



Citation: Mulaee v. Aviva Insurance Canada, 2023 ONLAT 21-015143/AABS

Licence Appeal Tribunal File Number: 21-015143/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:

Noor Mulaee

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR:

Rebecca Hines

For the Applicant:

Camille Narine-Ramrattan, Paralegal

For the Respondent:

Lauren Kolarek, Counsel

HEARD:

By way of written submissions

OVERVIEW

- [1] Noor Mulaee, the applicant, was involved in two automobile accidents on **November 9 and 10, 2020**, 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, Aviva Insurance Canada, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute. The applicant’s claims for both accidents have been combined and will be addressed in this decision.

ISSUES

- [2] The issues to be decided arising from the accident on November 9, 2020, are as follows:
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 Minor Injury Guideline limit?
 2. Is the applicant entitled to \$2,860.58 for physiotherapy services, proposed by Midland Wellness Centre in a treatment plan/OCF-18 (“plan”) submitted March 8, 2021?
 3. Is the applicant entitled to a non-earner benefit in the amount of \$185.00 per week from January 11, 2021, to March 31, 2022?
- [3] The issues to be decided arising from the accident on November 10, 2020, are as follows:
1. Is the applicant entitled to a non-earner benefit in the amount of \$185.00 per week from January 11, 2021, to March 31, 2022?
 2. Is the applicant entitled to \$3,122.48 for physiotherapy services, proposed by Midland Wellness Centre in a treatment plan submitted July 13, 2021?
 3. Is the applicant entitled to \$2,473.04 for physiotherapy services, proposed by Midland Wellness Centre in a treatment plan submitted November 11, 2021?
 4. Is the applicant entitled to \$2,797.76 for physiotherapy services, proposed by Midland Wellness Centre in a treatment plan submitted September 7, 2021?

RESULT

- [4] The applicant has not established that her impairments arising from the November 9, 2020, accident fall outside the MIG. Further, she has not established entitlement to any of the disputed benefits.

BACKGROUND

- [5] On November 9, 2020, the applicant was involved in an accident when her vehicle was sideswiped by another vehicle. The airbags did not deploy, no emergency personnel attended, and she was able to drive home from the scene. She did not seek immediate medical attention.
- [6] On November 10, 2020, the applicant was involved in a subsequent accident when the vehicle she was driving was rear-ended by another. The airbags were deployed, and she hit her head on the airbags. She attended the hospital where diagnostic imaging was taken of her knee which were normal. She was prescribed Tylenol and was discharged. The applicant was removed from the MIG as a result of this accident because she was diagnosed with a concussion.

ANALYSIS

The applicant's accident-related impairments arising from the November 9, 2020, accident fall within the MIG and are subject to treatment in the MIG limit

- [7] Section 18(1) of the *Schedule* sets out that medical and rehabilitation benefits are limited to \$3,500.00 if the insured person sustains an impairment that is predominantly minor 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."
- [8] An insured person may successfully be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, pursuant to s. 18(2), that they have a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition prevents recovery if they are kept within the MIG. The Tribunal has also determined that chronic pain with functional impairment or a diagnosed psychological condition may justify removal from the MIG. The applicant bears the onus of proving on balance of probabilities that her accident-related impairments fall outside of the MIG.
- [9] The applicant submits that she should be removed from the MIG because she had pre-existing conditions which were exacerbated by the accident. Further she

suffers from ongoing pain to multiple joints and psychological symptoms. She relies on an emergency hospital record dated November 10, 2020, a disability certificate ("OCF-3") dated November 18, 2020, and a clinical note and record ("CNR") from her family doctor dated November 23, 2023.

