

**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**

Citation: Sukdeo Keswar vs. Wawanesa Insurance, 2020 ONLAT 18-005918/AABS

**Released Date: 04/09/2020
File Number: 18-005918/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:

Sukdeo Keswar

Applicant

and

Wawanesa Insurance Company

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR:

Sandeep Johal

APPEARANCES:

Paralegal for the Applicant:

Marc Golding

Counsel for the Respondent:

Matthew Lafave

Heard in writing on:

October 28, 2019

OVERVIEW

- [1] The applicant was injured in an automobile accident on August 12, 2017 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the "*Schedule*").
- [2] The applicant was a driver in a vehicle that was rear-ended by another vehicle. As a result of the accident, the applicant sustained injuries to his back, neck, shoulders and right knee, along with anxiety and depression.
- [3] The applicant applied for medical benefits that were denied by the respondent because she was placed into the Minor Injury Guideline (the "MIG"). The applicant disagreed with this decision and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for dispute resolution.
- [4] At the case conference, an in-person hearing was scheduled. However, the hearing's format was later changed, on the parties' consent, to a hearing in writing.

ISSUES TO BE DECIDED

- [5] The following are the issues to be decided:
 - i. Did the applicant sustain predominantly minor injuries as defined under the *Schedule*?
 - ii. If the answer to issue (i) is no, then is the applicant entitled to payment for medical benefits and examination expenses for the following OCF-18's recommended by Downsview Healthcare Inc.:
 - a) \$1,242.56 for physiotherapy submitted on December 9, 2017;
 - b) \$1,830.00 for physiotherapy submitted on January 25, 2018;
 - c) \$3,335.98 for psychological treatment submitted on February 26, 2018;
 - d) \$1,632.56 for physiotherapy submitted on March 29, 2018;

¹ O. Reg. 34/10.

- e) \$2,000.00 for a psychological assessment submitted on October 26, 2017;
- f) \$2,000.00 for a chronic pain assessment submitted on April 30, 2018;
- g) \$200.00 for completion of an OCF-3 incurred to date;
- h) \$200.00 for an ultrasound.
- i) Is the applicant entitled to interest on any overdue payment of benefits?
- j) Is the applicant entitled to an award under *Ontario Regulation 664* because the respondent unreasonably withheld or delayed the payment of benefits?

RESULT

[6] Based on the totality of the evidence before me, I find:

- iii. the applicant sustained predominately minor injuries as defined in the *Schedule* and, thus, he is subject to treatment within the MIG;
- iv. as a result of having found the applicant's injuries to be within the MIG and the MIG limits being exhausted, there is no need to determine the reasonableness and necessity of the remaining treatment plans or the cost of examination;
- v. as there are no outstanding benefits, the applicant is not entitled to interest or an award.

ANALYSIS

Applicability of the Minor Injury Guideline

[7] 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.

- [8] The applicant bears the onus of establishing, on a balance of probabilities, his entitlement to coverage beyond the \$3,500 cap for minor injuries.²
- [9] The applicant's Disability Certificate (OCF-3)³ completed by Dr. Pivtoran, chiropractor, notes the applicant's physical injuries to be a sprain and strain of the shoulder and cervical, lumbar, and thoracic spine. He also has a sprain and strain of the hip and thigh area as well as a sprain and strain of the joints and ligaments. The OCF-3 also lists psychological impairments, such as acute stress reaction, and symptoms and signs involving an emotional state.⁴
- [10] The applicant also submits an ultrasound of his shoulder, which notes supraspinatus tendinopathy with areas of decreased heterogeneity and a small partial tear distal inner margin anechoic area.⁵
- [11] I find the injuries as listed in the OCF-3 and the ultrasound are within the definition of the MIG, which also includes partial tears. I do not place any weight on the psychological injuries listed in the OCF-3 as it would be beyond the scope of a chiropractor to opine on psychological impairments.

Requirements to be removed from the MIG

- [12] Even if the applicant's injuries fall within the definition of minor injury, the applicant can still be taken out of the MIG in accordance with s. 18(2) of the *Schedule*. The applicant must meet all three of the following requirements in order to be removed from the MIG under this section:
- a) have a pre-existing medical condition;
 - b) the pre-existing medical condition was documented by a health practitioner before the accident; and
 - c) the person's treating 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 \$3,500 limit under the MIG.
- [13] I find that the applicant has not satisfied his onus and has not provided any submissions or evidence of pre-existing conditions that satisfy the criteria in

² *Scarlett v. Belair Insurance*, 2015 ONSC 3635 at para. 24.

³ Applicant's Brief of Documents Part 2 at Tab 9.

⁴ *Ibid* at page 3.

⁵ Applicant's Document Brief at Tab 7, Bluewater Imaging Ultrasound dated February 10, 2018.

s. 18(2) of the *Schedule* in order to be removed from the MIG for the following reasons.

- [14] The applicant submits he had a pre-existing right knee impairment dating back to 2015.⁶ In accordance with s. 18(2) of the *Schedule*, I would agree that the applicant had a pre-existing medical condition which was documented by a health practitioner before the accident. However, what is missing is the last component, namely evidence from a medical practitioner that the pre-existing knee injury will prevent maximal recovery from the minor injury if the applicant is subjected to the monetary limit under the MIG.
- [15] I have not been directed to any evidence that his pre-existing knee injury will prevent maximal recovery under the MIG. Without that third component of s. 18(2) the applicant is unable to be removed from the MIG as he is unable to satisfy the requirements under the *Schedule*.
- [16] However, the applicant submits he suffered psychological impairments as a result of the accident, and that a psychological injury is not within the definition of the MIG and, therefore, he should not be treated within the monetary limits of the MIG.

