Citation: Thavarasa v. Aviva Insurance Company of Canada, 2021 ONLAT 20-000535/AABS

Licence Appeal Tribunal File Number: 20-000535/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:

Selvarasa Thavarasa

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **Derek Grant**

APPEARANCES:

For the Applicant: Harlan Pottins, Counsel

For the Respondent: Jonathan Charland, Counsel

HEARD: **By way of written submissions**

BACKGROUND

[1] S.T. was injured in an automobile accident on July 5, 2017, and sought benefits from the respondent, Aviva, pursuant to the Statutory Accident Benefits Schedule - *Effective September 1, 2010*[1] (the "Schedule"). Aviva denied the disputed benefits on the basis of its determination that S.T.'s accident-related impairments were predominantly minor injuries and therefore subject to treatment within the Minor Injury Guideline (the "MIG"). S.T. disagreed and submitted an application to the Tribunal for resolution of the dispute.

ISSUES

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

a. Are S.T.'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?

[3] If S.T.'s injuries are not predominantly minor, then I must decide the following:

a. Are the following medical benefits for chiropractic treatment, recommended by Trillium Rehabilitation reasonable and necessary:

i. $2,034.06 submitted January 17, 2018, denied February 8, 2018;

ii. $1,739.34 submitted April 23, 2018, denied May 7, 2018;

iii. $1,630.00 submitted October 24, 2018, denied November 2, 2018;

iv. $1,740.00 submitted March 1, 2019, denied March 15, 2019;

v. $1,190.00 submitted September 18, 2019, denied September 23, 2019.

b. Is S.T. entitled to interest on any overdue payment of benefits?

FINDING

[4] S.T. has failed to demonstrate that his accident-related impairments warrant removal from the MIG. The MIG limits have not yet been exhausted, therefore,

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

S.T. may seek treatment up to the MIG limit. Interest is payable in accordance with s. 51.

BACKGROUND

[5] S.T. was involved in two other car accidents in 2013 and 2014. As a result of the 2013 accident, S.T. suffered injuries to his shoulders, back and legs. He received physiotherapy treatment for approximately six months until he recovered.

[6] On July 5, 2017, S.T. was operating his vehicle in the course of his employment as a courier, when he was struck from behind by a pickup truck.

[7] As a result of the July 2017 accident, S.T. sustained the following injuries: impingement syndrome of shoulder, injury of muscle and tendons of the rotator cuff, WAD III with complaint of neck pain with neurological signs, injury of muscle and tendon at neck level, tension-type headache, sprain and strain of the lumbar spine, sprain and stain of the sacroiliac joint.

[8] S.T.'s position is that his accident-related injuries are not minor, or, in the alternative, that he has pre-existing conditions which necessitate treatment outside of the MIG limits.

ANALYSIS

Applicability of the MIG

[9] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured sustains impairments that are predominantly a minor injury in accordance with the MIG. Section 3(1) 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."

[10] An insured may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG. Alternatively, removal from the MIG can occur under s. 18(2), if an insured has a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition prevents recovery if they are kept within the confines of the MIG. The Tribunal has also determined that chronic pain with functional impairment may warrant removal from the MIG. In all cases, the onus is on the insured to demonstrate on a balance of probabilities that the injuries fall outside of the MIG.

[11] On the evidence, I find that S.T. has failed to meet his burden to establish that he suffered injuries that are not predominantly minor as a result of the accident.

Does S.T. have a pre-existing condition?

[12] S.T. submits that his recovery was impacted by his pre-existing spine condition, both cervical and lumbar, which, was exacerbated by the accident. In support of his pre-existing condition, S.T. relies on family physician treatment records, and a diagnostic imaging report.

[13] A December 4, 2014 x-ray of his neck showed degenerative disc disease, and a congenital condition known as cervical rib.

[14] I place very little weight on these records for several reasons. First, there are no pre-2017 accident treatment records from any treatment providers that establishes that S.T. has a pre-existing condition that would prevent maximum medical recovery. Second, despite the December x-ray report, there is no evidence that S.T.'s cervical rib condition would prevent recovery under the MIG. Lastly, S.T.'s own evidence is that he recovered from his 2013 and 2014 accident-related injuries.

[15] Accordingly, I am not persuaded that S.T. has a pre-existing condition that would prevent him from reaching maximum medical recovery under the MIG limits.

Did S.T. suffer physical injuries that are not predominantly minor?

[16] On July 22, 2017, approximately two weeks after the accident, S.T. sought treatment from Dr. Mikhail who prescribed pain medication and recommended physiotherapy. On July 24, 2017, S.T. began physiotherapy treatment. Between August 2017 and March 2020, S.T. followed up with his family physician, presenting with accident-related neck and lower back pain and received physiotherapy treatment.

