accident on July 9, 2020. In records of a follow-up visit on July 15, 2020, Dr. Abdulkarim noted the applicant's complaints of ongoing headaches, photophobia, noise sensitivity, blurred vision, and dizziness, and performed a PERRLA (Pupils Equal Round Reactive to Light

Accommodation) eye assessment test that revealed that the applicant had a "[s]ignificant sensitivity to light."

[14] Dr. Abdulkarim noted "concussion" in his plan for the applicant in his CNRs and a diagnosis of "concussion" in a prescription for physiotherapy dated July 15, 2020. Further, in appointments dated May 22, 2021 and November 4, 2021, the applicant reported recurrent headaches and sensitivity to noise that forced him to avoid situations such as when his children played "electronic games" at home. In all, Dr. Abdulkarim's diagnosis of concussion is clear, as is the applicant's consistent reporting of symptoms to the family physician over a period of time covering roughly a year-and-a-half after the accident.

[15] Other medical evidence submitted by the applicant is equally harmonious with regard to the applicant's claimed concussion and post-concussion symptoms. While I assign limited weight to the Disability Certificate/OCF-3 dated July 20, 2020 and the Athlete's Care report dated October 22, 2020, as both were completed by physiotherapists with no claimed neurological expertise, I note them due to how they support the consistency of the applicant's reporting of his head injury symptoms. I assign the same limited weight with regard to the concussion claims of the applicant to the s. 25 report of Dr. Kevin Smith, anesthesiologist, who also documented the applicant's claims of intermittent headache when he examined him via videoconference on August 2, 2021. Again, however, I reference this report to underline the applicant's chronicling of his head injury and symptoms. I find the applicant's consistency to be relevant, even while I accept the respondent's criticisms regarding how much dependability can be placed on such a videoconference examination.

[16] More significantly, the insurer's examination ("IE") report of Dr. Tilak Mendis, neurologist, dated July 27, 2021 is inconclusive regarding the applicant sustaining a concussion as a result of the subject accident. Although Dr. Mendis diagnosed the applicant with whiplash associated disorder ("WAD II") and related post-traumatic headaches and did not find evidence of neurological injury, he did acknowledge "[it] is possible that [the applicant] suffered a mild concussion which was associated with a head strike and mild alteration in his level of awareness."

[17] In my view, this observation of Dr. Mendis supports the CNRs of Dr. Abdulkarim and the applicant's reports of experiencing headache, sensitivity to light and sound, and other symptoms typically encountered as a result of head trauma such as a concussion and post-concussion syndrome.

[18] Much of the respondent's counterargument focuses on the fact that the applicant was never formally diagnosed with a concussion, and that Dr. Abdulkarim did not

refer him to a neurologist or conduct testing for head trauma. I concede some of these points, although I do not agree that Dr. Abdulkarim did not diagnose the applicant with a concussion, nor that he took "no action," as asserted in the respondent's submissions.

[19] First, as noted by the applicant in reply submissions, Dr. Abdulkarim performed a PERRLA assessment, which can be utilized to determine possible head trauma such as concussions, and found that the applicant was sensitive to light. While this test may not be as comprehensive as what could have been ascertained by ordering neurological testing (as the respondent suggests would have been the ideal protocol to follow if Dr. Abdulkarim truly intended to diagnose the applicant with a concussion), it is testing, nonetheless.

[20] Second, even a neurologist in Dr. Mendis wrote that it was possible that the applicant may have suffered a concussion in the accident, a conclusion that is not nearly as definitive as those in the respondent's submissions. I assign this comment significant weight, as it is supported by the concussion diagnosis and the CNRs of Dr. Abdulkarim, along with the consistent reporting of the applicant for going on two years' post-accident. In addition, the notation of Dr. Mendis, in my view, distinguishes this matter from other Tribunal decisions referenced in the respondent's submissions such as *Nelson*, *Cruz*, *C.Y.*, *Mohammad*, *Wadood*, *Davidenko*, *Podlovics*, and *Ly*.

