2024 CanLII 28834 (ON LAT)

Citation: Goncalves v. Wawanesa Insurance, 2024 ONLAT 20-013261/AABS

Licence Appeal Tribunal File Number: 20-013261/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:

Alexandrinha Goncalves

Applicant

and

Wawanesa Insurance

Respondent

DECISION

ADJUDICATOR: **Jennifer Mendelsohn**

APPEARANCES:

For the Applicant: Antonio Azevedo, Counsel

For the Respondent: Elisabeth van Rensburg, Counsel

HEARD: **Via Written Submissions**

OVERVIEW

[1] Alexandrinha Goncalves (the "applicant") was injured in an automobile accident on July 13, 2018, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*") . She applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service ("Tribunal") after her claims for benefits were denied by Wawanesa Insurance (the "respondent").

[2] The respondent denied the benefits in dispute on the basis of its determination that the applicant's accident-related impairments fit the definition of "minor injury" prescribed by s. 3(1) of the *Schedule*, and therefore are subject to treatment within the Minor Injury Guideline (the "MIG").

[3] The applicant submits that her injuries fall outside of the MIG because of her pre-existing medical conditions of sciatic pain and edema.

[4] If the applicant's position is correct, then I must address whether the chiropractic services in dispute are reasonable and necessary pursuant to the *Schedule*.

[5] If the respondent's position is correct, then the applicant is subject to a $3,500.00 limit on medical and rehabilitation benefits prescribed by s. 18(1) of the *Schedule*, and not entitled to interest.

ISSUES

[6] The following issues are in dispute:

i. Are the applicant's injuries predominantly minor as defined in s. 3 of the *Schedule* and are therefore subject to treatment within the $3,500.00 limit of the MIG?

If the applicant's injuries are not considered to be predominantly minor,

ii. Is the applicant entitled to chiropractic services from Multi Rehabilitation Services Inc. as follows:

(a) $1,460.00 proposed by Melina Furtado in a treatment plan (OCF-18) dated July 17, 2019?

(b) $1,600.00 proposed by Manual Rodrigues in a treatment plan (OCF-18) dated November 15, 2019?

2024 CanLII 28834 (ON LAT)

(c) $2,300.00 proposed by Manual Rodrigues in a treatment plan (OCF-18), dated March 11, 2020?

iii. Is the applicant entitled to interest on any overdue payment of benefits pursuant to s. 51 of the *Schedule*?

RESULT

[7] I find that:

i. The applicant has not demonstrated that her accident-related impairments warrant removal from the MIG.

ii. The applicant does not have a pre-existing condition that would prevent recovery under the MIG.

iii. As the applicant's injuries are within the MIG, it is therefore unnecessary to consider the reasonableness and necessity of the treatment plans or the issue of interest.

[8] The application is dismissed.

LAW

[9] Section 18(1) of the *Schedule* states that when an insured person sustains an impairment that is predominantly a minor injury in accordance with the MIG, their entitlement to benefits for medical and rehabilitation treatment shall not exceed $3,500.00. 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."

[10] Section 18(2) of the *Schedule* provides that an applicant can be removed from the MIG if 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. In all cases, the burden of proof lies with the applicant.

[11] 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.

2024 CanLII 28834 (ON LAT)

ANALYSIS

Applicability of the MIG

[12] I find that the applicant sustained minor injuries from the accident as the weight of the medical evidence indicates that the applicant did not suffer any physical injuries other than soft tissue injuries resulting from the accident and is not removed from the MIG as a result of any pre-existing conditions.

[13] The MIG does permit an applicant with predominantly minor injuries to be removed from its coverage if she has a medically documented pre-existing condition. The applicant must provide compelling evidence from a health practitioner that he or she will be prevented from achieving maximal recovery from her injuries if she is subject to the $3,500.00 cap imposed by the MIG on treatment costs. It is the applicant's evidentiary burden to establish entitlement to coverage beyond the $3,500.00 cap on a balance of probabilities.

