



Citation: Truong v Economical Insurance Company, 2022 ONLAT 20-014306/AABS

Licence Appeal Tribunal File Number: 20-014306/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:

Cindy Truong

Applicant

and

Economical Insurance Company

Respondent

DECISION

VICE-CHAIR:

E. Louise Logan

APPEARANCES:

For the Applicant:

Dharshika Pathmanathan, Counsel

For the Respondent:

Lauren C. Kolarek, Counsel

HEARD:

By Way of Written Submissions

BACKGROUND

- [1] The applicant, Cindy Truong, was involved in an automobile accident on November 6, 2018, and sought benefits from Economical Insurance Company, the respondent, pursuant to the Statutory Accident *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (“*Schedule*”).¹
- [2] The respondent denied the applicant’s claims because it determined that the applicant’s injuries fit the definition of “minor injury” as prescribed by section 3(1) of the *Schedule* and, therefore, subject to the Minor Injury Guideline (“MIG”) and the \$3,500.00 funding limit on medical benefits.² As a result, the applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (“Tribunal”) for resolution of this dispute.
- [3] The parties participated in a case conference where they identified and agreed to the issues in dispute, which proceeded to a written hearing.

ISSUES

- [4] In her submissions, the applicant withdrew her application for entitlement to a non-earner benefit. As a result, the following issues are in dispute:
1. Has the applicant sustained a minor injury as defined in section 3 of the *Schedule*, and is therefore subject to the \$3,500.00 funding limit on treatment?
 2. Is the applicant entitled to the following two chiropractic treatments proposed by Yorkstar Rehabilitation Centre:
 - i. \$989.06 in a treatment plan (OCF-18) dated April 2, 2019; and
 - ii. \$1,328.10 in an OCF-18 dated August 1, 2019?
 3. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] I find that the applicant sustained a minor injury as defined in section 3 of the *Schedule*. As the respondent has approved treatment to the maximum available

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*.

within the \$3,500.00 MIG limit, there is no further entitlement to medical and rehabilitation benefits.

[6] As there are no benefits owing, the applicant is not entitled to interest.

[7] The application is dismissed.

ANALYSIS

Minor Injury Guideline

[8] 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 section 3(1) of the *Schedule* 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.” The terms, “strain,” “sprain,” “subluxation,” and “whiplash associated disorder” are defined in the *Schedule*.

[9] Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to \$3,500.00. An applicant may be entitled to treatment beyond the MIG limit if they can demonstrate that a pre-existing condition, documented by a medical practitioner, prevents maximal medical recovery under the MIG, or if they provide evidence of an impairment that is not included in the “minor injury” definition such as a psychological impairment or chronic pain with a functional impairment. It is the applicant’s burden to establish entitlement to coverage beyond the \$3,500.00 limit, on a balance of probabilities.³

[10] The applicant was the driver of a vehicle that was T-boned in a parking lot on November 6, 2018. After reporting the accident, the applicant went to Mackenzie Richmond Hill Hospital where she complained of neck stiffness, slight headache, and tingling on the left side of her face. Dr. Ping Fu, the attending physician, conducted a physical exam, including a head and neck exam that were unremarkable, and diagnosed the applicant with low back tenderness.⁴

[11] The applicant went to her family doctor, Dr. Salma Kassam, on November 7, 2018. The clinical notes and records of that visit show she reported that she had been diagnosed with a minor concussion and whiplash at the hospital, although this is not supported by the hospital records. Dr. Kassam noted the diagnosis and

³ *Scarlett v. Belair Insurance*, 2015 ONSC 3635, para. 24 (Div. Ct.).

⁴ Clinical Notes and Records of Mackenzie Richmond Hill Hospital, November 6, 2018, Tab 3 of the Respondent’s Submissions.

advised the applicant to apply ice/heat, do stretches, and take Advil or Tylenol as needed.⁵

- [12] A Disability Certificate was completed on November 8, 2018 by Dr. Nan Thien Tong and noted her injuries as neck and back pain, headache and anxiety.⁶ The applicant sought treatment at Yorkstar Rehabilitation Clinic and received chiropractic services, physiotherapy, and massage therapy for her injuries. While the Disability Certificate also included a recommendation that she see a psychologist, there are no records indicating the applicant has ever sought or received psychological treatment for accident-related injuries.