[21] Further, I find the applicant's reference to *Han v. Wawanesa* applicable here and agree with the reasoning in that Tribunal preliminary decision. As with *Han*, I also find that an insurer cannot escape its obligations under the *Schedule* by delaying action such as a MIG determination until an applicant has recuperated to a point when the determination could be argued to no longer matter. The approach suggested by Economical—centering on claims that the applicant's injuries, including his concussion symptoms, had "resolved completely" as of November 4, 2021 because no treatment was sought beyond that date—would undermine the consumer protection basis of the *Schedule*. To paraphrase *Han*, the issue is not whether Economical has to honour its obligations now, but whether the insurer should have honoured its obligations in the past, even if the denial made at that time was in good faith.

[22] Lastly, I am not ruling on Dr. Abdulkarim's qualifications as an expert witness under Rule 10.4 of this Tribunal's *Common Rules of Practice & Procedure*, as this challenge is not properly before me.

[23] In submissions, the respondent challenges Dr. Abdulkarim's opinions regarding a concussion, as "[h]e is not being called by the Applicant as an expert witness and

has not satisfied the obligations of Rule 10.4 required as [sic] expert witness." However, Rule 10.4 requires that a party intending to challenge an expert's qualifications, as in this instance, "give notice, with reasons," for the challenge to the other parties "as soon as possible and no later than 10 days before the hearing and file a copy with the Tribunal." The respondent has not provided any evidence that these criteria were met, and just mentioned the Rule 10.4 challenge in the body of its written submissions. Accordingly, I am not providing a ruling on this matter.

[24] In summation, the applicant has demonstrated that he suffered a concussion and post-concussion symptoms as a result of the subject accident. As this finding is sufficient to remove the applicant from the MIG, I will not be reviewing his claims of suffering from chronic pain and that his recovery within the MIG was precluded by a prior injury. The applicant is removed from the MIG and its $3,500.00 limit on treatment.

The Treatment Plans/OCF-18s

[25] To be entitled to a treatment plan/OCF-18 under ss. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. The applicant should identify treatment goals, how these goals would be met to a reasonable degree, and that the overall costs of achieving them are reasonable.

The applicant is not entitled to $3,069.77 for the physiotherapy services OCF-18

[26] I find that the applicant is not entitled to $3,069.77 for the physiotherapy services treatment plan dated July 20, 2020, as he has not demonstrated it to be reasonable and necessary.

[27] This plan, which was completed by Mohamed Fouda, physiotherapist, of Prime Physio Plus, is for 25 sessions of physical therapy, four sessions of therapy on multiple body sites, an aqua pillow, and a fee for documentation/support activity. It lists concussion, WAD 2, sprain and strain of thoracic spine, dorsalgia (back plan), lumbago with sciatica, and sprain and strain of wrist as the injuries and sequelae resulting from the subject accident. Goals of this treatment are pain reduction, increased range of motion, increase in strength, and a return to the pre-accident activities of normal living and to pre-accident work activities.

[28] The applicant submits that this treatment plan should have been approved by the respondent. However, there is a lack of clarity regarding what plan is actually being disputed.

[29] The applicant's submissions largely address his need for physical therapy in a general fashion. Where his submissions focus on a specific physiotherapy treatment plan, it is with glancing reference to a plan completed by Scott Hamlin, physiotherapist, dated January 27, 2021 in the amount of $3,870.08, and denied on February 9, 2021—not the treatment plan dated July 20, 2020 listed in the CCRO that set this matter down for a hearing. The applicant also notes in submissions that this January 27, 2021 plan came following "the completion of the initial treatment plan" for physiotherapy as recommended by Dr. Abdulkarim, a statement that seems to reference the earlier plan listed in the CCRO as the one in dispute. The applicant did not comment on either of these physiotherapy treatment plans in reply submissions.

[30] Also, the applicant does not list the plans in dispute in submissions. Instead, he references only the CCRO to indicate the issues that remain in dispute. He does, however, include both physiotherapy OCF-18s in his hearing brief, which does not serve to lessen the confusion.

[31] The respondent indicates some uncertainty regarding the nature of this dispute, as well. In submissions, the respondent does not mention the January 27, 2021 plan for $3,870.08. Instead, the respondent addresses only the OCF-18 listed in the CCRO in the amount of $3,069.00. It writes that this plan was "improperly submitted" without a Treatment Confirmation Form/OCF-23 on July 20, 2022. The insurer sent a letter to the applicant on July 22, 2020 denying this plan based on the absence of supporting medical documentation regarding a concussion and because the applicant was deemed to be within the MIG.

