



Citation: Takang v. Aviva General Insurance Company, 2022 ONLAT 20-009744/AABS

Licence Appeal Tribunal File Number: 20-009744/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:

Gabriel Takang

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: Brian Norris

APPEARANCES:

For the Applicant: Gabriel Takang, Applicant

Michael C. Agulefo, Paralegal

For the Respondent: Christina Chiu, Counsel

HEARD by Videoconference: October 14, 2021

OVERVIEW

- [1] Gabriel Takang, (“the Applicant”), was involved in an automobile accident on April 25, 2018, and sought benefits from Aviva Insurance Company, (“the Respondent”), pursuant to the Statutory Accident Benefits Schedule *Effective September 1, 2010 (including amendments effective June 1, 2016)* (“Schedule”)
- [2] The Respondent denied the Applicant’s claims because it had determined that all of his injuries fit the definition of “minor injury” as prescribed by s. 3(1) of the *Schedule* and, therefore, fall within the Minor Injury Guideline (MIG).¹ As a result, the Applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (“Tribunal”) for resolution of this dispute.

ISSUES

- [3] The issues to be decided in the hearing are:
1. 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?
 2. Is the Applicant entitled to attendant care benefits (“ACBs”) in the amount of \$1,795.60 per month from April 26, 2018 to April 25, 2020?
 3. Is the Applicant entitled to a medical benefit in the amount of \$2,811.37 for physiotherapy, recommended by HealthMax in a treatment plan (“OCF-18”) dated February 2, 2019?
 4. Is the Applicant entitled to a medical benefit in the amount of \$1,298.99, less \$948.97 approved by the Respondent, for physiotherapy, recommended by HealthMax in an OCF-18 dated October 20, 2018?
 5. Is the Applicant entitled to a medical benefit in the amount of \$1,388.45 for assistive devices, recommended by Princeton Hill Medical Assessments Inc. in an OCF-18 dated March 2, 2019?
 6. Is the Applicant entitled to a medical benefit in the amount of \$3,336.67 for psychological services, recommended by Injury Management and Medical Assessments in an OCF-18 dated November 22, 2018?

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

7. Is the Applicant entitled to a medical benefit in the amount of \$1,248.00 for occupational therapy services, recommended by Princeton Hill Medical Assessments Inc. in an OCF-18 dated March 2, 2019?
8. Is the Applicant entitled to a medical benefit in the amount of \$1,400.00 for an assessment of attendant care Needs (Form 1), recommended by Princeton Hill Medical Assessments Inc. in an OCF-18 dated March 4, 2019?
9. Is the Applicant entitled to a medical benefit in the amount of \$2,200.00 for a psychological assessment, recommended by Dr. J. Harris in an OCF-18 dated October 22, 2018?
10. Is the Respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the Applicant?
11. Is the Applicant entitled to interest on any overdue payment of benefits?

RESULT

- [4] I find that that Applicant sustained a minor injury as defined in the *Schedule*. As a result, he is subject to the \$3,500.00 funding limit on medical and rehabilitation benefits.
- [5] The Applicant is not entitled to the disputed treatment and assessment plans because he has exhausted the funding available to him pursuant to the MIG.
- [6] The Applicant is not entitled to an award or interest.

PROCEDURAL BACKGROUND AND PRELIMINARY ISSUE

- [7] The issues in dispute for this hearing were ordered to a combination hearing. It was ordered that written submissions would address all issues in dispute, but for the Applicant's entitlement to ACBs. That issue, and any additional closing submissions, would be made during the videoconference hearing.
- [8] According to the case conference report and order, the Applicant was ordered to serve written submissions and evidence upon the Respondent on or before August 16, 2021, and the Respondent was to serve its materials on or before September 20, 2021. The Applicant was given an opportunity to reply by no later than October 4, 2021.

- [9] The Applicant's submissions were served on September 13, 2021. The Respondent's submissions were served on by no later than September 21, 2021.
- [10] The Respondent requests via responding submissions, that the Applicant's submissions be struck as they were delivered nearly a month late, leaving the Respondent with only one week to deliver its response submissions. To the Respondent, the late production of the submissions amounts to a trial by ambush.
- [11] The Applicant had the opportunity for reply submissions but chose not to submit any.
- [12] Indeed, the Applicant's submissions were delivered late and in contravention of a Tribunal Order dated February 19, 2021. However, the Respondent suffered little prejudice as a result of the delay and delivered its submissions and evidence in a timely manner. Striking the Applicant's submissions entirely is an extreme measure that is disproportionate to the minor harm caused by the delay.