Pre-existing Condition and Psychological Injuries

- [13] The applicant submits that she should be removed from the MIG due to a pre-existing medical condition that will prevent her from achieving maximal recovery within the MIG. The applicant submits that, prior to the accident, she spoke to her doctor about being under stress and possibly seeking counseling. The applicant argues that following the accident, she developed driving anxiety that was initially manageable, but developed into a more serious fear of driving and travelling in a vehicle. The applicant argues that although a large portion of her current psychological symptoms are from unrelated stressors, the accident in 2018, along with a subsequent accident in 2020, is a material contributor to her driving anxiety.
- [14] The respondent argues that the applicant has only ever been diagnosed with conditions that fall within the definition of minor injury. The respondent argues that the applicant has not met her burden of demonstrating on a balance of probabilities that her psychological complaints are not psychological sequelae to a minor injury, or that she has sustained a psychological impairment as a direct result of the accident. In its submissions, the respondent also sets out arguments against the applicant being removed from the MIG on the basis of chronic pain, but I will not address these arguments in my decision because chronic pain is not one of the grounds being put forward by the applicant.
- [15] In support of her position, the applicant relies on the clinical notes and records of Dr. Kassam, the Minor Injury Discharge Report⁷ and the aforementioned Disability Certificate from Yorkstar Rehabilitation Centre. The respondent relies

⁵ Clinical Notes and Records of Dr. Salma Kassam, Tab C of the Applicant's Submissions.

⁶ Disability Certificate dated November 8, 2018, Tab F of the Applicant's Submissions.

⁷ Minor Injury Discharge Report dated August 1, 2019, Tab E of the Applicant's Submissions.

on the section 44 assessments of Dr. James L. Murray, psychologist⁸ and Dr. Hashmat Khan, physician.⁹

- [16] I find the applicant has not demonstrated that a pre-existing condition, documented by a medical practitioner, prevents maximal medical recovery under the MIG for the following reasons.
- [17] Section 18(2) of the *Schedule* provides that insured persons with minor injuries who have a pre-existing medical condition may be exempted from the \$3,500.00 cap on benefits. In order to do so, the applicant must provide compelling evidence that meets 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 on treatment costs under the MIG.
- [18] The standard for excluding an impairment on the basis of pre-existing conditions is well-defined and strict. A pre-existing condition will not automatically exclude a person's impairment from the MIG. It must be shown to prevent maximal recovery within the cap imposed by the MIG.
- [19] With respect to the applicant's pre-existing condition, I have reviewed the clinical notes and records of her family physician, and find that on January 10, 2018 the applicant noted significant family discord and requested counselling. In response, Dr. Kassam provided the applicant with numbers for family counsellors in the area. Subsequent pre-accident visits to the applicant's family physician do not refer to any psychological issues, and no clinical notes and records from a treating counsellor or psychologist have been provided by the applicant. In sum, the January 10, 2018 family physician visit referenced above is the only evidence of a pre-existing psychological condition provided by the applicant.
- [20] I will turn now to the question of whether the applicant's pre-existing condition prevented maximal recovery. I find the applicant has not provided any compelling evidence in support of this argument. The clinical notes and records of Dr. Kassam show that the applicant referenced symptoms arising from her accident

⁸ Section 44 Psychological Assessment of Dr. James Murray, dated February 28, 2019, Tab 7 of the Respondent's Submissions.

⁹ Section 44 Physician Assessment of Dr. Hashmat Khan, dated February 28, 2019, Tab 2 of the Respondent's Submissions.

on November 6, 2018 and again on March 5, 2019, when she reported she felt better since the accident with some ongoing headaches, which were diagnosed as tension headaches. The applicant visited Dr. Kassam numerous times between December 21, 2019 and September 2020 but did not report accident-related symptoms. According to the clinical notes and records, these visits were for lower left quadrant pain related to an ovarian cyst, and depression which was noted as being due to the impact of COVID-19 on her travel agent business and very significant family stressors.

