Citation: Opoku v. Jevco Insurance, 2021 ONLAT 20-003302/AABS

Licence Appeal Tribunal File Number: 20-003302/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:

Kojo Opoku

Applicant

and

Jevco Insurance

Respondent

DECISION AND ORDER

ADJUDICATOR: **Tavlin Kaur**

APPEARANCES:

For the Applicant:	Kojo Opoku, Applicant Alex Nikolaev, Counsel
For the Respondent:	Jevco Insurance Jonathan White, Counsel
Court Reporter:	Cathy Petrou

Heard: by Videoconference: **August 16 and 17, 2021 and by Written Submissions**

BACKGROUND

[1] The applicant was involved in an automobile accident on January 26, 2019 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*").[1] The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

PRELIMINARY ISSUES

Did the respondent's denials of the disputed treatment plans comply with s.38(8)of the Schedule?

[2] At the hearing, the applicant's counsel raised a preliminary issue regarding the respondent's notice letters for the treatment plans that are in dispute. It was argued that the notices failed to comply with section 38(8) of the *Schedule* and as such, the treatment plans are payable pursuant to section 38(11).

[3] The respondent submitted that all of the notice letters complied with section 38(8) of the *Schedule*. The respondent asserted that it had responded to the treatment plans within the requisite 10 business day timeframe and provided medical and other reasons for the denials based on the limited medical evidence it received from the applicant. The respondent made numerous section 33 requests for medical evidence but did not receive the majority of the medical records until a week before the case conference that was held on September 15, 2020. The respondent submitted that "the inadequacy of reasons for denials should not be used as a means to subvert the applicant's onus of proof. Where the respondent has none or limited information about the applicant's injuries, it is not able to provide specific reasons for denials, but this should not invalidate this response."

RESULT

[4] I find that the respondent's denials of the disputed treatment plans did not comply with s. 38(8) of the *Schedule*.

ANALYSIS

[5] Section 38(8) of the *Schedule* provides that an insurer shall respond to a treatment and assessment plan within 10 business days of receiving it identifying the goods, services, assessments and examinations described in the plan that the insurer does and does not agree to pay for. The insurer must also provide

[1] O. Reg. 34/10, as amended.

medical and all other reasons why it has determined that the treatment and assessment plan is not reasonable and necessary.

[6] If an insurer fails to comply with s. 38(8) the *Schedule* sets out two consequences under s. 38(11). First, an insurer who fails to provide the insured with adequate notice of the reasons for its denial is prohibited by s. 38(11)1 from taking the position that the insured person has an impairment to which the minor injury guideline ('MIG') applies. Second, s. 38(11)2 provides that if an insurer fails to provide proper notice of the reasons for its denial it must pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day the insurer received the application and ending on the day the insurer gives notice as described in s. 38(8).

[7] In *T.F. v Peel Mutual*[2], the Executive Chair provided some general guidance with respect to "medical and any other reasons":

> Nevertheless, an insurer's "medical and any other reasons" should, at the very least, include specific details about the insured's condition forming the basis for the insurer's decision or, alternatively, identify information about the insured's condition that the insurer does not have but requires. Additionally, an insurer should also refer to the specific benefit or determination at issue, along with any section of the Schedule upon which it relies. Ultimately, an insurer's "medical and any other reasons" should be clear and sufficient enough to allow an unsophisticated person to make an informed decision to either accept or dispute the decision at issue. Only then will the explanation serve the Schedule's consumer protection goal.

[8] I find that the respondent did not comply with section s. 38(8) of the *Schedule* for the following reasons.

Treatment plan in the amount of $4,023.46 for chiropractic treatment denied on July 26, 2019.

[9] The treatment plan was submitted on July 19, 2020 and Jevco complied with section 38(8) by responding within 10 business days on July 30, 2019. The letter from Jevco dated July 30, 2019 informed the applicant that his injuries fall within the MIG and that they require additional documentation as there is some evidence from the applicant's health practitioner that suggests that his injuries fall

[2] *T.F. v. Peel Mutual Insurance Company* 2018 CanLII 39373 (ON LAT)

outside of the MIG. The respondent did not specify the applicant's medical conditions as described in the available documentation.

[10] On September 29, 2020, the respondent sent another denial letter to the applicant. In this letter, it states that the impairment is predominantly a minor injury and that there is insufficient compelling evidence that the applicant had a pre-existing condition prior to the accident. Under the medical and any other reasons section, the respondent notified the applicant that he needs to attend an insurer examination.

[11] The respondent is required to provide medical and all of the other reasons for the denial. There are no references made to the applicant's medical conditions or what documents that they reviewed in coming to this decision. Although the respondent did not receive all of the clinical notes and records, a reference could have been made to the documents that were in the respondent's possession.

