Citation: Karimi v. Pembridge Insurance Company, 2023 ONLAT 20-014164/AABS and 21-002716/AABS

Licence Appeal Tribunal File Numbers: 20-014164/AABS and 21-002716/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:

Jalaludin Karimi

Applicant

and

Pembridge Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: **Stephanie Kepman**

APPEARANCES:

For the Applicant: Camille Narine-Ramrattan, Paralegal

For the Respondent: Sonya Katrycz, Counsel

HEARD: **By way of written hearing**

REASONS FOR DECISION AND ORDER

BACKGROUND

[1] The applicant was involved in an automobile accident on **April 5, 2017**, and sought benefits pursuant to the Statutory Accident Benefits Schedule – *Effective September 1, 2010 (including amendments effective June 1, 2016)*[1] *("Schedule")*. The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

[2] The applicant was involved in a second accident on **November 21, 2018**, and sought benefits pursuant to the *Schedule*. The applicant was denied certain benefits by the respondent and submitted an application to the Tribunal.

[3] At the Case Conference held on June 25, 2021, the parties agreed to combine matters 20-014164/AABS and 21-002716/AABS into one written hearing.

ISSUES

[4] For matter 20-014164/AABS, the issues for the Tribunal to decide are:

i. 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 Minor Injury Guideline?

ii. Is the applicant entitled to a medical benefit in the amount of $2,983.12 for physiotherapy treatment, proposed by Whitby Wellness Centre in a treatment plan/OCF-18 ("plan") dated December 8, 2017?

iii. Is the applicant entitled to a medical benefit in the amount of $2,142.15 for psychological services, proposed by Whitby Wellness Centre in a treatment plan/OCF-18 ("plan") dated November 23, 2018?

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

[5] For matter 21-002716/AABS, the issues for the Tribunal to decide are:

i. 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 Minor Injury Guideline?

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

ii. Is the applicant entitled to a medical benefit in the amount of $3,297.82 for physiotherapy treatment, proposed by Alexmuir Wellness Centre in a treatment plan/OCF-18 (“plan”) dated February 15, 2020?

iii. Is the applicant entitled to a medical benefit in the amount of $4,339.50 for physiotherapy treatment, proposed by Alexmuir Wellness Centre in a treatment plan/OCF-18 (“plan”) dated June 8, 2019?

iv. Is the applicant entitled to a medical benefit in the amount of $1,299.98 for physiotherapy treatment, proposed by Alexmuir Wellness Centre in a treatment plan/OCF-18 (“plan”) dated February 28, 2019?

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

LAW

[6] Section 3(1) of the *Schedule* states that a minor injury consists of 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. Section 3(1) of the *Schedule* also establishes the treatment framework regarding minor injuries.

[7] Sections 14 and 15 *Schedule* state that an insurer shall pay medical benefits to, or on behalf of an insured person so long as said person sustains an impairment as a result of an accident and that the medical benefit in dispute is a reasonable and necessary expense incurred by the insured person as a result of the accident.

[8] Section 18(1) of the *Schedule* states that when an insured person sustains an impairment that is predominantly a minor injury, the total cost of their medical and rehabilitation benefits payable shall not exceed $3,500.00.

[9] Section 18(2) of the *Schedule* provides that the $3,500.00 funding limit does not apply if an insured person provides compelling medical evidence that they have a pre-existing medical condition that was documented by a health practitioner before the accident and will prevent them from achieving maximal recovery from the minor injury if they are subject to the MIG funding limit.

[10] Section 51(2) of the *Schedule* states that interest is due on a benefit that is overdue if the insurer does not pay the benefit within the time stated by the *Schedule.*

[11] In *Scarlett v. Belair Insurance*[2] ("Scarlett"), the Divisional Court reviewed the minor injury provisions in the Schedule, finding that they were a limit on an insurer's liability, not an exclusion from coverage and that the onus of establishing entitlement beyond the cap rests with the claimant. Applying *Scarlett*, the applicant must establish her entitlement to coverage beyond the $3,500 cap for minor injuries.

