



**Citation: Chesnochkova v. Economical Mutual Insurance Company, 2023 ONLAT
21-012623/AABS**

Licence Appeal Tribunal File Number: 21-012623/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:

Marina Chesnochkova

Applicant

and

Economical Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR: Laura Goulet

APPEARANCES:

For the Applicant: Kateryna Vlada, Paralegal

For the Respondent: Jonathan Charland, Counsel

Written Hearing: Heard by way of written submissions

OVERVIEW

- [1] Marina Chesnochkova, the applicant, was involved in an automobile accident on July 24, 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, Economical Mutual Insurance Company, 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 minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the \$3,500.00 Minor Injury Guideline (“MIG”) limit?
 - ii. Is the applicant entitled to \$1,820.08 for physiotherapy services, proposed by Downsview Healthcare Inc., in a treatment plan/OCF-18 (“plan”) submitted September 5, 2019 and denied October 29, 2019?
 - iii. Is the applicant entitled to \$1,910.08 for physiotherapy services, proposed by Downsview Healthcare Inc., in a plan submitted October 22, 2019 and denied October 30, 2019?
 - iv. Is the applicant entitled to \$2,000.00 for a psychological assessment, proposed by Downsview Healthcare Inc., in a plan submitted November 4, 2019 and denied November 12, 2019?
 - v. Is the applicant entitled to \$1,868.26 for physiotherapy services, proposed by Downsview Healthcare Inc., in a plan submitted November 19, 2019 and denied November 28, 2019?
 - vi. Is the applicant entitled to \$1,563.72 for spinal decompression services, proposed by Downsview Healthcare Inc., in a plan submitted November 26, 2019 and denied December 3, 2019?
 - vii. Is the applicant entitled to \$2,000.00 for a chronic pain assessment, proposed by Downsview Healthcare Inc., in a plan submitted November 29, 2019 and denied December 17, 2019?

- viii. Is the applicant entitled to \$1,235.04 for physiotherapy services, proposed by Downsview Healthcare Inc., in a plan submitted January 3, 2020 and denied January 20, 2020?
- ix. Is the applicant entitled to \$3,335.98 for psychological services, proposed by Downsview Healthcare Inc., in a plan submitted February 5, 2020 and denied February 14, 2020?
- x. Is the applicant entitled to \$12,918.49 for chronic pain treatments, proposed by Downsview Healthcare Inc., in a plan submitted May 28, 2020 and denied June 11, 2020?
- xi. Is the applicant entitled to \$627.92 for psychoeducational compact discs, proposed by Downsview Healthcare Inc., in a plan submitted August 3, 2020 and denied August 10, 2020?
- xii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] The applicant's injuries are predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the MIG.
- [4] Since the MIG limit has been exhausted, it is not necessary to consider whether the treatment plans are reasonable and necessary.
- [5] The applicant is not entitled to interest.

ANALYSIS

Applicability of the Minor Injury Guideline

- [6] For the following reasons, I find the applicant's injuries are predominantly minor as defined in the *Schedule*.
- [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) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to \$3,500.00. An applicant may receive payment for

treatment beyond \$3,500.00 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. It is the applicant's burden to establish entitlement to coverage beyond the \$3,500.00 cap on a balance of probabilities.

- [9] The parties agree the MIG limits have been exhausted.
- [10] The applicant submits that she suffered severe physical and psychological injuries in the accident on July 24, 2019 ("subject accident") and that she is entitled to receive medical and rehabilitation benefits beyond the MIG limit. The respondent submits that the applicant's injuries are predominantly minor and that the proposed treatment plans are not reasonable and necessary.
- [11] The applicant submits she should be considered outside of the MIG based on a psychological impairment, a pre-existing injury and because of chronic pain. I will in turn address each one.

The applicant does not suffer a psychological impairment as a result of the accident that would take her out of the MIG

