

**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**

Citation: **Sandeep Gandhi vs. Aviva General Insurance, 2019 ONLAT 18-007668/AABS**

**Date: May 27, 2019
File Number: 18-007668/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:

Sandeep Gandhi

Appellant

and

Aviva General Insurance

Respondent

DECISION

PANEL: S. Braun

APPEARANCES:

For the Applicant: Sandeep Gandhi, Applicant
Francesco Blasi, Counsel

For the Respondent: Ajay Shukla, Adjuster
Surina Sud, Counsel

HEARD: In Writing on: April 1, 2019

OVERVIEW

- [1] The applicant was injured in an automobile accident (the accident) on September 20, 2015 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, as it determined all of his injuries fit the definition of 'minor injury' prescribed by s. 3(1) of the *Schedule*, and therefore, fall within the Minor Injury Guideline² (MIG).
- [3] The applicant's position is that his injuries do not fit the definition of 'minor injury' due to a diagnosis of chronic pain and the fact that he sustained a psychological injury as a result of the accident, both of which exempt him from the MIG.
- [4] If the applicant's position is correct, then I must address the issue of whether the medical treatments claimed are reasonable and necessary.
- [5] 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, it is not necessary to make a determination as to whether benefits claimed in excess of the \$3,500 maximum are reasonable and necessary.

ISSUES

- [6] Did the applicant sustain predominantly minor injuries as defined by the *Schedule*, thereby limiting his entitlement to benefits under the MIG?
- [7] If the applicant's injuries are not within the MIG, then I must determine the following issues:
 - i. Is the applicant entitled to a medical benefit in the amount of \$3,129.48 for psychological treatment, recommended by Pilowsky Psychological Professional Corporation in a treatment plan submitted on August 22, 2016 and denied by the respondent on August 25, 2016?
 - ii. Is the applicant entitled to a medical benefit in the amount of \$2,260.00 for an orthopaedic assessment, recommended by All Health Medical

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*.

Centre, as detailed in a treatment plan submitted on September 28, 2016, and denied by the respondent on September 29, 2016?

- iii. Is the applicant entitled to interest on any overdue payment of benefits?
- iv. Is the applicant entitled to an award under Ontario Regulation 664 as a result of the respondent unreasonably withholding or delaying payment of benefits?

RESULT

- [8] I find the applicant suffered a psychological injury as a direct result of the accident. His accident related injuries are therefore not minor and his entitlement to benefits not limited by the MIG.
- [9] I am not persuaded the treatment plans in dispute are reasonable and necessary.

ANALYSIS

The Minor Injury Guideline

- [10] 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.'³ The MIG defines in detail what these terms for injuries mean.
- [11] Section 18(1) of the *Schedule* prescribes a \$3,500.00 limit on medical and rehabilitation benefits payable for any one accident.
- [12] The onus is on the applicant to show that his injuries fall outside of the MIG.⁴

Accident related injuries

- [13] I find the evidence establishes that the applicant's physical injuries are minor, as defined by the *Schedule*.
- [14] The applicant was involved in a motor vehicle accident on September 20, 2015. He visited his family physician, Dr. Sidhu, on September 22, 2015 and was diagnosed with musculoskeletal pain. He was prescribed Naproxen and Baclofen, instructed to follow up in 1-2 weeks and told that x-rays were not

³ Ibid.

⁴ *Scarlett v. Belair*, 2015 ONSC 3635 para.24

necessary. Although the applicant commenced rehabilitative therapy, there was no evidence of a recommendation for same in the physician's clinical notes and records (CNRs).

- [15] On September 23, 2015, the applicant's chiropractor, Dr. Jessa completed a Disability Certificate (OCF-3), listing various muscle strains and sprains as well as headache, insomnia and stress. She opined that the anticipated duration of the applicant's disability would be 9-12 weeks and noted that he was taking 'painkillers, muscle relaxants, NSAIDs'.⁵
- [16] CNRs from Complete Rehab show only six visits, including the September 23, 2015 assessment. Subsequent visits occurred October 5 & 6, November 23, December 14, 2015 and January 14, 2016. The final entry in the records is a scheduled January 21 visit, for which the applicant was noted to be 'no show'. Of significance, the November 23 visit indicates the client's reaction to treatment was 'good'. The December 14 visit specifically indicates he reported decreased pain and the January 14 visit indicates that his reaction was, again, 'good'.⁶
- [17] Despite the family physician's recommendation that the applicant follow up in 1-2 weeks, clinical notes and records indicate he next visited on November 2016 for an unrelated health concern. Other than the September 22, 2015 note, there is no indication that he ever raised a concern or complaint respecting musculoskeletal pain again and there was no evidence that he continued to take medication for same beyond October 2, 2015.
- [18] On the basis of all of the foregoing, I find the applicant's physical injuries are "minor injuries", as defined by the *Schedule*.

