

**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**



Citation: DP vs. Aviva General Insurance Company, 2020 ONLAT 19-001218/AABS

**Released Date: March 11, 2020
File Number: 19-001218/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:

D. P.

Applicant

And

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: Derek Grant

APPEARANCES:

For the Applicant: Lisa Bishop, Counsel

For the Respondent: Ramandeep Pandher, Counsel

HEARD: In Writing

September 23, 2019

OVERVIEW

- [1] The applicant (“D.P.”) was involved in an automobile accident on June 19, 2017 (“the accident”) and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the “Schedule”). D.P. was denied certain benefits by the respondent (“Aviva”) and applied to the Licence Application Tribunal - Automobile Accident Benefits Service (“the Tribunal”).
- [2] Aviva argues that D.P.’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”).¹ D.P. disagrees.
- [3] If Aviva is correct, D.P. is then subject to the \$3,500.00 limit on benefits prescribed by s. 18(1) of the *Schedule* and, in turn, a determination of whether the claimed benefits are reasonable and necessary will not be needed as D.P. has exhausted the \$3,500.00 maximum benefit for minor injuries.
- [4] I must, therefore, decide whether D.P.’s injuries are predominantly minor as defined by the *Schedule*. If they are not, I must then determine whether the disputed medical benefits, as well as the associated fees and expenses, are reasonable and necessary.

ISSUES

- [5] The issues in dispute were identified and agreed to as follows:
- i. Are D.P.’s injuries predominantly minor injuries as defined in the Schedule and subject to treatment within the Minor Injury Guideline (the “MIG”)?
- [6] If D.P.’s injuries are not minor, then the issues I must determine are as follows:
- ii. Is the attendant care benefit in the amount of \$296.11 per month for the period from November 15, 2017 to date and ongoing, reasonable and necessary?
 - iii. Is the medical benefit in the amount of \$2,970.80 for chiropractic treatment recommended by Health-Pro Wellness in a treatment plan submitted on November 14, 2017 and denied by the respondent on November 17, 2017, reasonable and necessary?
 - iv. Is the medical benefit in the amount of \$519.00 (the amount remaining on a treatment plan in the total amount of \$1,619.00 and partially approved for \$1,100.00) recommended by Health-Pro Wellness in a treatment plan

¹Minor Injury Guideline, Superintendent’s Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act*.

submitted on September 19, 2017 and denied by the respondent on October 4, 2017, reasonable and necessary?

- v. Is the cost of examination in the amount of \$2,219.74 for a psychological assessment recommended by Health-Pro Wellness in a treatment plan submitted on October 18, 2017 and denied by the respondent on November 18, 2017, reasonable and necessary?
- vi. Is D.P. entitled to interest on any overdue payment of benefits?
- vii. Is D.P. entitled to receive an award for unreasonably withheld or delayed payments pursuant to section 10 of Reg. 664, R.R.O. 1990?

RESULT

- [7] Based on the evidence before me, I find that D.P.'s physical and psychological injuries meet the definition of "minor injury" under the *Schedule*. It is therefore unnecessary to consider the reasonableness of the treatment plans or the issue of interest regarding same;
- [8] I must still determine whether the balance of the September 19, 2017 treatment plan is payable.
- [9] Aviva concedes that its denial letter in response to the September 19, 2017 treatment plan did not meet the requirements of s. 38(8) of the *Schedule*, as it did not provide the required notice to D.P. within 10 business days.
- [10] Thus, Aviva is prohibited from taking the position that D.P.'s injuries are predominantly minor injuries to which the MIG applies regarding the September 2017 treatment plan;
- [11] Aviva was therefore required under s. 38(11) of the *Schedule* to pay, starting on the 11th business day, (i.e., October 6, 2017), the disputed medical benefits for the chiropractic treatment. However, Aviva provided a valid denial on October 6, 2017. D.P. has not provided evidence of any treatment incurred on October 6, 2017. Therefore, Aviva is not required to pay any amount of the balance of the September 19, 2017 treatment plan.
- [12] In addition, since I have found that D.P.'s injuries are predominantly minor, and she has exhausted the MIG limit, I do not need to consider whether the treatment is reasonable and necessary.

LAW

Minor Injury Guideline

- [13] The MIG establishes a framework for the treatment of minor injuries. The term "minor injury" is defined in subsection 3(1) of the *Schedule* 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.” The terms “sprain”, “strain”, “subluxation”, and “whiplash associated disorder” are also defined in subsection 3(1).

