



**Citation: Yanovych v. Aviva Insurance Company, 2024 ONLAT 22-000098/AABS**

**Licence Appeal Tribunal File Number: 22-000098/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:

**Maksym Yanovych**

**Applicant**

and

**Aviva Insurance Company**

**Respondent**

**DECISION**

**ADJUDICATOR: Tami Cogan**

**APPEARANCES:**

For the Applicant: Alexei Antonov, Counsel

For the Respondent: Geoffrey Keating, Counsel

**HEARD: In Writing**

## OVERVIEW

- [1] Maksym Yanovych, the Applicant, was involved in an automobile accident on December 2, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”). The Applicant was denied benefits by the Respondent, Aviva Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

## PRELIMINARY ISSUES

- [2] **The preliminary issues to be decided are:**

1. Is the Applicant barred from bringing an application for any of the treatment plans in question when he has failed to attend multiple s. 44 Insurer’s Examination assessments?
2. Should the Applicant be prevented from claiming some treatment plans because they are for the same services as others?

- [3] **Results of the preliminary issues:**

1. The Applicant is not barred from proceeding with his application.
2. The Applicant may proceed with all issues in dispute, as listed below.

## SUBSTANTIVE ISSUES

- [4] **The substantive issues to be decided 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 Minor Injury Guideline (“MIG”) limit? Note: \$2,204.96 has been paid under the MIG limit.
- ii. Is the Applicant entitled to \$\$2,200.00 for a psychiatric assessment, proposed by Physiomed in a treatment plan/OCF-18 (“plan”) that was denied on February 25, 2020?
- iii. Is the Applicant entitled to \$2,000.00 for a psychological assessment, proposed by Downsview Healthcare in a plan that was denied on September 21, 2020?

- iv. Is the Applicant entitled to \$2,000.00 for an orthopedic assessment, proposed by Downsview Healthcare in a plan that was denied on September 21, 2020?
- v. Is the Applicant entitled to \$2,000.00 for a chronic pain assessment, proposed by Downsview Healthcare in a plan that was denied on October 5, 2020?
- vi. Is the Applicant entitled to \$1,733.72 for physiotherapy services, proposed by Physiomed in a plan that was denied on January 4, 2021?
- vii. Is the Applicant entitled to \$2,887.14 for psychological services, proposed by Downsview Healthcare in a plan that was denied on January 28, 2021?
- viii. Is the Applicant entitled to \$1,981.70 for a driving rehabilitation assessment, proposed by Downsview Healthcare in a plan that was denied on January 28, 2021?
- ix. Is the Applicant entitled to \$12,918.49 for multi-disciplinary chronic pain treatment, proposed by Downsview Healthcare in a plan that was denied on February 22, 2021?
- x. Is the Applicant entitled to \$1,555.20 for physiotherapy services, proposed by Downsview Healthcare in a plan that was denied on April 12, 2021?
- xi. Is the Applicant entitled to \$1,577.00 for physiotherapy services, proposed by Physiomed in a plan that was denied on February 9, 2021?
- xii. Is the Respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the Applicant?
- xiii. Is the Applicant entitled to interest on any overdue payment of benefits?

[5] **Results of the Substantive Issues:**

- i. The Applicant sustained a predominantly minor injury as a result of the accident. He remains within the MIG and is subject to its \$3,500.00 limit on treatment.
- ii. The Applicant is entitled to the benefits set out in the disputed treatment plans, once incurred, up to the remaining amount of the MIG limit, plus interest in accordance with s. 51 of the *Schedule*, as such benefits are deemed reasonable and necessary pursuant to s. 40(8) of the *Schedule*.

- iii. No award under s. 10 of Regulation 664 is payable.
- iv. The application is dismissed.

