LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

Tribunal File Number: **17-002501/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:

S. S. K.

Applicant

And

TD Home and Auto Insurance Company

Respondent

HEARING DECISION

Adjudicator:	Ian Maedel
Appearances:	Jordan Mintz, Counsel for the Applicant
	Patrick M. Baker, Counsel for the Respondent
Heard in writing on:	August 23, 2017

OVERVIEW

[1] The applicant was injured in a motor vehicle collision on October 14, 2015. As a result of the accident, the applicant suffered muscle strain, paraspinal tenderness, mild crepitus of the left knee and pain in the left foot.[1] The applicant also claims that she suffers from a pre-existing condition in her right shoulder and neck. The insurer, TD Home and Auto, determined that she had suffered predominantly "minor injury" and is subject to the $3,500 limit for medical benefits as set out in the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "Schedule").

[2] The applicant submitted an application to the Licence Appeal Tribunal ("LAT") on April 26, 2017, following the denial of a treatment plan for physiotherapy. The respondent denied this treatment plan based on a multidisciplinary insurer's examination finding that her injuries are predominantly minor and that she had almost exhausted the $3,500 treatment limit. The applicant submits that her injuries are not predominantly minor. If they are, the applicant submits that she has a pre-existing condition and is entitled to higher limit since she would not be able to recover if subjected to the $3,500 limit. She claims entitlement to payment for the treatment plan in question, payment for an orthopedic examination and interest on overdue benefits.

[3] The major issue in dispute between the parties is whether the applicant has predominantly minor injuries. To resolve this issue I must first look at the nature of the injuries the applicant suffered in the accident. If those injuries meet the Schedule definition of "minor injury" then I must consider if there is compelling evidence that the applicant had a documented pre-existing medical condition that would limit her recovery. Finally, if she satisfies both of these tests, I must consider if the medical benefits she seeks are reasonable and necessary.

[4] Having reviewed the evidence, I find that the applicant suffered predominantly minor injuries. There is no compelling evidence that she suffered from a pre-existing medical condition that would limit her recovery. Having made these findings, I do not need to consider the reasonableness and necessity of medical benefits.

ISSUES TO BE DECIDED

[5] The following are the issues to be decided:

a) Has the applicant sustained a minor injury as defined under the *Schedule* as a result of the accident?

[1] Respondent's Submissions. Tab 3. Records of Dr. Manocharan. October 16, 2015.

b) Is the applicant entitled to a medical benefit in the amount of $1,305.00 for physiotherapy services recommended by Divine Life Physio and Rehab Clinic, in a treatment plan submitted to the respondent on July 20, 2016 and denied August 2, 2016?

c) Is the applicant entitled to the cost of an orthopaedic assessment in the amount of $3,785.50 recommended by Allied Med, in a treatment plan submitted to the respondent on August 11, 2016 and denied on October 4, 2016?

d) Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[6] Based on the totality of the evidence before me, I find that the applicant has sustained a minor injury pursuant to section 3 of the Schedule and the injuries sustained fall within the *Minor Injury Guideline* ("MIG"). The applicant has not adduced compelling evidence to establish a pre-existing medical condition which would place her outside of the MIG. As a result, I need not consider the reasonableness and necessity of the proposed treatment plans.

[7] The applicant is not entitled to payment of interest, as there are no overdue benefits outstanding.

FACTS

[8] The applicant was involved in a motor vehicle collision on October 15, 2015 when her vehicle was rear-ended and forced into the vehicle directly in front of her. As a result of the accident she suffered whiplash associated disorder (WAD2) with pain on the left side of her body including muscle strain, paraspinal tenderness, mild crepitus of the left knee and pain in the left foot.[2]

[9] On October 22, 2015, a Disability Certificate (OCF-3) was completed by Anita Daxini, Physiotherapist. She noted that the applicant was previously suffering from neck pain and that the anticipated duration of the disability was 9-12 weeks.[3]

[10] On July 20, 2016, a Treatment and Assessment Plan (OCF-18) was completed by Kelly Caverly, Chiropractor, in the amount of $1,305.00. The Chiropractor did not note any pre-existing disease, condition or injury that could affect the applicant's treatment. No barriers to recovery were identified and it was noted that the patient had been attending chiropractic care since the motor vehicle accident.[4]

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[2] Respondent's Submissions. Tab 3. Records of Dr. Manocharan. October 16, 2015. Applicant's Submissions. Tab 6. Disability Certificate (OCF-3).

