



Citation: Jafari v. Economical Insurance Company, 2022 ONLAT 20-010214/AABS

Licence Appeal Tribunal File Number: 20-010214/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:

Atiqullah Jafari

Applicant

and

Economical Insurance Company

Respondent

DECISION

ADJUDICATOR: Asad Ali Moten

APPEARANCES:

For the Applicant: Kameliya Stancheva, Paralegal

For the Respondent: Earl Murtha, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] The applicant (the “Applicant”) was involved in a motor vehicle accident on August 26, 2018. He seeks benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg. 34/10 (the “Schedule”).
- [2] At issue between the parties are the Applicant’s claims for various medical benefits. A threshold issue is whether the Applicant’s injuries are predominantly minor as defined in the Minor Injury Guideline (“MIG”) under the Schedule.
- [3] The Applicant’s claims to the insurer were denied, and now he appeals to the Licence Appeal Tribunal – Automobile Accidents Benefits Service (the “Tribunal”) for resolution of these claims.
- [4] The Applicant argues that he has pre-existing medical conditions and suffered a psychological injury in the accident – both of which would be sufficient to remove him from the MIG. He further argues that the proposed treatment plans are reasonable and necessary. Though listed as an issue, the Applicant makes no submissions with respect to the Respondent’s liability for an award under Regulation 664.
- [5] The Respondent rebuts the Applicant’s arguments, specifically that the Applicant has discharged his onus with respect to whether he falls within the MIG and whether the proposed treatment plans are reasonable and necessary. The Respondent further submits that it has acted reasonably in denying the Applicant’s claims, and that there is no basis for ordering an award.

ISSUES

- [6] The issues to be decided are:
 - a. Are the Applicant’s injuries predominantly minor as defined in section 3 of the MIG and therefore subject to treatment within the \$3,500.00 limit of the MIG?
 - b. Is the Applicant entitled to a medical benefit in the amount of \$220.81 for chiropractic services recommended in a treatment plan submitted on December 19, 2018 and denied by the Respondent on January 4, 2019?
 - c. Is the Applicant entitled to a medical benefit in the amount of \$1,248.81 for chiropractic services recommended in a treatment plan submitted on November 30, 2018 and denied by the Respondent on December 12, 2018?

- d. Is the Applicant entitled to a medical benefit in the amount of \$63.65 for physical rehabilitation treatment recommended in a treatment plan submitted on December 20, 2018 and denied by the Respondent on January 4, 2019?
- e. Is the Applicant entitled to a medical benefit in the amount of \$66.80 for physical rehabilitation treatment recommended in a treatment plan submitted on December 20, 2018 and denied by the Respondent on January 4, 2019?
- f. Is the Applicant entitled to a medical benefit in the amount of \$39.91 for physical rehabilitation treatment recommended in a treatment plan submitted on December 20, 2018 and denied by the Respondent on January 4, 2019?
- g. Is the Applicant entitled to a medical benefit in the amount of \$3.15 for physical rehabilitation treatment recommended in a treatment plan submitted on December 20, 2018 and denied by the Respondent on January 4, 2019?
- h. Is the Applicant entitled to an examination expense in the amount of \$1,798.00 for a bio-psychological assessment recommended in a treatment plan submitted on November 22, 2018 and denied by the Respondent on December 4, 2018?
- i. Is the Applicant entitled to a payment in the amount of \$200.00 for the cost of completing a psychological treatment plan submitted on April 1, 2019 and denied by the Respondent on April 12, 2019?
- j. Is the Applicant entitled to interest on overdue payments of benefits?
- k. Is the Respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the Applicant?

RESULT

[7] I find that, for the reasons below, the Applicant has not met his onus to prove, on a balance of probabilities, that he has suffered injuries that are not predominantly minor, or that the Applicant suffered from a pre-existing medical condition that would prevent him from achieving maximal recovery within the MIG.

[8] It appears, from the list of issues in the Applicant's submissions, that some of the above noted proposed treatment plans are no longer in dispute. Neither party, however, addressed these issues in their submissions or what happened to them. It is not clear if they have resolved or were simply missed.

[9] As a result, I have not considered issues c), d), and e) above.

- [10] With respect to the balance of the proposed treatment plans, given my finding with respect to the MIG, I find that the Applicant has not discharged his onus to demonstrate, on a balance of probabilities, that the proposed treatment plans are reasonable and necessary.
- [11] Consequently, the Applicant is not entitled to interest on any overdue payments, nor is the Respondent liable for an award under Regulation 664.