20-014164/AABS – APPLICABILITY OF THE MINOR INJURY GUIDELINE ("MIG")

General Submissions

[12] After reviewing the applicant's submissions, I had trouble following his arguments, as he failed to specify which evidence and arguments were in relation to which of the applicant's two accidents.

[13] Moreover, given that the applicant's clinical notes and notes and records were not submitted in chronological order, I note that the applicant did not follow the Tribunal's Order to provide page numbers for his submissions. I also note the respondent also failed to provide page numbers when referring to evidence. Despite all of the above, I reviewed all of the evidence relied upon by the parties.

[14] The applicant submitted that as a result of his first accident, he suffered non-minor physical injuries and psychological injuries, both requiring removal from the MIG.

[15] The respondent submitted that the applicant has not shown that his accident-related injuries require removal from the MIG. It argued that in relation to the first accident, the applicant has not provided a Motor Vehicle Accident Report, or a record from a collision reporting centre, nor called emergency services for help.

[16] The respondent also submitted that an adverse inference should be drawn as the applicant did not disclose his Ontario Health Insurance Program ("OHIP") summary or prescription summary.

[17] Upon reviewing the Case Conference Report and Order of the Adjudicator, I noted that the parties agreed that a production order was not required.

[18] Perhaps in an ideal world, the applicant would have provided this information, however I am not prepared to make an adverse inference in the absence of a

[2] *Scarlett v. Belair Insurance*, 2015 ONSC 3635 (CanLII) at para 24.

production order. I note that the applicant's position may be weakened by the lack of evidence.

Did the applicant sustain predominantly minor physical injuries?

[19] I find that the evidence establishes that the applicant sustained a minor, physical injury for the following reasons:

[20] The applicant submitted that he suffered non-minor, physical injuries related to pain in his back, arms and hands, requiring removal from the MIG. The applicant relied on the clinical notes and records of Pickering Urgent Care and Family Practice ("Pickering Urgent Care"):

i. On April 10, 2017[3], Dr. Sulochana Shanmugathasan, physician, provided the applicant with a prescription for physiotherapy related to his accident.

ii. On April 18, 2017[4], the applicant was again seen by Dr. Shanmugathasan, with complaints of body pain related to his first accident. The doctor advised the applicant to stop his weightlifting and suggested he attend physiotherapy.

iii. On June 5, 2017[5], the applicant again reported experiencing pain, this time to Dr. Al-Noor Keshavjee, physician, in his hands.

iv. On June 12, 2017[6], the applicant was seen by Dr. Isa Mohammed, physician, again reporting pain in his hands.

v. On September 12, 2017[7], the applicant was seen by Dr. Keshavjee, where he again reported his hand pain and was recommended to take Aleve.

[21] The applicant also relied on the disability certificate[8] ("OCF-3") of Sindhuri Parmini, physiotherapist, which noted the following accident-related physical injuries: whiplash-associated disorder ("WAD-II") with complaints of neck pain, stiffness or tenderness only, sprain and strain of the elbow and wrist, injury of the muscle and tendon at the wrist and hand level, lower back pain, headache, and abnormal posture.

[3] Clinical notes and records of Pickering Urgent Care dated April 10, 2017
[4] Clinical notes and records of Pickering Urgent Care dated April 18, 2017.
[5] Clinical notes and records of Pickering Urgent Care dated June 5, 2017.
[6] Clinical notes and records of Pickering Urgent Care dated June 12, 2017.
[7] Clinical notes and records of Pickering Urgent Care dated September 12, 2017.
[8] OCF-3 of Ms. Parmini dated April 21, 2017.

[22] The respondent submitted that the applicant had not provided persuasive evidence that his physical injuries were not minor.

[23] The respondent also relied on the clinical notes and records of Pickering Urgent Care and noted that:

i. On June 13, 2017[9], the applicant had an ultrasound performed on his left hand, where the findings were not remarkable.

ii. On September 12, 2017[10], Dr. Keshavjee noted that the applicant's work as a systems administrator involved repetitive tasks with his hands including manipulating cables. The respondent also noted that the doctor did not diagnose the applicant, order imaging, refer him to a specialist, provide him with a prescription or suggest he attend physiotherapy.

