

**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**

Tribunal File Number: 17-006182/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:

V.M.

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR:

Melody Maleki-Yazdi

APPEARANCES:

Counsel for the Applicant:

Virginia Essipova

Counsel for the Respondent:

Alexander Hartwig

Written Hearing on:

May 14, 2018

OVERVIEW

- [1] V.M. (“the applicant”) was injured in an automobile accident (“the accident”) on May 24, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the “*Schedule*”). She applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) when her 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 section 3(1) of the *Schedule*, and therefore, fall within the Minor Injury Guideline² (“the MIG”). The applicant’s position is the opposite.
- [3] 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

- [4] Did the applicant sustain predominantly minor injuries as defined by the *Schedule*?
- [5] If the applicant’s injuries are not within the MIG, then I must determine the following issues:
 - i. Is the applicant entitled to receive medical benefits recommended by Downsview Healthcare Clinic as follows:
 - a) \$1,280.80 for chiropractic services (less \$1,100.00 already approved) in a treatment plan submitted on September 15, 2015, denied by the respondent on September 15, 2015;
 - b) \$1,861.60 for chiropractic services in a treatment plan submitted on November 8, 2015, denied by the respondent on November 19, 2015;
 - c) \$2,887.14 for psychological services in a treatment plan submitted on January 27, 2016, denied by the respondent on February 9, 2016; and,
 - d) \$1,151.20 for chiropractic services in a treatment plan submitted on February 1, 2016, denied by the respondent on February 9, 2016?

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*.

- ii. Is the applicant entitled to payments for the cost of examinations proposed by Downsview Healthcare Clinic as follows:
 - a) \$1,855.39 for a psychological assessment in a treatment plan submitted on September 28, 2015, denied by the respondent on September 28, 2015; and,
 - b) \$2,000.00 for a chronic pain assessment in a treatment plan submitted on February 19, 2016, denied by the respondent on February 22, 2016?
- iii. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed payments?
- iv. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [6] I find that the applicant's injuries fall within the MIG. Accordingly, she is not entitled to the treatment plans claimed in this application. Further, since there is no outstanding payment of benefits, there can be no basis for interest or an award under Ontario Regulation 664.

ANALYSIS

The Minor Injury Guideline

- [7] 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 *Schedule* also defines what these terms for injuries mean.
- [8] Section 18(1) limits the entitlement for medical and rehabilitation benefits for minor injuries to \$3,500.00.
- [9] The onus is on the applicant to show that her injuries fall outside of the MIG.

Did the applicant sustain predominantly minor physical injuries?

- [10] I find that the evidence indicates the applicant sustained a physical injury or injuries that are predominantly a minor injury.
- [11] In the applicant's submissions, she does not argue that any particular physical impairments remove her from the MIG. Her evidence and submissions indicate that she has developed psychological impairments and a chronic pain condition as a result of the accident. It is on this basis that she argues that her impairments fall outside of the MIG.

Does the applicant have psychological impairments?

- [12] The applicant claims that she sustained psychological impairments as a result of the accident that place her claims outside of the MIG.
- [13] Psychological impairments, if established, fall outside the MIG, because the MIG only governs “minor injuries” and the definition does not include psychological impairments.
- [14] I find the applicant does not have a psychological injury that would take her out of the MIG.
- [15] The applicant submits that in a report dated January 3, 2016, Ms. Ilios, therapist, and Dr. Shaul, supervising psychologist (to be addressed as Dr. Shaul’s report going forward for simplicity) diagnosed her with Adjustment Disorder with Anxiety and Specific Phobia (travelling in a vehicle) and recommended psychological counselling. Furthermore, Dr. Shaul opined that the applicant suffers from mood disturbances, sleep problems, cognitive impairments, and driving and passenger anxiety.
- [16] In response, the respondent relies on the insurer’s examination (“IE”) report by Dr. Rod Day, psychologist, who assessed the applicant on November 6, 2015. Dr. Day administered three psychometric tests as part of his assessment. The results of Dr. Day’s psychological assessment did not indicate the presence of any accident-related psychological condition or impairment. Dr. Day’s report includes that the applicant “emphatically stated that she did not require treatment and was surprised that it had been proposed”. He found that her profile was valid, without presence of any dysfunctional or catastrophic thoughts in response to her pain. The respondent submits that the applicant herself has denied the need for psychological treatment and that there are no psychological complaints in Dr. Shirley Ostroff’s (the applicant’s family physician) notes or in any other treatment records.
- [17] Both Dr. Day and Dr. Shaul conducted a number of psychometric tests and clinical interviews with the applicant, resulting in different diagnoses. I have no reason to doubt the qualifications or methods of either doctor, but must assign weight. After reviewing both reports, I notice the following discrepancies between what the applicant reported to Dr. Day and what she reported to Dr. Shaul, noting that Dr. Day assessed the applicant about 2 months before Dr. Shaul assessed her:
- i. Regarding her social history, the applicant told Dr. Day that she regularly attends church, she has a close girlfriend who she sees on a weekly basis and she typically makes dinner for a group of friends every Sunday. She sees her friends more since the accident than she did before. Conversely, she tells Dr. Shaul that she has not been able to return to any of her social activities at the moment. However, she also states that her