Did the applicant sustain a psychological injury that removes him from the MIG?

- [19] The applicant claims he sustained a psychological injury as a result of the accident, which exempts him from the MIG. Psychological injuries, if established, fall outside the MIG, as the prescribed definition of 'minor injuries' does not include psychological impairments.
- [20] I find the applicant sustained a psychological injury which exempts him from the limit on medical benefits in the MIG. Both the applicant's and respondent's

⁵ Respondent's submissions, Tab 3 pp. 4-6.

⁶ Respondent's submissions, Tab 4, p. 4/20 & 6/20.

assessors conclude that he sustained psychological impairments as a direct result of the accident and offer related clinical diagnoses.

- [21] At page 11 of an assessment dated July 22, 2016, Dr. Pilowsky diagnoses the applicant with Major Depressive Disorder, Single Episode, Moderate with anxious distress and symptoms of phobia specific to vehicular travel (passenger).⁷
- [22] In a psychological IE assessment dated August 23, 2016, Dr. Moshiri states: 'In regard to psychological issues, given the findings of this examination and by review of the documentation provided, Mr. Gandhi's complaints relate to a diagnosis of mild adjustment disorder...Mr. Gandhi, as a direct result of the subject accident, presents with psychological impairments related to the symptoms associated with the diagnosis.'⁸
- [23] Despite the fact that the specific diagnoses of the assessors differ, it is clear they agree the applicant suffered psychological impairments from the accident. On this basis, I find that the applicant sustained a psychological injury which exempts him from the MIG treatment limits.
- [24] As I have found the applicant to be outside of the MIG, I must now determine whether the treatment plans claimed by the applicant are reasonable and necessary, which the applicant bears the onus of proving on a balance of probabilities.

Is the psychological treatment plan recommended by Pilowsky Psychological Professional Corporation reasonable and necessary?

- [25] Although both psychological assessors conclude that the applicant suffered a psychological injury from the accident, their opinions on the necessity for treatment differ quite significantly. As such, I considered both assessments in the context of other evidence and ultimately determined that the treatment plan at issue was not reasonable and necessary.

Dr. Pilowsky's assessment

- [26] Dr. Pilowsky administered the following tests, with results as noted below:
- a. Beck Depression Inventory: moderate levels of depression;

⁷ Appellant's submissions, Tab 3, p. 11.

⁸ Appellant's submissions, Tab 5, p. 9.

- b. Beck Anxiety Inventory: mild (high end) levels of anxiety;
- c. Pain Catastrophizing Scale: suggestive of a moderately elevated score;⁹ and states at page 7: “Mr. Singh [Gandhi] is lacking self-belief and incentive he once prided himself upon and characterized himself as ‘lazy’ in turn. Mr. Singh [Gandhi] now believes that his ability to be successful is hampered, and the progressions he was planning to make occupationally are either stagnated or futile.”

[27] She goes on to note his “social withdrawal from friends and family”; that, given his “newfound lack of self-confidence, he experiences nervousness when meeting new people”; and ‘deeply regrets that he is no longer involved in community projects.’ Moreover, she indicates he misses work as a result of accident-related appointments, pain, low mood and anxiety.

[28] With respect to prognosis, Dr. Pilowsky opines that the applicant is “in dire need of treatment in order to prevent an emotional collapse and to promote the further processing of the emotions he suppresses”.¹⁰ The goals of her proposed treatment plan are to decrease the applicant’s psychological problems and return him to his activities of normal living.

