



Citation: Tumblood v. Aviva General Insurance Company, 2022 ONLAT 20-011538/AABS

Licence Appeal Tribunal File Number: 20-011538/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:

Edwin Tumblood

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

VICE-CHAIR:

Ian Maedel

APPEARANCES:

For the Applicant:

Darcie Sherman, Counsel

For the Respondent:

Bhavpreet Saini, Counsel

HEARD:

By Way of Written Submissions

BACKGROUND

- [1] The applicant was involved in an automobile accident on May 27, 2018 and sought benefits pursuant to the Statutory Accident Benefits Schedule – *Effective September 1, 2010 (including amendments effective June 1, 2016)* (“*Schedule*”). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).
- [2] The index accident occurred when the applicant was a seat-belted driver of a motor vehicle stopped at a red light. His vehicle was impacted by another in a rear-end collision. The air bags did not deploy, there was no loss of consciousness, and he did not seek medical attention until he attended his Family Physician the next day. The applicant immediately complained of pain in the neck, left shoulder and left back.
- [3] A case conference was conducted on June 16, 2021 and a written hearing was scheduled.

ISSUES

- [4] The issues to be decided in the hearing are:
 - i. Are the applicant’s injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the \$3,500.00 limit and in the Minor Injury Guideline (“MIG”)?
 - ii. Is the applicant entitled to \$1,977.05 for chiropractic and massage therapy recommended by Mackenzie Medical in a treatment plan submitted on September 19, 2018?
 - iii. Is the applicant entitled to \$1,384.70 for chiropractic and massage therapy recommended by Mackenzie Medical in a treatment plan submitted on November 14, 2018?
 - iv. Is the respondent liable to pay an award pursuant to Regulation 664 because it unreasonably withheld or delayed payments to the applicant?
 - v. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] I find that:

- i. The applicant's injuries are predominantly minor and therefore subject to treatment within the \$3,500.00 limit of the Minor Injury Guideline;
- ii. Given the applicant is within the MIG and the \$3,500.00 limit has been exhausted, the treatment plans in dispute are not payable;
- iii. The respondent is not liable to pay an award pursuant to Regulation 664;
- iv. The applicant is not entitled to interest on any overdue payment of benefits pursuant to s. 51 of the *Schedule*.

ANALYSIS

- [6] I am satisfied the applicant suffered soft tissue injuries that fall within the definition of a "minor injury", thus the treatment limit of the MIG applies.
- [7] The MIG establishes a framework available to injured persons who sustain a minor injury as a result of an accident. 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*.
- [8] Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to \$3,500.00. An applicant may receive payment for treatment beyond the \$3,500.00 limit if they can demonstrate that a pre-existing condition, documented by a medical practitioner, prevents maximal medical recovery under the MIG or if they provide evidence of a psychological impairment or chronic pain with a functional impairment. It is the applicant's burden to establish entitlement to coverage beyond the \$3,500.00 cap on a balance of probabilities.¹
- [9] The Disability Certificate dated May 31, 2018 completed by Ryan Pagnanelli, Chiropractor, lists a number of injuries as a direct result of the accident. These injuries include dislocation, sprain, strain of the joints at neck level, dislocation, sprain, strain of joints and ligaments of thorax, sprain and strain of joints and ligaments of the shoulder girdle, injury of muscle and tendon at neck level, injury of muscle and tendon at thorax level, injury of muscle and tendon of abdomen, lower back and pelvis, injury of muscle and tendon at shoulder and upper arm level, headache and other sleep disorders, acute stress reaction and

¹ *Scarlett v. Belair Insurance*, 2015 ONSC 3635, para. 24 (Div. Ct.).

nervousness. The anticipated duration of these injuries was 9-12 weeks.² Otherwise, I am not persuaded by this professional's diagnoses regarding sleep disorders, acute stress reaction and nervousness, as they fall beyond the scope of his practice as a chiropractor.