THE VIDEOCONFERENCE HEARING

- [13] The videoconference portion of the hearing commenced and the Applicant, through his counsel, advised that he would not call any witnesses. Counsel for the Applicant and Respondent made opening submissions and answered a few clarifying questions. Counsel then made closing statements.

BACKGROUND OF ACCIDENT AND INJURIES

- [14] The Applicant was the driver of a vehicle which was struck from behind while in the process of pulling over to the side of the road. His submissions state that the action was made in anticipation of an approaching emergency vehicle, however all reports indicate that he pulled over in order to make a U-turn.
- [15] The Applicant sought no medical attention on the date of the accident. He submits that he went to the hospital the following day but provided no record of this visit. Conversely, in the same submissions, the Applicant also submits that he never attended a hospital after the accident. Nevertheless, it appears that the Applicant started treatment at HealthMax Physiotherapy on April 28, 2018. However, no clinical notes and records, ("CNRs"), from this clinic were submitted for this hearing.
- [16] The Applicant visited his family physician, Dr. G. Smith, on May 14, 2018. The reason for the visit was for a follow-up regarding an abdominal ultrasound. The

CNRs for that visit do not mention the subject accident or any accident-related complaints.

- [17] The Applicant then saw, Dr. I. Shahin, physician, at a walk-in clinic on June 11, 2018. There, the Applicant complained of back and neck pain that started after the April accident and was worse the day before. An examination occurred and it was noted that the Applicant had normal range of motion, (“ROM”), but stiff trapezius muscles. He was diagnosed with whiplash and prescribed Naproxen, a pain medication. The Applicant visited his family physician, Dr. Smith, a few days later with complaints of shoulder pain, but Dr. Smith ruled out any rotator cuff injury. There is no mention of any pre-existing medical condition in this entry and there are no other visits noted between the subject accident and the June 11, 2018 visit. The subject accident is not mentioned in any other visits with Dr. Shahin or Dr. Smith.

The Minor Injury Guideline (MIG)

- [18] The MIG establishes a treatment framework available to injured persons who sustain a minor injury as a result of an accident. A “minor injury” is defined in the *Schedule* and includes sprains, strains, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae. The MIG provides that a strain is an injury to one or more muscles and includes a partial tear.
- [19] Minor injuries are subject to the treatment methodologies outlined in the MIG and, under section 18 of the *Schedule*, injuries that are defined as minor are subject to a \$3,500.00 funding limit on treatment. Pursuant to subsection 18(2), the funding limit does not apply if the Applicant’s health practitioner determines and provides compelling evidence that a pre-existing medical condition will preclude his recovery if subject to the MIG.
- [20] If an insurer deems an Applicant’s injuries to be minor in nature, the onus is on the Applicant to establish that the MIG, and the related funding limit, should not apply.
- [21] I find that the Applicant has not met his onus to demonstrate that his accident-related impairments require treatment beyond the MIG on the basis of chronic pain, psychological impairment, or pre-existing conditions.

Chronic Pain Syndrome

- [22] I find insufficient evidence demonstrating that the Applicant suffers from a chronic pain condition which would remove him from the MIG.
- [23] The Applicant submits that he has ongoing pain in his neck, shoulders, arms, hands, ankles and knees, more than three years post-accident. He submits that he has been consistent in recounting the accident and reporting his injuries and declining functional ability. However, I find no evidence indicating that the Applicant is impaired by ongoing pain or has been diagnosed with chronic pain syndrome or a chronic pain condition.
- [24] The family physician records provided by the Applicant are not indicative of a chronic pain condition which would warrant removal from the MIG. No physician diagnosed the Applicant with chronic pain syndrome, the CNRs make few references to the subject accident, and there is no reference to the subject accident after June 2018, when Dr. Shahin observed that the Applicant had normal ROM. Similarly, none of the CNRs and reports on record document any ongoing functional deficits as a result of pain. The Applicant returned to work on a full-time basis following the accident and provides no evidence that he required any accommodations at the workplace. The Applicant does not depend on healthcare providers, family, or prescription medication to cope with pain. There is no evidence that the Applicant has deconditioned due to pain and, as I will outline further below, the Applicant does not suffer from any psychological sequelae as a result of the subject accident.
- [25] The attendant care assessment report by registered nurse L. Listar, dated March 4, 2019 is unpersuasive evidence of a chronic pain condition which would remove the Applicant from the MIG. Nurse Listar is unqualified to diagnose any health conditions and can only report observed behaviour. However, the observations recorded and the recommendations provided in the report are incompatible with the other evidence. For example, the report notes that the Applicant has reduced range of motion in his shoulders, that is equal bilaterally in all planes. Yet, the Applicant reported to Dr. Siddiqui that his left shoulder is symptomatic and never mentioned the right shoulder. Similarly, the report notes that the Applicant is unable to don pants, socks, or shoes and requires assistance from his son for these tasks. The report also notes that the Applicant requires assistance with food preparation due to restricted standing and bending tolerances and is unable to reach higher shelves due to limited shoulder range of motion and he is unable to squat, kneel, or bend low to access lower cupboards.