[3] Applicant's submissions. Tab 6. Disability Certificate (OCF-3).

[4] Applicant's submissions. Tab 7. Treatment and Assessment Plan (OCF-18).

[11] On August 11, 2017, a Treatment and Assessment plan (OCF-18) was submitted by Dr. Michael West, Orthopaedic Surgeon, for completion of an orthopaedic assessment in the total amount of $3,785.50.

[12] In response to these treatment plans, the insurer required the applicant to attend for a section 44 Insurer's Examinations ("IE") scheduled for September 13 and 19, 2016. As a result, a multidisciplinary report containing the findings of Dr. Neetan Alikhan, General Practitioner, and Dr. Godwin Lau, Psychologist, was issued September 27, 2016. Dr. Alikhan noted the applicant suffered predominantly soft tissue injuries and both practitioners determined her injuries fell within the treatment limits of the MIG.[5]

[13] Based on the multidisciplinary report, the respondent denied treatment for the two treatment plans in dispute. Following the denials, the applicant attended for an orthopaedic assessment with Dr. Michael West, Orthopaedic Surgeon, who provided a report dated December 8, 2016. He was of the opinion that the applicant would require treatment exceeding the MIG limits.[6]

[14] The applicant was also referred by his family doctor to Dr. Lawrence Chizen, Physiatrist. Dr. Chizen provided a brief report dated March 28, 2016, in which he recommended additional pool exercises, stretching and strengthening routines and made no comment with regard to treatment and the MIG limits.[7]

[15] The applicant sought and was approved for other treatment within the MIG. To the date of the respondent's submissions, she still had $744.45 in funds remaining within the MIG limit of $3,500.00.[8]

[16] The applicant submits that the IE assessors overlooked critical evidence regarding the applicant's pre-existing medical condition, and as a result she was prejudiced by the respondent's wrongful denial of benefits. This forced her to obtain a medical assessment from Dr. West, who correctly diagnosed the need for further treatment outside of the MIG.

[17] The respondent submits that the applicant has suffered predominantly minor injuries as defined by the *Schedule*. It submits that the applicant failed to provide necessary clinical notes and records to the insurer's assessors in a timely manner. This is contrary to the applicant's duty of good faith and a negative inference must be drawn in this proceeding. The respondent further submits that the applicant has failed to provide compelling evidence of a pre-existing medical condition and the treatment plans in dispute are not reasonable and necessary.

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[5] Respondent's Submissions. Tab 2. Multidisciplinary Report. Pages 9-10, 16-17.
[6] Respondent's Submissions. Tab 12. Report of Dr. West. Page 8.
[7] Respondent's Submissions. Tab 4. Report of Dr. Chizen. Page 2.
[8] Respondent's submissions. Page 3, para. 11.

ANALYSIS

Late Productions and the Insurer's Examination Reports

[18] The dispute involves a treatment plan and a cost of assessment. The parties rely on a total of four reports from medical professionals. The applicant relies on the reports of Dr. Michael West, Orthopaedic Surgeon dated December 6, 2016 and the report of Dr. Lawrence Chizen, Physiatrist, dated March 28, 2016. The multidisciplinary report tendered by the respondent contains findings from Dr. Neetan Alikhan, General Practitioner and Dr. Godwin Lau, Psychologist, this report is dated September 27, 2016.

[19] The applicant submits that the findings of Dr. Alikhan must be rejected, as he failed to consider the applicant's chiropractic treatment prior to the date of the accident and her pre-existing condition. The respondent submits that the applicant has intentionally misled the Tribunal, as Dr. Alikhan based his findings on the information provided at the time of his assessment. The respondent was provided with clinical notes from Whitby/Durham Chiropractic on June 14, 2017, nine months after the issuance of the respondent's multidisciplinary report.

