



Citation: Herbert Rose vs. Economical Insurance Company, 2021 ONLAT 20-005673/AABS

**Released Date: 04/30/2021
File Number: 20-005673/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:

Fitz-Herbert Rose

Applicant

and

Economical Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: Monica Chakravarti

APPEARANCES:

For the Applicant: Darshika Pathmanathan, Counsel

For the Respondent: Matthew Owen, Counsel

HEARD: Via Written Submissions

OVERVIEW

- [1] The applicant was involved in a motor vehicle accident on September 19, 2018 and sought medical and rehabilitation benefits from the respondent pursuant to the *Statutory Accident Benefits Schedule-Effective September 1, 2010*¹ (the “Schedule”).
- [2] The respondent denied the applicant’s medical and rehabilitation benefits based on its determination that the Minor Injury Guideline (“MIG”) applied to the treatment of his accident-related injuries. The applicant then applied to the Licence Appeal Tribunal (the “Tribunal”) for the resolution of the dispute.

ISSUES TO BE DECIDED:

- [3] The issues to be decided are:
- a. 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 MIG?
 - b. Is the Applicant entitled to a medical benefit in the amount of \$4,911.56 for a physiotherapy services recommended by PhysioFix and Fitness in a treatment plan (OCF-18) dated May 27, 2019? (the “Disputed Treatment Plan”)
 - c. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT:

- [4] The applicant has not met his evidentiary burden to show that the injuries sustained in the accident fall outside of the MIG or that they are not minor as defined in the Schedule. The applicant has not shown that the Disputed Treatment Plan is reasonable and necessary. Therefore, as no benefits are overdue there is no entitlement to interest.

ANALYSIS

Are the Applicant’s injuries “minor” injuries and subject to the MIG?

- [5] 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,

¹ O. Reg. 34/10

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*.

- [6] Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to \$3,500.00. Section 18(2), however, allows for treatment outside the MIG if the applicant has a pre-existing medical condition, documented by a health practitioner before the accident and that will prevent him from achieving maximum recovery from the minor injury. Specifically, section 18(2) states:

Despite subsection (1), the limit in that subsection does not apply to an insured person if his or her health practitioner determines and provides compelling evidence that the insured person has a pre-existing medical condition that was documented by a health practitioner before the accident and that will prevent the insured person from achieving maximal recovery from the minor injury if the insured person is subject to the limit or is limited to the goods and services authorized under the Minor Injury Guideline.

- [7] A psychological impairment and/or chronic pain as a result of the accident are not part of the definition of “minor injury” under the *Schedule* and are not subject to the confines of the MIG.
- [8] The onus is on the applicant to show on a balance of probabilities that his injuries do not fit within the confines of the MIG.
- [9] The applicant has not met his onus to show that his accident related injuries are anything other than minor as defined in the Schedule. The Schedule defines minor injury 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.”
- [10] The applicant submits, and the respondent and the Tribunal accepts, that following the accident the applicant was diagnosed with whiplash. The applicant’s immediate injuries included chest, neck, shoulder and upper back pain with a later onset of lower back pain. The clinical note of November 23, 2018 from the family doctor, Dr. Wong, indicated that the neck and upper back pain had resolved, and the left anterior shoulder pains was less, aggravated with range of motion and were otherwise symptom free. There was no mention of lower back pain in this note or the clinical notes in the month previous. The physical examination conducted on November 23, 2018 noted the left shoulder had full range of motion with no pain.

- [11] Dr. Wong's note of December 20, 2018, three months post-accident, noted "*Left Anterior [shoulder] pains: ONLY WITH EXERTION Otherwise remains asymptomatic.*" The physical examination conducted that day noted the left shoulder was normal.
- [12] Following the note of December 20, 2019 there are no further complaints of accident related injuries and no visits to the family doctor, Dr. Wong. At this point the applicant had returned to work.
- [13] The next visit is on March 11, 2019 wherein the applicant attended at Dr. Wong and indicated that he had to brake suddenly, and this exacerbated the left chest and left upper back pain as well as left anterior shoulder pain. Thereafter the clinical notes and records of Dr. Wong make no further notations of left upper back or chest pain and the only notation is with respect to the shoulder culminating into a suspicion of AC tendonitis.
- [14] There is no evidence however that the applicant has AC tendonitis as the left shoulder x-ray of May 27, 2019 is normal and the ultrasound of the left shoulder on that date indicated no fluid or tears in the tendons or rotator cuff tendons. Further the clinical notes of September 10, 2019 indicate that the left shoulder pain is episodic and aggravated with movement. There are no further notes or evidence of ongoing left shoulder pain following September 10, 2019 (despite further records being produced by the applicant).
- [15] The applicant was assessed by Dr. Naaman, physiatrist, in the context of an insurer examination (I.E.) on July 29, 2019. Dr. Naaman diagnosed the applicant with left shoulder/pectoral sprain/strain. The applicant does not dispute this diagnosis.
- [16] Based on the above the applicant has not met his evidentiary burden to show his injuries and specifically the injury to the left shoulder is more than an associated sequela to his sprain, strain or subluxation injury. Therefore, the applicant's accident related injuries are minor injuries and confine him to the MIG.

Does the Applicant's pre-existing medical conditions prevent maximal recovery from his accident related minor injuries?

- [17] The applicant submits that he has pre-existing medical condition and therefore he should be removed from the MIG.
- [18] As per section 18(2), the applicant may escape the MIG if he has compelling evidence from his health practitioner that he has pre-existing medical conditions

and that the limits in the MIG will prevent him from achieving maximal recovery from the minor injury if he is subject to the MIG limits.