This is in direct contrast to the other medical reports, all of which state that the Applicant is independent with his personal care tasks.

- [26] The occupational therapist report by L. Goldlust, dated May 21, 2019, appears to be a more accurate account of the Applicant's functionality. The report concludes that the Applicant demonstrated adequate functionality that required no assistance from an aide or attendant. The Applicant participated in range of motion testing during the assessment. Occupational therapist Goldlust determined that the Applicant fell within normal limits throughout, but for some mild to moderate left shoulder dysfunction. Contrary to the report by registered nurse Listar, the Applicant's ability to kneel, squat, and crouch was observed and unrestricted.
- [27] Dr. F. Siddiqui, physician, determined that the Applicant sustained a minor injury as described in the *Schedule* and required no assistance in order to complete his personal care tasks. In a report dated May 21, 2019, Dr. Siddiqui assessed the Applicant and noted that, despite the Applicant's complaints of left shoulder, neck, and back pain at a severity of 9/10, the Applicant's ROM and strength testing were all within normal limits and there was no evidence of any neurological or radicular issues.
- [28] Dr. Siddiqui maintained the opinion in an addendum report dated July 17, 2019. Dr. Siddiqui reviewed the clinical notes and records from Dr. Shahin and Dr. Smith for the addendum report but concluded that the Applicant would not benefit from any further facility-based treatment.
- [29] Thus, I am unable to conclude from the evidence that the Applicant suffers from a chronic pain condition.

Pre-Existing Medical Condition

- [30] I find insufficient evidence demonstrating that the Applicant's pre-existing health conditions preclude his recovery if subject to the MIG.
- [31] The Applicant submits that he should be removed from the MIG due to being HIV positive and suffering from hepatitis B. However, as submitted by the Respondent, the Applicant provides no submissions or evidence demonstrating that his pre-existing health status acts as a barrier for recovery. The Applicant disclosed the accident to his family physician on June 11, 2018 yet, the CNRs include no record of any comment or concern that the Applicant would have a prolonged recovery from soft tissue injuries as a result of his pre-existing health status.

- [32] The Disability Certificate by Dr. M. Takallou, chiropractor, dated September 15, 2018, is unconvincing evidence of a pre-existing health condition that would preclude the Applicant's recovery if subject to the MIG. While this document notes that the Applicant has pre-existing health conditions, it is unconvincing because Dr. Takallou is a chiropractor and is not qualified to comment on the impact, if any, that the Applicant's pre-existing health status would have on his soft-tissue injuries. In addition, the document does not pre-date the accident and is unaccompanied by the relevant CNRs which would help explain the reason(s) why or how Dr. Takallou concluded that the Applicant's recovery would be impacted by his pre-accident health status.
- [33] Dr. Siddiqui was aware of the Applicant's pre-existing health status and concluded that the Applicant sustained a minor injury. The May 12, 2019 report noted that the Applicant is HIV positive and takes medication for same. Yet, Dr. Siddiqui concluded that the Applicant sustained a minor injury and found no compelling evidence of a pre-existing medical condition that will prevent the Applicant from achieving maximal recovery if subject to the MIG. The fact that Dr. Siddiqui failed to note in the report that the Applicant disclosed his hepatitis B status does not detract from the conclusions therein. This is because Dr. Siddiqui's addendum report included a review of Dr. Smith's CNRs, which noted the Applicant's hepatitis B status. In the addendum report, Dr. Siddiqui maintained the opinion that the Applicant sustained a minor injury.
- [34] Ultimately, the Applicant provides no compelling opinion from a medical practitioner that indicates a prolonged recovery, or an inability to recover if subject to the MIG, due to his pre-existing health status.

