

**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**

Tribunal File Number: 17-005544/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:

A.W.

Applicant

and

Pembridge Insurance

Respondent

DECISION

ADJUDICATOR: Monica Purdy

APPEARANCES:

For the applicant: Suhaib Ibrahim, Counsel

For the respondent: Patrick M. Baker, Counsel

Written Hearing: March 5, 2018

REASONS FOR DECISION AND ORDER

OVERVIEW

- [1] The applicant, A.W., was injured in a motor vehicle accident on June 25, 2014. A.W. was struck by a vehicle while standing at the side of the road outside of his parked vehicle. A.W. applied for medical benefits under *the Statutory Accident Benefits Schedule* – Effective September 1, 2010 (the “*Schedule*”). The respondent, Pembridge Insurance, denied the claims for these benefits. The applicant appealed the denial to the Licence Appeal Tribunal – Automobile Accident Benefit Services (“Tribunal”).
- [2] The parties were unable to reach a settlement at the case conference in December 2017. The matter proceeded to a hearing on the following issues:
- i. Do A.W.’s injuries fall within the Minor Injury Guideline?
 - ii. Is A.W. entitled to a medical benefit in the amount of \$2,520.00 for an orthopaedic assessment provided by Michael West at All Health Medical Centre, submitted on August 6, 2015 and denied on September 24, 2015?
 - iii. Is A.W. entitled to a medical benefit in the amount of \$2,260.00 for a chronic pain assessment provided by Ray Zalzman at All Health Medical Centre, submitted on August 6, 2015 and denied on September 29, 2015?
 - iv. Is A.W. entitled to a medical benefit in the amount of \$2,260.00 for a neurological assessment provided by Inese Robertus at All Health Medical Centre, submitted on July 14, 2016 and denied on July 25, 2016?
 - v. Is A.W. entitled to a medical benefit in the amount of \$4,512.14 for psychological treatment provided by Nina Balyakova at All Health Medical Centre, submitted on June 7, 2016 and denied on June 14, 2016?
 - vi. Is A.W. entitled to interest on the overdue payment of benefits?

RESULT

- [3] I find that A.W.’s injuries are predominately minor injuries, as defined by the *Schedule* and that he is not entitled to the benefits in dispute.

Does the Minor Injury Guideline apply to A.W.?

- [4] The Minor Injury Guideline establishes a treatment framework limit for minor injuries in the amount of \$3,500. If I find that A.W.’s injuries are outside of the Minor Injury Guideline, then A.W. is eligible to receive up to \$50,000 worth of treatment for his injuries. If I find that his injuries are predominantly minor, A.W. is not entitled to any treatment above the Minor Injury Guideline limit.

- [5] A.W. must meet the test under s.3 of the *Schedule*, which defines minor injuries as: one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury. Sprain means an injury to one or more tendons or ligaments or to one or more of each, including a partial but not a complete tear.
- [6] A.W. bears the burden of proof in persuading me that his injuries are not minor and that he is entitled to the treatment plans listed above that would take him outside the limits imposed by the Minor Injury Guideline.
- [7] I find that A.W.'s injuries arising from the motor vehicle accident are predominantly minor for the following reasons.
- [8] The day following the motor vehicle accident, A.W. attended the emergency room and was diagnosed with soft tissue injury, possible rib fracture and possible rotator cuff tear. I note that an x-ray dated June 26, 2014 found no dislocation or fracture of the left shoulder.
- [9] None of the evidence showed an impairment beyond the minor injury. For example, the disability certificate dated July 14, 2014 completed by Dr. Alrick Daughtery noted left rotator cuff dysfunction/syndrome, left knee sprain/strain/contusion/ post traumatic headaches; cervical spine strain/strain, lumbar spine sprain/strain; chest soft tissue damage.
- [10] A MRI report of the left knee from August 26, 2014 showed a small tear at the posterior horn medial meniscal and mild compartment degenerative changes. There's no indication from the medical document that these impairments are a result of the motor vehicle accident. A total tear of a tendon normally removes a person from the Minor Injury Guideline whereas a partial tear does not. This is neither. I see no evidence before me that it is a medical condition that warrants additional treatment that would take A.W. out of the Minor Injury Guideline.
- [11] I also reviewed the orthopedic reports of Dr. West submitted by A.W. and that of Dr. Saffir submitted by the respondent. Dr. West's assessment of A.W. took place approximately 15 months after the motor vehicle accident, in September 2015. Dr. West examined A.W.'s left knee and described "severe amount of pain diffusely throughout the joint". Dr. West diagnosed a contusion of the left knee with post traumatic patellofemoral syndrome and left shoulder contusion with post traumatic painful arc syndrome. All of which are soft tissue injuries.
- [12] What I find consistent throughout my review of the medical documentation was that Dr. Golda, Dr. West and Dr. Saffir, who assessed A.W.'s injuries from the June 2014 motor vehicle accident, all classified those injuries as soft tissue in nature.
- [13] I find the medical documentation of the motor vehicle accident compelling in describing and classifying A.W.'s injuries as soft tissue and predominantly minor. A.W.'s minor injuries are treatable within the Minor Injury Guideline.