[24] The respondent also relied on the Insurer's Examination[11] ("IE") of Dr. Rajka Soric, physiatrist, where the doctor opined that the applicant suffered a lumbosacral sprain as a result of his first accident. Dr. Soric found that the applicant's injuries could be treated within the MIG and that no further physical treatment was reasonable and necessary.

[25] After considering the submissions and evidence of the parties, based on a balance of probabilities, I find that the applicant's physical injuries fall within the MIG.

[26] I did not find the OCF-3 of Ms. Parmini showed that the applicant suffered non-minor physical injuries. I appreciated that she captured the applicant's complaints of neck, elbow, wrist, hand and back pain and his headaches. However, I find that as a physiotherapist, she is not qualified to diagnose a WAD-II and put little weight on that finding.

[27] I did consider the evidence from Pickering Urgent Care, and as a whole, I found it demonstrated that the applicant's doctors did not find the applicant's hand pain to be concerning after his ultrasound showed normal findings. Moreover, I agreed with the respondent's argument that the applicant not only performed repetitive hand tasks in his work as he was able to return to his job, but that his doctors did not diagnose him or prescribe him treatment beyond the initial prescription for physiotherapy and recommended he take Aleve.

[9] Clinical notes and records of Pickering Urgent Care dated June 13, 2017.
[10] Clinical notes and records of Pickering Urgent Care dated September 12, 2017.
[11] Insurer Examination – Section 44 (In Person) – Physiatrist Report of Dr. Soric dated November 14, 2017.

[28] I preferred the findings of Dr. Soric, who specifically addressed the issue at stake, and found that the applicant's injuries fell within the MIG. Moreover, Dr. Soric's findings are consistent with the contemporaneous, medical evidence. Therefore, I find that the applicant's physical injuries fall within the MIG.

[29] Though the applicant has presented evidence that after his accident, he experienced pain in his hands, he has not provided evidence that supports his position that his injuries are beyond minor. Though I believe that his hands hurt after his accident, the applicant carries the onus to provide persuasive medical evidence to show that his injuries go beyond the definition of a minor injury and I find he has not done so.

Does the applicant have a psychological impairment(s)?

[30] The applicant also argued he sustained a psychological injury as a result of his first accident, which places his claim outside of the MIG.

[31] The applicant relied on the OCF-3[12] of Ms. Parimi, which noted the following accident-related injuries and sequelae: phobic anxiety disorders and non-organic disorders of the sleep-wake schedule.

[32] After considering the submissions and evidence, I find that the applicant has not met his evidentiary burden of showing, that based on a balance of probabilities, he suffered a psychological impairment as a result of his accident.

[33] Though I did consider Ms. Parimi's OCF-3, I find that as a physiotherapist, diagnosing psychological impairments goes beyond the scope of her practice. Furthermore, the applicant's clinical notes and records from Pickering Urgent Care did not provide contemporaneous evidence to support the findings of Ms. Parimi.

[34] Therefore, I find that the applicant's injuries are within the MIG. Since the parties agreed that the applicant has exhausted the limits of the MIG, I do not need to consider if the outstanding treatment plans are reasonable and necessary.

20-014164/AABS – INTEREST

[35] As I have found that the applicant's injuries fall within the MIG, and no benefits are outstanding, no interest is payable.

[12] OCF-3 of Ms. Parmini dated April 21, 2017

21-002716/AABS – APPLICABILITY OF THE MINOR INJURY GUIDELINE

Does the applicant have any pre-existing conditions?

[36] 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 cap on benefits. In order to be removed from the MIG, the applicant must provide compelling evidence meeting the following requirements:

a. There was a pre-existing medical condition that was documented by a health practitioner before the accident; and

b. The pre-existing condition will prevent maximal recovery from the minor injury if the person is subject to the $3,500 treatment costs under the MIG[13].