[32] Additionally, the respondent notes that the applicant did not file the requested OCF-23, but did submit an Expenses Claim Form/OCF-6 for a total of $730.00 in physiotherapy provided by Prime Physio Plus between July 14, 2020 and August 18, 2020. Correspondence from the insurer to the applicant dated October 22, 2020 indicates that this amount was paid, but that no further consideration would be granted to any other treatment incurred without an OCF-23.

[33] Given the above, it is difficult to understand what treatment plan is actually in dispute in this hearing, and impossible to conclude that the applicant has met his burden and demonstrated any of the physiotherapy to be reasonable and necessary. Even if it were clear which of the physiotherapy plans was in dispute here, the applicant has provided minimal support for his position. He included just three paragraphs in written submissions on the physiotherapy plan/s that mostly critique the respondent's failure to approve this treatment, as recommended by Dr. Abdulkarim, and how the respondent did not schedule its neurological IE until

June 24, 2021, despite the applicant's "well-documented head injury." This argument is of limited relevance with regard to establishing the reasonable and necessary nature of a specific physiotherapy treatment plan.

[34] Accordingly, the applicant is not entitled to the physiotherapy services treatment plan listed in dispute, nor interest.

The applicant is not entitled to $1,998.05 for the psychological services OCF-18

[35] I find that the applicant is not entitled to the treatment plan for psychological services in the amount of $1,998.05 dated August 6, 2020, as he has failed to demonstrate it to be reasonable and necessary. It follows that interest is not applicable.

[36] This plan, completed by Patricia Parmashwar, psychologist, is for an assessment to determine the "psychological consequences of the MVA." It includes a total body assessment and two fees for documentation and support activity.

[37] There is no confusion regarding this plan. The applicant submits that the psychological assessment should be deemed reasonable and necessary due to Ms. Parmashwar's preliminary assessment that the applicant suffers from mood swings, driving anxiety, and loss of appetite. The applicant also notes that the respondent did not schedule a psychological IE and therefore denied this plan based "on their own opinion."

[38] In response, the respondent submits that the psychological intake screening conducted by Ms. Parmashwar should be given little weight as it is a "simple hand-written questionnaire [that] provides very little insight or information into the Applicant's psychological state and only includes one question asking the Applicant to list any psychological issues."

[39] Further, the respondent asserts that no rationale has been provided to demonstrate why such a screening was required, as the applicant never noted psychological issues to his family doctor or the IE assessors. The only time when the applicant endorsed psychological concerns, the respondent adds, was in the examination with Dr. Smith. However, it requests that these comments be afforded little weight as they consist entirely of self-reporting and Dr. Smith is an anesthesiologist unqualified to make psychological diagnoses.

[40] I agree with the respondent. While the applicant corrected the respondent in reply submissions and rightly noted that the applicant reported feelings of stress to Dr. Abdulkarim in an appointment on June 24, 2021, the notation in the CNRs

was to “emotional!! stress” in the context of an entirely unrelated health matter involving “personal issues.” There is no mention of the subject accident, or anything that could be reasonably connected to the psychological treatment plan.

[41] Also, even though I acknowledge that Dr. Smith recommended a psychological assessment in his August 2, 2021 report, this recommendation was founded entirely on the self-reported concerns of the applicant. Dr. Smith also does not have any claimed psychological training. As a result, I assign Dr. Smith’s report no weight regarding this psychological assessment treatment plan.

[42] For the reasons noted above, the applicant is not entitled to the psychological services treatment plan, nor interest.

ORDER

[43] I find that:

i. The applicant is removed from the MIG, as he has met his burden and demonstrated, on a balance of probabilities, that his injuries fall outside of the definition of a minor injury in the *Schedule*.

ii. The applicant is not entitled to the treatment plan for physiotherapy, nor the treatment plan for psychological services, as he has failed to demonstrate them to be reasonable and necessary. As no benefits are owing or overdue, interest is not applicable.

Released: January 4, 2024

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Brett Todd
Vice-Chair