Psychological Injuries

- [35] I find on a balance of probabilities that the Applicant does not suffer from a psychological injury as a result of the subject accident.
- [36] I prefer the report and addendum of Dr. A. Syed, psychologist and clinical notes and records of Dr. Smith, over the report by Dr. R. Harris, psychologist, dated November 5, 2018. I afford Dr. Harris' report less weight as it is anomalous to the remaining medical records.
- [37] Dr. Smith's CNRs partly explain the nightmares reported and do not demonstrate that the Applicant sustained a psychological injury. The CNRs document three instances where the Applicant made psychological complaints as a result of the accident. First, the Applicant complained of nightmares and mild post-traumatic

stress disorder, ("PTSD"), during a visit on March 18, 2019. However, Dr. Smith found the Applicant's mood was "ok," made no referral for any specialist intervention and there is no mention of the accident in the clinical entry for the visit. The second occurrence was on February 21, 2020, where it is noted that that Applicant has been experiencing increased dreams since starting his HIV medication and doesn't want to talk about ongoing stress. The CNRs note that the Applicant reported feeling well otherwise and his mood was "n", which I conclude means normal. There is no mention of the subject accident in this entry. Last, the Applicant again complained of nightmares on March 30, 2020, but noted that they were not as bad as when he was off his HIV medication. To me, this suggests that the Applicant's nightmares are most likely due to his HIV medication and not the subject accident. Further, I conclude from Dr. Smith's inaction that the Applicant's psychological complaints do not raise to the level to warrant any investigation or treatment. The three complaints, which make no reference to the subject accident, are insufficient evidence of an accident-related psychological injury because there is no connection between them and the accident.

- [38] I find that the psychological reports of Dr. Syed and Dr. Harris are unconvincing evidence of a psychological injury which would remove the Applicant from the MIG. Looking at the reports together, it appears that the Applicant over-reports his symptoms to assessors and provides an inaccurate account of his accident-related injuries. For example, the reported to Dr. Syed that he had high levels of pain, 9 out of 10, 10 being unbearable, but the CNRs of his family physician, note only one accident-related complaint. Likewise, Dr. Harris' report found that the Applicant suffered from PTSD and scored in the severe range for depression and anxiety, but there is no indication in any other medical records that suggests he suffers from such severe symptomology. While the Applicant reports to assessors that he drives less frequently than prior to the accident, he never mentioned this ongoing phobia to his family physician and continues to drive. As noted previously, the Applicant regularly saw Dr. Smith but was never referred for any psychological or psychiatric consultations.
- [39] In the May 2, 2019 report, Dr. Syed ruled out an Adjustment Disorder with Mixed Anxiety and Depressed mood due to unreliable and invalid findings on evaluation. The report notes that the Applicant's answer to the psychometric testing were infrequent and atypical, and his validity measure scores were indicative of feigning psychological impairment. In conclusion, Dr. Syed found no objective psychometric evidence to substantiate the Applicant's subjective self reports of psychological impairment related to the accident. Dr. Syed's

conclusion that there was no evidence to substantiate the Applicant's subjective self reports, remained the same after reviewing Dr. Smith's CNRs. This is noted in the addendum report dated July 17, 2019. It is also noted in Dr. Harris' report that the Applicant reported a history of depression prior to the accident. Yet, no records before me suggest a history of depression and the Applicant denied any pre-accident psychological issues to Dr. Syed.

- [40] Considering the Applicant's inconsistent reporting to healthcare professionals and the elevated psychometric validity test scores, I conclude that the level of psychological disability identified in Dr. Harris' report is not an accurate account of the Applicant's psychological health, as it relates to the subject accident. Indeed, the Applicant reported symptoms of depression, anxiety, and post-traumatic stress to assessors but most of the complaints concern issues that are unrelated to the accident such as his ongoing need to manage his health due to his HIV status, or ongoing familial issues that do not stem from the subject accident.

ACBs THE DISPUTED TREATMENT AND ASSESSMENT PLANS

- [41] The Applicant is subject to the MIG and the \$3,500.00 funding limit on treatment. Attendant care benefits are not available to the Applicant as they are limited to people who sustain an injury that is not a minor injury. The disputed treatment and assessment plans are not reasonable and necessary as they are for goods and services that fall outside the MIG.

AWARD

- [42] Pursuant to section 10 of *O. Reg. 664*, the Applicant may be entitled to an award if the respondent unreasonably withheld or delayed payment of a benefit. Having found no benefits payable, it follows that no award is payable as no payments were unreasonably withheld or delayed.

CONCLUSION AND ORDER

- [43] The Applicant was involved in a rear-end collision and sustained soft tissue injuries as a result. He has not developed a chronic pain or psychological condition that would remove him from the MIG and the \$3,500.00 funding limit on treatment. There is no evidence that demonstrates that Applicant's pre-existing

health condition would preclude his recovery if subject to the MIG and the \$3,500.00 funding limit on treatment.

[44] No interest is payable as no payments went overdue.

[45] The Applicant is not entitled to an award.

[46] The Application is dismissed.

Released: June 29, 2022



Brian Norris
Adjudicator