



Citation: Jones-Linton v. Wawanesa Mutual Insurance Company, 2023 ONLAT 21-012070/AABS -A

Licence Appeal Tribunal File Number: 21-012070/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:

Marlene Jones-Linton

Applicant

and

Wawanesa Mutual Insurance Company

Respondent

AMENDED DECISION

ADJUDICATOR: Janet Rowsell

APPEARANCES:

For the Applicant: Marlene Jones-Linton, Applicant
Elliot Goodman, Counsel

For the Respondent: Wawanesa Mutual Insurance Company,
~~Elizabeth Van~~ **Elisabeth van** Rensburg, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Marlene Jones Linton, the applicant, was involved in an automobile accident on June 9, 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, Insurer, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.
- [2] The applicant attended the William Osler Health System - Brampton Civic Hospital on the day of the accident, reporting being seat-belted when her vehicle was rear-ended and that the airbags did not deploy. The applicant denied a head injury, loss of consciousness or visual disturbance at the time of the accident. She reported pain in her neck, right arm, and back as a result of the accident.

ISSUES

- [3] 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 limit and in the Minor Injury Guideline (MIG)? The parties agree that the MIG limits have been exhausted.
 - ii. Is the applicant entitled to \$4,053.62 (\$5,353.62 less \$1,300.00 approved) for physiotherapy services, recommended by 101 Physio in a treatment plan/OCF-18 (“plan”) submitted September 17, 2019, and denied October 3, 2019?
 - iii. Is the applicant entitled to \$3,469.67 (\$4,579.67 less \$2,200.00 approved) for physiotherapy services, recommended by 101 Physio in a plan submitted on June 12, 2019, and denied June 21, 2019?
 - iv. Is the applicant entitled to \$2,460 00 for an orthopaedic assessment recommended by 101 Assessment Centre in a plan dated January 7, 2020, and denied January 24, 2020?
 - v. Is the applicant entitled to \$2,460 00 for a psychological assessment recommended by 101 Assessment Centre in a plan dated August 2, 2019, and denied on August 16, 2019?

- vi. Is the applicant entitled to \$39.23 for medications, submitted on a claim form (OCF-6) submitted on February 14, 2020, and denied March 4, 2020?
- vii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [4] The applicant has not met her burden of proof by demonstrating, on a balance of probabilities, entitlement to treatment for her injuries beyond the \$3,500.00 MIG limit.
- [5] Having determined that the applicant sustained minor injuries that are treatable within the MIG and understanding that the MIG limit has been exhausted, an analysis of whether the treatment and assessment plans in dispute are reasonable and necessary is not required.
- [6] Given that there are no benefits owed, the applicant is not entitled to interest pursuant to s. 51 of the *Schedule*.
- [7] The application is dismissed.

ANALYSIS

Pre-existing Injuries and Physical Accident-related Injuries

- [8] The Minor Injury Guideline (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 the *Schedule* which includes sprains, strains, whiplash associated disorders, contusion, laceration or subluxation, and any clinically associated sequelae. The MIG and the *Schedule* define a strain as an injury to one or more muscles and includes a partial tear. Minor injuries are subject to the treatment methodologies outlined in the MIG and, under section 18 of the *Schedule*, injuries that are defined as minor are subject to a \$3,500.00 funding limit on treatment.
- [9] If an insurer deems an applicant’s injuries to be minor in nature, the onus is on the applicant to establish that the MIG, and the related funding limit, should not apply. The applicant received chiropractic treatment and physical therapy paid for by the respondent, however, the benefit statement dated November 22, 2019, sets forth that the respondent determined the applicant’s injuries, resulting from the accident, were found to be appropriately limited to treatment within the limits

- of the MIG and that the applicant could reach maximal recovery if she was limited by the MIG.
- [10] Section 18(2) states that the \$3,500 limit does not apply if the insured person “provides compelling evidence that the insured person has a pre-existing medical condition documented by a health practitioner before the accident and that will prevent the insured person from achieving maximum medical recovery from the minor injury if he is subject to the \$3,500 limit.”
- [11] The applicant must meet all three of the following requirements in order to be removed from the MIG under this section:
- a. She has a pre-existing medical condition;
 - b. The pre-existing medical condition was documented by a health practitioner before the accident; and
 - c. The health practitioner determines and provides compelling evidence that the pre-existing condition will prevent maximal recovery from the minor injury if the person is subject to the \$3500.00 limit under the MIG.
- [12] The applicant submits that she does not have a pre-existing condition involving back pain. The applicant underwent an x-ray on June 12, 2019, and an MRI on October 12, 2019. The x-ray showed degenerative disc disease in her cervical spine but also non-acute, 50% compression fractures, which were characterized as possibly causing pain and muscle spasm. The MRI of the applicant’s cervical spine showed no compression fractures but did reveal disc and facet disease with canal stenosis, linked to the age-related deterioration of the spine.
- [13] The applicant submits that she suffers from a functional impairment restricting her range of motion in her lumbar spine as a result of the accident. She submits that she has difficulties performing household chores, in addition to sleep disturbances, pain and stiffness in her shoulders as well as a constant dull achy pain in her lower back which limits her ability to sit and stand as a result of the accident on June 9, 2019. The applicant submits that she is prevented from reaching maximal recovery if she is kept within the limits of the MIG.
- [14] The applicant has not provided compelling evidence that she has a pre-existing condition that will prevent maximal recovery if she is subject to the \$3500 limit under the MIG. The applicant reported to Dr. Tajedin Getahun, in his section 25 orthopaedic medical assessment dated November 10, 2022, a history of gynecological interventions, an absence of work-related injuries, in addition, no