[37] The standard for excluding an impairment on the basis of a pre-existing condition 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.

[38] The applicant submitted that as a result of his first accident, he suffers from pre-existing injuries that prevent him from reaching maximal medical recovery if confined to the limits of the MIG. The applicant took the position that his physical pain from his first accident has been aggravated.

[39] The applicant relied on the following clinical notes and records from Pickering Urgent Care:

i. On May 25, 2019[14], the applicant was seen by Dr. Hunaina Mirza, physician, due to his bilateral hand pain that he's had for approximately one and a half years. Dr. Mirza opined the applicant suffered from a bilateral tendon injury and soft tissue contusions of his hands and tendon reflex. Dr. Mirza noted that the applicant was seeing a physiotherapist and taking over-the-counter painkillers but still had hand pain, which was worsening, and he could not do push-ups.

[13] 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".
[14] Clinical notes and records of Pickering Urgent Care dated May 25, 2019.

ii. On January 11, 2021[15], the applicant was seen by Dr. Keshavjee with complaints of pulsing in his hands, pain and loss of mobility with reports of numbness in his fingers and had seen a chiropractor.

iii. On July 16, 2021[16], the applicant was seen by Dr. Mohammed with reports of muscular pain in his neck, trapezoid, shoulder and left arm. The applicant reported a decreased range of motion due to pain, which was causing the applicant to miss work.

[40] The applicant also relied on the physiatry IE[17] of Dr. Todd Bentley, physiatrist, who found that the applicant's Tinel's test showed nerve problems in the applicant's right C5-T2 of his spine and hypoesthesia from his L1 to L2 over his lateral femoral cutaneous area and right V1 and a thoracic curve. The applicant noted that he reported to Dr. Bentley that he began having headaches, stiffness in his neck and lower back and pain and numbness in his hands from his second accident.

[41] The applicant relied on the Psychological Pre-Screen[18] of Dr. Leon Steiner, registered psychologist, where the applicant reported experiencing pain in his hand and back and headaches after his first accident, which was aggravated by his second accident.

[42] The applicant relied on the matter of *J.T. v Aviva General Insurance*[19], where the Tribunal found the applicant had shown, based on a balance of probabilities, that the physiotherapy treatment was reasonable and necessary. The Tribunal also found that pain reduction, increasing strength and range of motion and the return to normal activities of daily living were reasonable goals of the disputed treatment The applicant submitted that similar circumstances exist in the subject matter, as the applicant has reported temporary relief from passive therapies.

[43] The applicant also relied on *18-001673 v Primmum Insurance Company*[20], where the Tribunal found the applicant's injuries removed him from the MIG due to chronic pain based on the applicant's level of pain and functionality. The applicant again submitted that based on his levels of pain and reduced functionality, his injuries must be found outside the MIG.

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[15] Clinical notes and records of Pickering Urgent Care dated January 11, 2021.
[16] Clinical notes and records of Pickering Urgent Care dated July 16, 2021.
[17] Insurer's Examination – Physiatry Assessment of Dr. Bentley dated August 21, 2019.
[18] Psychological Pre-Screen report of Dr. Steiner dated March 30, 2020.
[19] *J.T. v Aviva General Insurance*, 2019 CanLII 122730 (ON LAT) at paras. 17 to 19.
[20] *18-001673 v Primmum Insurance Company,* 2019 CanLII 43884 (ON LAT) at paras. 19 to 22.

[44] The respondent submitted that the applicant has not shown that he suffered from a pre-existing condition that requires treatment beyond the limits of the MIG to reach maximum medical recovery.

[45] The respondent also relied on the clinical notes and records from Picking Urgent Care and noted the following:

i. On May 25, 2019[21], the applicant was seen by Dr. Mirza, where the applicant mentioned his hand pain, but not his second accident. The doctor opined the applicant's pain was a soft-tissue injury and prescribed him Vimovo. The respondent noted that Dr. Mirza did not recommend any physical therapy for the applicant's hand pain.

ii. On June 4, 2020[22], the applicant was seen by Dr. Barwaaqo Abdallah, physician, and reported his hand pain. The respondent directed the Tribunal's attention to the applicant reporting "going through a windshield", despite there being no evidence to support this.

iii. On January 11, 2021[23], the applicant was seen by Dr. Kashavjee, where the doctor noted there was no clear diagnosis for the applicant's hand pain and did not mention his second accent.

