



Citation: Persaud v. Unifund Assurance Company, 2023 ONLAT 20-015016/AABS

Licence Appeal Tribunal File Number: 20-015016/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:

Brian Persaud

Applicant

and

Unifund Assurance Company

Respondent

DECISION

ADJUDICATOR: Bruce Stanton

APPEARANCES:

For the Applicant: Maziar Mortezaei, Counsel

For the Respondent: Geoffrey Keating, Counsel

HEARD By Way of Written Submissions

REASONS FOR DECISION

BACKGROUND

- [1] The applicant, Brian Persaud, was injured in an automobile accident on December 18, 2018. He claimed a cost of examination benefit (psychological assessment), pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”)¹, from the respondent, Unifund Assurance Company.
- [2] The respondent denied the claim and takes the position that the applicant’s injuries are predominantly minor and therefore subject to the \$3,500.00 Minor Injury Guideline (“MIG”) limit, for the cost of medical and rehabilitation treatments or costs of examination, prescribed by s. 3(1) of the *Schedule*.
- [3] As a result, the applicant applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”).

ISSUES IN DISPUTE

- [4] The following issues are to be decided:
- i. Are the applicant’s injuries predominantly minor injuries as defined in s. 3 of the *Schedule* and therefore subject to treatment within the MIG and the \$3,500.00 limit in s.18(1) of the *Schedule*?
 - ii. Is the applicant entitled to \$2,200.00 for a psychological assessment from Health-Pro Wellness proposed by Ms. Fahimeh Aghamohseni in a treatment plan (“OCF-18”) dated June 27, 2019?
 - iii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] The applicant sustained predominantly minor injuries in the accident.
- [6] The applicant failed to establish entitlement to accident benefits beyond the MIG and is therefore not entitled to the psychological assessment in dispute.
- [7] The applicant is not entitled to interest.

¹ O. Reg. 34/10.

ANALYSIS

The Minor Injury Guideline (“MIG”)

- [8] To be eligible for the treatment plan he seeks in this application, the applicant has the onus of proving, on a balance of probabilities, that the impairments he sustained in the accident were beyond “minor” as defined in the *Schedule*.
- [9] A “minor injury” is defined in s. 3(1) of the *Schedule* as, “one or more of a strain, sprain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury.” The terms, “strain,” “sprain,” “subluxation,” and “whiplash associated disorder” are defined in the *Schedule*.
- [10] Section 18(1) of the *Schedule* limits recovery for medical and rehabilitation benefits for predominantly minor injuries to \$3,500.00. It is the applicant’s burden to demonstrate entitlement to coverage beyond the \$3,500.00 cap, on a balance of probabilities.²
- [11] Section 18(5) clarifies that, for the purposes of 18(1), medical and rehabilitation benefits in respect of an insured person include all fees and expenses for conducting assessments and examinations, as may be contemplated in the treatment plan in dispute.
- [12] The applicant submits that he sustained serious and permanent injuries including chronic pain and psychological impairments from the accident that cannot be treated within the limits of the MIG. I disagree. As I will outline below, the medical evidence does not demonstrate the applicant suffered from chronic pain or psychological impairments from the accident.

Chronic Pain and the MIG

- [13] Chronic pain is not included in the definition of minor injury in s.3.1 of the *Schedule*. If the applicant proves he suffered chronic pain as a result of the accident, and that it was sufficient to rise to a non-minor injury, the psychological assessment in dispute should be approved. However, I find the evidence does not support a finding that the applicant suffered chronic pain as a result of the accident.

² *Scarlett v. Belair Insurance*, 2015 ONSC 3635, para. 24 (Div. Ct.).

- [14] The applicant directs me to *T.S. v. Aviva General Insurance Canada*³ in defining chronic pain as ongoing or recurrent pain lasting more than three to six months after an initial trigger injury. The applicant also claims that the Tribunal has accepted the the *American Medical Association Guides* (“*AMA Guides*”)⁴ criteria for determining whether an insured suffers from chronic pain. The *AMA Guides* direct that a chronic pain diagnosis would apply if a person met at least three of the following criteria:
- I. Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances;
 - II. Excessive dependence on health care providers, spouse, or family;
 - III. Secondary physical deconditioning due to disuse and or fear-avoidance of physical activity due to pain;
 - IV. Withdrawal from social milieu, including work, recreation, or other social contacts;
 - V. Failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family or recreational needs; and
 - VI. Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviors.
- [15] Although I am not bound to apply the *AMA Guides* criteria in assessing the applicant’s pain complaints, they are a helpful guide in determining whether the applicant’s pain rises to more than minor, and therefore, outside of the MIG.
- [16] The applicant submits that he has experienced ongoing pain for more than six months after the accident, and that he meets criteria’s II, IV, V and VI of the *AMA Guides*. However, he provides little substantive evidence to support this claim.
- [17] For example, criteria II of the *AMA Guides* includes having “excessive dependence on healthcare providers.” The applicant submits he meets criteria II by simply having had “regular treatments” at Health-Pro Wellness. He provides no evidence of the frequency or nature of these treatments. Even if I accept that the applicant may have been attending various health care providers during the