psychological disorders, which would constitute pre-existing conditions. When she attended the Brampton Civic Hospital, on the day of the accident, she described no medical history of pre-existing conditions. The applicant attended a family medical practice called Good Doctor's Medical clinic, in Val Caron, Ontario, where a rotation of physicians is responsible for the family medical practice.

- [15] On June 11, 2019, post-accident, the applicant met with family physician Dr. Sanaz Zarinehbafe Asadi, when she described having no previous history of back injury, trauma or surgery. She reported pain in her right shoulder, down her right back and across her lower back post-accident. Dr. Sanaz Zarinehbafe Asadi prescribed baclofen and naproxen based on the applicant's reports of injury and pain.
- [16] The applicant submits that her complaints of accident-related pain have not been sporadic or inconsistent since June 11, 2019, when she met with Dr. Sanaz Zarinehbafe Asadi. The respondent submits that the applicant has failed to meet her burden demonstrating with the provision of medical evidence that she experienced injuries removing her from the Minor Injury Guideline (MIG), caused by the accident nor has the applicant provided compelling medical evidence of pre-existing injuries preventing her from maximal recovery outside the limits of the MIG.
- [17] The respondent submits that the applicant had telephone and in-person appointments with her family physician Dr. Fatima Anis of Shopper's World medical clinic, on September 15, 16 and 27, 2021, without any reference to shoulder complaints, pain or accident-related sequelae. Subsequent to June 11, 2019, the applicant seeks medical attention for matters completely unrelated to the accident. She does not raise the issue of what could be considered accident-related injuries until, July 18, 2022, which is three years post-accident, when she describes bilateral shoulder pain. The applicant has an x-ray performed of her shoulders which returns a normal result and an ultrasound which shows minimal bursitis in the right subdeltoid bursa region.
- [18] As set forth by the Tribunal in *P.T. v. Aviva General Insurance*, 2020 ONLAT 19-002373/AABS, at paragraph 13: "Suffering from bursitis, or some form of inflammation or tendinitis in the left shoulder is an otherwise unremarkable injury. In the absence of evidence that there is a complete or even partial tear in P.T.'s shoulder, which the ultrasound rules out, the bursitis, the inflammation, or irritation of a tendon is captured within the definition of minor injury under the Schedule and can be treated within the MIG."

- [19] As stated, before July 18, 2022, the applicant seeks referrals to investigate medical issues unrelated to the accident respecting cardiovascular and cardiac concerns by means of referral for an echocardiogram and stress test on June 9, 2020. She attends the William Osler Health System and Brampton Civic Hospital to investigate cardiovascular pain in May 2020, without mention of the accident. On March 5, 2020, the applicant completes a cancer screening test. As submitted by the respondent, the applicant meets with her family doctor on a number of occasions in the year 2021, without mention of shoulder pain or accident-related pain. When she meets with her doctor on July 18, 2022, the CNR's describe the applicant reporting shoulder pain over several months as opposed to over several years.
- [20] I agree with the respondent based on insufficient evidence of the applicant experiencing accident-related injuries following the appointment on June 11, 2019, as described in the clinical notes and records of the family physician (CNR's). In order for the applicant to meet her burden to demonstrate that the injuries fall outside the limits of the MIG, there is the requirement for medical evidence showing the applicant's injuries are not minor or mere sequelae. There is a gap of three years from June 11, 2019, to July 18, 2022, before the applicant addresses the issue of any accident-related pain with her family doctor. In addition, following the prescription for baclofen and naproxen on June 11, 2019, the applicant does not request further prescriptions for pain medication.
- [21] The applicant reports a few months after July 18, 2022, accident-related pain complaints to Dr. Tajedin Getahun, which are described in his section 25 Orthopaedic Medical assessment dated November 10, 2022. I find the lack of evidence in the period from June 11, 2019, to July 18, 2022, does not support a finding that the applicant's accident-related injuries are outside the Minor Injury Guideline. I find that the applicant has provided insufficient medical evidence to meet her burden showing that she can not reach maximal recovery outside the limits of the MIG.