Are A.W.'s chronic pain and psychological impairments a result of the motor vehicle accident?

- [14] At the time of A.W.'s application to the Licence Appeal Tribunal, he was suffering from chronic pain and was receiving treatment for psychological impairments. A.W. claims that the motor vehicle accident and the workplace accidents materially contributed to his current impairments.
- [15] A.W. submits that the material contribution test, used primarily in negligence cases, is less onerous than the "but for" test and applies to his case.
- [16] The respondent referred to several Financial Services Commission of Ontario decisions in which the adjudicators referred to binding Court of Appeal and Supreme Court decisions that support the "but for" test as the default test for determining causation.
- [17] I note that the Courts have also found that the "material contribution" test can be used based on the facts of the case.
- [18] The respondent also noted that the same argument for material contribution was used by A.W.'s employer, Cole Carrier, to WSIB. WSIB conclusively rejected the employer's position and determined that the injuries from the June 2014 motor vehicle accident were fully resolved before the workplace accidents of October 2014 and December 2014.
- [19] I reviewed all the case laws, Courts decisions, and medical information put before me by the parties. The facts in this case do not support A.W.'s position that the motor vehicle accident materially contributed to his chronic pain or his psychological condition. WSIB came to the same conclusion when A.W.'s employer advanced the same issue. Based on the facts in this case, A.W.'s chronic pain and psychological impairments flow from the workplace accident of December 2014, and not from his injuries of the motor vehicle accident.

A. Chronic pain

- [20] A.W. was diagnosed with chronic pain by WSIB doctors after a workplace accident in which he fell off a truck and fractured his lumbar spine in December 2014. Prior to the December workplace accident and after the motor vehicle accident in June 2014 A.W. also suffered injuries from another fall while at work. In October 17, 2014, A.W. fell off a trailer while at work and received "LOE and HC benefits" from WSIB. A record of the accident from WSIB, dated October 22, 2014, showed that A.W. injured both shoulders and knees, with the left knee injury worse than the right after the fall.
- [21] The WSIB records noted that A.W. fully recovered from the injuries and returned to work on October 27, 2014. In November 2014, A.W. was moving residences when he fell down the stairs while carrying a dryer. A.W. requested a day off work in an email to his employer dated November 30, 2014.

