

**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**

Citation: Salina Chowdhury vs. Allstate Canada, 2021 ONLAT 19-010428/AABS

**Released Date: 01/08/2021
File Number: 19-010428/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:

Salina Chowdhury

Applicant

and

Allstate Canada

Respondent

DECISION

ADJUDICATOR: Jesse A. Boyce, Vice-Chair

APPEARANCES:

For the Applicant: Michael Yermus, Counsel
Jaspreet Dhaliwal, Counsel

For the Respondent: Yann Grand-Clement, Counsel

HEARD: Via written submissions

OVERVIEW

[1] The applicant was injured in an accident on May 16, 2017, and sought various benefits from the respondent, Allstate, pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010¹ ("*Schedule*"). Allstate denied the benefits in dispute on the basis of its determination that her accident-related impairments were predominantly minor injuries and therefore subject to treatment within the Minor Injury Guideline ("MIG"). The applicant disagreed and submitted an application to the Tribunal for resolution of the dispute.

ISSUES IN DISPUTE

[2] The following issues are in dispute:

1. 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 limit and in the Minor Injury Guideline?
2. If the applicant's injuries are not considered to be predominantly minor,
 - i. Is the applicant entitled to a medical benefit in the amount of \$2,438.20 for chiropractic services at Warden Woods Physio and Rehab as set out in a treatment and assessment plan dated November 28, 2017 (submitted on December 5, 2017) and denied by the respondent on December 15, 2017?
 - ii. Is the applicant entitled to a medical benefit in the amount of \$1,804.96 for chiropractic services at Warden Woods Physio and Rehab as set out in a treatment and assessment plan dated March 20, 2018 (submitted on April 3, 2018) and denied by the respondent on April 13, 2018?
 - iii. Is the applicant entitled to the cost of an examination in the amount of \$2,200.00 for a psychological assessment by Arpita Biswas Psychology P.C. as set out in a treatment and assessment plan dated July 6, 2017 (submitted on July 11, 2017) and denied by the respondent on July 14, 2017?

¹ O. Reg. 34/10, as amended.

Preliminary Issue:

The respondent raised the following preliminary issue only with respect to the issue of cost of examination in the amount of \$2,200.00 denied on July 14, 2017:

Is the applicant statute-barred from appealing the denial of the cost of examination because the application with respect to this benefit has not been commenced within two years after the insurer's refusal to pay the amount claimed?

3. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?
4. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] The applicant has not demonstrated that her accident-related impairments warrant removal from the MIG. As the MIG limits have been exhausted, the treatment and assessment plans in dispute are not reasonable and necessary, no interest is payable, and an s. 10 award is not appropriate.

ANALYSIS

Applicability of the MIG

- [4] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to \$3,500.00 if the insured sustains impairments that are predominantly a minor injury in accordance with the MIG. Section 3(1) 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." An insured may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under s. 18(2), that they have a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition precludes recovery if they are kept within the confines of the MIG. The Tribunal has also determined that chronic pain with functional impairment or a psychological impairment may warrant removal from the MIG.

- [5] The applicant submits that as a result of the accident, she suffers from back pain, lower abdominal pain, left leg pain, severe headaches, sleeping issues and psychological injuries, including anxiety and depression. She submits that she

has consistently attended for physiotherapy treatment, has been prescribed various pain medication, was referred to a neurologist and underwent three sessions with a psychologist who diagnosed her with mixed anxiety and depressive disorder, specific (isolated) phobias, nonorganic sleep disorders and reaction to severe stress, adjustment disorders. The applicant argues that her pre-existing headaches and psychological impairments justify removal from, and treatment beyond, the MIG.

- [6] In response, Allstate submits that the applicant has not met her burden to prove that she suffers from more than minor injuries, that her pre-existing condition prevents maximal medical recovery under the MIG or that she sustained an actual psychological impairment from the accident. It relies on the s. 44 Insurer's Examination ("IE") report of Dr. Guerra, who determined that the applicant sustained predominantly minor injuries as a result of the accident that were treatable within the MIG.
- [7] I agree with Allstate and find the applicant has not demonstrated that her accident-related impairments warrant removal from the MIG. First, the actual physical injuries identified are all seemingly minor injuries, as they are sprain and strain-type injuries identified as back pain, lower abdominal pain and left leg pain. While I am alive to her reports of pain to her family physicians and the various prescriptions that the applicant has been prescribed, being Amitriptyline, Zolmitriptan and Naproxen, I find there is limited indication in the file that her physical accident-related impairments should be considered outside of the definition of minor injury under s. 3(1). The applicant cites diagnostic imaging which showcased subchondral sclerosis at her sacroiliac joints, partial bony ankylosis and a mild degenerative disc bulging at L5-S1, but it is unclear how these largely age-related conditions would have been caused by the accident.
- [8] In a similar vein, with regards to s. 18(2), while it is noted that she has pre-existing conditions like headaches and diabetes, there is no indication that these impairments would prevent maximal medical recovery if kept within the MIG, as the applicant submits. Many of the conditions in the medical documentation are all age-related conditions, like degenerative disc disease and subchondral sclerosis, so it is unclear how these would fit into the parameters of s. 18(2). It also appears that her diabetes is under control and well-managed and was not exacerbated by the accident. The s. 44 IE report of orthopaedic surgeon Dr. Guerra, which formed the basis of Allstate's denials, supports this finding, as it found no evidence to remove the applicant from the MIG, as she sustained myofascial injuries to her lumbar spine and soft-tissue injuries to her legs.

