Citation: Castro v. Allstate Insurance, 2023 ONLAT 21-013387/AABS

Licence Appeal Tribunal File Number: 21-013387/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:

Myrna Castro

Applicant

and

Allstate Insurance

Respondent

DECISION

ADJUDICATOR: **Michael Beauchesne**

APPEARANCES:

For the Applicant: Taser Shah, Paralegal

For the Respondent: Kamil Podleszanski, Counsel

HEARD: **By way of written hearing**

OVERVIEW

[1] Ms. Myrna Castro, the applicant, was involved in an automobile accident on July 3, 2017, 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, 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 section 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 limit and the Minor Injury Guideline (the "MIG")?

ii. Is the applicant entitled to a chronic pain assessment in the amount of $2,632.90, proposed by Medex Assessments Inc. in a treatment plan (the "OCF-18") submitted on May 17, 2021, and denied on May 20, 2021?

iii. Is the applicant entitled to physiotherapy services in the amount of $2,594.00, proposed by Velocity Sports Medicine and Rehabilitation in an OCF-18 submitted on January 11, 2022, and denied on January 24, 2022?

iv. Is the applicant entitled to expenses in the amount of $18,386.25, submitted on a claim form (the "OCF-6") and denied on January 4, 2023?

v. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[3] The applicant sustained predominantly minor injuries and is therefore subject to treatment within the $3,500.00 limit of the MIG.

[4] The applicant is not entitled to the disputed OCF-18s or the expenses claimed on the OCF-6.

[5] No benefits or expenses are owing, so no interest is payable.

ANALYSIS

The applicant remains in the MIG

[6] I find the applicant has failed to provide sufficient medical evidence that proves her injuries are not minor as defined by the *Schedule*.

[7] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured sustains impairments that are predominantly a minor injury. 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 may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under section 18(2), that they have a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition precludes recovery if they are kept within the confines of the MIG. The Tribunal has also determined that chronic pain with functional impairment or a psychological condition may warrant removal from the MIG. In all cases, the burden of proof lies with the applicant.

[9] The applicant submits she should be removed from the MIG because she sustained chronic pain, a concussion, and psychological impairments as a result of the accident, and that her injuries have worsened over time due to the lack of medical treatment made available to her by the respondent. The respondent argues that the applicant should not be removed from the MIG because her accident-related injuries are predominantly soft-tissue injuries, and that any medical conditions that may fall outside the MIG were not caused or worsened by the accident.

Does the applicant suffer from accident-related chronic pain that impairs function?

[10] No. I find the applicant provided insufficient medical evidence about her chronic pain to warrant removal from the MIG.

[11] Chronic pain is not included in the definition of a minor injury in the *Schedule*. To be removed from the MIG, the applicant must prove, on a balance of probabilities, that she suffers accident-related chronic pain resulting in functional impairment. There must be medical evidence that shows accident-related chronic pain is the cause of the functional impairment and is not sequelae resulting from accident injuries.

[12] In her submissions, the applicant claims she suffers pain in her neck, shoulder, arm, mid and lower back, and right hip as a result of her accident. She further claims this pain radiates to her upper and lower extremities, that movements such as bending, sitting, standing, and lifting aggravate her pain, and that she experiences headaches because of the accident. The applicant says her pain has worsened since the accident.

[13] The applicant relies on the clinical notes and records of Dr. Nasser Zaki (family physician) to provide medical evidence of chronic pain.

[14] I find there is insufficient medical evidence to establish the applicant's ongoing pain results in functional impairment. As the applicant points out in her submissions, Dr. Zaki objectively observed—five days after the accident on July 8, 2017—that her range of motion was reduced. Dr. Zaki counselled the applicant to exercise and bend in the right way. The only restriction noted by Dr. Zaki at that time pertained to lifting with a follow up appointment recommended in two to four weeks. There is no evidence that shows the applicant had a follow-up appointment with Dr. Zaki within two to four weeks, or any other evidence of functional restrictions objectively determined by Dr. Zaki thereafter. In fact, there are no records of another visit with Dr. Zaki in evidence until almost two years later on March 2019, which I find inconsistent with the applicant's claims that her pain was significant and constant since the accident.

