

**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: J. M. vs. Aviva General Insurance, 2020 ONLAT 19-004363/AABS

Tribunal File Number: 19-004363/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:

J. M.

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR:

Brian Norris

APPEARANCES:

For the Applicant:

Leonard Liu

For the Respondent:

Margaret H. Louie

Heard by way of written submissions

OVERVIEW

- [1] The applicant was injured in an automobile accident on **October 28, 2016** and sought benefits from the respondent pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010*, O. Reg. 34/10 (the “*Schedule*”).
- [2] The respondent determined the applicant’s injuries fell within the *Minor Injury Guideline* (the “MIG”) and refused to pay for certain medical benefits. As a result, the applicant applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of this dispute.

ISSUES

- [3] The disputed claims in this hearing are:
 1. Has the applicant sustained predominantly minor injuries as defined under the *Schedule*?
 2. Is the applicant entitled to a medical benefit in the amount of \$1,965.25 for physiotherapy treatment recommended by Physiomed Bramalea in a treatment plan dated May 3, 2017?
 3. Is the applicant entitled to a medical benefit in the amount of \$3,559.50 for physiatry assessment recommended by Allied Med Trauma in a treatment plan dated July 11, 2017?
 4. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [4] The applicant sustained predominantly minor injuries as defined under the *Schedule* and is subject to the \$3,500.00 funding limit.
- [5] The applicant is not entitled to the disputed physiotherapy treatment plan, the physiatry assessment, or interest.

BACKGROUND

- [6] The applicant was the driver of a vehicle which was struck from behind while stopped at a red light. The impact of the collision caused the applicant’s vehicle to strike another vehicle which was stopped in front of her. She reported no immediate pains and did not seek medical attention at the scene of the accident. She reported to various assessors that she went to the hospital following the

accident and was x-rayed, which showed no fractures, and released. Though, no hospital records were submitted for this hearing.

- [7] About a month following the accident, the applicant visited to her family physician, Dr. T. Tran, for the first time post-accident. During that visit, she complained of neck, back and shoulder pain. Dr. Tran examined the applicant and referred her for physiotherapy and x-rays. The x-rays revealed mild supraspinatus tendinosis in both shoulders.
- [8] It appears that the applicant treated her injuries pursuant to the MIG at Physiomed Bramalea, however, no treatment records were submitted for this hearing.
- [9] I can conclude that the respondent characterized the applicant's injuries as a minor injury as defined by the *Schedule* and subject to a \$3,500.00 funding limit on treatment. According to a letter dated September 9, 2019, the applicant consumed the entirety of the \$3,500.00 funding limit.
- [10] The applicant claims that pre-existing back pain, rotator cuff tendinopathy, and a previous ankle fracture preclude her recovery within the MIG and, thus, the funding limit should be removed. She also claims to have developed chronic pain syndrome and psychological sequela as a result of the accident, further entitling her to funding for treatment beyond the \$3,500.00 limit.

THE MINOR INJURY GUIDELINE

- [11] The MIG establishes a treatment framework available to injured persons who sustain a minor injury as a result of an accident. A "minor injury" is defined in the *Schedule* and includes sprains, strains, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae. The MIG provides that a strain is an injury to one or more muscles and includes a partial tear. Minor injuries are subject to the treatment methodologies outlined in the MIG and, under section 18 of the *Schedule*, injuries that are defined as minor are subject to a \$3,500.00 funding limit on treatment.
- [12] If an insurer deems an applicant's injuries to be minor in nature, the responsibility is on the applicant to establish that the MIG, and the related funding limit, should not apply.
- [13] Upon review of the evidence and submissions I find the applicant has sustained predominantly minor injuries as defined by the *Schedule*. As a result, she is subject to the \$3,500.00 funding limit provided by section 18 of the *Schedule*.

Pre-Existing Conditions

- [14] The applicant submits that her pre-existing right shoulder tendonitis is evidence of a pre-existing condition which would preclude her recovery if subject to the MIG. She refers to a consultation report of Dr. G. Hockmann, dated April 25, 2014, which notes her right shoulder has mild degenerative changes. The respondent discounts the severity of the applicant's pre-existing shoulder tendonitis. It submits that there are only two instances prior to the accident where the applicant sought OHIP-funded medical attention for her shoulder and, in a physiatry assessment by Dr. S. W. J. Wong, dated August 23, 2017, it was noted that the applicant had no significant pre-existing problems aside from degenerative changes of the spine.
- [15] I find no evidence of a documented pre-existing condition that would preclude the applicant's recovery if subject to the MIG.
- [16] There is no evidence to show that the applicant's right shoulder tendonitis precludes her recovery. The applicant led no evidence indicating any concern by her treating healthcare professionals with respect to the impact this pre-existing condition will have on her recovery. She provided no clinical notes from her family physician, nor did she submit any records from her treatment facility. The rheumatology report by Dr. M. Lee, dated March 15, 2017 fails to acknowledge the applicant's shoulder tendonitis as a pre-existing condition.
- [17] The applicant's left ankle fracture healed before the accident. The applicant's submissions suggest an ankle fracture in 2014 is a pre-existing condition that would preclude her recovery within the MIG. However, the consultation report dated April 25, 2014 states that it healed and there is no evidence of any complications since then.
- [18] The applicant's evidence shows mostly mild degenerative changes in her shoulder, back, and neck. The applicant submits that x-rays on April 25, 2014 showed mild degenerative changes which worsened according to x-rays taken on December 3, 2016. However, the imaging was considered and dismissed by Dr. M. Nesterenko, physician, in an insurer's examination ("IE") report dated June 16, 2017. Dr. Nesterenko found no evidence of a pre-existing medical condition that would impact the applicant's recovery if subject to the MIG. Dr. Wong's physiatry assessment report dated August 23, 2017 contradicts itself and is unconvincing as a result. The report states that the applicant had no significant pre-existing problems involving the neck and back, but the following paragraph in the report finds that x-rays demonstrated degenerative changes of the spine that can make it more difficult for her to recover.