³ 17-000835 v. Aviva General Insurance Canada, 2018 CanLII 83520 (ON LAT)

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 6th Edition, 2008, pages 23-24.

period following the accident, no evidence has been provided to suggest the applicant was excessively dependent upon these services.

- [18] The applicant directs me to the psychological assessment report by Ms. Fahimeh Aghamohseni, Psychologist, of Health-Pro Wellness, conducted March 18, 2021, where the applicant reported his inability to play cricket, baseball, or walk several times per week. The applicant also reported greater difficulty caring for his daughter due to the physical pain and psychological effects of the accident.
- [19] Her report speaks of the applicant's social withdrawal, inability to return to work, and suffering of psychological impairments, as the basis of the applicant's injuries meeting criteria IV, V, and VI, and claims that no surveillance or other evidence suggest the contrary. However, I find the evidence from the applicant's family physician and two Insurer Examination assessors directly contradicts the applicant's claim. The evidence suggests that the applicant did go back to work after the accident, and his psychological and his social withdrawal symptoms did not begin until nearly two years after the accident.
- [20] I do not give Ms. Aghamohseni's report much weight. The assessment did not occur until two years and three months after the accident. This was after a subsequent accident in September 2019, and after other sources of psychological stress presented in the applicant's life which are further discussed below. Her report captures the applicant's self-reports of pain-related limitations. Further, the assessment was conducted online due to COVID-19 protocols and would not have provided Ms. Aghamohseni the opportunity to observe the applicant's current pain-related symptoms.
- [21] The applicant has failed to provide a convincing claim that his injuries met three or more of the AMA Guides criteria.
- [22] The applicant's earliest assessment of accident-related injuries was completed by Rob Tarulli, Chiropractor, of Health-Pro Wellness, on February 2, 2019, approximately six weeks after the accident. I attach weight to this evidence as the assessment comes relatively soon after the accident. It describes the applicant's impairments as sprain and strains of the thoracic spine, lumbar spine, sacroiliac joint, shoulder joint, and rotator cuff capsule; an impingement syndrome of the shoulder, acute pain, and malaise and fatigue. These impairments are consistent with minor injuries as defined in the *Schedule*. Mr. Tarulli also notes, on page four of the Disability Certificate OCF-3 he completed, that the disabilities he observed were expected to resolve within nine to twelve weeks, also consistent with the MIG.

- [23] The applicant refers me to the clinical notes and records of Dr. Sabha Cheema, family physician, starting May 28, 2019, approximately five months after the accident, through to July 3, 2021. At the applicant's appointment on May 28, 2019, she notes the applicant's reports of chronic pain and aches in the shoulder, neck, and lower back, arising from a motor vehicle accident of December 18, 2018. She advised the applicant to complete physiotherapy to increase mobility, and recommended x-rays if the pain persisted.
- [24] On June 18, 2019, the applicant attended a follow-up appointment with Dr. Cheema for parotitis (swelling of parotid glands), which had been detected in x-rays taken June 2, 2019. No mention is made of any treatments for musculoskeletal pain.
- [25] On July 2, 2019, the applicant visited Dr. Cheema to get a sick note so that he could care for his mother who was experiencing chronic pain. The necessity of obtaining a sick note suggests the applicant was working. The record showed no further complaints of pain.
- [26] I attach significant weight to Dr. Cheema's clinical notes and records given the frequency with which she assessed the applicant during the post-accident period. These records indicate the applicant's pain symptoms noted in May 2019 were resolved by July 2019.
- [27] Dr. Cheema's records reveal the applicant sustained injuries from a subsequent motor vehicle accident on September 24, 2019, and a slip and fall in December 2019.
- [28] This second motor vehicle accident resulted in the applicant reporting to Dr. Cheema on September 27, 2019, that he was experiencing stiffness/pain (level 8/10), and the applicant's lumbar vertebrae and lower back muscles were tender to the touch.
- [29] Dr. Cheema's notes and records from September to December of 2019 leave the impression that the applicant suffered a lower back impairment following the September 24, 2019 accident.
- [30] For example, on October 17th, Dr. Cheema noted the applicant had been experiencing lower back pain since the accident on September 24th. On November 7th, Dr. Cheema noted, "He still has LBP (lower back pain), but he wants to return to work at this point." She reached the same conclusion during a visit on November 22nd. Then, at an appointment on December 10th, the applicant reported a fall after work in the driveway that aggravated the previous