[12] On July 22, 2021, the respondent sent the applicant a letter, which provided an explanation with medical reasons as to why the applicant was denied. As a result of the above, I find the denial letters dated July 30, 2019 and September 29, 2020 were deficient and not in accordance with s. 38(8) of the *Schedule*. Therefore, the respondent is prohibited from taking the position the applicant has an impairment where the MIG applies with respect to this treatment plan.

[13] I find that the denial letter dated July 22, 2021 to be proper notice in accordance with section 38(8) of the *Schedule* because it makes references to the applicant's injuries. This letter meets the requirements set out in *T.F. v. Peel Mutual*. Therefore, I find that Jevco did provide a proper notice by July 22, 2021. Pursuant to section 38(11)2 of the *Schedule*, the respondent shall pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day it received the treatment plan (OCF-18) and ending on July 22, 2021, the date proper notice was provided, along with any applicable interest.

Treatment plan in the amount of $3,903.23 for chiropractic treatment denied on July 28, 2020.

[14] The treatment plan was submitted on July 21, 2020 and Jevco complied with section 38(8) of the *Schedule* by responding within 10 business days on July 28, 2020. I find that Jevco advised the applicant that his injuries fall within the MIG and that the applicant needed to attend an insurer examination. Under the "medical reasons and all other reasons section, the respondent mentions that the applicant's injuries fall within the MIG. There are no references made to the

applicant's medical conditions or what documents they reviewed in coming to this decision. Although the respondent did not receive all of the clinical notes and records, a reference could have been made to the documents that were in the respondent's possession.

[15] As a result of the above, I find the denial letter dated July 28, 2020 was deficient and not in accordance with s. 38(8), therefore, the respondent is prohibited from taking the position the applicant has an impairment where the MIG applies with respect to this treatment plan.

[16] A second denial letter was issued on September 22, 2020. The reason that is cited is "after obtaining a secondary medical opinion, the claimant sustained various uncomplicated soft tissue injuries, therefore treatment beyond the Minor Injury Limit is deemed unreasonable and unnecessary."

[17] I find that the denial letter dated September 22, 2020 to be proper notice in accordance with section 38(8) of the *Schedule* because it makes references to the applicant's injuries. The applicant argued that the explanation is vague. However, in my view, using the term "uncomplicated soft tissue injuries" is quite clear. Although the respondent could have made reference to the specific conditions such as the sprain/strain of joints and ligaments, I find this explanation to be tailored towards someone who might not have an understanding of medical terminology. It explains the conditions in simple terms.

[18] As such, I find that this letter meets the requirements set out in *T.F. v. Peel Mutual*. Therefore, I find that Jevco did provide a proper notice by September 22, 2021. Pursuant to section 38(11)2 of the *Schedule*, the respondent shall pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day it received the treatment plan (OCF-18) and ending on September 22, 2021, the date proper notice was provided, along with any applicable interest.

Psychosocial assessment in the amount of $2,200.00 denied on June 1, 2020

[19] The treatment plan was submitted on May 20, 2020 and Jevco complied with section 38(8) by responding within 10 business days on June 1, 2020. I find that Jevco advised the applicant that his injuries fall within the MIG and that the applicant needed to provide additional medical information. It should be noted that in this letter, no medical reasons are provided. There are no references made regarding the applicant's medical conditions. Although the respondent did

not receive all of the clinical notes and records, a reference could have been made to information that was being relied upon.

[20] A second denial letter was issued on July 28, 2020. The letter notifies the applicant that his injuries fall within the MIG and that there is insufficient compelling evidence that he had a pre-existing medical condition that was documented. Under the medical reasons and all of the other reasons section, the respondent informs the applicant that he needs to attend an insurer examination. There are no specific details provided about the applicant's conditions or what documents that they reviewed in coming to this decision.

[21] On November 5, 2020, the respondent sent the applicant a letter which states that there were no pre-existing psychological conditions identified and no objective psychometric evidence found to substantiate the applicant's subjective self-report of his psychological impairments relating to the accident. The applicant is of the view that this is a complicated explanation. I find this explanation to be clear.

[22] As a result of the above, I find the denial letters dated June 1, 2020 and July 28, 2020 were deficient and not in accordance with s. 38(8) of the *Schedule*, therefore, the respondent is prohibited from taking the position the applicant has an impairment where the MIG applies with respect to this treatment plan.

[23] I find that the denial letter dated November 5, 2020 to be proper notice in accordance with section 38(8) of the *Schedule* because it makes references to the applicant's injuries. This letter meets the requirements set out in T.F. v. Peel Mutual. Therefore, I find that Jevco did provide a proper notice by November 5, 2020.

