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 No.: 18-011250/AABS

In the matter of an application pursuant to subsection 280(2) of the *Insurance Act*, R.S.O. 1990, c.I.8, in relation to statutory accident benefits.

Between:

Mohanrajah Ariyanayagam

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: **Nidhi Punyarthi**

APPEARANCES: Ramy Akladios, Lawyer for the Applicant

Margaret Louie, Lawyer for the Respondent

Heard: **January 13, 2020**

OVERVIEW

[1] On June 15, 2016, the applicant got into a car accident (the "accident"). He applied to the respondent for benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* ("*Schedule*").[1] The respondent denied his claim for benefits. He applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service ("Tribunal").

[2] The matter proceeded to a written hearing before me.

ISSUES

[3] The issues in dispute are as follows:[2]

i. Do the applicant's injuries fall within the *Minor Injury Guideline*[3]?

ii. Is the applicant entitled to a medical benefit in the amount of $1,886.80 for physiotherapy treatment recommended by Prime Health Care in a treatment plan submitted on March 3, 2017, and denied on March 17, 2017?

iii. Is the applicant entitled to a medical benefit in the amount of $2,090.20 for physiotherapy treatment recommended by Prime Health Care in a treatment plan submitted on August 14, 2017, and denied on August 17, 2017?

iv. Is the applicant entitled to payment for a cost of examination in the amount of $2,000 for a psychological assessment recommended by Prime Health Care in a treatment plan submitted on September 29, 2016, and denied on December 8, 2016?

v. Is the applicant entitled to payment for a cost of examination in the amount of $2,000 for an orthopedic assessment recommended by Downsview Health Care Inc. in a treatment plan submitted on September 27, 2017, and denied on October 2, 2017?

vi. Is the applicant entitled to payment for a cost of examination in the amount of $1,950 for an MRI recommended by Prime Health Care in a

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[1] *Statutory Accident Benefits Schedule – Effective September 1, 2010,* O. Reg. 34/10 ("*Schedule*").
[2] Order of Adjudicator Parish dated June 3, 2019.
[3] *Minor Injury Guideline* - February 2014, Superintendent's Guideline No. 01/14. Financial Services Commission of Ontario. Available online at https://www.fsco.gov.on.ca/en/auto/autobulletins/2014/Documents/a-01-14-1.pdf.

treatment plan submitted on August 23, 2017, and denied on August 23, 2017?

vii. Is the applicant entitled to an award under *Regulation 664*[4] because the respondent unreasonably delayed or withheld payments of a benefit to him?

viii. Is the applicant entitled to interest on any overdue payments of benefits?

RESULT

[4] The Tribunal upholds the respondent's decision.

[5] The applicant's injuries from the accident are minor injuries as defined in the *Schedule*.[5] Consequently, he is not entitled to the benefits claimed in this application or the corresponding interest. The evidence in this case does not support making an order for an award under *Regulation 664*.

ANALYSIS

[6] A "minor injury" is defined in the *Schedule* 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."[6] Psychological injuries and chronic pain are excluded from this definition.

[7] If an insured person's injuries from the accident are minor, that person's benefit entitlement under the *Schedule* is limited to $3,500.[7]

i. Under the *Schedule,* an insured person's injury from the accident is not minor if:

There is compelling evidence that the insured person has a pre-existing medical condition;

ii. The pre-existing medical condition was documented by a health practitioner before the accident; and The pre-existing medical condition will prevent the insured person from achieving maximal recovery from the

[4] *Automobile Insurance*, R.R.O. 1990, Reg. 664 ("*Regulation 664"*).
[5] *Schedule*, s.3.
[6] *Schedule,* s.3.
[7] *Schedule*, s.18(1).

minor injury if the insured person is subject to the $3,500 limit of the Minor Injury Guideline.[8]

[8] The respondent determined the applicant's injuries from the accident were minor. The respondent did not approve any of the benefits in dispute because they were beyond the $3,500 limit.

[9] The applicant submitted that his injuries fell outside of the *Minor Injury Guideline* for three reasons:

i. He had a pre-existing medical condition that met the requirements of s.18(2) of the *Schedule*;

ii. He suffered psychological injuries from the accident; and

iii. He suffered chronic pain from the accident.

[10] Overall, the evidence does not persuade me of any of these reasons. In the following paragraphs, I will explain why.

Pre-existing Medical Condition

[11] The applicant points me to one family doctor note from before the accident with a mention of lower back pain.[9] I am hardly able to characterize this as "compelling evidence" as required by the *Schedule*. I am not pointed to any other evidence from the applicant's pre-accident treatment file.

