

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Date: 2018-06-18

Tribunal File Number: 17-006136/AABS

Case Name: 17-006136 v Aviva Insurance Canada

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

The applicant

Applicant

and

Aviva Insurance Canada

Respondent

AMENDED DECISION

ADJUDICATOR:

Christopher A. Ferguson

APPEARANCES

Mariya Verkhovets,

Counsel for the Applicant

Ramandeep Pandher,

Counsel for the Respondent

Heard in Writing:

May 14, 2018

OVERVIEW

- [1] [The applicant] was involved in an automobile accident on September 18, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the "Schedule").
- [2] [The applicant] applied to the Licence Appeal Tribunal (the "Tribunal") when the disputed benefits were denied by Aviva.

ISSUES IN DISPUTE

- [3] The issues before me are:
1. 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 (MIG)?
 2. If [the applicant]'s injuries are not predominantly minor:
 - a) Is [the applicant] entitled to payment in the amount of \$1,436.14 per month for attendant care benefits (ACBs) from September 18, 2015 to September 18, 2017, denied by the respondent on November 26, 2015?
 - b) Is [the applicant] entitled to payment in then amount of \$3,939.43 for physiotherapy services as set out in a treatment and assessment plan dated October 13, 2015 from Complete Rehab Centre, denied by the respondent on October 19, 2015?
 - c) Is [the applicant] entitled to payment in the amount of \$1,816.74 for physiotherapy services as set out in a treatment and assessment plan dated May 30, 2016 from Complete Rehab Centre, denied by the respondent on June 3, 2016?
 - d) Is [the applicant] entitled to payment in the amount of \$2,108.11 for physiotherapy services as set out in a treatment and assessment plan dated January 26, 2016 from Complete Rehab Centre, denied by the respondent on January 27, 2016?
 - e) Is [the applicant] entitled to payment in the amount of \$2,460.00 for an orthopaedic assessment as set out in a treatment and assessment plan dated April 27, 2016 from Complete Rehab, denied by the respondent on April 28, 2016?
 - f) Is [the applicant] entitled to payment in the amount of \$2,248.90 for an In Home Assessment dated October 24, 2015, as set out in a treatment and assessment plan dated October

¹ O.Reg. 34/10

19, 2015 from Complete Rehab, denied by the respondent on October 23, 2015?

- g) Is [the applicant] entitled to payment in the amount of \$2,200.00 for a neurology assessment dated April 7, 2016 as set out in a treatment and assessment plan dated January 26, 2016 from Complete Rehab, denied by the respondent on January 27, 2016?
- h) Is [the applicant] entitled to payment in the amount of \$2,460.00 for a psychiatry assessment as set out in a treatment and assessment plan dated April 29, 2016 from Complete Rehab, denied by the respondent on May 5, 2016?
- i) Is [the applicant] entitled to payment in the amount of \$2,460.00 for a chronic pain assessment dated September 1, 2016 as set out in a treatment and assessment plan dated May 6, 2016 from Complete Rehab, denied by the respondent on May 13, 2016?
- j) Is [the applicant] entitled to payment in the amount of \$2,460.00 for a psychology assessment as set out in a treatment and assessment plan dated April 26, 2016 from Complete Rehab, denied by the respondent on April 29, 2016?

3. Is the applicant entitled to interest for the overdue payment of benefits?

FINDINGS

- [4] [The applicant]'s injuries are predominantly minor, and governed by the MIG. His claim is dismissed.

REASONS

Are [the applicant]'s injuries predominantly minor?

- [5] 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.” It also defines these injuries.
- [6] Section 18(1) limits the entitlement for medical and rehabilitation benefits for minor injuries to \$3,500.
- [7] Section 14.2 restricts the payment of attendant care benefits (ACBs) to persons whose injuries are not minor.

- [8] The onus is on the applicant, [the applicant], to show that his injuries fall outside of the MIG²
- [9] Aviva argues that all of the applicant's injuries fit the definition of "minor injury" prescribed by s. 3(1) of the *Schedule*, and therefore, fall within the Minor Injury Guideline ("the MIG"). The applicant's position is exactly the opposite.
- [10] If Aviva's position is correct, then the applicant is subject to the \$3,500.00 limit on medical and rehabilitation benefits prescribed by the 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.
- [11] If [the applicant] is right, and his injuries are not minor, I must determine his entitlement to the claimed treatment and assessment plans and the ACBs.
- [12] [The applicant]'s submissions confirm that the injuries that he sustained as a result of the accident were predominantly minor, consisting of soft-tissue sprains and strains. His case for removal from the MIG is based on chronic pain and psychological injury, both of which are commonly recognized bases for removal from the MIG.