Dr. Moshiri’s assessment

[29] The IE assessor, Dr. Moshiri, administered the following tests, with results as noted below:

- a. Pain Patient Profile: depression, anxiety and somatization subscales were reflective of severe, sub average and average levels;
- b. Burns Anxiety Inventory: extreme levels;
- c. Brief Mood Survey: reflected severe levels of depression, anxiety and anger/irritability;
- d. Beck Depression Inventory: severe level of depression;
- e. Beck Anxiety Inventory: severe level of anxiety;
- f. Driver and Passenger Fear Questionnaire and Vehicle Anxiety Questionnaire – he believes he can overcome his vehicular anxiety on his own; and ultimately concludes: ‘Based on DSM-5 diagnostic categories,

⁹ Appellant’s submissions, Tab 3, p. 10.

¹⁰ Appellant’s submissions, Tab 3, p. 11.

his diagnosis is mild Adjustment Disorder – 309. A mild impairment exists, but it is not significant and compelling enough to require psychological treatment.’¹¹

[30] There was no reasonable explanation as to why the applicant’s mainly ‘severe’ test results translated into a diagnosis of a ‘mild’ adjustment disorder which does not require treatment.

[31] Notwithstanding the foregoing, I find the applicant’s test results and specific diagnoses are not determinative of whether the treatment plan is reasonable and necessary but rather, in order to make such a determination, the treatment plan must be viewed within the context of the totality of the evidence.

Other Evidence

[32] I found it significant that, when questioned as to whether he needed psychological attention, the applicant stated to Dr. Moshiri, “No, I can overcome it on my own. My problem is mainly physical. It is the pain. I receive counselling and emotional support from my joint family and that is sufficient for me”.¹² In addition, he indicated he felt he could overcome his vehicular anxiety on his own.

[33] The foregoing statements, along with a lack of supportive evidence, render Dr. Pilowsky’s assessment difficult to accept.

[34] The applicant did not provide evidence that he missed time at work as was suggested in the assessment, nor was there evidence that he sought assessment/treatment prior to Dr. Pilowsky’s involvement almost 9 months after the accident, despite a notation in the September 23, 2015 OCF completed by the chiropractor, which indicates complaints of anxiety, frustration, irritability and depressed mood and that the applicant may require psychological assessment/counselling. The physician’s clinical notes and records include no such complaints at any time and the applicant did not offer an explanation for the delay in seeking an assessment or the absence of complaints in the clinical notes and records.

[35] Perhaps most compellingly, the applicant’s post-accident level of activity was not reconcilable with Dr. Pilowsky’s assessment that he suffered from social

¹¹ Respondent’s submissions, Tab 2, p. 11.

¹² Respondent’s submissions, Tab 2, p. 6.

withdrawal, lack of motivation, lack of self-confidence, etc., which adversely impacted his functioning in employment, social and community pursuits.

- [36] The applicant's reporting to his psychological assessors and the respondent's submissions, (which were not refuted) indicate that, prior to the accident, he was not employed/looking for work and after the accident, he obtained his real estate license and began working as a real estate broker; began working in a management position at his brother's rental car company; earned a designation as a mortgage specialist; was working as a radio/television host; acquired two companies of his own; typically worked from approximately 9am to 7pm, after which he ate dinner and played games with his family and went to bed at approximately 10 pm; and most recently, in 2018, campaigned as an Area Councillor, which included activities such as marketing, advertising, holding community events and being interviewed by various news stations.
- [37] The respondent submitted a number of social media postings from the applicant's Facebook account, depicting his participation in numerous occupational, social and community activities, including various political campaign events in support of his candidacy for a position as an Area Councillor. While these are by no means determinative, when considered in the context of the totality of the evidence, they tend to support a level of functioning rebutting Dr. Pilowsky's suggestion that his psychological impairments result in restriction/withdrawal from social and occupational activities, a lack of self-belief or self-confidence, low motivation, etc.¹³
- [38] On the basis of all of the foregoing, I find the evidence is more consistent with Dr. Moshiri's assessment, that, despite his psychological impairments, the applicant does not require treatment. In fact, it would appear from his post-accident level of activity that he has been able to achieve the goals of the treatment plan on his own without psychological intervention, which is consistent with his statements to Dr. Moshiri. Consequently, I am not persuaded that the psychological treatment plan proposed by Pilowsky Psychological Professional Corporation is reasonable and necessary.

Is the orthopaedic assessment recommended by All Health Medical Centre reasonable and necessary?

