

**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: Dwayne Peck vs. Allstate Insurance, 2019 ONLAT 18-008134/AABS

**Released Date: 12/30/2019
File Number: 18-008134/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:

Dwayne Peck

Applicant

and

Allstate Insurance

Respondent

DECISION

ADJUDICATOR:

Tavlin Kaur

APPEARANCES:

For the Applicant:

Dwayne Peck, Applicant
Humberto Geovo, Paralegal

For the Respondent:

Laura Ligda, Adjuster
Maia K. Abbas, Counsel

HEARD: In Writing

May 27, 2019

OVERVIEW

- [1] The applicant was injured in an automobile accident (“the accident”) on August 30, 2017 and sought insurance benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the “*Schedule*”). He applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (“the Tribunal”) when his claim for benefits was denied by the respondent.
- [2] The respondent denied the applicant’s claim because it determined that all of the applicant’s injuries fit within the definition of a “minor injury” prescribed by s. 3(1) of the *Schedule*, and therefore, fall within the Minor Injury Guideline² (“MIG”). The applicant disagrees.
- [3] If the respondent’s position is correct, then the applicant is subject to a \$3,500 limit on medical and rehabilitation benefits for the treatment of predominantly minor injuries as prescribed by s. 18(1) of the *Schedule*. If the applicant’s position is correct, then I must address whether the medical benefits claimed are reasonable and necessary.

ISSUES

- [4] I have been asked to decide the following issues:
 - (i) Did the applicant sustain predominately minor injuries as defined under the *Schedule*?
 - (ii) If the answer to issue (i) above is “no”, then I must determine the following issues:
 - (iii) Is the applicant entitled to receive a medical benefit in the amount of \$3,913.95 for chiropractic treatment, recommended by Spinal Touch Wellness Centre in a treatment plan dated April 6, 2018, and denied by the respondent on April 26, 2018?
 - (iv) Is the applicant entitled to receive a medical benefit in the amount of \$3,913.95 for chiropractic treatment, recommended by Spinal Touch Wellness Centre in a treatment plan dated August 7, 2018, and denied by the respondent on September 5, 2018?

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*.

- (v) Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] I find that the applicant sustained predominantly minor injuries as defined under the *Schedule*. Therefore, it is unnecessary to consider the reasonableness or necessity of the treatment plans in dispute or the issue of interest.

ANALYSIS

- [6] The onus is on the applicant to show that his injuries fall outside of the MIG.³ In order to determine if the applicant's injuries fall outside the MIG, I considered whether or not there was any evidence that the applicant: (a) had a pre-existing medical condition that would prevent him from achieving maximum medical recovery within the MIG; (b) if he sustained any physical injuries that were more than soft tissue in nature; or (c) if he has psychological injuries and chronic pain as a result of the accident.

The Minor Injury Guideline

- [7] 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." The MIG defines in detail what these terms for injuries mean.
- [8] Section 18(1) of the *Schedule* prescribes a \$3,500 limit on medical and rehabilitation benefits payable for individuals who sustain a predominantly minor injury.
- [9] The onus is on the applicant to show that his injuries fall outside of the MIG.⁴

Did the applicant have a pre-existing condition?

- [10] Section 18(2) of the *Schedule* provides that insured persons with minor injuries who have a pre-existing medical condition may be exempt from the \$3,500 cap on benefits. In order to be removed from the MIG, the applicant must provide compelling evidence meeting the following requirements:
- (i) There was a pre-existing medical condition that was documented by a health practitioner before the accident; **and**

³ *Scarlett v. Belair*, 2015 ONSC 3635 para. 24

⁴ *Scarlett v. Belair*, 2015 ONSC 3635 para. 24

- (ii) The medical documentation supports that the pre-existing condition will prevent maximal recovery from the minor injury if the person is subject to the \$3,500 limit on treatment costs under the MIG.⁵

[11] A pre-existing medical condition will not automatically remove a person with predominantly minor injuries from the MIG. The pre-existing medical condition must be shown to prevent maximal recovery within the cap imposed by the MIG.

[12] I find that the applicant does not have a pre-existing medical condition that warrants removing him from the MIG for the following reasons.