participation in social activities has not declined since the accident. She shares that she always wants to be in the company of people.

- ii. Regarding her activities of daily living, she tells Dr. Day that she did not report any change in her pattern of activity subsequent to the accident. Conversely, she tells Dr. Shaul that she has become so fatigued that she has difficulty taking care of her children, she has been having difficulty with her sleep, her energy level has decreased considerably and she is unable to do the things she used to.
- iii. With respect to her mood, she tells Dr. Day that she is not experiencing persistent depressed mood, but that she has some transient feelings of disappointment and frustration that the first vehicle she had ever purchased was written off in the accident. Conversely, she tells Dr. Shaul that since the accident she has become irritable and frustrated more easily because she is constantly in pain and faces many limitations as a result. She stated that since the accident she has been feeling sad.
- iv. Significantly, the applicant told Dr. Day that she did not require psychological treatment and was surprised that it had been proposed.

[18] I find that there is an issue regarding the applicant's credibility. As noted above, the applicant presented differently in front of Dr. Day and Dr. Shaul. These assessments were about 2 months apart. For this reason, I must determine which assessment is the more accurate reflection of whether the applicant has a psychological impairment. Both psychologists interviewed the applicant. Both psychologists administered tests. Dr. Day administered the Personality Assessment Inventory, Pain Patient Profile and Pain Catastrophizing Scale. Conversely, Dr. Shaul administered the Beck Depression Inventory, Beck Anxiety Inventory and Symptom Checklist-90-Revised.

[19] The applicant presented herself in front of Dr. Day as someone who does not require psychological treatment, has a healthy social life, is able to perform her daily activities with no differences from before the accident and that she feels disappointed and frustrated sometimes that her car had been written off in the accident. In front of Dr. Shaul, she presented as someone who always wants to be in the company of people, someone who experiences difficulty with her sleep and with taking care of her children, has low energy levels and is irritated and frustrated more easily due to pain.

[20] I prefer Dr. Day's report over Dr. Shaul's report, as I find that the applicant presented more genuinely in front of Dr. Day rather than in front of Dr. Shaul. Although there is a possibility that the applicant's symptoms worsened from the time she saw Dr. Day to when she saw Dr. Shaul, I have not been provided any evidence to indicate that the worsening of the symptoms would have been as a result of the accident. Further, there is no reference in Dr. Shaul's report that the applicant indicated there had been any recent or significant change in her

condition in the past few months.

- [21] From the evidence before me, I do not find the applicant to be functionally impaired due to psychological reasons. There were no references to any psychological complaints in her family doctor's clinical notes and records or in any other treatment records. This evidence is more consistent with the conclusions of Dr. Day. In addition, Dr. Shaul's report makes no mention of any change of impairment from the approximately 2 months prior when the applicant saw Dr. Day. As a result, I prefer Dr. Day's assessment. I find that the applicant does not have any psychological condition or impairment that would remove her from the MIG.

Does the applicant suffer from chronic pain?