[20] The applicant does not provide a satisfactory reason for the late disclosure of the clinical notes and records, simply stating that she had no control over the dissemination of the records by the treatment facility and provided the records as soon as they were received.[9] Even though the respondent did not make a s. 33 request for documents, this is not a reasonable explanation given the time elapsed and the applicant's duty to provide the medical records so that a fair and balanced IE could be undertaken.

[21] Notwithstanding the late delivery of the records, the respondent had a corresponding duty and could easily have provided these medical records to its medical assessors. The assessors could have reviewed them and provided addendums to their reports.

[22] The matter has now proceeded to a formal hearing and I am left to rule on the reliability of the respondent's reports. I have reviewed all of the materials provided by both parties. After reviewing the clinical notes of Whitby/Durham Chiropractic, I find that the lack of review of these documents is not fatal to the findings of the IE assessors. I have found no compelling evidence regarding any pre-existing medical condition as outlined in the documents. I can place weight upon the multidisciplinary report provided by the respondent.

[9] Applicant's Reply Submissions. Page 4. Para. 20.

Predominantly Minor Injuries

[23] The issue of whether the applicant sustained a minor injury as defined by s. 3 of the Schedule must first be addressed in order to determine the reasonableness and necessity of the Treatment and Assessment Plans at issue.

[24] In accordance with s. 3 of the Schedule, "minor injury" is defined as one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae.

[25] S. 18(1) of the Schedule states that the sum of benefits payable under medical and rehabilitation benefits are limited to $3,500 if the person sustains impairments that are predominantly a minor injury in accordance with the MIG. S. 18(2) states that the $3,500 limit does not apply if the insured person "provides compelling evidence… the insured person has a pre-existing medical condition that will prevent the insured person from achieving maximum medical recovery from the minor injury if [he or she] is subject to the $3,500 limit…".

[26] The burden of proof rests with the applicant on a balance of probabilities standard. This well-accepted principle was confirmed by the Ontario Superior Court of Justice, Divisional Court in the case of *Scarlett v. Belair Insurance Co*.[10] Pursuant to s. 15 of the Schedule, the applicant must establish that the medical treatment plans in dispute are reasonable and necessary.

Competing Medical Evidence

[27] The multidisciplinary report containing the findings of Dr. Alikhan and Dr. Lau was undertaken to assess whether the proposed treatment was reasonable and necessary pursuant to the test outlined in the Schedule. In examining the report of Dr. Alikhan, I found it to be thorough and well-reasoned. His examination did not reveal any reliable objective evidence of a substantial musculoskeletal functional impairment/range of motion or neurological/sensory motor deficit.[11] He concluded that the applicant's injuries included cervical sprain/strain, left trapezius muscle sprain/strain, lumbo-sacral sprain/strain, left upper extremity sprain/strain and sprain/strain of the left lower extremity. These were predominantly minor soft tissue injuries in keeping with the definition outlined in the Schedule.[12] Dr. Alikhan did not provide any treatment recommendations beyond the MIG.

[28] The basis for Dr. Lau's report is somewhat puzzling, as there were no issues in dispute with regard to the applicant's mental health. However, he found that there was no psychological diagnosis as a result of the motor vehicle accident. It was his medical opinion that the applicant's psychological condition fell within the MIG.

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[10] *Scarlett v. Belair Insurance Co.* 2015 ONSC 3635 at para. 20.
[11] Respondent's Book of Authorities. Tab 2. Multidisciplinary Report. Page 9.
[12] Respondent's Book of Authorities. Tab 2. Multidisciplinary Report. Page 10.

