

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

File Number: 18-008269/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:

A.A.

Applicant

and

Unifund Assurance Company

Respondent

DECISION

ADJUDICATOR: LINDSAY LAKE

APPEARANCES:

For the Applicant: Glen Bushi, Counsel

For the Respondent: Sabina Arulampalam, Counsel

HEARD IN WRITING: June 24, 2019

OVERVIEW

- [1] The applicant, A.A., was injured in an automobile accident on December 15, 2013 (the “accident”) and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “*Schedule*”) from Unifund Assurance Company (“Unifund”), the respondent.
- [2] Unifund denied A.A.’s claim for three treatment plans for a psychiatric evaluation, a social work assessment and a chronic pain assessment. Unifund denied the treatment plans because it took the position that all of A.A.’s injuries fit the definition of “minor injury” as prescribed by s. 3(1) of the *Schedule* and, therefore, fall within the Minor Injury Guideline (the “MIG”).¹ As a result, A.A. submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”).
- [3] The parties were unable to resolve their dispute at the case conference held on February 27, 2019 and the matter proceeded to a written hearing on June 24, 2019.

ISSUES IN DISPUTE

- [4] The following issues are to be decided:
 - (i) Did A.A. sustain predominately minor injuries as defined under the *Schedule*?
 - (ii) If the answer to issue (i) above is “no,” then I must determine the following issues:
 - (a) Is A.A. entitled to payment for the cost of an examination in the amount of \$2,259.78 for a psychiatric evaluation recommended by Royal Health Evaluation in a treatment plan submitted on October 10, 2017 and denied by Unifund on October 17, 2017?
 - (b) Is A.A. entitled to payment for the cost of an examination in the amount of \$2,135.70 for a social work assessment recommended by Auxilium Wellness in a treatment plan submitted on February 3, 2017 and denied by Unifund on February 13, 2017?
 - (c) Is A.A. entitled to payment for the cost of an examination in the amount of \$2,260.00 for a chronic pain assessment recommended by Auxilium Wellness in a treatment plan submitted on February 17, 2017 and denied by Unifund on February 21, 2017?
 - (d) Is A.A. entitled to interest on any overdue payment of benefits?

¹ Minor Injury Guideline, Superintendent’s Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act*.

PRELIMINARY ISSUE: Notice of Motion

- [5] Included in his materials, A.A. submitted a Notice of Motion dated May 27, 2019. Under the reasons for the motion, it states “suspension of the income replacement benefit of the applicant did not constitute a proper denial.”² No other supporting material accompanied the Notice of Motion except correspondence from Unifund dated November 5, 2014.
- [6] In his submissions, A.A. argued that the November 5, 2014 letter from Unifund did not constitute a proper denial of income replacement benefits (IRBs) and, therefore, A.A. is not statute barred from disputing Unifund’s denial of his IRBs.
- [7] Unifund did not respond to the Notice of Motion in its hearing submissions.
- [8] I find that A.A.’s Notice of Motion is not properly before me as part of this written hearing. The case conference in this matter was held on February 27, 2019. As such, A.A. had sufficient time before the hearing to bring a motion to allow Unifund a full opportunity to respond to his request. It is highly prejudicial to Unifund to simply attach a Notice of Motion in hearing submissions, especially given the date of Unifund’s correspondence, and it is not the appropriate way of adding the issue of IRBs to this hearing.
- [9] For all of these reasons, I am not prepared to decide on A.A.’s Notice of Motion as part of this hearing.

RESULT

- [10] Based on the totality of the evidence before me, I find that A.A. is not removed from MIG as a result of chronic pain or a psychological condition. It is, therefore, unnecessary for me to consider the reasonableness of the treatment plans or the issue of interest because the maximum of \$3,500.00 for medical and rehabilitation benefits under the MIG has been exhausted.

ANALYSIS

Did A.A. sustain predominately minor injuries as defined under the *Schedule*?

- [11] The 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 s. 3(1) of the *Schedule* as, “one or more of a strain, sprain, 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 defined in the *Schedule*.
- [12] Section 18(1) of the *Schedule* limits the entitlement for medical and rehabilitation benefits for minor injuries to \$3,500.00.

