



Citation: Gkiksana v. Wawanesa Mutual Insurance Company, 2022 ONLAT 20-008312/AABS

Licence Appeal Tribunal File Number: 20-008312/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:

Maria Gkiksana

Applicant

and

Wawanesa Mutual Insurance Company

Respondent

DECISION [AND ORDER]

ADJUDICATOR: Daniela Corapi

APPEARANCES:

For the Applicant: Maria Gkiksana, Applicant
Allan S. Blott, Counsel

For the Respondent: Naiomie Sukhai, Accident Benefits Adjuster
Oliver Gorman-Asal, Counsel

HEARD: By Way of Written Submissions

REASONS FOR DECISION [AND/OR ORDER]

BACKGROUND

- [1] The applicant was involved in an automobile accident on **November 13, 2016**, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (“*Schedule*”). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (“Tribunal”).
- [2] The applicant submitted an Application for Accident Benefits to the respondent on January 18, 2017. Disputes arose and the respondent produced insurer’s examination reports from Dr. Castiglione and Dr. Margaliot in support of its denials.
- [3] A one-day videoconference hearing took place on August 5, 2021 to address allegations that there are conflicts in the evidence in respect of the Insurer’s Examination reports. The videoconference hearing was limited to the cross-examination of Dr. Castiglione and Dr. Margaliot.
- [4] This matter pertains to the written hearing which followed the August 5, 2021 examinations.

ISSUES

- [5] The issues to be decided in the hearing are:
 - a. 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 Minor Injury Guideline (“MIG”)?
 - b. If the applicant’s injuries are not within the MIG, then I must determine the following issues:
 - i. Is the applicant entitled to \$2,600.00 for an X-Ray and Report, recommended by Dr. John Baird at Markham Chiropractic Centre in a Treatment Plan (OCF-18) dated March 20, 2018?
 - ii. Is the applicant entitled to \$2,200.00 for a Psychological Assessment and Report, recommended by Dr. Gloria Fiati at MedEx Health Services in a Treatment Plan (OCF-18) dated October 30, 2019?

iii. Is the applicant entitled to \$4,125.00 for an assessment and treatment, recommended by Dr. John Baird at Markham Chiropractic Centre in a Treatment Plan (OCF-18) dated July 30, 2020?

c. Is the Applicant entitled to interest on any overdue payment of benefits?

RESULT

[6] The applicant's treatment is confined to the \$3,500 limit in the MIG. Neither her physical impairment nor psychological condition extends beyond the definition of "minor injury", placing her within the MIG.

[7] Since no payment is owing, the applicant is not entitled to interest.

ANALYSIS

Applicability of the Minor Injury Guideline

[8] The MIG establishes a framework for the treatment of minor injuries. The term "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." The terms "strain," "sprain," "subluxation," and "whiplash associated disorder" are also defined in s. 3(1). Section 18(1) limits recovery for medical and rehabilitation benefits for such injuries to \$3,500.00.

[9] The applicant bears the onus to establish her entitlement to coverage beyond the \$3,500 cap for minor injuries on a balance of probabilities.

[10] The applicant claims that her physical and psychological injuries remove her from the MIG. The applicant has failed to establish, on a balance of probabilities, that her injuries place her outside the MIG.

(i) Chiropractic X-Ray, Report, Assessment & Treatment

[11] In a treatment plan (OCF-18) dated March 20, 2018 for an X-Ray and Report, Dr. Baird from Markham Chiropractic Centre outlined the complaints of the Applicant to include: 1) sprain and strain of cervical spine; and 2) concussion. He further indicated that the applicant reported headache, dizziness, neck pain and sleep disturbance. Dr. Baird's recommended assessment would include a physical examination, DMX Digital/Dynamic Motion X-ray, and a report.