[29] The applicant relies on the findings of Dr. West, Orthopaedic Surgeon, in his report dated December 8, 2016. Dr. West concluded that the applicant suffered from strain of the lumbosacral and cervical spine, post-traumatic headache, insomnia, fatigue, and anxiety with depressive episodes. It was his opinion that her injuries would require treatment exceeding the MIG limits and the applicant would require psychological treatment, physiotherapy, chiropractic treatment, massage therapy, assistive devices, medication and family/social counselling.[13] Dr. West is the only medical professional who examined the applicant and recommended further institutional-based treatment. However, even he had difficultly diagnosing specific musculoskeletal or orthopaedic impairments. Sprain/strain of the lumbrosacal and cervical spine fall directly within the definition of a minor injury in s. 3 of the Schedule. I find that conclusions regarding anxiety and depression are better left to mental health practitioners like Dr. Lau, who found that the applicant demonstrated no psychological issues and could adequately be treated within the MIG.

[30] The applicant also relies upon the report of Dr. Chizen, Physiatrist. He indicated that the applicant was suffering from residual myoligamentous pain affecting the neck, upper back and sacroiliac region and strain of the left ankle. He recommended additional pool exercises, stretching and strengthening routines.[14] He did not make any recommendations for any further institutional-based treatment and did not comment regarding treatment beyond the MIG. Again, sprain/strain does not speak to any specific musculoskeletal or orthopaedic impairment and Dr. Chizen's lack of recommendation of further treatment like chiropractic, massage and physiotherapy speaks to the predominantly minor nature of the applicant's injuries.

[31] The applicant has the burden to establish that the treatment and assessment sought are reasonable and necessary. The multidisciplinary report provided by the respondent clearly indicated that there were no musculoskeletal or orthopedic impairments. Even when the applicant did seek out the opinions of Dr. West and Dr. Chizen, both medical professionals specializing in orthopaedic, physical medicine and rehabilitation, only Dr. West found treatment was required outside of the MIG. Dr. West struggled to demonstrate a specific orthopaedic impairment beyond a sprain/strain that fell outside of the definition of a minor injury. In my opinion, this demonstrates that the applicant's injuries fall within the definition of minor injury set out in the Schedule.

[32] When I consider the evidence adduced by the parties, it is clear that the injuries suffered by the applicant are predominantly soft tissue injuries and minor in nature. They can adequately be treated within the monetary limits of the MIG. As of the date of the respondent's submissions, funds still remain within the $3,500.00 MIG limit. I find that the applicant is not entitled to payment for the treatment plan or

[13] Respondent's Submissions. Tab 12. Report of Dr. West. Pages 8-11.
[14] Respondent's Submissions. Tab 4. Report of Dr. Chizen. Page 2.

orthopaedic examination in dispute unless she can provide compelling evidence of a pre-existing condition that would prevent her from achieving maximal recovery if she is subject to the $3,500 limit.

Pre-Existing Medical Condition

[33] S. 18(2) of the Schedule states that the $3,500.00 MIG limit does not apply to an insured party whose health practitioner has determined and provided compelling evidence that the insured has a pre-existing medical condition that was documented before the accident and will prevent the insured person from achieving maximal recovery from the minor injury if the insured party is subject to the $3,500.00 limit under the MIG.

[34] The bulk of the applicant's submissions centre around the pre-existing medical condition identified as neck, shoulder and arm pain as a result of her employment as a software engineer and prolonged use on her computer.[15] However, the applicant has provided no medical diagnosis of a pre-existing condition.

[35] The applicant sought chiropractic treatment from Dr. Anthony Duivesteyn beginning in June of 2015, approximately four months prior to the motor vehicle accident. The applicant asserts she attended for 38 sessions of chiropractic treatment prior to the accident.[16] However, upon examination of the chiropractic records, it is noted that the applicant attended for 19 sessions of chiropractic treatment prior to the date of the accident and 19 entries were duplicate entries. The Treatment and Assessment Plan (OCF-18) completed by Kelly Caverly, Chiropractor, states that the applicant had been attending chiropractic treatment following the motor vehicle accident and the applicant implied that treatment continued "following the accident… receiving adjustments until November 30, 2016".[17] However, the chiropractic records indicate that there were no chiropractic treatment sessions for nearly eight months between October 15, 2015 and June 8, 2016.[18] At best, these submissions reflect a general lack of attention to the records in evidence; at worst, they illustrate an attempt to bolster weak submissions based on little or no evidence. Both lead to a negative inference regarding the applicant's credibility.