- [12] Psychological injuries, if established, fall outside the MIG, because such impairments are not included in the prescribed definition of "minor injuries." I find that the applicant has failed to prove on a balance of probabilities that she should be removed from the MIG as a result of a psychological impairment.
- [13] A psychological assessment was prepared based on an assessment of the applicant on December 16, 2019. The applicant was interviewed by Helen Ilios, a Registered Psychotherapist, working under the supervision of Dr. Jacqueline Brunshaw, Psychologist, who both work at Downsvue Healthcare Inc., the facility that submitted all of the treatment plans at issue.
- [14] Ms. Ilios assessed the applicant based on an interview and the administration of three psychological self-report questionnaires which did not contain validity testing. She also reviewed an OCF-3 dated August 2, 2019 and an OCF-18 completed by Dr. Oleksandr Pivtoran, Chiropractor, from Downsvue Healthcare Inc., as well as clinical notes and records of Dr. Kamenskaia, the applicant's family physician. The results of the applicant's self-reporting tests indicated that she is experiencing moderate levels of emotional distress, characterized primarily by symptoms of depression, anxiety, and somatic pain. She was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia (travelling in and around a vehicle). The opinion in the report is that the

applicant's diagnoses are a direct result of the subject motor vehicle accident. It is recommended that the applicant receive 14 counselling sessions, a comprehensive driver/passenger rehabilitation evaluation to create a treatment regimen, a psychotherapy progress report (as needed) and psycho-educational CDs, to be used under the guidance of a health care professional. Further, the report goes on to state that the applicant's psychological condition has increased to a level of impairment that prevents her from achieving maximal medical recovery with the confines of the MIG. I give less weight to this report because it was prepared based on the administration of self-report questionnaires which did not contain validity testing by the facility that submitted all of the treatment plans at issue.

- [15] The only psychological complaint made by the applicant to her family doctor after the subject accident was on November 19, 2021, where she complained of panic attacks. Dr. Kamenskaia indicated that this was one of the symptoms "more or less since the MVA" and diagnosed the applicant with PTSD. There was no referral for psychological treatment or medication prescribed. As a result of the vague reference of "more or less since the MVA," as well as the fact that this notation was made almost two and a half years after the accident, and this was the only reference in the family physician records of a psychological complaint since the accident, I am not convinced the PTSD is as a direct result of the subject accident.

- [16] I am not satisfied based on the psychological assessment alone, that was prepared by the agency who also prepared the treatment plans at issue, that the applicant suffers a psychological impairment as a result of the accident that would take her out of the MIG. I find that there is a lack of supporting objective evidence of a psychological impairment directly attributable to the accident. The applicant's family doctor would be in the best position to document any psychological effects from the accident. The only mention of any type of psychological complaint to the family doctor was almost two and a half years after the subject accident. As such, I do not find there is sufficient evidence that this complaint was as a direct result of the accident.

- [17] An insurer's Psychological Examination of the applicant was conducted on December 2, 2019 by Dr. Arnold Rubenstein, Psychologist. Dr. Rubenstein reviewed treatment plans, Dr. Kamenskaia's medical records, interviewed the applicant, and conducted two psychological tests which included validity scales. Dr. Rubenstein indicated in his report that the applicant did not achieve reliability as an informant, having compromised the validity of objective psychological testing, apparently based on symptom amplification. Based on a review of the

documentation, direct observation and objective psychological testing, Dr. Rubenstein was of the opinion that the applicant has not sustained any diagnosable psychological impairment as a direct result of the subject accident. I place more weight on this evidence since the psychological tests contained validity testing, as well as the fact that the results of this testing are in line with the applicant's lack of psychological complaints to her family doctor for almost two and half years after the subject accident.

- [18] Based on all of the evidence, I find that the applicant has not met her burden of proof on a balance of probabilities that she suffers from a psychological injury as a result of the accident that would warrant her removal from the MIG.

The applicant does not have a pre-existing medical condition that would prevent her from achieving maximum medical recovery within the MIG limit

- [19] The applicant has failed to prove on a balance of probabilities that she should be removed from the MIG as a result of any pre-existing conditions.
- [20] 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 \$3,500.00 on treatment costs under the MIG.
- [21] 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.
- [22] The applicant submits that she was involved in an accident approximately 30 years ago, resulting in a head injury and subsequent diagnosis of depression and anxiety. She was also involved in a second accident in 2010, where she sustained injuries to her lower and upper back, further exacerbating her pre-existing levels of depression and anxiety. The applicant submits that as a result of the subject third accident, the applicant's pre-existing physical and psychological injuries have significantly worsened.