- [14] The onus is on D.P. to show that her injuries fall outside of the MIG.²
- [15] D.P. argues that her injuries go beyond the definition of “minor injury” because she has sustained physical and psychological impairments which remove her from the MIG.
- [16] I disagree with D.P.’s position for the following reasons. I acknowledge D.P. suffered injuries in the accident. However, I find that the medical evidence demonstrates that those injuries are predominantly “minor injuries”.

ANALYSIS

- [17] I now turn to my analysis of the evidence of D.P.’s pre- and post-accident medical history and my reasons for the applicability of the MIG.

Medical History – Pre-accident

- [18] D.P. has a medical history including, but not limited to: type II diabetes and gastroesophageal reflux disease and “multiple complex medical issues, including her gastric bypass in 2011, gastrointestinal bleeding, diabetes since 2015, hypertension, hyperlipidaemia and obesity.”³ Prior to the subject accident, D.P. was taking several types of medications for various ailments and treatments.

Medical History – Post-accident

- [19] At the first post-accident visit on June 26, 2017, approximately two-weeks post-accident, D.P. presented with pain in her neck, left shoulder and left hip. At a second visit on September 29, 2017, Dr. Turner did not make any recommendations for treatment or prescribe medication.
- [20] On February 1, 2018, D.P. returned to Dr. Turner complaining of “pain all over” and that her “neck clicks,” for which she was prescribed Tylenol #3.⁴ D.P. complained of stress again on February 4, 2018, and stress and neck pain again at an April 27, 2018 visit.⁵ Again, no recommendations for treatment or prescriptions issued.

D.P. did not sustain physical injuries that remove her from the MIG

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

³ Dr. Weber Consultation Note, CNRs of Dr. Turner, at Tab 3 of the Applicant's Book of Exhibits, pg. 47-48

⁴ CNRs of Dr. Turner Tab 3 of the Applicant's Book of Exhibits, pg. 22

⁵ *Ibid*

- [21] Although D.P. has provided medical evidence confirming she sustained injuries as a result of the accident, none of this evidence shows that these injuries fall outside the MIG. To the contrary, the evidence submitted by both D.P. and Aviva confirms that D.P.'s physical injuries fall within the MIG.
- [22] My finding that D.P.'s physical injuries fall within the MIG is supported by the following evidence;
- (i) The disability certificate ("OCF-3"), dated June 24, 2017, was completed by Benson Ng, Chiropractor. The injuries listed in the OCF-3 are properly considered predominantly 'minor';⁶
 - (ii) In the report⁷ of Dr. Moolla, Physician, D.P. rated her pain complaints to Dr. Moolla as: neck pain, rated at 2/10, occasionally a 7/10 in severity, low back pain, rated at 2/10, occasionally a 7/10. Both the neck and back pain are relieved with Tylenol #3, with the intermittent back pain relieving spontaneously;
 - (iii) Additionally, D.P. reported to Dr. Moolla, independence with self-care, ie: toileting, dressing and feeding, personal hygiene, bathing, brushing, grooming and makeup application. She reported normal abilities with dusting, mopping, cooking, grocery shopping, bed making, wiping surfaces, sweeping, cleaning dishes and doing laundry;
 - (iv) I note that D.P.'s pre- and post-accident list of medications were the same, and D.P. did not point me to any evidence that the dosages were increased post-accident; and
 - (v) Lastly, Dr. Moolla's report noted that D.P. returned to work immediately on full-time duties after the accident;
- [23] D.P. has not directed me to any report, treatment plan, or other evidence suggesting that the injuries she suffered as a result of the July 2015 accident are not "minor injuries." Further, I am not persuaded by any medical evidence that D.P. was not able to reach maximum medical recovery under the MIG limit for the injuries sustained in the accident.
- [24] D.P. has therefore failed to persuade me that the physical injuries she sustained in the accident require treatment beyond that provided for in the MIG.

D.P. did not sustain psychological injuries that remove her from the MIG

⁶ OCF-3 injuries listed: whiplash associated disorder (WA02J with complaint of neck pain with musculoskeletal signs, other sprain and strain of cervical spine, strain and sprain of thoracic spine, sprain and strain of sacroiliac joint, sprain and strain of other and unspecified parts of lumbar spine and pelvis, sprain and strain of shoulder joint, low back pain, pain in thoracic spine, other sleep disorders and acute pain.