back injury. Following this appointment, the applicant was referred to an ENT (Ear – Nose – Throat) specialist, for the parotid gland enlargement issue, and advised to continue physiotherapy for the lower back pain.

- [31] At a March 16, 2020, appointment to review the ENT results, Dr. Cheema reported that her patient was, otherwise, doing well with no new complaints. Notably, there were no remaining complaints of lower back pain, indicating the back pain from the September 2019 accident had resolved.
- [32] Insurer Examination assessments of the applicant are consistent with Dr. Cheema's records in demonstrating the applicant's accident-related injuries were minor and he did not suffer chronic pain from the accident.
- [33] The Insurer Examination conducted by Dr. E. Silver, General Practitioner, on September 7, 2021, concluded the applicant, "... sustained uncomplicated soft tissue injuries to his shoulders and back as a result of the subject accident." The assessment took place in-person over 50 minutes. Dr. Silver is certified in Impairment and Disability Rating by the American Board of Forensic Professionals.
- [34] In his addendum report December 31, 2019, after a review of Dr. Cheema's clinical notes and records pertaining to the September 2019 motor vehicle accident, Dr. Silver noted the applicant, "... denied having any motor vehicle accidents or major physical traumas following the subject accident when I assessed him on September 7, 2021." Based on his review of these newly provided documents, Dr. Silver opined that, "...Mr. Persaud sustained minor soft tissue injuries to his shoulders and back as a result of the subject accident, which likely fully resolved prior to a subsequent motor vehicle accident in September 2019 ..."
- [35] The applicant underwent an Insurer Examination by Psychologist, Dr. Jay McGrory, on September 18, 2021. In Dr. McGrory's report, he describes the applicant's functionality as more capable than the description provided in Ms. Aghamohseni's report. Dr. McGrory reported that although the applicant continued to experience neck and back pain, he was taking no medication, he drove as required with no significant limitations, went to the gym approximately four times per week, walked his dog, and completed routine household tasks. He was able to care for his four-year old daughter's needs.
- [36] The applicant submits that by November 2019, nearly one year after the accident, he continued to suffer from multiple injuries and was diagnosed with ongoing musculoskeletal back pain, stiffness, limited range-of-motion and

difficulty ambulating and sleeping; all of it caused by the motor vehicle accident of December 18, 2018.

- [37] However, according to Dr. Cheema's notes, the pain symptoms the applicant was experiencing in November 2019 related to the motor vehicle accident of September 24, 2019 and those pain symptoms appear to have resolved by March 16, 2020.

Causation

- [38] In accident benefits disputes, the test for establishing causation is the "but for" test. It is well-settled that the leading case on causation was set out by the Divisional Court in *Sabadash v. State Farm*⁵, which is binding on this Tribunal. The applicant submits that the December 18, 2018 accident was the cause of his physical and psychological impairments yet the facts in the medical records and assessments suggest otherwise.
- [39] I must determine whether the applicant would not have had his physical and psychological impairments, but for the December 18, 2018 accident. According to *Sabadash*, the accident is not required to have been "the cause" of his impairments, it need only to have been a "necessary cause." Put another way, Mr. Persaud's December 18, 2018 accident must have been sufficient to cause his impairments, beyond minor injuries, but it need not have been the sole cause.
- [40] I find that the evidence does not establish that the December 18, 2018 accident was the necessary cause of Mr. Persaud's impairments beyond minor injuries. The chronic pain he reports to Dr. Silver in September 2021 has no evidentiary basis from the December 18, 2018 accident. The applicant would not have suffered chronic pain "but for" the accident.
- [41] The applicant bears the onus of establishing that as a result of the December 18, 2018 accident, he suffered impairments that exceed the definition of a minor injury. I find that the applicant has not met this burden. Dr. Cheema's records support a finding that the applicant sustained minor, soft tissue injuries in the subject accident that resolved within a matter of months. Likewise, Dr. Silver and Chiropractor Tarulli assessed the applicant's accident-related injuries as minor. The applicant may have continued to suffer pain, but he has failed to show that his pain complaints were accompanied by any functional impairment or were

⁵ *Sabadash v. State Farm et al.*, 2019 ONSC 1121 (CanLII)

more than the sequelae, or clinically associated consequences, of his minor injuries.

