

**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: 17-006157/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:

R.K.

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR:

Jesse A. Boyce

APPEARANCES:

Counsel for the Applicant:

Virginia Essipova

Counsel for the Respondent:

Alexander D. Hartwig

Written Hearing on:

May 23, 2018

OVERVIEW

- [1] The applicant, R.K., was injured in an automobile accident on August 5, 2015 and sought benefits from the respondent, Aviva Insurance Canada (Aviva), pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010¹ (Schedule)*.
- [2] R.K. applied for medical benefits and costs of examinations that were denied by Aviva on the grounds that R.K. was placed into the Minor Injury Guideline (MIG) and that the treatment and assessment plans were not reasonable and necessary. R.K. disagreed with Aviva's decision and submitted an Application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (Tribunal) for resolution of the dispute. The parties participated in a case conference but were unable to resolve the issues, and proceeded to this hearing.

ISSUES TO BE DECIDED

- [3] The following are the issues to be decided, as per the case conference order of Adjudicator Kowal, dated January 30, 2018:
- i. Are the applicant's injuries considered predominantly minor injuries as defined in s. 3(1) of the *Schedule*, and therefore subject to treatment within the Minor Injury Guideline?
 - ii. Is the applicant entitled to payment in the amount of \$1,047.60 (\$3,247.60 less \$2,200.00 approved) for chiropractic services as set out in a treatment and assessment plan dated September 14, 2015 from Prime Health Care, denied by Aviva on September 15, 2015?
 - iii. Is the applicant entitled to payment in the amount of \$1,855.39 for psychological services as set out in a treatment and assessment plan dated November 6, 2015 from Prime Health Care, denied by Aviva on November 6, 2015?
 - iv. Is the applicant entitled to payment in the amount of \$1,230.92 for an attendant care assessment as set out in a treatment and assessment plan dated September 21, 2015 from Prime Health Care, denied by Aviva on October 1, 2015?
 - v. Is the applicant entitled to payment in the amount of \$1,108.50 (\$2,208.50 less \$1,100.00 approved) for chiropractic services as set out in a treatment and assessment plan dated October 30, 2015 from Prime Health Care, denied by Aviva on November 6, 2015?

¹ O. Reg. 34/10.

- vi. Is the applicant entitled to payment in the amount of \$1,888.50 for chiropractic services as set out in a treatment and assessment plan dated February 5, 2016 from Prime Health Care, denied by Aviva on February 19, 2016?
- vii. Is the applicant entitled to interest for the overdue payment of benefits?

RESULT

- [4] I find on the evidence that R.K. sustained injuries that are predominately minor injuries, as defined by the Schedule.
- [5] As I find that R.K.'s injuries are treatable within the MIG, I have not analyzed whether the treatment plans in dispute are reasonable and necessary.

ANALYSIS

Applicability of the Minor Injury Guideline

- [6] I find that the medical evidence indicates that R.K. sustained injuries that are predominately minor injuries that can be treated within the MIG.
- [7] The MIG establishes a framework for the treatment of minor injuries, as defined in s. 3(1) of the *Schedule*. Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to \$3,500. Applying *Scarlett v. Belair Insurance*,² the applicant must establish entitlement to coverage beyond the \$3,500 cap on a balance of probabilities.
- [8] On its face, the injuries listed in the Disability Certificate (OCF-3) of August 14, 2015, prepared nine days after the accident, fall within the definition of minor injury, as they are listed as headaches and sprain and strain-type injuries to R.K.'s cervical spine, thoracic spine and lumbar spine. I find that these injuries, considered alone, fall squarely within the definition of "minor injuries" under the *Schedule* and can be treated within the MIG.
- [9] However, R.K. argues that as a result of the accident, he suffers from chronic pain and psychological impairments that remove him from the MIG.

Does R.K. suffer from chronic pain or psychological impairments that remove him from the MIG?

- [10] I find that R.K. has not shown, on a balance of probabilities, that he suffers from chronic pain or a psychological impairment as a result of the accident that would entitle him to treatment beyond the limits of the MIG.