- [21] I do not find the Yorkstar Rehabilitation Clinic Minor Injury Discharge Report dated August 1, 2019 and Disability Certificate of the same date to be compelling evidence in support of the applicant's position. The clinical notes and records of Yorkstar prior to discharge show improvement in the applicant's symptoms. The Discharge Report indicates that additional treatment outside the MIG is required but does not relate this to a pre-existing condition. The Discharge Report specifically indicates that the applicant did not have any prior disease, condition or injury that could affect her response to treatment for her accident-related injuries. Similarly, the Disability Certificate does not refer to a pre-existing medical condition.
- [22] I am unable to find evidence of a connection between the subject accident, the pre-existing condition, and the symptoms of vehicular phobia reported by the applicant. On October 20, 2020, the applicant visited Dr. Kassam and reported she was involved in another car accident a couple of weeks prior to her visit. The applicant advised Dr. Kassam that this accident was minor, she had not been injured, and that she is "now afraid to drive". Prior to this point, although "anxiety" was listed on the November 8, 2018 Disability Certificate, there had been no mention of vehicular phobia or related anxiety in the family physician clinical notes and records. Specifically, there is no mention of driver anxiety between the date of the accident on November 6, 2018 and December 19, 2020. No mention is made of a connection between the applicant's recovery from her accident-related injuries and pre-existing psychological conditions. In fact, the accident is not mentioned at all after March 9, 2019. It is only on December 20, 2020, more than two years after the first accident and immediately following the second accident, that the applicant reports to Dr. Kassam she is now afraid to drive. The prolonged period between anxiety complaints, coupled with the development of symptoms following the 2020 accident, lead me to conclude that the applicant's current psychological symptoms are a result of the 2020 accident, not the November 6, 2018 accident.

- [23] In sum, I find there is nothing in Dr. Kassam's clinical notes and records to support the applicant's argument that the November 6, 2018 accident exacerbated a pre-existing psychological condition leading to driver anxiety, which prevents her from achieving maximal recovery within the MIG. Similarly, there is no compelling evidence in the August 2019 Disability Certificate or the Discharge Report that supports the applicant's position. While there is some evidence that the applicant experienced post-accident anxiety related to driving in the immediate period after the accident, in my view these are sequelae of the applicant's minor injury.
- [24] The respondent relies on the report of Dr. Murray who examined the applicant on January 16, 2019 and concluded that she sustained a minor injury as a result of the accident. The applicant reported no prior mental health conditions, or treatment from mental health providers during the examination. She reported she was in family counselling for non-MVA related issues. The applicant also indicated that she drove herself to the IE assessment appointment, regularly drives her daughter to and from school, and drives to do errands and shopping. The applicant reported she had been driving a rental car following the accident and purchased a new car for herself in December 2018. She reported to Dr. Murray that she had "lost her trust in other drivers" as a result of the November 6, 2018 accident, but nonetheless had resumed her normal activities, including buying a new car and driving it regularly.
- [25] In his report, Dr. Murray opines that the applicant sustained minor injuries as a result of the accident, and that there is no significant psychological impairment or DSM-5 diagnosis that could be clearly and directly attributable to the accident. He also noted that the applicant has not experienced severe or enduring mental health concerns within her personal history. He concludes that while the applicant is participating in family counselling, this is a non-MVA related factor and should not be a barrier or a hurdle for this claimant's post-accident rehabilitation from her physical injuries. Dr. Murray's assessment is consistent with the conclusion of Dr. Khan who opined in his February 28 2019 section 44 report that the applicant's injuries fall within the MIG, and there were no outside factors that would prevent her from achieving maximal recovery.
- [26] After reviewing the evidence, I give more weight to the IE assessment of Dr. Murray, psychologist. In doing so, I note that while the applicant argues that both her pre-existing medical condition and post-accident injuries are psychological in nature, she has not submitted compelling evidence in support of her position. Dr. Murray's IE assessment is the only psychological report in evidence, and it concludes that the applicant's injuries can be treated within the MIG. I find his

opinion is also consistent with the balance of the evidence, including the fact the applicant had not sought any psychological treatment prior to the accident and did not seek it after the accident, her physical injuries improved with treatment following the accident, and despite reporting some anxiety, within a month of the accident she had bought a new car and continued to drive it regularly.

- [27] Following my review of the submissions and evidence, I find the applicant has not provided compelling evidence that a pre-existing medical condition prevents her from achieving maximal medical recovery under the MIG. Likewise, I find no evidence demonstrating that she sustained a psychological injury from the accident. As a result, the applicant has not met her burden to establish entitlement to coverage beyond the \$3,500.00 MIG limit, on a balance of probabilities.

INTEREST

- [28] As there are no benefits payable, the applicant is not entitled to interest pursuant to section 51 of the *Schedule*.

CONCLUSION AND ORDER

- [29] I find that the applicant has not met her onus of demonstrating that her accident-related impairments fall outside the definition of a “minor injury” in section 3 of the *Schedule*.
- [30] As the respondent has approved the funding of treatment to the maximum available within the \$3,500.00 MIG limit, there is no further entitlement to medical and rehabilitation benefits.
- [31] As there are no benefits owing, the applicant is not entitled to interest.
- [32] The application is dismissed.

Released: November 28, 2022



E. Louise Logan
Vice-Chair