- [42] I find that the applicant has failed to prove on a balance of probabilities that he should be removed from the MIG as a result of chronic pain.

Psychological Impairment and the MIG

- [43] Psychological impairments, if established, fall outside the MIG, because such impairments are not included in the prescribed definition of “minor injuries”. It is the applicant’s onus is to show that he suffered a psychological impairment and that it was caused by the subject accident. The applicant has not provided medical evidence to meet this burden.
- [44] The applicant submits he suffered significant physical and psychological impairments, caused directly by the subject accident. The applicant relies on the conclusions of Ms. Aghamohseni, in her report of March 18, 2021, in which she diagnoses Mr. Persaud with major depressive disorder, somatic symptom disorder, and specific phobia.
- [45] Although Ms. Aghamohseni’s report attempts to conclude that the December 18, 2018 accident was the cause of the applicant’s psychological impairments, she provides no specific evidence linking Mr. Persaud’s psychological impairments to the subject accident, aside from his situational phobia.
- [46] She makes no mention of Mr. Persaud’s subsequent motor vehicle accident of September 24, 2019, his slip and fall in December 2019, or the circumstances the applicant described to Dr. Cheema and Dr. McGrory’s that could have contributed to the psychological symptoms he reported to Ms. Aghamohseni. Her lack of inquiry into other situational sources for Mr. Persaud’s reported anxiety and depression leave me to assign less weight to her report.
- [47] The applicant’s first indication of psychological symptoms was reported in Dr. Cheema’s clinical notes and records nearly two years after the accident; where the applicant reports feeling depressed at his October 3, 2020, appointment. Notes from this appointment indicate the applicant was currently not working, that he was at home caring for his mother who was dealing with illness, and his grandmother had passed away.
- [48] Medical evidence provided by Dr. Jay McGrory, reveals the applicant was laid off work in August 2020 and his employer attempted to terminate him. The applicant described experiencing difficulties with “stress” because of his “living situation”

and conflict within his family. Dr. McGrory concludes that Mr. Persaud's psychological symptoms are likely not related to the subject accident. With respect to the vehicular phobia, Mr. Persaud reported to Dr. McGrory that he is driving as required without significant psychological limitations.

- [49] I do not find Ms. Aghamohseni's conclusions about the cause of the applicant's impairments persuasive. Her assessment was lacking in any inquiry of the applicant's post-accident pain symptoms, it failed to note the applicant's first reported psychological symptoms arose nearly two years after the accident and did not include any discussion of the applicant's current difficulties with his living situation or family conflict.
- [50] I give more weight to Dr. Cheema's and Dr. McGrory's reports. In the case of Dr. Cheema, she had ongoing and regular appointments with the applicant over the span of time post-accident. Dr. McGrory's assessment inquired of and reported upon the current situational pressures the applicant was experiencing that could be the source of his psychological symptoms.
- [51] The respondent submits its denial of benefits beyond the MIG is supported by Dr. McGrory's Insurer Examination of September 18, 2021, in which he concluded there was no psychological diagnosis that is a result of the motor vehicle accident. I agree.
- [52] It is evident that the applicant is undergoing psychological strain and it is affecting his functionality, but he has not shown that his psychological symptoms were caused by the accident.
- [53] I find that the applicant has failed to prove on a balance of probabilities that he should be removed from the MIG as a result of a psychological impairment.

Treatment Plan for a Psychological Assessment

- [54] I find that it is unnecessary for me to consider whether the proposed assessment is reasonable and necessary, as I have concluded that the applicant's injuries fall within the MIG. The disputed treatment plan is not payable.

Interest

- [55] As there are no benefits owing, no interest is payable.

CONCLUSION

- [56] For the reasons outlined above, I find that the applicant has not established, on a balance of probabilities, that his accident-related injuries entitle him to treatment beyond the funding limits of the MIG.
- [57] As the sole the treatment plan in dispute proposes treatment outside of the MIG framework, the applicant is not entitled to this treatment plan or any interest on overdue payment of benefits.

Released: February 6, 2023

**Bruce Stanton
Adjudicator**