[24] Pursuant to section 38(11)2 of the *Schedule*, the respondent shall pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day it received the treatment plan (OCF-18) and ending on November 5, 2020, the date proper notice was provided, along with any applicable interest.

Orthopaedic assessment in the amount of $2,460.00 denied on June 1, 2020

[25] The treatment plan was submitted on May 20, 2020 and Jevco complied with section 38(8) by responding within 10 business days on June 1, 2020. I find that Jevco advised the applicant that his injuries fall within the MIG and that the applicant needed to provide additional medical information. It should be noted that in this letter, no medical reasons are provided. There are no references

made regarding the applicant's medical conditions. Although the respondent did not receive all of the clinical notes and records, a reference could have been made to information that was being relied upon.

[26] A second denial letter was issued on July 28, 2020. The letter notifies the applicant that his injuries fall within the MIG and that there is insufficient compelling evidence that he had a pre-existing medical condition that was documented. Under the medical reasons and all of the other reasons section, the respondent informs the applicant that he needs to attend an insurer examination. There are no specific details provided about the applicant's conditions or what documents that they reviewed in coming to this decision. Although the respondent did not receive all of the clinical notes and records, a reference could have been made to the documents that were in the respondent's possession.

[27] On September 22, 2020, the respondent sent the applicant a letter which states that he sustained various uncomplicated soft tissue injuries. The applicant is of the view that this does not describe the applicant's conditions and therefore is not in compliance with the *Schedule* and case law.

[28] As a result of the above, I find the denial letters dated June 1, 2020 and July 28, 2020 were deficient and not in accordance with s. 38(8), therefore, the respondent is prohibited from taking the position the applicant has an impairment where the MIG applies with respect to this treatment plan.

[29] I find that the denial letter dated September 22, 2020 to be proper notice in accordance with section 38(8) of the *Schedule* because it makes references to the applicant's injuries. This letter meets the requirements set out in *T.F. v. Peel Mutual*. Therefore, I find that Jevco did provide a proper notice by November 5, 2020.

[30] Pursuant to section 38(11)2, the respondent shall pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day it received the treatment plan (OCF-18) and ending on September 22, 2020, the date proper notice was provided, along with any applicable interest.

Chiropractic treatment in the amount of $1,298.96

[31] The respondent made submissions regarding this treatment plan. However, at the hearing, the applicant did not make any submissions regarding whether the notices failed to comply with section 38(8) of the *Schedule*. A review of the

transcript confirms this. As such, I am not making a ruling as to whether there was an improper denial for this treatment plan.

ISSUES

[32] At the hearing, it was brought to the Tribunal's attention that the MIG was an issue in dispute. This was not reflected in the case conference report and order. As such, it has been added.

[33] Issue vi was originally listed as a Social Worker Assessment in the Order of Adjudicator Wallace, dated October 2, 2020. The parties consented to amending it to a psychosocial assessment.

[34] I have been asked to decide the following issues:

i. Did the applicant sustain predominantly minor injuries as defined by s. 3 of the *Schedule* and is therefore subject to treatment within the MIG?

ii. Is the applicant entitled to receive a weekly income replacement benefit in the amount of $400.00 per week for the period July 10, 2019 to date and ongoing?

iii. Is the applicant entitled to a medical benefit in the amount of $1,298.96 for chiropractic recommended by HealthMax in a treatment plan (OCF-18) submitted on April 27, 2019, and denied on May 18, 2019?

iv. Is the applicant entitled to a medical benefit in the amount of $4,023.46 for chiropractic treatment recommended by HealthMax in a treatment plan (OCF-18) submitted on July 6, 2019, and denied on July 26, 2019?

v. Is the applicant entitled to a medical benefit in the amount of $3,903.23 for chiropractic treatment recommended by HealthMax in a treatment plan (OCF-18) submitted on July 21, 2020, and denied on July 28, 2020?

vi. Is the applicant entitled to payments for the cost of examinations in the amount of $2,200.00 for a psychosocial assessment, recommended by HealthMax in a treatment plan dated May 21, 2020 and denied by the respondent on June 1, 2020?

vii. Is the applicant entitled to payments for the cost of examinations in the amount of $2,460.00 for an Orthopaedic Assessment, recommended by Howe Disability in a treatment plan dated May 19, 2020 and denied by the respondent on June 1, 2020?

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

ix. Is the applicant entitled to an award for unreasonably delaying or withholding payment of a benefit contrary to Regulation 664?

ANALYSIS

Issue i: The Minor Injury Guideline

[35] 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 and includes any clinically associated sequelae to such an injury."[3]

[36] Section 18(1) of the *Schedule* prescribes a $3,500.00 limit on medical and rehabilitation benefits payable for any one accident.

