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

Citation: **Pervez Masih vs. TD Insurance Meloche Monnex, 2019** ONLAT **18-003316/AABS**

File Number: 18-003316/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:

P. M.

Appellant

and

TD Insurance Meloche Monnex

Respondent

DECISION

ADJUDICATOR:	**Derek Grant**
For the Appellant:	Jaspal Brar, Counsel
For the Respondent:	Patrick Baker, Counsel

HEARD: In Writing **Hearing: January 28, 2019**

OVERVIEW

[1] The applicant ("P.M.") was involved in a motor vehicle accident ("the accident") on September 23, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] ("the *Schedule*").

[2] P.M. applied for benefits from the respondent ("TD") and applied to the Licence Appeal Tribunal (the "Tribunal") when his claims were denied.

[3] TD argues that all of P.M.'s injuries fit the definition of "minor injury" prescribed by s. 3(1) of the *Schedule*, and therefore, fall within the Minor Injury Guideline ("the MIG")[2]. P.M.'s position is exactly the opposite.

[4] If TD is correct, P.M. is then subject to the $3,500.00 limit on benefits prescribed by s.18(1) of the *Schedule*, and in turn, a determination of whether claimed benefits are reasonable and necessary will be unnecessary as the $3,500.00 maximum benefit for minor injuries has been exhausted.

[5] I must decide whether P.M.'s injuries are predominantly minor as defined by the *Schedule* and thus subject to a $3,500 treatment limit, and if they are not, I must determine his entitlement to the medical benefits in dispute.

ISSUES IN DISPUTE

[6] Did P.M. sustain predominantly minor injuries as defined under the *Schedule*?

[7] If P.M.'s injuries are not within the MIG, then I must determine:

(i) Is the treatment plan in the amount of $982.58 for physiotherapy treatment, recommended by Active Life Wellness Centre, submitted in a treatment plan dated April 13, 2016, and denied on April 19, 2016, reasonable and necessary?

(ii) Is the treatment plan in the amount of $457.69 for physiotherapy treatment, recommended by Active Life Wellness Centre, submitted in a treatment plan dated October 19, 2017, and denied on October 26, 2017, reasonable and necessary?

(iii) Is P.M. entitled to interest on any overdue payment of benefits?

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[1] O. Reg. 34/10.

[2] Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act*.

RESULT

[8] I find that P.M.'s injuries are predominantly minor as defined by the *Schedule* and fall within the MIG.

[9] My finding with respect to P.M.'s injuries means that he is not entitled to the benefit he claims.

[10] As I have denied P.M.'s claims, there is no interest payable by TD.

REASONS & ANALYSIS

Minor Injury Determination

[11] Section 3(1) of the Schedule defines a "minor injury" 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 and includes any clinically associated sequelae to such an injury." The MIG defines in detail what these injuries mean.

[12] Section 18(1) of the *Schedule* prescribes a $3,500.00 limit on medical and rehabilitation benefits payable for any one accident.

[13] The onus is on the applicant, in this case P.M., to prove that his injuries or impairments fall beyond the MIG[3].

[14] P.M. submits that his injuries themselves exceed the definition of "minor injury" in s. 3(1) of the *Schedule* because he has a pre-existing psychological condition, and that this removes him from the MIG.

[15] Psychological impairments may, if established, fall outside the MIG, because the MIG only covers "minor injuries" and the definition does not include psychological impairments. I find P.M. does not have a psychological diagnosis stemming from the September 2015 accident that would take him outside of the definition of the MIG for the following reasons.

[3] *Scarlett v. Belair,* 2015 ONSC 3635 (CanLII) para.24

Does P.M. suffer from a pre-existing psychological condition?

[16] P.M. submits that he suffers from Generalized Anxiety Disorder ("GAD") as a pre-existing condition, and as a result, should be removed from the MIG. In his evidence, P.M. has records that indicate a GAD diagnosis in 2013 and 2014.