Does the applicant have a psychological injury to remove him from the MIG?

- [17] I find that the applicant has not proven on a balance of probabilities that he has a psychological injury that would take him out of the MIG for the following reasons.
- [18] The applicant relies upon the psychological report dated January 12, 2018 from Dr. Shaul, psychologist.⁷ In his report, Dr. Shaul diagnosis the applicant with an Adjustment Disorder with Mixed Anxiety and Depressed Mood as well as with Specific Phobia (travelling in and around a vehicle).⁸
- [19] The respondent relies upon the insurer examination (“IE”) report of Dr. Dumitrascu, psychologist, dated February 2, 2018.⁹ In her report, Dr. Dumitrascu finds that the applicant’s presentation and self-report during the evaluation and from the objective data revealed a tendency of symptom magnification and, as a result, she did not find that the applicant met the DSM-5 criteria for a psychological disorder.

⁶ Ibid at Tab 2, Dr. Rikhye’s Clinical Notes and Records.

⁷ Ibid at Tab 4.

⁸ Ibid at Tab 4, page 12.

⁹ Responding Submissions of the Respondent at Tab 8.

- [20] I am left to decide between two competing reports that have differing conclusions. Both reports were based on two similar tests, the Beck Depression Inventory (BDI-II) and the Beck Anxiety Inventory (BAI). Dr. Shaul notes that the applicant scored in the severe range for the BDI-II and the BAI tests.¹⁰ Dr. Dumitrascu found similar results under these two tests.¹¹
- [21] The difference between the two reports was that Dr. Dumitrascu conducted additional validity testing that Dr. Shaul did not. The validity tests were the Trauma Symptom Inventory-2-A (TSI-2-A) and the Structured Inventory of Malingered Symptomatology (SIMS). According to the TSI-2-A test, the applicant's scores were significantly elevated, indicating that he had a tendency to over-endorse his emotional symptoms and the SIMS test score was also significantly elevated above the cut-off score for an identification of suspected malingering and/or symptom magnification. Dr. Dumitrascu notes that the applicant's scores on the SIMS test indicated that he had a tendency to magnify his emotional and cognitive symptoms which has likely affected his responses on all administered psychometric measures.¹²
- [22] Dr. Dumitrascu further opines that, as a result of the testing, which suggested symptom magnification, his symptoms are likely not of such a severity as he endorsed on the tests that were conducted for the Clinical Assessment of Depression, the Beck Anxiety Inventory and the Beck Depression Inventory-II.¹³
- [23] Dr. Shaul does not discuss symptom magnification or whether any validity testing was done, and his report differs from Dr. Dumitrascu's in terms of the applicant's self-reporting. Dr. Dumitrascu stated that the applicant did not describe any clinically significant accident-related symptoms of emotional distress, whereas Dr. Shaul's report notes there was significant emotional distress reported by the applicant.
- [24] In this difficult situation, I am left to rely on corroborating evidence and, when looked at as a whole in terms of all the medical documentation provided, I find on a balance of probabilities that the applicant does not have a psychological impairment that would warrant him being removed from the MIG. The severity of the symptoms noted by Dr. Shaul, who is not his treating practitioner, are not noted anywhere else. I am not directed to any

¹⁰ Applicant's Brief of Documents Part 2 at Tab 4, page 10.

¹¹ Supra Note 8, Dr. Dumitrascu Report at pages 8-9.

¹² Supra Note 8, Dr. Dumitrascu Report at pages 8-9.

¹³ Ibid at page 11.

notations from his family doctor or other medical practitioner he has been seeing on a regular basis of any psychological symptoms that would warrant his removal from the MIG. The applicant referred me to a note from his family doctor in 2014 of severe anxiety, however that was previous to the accident and it would appear to be due to a recent separation he was going through.¹⁴

[25] I place more weight on the IE report because of the validity testing that was done to confirm the test results, whereas Dr. Shaul does not conduct any validity testing and does not discuss how valid the self-reporting answers are from the tests he conducted.

[26] The applicant submits the OCF-3 Disability Certificate mentions anxiety, nervousness and sleep disorders. However, as stated above, I place little weight on that evidence because these impairments are being identified by a chiropractor, and I find that it is not within the chiropractor's scope of practice to comment on psychological impairments or provide a psychological diagnosis.

[27] The onus is on the applicant to prove on a balance of probabilities. I have not been satisfied on a balance of probabilities that the applicant has psychological impairments or a psychological diagnosis that would remove him from the MIG.

[28] As I have found that the applicant has not met his onus to show his injuries to be outside of the MIG and the MIG limits have been exhausted, there is no need for me to conduct an analysis of whether the remaining treatment plans or the cost of examination for a psychological assessment is reasonable and necessary.

ORDER

[29] As a result of the above and on a balance of probabilities, I find that:

- i. the applicant sustained predominately minor injuries as defined in the *Schedule* and he is subject to treatment within the MIG;
- ii. as a result of having found the applicant's injuries to be within the MIG and the MIG limits being exhausted, there is no need to determine the

¹⁴ Applicant's Brief of Documents at Tab 2, page 8.

reasonableness and necessity of the remaining treatment plans or the cost of examination;

- iii. As there are no outstanding benefits, the applicant is not entitled to interest or an award.

Released: April 9, 2020

A handwritten signature in black ink, reading "Sandeep S. Johal". The signature is written in a cursive style with a horizontal line underneath it.

Sandeep Johal, Adjudicator