- [12] On July 6, 2018 the respondent denied the cost of the proposed assessment and report on the basis that the applicant was subject to the MIG limit. The respondent relied on an Insurer's Examination Multidisciplinary Assessment Report (dated June 26, 2018) by Dr. Castiglione and Dr. Margalot.
- [13] Dr. Baird conducted the subject assessment and rendered a report dated November 27, 2018, which included his findings and imaging. Relying on a "Digital Radiographic Analysis", Dr. Baird concluded that the applicant sustained loss of motion segment integrity which, he explained, amounts to a disc injury. Dr. Baird proposed that the radiographic evidence supports his position that the applicant did not sustain a minor injury since disc injury is not explicitly included in the SABS definition of a MIG. Dr. Baird noted that the injury to the spinal stabilizers and the loss of motion segment integrity should be considered permanent and there is the potential for neurological degeneration.
- [14] In terms of impairment rating, Dr. Baird concluded as follows: "Loss of motion segment integrity is AMA Guides DRE Category IV (Page 104) which is a 25% impairment of the whole person. The craniocervical injury involving the cerebellum and spinal cord requires further investigation. It is premature to rate this injury as it may worsen over time. An HMPAO Brain SPECT scan should be obtained to provide a baseline and a clinical strategy should be developed hastily in the event of further deterioration."
- [15] On June 4, 2019 the respondent further denied the cost of the subject assessment and report. The respondent relied on an Insurer's Examination Multidisciplinary Paper Review Report (dated May 15, 2019) by Dr. Castiglione and Dr. Margalot.
- [16] The respondent states that Dr. Baird's findings are unreliable given the discrepancy between the applicant's diagnostic imaging report and Dr. Baird's PostureRay Report's findings.
- [17] The respondent's further reasons for denying the cost of the assessments and reports may be summarized as follows:
- a. the "PostureRay" software used by Dr. Baird to provide a diagnosis of "loss of motion segment" is unreliable;
 - b. Dr. Baird's reports did not include an "Acknowledgment of Expert's Duty" form required by Rule 10.2(b) of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of*

Practice and Procedure, Version I (October 2, 2017) as amended (“Rules”);

- c. Dr. Baird’s digital radiographic imaging is not reliable;
- d. The applicant has undergone extensive diagnostic imaging of the cervical spine, including a CT scan, X-Rays and MRIs. All imaging results directly contradict Dr. Baird’s reports;
- e. Dr. Castiglione diagnosed the applicant with soft tissue injuries to the cervical spine with WAD I-II classification and soft tissue strain of the thoracolumbar spine. Dr. Castiglione acknowledged the applicant’s diagnostic imaging, which showed degenerative changes at the C5-C6 level but opined that there was no evidence that those degenerative changes were exacerbated or aggravated by the subject accident.
- f. Dr. Margalot noted that the applicant’s medical records confirm a delay in the onset of neurological symptoms, which means that the applicant did not sustain a concussion or other neurologic injury as a result of the subject accident. Dr. Margalot concluded that the applicant’s injuries belonged in the MIG from a neurological perspective.

[18] The applicant states that Dr. Castiglione completely disregarded Dr. Baird’s findings, such as Loss of Motion Segment Integrity indicative of ligamentous sub-failure as well as possible disc damage.

[19] The applicant submits that Dr. Margalot believed that “no headache complaint was documented in the Emergency room notes from November 16, 2016 or in the Initial assessment physiotherapy clinic intake report dated December 12, 2016”; however, the initial assessment physiotherapy clinic report (dated December 12, 2016) did in fact document complaints of constant headaches, disturbed sleep and dizziness. During Dr. Margalot’s cross-examination, she acknowledged this error.

[20] During cross-examination, applicant’s counsel asked Dr. Margalot about this discrepancy, and specifically, whether or not she would change her opinion based on the evidence which substantiates that the applicant sustained an earlier onset of headaches. Dr. Margalot testified that she would not change her opinion based on the nature of the applicant’s injuries and course of treatment. Given Dr. Margalot’s consideration of the potential impact of an earlier onset of headaches to her findings, in conjunction with her conclusion that her determination remains unchanged, I give little weight to this discrepancy.