## **ANALYSIS**

### **Preliminary Issues:**

#### ***Is the application barred under s. 55 of the Schedule?***

- [6] The Applicant is not barred from proceeding with his application pursuant to Section 55(1)2 of the Schedule.
- [7] The Respondent submits that the Applicant should be barred from bringing an application to dispute any of the treatment plans in question because he has failed to attend multiple s. 44 Insurer's Examination assessments ("IEs"). The Applicant submits that he has complied by attending three IEs in 2023 and should be allowed to dispute the issues in the application.
- [8] Section 44(1) of the Schedule provides that, for the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit for which an application is made, but no more often than is reasonably necessary, an insurer may require an insured person to be examined by one or more persons chosen by the insurer who are regulated health professionals or who have expertise in vocational rehabilitation.
- [9] Section 55(1)2 of the Schedule provides that an insured person shall not apply to the Tribunal if the insurer has provided the insured person with notice that it requires an examination under s. 44, but the insured person has not complied. The onus is on the insured person to put forth a reasonable explanation for non-attendance at an IE. The Tribunal may, under s. 55(2) of the Schedule permit an insured person to apply to the Tribunal despite a failure to comply with s. 44, subject to terms and conditions.
- [10] In order for an insurer to invoke its s. 44 right to an IE, it must first provide a legally sufficient notice pursuant to s. 44(5). If the Respondent's notice does not comply with s. 44(5), an insurer cannot rely on the remedy available in s. 55 of the Schedule to bar an insured's application from proceeding before the Tribunal.
- [11] I have no evidence before me that supports a conclusion that the Respondent provided notice pursuant to s. 44(5). The Respondent has submitted letters of denial which indicate the s. 44 IEs may be scheduled, and letters of "Notice of Examination by Insurer", but none of these documents provides information as to

whether the Applicant must attend in-person, the date, time, location, or identifies the assessors. Based on the evidence before me, I cannot determine on a balance of probabilities that the Respondent's notices were sufficient in accordance with s. 44(5) of the Schedule.

- [12] Given that I am not satisfied that the notices were in compliance with s. 44 of the Schedule, it is not necessary for me to analysis whether the IEs were reasonably necessary and whether the Applicant had a reasonable explanation for his non-attendance.
- [13] I find the Applicant may proceed with his application for the issues in dispute as outlined above.

***Are there issues which are duplicative?***

- [14] The Applicant may proceed with all substantive issues in dispute.
- [15] At the Case Conference the Respondent identified the preliminary issue of whether various issues are duplicative, and whether the Applicant should be permitted to dispute only one of those issues.
- [16] The Respondent has not addressed this issue in its submissions.
- [17] I find that although the issue was identified at the case conference, the Respondent has not pursued this issue in the hearing. Without submissions in opposition, I find the Applicant may proceed on all substantive.

**Substantive Issues:**

**Issue 1: *Minor Injury Guideline ("MIG")***

- [18] I find the Applicant sustained predominantly minor injuries as a result of the subject accident. He remains within the MIG and is subject to its \$3,500.00 limit on treatment.
- [19] 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 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." Under section 18 of the *Schedule*, injuries that are defined as minor are subject to a \$3,500.00 funding limit on treatment.

- [20] The onus is on the Applicant to demonstrate that he sustained an injury that is not included in the minor injury definition or that he has a pre-existing health condition that would preclude him from reaching maximal recovery if subject to the MIG and the \$3,500.00 funding limit on treatment.
- [21] The treatment and assessment plans in dispute propose treatment that falls outside the MIG. Thus, the Applicant's entitlement to them is contingent on a finding that his injuries are not included in the minor injury definition. If so, the Applicant must then demonstrate that the treatment and assessment plans are reasonable and necessary on a balance of probabilities.
- [22] The Applicant submits that as a result of the accident he suffers from chronic pain with functional impairment and sustained a psychological impairment, which entitle him to treatment beyond the MIG limit.
- [23] The Respondent submits the Applicant does not meet the criteria for chronic pain, and the psychological impairment is not corroborated by objective medical evidence, concluding that the Applicant's accident-related injuries fall within the definition of minor injuries and treatment should be subject to the MIG limit.