- [10] The applicant does not rely on any s. 25 expert reports, simply the clinical notes and records provided from the applicant's family physician and the treatment provider, Mackenzie Medical Rehabilitation. On May 28, 2018, the day after the accident, Dr. Rebecca Grunwald, Family Physician, noted the applicant suffering from pain the right neck, shoulder/back which started shortly after the accident. She further noted he had full range of motion in his shoulder and neck and right flank pain over his lower ribs. She concluded he had suffered soft tissue injuries of the neck, back, and shoulder, recommending physiotherapy, massage and Tylenol or Naproxen for pain.³
- [11] The clinical notes and records of Mackenzie Medical Rehabilitation noted at the initial consultation on May 31, 2018 that his prognosis was "fair" and he was suffering from sprain/strain of the cervical, thoracic, lumbar spine joints and associated muscles. The box checked indicated the case type was "MIG".⁴
- [12] On June 8, 2018, Dr. Grunwald noted he continued to suffer ongoing neck pain, but there was some improvement with intensive physio and no increased pain. She noted he had full range of motion in the neck that the applicant was still working as an interior designer and "has not affected work".⁵ When asked to complete the disability forms at the applicant's request, she questioned why they were necessary, as the patient "is functional and continuing with regular duties and work".⁶
- [13] In January 2019, the Family Physician noted the applicant was more tired, less interested in usual activities, vague generalized behaviour change, and memory impairment. When asked about these cognitive changes in February 2019, the applicant's wife indicated they were likely due to stress. Additionally, the applicant experienced back pain in September 2020 when he heard a "snap" in his lower back when untying his shoes.⁷ However, neither these cognitive symptoms nor back pain were referred for any additional investigation, and neither were linked to the accident in any way. By March 5, 2021, the applicant

² Applicant's Written Submissions, Tab 9.

³ Applicant's Written Submissions, Tab 6.

⁴ Applicant's Written Submissions, Tab 8.

⁵ Applicant's Written Submissions, Tab 6.

⁶ Ibid.

⁷ Applicant's Written Submissions, Tab 7.

noted continuing lower back pain, but indicated he had not been doing his recommended exercises, nor had he been attending physiotherapy due to COVID-19. The physician recommended back exercises.⁸

- [14] The only expert report tendered for this hearing was as a result of a s. 44 Insurer's Examination ("IE") conducted by Dr. Maria Nesterenko, Family Physician. The assessment was conducted October 30, 2018 and specifically related to the MIG and a treatment plan submitted.⁹ During the examination, the applicant reported a 20-30% improvement with regard to post-accident pain, but pain symptoms remained in his neck, back, right shoulder and right arm.¹⁰ Dr. Nesterenko diagnosed the applicant with cervical spine sprain/strain – WAD I/II, thoracic spine sprain/strain, right shoulder and right arm sprain/strain. She noted these were soft tissue injuries as a result of the accident and customary healing time was 8-12 weeks. She further noted no ongoing objective musculoskeletal impairment attributable to accident-related injuries and functional range of motion in the cervical and thoracolumbar spine, as well as both upper extremities. Finally, she opined that the applicant had achieved maximum therapeutic benefit from facility-based physical rehabilitation and similar care would not be expected to be of any additional therapeutic benefit.¹¹
- [15] I find the IE Report provided by Dr. Nesterenko compelling and persuasive, particularly given the applicant has failed to provide any s. 25 expert reports. This IE report specifically speaks to the MIG and whether the treatment is reasonable and necessary pursuant to the *Schedule*. Dr. Nesterenko specifically concluded there was no ongoing musculoskeletal impairment attributable to the accident. Otherwise, the clinical notes and records provided depict an applicant with soft tissue injuries that had largely resolved in the year following the accident. That is precisely why the applicant's family physician questioned the necessity of completing the disability forms, as early as June 2018. Similarly, the applicant has failed to establish any nexus between the cognitive issues experienced in January/February 2019, or the lower back pain suffered in September 2020 to the index accident.
- [16] Thus, I am persuaded the applicant's soft tissue injuries are predominantly minor and therefore subject to treatment within the \$3,500.00 limit of the Minor Injury Guideline.

⁸ Ibid.

⁹ Respondent's Submissions, Tab 6.

¹⁰ Ibid.

¹¹ Ibid.

- [17] However, given that the \$3,500.00 treatment limit was exhausted in August 2018, no additional analysis is required to determine if the two treatment plans at issue are reasonable and necessary pursuant to the *Schedule*.

Award and Interest

- [18] Given that no benefits are payable, the respondent cannot be found to have unreasonably withheld or delayed payment of benefits pursuant to s. 10 of Regulation 664. Thus, no award is payable.
- [19] Given there are no overdue payment of benefits, the applicant is not entitled to interest pursuant to s. 51 of the *Schedule*.

ORDER

- [20] The application is dismissed, and I find that:
- i. The applicant's injuries are predominantly minor and therefore subject to treatment within the \$3,500.00 limit of the Minor Injury Guideline;
 - ii. Given the applicant is within the MIG and the \$3,500.00 limit has been exhausted, the treatment plans in dispute are not payable;
 - iii. The respondent is not liable to pay an award pursuant to Regulation 664;
 - iv. The applicant is not entitled to interest on any overdue payment of benefits pursuant to s. 51 of the *Schedule*.

Released: June 14, 2022



Ian Maedel
Vice-Chair