- (i) In his submissions, the applicant states that his injuries cannot be considered minor injuries because he was involved in a previous car accident that occurred on October 2016. The applicant reported that he was experiencing pain in his right shoulder and left knee as a result of the October 2016 accident.
- (ii) In his affidavit, the applicant mentions that he had sustained injuries to his right shoulder, lower back and left knee and that the August 30, 2017 accident aggravated these conditions.
- (iii) The applicant relies on Dr. Wong's assessment dated July 27, 2018. Dr. Wong is a physiatrist. For the purpose of the assessment, Dr. Wong relied on the clinical notes and records ("CNRs") of his family physician, Dr. Lielmanis, an ultrasound report of his right shoulder dated March 27, 2018, an ultrasound report of his right shoulder dated April 10, 2017 and a disability certificate dated April 6, 2018.
- (iv) In his report, Dr. Wong states "I believe that Mr. Peck has not recovered from the initial motor vehicle accident when the second collision occurred [sic], the injured areas from the first accident can make him more difficult to heal as the pre-existing injuries can make him more vulnerable to injury and, therefore, more difficult to heal from injuries sustained in the second collision."
- (v) The respondent argues that there is no compelling evidence that a pre-existing medical condition will prevent the applicant from achieving maximal recovery under the MIG. The respondent relies on the report of Dr. Jaroszynski dated November 13, 2018. Dr. Jaroszynski is an orthopaedic surgeon. Dr. Jaroszynski states that "Mr. Peck's injuries are

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

predominantly minor, notwithstanding his pre-existing issues. The presence of a pre-existing condition would not have affected his recovery from the accident related injuries if subjected to the minor injury funding cap of \$3,500.00.”

- (vi) I prefer Dr. Jaroszynski’s opinion over Dr. Wong’s opinion for a variety of reasons. Firstly, I find that it is more consistent with the medical evidence on record. The medical evidence supports that the injuries were minor in nature and that his pre-existing conditions did not affect his recovery. For example, the diagnostic imaging yielded normal results. With respect to the x-rays of the right shoulder, it was found that it is a partial tear; this is considered to be a minor injury. Moreover under Part 7 (a) of the treatment plans, his chiropractor Dr. Sarathy checked off “no” when asked whether prior to the accident the applicant had any disease, condition or injury that could affect his response to treatment.
- (vii) Secondly, I found that Dr. Jaroszynski’s assessment was more thorough as he reviewed more medical documentation than Dr. Wong. In addition to reviewing the same documentation that Dr. Wong did, he also had the advantage of reviewing other documentation. For example, he reviewed Dr. Wong’s physiatry report, the application for accident benefits, the disability certificate (“OCF-3”), the treatment plan dated August 7, 2018, the OHIP summary from August 30, 2013 to November 29, 2017 and the x-ray of the applicant’s left knee dated March 3, 2016. As such, I find that he has come to a more well-informed opinion regarding the applicant.
- (viii) Thirdly, Dr. Wong’s conclusion is not supported by the objective evidence that he reviewed. For example, Dr. Lielmanis’ CNRs do not provide any information regarding how the applicant’s pre-existing medical conditions prevent him from achieving maximal recovery. The two x-rays that he reviewed are in relation to the size of the partial tear in the applicant’s shoulder. The disability certificate filled out by Dr. Sarathy does not provide any information in this regard. Based on the limited information that Dr. Wong reviewed, it is unclear to me how he arrived at the conclusion that he did.
- (ix) While I acknowledge that the applicant sustained injuries in the October 2016 accident, the applicant has not advanced any medical evidence that corroborates Dr. Wong’s opinion that that he has any pre-existing medical conditions from the earlier car accident in October 2016 that will prevent

him from achieving maximal recovery from the injuries sustained in the subject accident on August 30, 2017.

- (x) The applicant has not met his onus in providing compelling medical evidence of a pre-existing medical condition that was documented by a health practitioner, prior to his accident, which would prevent him from achieving maximal recovery if subjected to the \$3,500 MIG limit. As a result, I find the applicant's pre-existing conditions do not remove him from the MIG.

Did the applicant sustain predominantly minor physical injuries?

[13] The applicant has not persuaded me that he sustained any injuries that were more than soft tissue in nature for the following reasons.

- (i) The applicant did not visit his family doctor regarding his accident related impairments until March 8, 2018, which is approximately seven months after the subject accident. In Dr. Lielmanis' CNRs, the applicant reported that he had pain in his chest for one year and pain in his groin area for three months. There is no note made in relation to the accident or indicating that these chest and groin complaints were in any way related to the accident.
- (ii) A few weeks later, the applicant returned and informed the family doctor that he had right shoulder pain and left groin pain. Dr. Lielmanis requisitioned a thoracic spine x-ray and noted "thoracic vertebrate pain-1 year and weightlifting. Injured L rhombosis." The result of the x-ray found that the applicant's thoracic spine was normal.
- (iii) Additional diagnostic imaging was conducted which concluded that the applicant's pelvic and hip joints were normal. An ultrasound of his left groin revealed no abnormality or evidence of inguinal hernia. An ultrasound overlying the posterior back/shoulder revealed no soft tissue pathology. His muscles appeared to be intact and there was no abnormal fluid collections. The applicant underwent an ultrasound of his right shoulder, which confirmed that there is a partial thickness tear of the supraspinatus tendon with surrounding tendinosis.
- (iv) In his report dated November 13, 2018, Dr. Jaroszynski opined that the applicant suffered a soft tissue injury to the axial skeleton and a minor contusion of his knees.