Psychological Injuries Post-Accident

- [22] Psychological impairments may, if established, fall outside the MIG, because the definition of "minor injury" under the Schedule does not include psychological impairments. I find the applicant does not have a psychological diagnosis stemming from the June 9, 2019, accident that would take her outside of the definition of the MIG for the following reasons.
- [23] In April 2019, and on November 7th and 29th, 2019, the applicant describes to physicians Dr. Hiran Shah, Dr. Darren Merker, and Dr. Ram Gupta, at Good

Doctor's Medical clinic, that she is experiencing anxiety, depression, poor energy, poor sleep, and poor appetite which she directly attributes to difficulties with her co-workers and possibly racialized targeting in the course of her employment (CNR dated November 7, 2019). The applicant similarly describes challenges with her stepchildren and family issues on November 9, 2018. The applicant does not attribute these psychological challenges to the accident five months after the event, but she attributes the psychological issues entirely to difficulties at her place of employment and with her family.

- [24] The applicant is not diagnosed with any psychological or psychiatric disorders by her family physician nor provided with a referral for any accident-related psychological impairment. There is evidence that the applicant takes anti-depressant medication and medication for attention deficit disorder in adults, in the CNR's. However, the medication and the applicant's issues with depression and anxiety are at no point associated with nor in any way attributed to the accident.
- [25] The applicant has not presented evidence to discharge the burden of demonstrating that any psychological injuries sustained in the accident are not predominantly minor injuries capable of being treated within the limits of the MIG. I find that the applicant has sustained predominantly minor injuries and the MIG applies.

Chronic Pain Syndrome

- [26] The applicant submits that she has restricted range of motion in her lumbar spine area and tenderness in her shoulders. She submits that she reported sleep disturbances due to shoulder pain, in addition to pain and stiffness in both shoulders as well as a constant dull achy pain in her lower back. She alleges difficulty doing household chores. As submitted by the respondent, determining the applicant with chronic pain is a fact-based exercise which depends on the medical evidence before the panel. As set forth by the Tribunal in *P.T. v. Aviva General Insurance*, 2020 ONLAT 19-002373/AABS:

In my view, a simpler starting point that everyone can understand is that chronic or persistent pain is pain that continues long after it should not, and I prefer the following well accepted criteria:

- i. The insured person suffers severe and constant pain – more than simple ongoing or recurrent, intermittent pain.

- ii. The insured person's pain has persisted well beyond the normal healing times for the injuries sustained.
- iii. The pain is not clinically associated sequela to minor injuries.
- iv. The injured person's pain causes functional impairment and disability. It significantly disrupts or disables pre-accident activities of daily living (*YXY v. Personal Insurance Company*, 2017, Can LII 59515 (ON LAT) para. 24-29.

[27] As stated, the applicant did not make any reports of accident-related pain to her family physician from June 11, 2019, to July 18, 2022. The applicant receives an echocardiogram and stress test by reason of cardiovascular concerns and chest pain in May 2020, without any reference to the accident. The applicant described taking time off of work in May 2020, by reason of shortness of breath and chest pain, without any reference to the accident or accident-related pain. The applicant did not request or indicate that she was taking pain medication following the appointment with her family physician on June 11, 2019, and she does not mention any symptoms as a result of the accident including pain until July 18, 2022. The applicant reports a few months after July 18, 2022, to Dr. Tajedin Getahun, accident-related pain complaints, which are described in his section 25 Orthopaedic Medical assessment dated November 10, 2022. I find the lack of evidence in the period from June 11, 2019, to July 18, 2022, of severe, constant pain persisting beyond healing times for the injuries sustained, does not support a finding that the applicant's accident-related injuries are outside the Minor Injury Guideline. I find that the applicant has not met her burden to show that she can not reach maximal recovery outside the limits of the MIG.

[28] In terms of functional limitations, the applicant did not mention any pain or functional limitations after June 11, 2019, until July 18, 2022. The applicant reports to Dr. T. Getahun that she experienced back pain and shoulder pain when she returned to her employment as a personal support worker, two weeks after the accident. The applicant informs Dr. T. Getahun, that she ceased working in 2020 when she was terminated as a result of the pain experienced following the motor vehicle accident. Again, I would reasonably expect this information regarding functional limitations to appear as mentioned by the applicant in the CNR's.

