Appeal P17-00034

OFFICE OF THE DIRECTOR OF ARBITRATIONS

AVIVA CANADA INC.

Appellant

and

MAVERICK SLEEP

Respondent

BEFORE:	Maggy Murray
REPRESENTATIVES:	Jason Frost for Aviva Canada Inc. Robert Ford for Mr. Sleep
HEARING DATE:	April 25, 2018

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The appeal of the Arbitrator's Order of May 1, 2017 is allowed in full. Paragraphs 1 and 2 of the Arbitrator's order are revoked, and the following substituted:

   i. Mr. Sleep's injuries fall within the Minor Injury Guideline as defined in s. 3(1) of the *Schedule*;

   ii. If the parties are unable to agree on the entitlement to, or quantum of the arbitration expenses of this matter, the parties may request an appointment for

determination of them in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

2. Before the appeal, the parties agreed that the successful party to the appeal would be entitled to $5,000.00 inclusive of disbursements and HST. Mr. Sleep shall pay Aviva Canada Inc. its legal expenses of the appeal proceedings herein, in the amount of $5,000.00, inclusive of disbursements, HST.

Maggy Murray Director's Delegate	July 10, 2018 Date

I. NATURE OF THE APPEAL

Aviva Canada appeals the order of Arbitrator Anschell dated May 1, 2017, wherein she found that Mr. Sleep's injuries did not fall within the Minor Injury Guideline (MIG) and awarded him expenses of the hearing.

For the reasons set out below, the appeal is allowed.

II. BACKGROUND

Mr. Sleep was involved in an accident on March 26, 2014. He was 15 years old, in Grade 10, and lived with his parents when the accident occurred. Mr. Sleep began experiencing back pain within a few days of the accident. The Arbitrator found Mr. Sleep credible and accepted the opinion of Dr. Fern (orthopaedic surgeon) that Mr. Sleep developed chronic mechanical problems with regard to his back. The Arbitrator concluded that "Mr. Sleep's ongoing sharp back pain does not constitute a "minor injury" as defined in s. 3(1) of the *Schedule*. A chronic pain diagnosis a few years post-accident establishes a severity beyond that contemplated by the

Minor Injury Guideline."[1] Consequently, the Arbitrator found that the diagnosis of chronic pain took Mr. Sleep out of the MIG.

III. ANALYSIS

Aviva's primary ground of appeal is that Mr. Sleep's injuries fall within the MIG.

1. Whether the Arbitrator Failed to Apply the Proper Legal Test for Determining Whether Mr. Sleep's Injuries Were Outside the MIG

A minor injury is defined in s. 3(1) of the *Schedule* as one or more of a: "**sprain, strain**, whiplash associated disorder, contusion, abrasion …, **and includes any clinically associated sequelae to such an injury** (emphasis added)."

Sequelae is defined as: "an aftereffect of a disease, condition, or injury; a secondary result."[2]

Section 18(1) of the *Schedule* provides that if a claimant's injuries fall within s. 3(1) of the *Schedule* and are "predominantly a minor injury," the claimant can only receive up to $3,500 for their medical treatment. In *Scarlett and Belair Insurance Company Inc*., Director's Delegate Evans determined that in deciding whether a claimant's injuries fall within the MIG, an Arbitrator must address why impairments, such as chronic pain and psychological impairments, are not "clinically associated sequelae"[3] to a claimant's minor injuries. Although I am not bound by my own, another delegate's, or a Director's decision on the same issue,[4] I believe *Scarlett* was correctly decided on the issue of determining whether a claimant's injuries fall within the MIG.

Therefore, an Arbitrator must first consider a claimant's injuries and determine whether they are within the MIG. If the injuries are within the MIG, an Arbitrator must then consider whether the

[1] *Sleep and Aviva Insurance Company of Canada*, QL at para. 77 (FSCO A16-001401, May 1, 2017)

[2] Online *Merriam-Webster Dictionary*, 2018 Merriam-Webster, Incorporated

[3] QL at paragraph 24 (FSCO P13-00014, November 28, 2013)

[4] *Aboufarah and Allstate Insurance Company of Canada*, QL at para. 7 (FSCO P03-00038, February 1, 2006)

claimant's injuries are a "clinically associated sequelae" of a claimant's minor injury. In Mr. Sleep's case, the Arbitrator did not analyze whether Mr. Sleep's complaints of chronic pain were separate from the minor injury complaints, and that is an error of law.

Although Mr. Sleep complained of depression, the Arbitrator found that: "Mr. Sleep's single complaint to a physician with respect to depression is not sufficient to remove him from the Minor Injury Guideline."[5]

The Arbitrator summarized a portion of Dr. Fern's (orthopaedic surgeon) report which stated:

> I would consider Mr. Sleep's mechanism of injury resulted in **sprain and strain** and myofascial type injuries initially to the **neck[6] and back**. However, I note that **he has developed chronic pain problems with his areas of injury** and has now transitioned in having chronic mechanical pains to his neck and back. **His problems would not be considered minor given the chronicity of his symptoms**. **I would consider his ongoing problems to be related to mechanical problems that have now developed** with regard to his intervertebral discs and facet joint structures. As such, I would consider his ongoing problems that have developed as a result of his accident of March 26, 2014 are such that it would place him outside of a minor injury. I would consider his current problems to place him outside of Minor Injury Guideline (emphasis added).[7]