BACKGROUND

- [12] The Applicant was the driver in a car accident on August 26, 2018. His wife was a passenger in the car. He was traveling southbound when he t-boned another car. Though no injuries were noted on the motor vehicle accident report, the Applicant reports that as a result of the collision the Applicant lost consciousness for a few seconds.
- [13] The Applicant went on his own, to Lakeridge Health hospital that evening. He complained of dizziness, headaches, neck pain, and back pain. He was not tested for anything specific nor was any particular injury noted. The Applicant was not admitted, but prescribed pain medication by the attending physician.
- [14] It does not appear that the Applicant has visited his family doctor since the accident, nor are there any reported referrals, investigations or management of any accident-related injuries.
- [15] At the time of the accident, the Applicant was self-employed as a contractor, and worked full-time in this capacity. In his submissions, the Applicant states that he had previously been in a car accident in 2014, as a result of which he missed a year of work. The Applicant has not, however, provided any evidence with regard to either the previous accident or the time off work.
- [16] Since the accident that is the subject of this application, the Applicant has returned to work, but purportedly only a few hours a week, mainly taking meetings and doing inspections.
- [17] In November 2018, two months after the accident, the Applicant visited a health care provider to complete a truck driving medical form, presumably for employment as a truck driver, though the reason is inconsequential. The provider's notes indicate no complaints and no previous medical problems.
- [18] Also in November 2018, the Applicant submitted an OCF-18 for a biopsychosocial assessment. The Respondent then arranged for a section 44 examination to determine whether the Applicant suffered a predominantly minor injury.

- [19] In January 2019, the Applicant underwent the section 44 examination with Dr. Direnfeld, a registered psychologist. The Applicant reported chronic pain in his neck, shoulders, and back. Dr. Direnfeld also described that the Applicant had a fifteen-year history of social anxiety. This is based on the Applicant's self-reporting, though it does not appear in any other records.
- [20] The Applicant reports having started physical therapy finding it very helpful. It is not clear when he began physical therapy. The records from the centre where the Applicant purports to have started this physical therapy have not been produced.
- [21] In March 2019 the Applicant submitted an OCF-18 requesting a psychological assessment. Dr. Keeling was the psychologist supervising the completion of the OCF-18. The proposed treatment plan notes, in respect of prior psychological challenges:
- He reported that he did not have any previous medical conditions prior to the MVA. He reported that he had never been diagnosed with any psychological illness prior to the MVA and his mental health was good. Mr. Jafari reported that there were no concurrent non-accident-related stressors or pre-existing mental health history that may be contributing to his reported emotional disturbance.
- [22] Dr. Keeling provisionally diagnoses the Applicant with adjustment disorder with anxiety and depression, and specific phobia. This provisional diagnosis is based on the Applicant's self-reporting.
- [23] The Applicant self-reports suffering psychological impairments as a result of the accident. Anxiety and depression have led him to grind and break two of his teeth. He feels panicked when driving in traffic.
- [24] Well before the current accident, in November 2016, the Applicant went to see his family doctor, reporting a previous accident that happened "3-4 days ago". This is inconsistent with what is contained in the Applicant's OCF-3, which reported a previous accident in 2014. At this visit in November 2016, the Applicant was prescribed pain medication and advised to return if he did not feel better. He did not return. There were also no emotional or psychological complaints noted in the clinical notes and records.
- [25] The only other visits to the Applicant's family physician before the accident came in March 2017 when he attended for headaches/migraines, with no follow-up, and June 2017, where the Applicant reported seasonal allergies.

ANALYSIS

a. Are the Applicant's injuries predominantly minor as defined by the MIG?

- [26] The MIG establishes a framework for the treatment of minor injuries. Section 3(1) of the Schedule defines a minor injury as a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation. A minor injury also includes any clinically associated sequelae to the injuries noted above. An applicant who falls within the MIG is eligible for up to \$3,500 in medical and rehabilitation benefits.
- [27] An applicant may be removed from the MIG if, on a balance of probabilities, they can demonstrate that the injuries they suffered are not within the minor injury definition. The Tribunal commonly hears disputes about whether an applicant's psychological conditions or chronic pain suffered are sufficient to remove an applicant from the MIG.
- [28] With respect to psychological injuries, there is some basis for the argument that a formal diagnosis is not required in order for psychological injuries to remove a person from the MIG,¹ but there must be at least sufficient evidence, on a balance of probabilities, to show psychological injury suffered in the accident that would take an applicant out of the MIG.²
- [29] An applicant may also be removed from the MIG if they have a pre-existing condition. Section 18(2) of the Schedule provides that an applicant can fall outside of the MIG if his or her health practitioner determines and provides compelling evidence that the applicant has a pre-existing medical condition which prevents maximal recovery of an otherwise minor injury if the applicant is limited to the benefits under the MIG.
- [30] The Applicant bears the burden of proving, on a balance of probabilities, that the MIG does not apply. Whether the evidence in a particular case is sufficient to meet the test of 'compelling' must be determined on the facts of each case having regard to what is reasonable in all of the circumstances.³
- [31] Though it is not entirely clear from his submissions, it appears the Applicant argues that there are two bases for his removal from the MIG: (a) pre-existing physical and psychological injuries that prevent the Applicant from maximal

¹ *Saadati v. Moorhead* 2017 SCC 28, para. 31.