- [22] The bulk of the WSIB records were on the December 2014 accident, which was considered more serious than the October 2014 workplace accident.
- [23] A.W. referred to Dr. West's orthopedic assessment in which Dr. West noted that the fracture to A.W.'s lumbar spine from the December 2014 workplace accident and injuries from motor vehicle accident of June 2014, precluded A.W. from performing the essential tasks of his pre-accident employment. Dr. West did not refer to the October 2014 workplace accident, which occurred after the motor vehicle accident and prior to the December 2014 workplace accident, which I find puzzling.
- [24] In the same report, Dr. West noted that A.W. was developing chronic pain as a result of the fracture at L1 to L4, from the workplace accident, not the left knee.
- [25] I was not persuaded by Dr. West's report. Dr. West noted in his assessment report that he had reviewed WSIB documents, but did not explain how the connection between A.W.'s injuries from the motor vehicle accident and that of the workplace accident differed from that of WSIB.
- [26] In coming to a diagnosis and during his assessment, Dr. West noted "current and ongoing symptoms" when referring to injuries from the workplace accident of December 7, 2014, and the motor vehicle accident of June 2014, which I find confusing. I turned my attention to Dr. Saffir's report in the respondent's submission.
- [27] Dr. Saffir, noting the workplace accident of December 7, 2014, stated that A.W.'s left shoulder and left knee injuries from the motor vehicle accident reached maximum medical recovery, in all reasonable medical certainty, by the time of the December 2014 workplace injury. Further, a medical opinion from Dr. Heather Badalato provided to WSIB dated June 6, 2015 indicated that A.W. "has chronic pain resulting from his work injury that is poorly controlled".
- [28] A WSIB psychiatric assessment completed in October 6, 2015 by a team from the Psychological Trauma Program at Centre for Addiction and Mental Health, also diagnosed A.W. with chronic pain syndrome as a result of vertebral injuries. I find on the evidence that A.W.'s chronic pain was a result of the workplace injury and that the motor vehicle accident of June 2014 did not materially contribute to the impairment of chronic pain.

B. Psychological impairment

- [29] I did not give much weight to Dr. West's opinion that A.W. suffered from post-traumatic anxiety and stress with depression. Dr. West is an orthopedic specialist and not a psychologist or psychiatrist. A.W. also cited a psychological report dated December 14, 2016 by Dr. Yana Shcherbina supervised by Dr. Nina Belyakova, to support his position.

- [30] I did not find the psychological report completed 2 years after the motor vehicle accident supportive or compelling. Similar to Dr. West, Dr. Shcherbina's assessment referred to A.W.'s current symptoms and did not provide any details of a direct link to the accident that occurred 2 years ago. Dr. Golda's progress reports from January to March 2015 written closer to the time of the accidents was more informative to my determination. On A.W.'s visits to the family physician January 13 and 29, 2015, Dr. Golda noted that A.W. signed himself out of the hospital in December 2014, where he was recovering from the workplace accident, because he was anxious.
- [31] Dr. Golda assessed A.W. for depression and immediately began treatment for the impairments. A.W. saw Irene Soliveri, a counselor in the same building as the family physician and he was prescribed Cymbalta by Dr. Golda on recommendation of the counselor at that first visit, in January 2015. There were no previous entries made by Dr. Golda about A.W.'s psychological impairment prior to the December 2014 workplace accident. I find no reliable evidence before me that A.W.'s psychological impairment resulted from the motor vehicle accident of June 2014.

ORDER

- [32] My orders are:
- i. A.W.'s injuries are minor and he is not entitled to the following benefits:
 - ii. A.W. is not entitled to a medical benefit in the amount of \$2,520.00 for an orthopaedic assessment provided by Michael West at All Health Medical Centre, submitted on August 6, 2015 and denied on September 24, 2015.
 - iii. A.W. is not entitled to a medical benefit in the amount of \$2,260.00 for a chronic pain assessment provided by Ray Zalzman at All Health Medical Centre, submitted on August 6, 2015 and denied on September 29, 2015.
 - iv. A.W. is not entitled to a medical benefit in the amount of \$2,260.00 for a neurological assessment provided by Inese Robertus at All Health Medical Centre, submitted on July 14, 2016 and denied on July 25, 2016.
 - v. A.W. is not entitled to a medical benefit in the amount of \$4,512.14 for psychological treatment provided by Nina Balyakova at All Health Medical Centre, submitted on June 7, 2016 and denied on June 14, 2016.
 - vi. A.W. is not entitled to interest on the overdue payment of benefits.

Released: May 15, 2018



Monica Purdy, Adjudicator