[37] The onus is on the applicant to show that his injuries fall outside of the MIG.[4]

RESULT

[38] I find that the applicant sustained predominantly minor injuries as defined under the *Schedule*.

Did the applicant have a pre-existing condition?

[39] 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 $3,500.00 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**

ii. The pre-existing condition will prevent maximal recovery from the minor injury if the person is subject to the $3,500.00 limit on treatment costs under the MIG.

[3] Supra note 1
[4] *Scarlett v. Belair Insurance*, 2015 ONSC 3635 (CanLII)

[40] The standard for excluding an impairment on the basis of pre-existing condition(s) is well-defined and strict. A pre-existing condition will not automatically exclude a person's impairment from the MIG.

[41] Based on my review of the evidence, there is nothing in the records to suggest that the applicant had a pre-existing condition, which would prevent the applicant from reaching maximal recovery. At the various assessments, the applicant also confirmed that he did not have any pre-existing conditions. As such, I find that the applicant did not have any pre-existing conditions that would remove him from the MIG.

Post-Concussive Syndrome

[42] Concussions and post-concussive syndrome, if established, fall outside the MIG because the MIG relates only to "minor injuries", as defined in section 3(1) of the *Schedule*. However, in order to be removed from the MIG, the applicant must present evidence that demonstrates that as a result of the accident, he suffered a concussion or post-concussive syndrome.

[43] The applicant testified that he experiences headaches. Furthermore, the applicant reported that he was experiencing headaches to his family doctor, Dr. Strasberg, Ms. Walton, and the various assessors.

[44] The applicant testified that a doctor at Healthmax told him that he had a concussion. The applicant also confirmed that he underwent concussion testing. The disability certificate completed by Dr. Mahsa Takallou, chiropractor, notes that the applicant has 'post-traumatic headache'. The treatment plan dated July 6, 2019 notes that the applicant underwent some testing for a concussion. The note states, "Concussion test:(+} gaze stability, smooth pursuit, (+} saccade and VOR test causes Ha and dizziness."

[45] There is another OCF-18 dated June 24, 2020, completed by Dr. Dahir Hashi, chiropractor. It states, "still has concussion signs and symptoms including headaches and dizziness". I find that diagnosing a concussion is outside of the scope of a chiropractor. Furthermore, the treatment plans and the disability certificate are not evidence of a diagnosis. As such, I am placing less weight on these records.

[46] According to the CNRs dated February 11, 2019 from Lauren Walton, who is a nurse practitioner at Dr. Strasberg's clinic, the applicant reported that he did not hit his head during the accident. Dr. Strasberg did not refer him to see a specialist for further investigation and nor did she diagnose him with a

concussion or a post-concussive injury. If the headaches were a serious concern, it begs the question why he was not referred to see a specialist, such as a neurologist, to determine if he had a concussion.

[47] Aside from the records from HealthMax-Etobicoke, the applicant did not submit any evidence that supports that he suffered a concussion or post-concussive syndrome. Furthermore, there is no diagnosis from Dr. Strasberg or a specialist that confirms that he sustained a concussion or post-concussive syndrome.

[48] Based on the totality of the evidence before me, I do not find that the applicant has sustained a concussion or post-concussive syndrome as a result of the accident that would remove him from the MIG.

Did the applicant sustain a predominantly minor injury?

[49] I find that the applicant has not provided the evidence necessary to establish on a balance of probabilities that his injuries fall outside of the MIG.

[50] The disability certificate completed by Dr. Takallou, which is dated February 11, 2019, describes the applicant's physical injuries as follows: sprain and strain of joints and ligaments of neck level, lumbar spine and pelvis, pain in the thoracic spine, sprain and strain of shoulder joint and rotator cuff capsule.

[51] In her report dated September 2, 2020, Dr. Nesterenko diagnosed the applicant with cervical spine sprain/strain – WAD I/II, thoracolumbar spine sprain/strain and bilateral shoulder and left-hand sprain/strain.

[52] In his report dated June 15, 2020, Dr. T.Y. Getahun stated, "based on history, physical examination, and review of the documentation provided, it is my impression that his accident related injuries as a direct result of the motor vehicle collision of January 26, 2019 are as follows: 1. Myofascial strain of the cervical spine. 2. Myofascial strain of the lumbosacral spine. 3. Left shoulder strain with restricted range of motion." Dr. Getahun is of the view that the applicant should be removed from the MIG because his injuries haven't resolved. However, he refers to the applicant's injuries as "uncomplicated soft tissue injuries".

