



**Citation: Bailey v. Allstate Insurance Company of Canada, 2023 ONLAT
20-003424/AABS**

Licence Appeal Tribunal File Number: 20-003424/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:

Denise Bailey

Applicant

and

Allstate Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: Kate Grieves

APPEARANCES:

For the Applicant: Sherilyn Pickering, Counsel

For the Respondent: Sonya Katrycz, Counsel

HEARD: By Way of Written Submissions

OVERVIEW

- [1] Denise Bailey, the Applicant, was involved in an automobile accident on January 22, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”). The Applicant was denied benefits by the Respondent, Allstate Insurance Company of Canada, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

- [2] The issues in dispute are:
- i. Are the Applicant’s injuries predominantly a minor injury as defined in section 3 of the *Schedule* and therefore subject to treatment within the in the Minor Injury Guideline (“the MIG”) and the \$3,500.00 funding limit?
 - ii. Is the Applicant entitled to a medical benefit in the amount of \$2,836.89 for chiropractic services, proposed by South Barrie Health Group in a treatment plan (“plan”) dated February 14, 2019?
 - iii. Is the Applicant entitled to a medical benefit in the amount of \$3,031.00 for chiropractic services, proposed by South Barrie Health Group in a plan dated October 31, 2019?
 - iv. Is the Applicant entitled to a medical benefit in the amount of \$2,434.00 for a psychological assessment, proposed by Dr. Leon Steiner in a plan dated August 26, 2019?
 - v. Is the Applicant entitled to interest on any overdue payment of benefits?
 - vi. Is the Respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the Applicant?
- [3] The parties confirmed that the non-earner benefit listed in the case conference report was no longer in dispute.

RESULT

- [4] The Applicant sustained a minor injury as a result of the accident.

- [5] The Applicant is not entitled to the treatment and assessment plans in dispute because they propose treatment outside of the MIG and the \$3,500.00 funding limit on treatment for a minor injury.
- [6] Given there are no benefits owed, or payments outstanding, the Applicant is not entitled to interest or an award under s. 10 of O. Reg. 664.

ANALYSIS

The Minor Injury Guideline (“MIG”)

- [7] 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*.
- [8] Section 18(1) of the *Schedule* limits funding for medical and rehabilitation benefits for predominantly minor injuries to a cap of \$3,500.00. An Applicant may receive funding for treatment beyond the \$3,500.00 limit if they can provide evidence of an injury that is not included in the minor injury definition.
- [9] It is the Applicant’s burden to establish entitlement to coverage beyond the \$3,500.00 cap on a balance of probabilities See: *Scarlett v. Belair Insurance*, 2015 ONSC 3635, paragraph 24 (Div. Ct).
- [10] The Applicant submits that she suffered physical and psychological impairments that fall outside the definition of a minor injury and is therefore entitled to treatment beyond the \$3,500.00 MIG limit. The respondent submits that she has not met the burden of proving that the accident caused injuries that fall outside of the scope of the MIG. I agree with the respondent.

Physical Impairment

- [11] The Applicant submits that she suffered a traumatic brain injury, post-traumatic headaches, and chronic pain, and as such her injuries fall outside of the definition of a minor injury. I find that the Applicant has not established that her physical accident-related impairments fall beyond the definition of a minor injury.
- [12] The Applicant was the driver of a rear-ended vehicle. The airbags did not deploy, and she did not seek any immediate medical attention. She returned to work within days. The Disability Certificate (“OCF-3”) completed by Dr. A. Ryzhykh,

dated January 31, 2019, confirms the Applicant suffered soft tissue physical injuries as a result of the accident. It lists whiplash associated disorder, sprain and strain injuries of the thorax, knee tear, tension-type headaches, and pain. Aside from these soft-tissue physical injuries, diagnoses of concussion or psychological impairments are outside the scope of Dr. Ryzhykh's scope of practice as a chiropractor.

- [13] The clinical notes and records from the family doctor do not support the conclusion that she suffered injuries that would fall outside of the MIG. The Applicant was seen two days after the accident, and experienced no loss of consciousness, but complained of ongoing headaches, dizziness, tingling in her right arm, and overall pain. The doctor diagnosed musculoskeletal pain. She followed up in March 2019 and reported some improvement to her pain and headaches with physiotherapy. The doctor referred her to a neurologist for the tingling in her arms that she experienced, mainly when driving long distances. There was no concussion protocol undertaken. X-rays of her neck revealed no fracture or malalignment.
- [14] The Applicant relies on a chronic pain assessment report from Dr. Friedlander, dated September 10, 2021. Dr. Friedlander noted that she had tension headaches and symptoms consistent with post concussion syndrome but concluded that she should be assessed by the appropriate expert to confirm or rule out the diagnosis.
- [15] The Applicant saw an OHIP-funded neurologist, Dr. Maher, in April 2019, upon referral by the family physician. Dr. Maher determined that the examination was essentially normal, aside from positive Tinel's signs at the carpal tunnels and ulnar grooves. He arranged EEG testing, which was normal, and evaluated her cognition which was normal (29/30). An MRI of her back from September 2019 revealed degenerative changes.
- [16] I place weight upon the Physiatry Insurer's Examination ("IE") reports by Dr. Soric, dated March 12, 2020. Dr. Soric reviewed the x-rays, MRI report, clinical notes and records of the family doctor in January and March 2019, the neurologist's reports and EEG. She noted the examination did not reveal any ongoing accident-related pathology or impairments. The Applicant sustained soft-tissue sprain/strain injury to the cervical and lumbosacral regions, that fell within the definition of a minor injury. After reviewing a further MRI report dated April 22, 2021, Dr. Soric confirmed her previous diagnosis in the addendum report dated June 10, 2021.