[15] Although the applicant argues in her reply submission that she was receiving treatment at Cornerstone Physiotherapy between November 2017 and March 2019, the applicant did not point me to any specific evidence in those records to argue her removal from the MIG.

[16] The applicant points to an x-ray of her cervical spine on April 18, 2019, which revealed mild lordosis that could reflect a muscle spasm. I did not find this evidence to be persuasive because no opinion was given as to the functional limitations posed by mild lordosis. I similarly placed little weight on the shoulder ultrasound referenced in the applicant's submission. This was conducted by Dr. James Haroun on July 3, 2019, and revealed no evidence of a tendon tear. Dr. Haroun did not comment on any functional limitations associated with this condition.

[17] In terms of limitations, the applicant says her pain causes sleep disturbances. I did not find this to be persuasive because the applicant provided no objective medical evidence to show her sleep is affected by her pain. The applicant did not produce evidence that shows she followed up on the sleep study recommended by Dr. Mansouri in October 2022. The applicant complained to

Dr. Zaki about difficulties cleaning, lifting, and holding her baby on June 24, 2019, and March 19, 2022. Dr. Zaki proposed ice, rest, and exercise to address the June 2019 complaints. In March 2022, he explained imitation in lifting, bending, and standing. Dr. Zaki did not attribute the applicant's difficulties to accident-related injuries in either case, and I find this evidence is not consistent with the applicant having functional limitations of a severe and constant nature, owing to the elapsed time between these complaints and the lack of restrictions recommended by Dr. Zaki.

[18] Although the applicant's reply submissions additionally pointed to the clinical notes and records of Cornerstone Dizziness Clinic and Physiotherapy, Body Kineck Physio, and the respondent's insurance examination report (dated October 26, 2018) as evidence of her limitations, the applicant did not specify what evidence in these reports she relies on to make her case, other than a brief reference to various pain-related complaints voiced in the latter report

[19] In conclusion, I accept that the applicant is experiencing pain. However, I do not see compelling medical evidence that establishes her ongoing pain post-accident is related to the accident or worsening to any discernable degree. There is insufficient evidence of severe or functionally disabling pain that is consistent and that affects day-to-day or work function. I therefore do not agree that the applicant should be removed from the MIG because of chronic pain.

Did the applicant sustain a concussion in the accident?

[20] No. I find the applicant did not establish that she suffered a concussion as a result of the accident.

[21] A concussion is not included in the definition of a minor injury in the *Schedule*. The applicant must prove she sustained a concussion as a result of the accident to be removed from the MIG. The applicant submits she has been diagnosed with a concussion and post-concussion syndrome. She relies heavily on the report (dated October 25, 2022) of Dr. Behzad Mansouri (neurologist and neuro-ophthalmologist) to establish she sustained a concussion and post-concussion syndrome from the accident. In her reply submission, she also claims a physiotherapist diagnosed a concussion and post-concussion syndrome.

[22] I am not convinced the applicant's evidence proves she was diagnosed with a concussion and post-concussion syndrome as alleged by the applicant. I was not pointed to evidence of a concussion diagnosis by a physiotherapist, nor was I presented with any proof that physiotherapists are qualified to offer this type of diagnosis. I therefore did not attribute much weight here.

[23] Pertaining to Dr. Mansouri's report, the respondent points out in its submissions, that Dr. Mansouri arrived at an "impression" of concussion and post-concussion syndrome, and did not speak to what caused this. The respondent says this means a definitive diagnosis was not provided by Dr. Mansouri, only a diagnostic impression.

[24] I cannot find that Dr. Mansouri diagnosed the applicant with a concussion or post-concussion syndrome arising from the accident. Dr. Mansouri used the term "impression." I am unsure that Dr. Mansouri equates impression (i.e., initial opinion) with diagnosis (i.e., final opinion).

