



Citation: Elson v. TD General Insurance Company, 2021 ONLAT 20-002550/AABS

**Release date: 08/19/2021
File Number: 20-002550/AABS**

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c l.8., in relation to statutory accident benefits.

Between:

Clifford Elson

Applicant

and

TD General Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: Avril A. Farlam

APPEARANCES:

For the Applicant: Tania Lanteigne, Paralegal

For the Respondent: Kamil Podleszanski, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Clifford Elson (“applicant”) was involved in an automobile accident on September 19, 2018 (“accident”) and suffered injuries. The applicant sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule")*.¹ The applicant was denied certain benefits by TD General Insurance Company (“respondent”), and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).
- [2] The respondent determined that the applicant’s injuries fit the definition of “minor injury” prescribed by s. 3(1) of the *Schedule* and, therefore, fall within the Minor Injury Guideline (“MIG”).² The respondent also submits that, even if the MIG is found not applicable, the applicant has not established that the disputed treatment plans are reasonable and necessary.
- [3] The applicant’s position is that his injuries to his neck, right hand, back and resulting nerve impairment sustained in the accident are not minor. Further the applicant submits his chronic pain, pre-existing issues with dislocation of shoulder and psychological issues caused or exacerbated by the accident, take him out of the MIG. The applicant also requests an Order that the respondent schedule an insurer’s examination (“IE”) so that the applicant can continue with treatments.

ISSUES

- [4] The issues to be decided in this hearing are:
- i. Are the applicant’s injuries predominantly minor injuries as defined in s. 3 of the *Schedule* and therefore subject to treatment within the MIG and the \$3,500.00 limit in s. 18(1) of the *Schedule*?³
 - ii. Is the applicant entitled to \$3,688.72 for physiotherapy, chiropractic and massage therapy services recommended by Ginni Bejaj, physiotherapist of Alexmuir Wellness Centre in a treatment plan (OCF-18) dated January 16, 2019?
 - iii. Is the applicant entitled to \$2,974.66 for physiotherapy, chiropractic and massage therapy services recommended by Dr. Branko Milen, chiropractor

¹ O. Reg. 34/10.

² Minor Injury Guideline, Superintendent’s Guideline 01/14, issued under s. 268.3(1.1) of the *Insurance Act*.

³ The Tribunal’s September 18, 2020 case conference Order notes that the parties agree that the MIG limits have not been exhausted and their submission shall identify the amounts remaining.

of Alexmuir Wellness Centre in a treatment plan (OCF-18) dated April 26, 2019?

- iv. Is the applicant entitled to \$3,013.76 for psychological services recommended by Dr. Leon Steiner, psychologist of Alexmuir Wellness Centre in a treatment plan (OCF-18) dated May 21, 2019?
- v. Is the applicant entitled to \$2,898.05 for physiotherapy, chiropractic and massage therapy services recommended by Dr. Branko Milen, chiropractor of Alexmuir Wellness Centre in a treatment plan (OCF-18) dated August 7, 2019?
- vi. Is the applicant entitled to \$3,360.50 for physiotherapy, and massage therapy services recommended by Sunliha Shanmugam, physiotherapist of Alexmuir Wellness Centre in a treatment plan (OCF-18) dated November 25, 2019?
- vii. Is the applicant entitled to \$2,125.00 for a psychological assessment recommended by Dr. Leon Steiner, psychologist of Alexmuir Wellness Centre in a treatment plan (OCF-18) dated April 2, 2019?
- viii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] The applicant sustained minor injuries as defined under the *Schedule* and is subject to the \$3,500.00 funding limit, which has already been substantially provided by the respondent. It is therefore unnecessary to consider the reasonableness or necessity of the disputed treatment plans. No interest is payable.

LAW

- [6] The MIG establishes a treatment framework available to an injured person who sustains 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 sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury”. Under s. 18(1) of the *Schedule*, injuries that are defined as a “minor injury” are subject to a \$3,500.00 funding limit on treatment.

- [7] To request treatment above the \$3,500.00 funding limit, the applicant must prove that his or her injuries do not fall within the definition of “minor injury”. The applicant can establish that by:
- i. Producing compelling evidence, provided by a health practitioner, that a pre-existing condition documented before the accident will prevent the applicant from achieving maximal recovery from the minor injury if subject to the funding limit; or
 - ii. Establishing that an impairment sustained in the accident is not a predominantly minor injury.
- [8] The onus is on the applicant to show, on a balance of probabilities, that his or her injuries fall outside of the MIG.⁴
- [9] Sections 14, 15 and 16 of the *Schedule* provide that an insurer is only liable to pay for medical and rehabilitation expenses that are reasonable and necessary as a result of the accident. The applicant has the onus of proving on a balance of probabilities that the benefits he or she seeks are reasonable and necessary.