² Applicant’s Submissions, tab 12.

[13] The onus is on A.A. to show that his injuries fall outside of the MIG.³ In this case, A.A. argues that he should be removed from the MIG because he has chronic pain, and/or he sustained psychological injuries as a result of the accident.

Chronic Pain

[14] I find that A.A. has failed to prove on a balance of probabilities that he should be removed from the MIG as a result of chronic pain.

[15] Both parties relied upon previous decisions regarding chronic pain as a basis for removal from the MIG. Unifund argued that unless chronic pain is more than mere sequelae of a minor injury, or the applicant has been diagnosed with chronic pain *syndrome* with a demonstrated functional impairment, that there is no removal from the MIG.⁴ Unifund also relied upon a definition of chronic pain from the American Medical Association Guides that was previously adopted by the Tribunal.⁵

[16] Although persuasive, I am not bound by any of the decisions relied upon by the parties. I do, however, agree with Executive Chair Linda Lamoureux's reconsideration decision in *T.S. v. Aviva General Insurance Canada*⁶ which neither party cited in their submissions. In this decision, the insured person was removed from the MIG as a result of being diagnosed with chronic pain *syndrome* as Executive Chair Lamoureux found that the Tribunal erred at first instance in its interpretation of s. 3 of the *Schedule*. Executive Chair Lamoureux also held that chronic pain (distinguished from chronic pain *syndrome*), if established, should not be included in the MIG's definition as a sequelae to minor injuries. Executive Chair Lamoureux also defined chronic pain as persistent pain that continues when it should not.⁷ I agree and adopt the findings in this reconsideration decision.

[17] A.A. submits that he is removed from the MIG as a result of chronic pain. To support his position, he relies upon the chiropractic assessment by Dr. George Charlabous dated August 23, 2014⁸ in which A.A. is diagnosed with the following conditions:

- Chronic cervical spine sprain/strain;
- Chronic lumbar spine sprain/strain with radicular symptoms;
- Chronic thoracic spine sprain/strain;
- Chronic left shoulder dysfunction;
- Chronic post-traumatic headaches;
- Frustrated/irritable; and

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

4 Respondent's Written Submissions, page 7, paras. 27-28.

5 *Ibid.* at paras. 29-30.

6 2018 CanLII 83520 (ON LAT).

7 *Ibid.* at para. 23.

8 Applicant's Submissions, tab 7.

- Anxiety/depression.⁹

[18] Dr. Charlambous reported that A.A. continues to experience the following pain: intermittent neck pain with a pain intensity rating of 8/10; intermittent upper back pain with a pain intensity rating of 6/10; constant lumbar spine pain with a pain rating of 8/10; intermittent shoulder pain with a pain rating of 7/10; and intermittent left achilles tendon pain with a pain rating of 7/10.

[19] I give little weight to Dr. Charlambous' report for the following reasons:

- (i) Dr. Charlambous refers to A.A.'s functionality after his motor vehicle accident on March 6, 2014, which is incorrect. The date of the accident was December 15, 2013;
- (ii) Dr. Charlambous reports that A.A. suffered from chronic neck and low back pain due to a previous motor vehicle accident in July 2013. However, he does not explain the impact of these injuries, if any, on his diagnoses of A.A.;
- (iii) Dr. Charlambous made diagnoses outside of his expertise, such as anxiety/depression; and
- (iv) Dr. Charlambous did not review any medical evidence in preparation of his report and assessment of A.A.

[20] I also give little weight to A.A.'s reliance upon the one clinical note and record (CNR) that he submitted from his family doctor, Dr. Alireza Oliaei, dated January 29, 2019. While A.A. reports on this date that since the accident, he has had neck and lower back pain which sometimes radiates to his right shoulder and is diagnosed with muscular pain, A.A. failed to submit any other CNRs from any time from the accident leading up to January 29, 2019. Therefore, I am unable to find that his pain was persistent from the accident. I am also unable to determine if there were any other intervening pain-causing incidents between the accident and January 29, 2019, which is important as A.A. was involved in a motor vehicle accident in 2015¹⁰ and was likely involved in another motor vehicle accident in 2018.¹¹

[21] I also agree with Unifund that A.A. failed to provide any other treatment records or an OHIP summary covering the period from the accident to March 2015. A.A.'s submissions that he attended Alpha Med Wellness Centre for treatment from January 2014 to October 2017 are not evidence. Furthermore, the OHIP records submitted by Unifund from March 10, 2015 to May 5, 2016 and from November 10, 2017 to March 2, 2018, show no accident related pain attendances to any medical clinics for either of these time periods. I also agree with Unifund that significant gaps in treatment and reporting of pain mitigates against a finding of chronic pain.