[12] Nonetheless, while I am prepared to acknowledge that the applicant experienced lower back pain before the accident, the criteria in s.18(2) of the *Schedule* are still not met on the evidence. I agree with Adjudicator Johal's reasoning in *B.W. v. Royal SunAlliance Insurance,* 2017 CanLII 19203 (ON LAT) at para. 25:

> The presence of pre-existing conditions alone is not sufficient to remove the applicant from the MIG [*Minor Injury Guideline*]. The applicant bears the onus and must adduce evidence to demonstrate that the pre-existing condition prevents him from achieving maximal recovery within the MIG. The applicant did not point me to any evidence that demonstrates this.

[8] *Schedule*, s.18(2).
[9] Applicant's Written Submissions, at para. 7, and Additional Information – Applicant Submissions, Tab 3, p.24.

[13] The evidence before me leads me to a similar conclusion. There is no evidence to indicate that the lower back pain from before the accident prevents the applicant from reaching maximal medical recovery within the *Minor Injury Guideline*.

[14] I will also briefly address the report of orthopedic surgeon Dr. Michael West, dated October 3, 2017 (the "West Report"). The applicant relies on the West Report in support of his submission that he has a pre-existing medical condition. The West Report contains a big contradiction. Under 'Pre-Accident Medical History,' Dr. West wrote that the applicant was asymptomatic at the time of the subject accident. However, in his conclusion, he wrote that the applicant had pre-existing lumbar spine pain.

[15] Dr. West contradicts himself again in a subsequent addendum report from 2019. When asked under Question 2 whether the applicant had a pre-existing condition, he said no.

[16] On a balance of probabilities, the applicant does not have a pre-existing medical condition that satisfies the criteria of s.18(2) of the *Schedule*. He cannot be removed from the *Minor Injury Guideline* on this basis.

Psychological Injuries

[17] The applicant relies on the psychological assessment report of Dr. Shaul dated June 12, 2019 (the "Shaul Report").[10] The Shaul Report concludes that the applicant suffers from a psychological impairment as a result of the accident.

[18] The Shaul Report is inconsistent with other evidence that is before me in the record. I am unable to ignore this.

Importantly:

i. There is no mention whatsoever in the post-accident family doctor notes that the applicant suffered any psychological injury from the accident; There is no referral to a psychologist, psychotherapist, or psychiatrist in the same set of family doctor notes; and The applicant reported to the IE assessor, Dr. Syed, that he did not want psychological treatment.[11]

[10] The report was completed by a registered psychotherapist, Ms. Helen Ilios, who was supervised by psychologist, Dr. Andrew Shaul.
[11] IE Report of Dr. Syed, p.18 of 28.

[19] There is no cogent or consistent evidence before me to support the submission that the accident caused the applicant psychological injuries. I give the Shaul Report less weight as it does not correspond to the trajectory of objective treatment evidence from the date of the accident. Further, the Shaul Report does not correspond to the applicant's subjective view that he did not want to proceed with psychological treatment.

[20] In his reply submissions, the applicant asks me to disregard his subjective opinion of psychological treatment. I am certainly not placing undue importance on his subjective opinion alone. Had the evidence shown me, on a balance of probabilities, that the applicant suffered a psychological injury from the accident, I would not have given much weight to the applicant's subjective opinion.

[21] In this case, the applicant's subjective opinion is just one piece of the larger context provided by the body of objective treatment records in the evidence. The objective treatment evidence that was put before me, as summarized above, does not support the opinion in the Shaul Report. Notably, this evidence makes no mention of a psychological condition caused by the accident.[12] Accordingly, I find that the applicant did not suffer psychological injuries as a result of the accident.

Chronic Pain

[22] The applicant relies on the report of Dr. Grigory Karmy, dated June 14, 2019 (the "Karmy Report") to demonstrate that he suffers from chronic pain as a result of the accident.

[23] I have concerns about the Karmy Report because the conclusions within that report are not supported by the examination findings set out earlier in the report. The following table[13] shows some of these contrasts:

Conclusion	**Contrasting Examination Finding**
Chronic bilateral knee pain.	The ranges of movement of the knees were full and painless, bilaterally.

[12] The evidence before me distinguishes this case from *C.H. v. Aviva Insurance Canada*, 2019 CanLII 76840 (ON LAT), which was submitted by the applicant.
[13] This is also summarized at para. 12 of the Respondent's Written Submissions.

Chronic mechanical upper and mid back pain, likely originating from the thoracic discs and facet joints.	Thoracic paraspinal muscles and thoracic facet joints were not tender, bilaterally.
Chronic bilateral shoulder pain.	The claimant did not report right shoulder pain during the examination.