[46] The respondent also relied on the physiatry IE[24] of Dr. Bentley and disputed the applicant's submissions with respect to the doctor's findings. The respondent submitted that no "nerve problems" were diagnosed or identified and instead, the doctor found the applicant suffered from soft tissue injuries that were well within the MIG, and that no further treatment would be reasonable or necessary.

[47] After considering the submissions and evidence of the parties, based on a balance of probabilities, I find that the applicant has not met his onus of showing that he has a pre-existing injury that would not reach maximum, medical recovery if restricted by the treatment limit of the MIG.

[48] I agree that the applicant has had ongoing pain in his hands that he began reporting to Pickering Urgent Care after the applicant's first accident, as supported by his clinical notes and records. I also agree that based on these

[21] Clinical notes and records of Pickering Urgent Care dated May 25, 2019.
[22] This appears to rely on the clinical notes and records of Pickering Urgent Care dated July and not June 4, 2020.
[23] Clinical notes and records of Pickering Urgent Care dated January 11, 2021.
[24] Insurer's Examination – Physiatry Assessment of Dr. Bentley dated August 21, 2019.

clinical notes and records, the applicant continued to report pain in his hands, which then began to impact his elbow, neck and shoulders.

[49] However, none of the doctors at Pickering Urgent Care diagnosed the applicant with an injury that falls outside of the MIG, nor specifically found that the applicant's injuries from his first accident required treatment outside of the MIG's limits as a result of his second accident. I also noted that the evidence also fails to comment if the applicant's injuries from his first accident are a barrier to reaching maximum medial recovery if confined to the limits of the MIG.

[50] In terms of Dr. Bentley's IE, I agree with the respondent's position, namely that it supports that the applicant's pain issues fall within the MIG and do not fall outside the definition of a minor injury found within section 3 of the *Schedule*. After reviewing the IE of Dr. Bentley, I noted that the "nerve pain" alleged by the applicant was specified to be "Subjective hypoesthesia over right V1, right C5-T2, of his spine and right L1-L2 of unclear etiology" and also falls within the definition of a MIG injury. Therefore, I did not find the applicant's submissions with respect to Dr. Bentley's IE to be persuasive.

[51] In terms of Dr. Steiner's Psychological Pre-Screen[25], I find that this evidence shows the applicant's self-reporting of his pain, namely that the applicant described the pain he experienced in his back and hands at length. However, this evidence does not speak to the issue at hand or the applicant's impact of his pre-existing condition in relation to reaching maximum medical recovery. Therefore, I did not find this evidence persuasive.

[52] I did not find the matter of *J.T. v Aviva General Insurance*[26] to be persuasive, as it addressed an applicant whose injuries were already found to be outside the MIG. I also did not find the matter of *18-001673 v Primmum Insurance Company*[27] to be persuasive, as in that matter, the applicant had been diagnosed with chronic pain, while the applicant currently before the Tribunal has not.

[53] In summary, I find that the applicant has not met his evidentiary onus of showing that he suffers from a pre-existing condition that requires treatment beyond the MIGs limits.

[25] Psychological Pre-Screen report of Dr. Steiner dated March 30, 2020.
[26] *J.T. v Aviva General Insurance*, 2019 CanLII 122730 (ON LAT).
[27] *18-001673 v Primmum Insurance Company*, 2019 CanLII 43884 (ON LAT) at paras. 19 to 22.

Does the applicant have a psychological impairment?

[54] The applicant also claims that he sustained a psychological injury as a result of the accident, which places his second, accident-related injuries claim outside of the MIG.

[55] Psychological injuries, if established, may fall outside the MIG, because the MIG only governs "minor injuries" and the prescribed definition does not include psychological impairments.