ANALYSIS

Are the Applicant’s Physical Injuries In the MIG?

- [10] I find that the applicant’s physical injuries resulting from the accident are predominantly minor injuries based on the weight of the medical evidence.
- [11] The September 20, 2018 OCF-3, disability certificate, made Dr. Ruecker, applicant’s chiropractor lists the applicant’s injuries as sprain and strain of cervical spine, whiplash associated disorder [WAD2] with complaint of neck pain with musculoskeletal signs, superficial injury of shoulder and upper arm, sprain and strain of lumbar spine and injury of muscle and tendon at shoulder and upper arm level. The anticipated duration of injuries is 9-12 weeks.
- [12] Post-accident the applicant’s family physician, Dr. Stern, recorded the impression that the applicant had sustained whiplash, shoulder strain, back strain, cervical radiculopathy and right arm neuropraxia and arranged for an MRI. The applicant’s November 12, 2019, MRI of the cervical spine revealed degenerative changes and foraminal stenosis but no nerve-root impingement or compression. After this imaging, Dr. Stern did not refer the applicant to a neurologist or any other specialist for further investigation of these possible conditions, tending to

⁴ *Scarlett v. Belair*, 2015 ONSC 3635 (Div. Ct.) para 24.

indicate that Dr. Stern ruled out cervical radiculopathy or neuropraxia resulting from the accident.

- [13] This is consistent with the opinion of the respondent's internal medicine physician, Dr. Maser, who examined the applicant, specifically considered this MRI and found no accident-related injuries other than uncomplicated soft tissue injuries, and found the applicant had no ongoing musculoskeletal, anatomic or neurological abnormality as a result of the accident. This is also consistent with the January 2019 x-ray of the applicant. As a result, the applicant's medical evidence, including the records of his treatment facility which are based largely on self-reports of pain, is insufficient to establish that the sustained cervical radiculopathy or right arm neuropraxia as a result of the accident on a balance of probabilities.
- [14] I find that the applicant's physical injuries from the accident are within the definition of "minor injury". However, the applicant argues that his pre-existing shoulder dislocation, psychological issues, chronic pain and nerve impairment remove him from the MIG.

Does the Applicant have Pre-existing Dislocation of Shoulder and Pre-existing Psychological Issues That Would Remove Him from the MIG?

- [15] I find that the applicant has brought forward no compelling evidence provided by a health practitioner that was documented before the accident of a pre-existing dislocation of his shoulder or pre-existing psychological issues that will prevent the applicant from achieving maximal recovery from the minor injury if subject to the funding limit.
- [16] Regarding the applicant's submission about his pre-existing dislocation of shoulder, Dr. Stern records shoulder strain but notes that the applicant has full range of motion even though the decoded OHIP summary for April 13, 2017, indicates shoulder dislocation. Dr. Stern's records do not contain any significant complaints related to his shoulder in the one and one-half years pre-accident. Dr. Stern's November 6, 2018, record, made on the applicant's first post-accident visit to Dr. Stern, does not show any pre-existing health issues.
- [17] That the applicant had no significant pre-existing health issues is consistent with what the applicant self-reported to the respondent's assessors Dr. Seon and Dr. Maser, the applicant's psychologist Dr. Steiner, the applicant's statements in his OCF-1, application for accident benefits, and the lack of pre-existing health issues noted by the applicant's chiropractor Dr. Ruecker on his September 20, 2018, disability certificate.

- [18] Regarding the applicant's submission about his pre-existing psychological issues, Dr. Stern does not deal with psychological complaints in his November 1, 2011, records, contrary to the suggestion in the decoded OHIP summary for November 1, 2011. There is no evidence that the applicant was referred to a psychologist or any other mental health specialist by Dr. Stern pre-accident.
- [19] The burden of bringing forward persuasive medical evidence of his alleged condition is on the applicant and he has not done so.

Does the Applicant have Psychological Impairment Caused or Exacerbated by the Accident that would Remove Him from the MIG?