Chronic Pain

- [13] In assessing the applicant's claim of chronic pain, I have applied the following criteria:
- i. Does the applicant suffer constant pain - more than simple ongoing or recurrent, intermittent pain?
 - ii. Has the applicant's pain persisted beyond the normal healing times for the injuries sustained?
 - iii. Is the pain a clinically associated sequelae to minor injuries?
 - iv. Does the applicant's pain cause functional impairment and disability? Does it significantly disrupt or disable pre-accident activities of daily living?³
- [14] To support his claim of chronic pain, [the applicant] cites diagnoses from Dr. Lance B. Majl neurologist (assessment report dated April 12, 2016), and Dr. Gregory Karmy, a pain specialist, in his report dated September 1, 2016.

² *Scarlett v. Belair*, 2015 ONSC 3635 para.24

³ The criteria I set out are derived largely from the decisions of other adjudicators, see for example *YXY v. The Personal Insurance Company*, 2017 CanLII 59515 (ON LAT) para. 24-29.

[15] Aviva argues that [the applicant] submits no conclusive evidence on chronic pain. Applying benchmarks set out by a chronic pain specialist, Dr. Michael Boucher in a report dated May 5, 2016, Aviva argues that [the applicant]'s evidence indicates that he does not meet the chronic pain threshold because:

- i. [The applicant]'s family physician, Dr. Dhaliwal's clinical notes and records indicate that [the applicant] complained of back, neck and shoulder pain in the three months following the accident. However, after visits in early 2016, there was a 20-month gap in [the applicant]'s visits to his doctor. Such medical visits contra-indicate chronic pain.
- ii. [The applicant]'s prescription history since the accident is not only inconsistent with chronic pain, but conflicts with the statements he made to various assessors about his level of pain medication. [The applicant] told various assessors that he was taking prescription painkillers (Baclofen and Naproxen) daily, sometimes twice daily, but his prescription history indicates a much lower rate of consumption. Chronic pain usually results in a higher rate of prescription drug consumption.
- iii. Diagnoses of chronic post-traumatic headaches is inconsistent with [the applicant]'s reported statements to Dr. Karmy and to Dr. Majl that his headaches are intermittent at a biweekly rate. Aviva submits that the applicant has not provided any evidence of pain that is constant and debilitating.
- iv. [The applicant] has returned to work as a truck driver, driving long shifts. There is no evidence in any reports of any secondary deconditioning, which is often associated with chronic pain, and there is significant evidence, including self-reporting, of minimal disruption to pre-accident activities.

[16] I find that [the applicant] has failed to meet the onus on him to prove that he should be removed from the MIG on chronic pain grounds because:

- i. The intermittent pain described in the medical reports does not appear to meet the threshold of constant, severe pain.
- ii. On balance, I do not find that the evidence illustrates that [the applicant]'s pain has significantly disrupted or disabled his pre-accident activities of daily life.

Psychological Injury

[17] [The applicant] does not directly argue psychological injuries as a basis for his removal from the MIG. His claim for a psychological assessment is connected to his chronic pain claims – his submission places psychological assessment and assistance in the context of addressing chronic pain.

- [18] [The applicant] states that “this assessment was recommended by the neurologist who assessed the Applicant as per recommendations of the Applicant's treating family physician, as well as chronic pain specialist.”
- [19] His primary evidence, which his evidence does not discuss, is the disputed treatment plan dated April 26, 2016 from Complete Rehab, purportedly overseen by Dr. Jon Mills, psychologist.
- [20] Aviva relies on the IE report by Dr. Sherri MacKay, psychologist, dated May 6, 2016, in which she reports:
- i. [The applicant] indicated no specific psychological complaints or problems related to driving, in contrast to claims made by Dr. Mills in relation to [the applicant]'s driving-related fears.
 - ii. [The applicant] reported participating in normal social interactions with his family and friends.
 - iii. She found no objective basis in interviews and tests for a psychological diagnosis or psychological impairment as a result of the accident.
- [21] On balance, I find that [the applicant] has not met the onus on him to prove that he sustained psychological injury as the result of the accident because I find the report by Dr. McKay more persuasive than the evidence led by [the applicant].
- [22] As the result of my finding on the MIG issue, it is unnecessary for me to determine whether specific medical benefits [the applicant] claims are reasonable and necessary.

CONCLUSIONS

- [23] [The applicant]'s injuries are predominantly minor and governed by the MIG.
- [24] [The applicant]'s appeal is dismissed. Accordingly, there is no interest on overdue payments owing to him.

Released: June 18, 2018

**Christopher A. Ferguson
Adjudicator**