

**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**

File Number: 18-007475/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:

H.F.

Applicant

and

Certas Home and Auto Insurance Company

Respondent

DECISION

ADJUDICATOR: Lindsay Lake

APPEARANCES:

For the Applicant: Nader Fathi, Paralegal

For the Respondent: Paul Irish, Counsel

HEARD IN WRITING: March 18, 2019

OVERVIEW

- [1] The applicant, H.F., was injured in an automobile accident on December 16, 2017 (the “accident”) and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “*Schedule*”) from Certas Home and Auto Insurance Company (“Certas”), the respondent.
- [2] Certas denied H.F.’s claims because it had determined that all of H.F.’s injuries fit the definition of “minor injury” as prescribed by s. 3(1) of the *Schedule*, and therefore, fall within the Minor Injury Guideline (the “MIG”).¹ As a result, H.F. submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) on July 25, 2018.
- [3] The parties were unable to resolve their dispute at the case conference held on November 16, 2018 and the matter proceeded to a written hearing on March 18, 2019.

ISSUES IN DISPUTE

- [4] The following issues are to be decided:
 - (i) Did H.F. sustain predominately minor injuries as defined under the *Schedule*?
 - (ii) If the answer to issue (i) above is “no,” then I must determine:
 - (a) Is H.F. entitled to payment for the cost of a psychological assessment in the amount of \$2,200.00 recommended by Dr. Romemo Vitelli, psychologist, of Promed Rehabilitation Clinic in a treatment plan dated January 10, 2018, and denied by Certas on April 4, 2018?
 - (b) Is H.F. entitled to interest on any overdue payment of benefits?

RESULT

- [5] I find that:
 - (i) H.F. sustained predominately minor injuries as defined under the *Schedule*;
 - (ii) H.F. has failed to prove on a balance of probabilities that he is removed from the MIG as a result of a pre-existing medical condition that would prevent him from maximal recovery under the MIG monetary limit; and
 - (iii) no interest is owed and H.F.’s application is dismissed.

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

Did H.F. sustain predominately minor injuries as defined under the *Schedule*?

- [6] The MIG establishes a 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.” The terms, “strain,” “sprain,” “subluxation,” and “whiplash associated disorder” are defined in the *Schedule*.
- [7] Section 18(1) of the *Schedule* limits the entitlement for medical and rehabilitation benefits for minor injuries to \$3,500.
- [8] The onus is on H.F. to show that his injuries fall outside of the MIG.² In the event that I find that H.F.’s injuries are “minor injuries” as prescribed by the *Schedule*, H.F. argues in the alternative that he should be removed from the MIG because his pre-existing medical conditions will prevent him from achieving maximal recovery under the MIG limits.

a) Soft-Tissue Injuries

- [9] Following the accident, H.F. was diagnosed with neck and shoulder strain.³ H.F. also complained to his family physician, Dr. Dru Mandel, of pain in his posterior neck, both shoulders, upper back, lower back, left more than right hip and in his right ankle on July 26, 2018 that H.F. attributed to the accident.
- [10] I agree with Certas that it appears as though H.F. accepts as a starting point that he sustained predominantly minor injuries as a result of this accident given that the focus of his submissions was on his pre-existing conditions. In any event, I find that H.F. sustained soft tissue injuries following the accident which are minor injuries as defined in s. 3 of the *Schedule*.
- [11] I must now consider if H.F. should be removed from the MIG as a result of pre-existing medical conditions.

b) Pre-existing Injuries

- [12] I find that H.F. has failed to prove on a balance of probabilities that he is removed from the MIG as a result of any physical or psychological pre-existing conditions.
- [13] Section 18(2) of the *Schedule* provides that insured persons with minor injuries who have a pre-existing medical condition may be exempted from the \$3,500 cap on benefits. In order to do so, the applicant must provide compelling evidence meeting the following requirements in order to be removed from the MIG:

² *Scarlett v. Belair*, 2015 ONSC 3635, para. 24 (Div. Ct.).

³ Clinical Notes and Records of Dr. Dru Mandel, March 22, 2018 entry, Written Submissions of the Applicant, tab B1.

- (i) There was a pre-existing medical condition that was documented by a health practitioner before the accident; and
- (ii) The pre-existing condition will prevent maximal recovery from the minor injury if the person is subject to the \$3,500 on treatment costs under the MIG.⁴

[14] The standard for excluding an impairment on the basis of pre-existing conditions is well-defined and strict. A pre-existing condition will not automatically exclude a person's impairment from the MIG: it must be shown to prevent maximal recovery within the cap imposed by the MIG.

Pre-existing Physical Injuries

- [15] H.F. argues that his pre-existing physical conditions should remove him from the MIG. For the reasons that follow, I find that H.F. has failed to prove on a balance of probabilities that his pre-existing physical conditions would prevent his maximal recovery within the MIG limits.
- [16] Prior to the subject accident, it is undisputed that H.F. was in two previous motor vehicle accidents on February 12, 2016 and July 15, 2016. Additionally, it appears as though H.F. was also involved in a third motor vehicle accident sometime in September 2016.⁵
- [17] Following his February 12, 2016 accident, H.F. saw Dr. Mandel, his family physician, on two occasions before his July 15, 2016 accident. At his first visit on February 28, 2016, H.F. was diagnosed with acute bronchitis and at his second visit on April 11, 2016, he was seen for a left-hand injury sustained at work which required splinting. There is no mention of his February 12, 2016 accident in either of these entries.⁶
- [18] H.F.'s next visit to Dr. Mandel was on August 28, 2016, over one month after his July 15, 2016 accident. At this visit, H.F. complained of neck and shoulder pain, was diagnosed with whiplash and prescribed physiotherapy.
- [19] H.F. submitted two treatment and assessment plans (OCF-18s) dated December 6, 2016 and January 31, 2017 that were both completed by Marco Curcio, chiropractor. Both OCF-18s lists the following under the injury and sequela information section: injury of muscle and tendon at neck level; sprain and strain of thoracic spine, lumbar spine, sacroiliac joint and ankle. The same injuries are listed in the Treatment Confirmation Form (OCF-23) dated September 7, 2016 completed by Dario Mirlan, chiropractor.