- [19] It is not enough that the applicant has a pre-existing condition, but that pre-existing condition must prevent maximal recovery from accident related injuries. The applicant submits that the pre-existing conditions are osteoarthritis in both knees and high blood pressure. The applicant also submits that injuries from a motor vehicle accident in 2014 persisted.
- [20] There is no compelling evidence from a health practitioner noting medical conditions arising from the 2014 motor vehicle accident that continued to persist. The medical records submitted² show that the last notation before the subject accident relating to the 2014 accident is in 2015. Further there is one notation of back pain on April 7, 2016 and one notation of left arm pain on March 27, 2017 with an examination of the left shoulder indicating that it is normal. This is not compelling evidence of medical conditions but rather are single notations of acute onset of pain that appear to have resolved. The evidence does show a long-standing history of osteoarthritis of the knees.
- [21] In order to be removed from the MIG the applicant must show that his pre-existing conditions, which as noted above is osteoarthritis in the knees, prevent maximal recovery. The applicant has not met this burden. There is no evidence of injuries to the knees as a result of the accident, no evidence of treatment to the knees and no evidence of an exacerbation of knee pain or symptoms to the knees as a result of the accident. May 16, 2019 is the first notation of any pain or issues with the knee reported by the applicant to the family doctor and the family doctor specifically notes that the applicant "Denies accident/injury".
- [22] Based on the above the applicant has not shown that the pre-existing medical condition of osteoarthritis prevents maximal recovery for his accident related injuries.

Does the applicant have chronic pain as a result of accident related injuries?

- [23] The applicant submits that he has chronic pain as a result of accident related injuries and as chronic pain falls outside of the definition of "minor under the Schedule that he is not subject to the confines of the MIG. The evidentiary onus remains on the applicant.

² Tab D of the applicant's brief

- [24] The applicant also submits that as a result of the accident related injuries and the pain from those injuries, his pain is now chronic in nature.
- [25] The applicant has not met his onus. He points me to no medical documents showing that his pain complaints are a result of accident-related injuries and that they are now chronic, in nature. Further there are no records showing accident related pain complaints past December of 2018. The notes of March 2019 until September of 2019 are related to pain experienced following a driving episode and not the accident. Following September of 2019 there are no notations of ongoing pain to his left shoulder or other areas other than his knees. Lastly, the applicant has provided no evidence indicating that any of the treating physicians consider the shoulder pain to be chronic in nature.
- [26] Thus, as there is no evidence of chronic pain the applicant remains within the confines of the MIG.

The Disputed Treatment Plan and Interest

- [27] The applicant submits that the Disputed Treatment Plan completed by Dr. Tran, chiropractor, is reasonable and necessary. The applicant points to the note of Dr. Wong of September 10, 2019 that states that the applicant is attending physiotherapy once a week and it was helping and that he continues with physiotherapy.
- [28] Prior to the note of September 10, 2019 there is no indication that physiotherapy or chiropractic therapy is being recommended at the time of the Disputed Treatment Plan. The evidence shows between December 20, 2018 and September 10, 2019 there are no recommendations for any ongoing therapy be it physiotherapy or chiropractic therapy. Further the note of September 10, 2019 makes it clear that the applicant was attending physiotherapy not on the advice of his family doctor but on his own initiative.
- [29] The respondent submits that the Disputed Treatment Plan is not reasonable and necessary as it is not correlated to the applicant's accident related injuries and physical condition. The respondent submits that the rationale provided by Dr. Tran, for ongoing treatment is unreliable and vague.
- [30] I agree with the respondent the Disputed Treatment Plan does not correlate to the applicant's injuries and impairments as a result of the accident. The Disputed Treatment Plan lists the injuries as sprains and strain of cervical spine, sprains and strain of thoracic spine and left rotator cuff syndrome. The evidence above confirms that the accident related injuries to the cervical and thoracic spine had

resolved. The evidence as well does not support that left rotator cuff syndrome is an accident related injury and the x-ray and ultrasound of the left rotator cuff notes that it has no tears.

[31] The rationale for the need for ongoing treatment is also inconsistent with the evidence. The evidence shows that a treatment plan dated March 29, 2019 signed by the applicant on April 1, 2019 recommended 8 sessions of chiropractic session, 8 exercise sessions 8 sessions of exercise instruction and 8 sessions of massage therapy. The Disputed Treatment Plan of May 27, 2019 recommends 18 sessions of chiropractic treatment, 18 exercise sessions, 18 massage therapy sessions and 18 laser therapy sessions. Dr. Tran, chiropractor, in the progress note of May 27, 2019 provides the rationale for the increase in treatment due to the applicant's high blood pressure and slower healing process. However, this rationale is not supported by any medical evidence as there is no indication that the applicant's high blood pressure interferes with his accident related injuries or treatment nor is there evidence that the applicant has a "slower healing process". The evidence indicates that the cervical and thoracic pain from the accident resolved within three months of the accident and that the left shoulder pain was being managed by medication, as noted in Dr. Wong's records.

[32] Other than the above note of Dr. Wong dated September 10, 2019, that is not contemporaneous to the Disputed Treatment Plan of May 27, 2019, there is no evidence provided by the applicant that the treatment proposed in the May 27, 2019 Dispute Treatment Plan is reasonable and necessary.

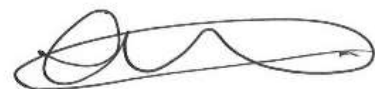
[33] As such the applicant has not met his evidentiary burden to show that the treatment plan is reasonable and necessary.

[34] As no benefits are overdue and owing no interest is payable.

ORDER

[35] The applicant's appeal is dismissed in its entirety.

Released: April 30, 2021



Monica Chakravarti
Adjudicator