⁹ *Ibid.* at page 6.

¹⁰ Psychiatric Report dated November 29, 2017, Applicant's Submissions, tab 10.

¹¹ AutoPlus Gold Report dated June 6, 2019, Respondent's Supporting Documentation Brief, tab 11.

- [22] While I agree that A.A. reported several areas of pain and pain intensity in a psychological report dated February 20, 2016,¹² and in a psychiatric report dated November 11, 2017,¹³ these reports are unaccompanied by any diagnostic testing and are solely based on A.A.'s self reports. I also have concerns over A.A.'s self reporting, as there were discrepancies in both reports regarding his involvement in other motor vehicle accidents both pre- and post-accident.
- [23] Additionally, I do not place weight on the January 12, 2017 OCF-18 completed by Dr. Igor Wilderman, physician, in which the injury and sequelae information section includes "other chronic pain." It is not clear how Dr. Wilderman arrived at his opinion of this diagnosis. It is also clear from the additional comments portion of the OCF-18 that a conclusive diagnosis of chronic pain had not yet been made by Dr. Wilderman.
- [24] Unifund relied upon an insurer's examination (IE) report dated July 14, 2014 by Dr. Paul Tepperman, physician,¹⁴ which was conducted to determine the applicability of the MIG. However, I am unable to place significant weight on this IE report as the issue of chronic pain was never put to Dr. Tepperman. In any event, Dr. Tepperman's report did not support A.A.'s removal from the MIG based upon chronic pain as Dr. Tepperman opined that A.A. suffered myofascial strain of his lumbar paraspinal musculature and right shoulder strain as a direct result of the accident but that his uncomplicated soft tissue injuries had resolved.
- [25] Unifund also submitted a review of systems questionnaire from Saint Joseph Physician Network dated June 6, 2014. In this questionnaire, A.A. answered "no" to having joint pain requiring medicine and calf or leg pain with walking.
- [26] Based on all of the evidence set out above, I find that A.A. has not met his onus of proving on a balance of probabilities that he suffers from chronic pain as a result of the accident. Therefore, A.A. is not removed from the MIG on the basis of chronic pain.

Psychological Injuries

- [27] I find that A.A. has failed to prove on a balance of probabilities that he should be removed from the MIG as a result of a psychological injury.
- [28] A.A. submits that he is removed from the MIG as a result of psychological injuries that he sustained as a result of the accident. A.A. submitted a psychological report dated February 20, 2016. This report indicates that A.A. was assessed by Vladimir Kulikov, psychometrist, who was working under the supervision of Dr. Ilya Gladshiteyn, psychologist. The purposes of this assessment were to determine the nature of, and the extent to which A.A. is suffering from psychological or emotional difficulties as a direct consequence of the accident and to make treatment recommendations. The assessment included a clinical interview, administration of psychological tests and a feedback interview. This report notes that A.A.'s presentation is consistent with a diagnosis of an adjustment disorder with mixed

12 Applicant's Submissions, tab 9.

13 *Supra* note 10.

14 Respondent's Supporting Documentation Brief, tab 2.

anxiety and depressed mood, persistent and specific phobia, situational type (driver/passenger). Further, the report noted that A.A.'s condition is consistent with a moderate impairment. The report is signed by both Dr. Gladshteyn and Mr. Kulikov.