- [21] I prefer the respondent's evidence for two reasons:
- [22] First, with respect to the investigation undertaken by Dr. Baird, I have no scientific or objective evidence before me which leads me to give more weight or prefer the results emerging from DMX Digital/Dynamic Motion X-ray - which is the method used by Dr. Baird. It remains unclear as to why DMX technology is superior to or more reliable than the well-established technology used by Dr. Castiglione (specifically, CT Scan and MRI). I find that the applicant has not met her onus and has failed to substantiate her case in this regard.
- [23] Moreover, Dr. Baird states that the craniocervical injury involving the cerebellum and spinal cord requires further investigation, while also stating that it is premature to rate this injury as it may worsen over time. I find this somewhat speculative. Dr. Baird's inability to rate the injury or capture its status quo is unpersuasive. Use of the word "may" worsen over time is starkly different from suggesting a likely possibility.
- [24] Second, the applicant attempts to carve out a further category as falling outside of the MIG. The onus is on the applicant to show that her injuries fall outside of the MIG on a balance of probabilities. However, Dr. Baird simply asserted that the applicant did not sustain a minor injury because disc injury is not explicitly included in the SABS definition of a MIG. I am not persuaded by this argument. The definition of minor injury under the *Schedule* simply lists types of injuries that would constitute a minor injury and doesn't speak to the location of such injuries; simply having a disc injury will not remove the applicant from the MIG.
- [25] For the reasons above, I find that the applicant has not provided compelling medical evidence that she sustained physical injuries that require treatment outside of the MIG.

(ii) Psychological Assessment

- [26] Dr. Gloria Fiati from MedEx Health submitted a treatment plan (OCF-18) dated October 30, 2019 for a Psychological Assessment and Report, which was denied by the respondent on December 4, 2019.
- [27] Dr. Fiati concluded that the severity of the applicant's symptoms is reflective of "severe anxiety, post-traumatic stress and difficulties coping with chronic pain", thereby removing her from the MIG. Dr. Fiati recommends "psychological intervention to help her resolve the symptoms and function at pre-accident state" and proposes that a comprehensive assessment would assist in planning treatment to help the applicant recover.

- [28] The applicant states that the respondent disregarded Dr. Fiati's opinion without proper consideration because it did not arrange for an IE assessment to evaluate the applicant's psychological complaints. I disagree. The onus is on the applicant to prove on a balance of probabilities with compelling medical evidence that she suffers from a psychological impairment.
- [29] The applicant has failed to demonstrate that Dr. Fiati undertook objective testing to support her conclusions; rather, it suggests that the conclusions were largely based upon the applicant's self-reporting. It is unclear whether or not Dr. Fiati reviewed other medical records in coming to her findings and recommendations.
- [30] The applicant relies on the pre-screening report of Dr. Fiati, dated November 11, 2019. This report was dated approximately three years after the accident. The applicant has failed to produce any evidence to suggest that she developed a psychological impairment or condition as a result of the accident. This considerable lapse of time and lack of proximity to the accident, coupled with the applicant's failure to point me to medical documentation which directly speaks to psychiatric or psychological diagnoses, is unpersuasive.
- [31] Having reviewed the documentation, I find that the applicant has not provided compelling medical evidence that she suffers from a psychological impairment that removes her from the MIG.

Are the treatment plans and assessments reasonable and necessary?

- [32] Having determined that the applicant's injuries are predominantly minor injuries and that she is not entitled to treatment beyond the MIG, I have not analyzed the medical benefits in dispute.

ORDER

- [33] For the reasons outlined above, I find that the applicant sustained predominantly minor injuries that fall within the MIG. Accordingly, she is not entitled to the treatment plans claimed in this application. Her application is dismissed.

Released: May 9, 2022

**Daniela Corapi
Adjudicator**