[53] I find that the diagnoses from Dr. Takallou, Dr. Nesterenko and Dr. Getahun are consistent with one another. Moreover, the applicant has not provided any evidence that his physical injuries are anything other than soft tissue injuries. I find that the applicant's physical injuries are predominantly minor injuries as per the definition set out in the *Schedule*.

Chronic pain

[54] I am not satisfied that the applicant has chronic pain as a result of the accident. Kira Shelton, who is a nurse practitioner at Dr. Strasberg's office, spoke to the applicant over the phone on June 18, 2020. She noted that the applicant has been complaining about back, neck, shoulder pain for one and a half year. She diagnosed the applicant with "Chronic Rt shoulder, neck and back pain post MVC." I am assigning less weight to this. Ms. Shelton did not conduct a physical examination of the applicant. She relied on the applicant's self-reporting. If there was a concern that he was suffering from chronic pain, why didn't she or anyone else from the clinic make a referral for him to see a chronic pain specialist? It should also be noted that Dr. Strasberg did not diagnose the applicant with chronic pain or chronic pain syndrome as per my review of the CNRs.

[55] Moreover, there is a major gap in the CNRs from Dr. Strasberg's clinic in relation to pain-related complaints. The applicant did not make any pain-related complaints at the April 23, 2019 and May 7, 2019 visits. He did not see anyone from the clinic until the following year on June 18, 2020. At the June 18, 2020 phone appointment, the applicant mentioned that he was having pain. However, if he were having these issues, it begs the question why he did not reach out to Dr. Strasberg's clinic regarding his issues during that timeframe?

[56] In his report dated June 15, 2020, Dr. Getahun states: "In my opinion Mr. Agyemang-Opoku's [the applicant] injuries do not fall within the minor injury guidelines. His injuries have not resolved within the expected time course for uncomplicated soft tissue injuries. He reports undergoing psychological treatment sessions. In my opinion these factors preclude him from achieving maximum medical recovery within the minor injury guidelines." However, no where in his report does he diagnose the applicant with chronic pain.

[57] While a formal diagnosis of chronic pain or a report from a specialist is not mandatory in order to be removed from the MIG, the applicant must demonstrate a functional impairment as a result of the pain. The applicant must provide an analysis as to how he meets the criteria under the AMA Guides. While the applicant testified that he continues to experience pain, he has not established that he meets the criteria.

[58] The applicant did not submit any diagnostic imaging such as MRIs and X-rays which could have explained why he continues to experience pain.

[59] I find that the applicant has not provided sufficient evidence to meet his burden of proof that he suffers from chronic pain justifying treatment beyond the MIG. There is no significant evidence of chronic pain related to the accident in the

evidence filed by the applicant. As such, the applicant has not satisfied his onus to establish that he has chronic pain that may remove him from the MIG.

Psychological Impairment

[60] 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.

[61] The applicant testified that he was experiencing depression and anxiety after the subject accident.

[62] The disability certificate completed by Dr. Takallou notes "psychological and behavioural factors associated with disorders or diseases classified elsewhere."

[63] The applicant went to his family doctor's clinic on February 11, 2019. He met with Lauren Walton, a nurse practitioner. The applicant reported that he was having driving anxiety and difficulty sleeping. On February 19, 2019, he met with Sam Kalathiparambil, who is a social worker at the clinic. Mr. Kalathiparambil noted the following:

> Client is constantly on edge and can't seem to concentrate on even the easiest tasks. Client describes generalized anxiety and worry about driving. Getting anxious while changing lanes. The source of the anxiety varies but the anxiety is present most days and he finds it difficult to control the worry. Her [sic] symptoms include: Sleep Disturbance, Excess muscle tension, Irritability, Difficulty concentrating or mind going blank, being easily fatigued. Client reports mood Is "okay, not very good", denies any suicidal ideations, normal thought process/content.

[64] Mr. Kalathiparambil discussed panic attacks and anxiety with the applicant. He provided him with coping techniques and deep breathing exercises.

[65] On April 3, 2019, the applicant met with Dr. Strasberg. He reported that he was having driving anxiety and had stopped driving. She noted "meditation and home exercises. Sam re anxiety." On April 16, 2019, he met with Mr. Kalathiparambil regarding his anxiety. It was noted that the applicant was not doing the coping techniques regularly. He was encouraged to do meditation, coping techniques, positive journal and home exercise.

[66] The applicant returned to the clinic on April 23, 2019, May 7, 2019 and June 18, 2020. No psychological complaints were documented in the CNRs. Moreover, it appears that he did not see Mr. Kalathiparambil for therapy.