- [22] The applicant submits that she suffers from chronic pain, which removes her from the MIG.
- [23] For chronic pain to fall outside of the MIG, the applicant must be suffering from severe, persistent and constant pain. The pain must cause the applicant to have a functional impairment adversely affecting her activities of daily living.
- [24] I find the applicant does not suffer from chronic pain that would take her out of the MIG.
- [25] The applicant submits that the medical notes of Dr. Ostroff reveal ongoing complaints of shoulder, neck, low back and left wrist pain – well beyond the 6-month period accepted by medical authorities in defining a chronic pain condition. The applicant submits that she visited Dr. Ostroff for pain-related complaints on the following dates: May 26, 2015; April 13, 2016; April 7, 2017; July 19, 2017 and March 19, 2018. Furthermore, a bilateral wrist ultrasound on March 2, 2018 revealed tenosynovitis in the left wrist, as objective imaging in support of a development of a chronic pain condition.
- [26] In response, the respondent relies on Dr. Jugnundan's paper review report dated April 13, 2016. As a result of Dr. Jugnundan's findings, the respondent denied the chronic pain assessment. The respondent submits that the only evidence to support a chronic pain diagnosis would be Dr. Oleksandr Pivtoran's, a chiropractor, Disability Certificate (OCF-3) dated September 14, 2015. The respondent submits that Dr. Pivtoran diagnoses several "chronic" injuries, despite less than three months having passed since the accident, and it is unclear what he based this finding on or whether he is even qualified to diagnose chronic pain. The respondent submits that the applicant returned to full work duties, household activities and activities of daily living shortly after the accident. Furthermore, she made infrequent complaints to her family doctor, Dr. Ostroff, in the time that followed.
- [27] In response to the applicant stating that she has had ongoing complaints of pain well beyond the 6-month period accepted by medical authorities in defining a

chronic pain condition, the respondent submits that the applicant does not cite any authority for this claim. I agree with the respondent that the applicant has not provided references to the medical authorities who mention a 6-month period of pain when defining a chronic pain condition. In any event, any discussion of how long the pain lasts for must also include a discussion of the level of pain experienced and its effect on the applicant's function.

- [28] I conclude that the applicant has not met the onus on her to show that she suffers from chronic pain as a result of the accident. I reached this conclusion for the following reasons:
- i. I agree with the respondent when stated in their submissions that the applicant's only ongoing complaint appears to be her left wrist. The applicant's submissions provide an argument that the ultrasound showing tenosynovitis in her left wrist is an objective image in support of her having chronic pain.
 - ii. I also agree with the respondent when stated in their submissions that ongoing wrist pain issues caused by tenosynovitis appear to have developed recently. A left wrist MRI on June 1, 2017 revealed "no apparent cause for pain". A bilateral wrist ultrasound on March 2, 2018 revealed mild tenosynovitis in her left wrist; however, this was not detected on the June 1, 2017 MRI scan, suggesting that it developed more recently. Therefore, it is likely that the tenosynovitis developed following the accident and is not a result of the accident.
 - iii. The applicant's wrist pain does not appear to cause functional impairments. The applicant works full-time as a dental assistant where she must work with her hands and wrists. She told Dr. Jugnundan at the July 21, 2015 assessment that she missed three days of work following the accident, then returned on modified duties for about two weeks before returning to regular duties.
 - iv. None of the other medical evidence in the applicant's submissions provides any indication or support of chronic pain.

- [29] Because I have found the applicant's injuries to fall within the MIG, it is unnecessary for me to assess whether the claimed treatment plans are reasonable and necessary.

Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed payment?

- [30] Pursuant to section 10 of Ontario Regulation 664, if an insurer has unreasonably withheld or delayed payments, the Tribunal may, in addition to awarding the benefits and interest to which an insured person is entitled under the *Schedule*, award a lump sum of up to 50 percent of the amount to which the insured was entitled at the time of the award, together with interest on all

amounts then owing. As I have determined that the applicant's injuries fall within the MIG, no award is payable.

CONCLUSION

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

- i. The applicant sustained predominantly minor injuries that fall within the MIG. Accordingly, she is not entitled to the treatment plans claimed in this application. Further, since there is no outstanding payment of benefits, there can be no basis for interest or an award under Ontario Regulation 664.
- ii. Her application is dismissed.

Released: June 18, 2018



Melody Maleki-Yazdi
Adjudicator