² 2015 ONSC 3635

Chronic Pain

- [11] I find that R.K. has not provided compelling medical evidence that his pain causes functional impairment, that it is continuous and severe or that it can only be made bearable with treatment.
- [12] As evidence of his chronic pain, R.K. directs me to the medical notes of Dr. Vakeesan, citing ongoing complaints of back pain which prompted an x-ray of the lumbar spine. On review of the notes of Dr. Vakeesan, the last mention of pain—in R.K.'s back, neck or elsewhere—is dated March 2016. The sporadic mentions of pain that are present in these notes also fail to mention the accident. Further, the x-ray in question revealed no abnormalities and was otherwise unremarkable. In his s. 44 insurer's examination with Dr. Sharma, R.K. reported that he is independent in his self-care, that he faces no significant difference in the performance of his post-accident home care activities and that he has not missed time at work or had to modify his duties as a result of his pain. In my view, R.K.'s pain, on this evidence, has not caused functional impairment in his home or work life.
- [13] Additionally, I disagree with R.K.'s submission that pain lasting beyond six months is proof that the pain has become chronic and automatically removes an applicant from the MIG. Based on R.K.'s self-reporting, the severity and persistence of pain has not increased over time or risen to the level that would entitle him to removal from the MIG. By all accounts, R.K. describes his back and neck pain as an "intermittent" dull pain that can rise to 7/10 at its worst, 1/10 at its least and 5/10 on average. In my view, this range constitutes a significant swing in severity, a range that is difficult to describe as impairing or disabling, especially when coupled with R.K.'s lack of functional impairment. Further, that R.K. describes his pain as intermittent and indicates his back pain is only aggravated by prolonged sitting and his neck pain by lateral rotation suggests that the pain is not continuous or persistent. While a formal diagnosis of chronic pain or a report from a specialist is not required to escape the MIG on this ground, I find that, in the absence of something more compelling than R.K.'s self-reporting, the evidence of chronic pain is lacking.
- [14] As a result, I find that there is not enough evidence to show, on a balance of probabilities, that R.K.'s pain is chronic enough in nature to cause impairment and that it would not be reasonable to remove him from the MIG on this basis.

Psychological Impairments

- [15] I find that R.K. has not provided compelling medical evidence that he suffers from a psychological impairment that removes him from the MIG.
- [16] In submissions, R.K. contends that he suffers from psychological impairments including driving anxiety that remove him from the MIG. He directs me to the psychological pre-screen report by Drs. Ilios and Shaul, which indicates that R.K.

requires a formal psychological assessment based on a screening interview that revealed that R.K. is irritable, frustrated, sad, depressed and nervous while driving. The report was based on R.K.'s self-reporting and does not make a formal diagnosis. The accompanying treatment and assessment plan lists R.K.'s behaviour impairments as follows: state of emotional shock and stress, unspecified; symptoms and sign involving emotional state; unspecified behavioural syndrome and limitation of activities due to disability. When viewing the file as a whole, I find that R.K.'s submission is not supported by the evidence and that the pre-screen interview report on which he relies is not proportional to the remainder of the evidence in the file.

- [17] First, the psychological screening interview was seemingly prompted on the recommendation of Dr. Le, chiropractor. Putting aside a chiropractor's expertise to diagnose a psychological condition, I find this referral notable because there are no psychological complaints in H.G.'s clinical notes and records dating back to 2015, related to the accident or otherwise. Further, Dr. Le's sole basis for a psychological screening was on R.K.'s alleged sleep disorder and driving anxiety, which is problematic in my view because at various points in the file, R.K. indicates that he manages eight hours of sleep per evening, does not suffer from fatigue and continues to operate a vehicle as needed.
- [18] Second, Dr. Browne's s. 44 psychological assessment, which I prefer, revealed no accident-related psychological impairments and no objective evidence to support a DSM-5 diagnosis or further treatment. This assessment was supported by a clinical interview, a full document review and objective psychometric testing. In his clinical interview with Dr. Browne, R.K. reported occasional sadness, but denied experiencing irritability, frustration or stress and noted no changes in his social interactions, daily living or work life, as well as no accident-related nightmares or flashbacks, which is contrary to everything reported by Drs. Ilios and Shaul. Further, he reported no significant cognitive difficulties in memory or concentration. Given the lack of evidence of a psychological impairment in the rest of the file, I afford significant weight to Dr. Browne's assessment and follow her clinical opinion.
- [19] As a result, I find that R.K. has not shown, on a balance of probabilities that he suffers from a psychological impairment that justifies treatment beyond the MIG.

Are the treatment plans and assessments reasonable and necessary?

- [20] According to submissions, R.K. has exhausted the funding available under the MIG. Having determined that R.K.'s injuries are predominately minor injuries and that he is not entitled to treatment beyond the MIG, I have not analyzed the medical benefits in dispute.

Interest

- [21] As no benefits are overdue, R.K. is not entitled to interest.

CONCLUSION

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

- i. R.K. sustained predominately minor injuries as a result of the motor vehicle accident which are treatable within the MIG; and
- ii. R.K. is not entitled to interest.

[23] The application is dismissed.

Released: July 18, 2018



Jesse A. Boyce, Adjudicator