Relying on the above, the Arbitrator found that Mr. Sleep's initial injury was sprain and strain to his back. Mr. Sleep then developed chronic pain in his back. That is, Mr. Sleep's back pain transitioned to chronic pain. The Arbitrator did not explain why Mr. Sleep's back pain and subsequent chronic pain were not a clinically associated sequelae of his minor injuries as required by *Scarlett*.[8]

The Arbitrator then concluded:

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[5] *Sleep and Aviva Canada Inc.*, QL at paragraph 68 (FSCO A16-001401, May 1, 2017)

[6] Although the Arbitrator relies on Dr. Fern's opinion (*Sleep and Aviva Canada Inc.*, QL at paragraph 77 (FSCO A16-001401, May 1, 2017)), the Arbitrator does not refer to Mr. Sleep's neck problems.

[7] *Sleep and Aviva Canada Inc.*, QL at paragraph 32 (FSCO A16-001401, May 1, 2017)

[8] QL at paragraph 24 (FSCO P13-00014, November 28, 2013)

> I am satisfied that Mr. Sleep's ongoing sharp back pain does not constitute a "minor injury" as defined in s. 3(1) of the *Schedule*. A chronic pain diagnosis a few years post-accident establishes a severity beyond that contemplated by the Minor Injury Guideline.[9]

The Arbitrator did not address why Mr. Sleep's chronic pain was not a "clinically associated sequelae" to his minor injuries of neck and back pain, and that is an error of law.

Although the Arbitrator relied on Dr. Fern's conclusion that Mr. Sleep's mechanism of injury resulted in "**sprain and strain** … to his neck and back … (and) that **he has developed chronic pain problems with his areas of injury**,"[10] the Arbitrator did not explain why Mr. Sleep's chronic pain was:

(i) Not a clinically associated sequela of his neck and back pain;
(ii) Separate and distinct from his neck and back pain and was not a sequelae thereof; and
(iii) Outside Mr. Sleep's predominantly minor injuries.

The Arbitrator incorrectly presumed that a chronic pain diagnosis automatically removes a claimant from the MIG. However, it is clear, based on *Scarlett*, that a finding of chronic pain alone does not remove a claimant from the MIG. Rather, a claimant bears the onus of proving that their chronic pain is separate from their initial soft tissue injuries and is not a sequelae thereof. Consequently, I find that the Arbitrator erred in law by failing to apply the proper test for determining coverage outside the MIG. Based on the evidence before the Arbitrator and the definition of a "minor injury" contained in the *Schedule*, Mr. Sleep's injuries fall within the MIG.

2. Whether the Arbitrator failed to give reasons why she did not exclude the reports of Dr. Fern and Dr. Goldhawk that were served 14 days before the hearing

[9] *Sleep and Aviva Canada Inc.*, QL at paragraph 77 (FSCO A16-001401, May 1, 2017)

[10] Report of Dr. Fern, *Sleep and Aviva Canada Inc.*, QL at paragraph 32 (FSCO A16-001401, May 1, 2017)

Because the Applicant's counsel was experiencing personal difficulties, the reports of Dr. Fern and Dr. Goldhawk were served 14 days before the hearing began, which is less than the minimum 30 days for service that is required by Rule 39.1 of the *Dispute Resolution Practice Code* – Fourth Edition. On the morning of the arbitration hearing, the Arbitrator explained that she would not force Mr. Sleep to proceed with the hearing without these two reports. The Arbitrator then gave Aviva the choice of proceeding with the hearing, adjourning the hearing to allow Aviva an opportunity to obtain rebuttal reports or transferring the issue to be decided to the License Appeals Tribunal.[11]

Aviva's counsel then stated: "Our preference is to go ahead today".[12] According to Aviva, the Arbitrator should not have allowed the reports of Dr. Fern and Dr. Goldhawk into evidence. I find no merit in this submission. Aviva chose to proceed with the arbitration hearing knowing that Mr. Sleep's reports would be evidence. Aviva cannot then resile from that position.

Conclusion

I find that there would be no purpose served by remitting the matter back to the Arbitrator. Subsection 283(5) of the *Insurance Act* provides that I may confirm, vary or rescind the order appealed from or substitute my order for that of the arbitrator. The appeal of the Arbitrator's order of May 1, 2017 is allowed in full. Paragraphs 1 and 2 of the Arbitrator's order are revoked, and the following substituted:

i. Mr. Sleep's injuries fall within the Minor Injury Guideline;
ii. If the parties are unable to agree on the entitlement to, or quantum of the arbitration expenses of this matter, the parties may request an appointment for determination of them in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

[11] Transcript, January 18, 2017 at 17-23

[12] Transcript, January 18, 2017 at 22

IV. EXPENSES

Before this appeal hearing, the parties agreed that the successful party to the appeal would be entitled to $5,000.00 inclusive of disbursements and HST. Therefore, Mr. Sleep shall pay Aviva Canada Inc. its legal expenses of the appeal proceedings herein, in the amount of $5,000.00, inclusive of disbursements, HST.

July 10, 2018

Maggy Murray
Director's Delegate

Date