[29] Dr. T. Getahun opines that the applicant experiences chronic myofascial strain of the lumbrosacral spine and chronic bilateral shoulder strains with ultrasound evidence of shoulder bursitis. Dr. Tajedin Getahun describes that the applicant's

soft tissue injuries ought to have resolved by the time of his assessment. He does not find that the applicant's injuries go conclusively beyond myofascial strains and sprains, which fall within the definition of minor injuries. In the absence of confirmation and compelling medical evidence that the applicant's injuries go beyond strains and sprain, I can not find that her physical injuries fall outside the Minor Injury Guideline (MIG) (Grieco v. Aviva General Insurance, 2022 ONLAT, 2022 CanLii 53791 (ONLAT), paragraph 16 to 25).

- [30] This Tribunal has held that identifying chronic pain, without a diagnosis of chronic pain syndrome or an indication that chronic pain is the predominant injury, is not sufficient to take the applicant out of the MIG (17-000640 v. TD Insurance Meloche Monnex, 2018 CanLii 13142).
- [31] Dr. Getahun states in his assessment that the applicant's injuries fall outside the Minor Injury Guideline on the basis of the duration of the symptoms of strain and sprain. This is not a basis for the Tribunal finding the applicant's accident-related injuries, are not capable of being addressed within the limits of the Minor Injury Guideline (MIG). As described, Dr. Getahun diagnoses the applicant as experiencing chronic myofascial strain of the lumbrosacral spine and chronic bilateral shoulder strains with ultrasound evidence of shoulder bursitis.
- [32] I find that the use of the word "chronic" does nothing to change the underlying nature of the injuries, that is strains of the upper and lower spine and Dr. Getahun's diagnosis falls squarely within the definition of "minor injury" in section 3 of the Schedule. The word "chronic" used in this context simply means that the strain has lasted a long time, as opposed to it being described as acute, meaning a shorter-term condition. Dr. T. Getahun does not find that the applicant experiences a radiculopathy, which is damage to the nerve root as it exits the spine which may cause pain, weakness and numbness (Nguyen v. Allstate Canada, 2021 CanLii 30276 (ON LAT)). Dr. Getahun notes that the applicant has no signs of nerve root irritation in her lower extremities.
- [33] A medical letter issued by Main Street Medical Center dated January 26, 2020, states that the applicant is healthy, and she takes no medications. The applicant stated to Dr. Fatima of Shopper's World medical clinic, on September 16, 2021, that she suffered no pain-related issues, and that she was not taking any pain medication as set forth in the CNR's.
- [34] As stated, the applicant did not request or take pain medication following the appointment with her family physician on June 11, 2019, and she does not mention any symptoms causally linked to the accident including pain until July 18, 2022. The applicant reports a few months after July 18, 2022, to Dr. Tajedin

Getahun, accident-related pain complaints, which are described in his section 25 Orthopaedic Medical assessment dated November 10, 2022. I find the lack of evidence in the period from June 11, 2019, to July 18, 2022, does not support a finding that the applicant's accident-related injuries are outside the Minor Injury Guideline or that she experiences chronic pain syndrome. I find that the applicant has not met her burden to show that she can not reach maximal recovery outside the limits of the MIG.

- [35] I do not accept that pain that lasts for more than six months without discussion of the level of pain, medical evidence of the pain's effect on the person's function, or whether the pain is bearable without treatment, is more than mere sequelae. Without something more than the length of time pain lasted, I do not accept based on the applicant's reports that she has "chronic pain syndrome," as discussed in *Aruda and Western Assurance Company*, (FSCO AI 3-003926), although I am not bound by FSCO decisions. The applicant has not satisfied me, on a balance of probabilities, that her pain complaints are accident-related and that the chronic pain complained of is not merely sequelae of the soft tissue injuries nor has the applicant explained whether the pain gives rise to a functional limitation. The only references to functional limitation as described are referenced starting in July 2022. The absence of previous reference to functional limitations in the CNR's dating from June 11, 2019, to July 18, 2022, results in the finding that the applicant has not met her burden showing that she has chronic pain syndrome or that her injuries will not reach maximal recovery within the limits of the MIG.

Interest

- [36] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the Schedule. As no benefits are payable, it follows that no benefits are overdue. Therefore, interest does not apply pursuant to s. 51.

TREATMENT PLANS, INTEREST, AWARD

- [37] Having determined that the applicant sustained minor injuries that are treatable within the MIG and understanding that the MIG limit has been exhausted, an analysis of whether the treatment and assessment plans in dispute are reasonable and necessary is not required.
- [38] As no benefits are payable, it follows that no benefits are overdue. Therefore, interest does not apply pursuant to s. 51.

ORDER

- [39] I find that the applicant sustained minor injuries as a result of the accident that are treatable within the MIG and that the MIG has been exhausted.
- [40] The applicant is not entitled to any treatment plans in dispute, as the MIG limits have been exhausted.
- [41] Given that there are no benefits owed, the applicant is not entitled to interest pursuant to s. 51 of the Schedule.
- [42] The application is dismissed.

Released: November 8, 2023

**Janet Rowsell
Adjudicator**