



Citation: Alava v. Economical Insurance, 2023 ONLAT 20-012284/AABS

Licence Appeal Tribunal File Number: 20-012284/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:

Noel Alava

Applicant

and

Economical Insurance

Respondent

DECISION

ADJUDICATOR: Lyndra Griffith

APPEARANCES:

For the Applicant: Micheal Yermus, Counsel
Elizabeth Gutierrez Nadal, Counsel

For the Respondent: Maia Abbas, Counsel

HEARD: By Way of Written Submissions

BACKGROUND

- [1] The applicant, Noel Alava, was injured in an automobile accident on March 24, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (Schedule)*¹ from Economical Insurance, the respondent.
- [2] The respondent denied the applicant’s claims, including chiropractic services, because it had determined that all of the applicant’s injuries fit the definition of “minor injury” as prescribed by s. 3(1) of the *Schedule* and, therefore, fall within the Minor Injury Guideline (MIG).² As a result, the applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (Tribunal).
- [3] A case conference was held on April 1, 2021, and the matter proceeded to a written hearing.

ISSUES IN DISPUTE

- [4] The issues to be decided in the hearing are:
1. Are the applicant’s injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the \$3,500.00 limit and in the MIG?
 2. Is the applicant entitled to medical benefits of \$1,944.53 for chiropractic services?
 3. Is the applicant entitled to medical benefits of \$3,166.04 for chiropractic services?
 4. Is the applicant entitled to an income replacement benefit (IRB) of \$400.00 per week from March 24, 2019, to date and ongoing?
 5. Is the respondent liable to pay an award under *Regulation 664* because it unreasonably withheld or delayed payments to the applicant?
 6. Is the applicant entitled to interest on any overdue payment of benefits?

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*.

RESULT

- [5] I find that the applicant has not met his onus of proving that his accident-related impairments require removal from the MIG. The applicant is also not entitled to the dispute plans, IRB, an award or interest, and the application is dismissed.

ANALYSIS

The Applicant's injuries fall under the MIG

- [6] The MIG establishes a framework available to injured persons who sustain a minor injury as a result of an accident. A "minor injury" is defined in s. 3(1) of the *Schedule* as, "one or more of a strain, sprain, whiplash associated disorder, 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*.
- [7] Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to \$3,500.00. An applicant may receive payment for treatment beyond the \$3,500.00 cap 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 a psychological impairment or chronic pain with a functional impairment as neither such impairment is included in the *Schedule's* definition of "minor injury." It is the applicant's burden to establish entitlement to coverage beyond the \$3,500.00 cap on a balance of probabilities.³
- [8] In a letter dated August 26, 2020, the respondent advised the applicant that it had approved \$3,500.00 worth of treatment and that his minor injury limits had been exhausted.
- [9] The applicant submits that he suffered injuries to his head, neck, upper and lower back, left shoulder and left elbow. The applicant argues that his injuries are not minor that he suffered a tear of the supraspinatus tendon. Section 3(1) of the *Schedule* defines "sprain" as an injury to one or more tendons or ligaments, including a partial but not a complete tear. The diagnostic imaging completed on September 5, 2020, and November 30, 2020, he had a small partial thickness tear of the distal supraspinatus tendon. Therefore, the applicant's partial tear falls under the definition of a minor injury.

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

- [10] Dr. Hashmat Khan, general practitioner, completed an Independent Insurer's Examination General Practitioner Report on September 30, 2020. The purpose of the assessment was to evaluate the applicant with respect to injuries that he sustained as a result of the accident and to provide an opinion as to the applicability of the MIG. Dr. Khan diagnosed the applicant with a WAD II and bilateral trapezius strain, in other words a minor injury.
- [11] I find that the applicant has not met his burden of proving that his accident-related impairments require treatment beyond the MIG on the basis pre-existing condition, of chronic pain and/or a psychological impairment.

Pe-existing Condition

- [12] The applicant has failed to prove on a balance of probabilities that he should be removed from the MIG as a result of any pre-existing conditions. It is well settled that 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.
- [13] 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 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 on treatment costs under the MIG.⁴
- [14] The applicant argues that his pre-existing conditions, including osteoarthritis in his lower back and calcification on the tendons in his shoulders (calcific tendinopathy) were exacerbated by the accident and as a result he should be removed from the MIG.
- [15] The respondent argues that prior to the accident the applicant rarely visited his family physician and his CNRs do not list any pre-existing conditions. Dr. Khan found no compelling evidence that the applicant does not come within the minor injury guideline due to a documented pre-existing medical condition.

⁴ *Supra* note 2 at page 5, heading 4, "Impairments that do not come within this Guideline".