- [20] I find that the applicant has not provided sufficient evidence to meet his burden of proof that he suffers from psychological impairment caused or exacerbated by the accident justifying treatment beyond the MIG.
- [21] There is little support in the records of Dr. Stern for the applicant's submission that he suffered psychological impairment as a result of the accident. Dr. Stern did not refer the applicant to a psychologist or mental health physician. This is consistent with the applicant's October 2019 self-reporting to the respondent's psychologist Dr. Seon that he did not have any significant change in his emotional functioning or any significant psychological impairment post-accident and felt he did not need psychotherapy. This is also consistent with Dr. Seon's opinion that the applicant did not present with symptoms sufficient to warrant any psychological diagnosis.
- [22] Post-accident, the applicant first saw a psychologist in April 2019 for a psychological assessment by Lydia Crombie, a registered kinesiologist supervised by Dr. Steiner, applicant's psychologist, who diagnosed the applicant with adjustment disorder with mixed anxiety and depressed mood along with specific phobia. I give Ms. Crombie and Dr. Steiner's assessment little weight because it is inconsistent with the records of Dr. Stern, who knows the applicant best, and Dr. Seon's opinion six months after Ms. Crombie's assessment. I prefer Dr. Seon's opinion because it is consistent with Dr. Stern's records and was performed by Dr. Seon whose education, training and experience I find to be superior to that of Ms. Crombie who appears to have conducted some if not all of the assessment.
- [23] Further, at no time did Dr. Stern or any other mental health professional arrange for the applicant to see an OHIP-funded treating psychologist for assessment.

- [24] As a result, the applicant's medical records do not contain persuasive evidence of psychological impairment exacerbated by the accident that will prevent the applicant from achieving maximal recovery if treated within the MIG. The burden of bringing forward persuasive medical evidence of his alleged condition is on the applicant and he has not done so.

Does the applicant have Chronic Pain That Would Remove Him from the MIG?

- [25] I find that the applicant does not have chronic pain resulting from the accident justifying treatment beyond the MIG based on the weight of the medical evidence.
- [26] Although the applicant complained of chronic pain to Dr. Stern post-accident, he declined referrals in 2020 to Dr. Minhas, an anesthesiologist, for pain management which tends to indicate that his pain was likely not the debilitating and functionally impairing pain type of chronic pain that might lead to a diagnosis sufficient to remove the applicant from the MIG. Post-accident, there is insufficient evidence of a significant decrease in the applicant's physical fitness.
- [27] The applicant has not been specifically diagnosed with chronic pain or chronic pain syndrome by any physician.
- [28] Further, the applicant has not been treated by any OHIP-funded medical specialists for chronic pain.
- [29] The burden of bringing forward persuasive medical evidence of his alleged condition is on the applicant and he has not done so.

Are the Treatment Plans for \$3,688.72, 2,974.66, \$2,898.05 and \$3,360.50 for Physiotherapy, Chiropractic and Massage Therapy and \$2,125.00 for Psychological Assessment and \$3,013.76 for Psychological Services Reasonable and Necessary?

- [30] The respondent submits that an analysis of whether or not the treatment plans are reasonable and necessary is not required. The applicant did not reply.
- [31] Correspondence filed sent by the respondent to the applicant shows that the respondent approved \$3,382.56 of the \$3,500.00 MIG limit for treatment, leaving a balance of \$117.44.
- [32] As a result, I find that the respondent has already substantially provided the limits of the MIG treatment. Having found that the applicant has not proven on a balance of probabilities that he has a condition that would remove him from the

MIG, I do not need to consider whether the disputed treatment plans and cost of psychological assessment in dispute are reasonable and necessary.

Interest

[33] Interest is not payable as no benefits are payable.

Order Requested by Applicant

[34] I decline to order the respondent to schedule an IE so that the applicant can continue with treatments as requested by the applicant. This was not one of the issues referred to me by the Tribunal's case conference Order. The applicant did not bring a motion after the case conference and before the written hearing to add it as an issue and I decline to add it as an issue now or to make the Order requested. Further, I note that the respondent has completed two IEs already.

ORDER

[35] For the reasons outlined above, I find that the applicant sustained minor injuries as defined under the *Schedule* and is subject to the \$3,500.00 funding limit, which has already substantially been provided by the respondent. It is therefore unnecessary to consider the reasonableness or necessity of the disputed treatment plans. No interest is payable.

Date of Issue: August 19, 2021

Avril A. Farlam, Vice Chair