[17] In support of his pre-existing condition, P.M. provided me with a psychological report[4] obtained on his behalf. Dr. Toneatto opined that P.M. is experiencing "significant emotional and psychological sequelae from the MVA". Dr. Toneatto recommended psychotherapy to treat P.M.'s anxiety and somatic complaints.

[18] TD contends that P.M. did not suffer from a pre-existing psychological condition or that the GAD was exacerbated a result of the accident TD submits;

i. Despite his pre-existing GAD diagnosis, the medical evidence shows it was controlled with medication.

ii. The clinical notes and records of P.M.'s Family Physician, Dr. Baath, contain no reports of psychological complaints related to the subject accident. The only 'psychological'-based complaints appear in April 2017, when P.M. complains of emotional distress relating to a political news story.

iii. Dr. Toneatto's report states that P.M. advised that he did not have any pre-existing psychological condition. Based on his findings, Dr. Toneatto concluded that P.M.'s pre-existing GAD would not preclude P.M. from achieving maximum medical recovery under the MIG.

[19] I conclude that P.M. has not met the onus on him to establish that he suffers from a pre-existing condition that was exacerbated as a result of the accident. I reached this conclusion for the following reasons:

(i) P.M.'s medical evidence provides no persuasive evidence of an exacerbated pre-existing psychological condition. My own reading of the medical evidence in P.M.'s submissions is that after September 2015, there is no explicit linkage between a pre-existing psychological condition and the accident. In fact, the medical evidence suggests that other factors negatively affected P.M.'s psychological condition.

(ii) I find that P.M.'s psychological complaints arise from an incident (the political news article referenced above) which is not accident related. I

[4] Dr. Tony Toneatto, Psychology report dated December 24, 2018

also find, on the evidence of Dr. Baath, that P.M.'s pre-existing condition was not impacted by the accident.

Did P.M. suffer physical injuries as a result of the accident?

[20] P.M. did not provide me any medical evidence that he sustained physical injuries in the accident which would remove him from the MIG. Dr. Baath's clinical notes and records indicate P.M. was diagnosed with "multiple sprains due to MVA" on a visit the day after the accident. Initial and subsequent visits to Dr. Baath note complaints of neck and back pain. These types of injuries fall squarely in the MIG.

[21] Dr. Toneatto notes in his 2018 psychological report, some of the subjective physical complaints made by P.M. However, I place very little weight on Dr. Toneatto's reporting of P.M.'s physical injuries, as Dr. Toneatto is a psychologist and physical injuries are beyond his area of expertise.

[22] P.M. also relied on diagnostic imaging, which indicated degenerative disc disease. All other results were found to be normal. This evidence does not support that P.M. should be removed from the MIG.

[23] To conclude, I find that P.M. has submitted no evidence from Dr. Baath, or any other medical evidence which establish that the injuries are anything but "minor".

Treatment plans - not reasonable and necessary

[24] Because I conclude that P.M. has not met the onus on him to show that he suffered injuries that are not considered to be minor as a result of the accident, it is unnecessary for me to determine whether the claimed treatment plans are reasonable and necessary.

Award

[25] Section 10 of Regulation 664 permits the Tribunal to award a lump sum of up to 50% of the amount to which the insured person (i.e. P.M.) was entitled at the time of the award together with interest on all amounts then owing (including unpaid interest) if it finds that that an insurer (i.e. TD) has "unreasonably" withheld or delayed payments.

[26] P.M. has not established that TD acted unreasonably within the meaning prescribed in the regulation. His request for an award is denied.

Costs

[27] Rule 19.1[5] permits a party to request that the Tribunal order the other party to pay costs, where the requesting party "believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith".

[28] TD seeks legal costs in the amount of $500.00, for what it believes amounts to the vexatious behaviour by P.M. TD argues that P.M. did not adhere to the Tribunal Order of Adjudicator Grieves, dated September 6, 2018. In her Order, Adjudicator Grieves set out the deadline for expert reports for November 22, 2018. P.M.'s initial submissions and evidence deadlines were set for January 7, 2019.