- [23] A Disability Certificate (OCF-3) dated August 2, 2019 was prepared by Dr. Oleksandr Pivtoran, Chiropractor. The following injuries are listed as being as a result of the subject accident: concussion, sprain/strain, lumbar spine strain/sprain, post-traumatic headache, shoulder and thoracic sprain and strain, post-concussion syndrome, dizziness, acute stress reaction and symptoms and signs involving emotional state. In the treatment plans at issue, similar types of injuries are listed, as well as “other chronic pain.”
- [24] Clinical notes and records were filed from the applicant’s family physician, Dr. Kamenskaia. On January 9, 2019, prior to the subject accident, the applicant met with Dr. Kamenskaia and was assessed with depression and was prescribed medication.
- [25] The applicant first attended to see Dr. Kamenskaia with respect to her accident-related injuries on September 5, 2019, six weeks after the subject accident. Dr. Kamenskaia assessed the applicant with lower back pain, headaches and indicated “improvement.” The applicant was advised to continue physiotherapy and massage and to return in one month for follow up. The next documented visit with Dr. Kamenskaia is on November 5, 2019, where the applicant reported that the headaches and lower back pain have improved with current therapy. Dr. Kamenskaia noted the improvements and recommended that the applicant continue physiotherapy and massage. The applicant had further consultations with her family doctor on December 10, 2019, January 29, 2020, and February 12, 2021 for various reasons unrelated to the subject accident. The applicant did not discuss any accident-related injuries with Dr. Kamenskaia during those visits.
- [26] On November 19, 2021, the applicant met with her family doctor by phone where she complained of lower back pain and headaches after the subject accident as well as panic attacks, “symptoms more or less since the MVA.” Her doctor assessed her with chronic lower back pain and PTSD. Dr. Kamenskaia referred the applicant to a Neurologist, Dr. Viachislav Prigozhikh. There is no notation in Dr. Kamenskaia’s records that any pre-existing condition will prevent maximal recovery from the minor injury if the applicant is subject to the \$3,500 on treatment costs under the MIG, as required for removal from the MIG under s. 18(2).
- [27] Dr. Prigozhikh, Neurologist, consulted with the applicant and prepared a letter to Dr. Kamenskaia dated August 17, 2022. He discussed his phone consultation with the applicant on May 4, 2022 with respect to follow up of “probably common migraine” which developed after the accident in 2019 and advised that the

applicant's headaches are not under control and she has insomnia. He prescribed medication to prevent headaches and to improve sleep.

- [28] X-ray results on the lumbar spine dated December 16, 2021 were filed. The findings were: minimal degenerative disc narrowing L4-5, minimal generalized spurring throughout the lumbar spine, with no other significant bone, joint or soft tissue abnormality.
- [29] The applicant submits that she has a significant history of pre-existing physical and psychological concerns and that she diligently adhered to a consistent schedule of appointments with her family physician which documented a gradual decline and worsening of her symptoms. The applicant submits that as a result of the subject accident, her pre-existing psychological injuries have significantly worsened. Further, the applicant submits that the subject accident has resulted in a severe aggravation of symptoms in her left shoulder, upper and lower back, and unbearable headaches. An exacerbation of conditions, however, is not the test to meet for removal from the MIG based on pre-existing conditions. The applicant must demonstrate that the pre-existing conditions will prevent maximal recovery from the minor injury if the person is subject to the \$3,500.00 on treatment costs under the MIG. The only medical evidence that was presented in this regard was the opinion in the psychological assessment that was provided by Ms. Ilios and Dr. Brunshaw, to which, for the reasons outlined above, I give less weight. There is no other supporting objective medical evidence.
- [30] On a consideration of the evidence above, I am not satisfied that the applicant has a pre-existing medical condition that would prevent her from achieving maximum medical recovery within the MIG limit.

The applicant has failed to demonstrate that she suffers from chronic pain

- [31] Chronic pain, if established, removes a claimant from the MIG, because the prescribed definition of "minor injury" does not include chronic pain conditions.
- [32] The applicant submits that her psychological conditions, debilitating headaches, neck pain, and radiculopathy have become chronic in nature. The respondent submits that there is no objective medical evidence of chronic pain with functional impairment that would warrant removal from the MIG.
- [33] The applicant submits that she suffers from Chronic Pain Syndrome. In support of her position, a Chronic Pain Assessment dated February 19, 2020 was filed, prepared by Dr. Grigory Karmy, a chronic pain physician certified by Canadian Academy of Pain Management. Dr. Karmy assessed the applicant on February

7, 2020 and based his report on his interview with her, a review of an OCF-3 prepared by Dr. Oleksandr Pivtoran, Chiropractor, as well as five treatment plans. Dr. Karmy did not review any clinical notes and records in making his assessment. Based on the applicant's self-reporting, a physical examination, and a review of the documents provided to him, Dr. Karmy assessed the applicant with the following impairments as a result of the subject accident:

- i. Persisting symptoms following mild Traumatic Brain Injury;
- ii. Chronic Post-Traumatic Headache;
- iii. Chronic mechanical neck pain;
- iv. Chronic mechanical left shoulder pain, likely originating from post-traumatic tendinopathy;
- v. Chronic mechanical back pain;
- vi. Sacroiliac joint dysfunction;
- vii. Chronic mechanical right hip pain, likely of myofascial origin;
- viii. Myofascial pain syndrome;
- ix. Chronic Pain Syndrome;
- x. Sleep disorder; and
- xi. Possible Mood Disorder with symptoms of Passenger and Driving Anxiety and post-traumatic symptoms.

[34] Dr. Karmy diagnosed the applicant with the above conditions without referring to any clinical notes and records.

[35] Dr. Karmy then cited some Tribunal decisions confirming that conditions such as chronic pain and Chronic Pain Syndrome fall outside the MIG, and "which conclude that prior findings to the contrary were incorrect." Dr. Karmy concludes that based on the applicant's history, clinical examination and a careful review of the provided medical documentation, the applicant's condition falls outside the MIG. Dr. Karmy also states that due to the applicant's pre-existing conditions of headaches, neck and back pain, she cannot achieve maximum medical recovery if she is treated within the MIG. Dr. Karmy elaborates on why the applicant should be removed from the MIG, using wording from s.18(2) of the *Schedule*:

The \$3,500 minor injury limit on medical and rehabilitation benefits, as set out in the *SABS*, does not apply to an insured if a health practitioner determines and provides compelling evidence that the insured has a pre-existing medical condition that, if subject to the \$3,500 minor injury limit or if limited to the goods and services authorized under the MIG, will prevent the insured from achieving maximum recovery from the minor injury.

- [36] The respondent submitted that Dr. Karmy takes on the role of an advocate, rather than an impartial expert, by citing caselaw in his report. I agree with the respondent and I find that this calls Dr. Karmy's neutrality into question. For this reason, and because Dr. Karmy only referred to documents from health providers who prepared treatment plans and not to any clinical notes and records, I place little weight on Dr. Karmy's assessment.
- [37] The only evidence of chronic pain in the applicant's family doctor's records is a notation of chronic lower back pain on November 19, 2021, almost two and a half years after the subject accident. There is no other compelling evidence to suggest the applicant has chronic pain or a diagnosis of chronic pain. In fact, prior to November 19, 2021, Dr. Kamenskaia's records only include indications of improvement with treatment.
- [38] On September 5, 2019, during the applicant's initial visit with her family physician after the subject accident, and at the next visit on November 5, 2019, the applicant reported that her headaches and physical symptoms had improved. During the next three visits between December 19, 2019 and February 12, 2021, the applicant did not report any accident-related injuries or pain. It was only at a visit to her family doctor almost two and half years after the subject accident on November 19, 2021 that the applicant indicated that she suffered from ongoing pain.
- [39] I find that for chronic pain to take someone out of the MIG, there must be an effect on their functionality. There is insufficient evidence that the applicant's accident-related injuries have had a detrimental impact on her functionality. As pointed out by the respondent in its submissions, there is a two year gap in any accident-related complaints to the applicant's family physician. The other evidence in support of the applicant's chronic pain is from Dr. Karmy's report, on which I place little weight, for the reasons outlined above.
- [40] I am not satisfied that the applicant has demonstrated that she suffers from chronic pain as a result of the subject accident. The applicant has not met her

onus in proving on a balance of probabilities that she suffers from chronic pain or Chronic Pain Syndrome which would remove her from the MIG.

Treatment plans

- [41] Based on my findings that the applicant suffered from predominantly minor injuries and falls within the MIG as well as the fact that the MIG limit has been exhausted, it is not necessary to consider whether the treatment plans are reasonable and necessary because the applicant is not entitled to the payment of benefits beyond the \$3,500 MIG limit.

Interest

- [42] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. The applicant is not entitled to any interest as there are no overdue payments.

ORDER

- [43] The applicant's injuries are predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the MIG.
- [44] Since the MIG limit has been exhausted, it is not necessary to consider whether the treatment plans are reasonable and necessary.
- [45] The applicant is not entitled to interest.

Released: November 24, 2023



Laura Goulet
Adjudicator