- [9] The applicant's submissions focus on her pre-existing headaches which she argues should remove her from the MIG. While I do see that she has a 15 year history of migraines and her post-accident complaints of same are consistent in the medical records, I find limited evidence from a medical professional that these headaches preclude maximal medical recovery under the MIG, which is the requirement for removal under s. 18(2). For example, the report of neurologist Dr. Borrett from October 2017, completed after the applicant was referred by her own physician, does not actually indicate that her headaches would prevent maximal medical recovery under the MIG to satisfy s. 18(2). The report states that while the applicant's headaches have increased post-accident, they only seem to occur one to two times per month now. Indeed, the report recommends treating her headaches symptomatically with Tylenol #1 and then states, "hopefully with time the headaches will simply settle down to their previous baseline." The CT scan report that accompanies Dr. Borrett's report found no definite cause for the applicant's symptoms. As s. 18(2) requires pre-existing reporting of a condition *and* compelling evidence that the condition will preclude recovery, I find that the evidence before the Tribunal cannot be characterized as compelling where Dr. Borrett opined that time and Tylenol #1, not removal from the MIG, will eventually lead to a reduction in headaches. This opinion was also echoed in the s. 44 report of Dr. Guerra, who found no objective indication that the accident exacerbated the applicant's headaches or that her headaches would prevent maximal medical recovery under the MIG.
- [10] While the applicant's submissions do not specifically argue for removal from the MIG based on chronic pain, for completion, I find no indication in the medical documentation that her lingering accident-related pain has become chronic in nature or is causing her functional impairment. While not strictly required for removal from the MIG, there is also no diagnosis of chronic pain syndrome in any of the documentation, despite her consistent complaints of back pain.
- [11] Finally, the applicant asserts that her psychological impairments justify removal from the MIG. To this end, she relies on the clinical notes from her three counselling sessions with Dr. Biswas' clinic in June 2017 as well as a provisional diagnosis of "post-traumatic stress, anxiety, depression, irritability, pain, fatigue and sleep disturbances" that is contained in a pre-screen report of Dr. Biswas, appended to the July 2017 OCF-18 in dispute. In the pre-screen report, and following three counselling sessions with her associate, Dr. Biswas states that the applicant's psychological impairments are outside of the MIG because "psychological factors exert an important influence on recovery following physical injury. Beliefs regarding severity and degree of disability, as well as coping style, have been shown to be important variables in the course of an individual's

recovery.” The applicant’s three sessions with Dr. Biswas’ clinic were paid for by her extended health carrier and after the three sessions were complete, the applicant did not attend for more counselling.

[12] With great respect, I find the applicant has not presented compelling evidence that she sustained a psychological impairment as a result of the accident. First, there is limited continuous or contemporaneous reference to any psychological or emotional symptoms in the notes and records of her family physicians in the three years post-accident that would provide objective confirmation of her struggle. Second, and despite this, Dr. Biswas’ pre-screen report from 2017 only makes a provisional diagnosis based on three sessions with her associate and I find the provisional diagnosis that the applicant was “presenting with an array of psychological symptoms” is not really supported by the rest of the evidence or by the applicant’s self-reporting elsewhere. The clinical notes from those three sessions resulted in recommendations for mindfulness-based meditation at home, practicing thought-recording sheets and encouraging her to return to swimming, which is not a particularly strong indication that psychological intervention was required. The notes also indicate that she was feeling better by the third session, which is supported by the fact that she has not undertaken or been referred for any other sort of psychological counselling or intervention in the over three years post-accident, either through OHIP or her extended health carrier. Based on her submissions, it also does not appear that the psychological assessment with Dr. Biswas was ever completed or incurred and, in any event, I query why the assessment was needed after the applicant had already attended for three sessions with the very clinic that would be assessing her.

[13] While Allstate did not offer a competing psychological report, the burden of proof ultimately lies with the applicant. In this sense, I agree with Allstate that more compelling evidence of a psychological impairment is required for removal from the MIG on this ground. Three clinical notes and an OCF-18 from within one month of the accident, submitted three years ago without contemporaneous reporting in the medical documentation elsewhere and with no evidence of psychological impairment or emotional distress since, does not, in my view, demonstrate that removal from the MIG is required. Accordingly, for these reasons, I find the applicant has not demonstrated that her accident-related impairments warrant removal from the MIG.

Reasonable and Necessary

[14] Having determined that the applicant has not demonstrated that removal from and treatment beyond the MIG is required, it is my understanding the limits of the

MIG have been exhausted. Therefore, an analysis of whether the treatment and assessment plans in dispute are reasonable and necessary under s. 16 is not required. Similarly, the preliminary issue raised by Allstate relating to the denial of the psychological assessment is moot. Finally, as no benefits are overdue, it follows that no interest is payable under s. 51.

Section 10 Award

- [15] The applicant also sought an award under s. 10 of O. Reg. 664, submitting that Allstate has unreasonably delayed payment of necessary treatment and has deliberately ignored the medical evidence supporting the approval of the denied treatment plans. Under s. 10, the Tribunal may award up to 50% of the total benefits payable if it determines that the insurer unreasonably withheld or delayed the payment of benefits. I find an award is not appropriate. As no benefits are overdue and the applicant has not demonstrated that her impairments warrant treatment beyond the MIG, it follows that the Tribunal cannot award up to 50% of zero. In any event, I find no indication that Allstate unreasonably withheld or delayed the payment of benefits.

CONCLUSION

- [16] The applicant has not demonstrated that her accident-related impairments warrant removal from the MIG. As the MIG limits have been exhausted, the treatment and assessment plans in dispute are not reasonable and necessary, no interest is payable, and a s. 10 award is not appropriate.

Released: January 8, 2021



Jesse A. Boyce
Vice Chair