[29] TD requests costs for the following reasons:

(i) TD did not receive Dr. Toneatto's report until January 9, 2019, almost two months after the deadline;

(ii) P.M.'s submissions were also filed four days late, on January 11, 2019;

(iii) Notwithstanding that expert reports were to be filed by November 22, 2018, as per Adjudicator Grieves Order, P.M. did not file a motion until December 19, 2018, to be permitted to rely on a psychological report at the hearing. The reason given in the Motion indicated "scheduling conflicts with the doctor";

(iv) P.M. received the expert report on December 24, 2018 but did not provide it to TD until January 9, 2019; and

(v) As a result of the late filing by P.M. of the expert report and submissions, TD was prejudiced by restricted timelines and the late filing of the expert report and denied the opportunity to respond to the expert report with any necessary rebuttal report of its own.

[30] For the reasons that follow, I grant TD's request for costs, however, in the amount of $250.00. Between the September 2018 Order and the date of the psychological expert report, P.M. had enough time to notify TD that he intended to obtain such a report and failed to do so. Once he became aware of it, he failed to notify TD that the expert report would not be obtained within the timelines set out in the Tribunal Order.

[5] All references to a "Rule" are made to the *Licence Appeal Tribunal Rules of Practice and Procedure, Version I (April 1, 2016)*

[31] All parties participating in a Tribunal proceeding are expected to adhere to the Tribunal Rules governing the timeliness and efficiency of these proceedings.

[32] P.M. offered no explanation as to the reason for the delay of meeting any deadlines (for filing submissions and/or expert reports) set out in the Tribunal Order or failing to notify TD. For example, despite the reason given for the Motion, the psychological assessment is dated December 20, 2019, the day after the Motion was filed. I find, on balance, the evidence around the issue of the psychological report and late filing of submissions, points to vexatious and bad faith behaviour on behalf of P.M., and grant TD's claim for costs in the amount of $250.00.

[33] I find that although P.M. has met the threshold of vexatious and bad faith behaviour, I do not find the behaviour to be so excessive as to warrant a cost award of $500.00. While parties must adhere to the Tribunal Orders, there is discretion afforded to what an Adjudicator considers to be a reasonable level of recourse when a party makes a request for costs.

[34] I find that the combination of missed deadlines, late report filing, and not allowing for a fair and efficient proceeding without a reasonable explanation, is a reasonable ground to award a claim against the offending party.

[35] Parties in a proceeding have a duty to ensure the Tribunal's Orders are adhered to. Should there be a delay, or a foreseeable reason for a delay, the parties have a duty to ensure the timeliness and efficiency of the proceeding is maintained, by notifying the other party of a foreseeable delay. Further, bad faith, vexatious and/or frivolous actions on behalf of a party, contrast with the Tribunal's purpose of ensuring a fair proceeding takes place.

[36] For these reasons, I find that a cost award in the amount of $250.00 is reasonable for TD's cost claim against the actions of P.M. in the subject proceeding.

INTEREST

[37] Section 51 of the Schedule sets out the criteria for assessing and awarding interest on overdue payments.

[38] The benefits claimed by P.M. are denied and therefore, no interest on overdue payments is due.

CONCLUSION

[39] P.M.'s injuries are minor and fall within the MIG.

[40] Because P.M.'s injuries fall within the MIG, his claims are subject to a $3,500.00 cap imposed by s.18 of the Schedule, and the claimed benefits cannot be paid. It is accordingly unnecessary for me to determine the merits of the claimed treatment plans.

[41] There are no overdue payments and therefore no interest due on overdue payments.

[42] P.M. is not entitled to an award.

[43] TD is entitled to costs in the amount of $250.00.

Released: July 24, 2019

Derek Grant
Adjudicator