[36] Dr. N. Pratt, of Dundas Center X-Ray & Ultrasound, mentions a mild degree of degenerative change in the mid-thoracic spine related to Scheurmann's Disease in notes following an x-ray on June 18, 2015.[19] This is the sole reference to any medically diagnosed condition prior to the date of the accident. There is no evidence presented to demonstrate how pain from this condition would prevent maximal recovery. No further explanation regarding treatment or recovery is

[15] Applicant's Submissions. Page 7. Para. 36.
[16] Applicant's Submissions. Page 4. Para 12.
[17] Applicant's submissions. Tab 7. Treatment and Assessment Plan (OCF-18).
[18] Applicant's Submissions. Tab 3. Clinical Notes and Records from Durham Chiropractic Centre.
[19] Applicant's Submissions. Tab 3. Clinical Notes and Records from Durham Chiropractic Centre.

provided. Conspicuously absent is a diagnosis of any pre-existing medical condition, other than generic back and leg pain in the clinical notes and records of Dr. S. Manoharan, the applicant's treating family physician. Similarly, the Disability Certificate (OCF-3) submitted October 22, 2015 makes a note of "neck pain", but does not provide any medical diagnosis, description, or further explanation.[20]

[37] The Treatment and Assessment Plan (OCF-18) submitted by Kelly Caverly on July 20, 2016, indicates that the applicant did not have any pre-accident disease, condition or injury that could affect her response to treatment of these injuries. The applicant asserts that the respondent is relying on this "technicality" to avoid payment of benefits.[21] However, the applicant denied any pre-existing history of medical illness, no prior motor vehicle accidents, no work-related injuries or sports-related injuries when the IE was conducted by Dr. Alikhan in September 2016.[22] The applicant provided no explanation as to why she failed to disclose any evidence of a pre-existing medical condition when prompted by either medical practitioner.

[38] Neither of the applicant's medical experts were able to provide compelling evidence related to a pre-existing medical condition. Dr. West, Orthopaedic Surgeon identified "pre-existing occasional neck, shoulder and arm pain" and Dr. Chizen, Physiatrist identified "chronic positional neck pain".[23] These diagnoses speak to lifestyle-related soft tissue complaints and not to a pre-existing medical condition that would prevent maximal recovery under the MIG

[39] The onus of establishing compelling evidence related to a pre-existing condition falls to the applicant. The evidence of a pre-existing condition is not borne out by the evidence adduced. Generic descriptions of back, neck, and leg pain do not constitute compelling medical evidence. There are no medical diagnoses provided that satisfies the test as laid out in s. 18(2) of the Schedule. Given this failure to satisfy the persuasive burden, she has not established that her injuries or any pre-existing condition would take her outside of the MIG.

[40] Given that there has been no finding that the applicant is entitled to any further payment of benefits, interest is also not an issue. Any claim of interest on overdue benefits owed is hereby dismissed.

[20] Applicant's Submissions. Tab 6. Disability Certificate.
[21] Applicant's Reply Submissions. Page 5. Para. 32.
[22] Respondent's Submissions. Tab 2. Multidisciplinary Report. Page 4.
[23] Respondent's Submissions. Tab 4. Report of Dr. Chizen. Page 2.

CONCLUSION

[41] For the reasons outlined above, I find that:

i. Based on the totality of the evidence before me, I find that the applicant has sustained a minor injury pursuant to section 3 of the Schedule and the injuries sustained fall within the Minor Injury Guideline ("MIG"). The applicant has not adduced compelling evidence to establish a pre-existing medical condition which would place her outside of the MIG. Based on this finding, I need not address the treatment and assessment plans.

ii. The applicant is not entitled to payment of interest, as there are no overdue benefits outstanding.

Released: January 3, 2018

Ian Maedel, Adjudicator