[67] In support of his case, the applicant is relying on a Psychosocial Assessment dated June 22, 2020 completed by David I. Ross. In his report, Mr. Ross stated:

> Emotionally, he is experiencing symptoms consistent with issues of depression and a heightened state of anxiety. There are increased levels of anger, irritability and interpersonal family tension. He described patterns of avoidance as a vehicle driver and passenger. There are in-vehicle psychosocial (fear, nervousness, lack of confidence, accident recollections), physiological arousal (increased muscle tension, body-temperature) and behavioral (hyper-vigilance, body-bracing, clenching, coaching the driver) anxiety issues. The above physical, psychosocial and behavioral sequelae continue to have a negative effect on various aspects of Mr. Agyemang-Opoku's daily life, including employment, household, personal care, family relationships, and engagement in social and meaningful life activities.

[68] Mr. Ross opined that the applicant should be removed from the MIG.

[69] The respondent is relying on an insurer examination conducted by Dr. Amena Syed, psychologist, dated October 16, 2020. The applicant underwent a variety of psychometric testing. Dr Syed did not find any objective psychometric evidence to substantiate the applicant's subjective self-report of psychological impairment related to the subject motor vehicle accident. She further stated that:

> As part of this evaluation, Mr. Kojo Agyemang [the applicant] underwent psychometric testing to assess the degree to which response styles may have affected or distorted the report of symptomatology. The findings suggest that certain symptomatology fall outside of the normal range, suggesting that Mr. Kojo Agyemang may not have answered in a completely forthright manner as his responses may have lead me to form a somewhat inaccurate impression of him as there are suggestions that he attempted to portray himself in a negative or pathological manner in particular areas. Some concern about distortion of the clinical picture must be raised as a result; Mr. Kojo Agyemang presents with certain patterns or combinations of features that are unusual or atypical in clinical populations but relatively common among individuals feigning mental disorder. As such limited confidence can be ascribed to the reliability and validity of the data gathered in this evaluation.

[70] Dr. Syed concluded the applicant should remain in the MIG.

[71] I prefer Dr. Syed's report over Mr. Ross's report. Firstly, Dr. Syed and her technician conducted a variety of psychometric testing. Mr. Ross did not conduct any objective testing to verify the applicant's subjective report of a psychological impairment. During the hearing, he stated he did not administer any validity tests. He stopped using them because they were ineffective in a virtual format. I find Dr. Syed's report to be more persuasive as the applicant underwent a series of psychometric testing. Through this testing, Dr. Syed concluded that there was no objective psychometric evidence to substantiate Mr. Kojo Agyemang's subjective self-report of psychological impairment related to the subject motor vehicle accident.

[72] Moreover, Dr. Syed is a psychologist. Mr. Ross is a registered social worker and psychotherapist. I prefer Dr. Syed's expertise over Mr. Ross's expertise. As a psychologist, Dr. Syed can diagnose an individual with psychological issues whereas Mr. Ross cannot. Mr. Ross confirmed this at the hearing. As such, I have given his findings that the applicant's reporting was consistent with the ICD codes less weight. Mr. Ross's findings are not a diagnosis.

[73] The CNRs from Dr. Strasberg's clinic show that the applicant did not report psychological complaints after the April 16, 2019 visit. No referrals to a psychiatrist were made. The applicant was not prescribed any medication for his psychological condition. If his psychological complaints were an issue, then why was he not referred to a psychiatrist for a further assessment? Furthermore, why was he not given medication? Moreover, why did he not continue to see Mr. Kalathiparambil for therapy? I am not persuaded that his psychological impairments are as serious as he purports them to be. As such, the applicant has not satisfied his onus to establish that he has a psychological impairment that may remove him from the MIG.

Issue ii: Income Replacement Benefit ('IRB')

[74] Entitlement to IRB is set out in sections 5 and 6 of the *Schedule*. Section 5(1)1i provides that the benefit is payable if the insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment. Section 6(2) provides that the benefit is only payable after the first 104 weeks from the date of the accident if the person suffers a complete inability to engage in any employment or self-employment for which he/she is reasonably suited by education, training or experience.

[75] The applicant submitted that the majority of his injuries center around his psychological injuries. It is stated, "He was unable to continue working on

modified duties because his main duty was to drive vehicles back and forth into the line. He was unable to do this given his severe driver anxiety, which is well-documented since February 11, 2019. The applicant is relying on the reports from Dr. Getahun and Mr. Ross.

[76] The respondent submitted that the applicant has not met his onus of proving entitlement. In support of its case, the respondent is relying on the IE insurer examinations from Dr. Nesterenko, Mr. Polygenis, Ms. Paquette and Dr. Syed.

[77] The applicant bears the onus of establishing on a balance of probabilities that he is entitled to the IRB as claimed.

RESULT

[78] I find that the applicant is not entitled to the IRB.