⁴ Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act* page 5, heading 4, "Impairments that do not come within this Guideline".

⁵ Dr. Mandel's CNRs dated August 11, 2017, Written Submissions of the Applicant, tab B1.

⁶ In a March 22, 2018 entry in Dr. Mandel's clinical notes and records, Dr. Mandel notes that H.F. was instructed to see a doctor following his February 12, 2016 accident, but he did not see a doctor as instructed.

- [20] On August 11, 2017, H.F. complained to Dr. Mandel of neck pain from his “Sept. 16 MVA.”⁷ Dr. Mandel reported that he had tenderness in his ankle and a right skin abrasion. Dr. Mandel instructed H.F. to resume physiotherapy, which he had discontinued, and ordered x-rays.
- [21] These were the only entries in Dr. Mandel’s clinical notes and records (CNRs) prior to the subject accident.
- [22] H.F. argues that his pre-existing physical conditions were aggravated as a result of the accident and, accordingly, he should be removed from the MIG. While I acknowledge that H.F. appears to have sustained injuries from previous motor vehicle accidents, aggravation of previous injuries is not the test to meet for removal from the MIG based on a pre-existing condition.
- [23] I also find that H.F. has failed to submit any evidence that any of his pre-existing physical conditions would prevent him from achieving maximal recovery within the MIG following the subject accident. In fact, the evidence supports the contrary. For example, on March 22, 2018, Dr. Mandel notes that H.F. informed him of low back pain and bilateral hip pain since his February 2016 accident, but that these complaints resolved in the summer of 2017. H.F. reported again to Dr. Mandel on July 26, 2018 that he had recovered from his first two accidents by Summer 2017. H.F.’s recovery reporting is consistent with the patient sign in sheets from Health Max Physiotherapy clinics submitted by H.F. that show that he attended chiropractic treatment, physiotherapy and massage therapy beginning in September 2016 and ending in April 2017.⁸ I accept this as corroborating evidence that H.F. had recovered from his previous accidents in the summer of 2017.
- [24] For all of the above reasons, I find that H.F. is not removed from the MIG based on any pre-existing physical condition.

Pre-existing Psychological Injuries

- [25] H.F. argues that his pre-existing psychological limitations need to be considered and addressed for his most recent accident and that such psychological limitations should remove him from the MIG. For the reasons that follow, I find
- [26] H.F. relies upon the psychological consultation report dated July 31, 2017 by Dr. Romeo Vitelli, psychologist.⁹ Following an assessment on July 26, 2017, Dr. Vitelli diagnosed H.F. with adjustment disorder with mixed depressed and anxious features. This report was completed prior to the accident at issue and, therefore, does not speak to how these alleged psychological conditions would prevent H.F.’s maximal recovery under the MIG following the subject accident.
- [27] Although the OCF-18 dated January 10, 2018 also refers to H.F.’s psychological difficulties, it appears as though the statements made therein refer to the July 14,

⁷ *Supra* note 5.

⁸ Written Submissions of the Applicant, Tab B3, part 1.

⁹ Written Submissions of the Applicant, Tab B4.

2016 accident as opposed to any psychological limitations that arose following the subject accident. Additionally, there is no discussion about how the July 14, 2016 psychological limitations would preclude H.F. from maximal recovery under the MIG limits following the subject accident.

[28] H.F. failed to file or refer me to any other evidence that supports his position that his alleged pre-existing psychological limitations from his previous July 2016 accident preclude his maximal recovery within the MIG limits following the subject accident. I agree with Certas that simply referring to medical records of the mere presence of a pre-existing medical condition is not enough to remove H.F. from the MIG.

[29] Based on the reasons set out above, I find that there is no compelling evidence before me demonstrating that H.F. had a pre-existing psychological condition which would prevent him from maximal recovery within the \$3,500 MIG limit.

Treatment Plan

[30] Because I have found H.F.'s injuries fall within the MIG, it is unnecessary for me to assess whether the treatment plan for a psychological assessment is reasonable and necessary.¹⁰

Interest

[31] As there are no benefits or costs that are overdue, no interest is payable.

CONCLUSION

[32] For the reasons outlined above, I find:

- (i) H.F. sustained soft tissue injuries following the accident;
- (ii) H.F. failed to prove on a balance of probabilities that he had any pre-existing physical or psychological conditions that would prevent him from maximal recovery under the MIG monetary limit of \$3500 such that he would be removed from the MIG regarding the subject accident;

¹⁰ While neither party directed me to any evidence that indicated whether or not the MIG limit was exhausted, I accept that the \$3500 limit is exhausted due to the reasons given by Certas in its April 4, 2018 denial of the treatment plan in dispute.

- (iii) H.F. is not entitled to interest; and
- (iv) The application is dismissed.

Released: August 28, 2019



**Lindsay Lake
Adjudicator**