[17] Another treating physician, Dr. Dookhoo documented various visits between August 15, 2018 and January 24, 2019, that S.T. has chronic back pain. I note that any mention of the MVA was only made at the August 15, 2018 visit. Dr. Dookhoo referred S.T. for a cervical spine x-ray which revealed that S.T. suffered from degenerative disc disease. Narrowing was also noted with evidence of a small right cervical rib. Dr. Dookhoo also referred S.T. for an MRI on June 9, 2019 which revealed L3-L4 and L4-L5 degenerative disc disease with diffuse disc bulge and posterior central annular tear with associated thickening of the ligamentum flavum, causing mild neural foraminal stenosis.

[18] As a result of the MRI, Dr. Dookhoo referred S.T. to spinal surgeon Dr. Li. Unfortunately, Dr. Li was unable to accommodate the request due to his busy schedule.

[19] On the evidence, I do not find that S.T.'s injuries prevent him from achieving maximum medical recovery under the MIG. The diagnostic imaging reveals similar findings to that of the pre-accident report. I am not directed to evidence that the degenerative disc disease or cervical rib condition has been exacerbated by the subject accident. Further, none of the treating family physicians provided documented evidence that S.T.'s injuries are more than predominantly minor. Further, the injuries indicated in the July 24, 2017 OCF-3 are captured within the definition of minor injuries under the *Schedule*.

Does S.T. from chronic pain as a result of the accident?

[20] S.T. relies on the records of Dr. Mikhail and Dr. Dookhoo that he suffers from chronic pain as a result of the accident. He further relies on a December 8, 2020 chronic pain assessment report from Dr. Getahun.

[21] Chronic pain, if established, removes an insured from the MIG, because the definition of "minor injury" does not include chronic pain conditions. On the evidence, I find that S.T. has failed to establish that he suffers from accident-related chronic pain that resulted in functional impairment.

[22] I find for chronic pain to take someone out of the MIG, there must be an affect on their functionality. The opinion that an insured suffers from chronic pain, must be supported by medical evidence that chronic pain is the cause of the disability. In addition, while not required, there should be some engagement with the criteria under the *AMA Guides* to assist in determining the extent of chronic pain claims.

[23] In this vein, S.T. relies on the previously mentioned family physician notes that indicate chronic back pain. Mainly, however, he relies on Dr. Getahun's report. However, I place little weight on this report.

[24] Dr. Getahun relies on the diagnostic criteria for chronic pain syndrome contained in the 4th Edition of the *AMA Guides*. I find this reliance is flawed, because the current edition is the 6th Edition, which was available in December 2020. Dr. Getahun indicates that the presence of two diagnostic criteria is enough to establish a diagnosis of chronic pain syndrome. I disagree, as well-settled case law requires that at least three of the criteria need to be met.

[25] On the evidence, I find that despite the duration of S.T.'s pain complaints, this is not enough to establish that he suffers from chronic pain. My finding is supported by the following evidence as it pertains to the six criteria under the *AMA Guides*:

a. There is no evidence of an overuse of prescription drugs in accordance with criteria (i);

b. Despite the referral to the spinal surgeon, there is no evidence S.T. followed up on this referral, nor is there an excessive dependence on healthcare providers. In spite of his pain complaints, S.T. has not yet exhausted the MIG limit. This does not satisfy criteria (ii);

c. Aside from not returning to work as a courier, S.T. secured a new full-time position as a crane operator, plays volleyball and still actively travels and engages in various activities of daily living, which fails to meet criteria (iii), (iv) and (v);

d. There is no evidence or complaints of any accident-related psychological impairment, thus, criteria (vi) is not met.

[26] I note that prior to the OCF-18s being submitted, on October 19, 2017, S.T. was able to fly to Germany and play soccer for four hours. At the conclusion of which he felt a backache. Accordingly, I find it difficult to conclude that this is indicative of an individual who suffers from the alleged functional impairment or that his back pain was not exacerbated by non-accident related activity.

Are the treatment plans reasonable and necessary?

[27] As I have found that S.T. suffered injures described as minor and fall within the MIG, and that amount has not been exhausted, S.T. may be entitled to receive treatment up to the $3,500.00 limit by following the protocol set out in the MIG.

CONCLUSION

[28] S.T. has not met his onus in establishing that his accident-related injuries are not predominantly minor.

[29] The MIG limit has not been exhausted, accordingly, S.T. may be able to receive treatment up to the $3,500.00 limit under the MIG. Interest is payable on any outstanding payment of benefits for approved treatment up to the remaining MIG limit, in accordance with s. 51 of the *Schedule*.

Released: December 29, 2021

Derek Grant
Adjudicator