- [10] The respondent argues that the applicant's accident-related impairments fall within the MIG. It relies on the multidisciplinary insurer examination ("IE") report completed by Dr. Harmantas, general practitioner and Anghela Sivananthan, occupational therapist dated March 19, 2021. Dr. Harmantas diagnosed the applicant with soft tissue injuries as a result of the accident which fell within the MIG. I agree with the respondent for the following reasons.
- [11] The applicant has fallen far short of meeting her onus. As a starting point, I do not find that she provided compelling medical evidence that any pre-existing condition would prevent her from achieving maximum medical recovery within the MIG. She asserts that prior to the accident she had surgery for a deviated septum and that the accident exacerbated this condition. Further, pre-accident she suffered from microcytic anemia which resulted in symptoms of fatigue, weakness, dizziness, numbness, and headaches. It is well established that evidence of a pre-existing condition alone does not warrant MIG removal. What I find lacking in this case is evidence from a treating practitioner supporting that these pre-existing conditions were exacerbated by the accident or would prevent her from achieving maximum medical recovery in the MIG. The applicant has not met her onus on a balance of probabilities that any pre-existing medical condition would remove her from the MIG.
- [12] I do not find that the hospital record or CNR from the family doctor support that the applicant sustained any impairment in this accident that would remove her from the MIG because both visits were made after the November 10, 2020, accident. The applicant relies on an OCF-3 dated November 18, 2020 authored by Sreeja Gimmy, a physiotherapist which note the following impairments: whiplash associated disorder [WAD2] with complaint of neck pain with musculoskeletal sign; sprain and strain of cervical spine; sprain and strain of thoracic spine; sprain and strain of lumbar spine; sprain and strain of other and unspecified parts of shoulder girdle; sprain and strain at other and unspecified parts of knees; contusion of thigh; contusion of other and unspecified path of lower leg; headache; nightmares; dizziness and giddiness; malaise and fatigue.
- [13] I find the physical impairments listed on the OCF-3 fall within the MIG. Further, I agree with the respondent that it is outside the scope of a physiotherapist to opine on psychological impairment or sequelae. In my view, the OCF-3 on its

own is insufficient to support that the applicant sustained these impairments as a result of the accident. Further, the applicant was diagnosed with a concussion as a result of the accident on November 10th not the subject accident. What I find lacking in this case was any CNRs or reports of any treating practitioner diagnosing the applicant with any accident-related impairment that falls outside the MIG in relation to this accident.

- [14] In contrast, the respondent relies on the IE of Dr. Harmantas, who determined that the applicant sustained soft tissue injuries as a result of the subject accident. The applicant has not submitted sufficient evidence to challenge Dr. Harmantas' opinion. Further, I find the doctor's opinion consistent with the medical record (or lack thereof) and as a result I assign this opinion more weight.
- [15] The applicant has not met her onus in proving on a balance of probabilities that she sustained any impairment as a result of the November 9, 2020, accident that would remove her from the MIG.

The applicant is not entitled to the OCF-18 in the amount of \$2,860.58 for physiotherapy services, proposed by Midland Wellness Centre

- [16] Neither party addressed whether the MIG limits have been exhausted despite receiving direction to do so in the Tribunal's case conference report and order. The disputed OCF-18 sought treatment outside of the MIG.
- [17] Since I have determined that the applicant's accident-related impairments fit within the MIG she is free to apply for and seek treatment up to the \$3,500.00 limit. I will now address whether the applicant is entitled to a NEB. Since her entitlement involves the same submissions and evidence, I will address both claims together.

The applicant is not entitled to a NEB from January 11, 2021, to March 31, 2022, in relation to either accident

- [18] Section 12(1) provides that an insurer shall pay a NEB to an insured person who sustains an impairment as a result of the accident, if the insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident. Section 3(7)(a) defines a "complete inability to carry on a normal life" as "an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident." The Court of Appeal set out the guiding principles for NEB entitlement in *Heath v. Economical Mutual Insurance Company*, 2009

ONCA 391 (CanLII) (“Heath”), which focuses on a comparison of the applicant’s pre-and post-accident activities.