⁷ Physician Assessment Report of Dr. Moolla dated January 11, 2018

- [25] For the reasons that follow, I find that the evidence does not support the conclusion that her psychological impairments remove her from the MIG. My finding is based on the following:
- (i) Insurer Examination (“IE”) assessor, Psychologist, Dr. Weinberg, reported that D.P., “declined the need for any psychological intervention”⁸;
 - (ii) D.P. reported to Dr. Weinberg that she does not have any psychological impairments as a result of the accident. She reported she does not have any accident-related nightmares, and no problems with her sleep. Further, she continues to drive, and has not restricted her driving patterns;
 - (iii) D.P. also reported to Dr. Weinberg that she did not have any feelings of guilt or hopelessness, and she denied any change in her confidence and self-esteem. D.P. denied any changes in her mood or personality. D.P. also declined the need for psychopharmacological intervention;
 - (iv) D.P. noted that her psychological symptoms are not significantly affecting her ability to function effectively in her social, occupational or other important areas of functioning;
 - (v) It’s important to note that D.P. declined the need for any current psychological intervention, regarding any anxiety related to travelling in a vehicle or any psychological intervention as a result of the accident; and
 - (vi) Based on the objective testing conducted by Dr. Weinberg, the results indicated minimal levels of anxiety, that D.P. is emotionally stable and there were no signs of malingering or symptom fabrication or exaggeration.
- [26] Based on D.P.’s subjective complaints and the objective testing results, Dr. Weinberg concluded that D.P. does not suffer from any psychological impairment that would warrant a diagnosis as per the DSM as a result of the accident. I agree.
- [27] It should be noted that D.P. reported to Dr. Weinberg that much of her stress was related to the care of her ailing sister, her concern over a friend who had their legs amputated, and her self-reporting that she has always been a worrier. I find these unfortunate personal circumstances are not accident-related psychological impairments that would prevent D.P. from reaching maximum medical recovery under the MIG limits.
- [28] Although D.P. alleges that she sustained a psychological impairment as a result of the accident, she has not provided any medical evidence demonstrating that any psychological impairment was not sequelae of the “minor injuries” suffered

⁸ Dr. Weinberg, Psychological Assessment Report dated March 5, 2018

as a result of the accident. Therefore, she has not met the onus of establishing her entitlement to psychological treatment beyond the MIG limits.

Attendant Care benefits

- [29] Regarding the attendant care benefit, the attendant care benefit is not available, if the applicant falls within the MIG.⁹ I therefore find that D.P. is not entitled to an attendant care benefit as I have found that her physical injuries are subject to treatment under the MIG.

AWARD

- [30] Section 10 of Regulation 664 permits the Tribunal to award a lump sum of up to 50% of the amount to which the insured person (i.e. D.P.) was entitled at the time of the award together with interest on all amounts then owing (including unpaid interest) if it finds that that an insurer (i.e. Aviva) has “unreasonably” withheld or delayed payments.
- [31] D.P. contends that Aviva failed to uphold its duty to D.P. to handle and adjust her file in a fair and even-handed manner. D.P. submits that Aviva engaged in unreasonable conduct, namely: “failing to provide medical or other reasons why the treatment and assessments were not payable, as well as routinely and without justified reason, second-guessing clear medical findings and recommendations of specified health care providers; denying benefits contrary to medical recommendations; failing to adhere to the SABS, and taking an adversarial approach”.¹⁰
- [32] D.P. submits that by withholding or delaying payments of statutory accident benefits, Aviva engaged in conduct which was unreasonable. I have already found that D.P. is not entitled to the treatment plans and attendant care benefit, therefore Aviva cannot be found to have unreasonably withheld payment. As such, D.P. is not entitled to an award.

⁹ *Schedule* section 14(2)

¹⁰ Letter from Rooz Law to Insurer's Counsel re: Particulars of Special Award, dated July 19, 2019 at Tab 16 of the Applicant's Book of Exhibits, pgs. 130-133

CONCLUSION

- [33] D.P. sustained predominantly minor physical and psychological injuries that fall within the MIG. Accordingly, D.P. is not entitled to payment for the treatment plans or the attendant care benefit claimed in this application. D.P. is also not entitled to an award. Her application is dismissed.

Released: March 11, 2020

**Derek Grant
Adjudicator**