- (v) However, Dr. Wong is of the opinion that the applicant suffered from myofascial injury of the cervical spine paraspinal muscles, myofascial injury of the thoracic spine muscles with referred pain to the shoulders, right shoulder rotator cuff tear and right and left knee patellofemoral syndrome with right knee medial collateral ligament strain.
- (vi) In the disability certificate and treatment plans at issue in this hearing, the applicant's injuries are listed as: injury of muscle(s) and tendon(s) of the rotator cuff of shoulder, adhesive capsulitis of shoulder, whiplash associated disorder [WAD2] with complaint of neck pain with musculoskeletal signs, sprain and strain of thoracic spine, sprain and strain of lumbar spine, headache, radiculopathy, dislocation, sprain and strain of joints and ligaments of elbow and sprain and strain involving (fibular)(tibial) collateral ligaments of knee.
- (vii) I find that the applicant's injuries are minor in nature. This is reflected in the records of Dr. Lielmanis, Dr. Jaroszynski and Dr. Sarathy who came to similar findings/diagnoses.
- (viii) I prefer the findings of Dr. Lielmanis, Dr. Jaroszynski and Dr. Sarathy over those of Dr. Wong because Dr. Wong's opinion is not supported by the diagnostic imaging and is inconsistent with their combined findings.
- (ix) Moreover, the applicant met with Dr. Lielmanis on only a few occasions. If the applicant's injuries were more than minor in nature, I would expect that he would have visited his family doctor on a more constant basis. The applicant's family doctor's records did not persuade me that the physical injuries he sustained are more than minor in nature.
- (x) Finally, I find that the partial tear of the applicant's rotator cuff, as identified in the two ultrasounds, is a predominantly minor injury as defined in s. 3(1) of the *Schedule*. Under s.3(1) of the *Schedule*, "sprain" means an injury to one or more tendons or ligaments or to one or more of each, including a partial but not a complete tear. "Strain" means an injury to one or more muscles, including a partial but not a complete tear.
- (xi) The evidence is that the applicant sustained a partial tear of supraspinatus tendon with surrounding tendinosis. There is no evidence that the applicant sustained a complete tear. The partial tear of the applicant's supraspinatus tendon with surrounding tendinosis fits within the definition of a "sprain" in the *Schedule*.

Chronic Pain

[14] I am not satisfied that the applicant has chronic pain or chronic pain syndrome as a result of the accident. My reasons are as follows.

- (i) The applicant relies on Dr. Wong's physiatry report dated July 27, 2018. During Dr. Wong's medical examination, he found that the range of motion of the applicant's shoulders, elbows, wrists, cervical, thoracic and lumbar spine was normal. However, the applicant reported experiencing pulling pain. The muscle strength of the knees was 5/5; however, the applicant complained of pain.
- (ii) Dr. Wong concluded that the applicant has chronic pain and chronic pain syndrome. He stated:

Chronic pain is defined as injury not healing despite the normal time for healing. The usual recovery time for soft tissue injuries is between three and six months, but it is well known that about 10 to 15 percent of patients who have soft tissue injuries never completely heal from their soft tissue injuries and continue to suffer with pain and often [sic] has disability. Examination today continues to show abnormal physical findings for the lower back and the patient continues to complain of pain. In my medical opinion, this patient is one of these unfortunate patients who have [sic] not healed from the injuries. The patient has chronic pain.

- (iii) The respondent relies on an insurer's examination report completed by Dr. Jaroszynski dated November 13, 2018. Dr. Jaroszynski's examination found that the spine examination showed no abnormal curvatures. The neurological examination showed symmetrical deep tendon reflexes in the upper and lower extremities. The examination of the elbows, hands and wrists was normal. The ranges of motion were noted to be normal. The knee examination showed no effusion or swelling.
- (iv) Dr. Jaroszynski concluded that, from a musculoskeletal perspective, the applicant sustained a soft tissue injury to the axial skeleton and a minor contusion of his knees. He states "the current complaints, in my opinion, are not attributable to the motor vehicle accident soft tissue injuries as those are expected to be healed. I believe there is significant nonorganic symptom magnification."