The Applicant's Accident-Related Injuries

- [19] The applicant submits that she suffers from chronic pain syndrome and requires treatment beyond the MIG and the \$3,500.00 funding limit. She submits she requires ongoing physiotherapy and cortisone shots as recommended by Dr. Lee and Dr. Wong. The respondent submits that the applicant suffered predominantly soft-tissue injuries, that she failed to produce any evidence from treating medical practitioners, and that a diagnosis of chronic pain syndrome, on its own, is insufficient to remove the applicant from the MIG.
- [20] I find on the evidence that the applicant's accident-related injuries, including her claims of chronic pain syndrome, fall within the definition of a minor injury.
- [21] The applicant's evidence shows she suffered predominately soft-tissue injuries which are captured in the minor injury definition. The applicant's predominant complaints are of ongoing soft-tissue pain in the back, neck and right shoulder. The medical record shows the applicant suffered no fracture as a result of the accident.
- [22] The applicant's injuries are minor injuries despite Dr. Lee's recommendation to change physiotherapists and engage in more active physiotherapy, as well as take cortisone shots if pain persisted. Dr. Lee's rheumatology report dated March 15, 2017 found the applicant suffered from posttraumatic myofascial pain syndrome with a component of supraspinatus tendonitis. Tendonitis and posttraumatic myofascial pain syndrome fall under the minor injury definition as soft tissue injuries and any clinically associated sequelae. Dr. Lee recommended active physiotherapy because the applicant reported to have engaged in predominantly passive treatment following the accident, with little to no benefit. Nevertheless, a referral to change physiotherapists is not evidence of an injury which is not included in minor injury definition nor is it evidence of a pre-existing condition which would preclude her recovery if subject to the MIG and the \$3,500.00 funding limit. Further, the applicant was scheduled for a follow up visit with Dr. Lee but failed to produce Dr. Lee's records of that appointment or any other visit.
- [23] Dr. Wong's diagnosis of "psychological problems" is unconvincing. In the August 23, 2017 report, Dr. Wong diagnosed the applicant with psychological problems because she described feeling stressed due to ongoing pain. No formal psychological investigation was conducted to examine the applicant's psychological health. Further, the diagnosis of "psychological problems" is unconvincing because there is no evidence to support the finding. There are no clinical notes and records from any other healthcare practitioner, including her

family physician and treatment facility, which note that the applicant experienced any psychological symptomology.

- [24] I prefer Dr. M. Nesterenko's opinion in the IE report dated June 16, 2017 over Dr. Wong's opinion because Dr. Nesterenko's opinion is clear and contains no contradictions like Dr. Wong's does. Dr. Nesterenko examined the applicant and found that the applicant had functional range of motion in her cervical spine, despite noting some tenderness and complaints of pain during examination. It was also determined that the applicant had normal active range of motion in the shoulders and was observed to exhibit full range of motion in her thoracic and lumbar spine. Dr. Nesterenko diagnosed the applicant with sprain/strain injuries and advised her to cease facility-based treatment and do exercises at home instead. Dr. Wong's examination revealed limited extension and rotation in the cervical spine, normal range of motion in the lumbar spine, slightly or moderately stiff and tender upper back and supraspinatus muscles, and limited range of motion in the right shoulder. Despite relatively similar examination results, Dr. Wong, a physiatrist, diagnosed the applicant with "psychological problems" and soft-tissue injuries - myofascial injuries to the cervical and thoracic spine as well as right shoulder rotator cuff tendinitis. The applicant's medical record is devoid of any other evidence showing she exhibited symptoms of a psychological injury. Notably, Dr. Wong excluded chronic pain syndrome from the diagnosis section in his report, despite stating later in the report that the applicant developed chronic pain syndrome. This omission undermines the validity of the report as it is inexplicable that the examiner would omit this information from the diagnosis section in the report if the condition was serious enough to warrant recommendations for participation in a comprehensive chronic pain program, the use of analgesic medication on a regular basis, continued physiotherapy, and trigger point injections and nerve blocks.
- [25] Considering the submissions and evidence before me, I conclude that the applicant suffered predominantly soft tissue injuries which fall within the minor injury definition.
- [26] An analysis of whether the treatment and assessment plans are reasonable and necessary is not required. The evidence shows that the applicant consumed \$3,500.00 in treatment, which is the funding limit for the treatment of minor injuries.

INTEREST

- [27] The applicant is not entitled to interest as no payments went overdue. Pursuant to section 51 of the *Schedule*, interest is payable if the respondent failed to pay a

benefit within the timelines provided. No benefits were found payable or due and, as a result, no interest is owed.

CONCLUSION

- [28] The applicant's injuries as a result of the accident fall within the minor injury definition. As a result, the applicant is subject to the funding limit prescribed by section 18 of the *Schedule*.
- [29] The applicant is not entitled to the disputed treatment plans because she has exhausted the \$3,500.00 funding limit for minor injuries.
- [30] No interest is owed.

Released: July 31, 2020



Brian Norris
Adjudicator