[24] Further, the Karmy Report opines that the applicant suffered a concussion from the accident. There is no other evidence referred to in the report or before me in record[14] to support that the applicant suffered a concussion from the accident.

[25] The unsupported conclusions in the Karmy Report lead me to give it less weight. The Karmy Report does not persuade me that the applicant suffers from chronic pain due to the accident. The specific evidence before me is contradictory and unreliable.[15]

[26] For the reasons given above, I find that the applicant does not have chronic pain from the accident.

Conclusion on the Classification of the Applicant's Injuries

[27] On a balance of probabilities, the evidence supports the respondent's determination that the applicant suffered minor injuries.
On the day of the accident, the applicant went to his family doctor and reported pain in his jaw, right foot, right hand, back and neck. His family doctor recommended physiotherapy, Vimovo, and Voltaren gel.
In the weeks following the accident, diagnostic imaging of the applicant was unremarkable.

[28] In the 2-year period after the accident, the applicant saw his family doctor about 4-5 times. The doctor continued to prescribe physiotherapy, Vimovo, and Voltaren gel.

[14] The parties disagree on whether one of the family doctor notes says "TBI (traumatic brain injury)" or "IBS (irritable bowel syndrome)". On a balance, the evidence supports the interpretation that there was no TBI: otherwise, I would have seen records such as imaging, and consultations with the appropriate specialists. There was no such evidence before me.
[15] I am therefore faced with a different fact scenario compared to the decisions in *T.S. v. Aviva General Insurance Canada*, 2018 CanLII 83520 (ON LAT) and *J.R. v. RSA Insurance*, 2019 CanLII 9631 (ON LAT) that were provided to me by the applicant.

[29] There is no doubt that the applicant was injured from the accident. However, my exercise is to evaluate whether the respondent correctly applied the *Schedule* in deciding the applicant's claim. I see no basis to decide differently from the respondent in this case because the evidence shows that the applicant's injuries are minor injuries as defined in the *Schedule*.

Benefits and Interest Claimed

[30] Given that the applicant's injuries are minor injuries, the applicant is not entitled to benefits outside of the $3,500 limit of the *Schedule*. It is unnecessary for me to decide whether these benefits are reasonable and necessary.

[31] Since I have not found any benefits to be due and owing, no interest is owed.

Award

[32] An award under *Regulation 664* operates as a type of penalty against insurers who do not act in good faith. First, the Tribunal has to find that the insurer acted unreasonably in withholding or delaying payment of a benefit. If the Tribunal makes such a finding, the Tribunal may order the insurer to pay the insured person a lump sum of up to 50% of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2% per month compounded monthly from the time the benefits first became payable under the *Schedule*.[16]

[33] In summary, the applicant submits that the respondent acted unreasonably by:

i. Ignoring relevant medical treatment evidence on hand at the time the benefit claims were submitted; and

[34] Failing to comply with s.38(8) of the *Schedule*.

Neither of these submissions is made out on the evidence before me.

The assessment of whether or not an insurer conducted itself reasonably will differ on a case-by-case basis. An insurer is not obligated to simply approve a benefit claim on the basis of claim forms and treatment evidence in hand. This is especially the case when, as in this case, the treatment evidence by itself did not provide compelling evidence that the applicant's injuries were more than minor.

[16] *Regulation 664,* s.10.

[35] In any event, an insurer has a qualified right under the *Schedule* to conduct IE assessments and then come to a conclusion as to whether the benefit should be paid.

[36] The insurer respondent in this case denied the benefits based on the opinions it received from its IE assessors. Taking all of the evidence before me into consideration, I see nothing unreasonable about the action taken by the respondent in assessing and determining whether the applicant was entitled to each benefit claim in issue.

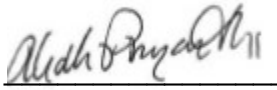
[37] The evidence also does not show me that there was a breach of s.38(8) of the *Schedule* as claimed by the applicant. Each denial of benefit or explanation of benefits was sent by the respondent to the applicant and there was no issue that it was successfully transmitted or received. The decision of *R.F. v. The Guarantee Company of North America,* 2019 CanLII 94015 (ON LAT) relied on by the applicant is distinct. In that case, there was a live issue as to whether the denials were even communicated. I have no such fact scenario before me.[17]

[38] Consequently, I find that no award under *Regulation 664* is payable to the applicant with respect to the respondent's determination of the benefits at issue.

CONCLUSION

[39] The application is dismissed.

Released: May 11, 2020



Nidhi Punyarthi
Adjudicator

[17] As an aside, I will also state that in *R.F.,* the Vice-Chair decided the s.38(8) issue even though it was not a listed issue in dispute.