[56] The applicant took the position that the pain from his first accident was a pre-existing condition that aggravated his psychological health.

[57] The applicant relied on the Psychological Pre-Screen of Dr. Steiner, where the applicant reported issues falling and staying asleep due to his pain, impatience, and anxiety from the changes in his life caused by pain. The applicant reported these injuries have caused him issues with concentration and focus, which impacts his day-to-day life and activities.

[58] The applicant relied on the matter of *J.T. v Aviva General Insurance*[28], where the Tribunal found that the applicant's diagnosis of somatic symptom disorder was supported by the medical evidence and proved that the psychological treatment was reasonable and necessary.

[59] The applicant also relied on *18-001673 v Primmum Insurance Company*[29], where the Tribunal found the applicant's injuries removed him from the MIG due to chronic pain based on the applicant's level of pain and functionality.

[60] The respondent submitted that Dr. Steiner's Pre-Screen should be afforded little to no weight, as the doctor formed "diagnostic impressions" and made no actual diagnosis. The respondent submitted that this Pre-Screen is not a psychological assessment and holds little value.

[61] The respondent also submitted that the applicant's position was not supported by the clinical notes and records of Pickering Urgent Care, where the applicant reported his diagnosed soft-tissue injuries but did not report psychological complaints.

[28] *J.T. v Aviva General Insurance*, 2019 CanLII 122730 (ON LAT) at para. 33.
[29] *18-001673 v Primmum Insurance Company*, 2019 CanLII 43884 (ON LAT) at paras. 19 to 22.

[62] After considering the submissions and evidence of the parties, based on a balance of probabilities, I find that the applicant has not shown that he suffers from psychological impairments as a result of his second accident.

[63] I agreed with the respondent's position, namely that Dr. Steiner's Pre-Screen did not diagnose the applicant with accident-related psychological impairments, but rather captured the applicant's subjective complaints. Though I did consider these complaints, as these are not diagnoses, I found them to be less than persuasive.

[64] Moreover, the applicant has not provided any medical opinion that supports his position that he suffered a psychological impairment as a result of his accident either via diagnosis or psychometric testing. I would expect the applicant's psychological issues to be captured in the clinical notes and records of Pickering Urgent Care and they were not. I was also not provided with objective, medical evidence that supported the applicant's submissions that his pain had an impact on his psychological health beyond accident-related sequelae.

[65] In terms of the applicant's submissions with respect to *J.T. v Aviva General Insurance*[30], I did not find this matter relevant, as in *J.T.*, the applicant had been diagnosed with a psychological impairment supported by contemporaneous evidence, which is not the case for the subject matter. I agreed with the respondent's arguments that the applicant has not been diagnosed with a psychological impairment and did provide corroborating evidence from his family doctor.

[66] Therefore, I find that the applicant did not suffer a psychological impairment as a result of his second accident.

[67] Since the parties agreed that the applicant has used all of the benefits available to him under the MIG, I do not need to consider the outstanding treatment plans.

21-002716/AABS – INTEREST

[68] As I have found that no benefits are outstanding, no interest is owed.

CONCLUSION AND ORDER

[69] For matter 20-014164/AABS, the application is dismissed, and I find:

[30] *J.T. v Aviva General Insurance*, 2019 CanLII 122730 (ON LAT) at para. 33.

i. The applicant's injuries fall within the Minor Injury Guideline.

ii. The applicant is not entitled to payments for the 2 treatment plans.

iii. The applicant is not entitled to interest.

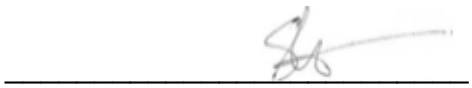
[70] For matter 21-002716/AABS, the application is dismissed, and I find:

i. The applicant's injuries fall within the Minor Injury Guideline.

ii. The applicant is not entitled to payments for the 3 treatment plans.

iii. The applicant is not entitled to interest.

Released: January 17, 2023



Stephanie Kepman
Adjudicator