### ***Chronic Pain***

- [24] I find that the Applicant has failed to prove, on a balance of probabilities, that he sustained chronic pain with functional impairment, from his injuries sustained in the subject accident.
- [25] Chronic pain with functional limitations is not included in the minor injury definition and a finding that the Applicant sustained chronic pain with functional limitations as a result of the accident would permit him to seek treatment outside of the MIG and beyond the \$3,500.00 funding limit provided by the MIG. The American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides") provide criteria for evaluating a chronic pain condition. While the AMA Guides are not a definitive test to determine if someone suffers from chronic pain, they provide a helpful tool in that they set forth that a person must meet at least three of six criteria to support a diagnosis of chronic pain. These criteria are:
- 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 contracts.
  - 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.
  - vi. Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviours.
- [26] The Applicant relies on a Disability Certificate (OCF-3) completed on January 13, 2020, which listed all the Applicant's injuries. The Applicant relies on the s. 25 assessment of Dr. Dimitri Louvish conducted on November 14, 2020, which suggests the Applicant has chronic pain syndrome and recommends he should be removed from the MIG.
- [27] The Respondent submits that the clinical notes and records of the treating physicians do not support a finding of chronic pain with functional limitations. The Respondent relies on the s. 44 assessment of Dr. Oshidari, Physiatrist, conducted March 20, 2023, which concludes that the Applicant's injuries were within the definition of MIG and can be treated under the MIG limit. The Applicant did not report any functional limitations or conditions that would satisfy any of the six criteria outlined in the AMA Guides.
- [28] I have read the OCF-3 to which the Applicant referred. I see no reference to any injuries on the document. Dr. Shaikh checked off boxes but did not provide any comment or reasons for the indications he had made. He did refer to an OCF-1, however, that document is not in evidence. Without information to support or explain why the Doctor made the indications, I give the document minimal weight.
- [29] I have reviewed the clinical notes and records (CNRs) from Vital Urgent Care Medical Centre, Trillium Health Partners, and St. Joseph's Healthcare, as submitted into evidence. The Applicant saw doctors on eight occasions between the accident on December 2, 2019, and Dr. Louvish's assessment on November 14, 2020. The Applicant's treating physicians identify reports of ongoing pain, but do not document any complaints of functional limitations. The treating physicians investigated the Applicant's injuries, which included diagnostic imaging; however, the only diagnosis was soft tissue injuries, and he was not referred to any specialists.

- [30] Based on the medical records in evidence, the Applicant reported functional limitations only to the s. 25 assessors. He reported limitations in housekeeping and groundskeeping tasks resulting in reliance on his roommates, as well as reduction in his social activities due to his post-accident pain. The assessment of Dr. Louvish does not make a diagnosis of chronic pain, but instead *suggests* that the Applicant has developed chronic pain syndrome based on his examination and the Applicant's reported symptoms. Dr. Louvish opines the Applicant should not be subject to the MIG treatment funding limit.
- [31] Dr. Oshidari's report is based on an examination on February 10, 2023. The Applicant reported being independent in all activities of daily living, and not taking any medication, although he does continue to experience discomfort and pain. Dr. Oshidari concluded the Applicant's injuries are subject to the MIG. I find the report of Dr. Oshidari more persuasive than Dr. Louvish's report. Dr. Oshidari's report is consistent with the CNRs of the Applicant's treating physician.
- [32] The Applicant has not directed me to any evidence of his use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances. I have not heard evidence to suggest he has an excessive dependence on health care providers, family, or friends. He reported that he is independent in his daily activities, which does not suggest physical deconditioning due to disuse or fear-avoidance of physical activity due to pain. The only report of withdrawal from socializing, work, or recreation was made to Dr. Louvish. The Applicant also reported to several doctors that he had returned to work. The only report of psychological symptoms was made to Dr. Burnshaw on October 28, 2020.
- [33] Although the Applicant's ongoing pain is well documented, on a balance of probabilities I cannot find that the Applicant has functional limitations or condition(s) that rise to the level of an impairment. The Applicant has not met his burden of proof that he has chronic pain with functional impairment, and on this criterion remains subject to the MIG.