[14] Although the applicant relies on the records of her family physician Dr. Almasi, who she saw three days post-accident, these records do not record any physical injuries resulting from the accident other than soft tissue injuries. Dr. Almasi noted that the applicant complained of pain in her back and right arm and advised the applicant to attend physiotherapy. The records of Multi Rehabilitation Services Inc., where the applicant attended for treatment, described her injuries from the accident as sprains and strains of her cervical spine, thoracic spine and shoulder joint, all of which fall within the MIG.

[15] I find that the applicant's physical injuries sustained in this accident are within the definition of "minor injury". However, the applicant argues that her pre-existing sciatic pain and edema remove her from the MIG.

Does the applicant have a pre-existing condition that would remove her from the MIG?

[16] While there is some evidence that the applicant suffered from sciatica as far back as 2015, there is no objective medical evidence before me that the applicant's sciatica was aggravated as a result of this accident, or that the applicant's pre-existing sciatica would prevent maximal recovery from a minor injury if the applicant is subject to the MIG limits.

[17] The applicant relies on the Tribunal's decision in *Bonilla-Lopez v. BelairDirect Insurance* Company, 2023 CanLII 26940 (ON LAT) *a*nd submits that sciatic pain documented by a medical professional prior to an accident is a pre-existing condition that meets the first part of the test in section 18(2) of the *Schedule*.

2024 CanLII 28834 (ON LAT)

[18] While pre-existing sciatic pain can certainly warrant an applicant's removal from the MIG, it does not automatically do so. In *Bonilla-Lopez*, the injuries the applicant sustained in the accident directly related to the applicant's pre-existing sciatica and to the proposed treatment. That is not the situation here.

[19] The OCF-18s at issue list the injuries the applicant sustained in the accident as sprain and strain of cervical spine, sprain and strain of thoracic spine and sprain and strain of shoulder joint. While the CNRs from Multi Rehabilitation Services Inc. are largely illegible, it appears the applicant was receiving treatment related to a diagnosis of Whiplash Associated Disorder II, shoulder sprain/strain and treatment of the thoracic spine. There is no evidence before me that the applicant injured her lower back in the accident or received treatment for lower back pain or sciatica-related complaints as a result of the accident.

[20] In regard to her pre-existing edema, Dr. Almasi noted in one visit in 2016 that the applicant presented with edema in her left leg. The next mention of edema in the applicant's medical records is from an ultrasound undertaken approximately two months after the accident. It revealed the applicant had "minimal soft tissue swelling." However, there is no further mention of edema in the applicant's medical evidence, nor is there any evidence that the applicant's edema would prevent her from achieving maximal recovery if subject to the MIG funding limit.

[21] The applicant relies upon a letter written by Dr. Almasi on April 5, 2023, nearly five years after the subject accident. I do not give much weight to this letter as it was not written contemporaneously and is not compelling evidence. Dr. Almasi begins the letter by stating that the applicant "had complaints about her right shoulder and also her leg pain which was a sciatic presentation" prior to her motor vehicle accident. However, there is a contradiction in his letter as he then goes on to state that he does not have any records related to shoulder complaints prior to this MVA. While Dr. Almasi opines that a right shoulder tear seen on a 2019 ultrasound could have been caused by the MVA, the November 15, 2019 treatment plan (the second issue in dispute in this application) states that the applicant's employment involves heavy lifting and repetitive nature of her employment. I have no contemporaneous evidence before me that attributes the applicant's shoulder problems to the accident Dr. Almasi's opinion that the applicant's injuries "could have" been caused by the MVA does not rise to the level of a balance of probabilities.

[22] The burden of bringing forward persuasive medical evidence of a pre-existing condition that prevents the applicant from achieving maximal medical recovery under the MIG funding limits is on the applicant, and she has not done so.

2024 CanLII 28834 (ON LAT)

Are the treatment plans reasonable and necessary?

[23] Having found that the applicant has not proven on a balance of probabilities that she has a condition that would remove her from the MIG, I do not need to consider whether the medical treatment plans in dispute are reasonable and necessary.

Interest

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

ORDER

[25] 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. It is therefore unnecessary to consider the reasonableness or necessity of the disputed treatment plans. No interest is payable.

Released: April 4, 2024

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Jennifer Mendelsohn
Adjudicator

2024 CanLII 28834 (ON LAT)