[25] The respondent also submits that Dr. Mansouri makes no notations on causation. The applicant did not address this directly in her submissions, offering only that she reported hitting her head during the accident, and that this strike could have led her to experience a concussion. I am persuaded by the respondent's argument because I find Dr. Mansouri does not relate his impression to the applicant hitting her head in the accident. I agree that Dr. Mansouri does not attribute his impression to the accident.

[26] In her reply submission, the applicant claims there are no indications of the current accident injuries (i.e., headaches symptomatic of a concussion) in the years prior to her accident. I disagree. The respondent produced a report (dated March 29, 2016) from Dr. Marek Gawel (neurologist) that notes the applicant had problems with headaches for some time, and that since she hit her head during a slip-and-fall accident on ice two years earlier, the headaches occurred daily and were of sufficient severity to halt her studying for an entire semester. Contrasted with the evidence provided in the applicant's submissions—mild headaches reported to Dr. Zaki on June 22, 2020, headaches reported to Dr. Zaki on July 4, 2020, weekly headaches that last up to several days reported to Dr. Mansouri (whose report is discussed later in this decision) on October 25, 2022—I find it is more likely the applicant's headaches have improved since before the accident.

[27] Given there is no diagnosis of a concussion or post-concussion syndrome attributable to the accident, I find the applicant has failed to show she should be removed from the MIG because of a concussion.

Did the accident cause a psychological impairment?

[28] No. I find the applicant did not sustain a psychological impairment because of the accident.

[29] The applicant claims she sustained a psychological impairment as a result of the accident that would place her claim outside of the MIG. Psychological injuries, if established, may fall outside of the MIG, because the MIG only governs "minor injuries", and the prescribed definition does not include psychological impairments.

[30] To be removed from the MIG, the applicant must show she sustained a psychological impairment because of the accident. I find the applicant's medical evidence is insufficient to prove this.

[31] The applicant acknowledges she has a history of anxiety and depression. But she contends that these symptoms did not limit her activities of daily living before the accident and that her mental health was good. The applicant says that since her accident, she has suffered from post-traumatic stress disorder (the "PTSD"), depression, anxiety, mood swings, irritability, and random crying spells.

[32] I am not convinced the applicant suffered psychological impairment resulting from the accident. The applicant did not provide any reports from a mental health practitioner to support her claims. She relies on her self-reports as documented by her family physician to prove psychological impairment. The applicant does not point me to any medical evidence of PTSD, such as a diagnosis, related to the accident or otherwise.

[33] Pertaining to her other psychological symptoms, the earliest evidence referenced in the applicant's submission is a note made by Dr. Zaki just over 29 months after the accident on December 13, 2019, that describes the applicant as stressed and anxious. However, no plan for assessment or intervention on these complaints was recommended. The next evidence is an entry made by Dr. Zaki on March 19, 2022. The applicant reported she was still stressed, had depression, and felt fatigued. Dr. Zaki observed poor eye contact, depressed affect, post-partum depression, and worsening psychiatric condition after the accident. I find no mental health diagnoses were offered by Dr. Zaki that relate to the accident, and his treatment plan addressed only the applicant's complaints of pain. No referrals were made to address her mental health.

[34] I find the applicant has not provided sufficient medical evidence of a psychological impairment caused by the accident. She failed to point me to any compelling medical evidence that corroborates Dr. Zaki's observation of a worsening psychiatric condition since her accident. Similarly, I was not pointed to any medical evidence that substantiates the applicant's claims of ongoing recommendations for psychotherapy in Dr. Zaki's notes.

[35] I turn now to the psychological evidence produced by the respondent, which consists of two reports. The first is a psychiatric consultation completed by Dr. Mitra Monir-Abbani (psychiatrist) on October 22, 2018. The second report, dated October 10, 2018, was prepared by Dr. Amena Syed (psychologist) on behalf of the respondent. The applicant was silent on both reports in her submissions.