BACKGROUND

[79] The applicant testified that he worked at Krown Rust Control on a full-time basis. The essential tasks of his employment were lifting pails of oil, rust proofing cars, drilling doors, spraying and cleaning cars. He also interacted with the customers and had to move around the cars. After the accident, he returned to work but was on modified duties for approximately a month but could not do it anymore. He has not worked since then.

ANALYSIS

[80] I find that the applicant is not entitled to the income replacement benefit for the following reasons.

[81] In support of his case, the applicant is relying on Mr. Ross's report. In his report, he stated that:

> It is recommended that this client start/continue receiving income replacement benefits (IRBs) as Mr. Agyemang-Opoku [the applicant] presently suffers a substantial inability to perform the essential tasks of his pre-accident employment. It is also stated that "he reported that he is living with significant financial strain and stress that is aggravating his post-accident psychosocial state. He would benefit by starting to receive Income Replacement Benefits (IRBs) to offset his post-accident financial stress.

[82] During the hearing, it became quite evident that Mr. Ross was not familiar or did not have an understanding of the test for income replacement benefits. For example, he did not describe the applicant's job duties in his report. Mr. Ross stated, "Not being a vocational assessor or job site analyst, I asked him for a description of the job environment, but it's not relevant to my report. He told me it was physical, fast paced, customer direct related work, which he was finding too difficult to manage." It is unclear why Mr. Ross did not believe that the job duties would not be relevant.

[83] In relation to the financial stress that the applicant was experiencing, Mr. Ross testified, "Receiving IRB to offset post-accident financial stress? Well here you have a claimant who was earning a certain amount of money and was going on with life and then following MVA, he can't earn the same amount and he was being supported by OW and other financial responsibilities and he cited that as a significant stressors. Financial stress could aggravate psychological anxiety."

[84] I find that Mr. Ross's report and testimony lacks an analysis of how the applicant suffered a substantially complete inability to engage in any employment or self-employment for which he is reasonably suited by education, training, or experience. Moreover, Mr. Ross's findings are based on the applicant's self-reporting. He did not conduct any validity testing. Furthermore, Mr. Ross did not review any other documents and there were some inconsistencies in his testimony. As such, I am assigning less weight to his report.

[85] The applicant is also relying on a report from Dr. Getahun in support of his case. Dr. Getahun conducted an examination of the applicant and concluded that he suffers from a myofascial strain of the cervical and lumbosacral spine as well as a left shoulder strain with restricted range of motion. Dr. Getahun states, "In my opinion Mr. Agyemang-Opoku suffers a substantial inability to perform the essential tasks of his pre-accident employment. I am of the opinion he is unable to perform the required lifting, carrying, twisting, standing, and walking of his position spraying cars." There are some issues with his opinion.

[86] Firstly, Dr. Getahun noted that the applicant is unable to walk. However, under the general exam section, he states "Mr. Agyemang-Opoku walked with a normal gait. He was not using any mobility devices." If the applicant was unable to walk, then why did Dr. Getahun note that he walked with a normal gait. I find this to be contradictory.

[87] The other issue with Dr. Getahun's report is that it falls short in explaining why the applicant should be entitled to IRBs. Although Dr. Getahun did not review the insurer examination reports, his diagnosis is similar to Dr. Nesterenko's report

with respect to the applicant's injuries. However, Dr. Getahun did not provide an analysis of the applicant's job duties and how his findings support that the applicant suffered a complete inability to engage in any employment or self-employment for which he is reasonably suited by education, training or experience.

[88] As such, I am applying less weight to this report.

[89] I prefer the respondent's insurer examinations over the applicant's evidence because I find that the opinions between the different assessors are consistent. Moreover, I find their examinations to be more thorough.

[90] In her report dated June 14, 2019, Dr. Nesterenko stated:

> The soft tissue injuries that Mr. Kojo Agyemang sustained as a result of the motor vehicle accident of January 26, 2019 have a customary healing time of 8 to 12 weeks. The prognosis in relation to the initially sustained injuries as a result of the subject motor vehicle accident is good. From a strictly physical perspective, in the absence of any ongoing significant objective musculoskeletal impairment attributable to the initially sustained physical injuries in the subject motor vehicle accident, Mr. Kojo Agyemang does not suffer a substantial inability to perform the essential tasks of his pre-accident employment as a Sprayer with Krown Rust Control. Mr. Kojo Agyemang would be well advised to continue with a self-directed and at-home exercise program for general maintenance and conditioning purposes.