### ***Psychological Impairment***

- [34] I find the Applicant has not suffered a psychological impairment as a result of the accident and is subject to the MIG limit.
- [35] Psychological impairments are not included in the minor injury definition and a finding that the Applicant sustained psychological impairment as a result of the accident would permit him to seek treatment outside of the MIG. An impairment is defined in s. 3(1) of the *Schedule* as a "loss or abnormality of a psychological, physiological or anatomical structure or function."
- [36] It is the Applicant's position that he has been diagnosed with Adjustment Disorder with mixed anxiety and depressed mood, by Dr. Jacqueline Burnshaw,



Psychologist. Based on a psychological impairment he should not be subject to treatment under the MIG limit.

- [37] The Respondent's position is that the Applicant remains subject to the MIG, and relied on the Insurer's Examination conducted by Dr. Medhi Lotfalizadeh, Psychologist on September 12, 2023, which opines there is no accident-related psychological impairment.
- [38] In my review of the evidence, Dr. Brunshaw's report is based on her assessment of the Applicant which took place on October 28, 2020. When reporting his physical pain and sleep, the Applicant did not mention that his treating physicians had prescribed muscle relaxants to be taken at bedtime. It is unclear to me if his description of his difficulty sleeping is with or without taking the medication. The Applicant reported mood changes since the accident, concerns about driving, and difficulty with concentration and memory. Dr. Burnshaw notes that the Applicant's test scores indicated low levels of emotional distress, but his interview suggested his emotional distress was more significant. The Applicant's reported symptoms to the s. 25 assessors are isolated and unsupported by the remaining evidence. The Applicant did not report psychological symptoms to his other treatment providers;
- i. December 5, 2019, at Trillium Health Partners, the doctor noted in his objective findings - no distress.
  - ii. His treating physicians also noted on December 9, and 14, 2019 that other than his pain, he was doing well. On February 10, and June 24, 2020, he reported working for Uber. In his 8 appointments with his treating physicians, between the date of the accident and the s. 25 assessments in October 2020, he did not report any anxiety, depression, or other psychological symptoms.
  - iii. During the assessment with Dr. Lotfalizadeh, the Applicant's test scores identified mild depression, anxiety, and disability, which is consistent with the findings of Dr. Burnshaw's testing. However, the Dr. Lotfalizadeh opined the Applicant did not sustain a psychological impairment as a result of the accident, and his symptoms do not rise to the level of requiring treatment.
- [39] I prefer the evidence of Dr. Lotfalizaden, which is consistent with the lack of symptoms reported to the Applicant's physicians.

[40] I note that despite some mild symptoms the Applicant continues to drive his car, is employed, and is independent with tasks of daily living. I find that there is insufficient evidence to conclude that the Applicant's psychological symptoms rises to the level of a psychological impairment that would warrant removal from the MIG.

### ***Treatment Plans and Interest***

[41] Having found that the Applicant remains in the MIG, s. 40(8) of the *Schedule* applies and accordingly, the Applicant is entitled to the benefits set out in the disputed treatment plans, if incurred, up to the remaining amount of the MIG limit, plus interest in accordance with s. 51 of the *Schedule*.

### ***Award***

[42] The Applicant submits an award is owing pursuant to s.10 of Regulation 664 because the insurer unreasonably withheld and delayed payment of benefits.

[43] The Respondent submits that it has properly responded to the submitted treatment plans in question.

[44] I find the respondent's conduct does not rise to a level worthy of an award. As 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. Therefore, no award is payable.

### **CONCLUSION AND ORDER**

[45] I order the following:

- i. The Applicant sustained a predominantly minor injury as a result of the subject accident. He remains within the MIG and is subject to its \$3,500.00 limit on treatment.
- ii. The Applicant is entitled to the benefits set out in the disputed treatment plans, if incurred, up to the remaining amount of the MIG limit, plus interest in accordance with s. 51 of the *Schedule*.

- iii. The Respondent is not liable to pay an award.
- iv. This application is dismissed.

**Released:** March 13, 2024

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**Tami Cogan**  
Adjudicator