- [39] An orthopaedic assessment was recommended by All Health Medical Centre in OCF-18 dated September 15, 2016. The respondent commissioned an IE assessment by Dr. Soon-Shiong, orthopaedic surgeon, and denied the above

¹³ Applicant's submissions, Tab 3 pp. 6-7.

noted treatment plan on the basis of his report dated August 23, 2016. Dr. Soon-Shiong's report indicates the applicant demonstrated full active range of motion through his cervical and lumbar spines and shoulders examination revealed full active range of motion. He describes a completely unremarkable musculoskeletal examination with no objective signs of physical impairment. He concludes that there are 'no compelling clinical findings that the applicant requires any further facility-based treatment beyond that which has been received'.¹⁴

- [40] Despite the respondent's denial of the treatment plan, All Health Medical Centre proceeded with an orthopaedic assessment performed by Dr. Benmofteh, orthopaedic surgeon. Dr. Benmofteh indicates the applicant exhibited 'multiple pain behaviours, which included withdrawal, guarding and diffuse tenderness' as well as 'Waddell's signs positive for tenderness, distraction, simulation and overreaction' and provided the following diagnoses: post-traumatic headaches; myofascial strains of the cervical spine; both shoulders; the thoracic spine; lumbar spine; and right knee; and chronic pain syndrome.¹⁵
- [41] I preferred the report of Dr. Soon-Shiong given that the family physician's CNRs which do not include any complaints of musculoskeletal pain following the initial visit of September 22, 2015 and indicate that the post-accident prescriptions of Baclofen and Naproxen ended on October 2, 2015 with no refills provided thereafter. There was no evidence that any anti-inflammatory or analgesic medications had been used by the applicant in an effort to treat his pain beyond this date.
- [42] Moreover, there is no evidence that the applicant participated in any treatment beyond the last entry of January 14, 2016 in the clinical records of Complete Rehab. While I acknowledge the applicant's statements to both orthopaedic assessors that he continued with therapy and his claim to Dr. Benmofteh that he was pursuing ongoing massage therapy at his own expense. However, he provided no invoices, payment records or other evidence of any ongoing therapy beyond January 14, 2016.
- [43] I considered the foregoing to be significant, given the statement that he was pursuing therapy at his own expense, especially in light of the fact that both the applicant's and respondent's submissions indicate more than \$2,000.00 remains available to him for medical and rehabilitative treatment under the MIG limits. I find it implausible he would not have sought payment for such

¹⁴ Applicant's submissions, Tab 9, pp. 4-5.

¹⁵ Applicant's submissions, Tab 10, pp. 8-9.

treatments through his insurer and if, for some reason, he chose not to do so, I would have expected him to have filed related invoices, cancelled cheques or payment records to establish ongoing treatment.

- [44] In the absence of any evidence to suggest that the applicant was experiencing ongoing musculoskeletal pain or ongoing physical complications arising from the accident, I am not persuaded that the treatment plan recommended by All Health Medical Centre is reasonable and necessary.

No award for unreasonably withholding or delaying payment

- [45] Section 10 of Ontario Regulation 644¹⁶, permits the Tribunal to award a lump sum of up to 50% of the amount to which the applicant was entitled at the time of the award together with interest on all amounts owing if it finds that the respondent has unreasonably withheld or delayed such payments.
- [46] The applicant submits the respondent ignored its fiduciary duty to properly assess all available medical documentation resulting in an unreasonable denial of necessary treatments and assessments, leading the applicant to continue to suffer with pain.
- [47] I find the applicant has not provided compelling evidence to support this argument. The respondent denied the treatment plans at issue on the basis of their interpretation of the reports provided by their IE assessors and the conclusions therein. I do not find this to be unreasonable and therefore the applicant is not entitled to an award.

CONCLUSION

- [48] The applicant sustained a psychological injury as a direct result of the accident and is therefore not governed by the MIG. However, he has failed to establish that the treatment plans claimed are reasonable and necessary and is therefore not entitled payment for these.

¹⁶ R.R.O. 1990, Regulation 664, s. 10.

[49] The applicant is not entitled to an award or interest and the application is dismissed.

Released: May 27, 2019

A handwritten signature in black ink, consisting of several overlapping loops and curves, positioned above a horizontal line.

S. Braun
Adjudicator