

**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: 17-006159/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:

A.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, A.K., was injured while riding as a passenger 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] A.K. applied for medical benefits and costs of examinations that were denied by Aviva on the grounds that A.K. was placed into the Minor Injury Guideline (MIG) and that the treatment and assessment plans were not reasonable and necessary. A.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 \$1,127.60 (\$3,327.60 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 December 2, 2015 from Prime Health Care, denied by Aviva on December 8, 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 \$1,288.50 (\$2,388.50 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 11, 2015?
 - vi. Is the applicant entitled to payment in the amount of \$2,008.50 for

¹ O. Reg. 34/10.

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 A.K. sustained predominately minor injuries that are treatable within the MIG limits.
- [5] As I find that A.K.'s injuries are predominately minor, 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 A.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] The bulk of the injuries listed in the Disability Certificate (OCF-3) dated August 14, 2015 fall within the definition of minor injury, as they are listed as headaches and sprain and strain-type injuries to A.K.'s right elbow, cervical spine, thoracic spine and lumbar spine. I find that these injuries, considered alone, are squarely within the definition of "minor injuries" under the *Schedule* and can be treated within the MIG.
- [9] However, A.K. argues that as a result of the accident, she suffers from chronic pain and psychological impairments that remove her from the MIG. These arguments are based on the other injuries listed in the same Disability Certificate (OCF-3): an unspecified injury to A.K.'s right arm and shoulder and two behaviour injuries, listed as "other anxiety disorder" and "other sleep disorder," respectively.

² 2015 ONSC 3635

Does A.K. suffer from chronic pain or psychological impairments that remove her from the MIG?

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

Chronic Pain

- [11] I find that A.K. has not provided compelling medical evidence that her pain causes functional impairment in her home or work life, that the pain is continuous and severe or that it can only be made bearable with treatment.
- [12] As evidence of chronic pain in her neck, lower back and right elbow, A.K. directs me to an Application for Accident Benefits (OCF-1), Disability Certificate (OCF-3) and the medical notes of Dr. Vakeesan, all of which reference pain. On review of the notes of Dr. Vakeesan, there are indeed reports of pain in A.K.'s back and knee dating back to 2013, pre-accident, with the frequency of back pain complaints increasing around the time of the accident, prompting an x-ray recommendation. An x-ray report, dated February 25, 2016, revealed mild degenerative changes in A.K.'s spine but was otherwise normal. Following the x-ray result, there are no mentions of pain or accident-related impairments in Dr. Vakeesan's notes for over a year, until May 2017. This notation, as Aviva points out, is accompanied by a note indicating that A.K.'s lawyer would like to close the file.
- [13] In her s. 44 insurer's examination of A.K., Dr. Sharma determined that A.K. has unchanged functional ability with respect to employment and her social/recreational activities, diagnosing A.K. with strains to her lumbosacral and thoracic spine and right elbow tendonitis. Further, A.K. returned to work immediately as a chef/kitchen assistant and resumed her pre-accident employment duties full-time without issue and without modification. She has resumed her pre-accident personal care tasks and her house-hold duties, albeit with pacing strategies. In my view, A.K.'s pain, on this evidence, has not caused functional impairment in her home or work life.
- [14] Additionally, I disagree with A.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 A.K.'s self-reporting, the severity and persistence of pain has not risen to the level that would entitle her to removal from the MIG. A.K. describes her back and neck pain as an "intermittent" dull pain that fluctuates in severity. Although A.K. attended for physiotherapy and reported a 55% improvement, she reports that a warm compress and over-the-counter medication provide relief as needed. 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 A.K.'s self-reporting, the evidence of chronic pain is lacking.

- [15] As a result, I find that there is not enough evidence to show, on a balance of probabilities, that A.K.'s pain is chronic enough in nature to cause impairment and that it would not be reasonable to remove her from the MIG on this basis.

Psychological Impairments

- [16] I find that A.K. has not provided compelling medical evidence that she suffers from a psychological impairment that removes her from the MIG.
- [17] In submissions, A.K. contends that she suffers from psychological impairments that remove her from the MIG. She directs me to the psychological pre-screen report by Drs. Ilios and Shaul, which indicates that A.K. requires a formal psychological assessment based on a pre-screening interview that revealed that A.K. is irritable, frustrated, sad and feels anxious, tense and nervous when travelling as a passenger in a vehicle. The report was based on A.K.'s self-reporting and does not make a formal diagnosis. The accompanying treatment and assessment plan lists A.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 A.K.'s submission is not supported by the evidence and that the pre-screen interview report on which she relies is not proportional to the remainder of the evidence in her file.
- [18] 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 Dr. Vakeesan's clinical notes and records dating back to 2013, related to the accident or otherwise. Further, Dr. Le's basis for recommending a psychological screening was on A.K.'s reporting of having trouble sleeping and feeling tired during the day which, in my view, are not the sort of psychological impairment that warrant removal from the MIG.
- [19] 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. A.K.'s responses in her clinical interview with Dr. Browne run contrary to everything reported by Drs. Ilios and Shaul. For example, A.K. declined the need for psychological treatment. A.K. denied having symptoms of depression and anxiety, denied persistent sadness and feelings of hopelessness. She denied experiencing irritability, frustration or stress, noted no changes in social interactions or her relationships and reported no accident-related nightmares or flashbacks. She reported no significant cognitive difficulties in memory or concentration and none were observed by Dr. Browne. Given the lack of evidence of a psychological impairment in the rest of the file and the inconsistencies between Dr. Browne's report and the pre-screen completed by Drs. Ilios and Shaul, I afford significant weight to Dr. Browne's

assessment and follow her clinical opinion.

[20] As a result, I find that A.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?

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

Interest

[22] As no benefits are overdue, A.K. is not entitled to interest.

CONCLUSION

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

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

[24] The application is dismissed.

Released: July 18, 2018



Jesse A. Boyce, Adjudicator