- (v) As already highlighted above, I am not persuaded by Dr. Wong's opinion and am assigning less weight to it for a variety of reasons. From a physical perspective, both of the assessors had somewhat similar findings when they assessed the applicant. However, Dr. Wong came to the conclusion that the applicant suffers from chronic pain.
- (vi) The medical records that Dr. Wong reviewed do not make any reference to chronic pain. For example, Dr. Wong reviewed Dr. Lielmanis' CNRs. These records do not show a history of chronic pain. Dr. Lielmanis did not diagnose the applicant with chronic pain or refer him to a chronic pain specialist.
- (vii) Dr. Wong states that he reviewed a medical note dated November 17, 2018 as part of Dr. Lielmanis' records, which indicated that the patient was experiencing pain involving his back, neck, hips, shoulders, ankles, chest and knees, headache, dizziness, poor sleep, nervousness and difficulties with daily activities. It appears that the date of November 17, 2018 is incorrect. The correct date is November 18, 2017. Moreover, this is a letter from the applicant, not Dr. Lielmanis, that was submitted as part of his application for accident benefits. Dr. Lielmanis did not write such a note.
- (viii) The other medical evidence such as the disability certificate and the treatment plans in dispute do not mention chronic pain. For example, in the disability certificate dated April 6, 2018, Dr. Sarathy does not make any mention of a chronic pain assessment under part 7 (further investigations or consultations). Rather, it is noted that a "chiropractic re evaluation exam, in home evaluation and functional exam (if required) may be contemplated or required."
- (ix) In the treatment plans dated April 5, 2018 and August 7, 2018, Dr. Sarathy notes that if there is little success with the active rehab of the shoulder and passive therapies, the applicant would have to see an orthopaedic specialist for a consultation of the shoulder tear. There is no mention made regarding chronic pain or a referral to a chronic pain specialist.
- (x) As such, I am not persuaded that the applicant has chronic pain and/or suffers from chronic pain syndrome.
- (xi) I prefer Dr. Jaroszynski's report as it is more consistent with the evidence before me.

[15] I find that the applicant has not met his burden to demonstrate that he has chronic pain. He has not provided supporting medical records that corroborate that he suffers from chronic pain as a result of the subject accident. The applicant has not satisfied his onus to establish that he has chronic pain that may remove him from the MIG.

Psychological Impairment

[16] A psychological impairment, if established, may fall outside the MIG, because the MIG only governs “minor injuries” and the prescribed definition does not include accident related psychological impairments.

[17] I find that the applicant has not demonstrated that he suffers from a psychological injury that would remove him from the MIG for the following reasons.

- (i) There is nothing in Dr. Lielmanis’ CNRs that show a history of ongoing psychological complaints. If the applicant had psychological issues, I would expect that he would have spoken to his doctor for the purpose of treatment and/or referrals.
- (ii) In his affidavit dated January 25, 2019, the applicant does not mention any psychological impairments stemming from the subject accident or the earlier October 2016 accident.
- (iii) Sleep disturbance is noted in a clinical note from The Sports Medicine Specialists dated April 28, 2017. However, ‘sleep issues’ is not checked off on the information form for the Spinal Touch dated April 3, 2018.
- (iv) In his report, Dr. Wong diagnoses the applicant with post-traumatic insomnia and psychological problems. He states that “I believe that there is a degree of anxiety problem.” I am assigning less weight to Dr. Wong’s opinion for various reasons. Diagnosing psychological conditions is outside of his expertise. He has relied on the applicant’s self-reports and not objective evidence. I am not persuaded by his findings.

[18] Based on the totality of the evidence before me, I do not find that the applicant has sustained a psychological impairment as a result of the accident that would remove him from the MIG.

The treatment plans and interest

[19] Because I have found the applicant's injuries fall within the MIG, it is unnecessary for me to determine whether the claimed treatment plans are reasonable and necessary. The applicant is not entitled to treatment beyond the \$3,500 MIG limit.

[20] Interest is not payable as there are no overdue amounts owing.

ORDER

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

- (i) The applicant sustained predominantly minor injuries as defined under the *Schedule*. Accordingly, the applicant is not entitled to the treatment plans claimed in this application;
- (ii) The applicant is not entitled to interest; and
- (iii) The application is dismissed in its entirety.

Released: December 30, 2019



**Tavlin Kaur
Adjudicator**