- [29] A.A. also relies upon the psychiatric report dated November 29, 2017. This report indicates that A.A. was assessed by Julia Kogut, therapist, under the supervision of Dr. Atih Seif, psychiatrist. The purpose of the assessment was to determine the nature of, and the extent to which A.A. was suffering from psychological or emotional difficulties as a direct consequence of the accident. The assessment included a clinical interview and the administration of psychological self-report questionnaires. This report noted that Dr. Seif did not meet A.A., and that his role was only to supervise Ms. Kogut. The report notes A.A. is diagnosed with the following: somatic symptom disorder with predominant pain, persistent; adjustment disorder with mixed anxiety and depressed mood; and specific phobia (travelling in a vehicle). The report states, "it is my opinion that [A.A.]'s current diagnoses are a direct result of his motor vehicle accident on December 15, 2013." The report further states, "it is my opinion that [A.A.]'s condition should be considered serious," and is signed by both Ms. Kogut and Dr. Seif.
- [30] In contrast, Unifund relies upon the IE Psychology report by Dr. Shahriar Moshiri, psychologist, dated July 14, 2014. This report followed an in-person assessment of A.A. on June 26, 2014 to address A.A.'s entitlement to a treatment plan in dispute but also to address the applicability of the MIG. The clinical interview was 1 hour and 15 minutes in which A.A. was accompanied by an interpreter. A.A. reported that psychologically he was asymptomatic, that he continued to drive and denied experiencing any driving phobia, any depression or anxiety. Dr. Moshiri opined that based on the findings of A.A.'s examination and his review of the documentation provided, A.A.'s reported symptoms did not relate to any reliable psychological diagnosis and, as a result, his symptomatology were not of the extent and intensity to exclude him from the MIG.
- [31] I prefer the evidence of Dr. Moshiri and his opinion that A.A. suffers no psychological injuries as a result of the accident over the opinions and diagnoses in the February 20, 2016 psychological report and in the November 29, 2017 psychiatric report for the following reasons:
- (i) Dr. Moshiri conducted the interview and assessment of A.A. I place more weight on his opinion as a psychologist over those of Mr. Kulikov, psychometrist, and Ms. Kogut, a therapist, who were both only supervised by a psychologist and psychiatrist, respectively;
 - (ii) It is unclear whose opinion is given in the February 20, 2016 psychological report and in the November 29, 2017 psychiatric report as it is signed by both the person conducting the assessment and the supervising medical professional, but reference is made to "us" and "I" throughout;
 - (iii) Dr. Moshiri reviewed more medical documents in preparation of his report than the documents reviewed in preparation of the February 20, 2016

psychological report (none) and in the November 29, 2017 psychiatric report (only the February 20, 2016 psychological report);

- (iv) A.A. disclosed to Dr. Moshiri, and it is contained in his report, that A.A. was involved in two prior motor vehicle accidents whereas he reported in the February 16, 2016 psychological report that he had not had a previous motor vehicle accident and he did not report his pre-accident motor vehicle collision in the November 29, 2017 psychiatric report; and
- (v) Dr. Moshiri's findings are more consistent with other evidence, such as an absence of evidence of any psychological complaints by A.A. to his family doctor and the review of systems questionnaire from Saint Joseph Physician Network dated June 6, 2014 in which A.A. reported no depression, anxiety or other psychiatric problems.

[32] I also give no weight to Dr. Charalmbous' diagnosis of anxiety and depression because, as a chiropractor, these diagnoses are outside his scope of practice.

[33] Based on all of the evidence discussed above, I find that A.A. has failed to prove on a balance of probabilities that he sustained any psychological injuries as a result of the accident. As a result, he is not removed from MIG on this basis.

Treatment Plans

[34] As I have found that A.A.'s injuries do not fall outside of the MIG and he has exhausted the \$3,500.00 MIG funding limit for medical and rehabilitation benefits, it is not necessary for me to determine the reasonableness and necessity of the treatment plans in dispute.

Interest

[35] Because I have found that there are no benefits or costs that are overdue, no interest is payable.

CONCLUSION

[36] For the reasons outlined above, I find:

- (i) A.A. is not removed from the MIG as a result of chronic pain or because of a psychological condition;
- (ii) it is not necessary to determine whether or not the treatment plans in dispute are reasonable and necessary because the maximum of \$3,500.00 for medical and rehabilitation benefits under the MIG has been exhausted;

- (iii) A.A. is not entitled to interest; and
- (iv) The application is dismissed.

Released: September 4, 2019



**Lindsay Lake
Adjudicator**