- [19] In support of her claim for a NEB, the applicant relies on two OCF-3s authored by Sreeja Gimmy, physiotherapist, both dated November 18, 2020, which support that she has a complete inability to carry on a normal life as a result of the accident.
- [20] The respondent argues that the applicant is not entitled to the NEB for the time-period claimed as a comparison of her pre- and post-accident daily activities does not support that she has a complete inability to carry on a normal life, nor does the medical evidence support it. It relies on the multidisciplinary IEs reports of Dr. Harmantas and Ms. Sivananthan dated August 5, 2021, and December 2, 2021. For the following reasons, I agree with the respondent.
- [21] I do not find the medical evidence relied on by the applicant supports that she has any ongoing impairments as a result of either accident that have impacted her ability to function in her daily activities. I agree with the respondent that one CNR from the family doctor and hospital ER visit shortly proceeding the accident does not support that the applicant has any ongoing physical or psychological impairments that result in a complete inability to carry on a normal life.
- [22] Further, as set out in *Heath* the first step in determining whether an individual qualifies for a NEB is to compare their pre- and post-accident activities of daily living. The applicant’s submissions did not address her pre- and post-accident activities of daily living at all, nor did she direct me to any evidence to support that she has been unable to carry out her pre-accident activities post-accident. I find the OCF-3s on their own insufficient evidence. Moreover, the applicant’s submissions did not support that she has any accident-related impairments that impacted her post-accident function which would result in a complete inability to carry on a normal life. For example, prior to the accident she was enrolled in a two-year university program. Following the accident, she continued with this program and graduated at the time expected. There is no evidence before me that the applicant’s accident-related impairments interfered or delayed her education in any way. Further, upon graduation she obtained a job working part-time as a receptionist.
- [23] In contrast, the respondent relies on the above-noted IE reports which support that the applicant continued to be independent with her personal care, continued to drive and socialize with her friends and family post-accident. The IE reports note that she may have participated less in some housekeeping and home maintenance tasks, however, that was the extent of any limitations. The applicant

did not submit any medical reports to refute the findings of the respondent's IE assessors. Therefore, I accept their opinions as they are more consistent with the evidence before me.

- [24] For the above-noted reasons, the applicant has not met the stringent NEB test and has therefore failed to demonstrate that she suffered a complete inability to carry on a normal life as a result of either accident. Accordingly, she is not entitled to payment of a NEB.

The applicant is not entitled to the three OCF-18s for physiotherapy recommended by Midland Wellness Centre in relation to the November 10, 2020 accident

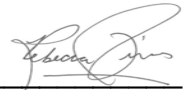
- [25] To receive payment for a treatment and assessment plan under s. 14 and 15 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.
- [26] All three OCF-18s are similar in that the goals are for pain reduction and increase range of motion ("ROM") to return the applicant to her daily activities. The OCF-18s recommended various modalities of treatment including massage, chiropractic treatment and physiotherapy. The applicant argues that the disputed OCF-18s are reasonable and necessary because she suffers from ongoing back, neck, shoulder pain and headaches. That was the extent of her submissions in support of her position that the OCF-18s are reasonable and necessary.
- [27] The respondent submits that the applicant has failed to meet her onus in proving that the three OCF-18s are reasonable and necessary. Moreover, she has not submitted any CNRs or progress notes from Midland Wellness to support that past treatment has resulted in any benefit. Nor has she produced any CNRs from the family doctor since December 2020 or from any treating practitioner to support that further physical treatment is needed. The respondent submits that I should draw an adverse inference because the applicant did not produce these records. I agree with the respondent.
- [28] The applicant has fallen short of meeting her onus. Insufficient evidence is before me to support that she suffers from ongoing impairments that require further treatment. Further, she did not direct me to any evidence to support that the goals of the OCF-18s were being met as far as pain reduction or increase ROM. Further, she did not address the cost of the OCF-18s at all in her submissions.

In my view, the OCF-18s are insufficient on their own to prove that they are reasonable and necessary. Finally, I agree with the respondent that the CNRs of Midland Wellness would have been helpful in establishing whether the applicant was receiving any benefit from past treatment. What I find lacking in this case was any CNRs post November 23, 2020, noting any ongoing impairments or an opinion from a treating practitioner recommending that the applicant requires additional treatment. For these reasons, the applicant has not met her onus in proving on a balance of probabilities that the OCF-18s are reasonable and necessary.

ORDER

- [29] For all of the above-noted reasons, the applicant has not established that her impairments arising from the November 9, 2020, accident fall outside the MIG. Further, she has not established entitlement to any of the disputed benefits. This application is dismissed.

Released: October 26, 2023



Rebecca Hines
Adjudicator