[91] In his report dated June 24, 2019, Mr. Polygenis, physiotherapist, stated the following:

> Based on today's functional evaluation, Mr. Kojo Agyemang's overall demonstrated functional ability can be classified at the Medium Physical Demand Characteristic (PDC). Mr. Kojo Agyemang satisfied the frequency requirements of his pre-accident vocation for standing, walking, stooping, crouching, kneeling, immediate reaching, overhead reaching and fingering. Mr. Kojo Agyemang partially satisfied the frequency requirements for handling. Tests were not completed for lifting from knuckle to shoulder level due to reported symptoms. Overall, Mr. Kojo Agyemang demonstrated a fair effort and the test results are considered a valid representation of Mr. Kojo Agyemang's current physical abilities. He passed 28 out of a possible 33 consistency scores or 90% were within expected limits (as shown in Table 1). Although Mr. Kojo Agyemang did

not pass all statistical measures of validity and declined some tests, there was compliance with most tests and most validity checks were passed.

[92] In the hypothetical job site analysis report, Ms. Pamela Paquette, kinesiologist, stated: “To summarize, according to the NOC, the Motor vehicle body repairers is classified as Medium. According to the DOT, the PAINTING-MACHINE OPERATOR (any industry) is classified as Medium Work.” This is consistent with Mr. Polygenis’ finding.

[93] Dr. Syed, in her report dated October 20, 2020 stated, “the present psychological investigation found no objective psychometric evidence to substantiate Mr. Kojo Agyemang’s subjective self-report of psychological impairment related to the subject motor vehicle accident. As such, Mr. Kojo Agyemang, from a psychological perspective, can resume his pre-accident normal daily activities and employment.”

[94] Based on the evidence, I find that the applicant has not met his onus for entitlement to IRB on the basis of his physical and psychological impairments.

Post-104 weeks IRB

[95] The test for entitlement to post-104 weeks IRB is set out in section 6(2)(b) of the *Schedule*, which states: “The insurer is not required to pay an income replacement benefit after the first 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience.” This is referred to as the “complete inability” test.

[96] The “complete inability” test for a post-104 IRB is a higher bar than the “substantial inability test” for a pre-104 IRB. Since the post-104 IRB test is more stringent than the pre-104 IRB test, it logically follows if the Applicant is not entitled to a pre-104 IRB, he cannot be entitled to a post-104 IRB unless there was a significant deterioration in his condition. The onus is on the Applicant to prove he is entitled to a post-104 IRB.

[97] I find that the applicant has not provided evidence which supports that he meets the post-104 weeks test. Therefore, he is not entitled to post-104 weeks IRB.

MIG not exhausted/treatment plans

[98] The parties did not make any submissions regarding whether the MIG was exhausted. It is unclear how much is remaining under the MIG. In the event that

the MIG is not exhausted, I find that the treatment plan in the amount of $1,298.96 is not reasonable or necessary.

[99] The applicant did not provide any submissions or direct the Tribunal to any specific references to evidence that supports his entitlement to the treatment plan in dispute. The applicant must direct the adjudicator to the relevant evidence in support of his case and explicitly explain why he meets the test based on this evidence. He has failed to do so.

[100] As such, I find that the applicant is not entitled to the treatment plan in the amount of $1,298.00 for chiropractic treatment.

Is the respondent liable to pay a special Award under section 10 Regulation 664?

[101] The applicant seeks a special award under s. 10 of *Regulation 664* on the basis that the respondent unreasonably withheld or delayed payments to the applicant.

[102] The applicant has not provided any submissions or evidence that proves that the respondent unreasonably withheld or delayed payments to him. Hence, I find that the applicant is not entitled to an award under s. 10 of the *Regulation 664*.

ORDER

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

i. The applicant sustained predominantly minor injuries as defined under the *Schedule*.

ii. Pursuant to section 38(11)2 of the *Schedule*, the respondent shall pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day it received the treatment plan (OCF-18) and ending on July 22, 2021, the date proper notice was provided, along with any applicable interest.

iii. Pursuant to section 38(11)2 of the *Schedule*, the respondent shall pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day it received the treatment plan (OCF-18) and ending on September 22, 2021, the date proper notice was provided, along with any applicable interest.

iv. Pursuant to section 38(11)2 of the *Schedule*, the respondent shall pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day it received the treatment plan (OCF-18) and ending on November 5, 2020, the date proper notice was provided, along with any applicable interest.

v. Pursuant to section 38(11)2 of the *Schedule*, the respondent shall pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day it received the treatment plan (OCF-18) and ending on September 22, 2020, the date proper notice was provided, along with any applicable interest.

vi. The applicant is not entitled to the IRB.

vii. The applicant is not entitled to the treatment plan in the amount of $1,298.96 for chiropractic treatment.

viii. The applicant is not entitled to an award under s. 10 of *Reg 664*.

Released: December 15, 2021

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Tavlin Kaur, Adjudicator