[36] As indicated by the respondent, neither report establishes that the applicant's psychological complaints resulted from the accident. Dr. Monir-Abbani noted the applicant's psychological condition, which she diagnosed as a major depressive disorder, started post-partum in 2018 and was perpetuated by certain relationships in her life. Dr. Syed, who the respondent maintains is the only psychological assessor to address the applicant's accident-related psychological impairments, conducted nine psychometric tests that produced scores largely within normal limits and concluded that the results of this testing—in concert with a clinical interview, a review of medical records and her clinical judgement—determined the applicant is not suffering from any psychological impairment or diagnosable psychological disorder due to the accident.

[37] I find there is insufficient medical evidence to establish the applicant sustained psychological impairment as a result of the accident. The applicant relies on the clinical notes and records of Dr. Zaki, which are based solely on the subjective complaints of the applicant. I prefer the evidence produced by the respondent because it relies on objective testing as well as the informed clinical insight of mental health practitioners. I therefore decline to remove the applicant from the MIG due to psychological impairment.

Are the disputed treatment plans reasonable and necessary?

[38] No. The applicant remains in the MIG and only $202.50 remains within the $3,500.00 MIG limit. It is therefore not necessary to adjudicate the treatment plans.

Is the applicant entitled to the disputed expenses?

[39] No. I find the applicant is not entitled to the expenses claimed on the OCF-6.

[40] Section 38(2) of the *Schedule* establishes that an insurer is not liable to pay an expense in respect of a medical or rehabilitation benefit, or an assessment or examination, if that expense is incurred before the insured person submits an OCF-18 unless: (i) the insurer pre-approves the expense, (ii) the expense is emergency-related (i.e., ambulance), (iii) the expense relates to prescribed drugs

or certain goods that cost less than $250 each, or (iv) the insurer agrees the expense is essential and costs less than $250 per item or service.

[41] The applicant submits she had to fund her own rehabilitation efforts because the respondent consistently denied the OCF-18s she needed to recover from her injuries. She argues the respondent's actions have been very detrimental because they prolonged and worsened her pain. The applicant says she continued to incur physical therapy expenses in the amount of $18,386.55, and points to evidence in the clinical notes and records of Cornerstone Dizziness Clinic and Physiotherapy, and Body Kineck Physio, to prove she had an ongoing need for the physiotherapy treatment she incurred.

[42] The applicant also argues that she made the respondent aware of her continuing treatment by providing the clinical notes and records of her service providers on an ongoing basis. The applicant explains the respondent had an opportunity to review and act upon these expenses because the clinical notes and records provide the same information that would be included in an OCF-18.

[43] The respondent relies on section 38(2) of the *Schedule* to show it is not liable to pay the expenses claimed by the applicant, and argues the applicant incurred treatment for four years before submitting it on an OCF-6. The respondent submits it is prejudiced by this action because it could not evaluate, on an ongoing basis, the plan's goals, outcome evaluation methods, and barriers to recovery—all of which would be included in an OCF-18. The respondent denies that the claim form submitted by the applicant corresponds to any OCF-18s it received from the applicant, including those in dispute.

[44] In my view, the applicant has failed to prove entitlement to the treatment expenses she claims. The OCF-6 includes treatment services from December 2018 to June 2022 from three different physiotherapy clinics. The applicant did not provide evidence of submitting corresponding treatment plans from these clinics to the respondent prior to incurring the expenses she claims on her OCF-6. The clinical records and notes of services providers are not a substitute for the legal requirement to submit an OCF-18 prior to incurring expenses. The applicant's submissions do not prove she met any of the exception criteria set out in section 38(2) of the *Schedule*.

[45] Therefore, I find the applicant does meet the requirements at section 38(2) and is barred from entitlement to the treatment expenses she incurred.

Interest

[46] No benefits are payable. Therefore, no interest is owing.

ORDER

[47] The application is dismissed.

Released: October 31, 2023

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Michael Beauchesne
Adjudicator