- [16] I find that the applicant has failed to submit any evidence that any of his pre-existing conditions would prevent him from achieving maximal recovery within the MIG. The applicant's medical records date back to May 2017 and there was nothing of significance noted. There were no pre-existing conditions noted in the applicant's medical file. Therefore, I find that he is not removed from the MIG based on any pre-existing conditions.

Chronic Pain

- [17] I find for chronic pain to take someone out of the MIG, there must be an effect on their functionality. There is no medical evidence or submissions made by the applicant that the accident-related injuries have had a detrimental impact on his functionality.
- [18] I find that the applicant has failed to prove on a balance of probabilities that he should be removed from the MIG as a result of a chronic pain.

Psychological Impairment

- [19] Lastly, psychological impairments, if established, fall outside the MIG, because such impairments are not included in the prescribed definition of "minor injuries."
- [20] There is no medical evidence or submissions made by the applicant that suggests that he suffered a psychological impairment as a result of the accident.
- [21] I find that the applicant has failed to prove on a balance of probabilities that he should be removed from the MIG as a result of a psychological impairment.

The applicant is not entitled to medical benefits in the amount of \$1,944.53 for chiropractic services

- [22] Section 14 and 15 of the *Schedule* provide that the insurer shall pay medical benefits to, or on behalf of, an applicant so long as the applicant sustains an impairment as a result of an accident and the medical benefit is a reasonable and necessary expense incurred by the applicant as a result of the accident.
- [23] The respondent advised the applicant on February 6, 2020, that there was insufficient medical documentation to support that his accident-related injuries fall outside of the minor injury definition, the MIG applied to his claim, and the treatment claimed in the plan was not reasonable or necessary.

- [24] The applicant bears the onus of proving entitlement to the proposed treatment by proving both OCF-18s are reasonable and necessary on a balance of probabilities.⁵
- [25] As I have found that the applicant has failed to prove that his accident-related impairments warrant treatment beyond the MIG limits, it is unnecessary for me to consider the reasonableness and necessity of the dispute treatment plan because the maximum of \$3,500.00 for medical and rehabilitation benefits available under the MIG has been exhausted.

The applicant is not entitled to medical benefits of \$3,166.04 for chiropractic services

- [26] As stated above, I have found that the applicant has failed to prove that his accident-related impairments warrant treatment beyond the MIG limits, therefore it is unnecessary for me to consider the reasonableness and necessity of the dispute treatment plan because the maximum of \$3,500.00 for medical and rehabilitation benefits available under the MIG has been exhausted.

The applicant is not entitled to IRBs

- [27] I find that the applicant is not entitled to an IRB for the period of January 27, 2018, to date and ongoing as he failed to present any evidence to prove entitlement this benefit.
- [28] The case conference report and order dated April 15, 2022¹ indicates that applicant is seeking IRBs from March 24, 2019 to date and ongoing. The test for eligibility to receive IRBs within 104 weeks of the accident is set out in s. 5(1) of the *Schedule*. An insured person is eligible to receive IRBs if, as a result of the accident, if they suffer a substantial inability to perform the essential tasks of their pre-accident employment within 104 weeks after the accident.
- [29] The respondent submits that the applicant has failed to make any submissions on this issue. Furthermore, the respondent argues that the applicant never applied for IRBs and a Disability certificate (OCF-3) was only received in October 2020.
- [30] The applicant bears the burden of proving on a balance of probabilities that he is entitled to IRBs for the period from March 24, 2019, to present and he has failed to discharge that burden.

⁵ *Supra* note 3 at paras. 20-24.

[31] As the applicant has not made any submissions or presented any evidence on this issue, he has not met his burden of proving his entitlement to an IRB.

The applicant is not entitled to an Award

[32] Section 10 of *Regulation 664* provides that, if the Tribunal finds that an insurer has unreasonably withheld or delayed payment of benefits, the Tribunal may award a lump sum of up to 50 per cent of the amount in which the person was entitled plus interest.

[33] As I have found in that no payment of benefits is owed there is therefore no basis upon which to consider an award in this matter.

The applicant is not entitled to Interest

[34] As there are no benefits owing, no interest is payable.

CONCLUSION

[35] For the reasons outlined above, I find that:

- (i) The applicant sustained predominantly minor injuries as defined under the *Schedule*.
- (ii) Is not entitled to the benefits in dispute;
- (iii) Is not entitled to an award under *Regulation 664*;
- (iv) No interest is payable; and
- (v) This application is dismissed.

Released: April 5, 2023

**Lyndra Griffith
Adjudicator**