- [17] The family doctor's chart notes indicate that the Applicant did not follow up for any physical complaints related to the accident with her family doctor until May 2021. She saw a different doctor in January 2021 and reported neck pain that comes and goes and occasional numbness down her arms. She was taking Advil.
- [18] A letter from the family doctor dated September 2021 indicates she reported headaches and paresthesia of her upper extremities, but she was not taking any medication for these issues.
- [19] Further, the Applicant does not demonstrate an ongoing functional impairment caused by pain, nor does she meet the criteria in the American Medical Association's *Guides to the Evaluation of Permanent Impairment, 6th Edition, 2008* ("the *AMA Guides*"). These criteria are not binding; however, the Tribunal has found the *AMA Guides* provide a useful and persuasive analytical tool for assessing functional capacity as it relates to chronic pain. The *AMA Guides* require that at least three of the six criteria are met in order to qualify for a diagnosis of chronic pain syndrome.
- [20] While Dr. Friedlander opines that she meets all criteria, he failed to clearly explain how he reached that conclusion. I am not persuaded that she met at least three of the six criteria. For example, (1) She was not using prescription drugs beyond the recommended duration or abusing other substances. In fact, the evidence was that she had been prescribed Gabapentin, but had not taken it. She was using Advil for pain at the time of Dr. Friedlander's assessment, and occasionally cannabis edibles. A prescription summary shows no pain medications until January 2021, and that she did not pick up the prescription for Gabapentin. (2) There was no evidence of excessive dependence on health care providers or family. (3) There was some evidence of secondary physical deconditioning – she reported having gained about 15 lbs because she was fearful of working out. The Tribunal was not persuaded that there was sufficient evidence of (4) withdrawal from social milieu, or (5) failure to restore pre-injury function, such as insufficient physical capacity to pursue work, family, or recreational needs. The Applicant returned to work full time within days of the accident, and Dr. Friedlander noted she was working up to 50 hours a week. She changed jobs and more than doubled her income, doing overtime as tolerated, and her employer was reportedly satisfied. She was independent with her personal care and had resumed driving. She was able to manage light cleaning and cooking. With respect to criteria (6), Dr. Friedlander opined that mental health impairments were best left to mental health professionals.

[21] Accordingly, the medical evidence does not support that the Applicant sustained any physical impairment or chronic pain condition that would remove her from the MIG.

Psychological Impairment

[22] The Applicant has not satisfied the burden to prove that she suffers from psychological impairments as a result of the accident.

[23] The Applicant relies on a psychovocational assessment report dated October 15, 2021, in which Dr. Miller (psychologist) and Mr. Walton (psychotherapist), conclude that she met the criteria for an adjustment disorder with mixed anxiety and depressed mood, as well as somatic symptoms disorder with predominant pain, mild to moderate, as a result of the accident.

[24] The Applicant was already being treated for a psychological condition at the time of the accident. Despite having told Dr. Friedlander that she was not taking any anti-depressant or anti-anxiety medications at the time of the accident the prescription summary and chart notes indicate she was taking CipraleX in 2018. Dr. Friedlander referenced family doctor chart notes that indicate she reported her 8-year relationship ended in October 2019. She was seen for follow up in November and December 2019, reported things were “overall okay”, but was avoiding events due to anxiety. Her medication and dosage were unchanged until over two years later in March 2021, when she was switched to Sertraline.

[25] The letter of the family doctor dated September 2021 in response to questions posed about her accident, refers to her reports of headaches and paresthesia. It does not mention anything about psychological issues as a result of the accident. In fact, she specifically noted that there was no exacerbation of any pre-existing conditions or impairments.

[26] Overall, I am not satisfied that the Applicant sustained a psychological impairment as a result of the accident. She was already being treated with CipraleX prior to the accident. She reported anxiety in November, but made no mention of the accident, and had recently experienced a significant breakup of an 8-year relationship. No changes were made to her medication at that time. The OHIP summary shows that the Applicant did not see any physicians for any accident-related complaints in 2020. The Applicant attributed that to the pandemic, however she did see doctors for other issues. When considered in the context of all the medical evidence, the Tribunal finds the psychovocational assessment inconsistent. I am not persuaded that there were psychological impairments that affected her functional ability. She resumed driving, changed

jobs in 2020, and was working upwards of 50 hours a week. On a balance of probabilities, I find that the Applicant has not met her burden of proof to substantiate psychological impairment as a result of the accident.

Treatment Plans

[27] For the foregoing reasons, I find the Applicant has not demonstrated that her physical or psychological impairments warrant removal from the MIG. As a result, she is subject to the MIG limits, and an analysis of the reasonableness and necessity of the treatment plans is not necessary. Given that there are no benefits owing or payments outstanding, the Applicant is not entitled to interest or an award under s. 10 of O. Reg. 664.

ORDER

[28] The Applicant sustained a minor injury as a result of the accident.

[29] The Applicant is not entitled to the treatment and assessment plans outside of the MIG and the \$3,500.00 funding limit on treatment for a minor injury.

[30] Given there are no benefits owed, or payments outstanding, the Applicant is not entitled to interest or an award under s. 10 of O. Reg. 664.

[31] The Application is dismissed.

Released: June 9, 2023



**Kate Grieves
Adjudicator**