² *B.N. v. The Co-Operators Insurance Company* 2020 CanLII 42652, para. 41.

³ *Scarlett v. Belair Insurance* 2015 ONSC 3635, paras. 24, 27.

recovery, specifically migraines in 2017 and a history of social anxiety; and (b) psychological injuries suffered in the accident.

Pre-existing physical and psychological injuries

- [32] In November 2016, the Applicant reported to his family physician that he had been in a car accident a few days earlier. He was assessed as having a musculoskeletal sprain and was prescribed medication and physiotherapy. There is no reported follow up.
- [33] The Applicant's family physician, in March 2017, notes that the Applicant has been suffering from headaches/migraines for several days. He was prescribed a non-steroid anti-inflammatory medication for his migraine. There is no reported follow up.
- [34] Neither of the two entries above indicate any psychological injuries.
- [35] Further, besides the Applicant's own self-report to Dr. Direnfeld, there is no evidence to substantiate that the Applicant was in a car accident in 2014 which resulted in him missing a year of work.
- [36] Based on the evidence available, I cannot conclude that the Applicant had a pre-existing medical condition, either physical or psychological. Even if I am wrong on this point, there is no evidence to suggest how such an injury would prevent the Applicant from maximal recovery from the otherwise minor injuries suffered in the subject accident.

Psychological injuries suffered in the accident

- [37] In making this argument, the Applicant relies on two documents. The first is the section 44 examination in January 2019. The second is an OCF-18 for a psychological assessment submitted in March 2019.
- [38] In August 2018, the accident occurs. The extent of any reported injury at the time comes from the hospital records as described above, and an OCF-3 completed a month later. The Applicant's OCF-3 notes issues (identified but not diagnosed) with sleep, depressive episodes, nervousness, restlessness, malaise, and PTSD. It is not apparent from the document how the health care provider, a chiropractor, identified these issues, though it can reasonably be assumed they are self-reported.

[39] By December 2018, after the Applicant reportedly received physical therapy, an OCF-24 notes that the Applicant still suffers from some physical impairments. No psychological injuries are noted.

[40] Dr. Direnfeld noted the following important points:

- a. The Applicant reported a 15-year history of social anxiety, but no treatment;
- b. The Applicant reported feeling a little down;
- c. The Applicant reported feeling sad for a day due to family issues;
- d. The Applicant reported grinding his teeth due to anxiety, but not seeing a dentist or doctor about it;
- e. The Applicant reported having more good days than bad days;
- f. The Applicant reported loving his life and was traveling extensively in November and December 2018;
- g. The Applicant's self-report did not contain any evidence of psychological impairment to his occupational functioning;
- h. The Applicant reported limitations in daily activities due to pain;
- i. The Applicant reported driving less often;
- j. The Applicant did not meet the threshold for PTSD;
- k. The Applicant's reported social anxiety symptoms have not disrupted his daily living;
- l. The Applicant was assessed as having concerning levels of anxiety, moderate symptoms for depression, significant impairment of his life because of 'problems' in his life, and clinically relevant pain catastrophizing;
- m. Several of the assessment tools (e.g. Accident Fear Questionnaire, Beck scales, Pain Catastrophizing Scale, etc.) used to evaluate the Applicant yielded results that were either invalid or should be viewed with caution because of inconsistencies between them and the Applicant's self-reporting;
- n. "There is no DSM-5 diagnosis related to the subject accident. Based on the results of the Structured Clinical Interview for DSM-5, Mr. Jafari did not sustain any psychological injury or impairments as a result of the subject accident."

- [41] The March 2019 OCF-18 by Dr. Keeling uses the Applicant's self-reporting about his psychological symptomology to draw provisional diagnoses of adjustment disorder with anxiety and depression, and specific phobia. The proposed treatment plan goes on to attribute the symptomology to the accident and describes the conclusions drawn in the pre-screening as 'compelling evidence'.
- [42] I disagree with the Applicant's submissions that he has suffered psychological injury as a result of the accident for the following reasons. First, the Applicant cites the findings of the section 44 report, but does so very selectively. While I understand that part of zealous advocacy is highlighting the evidence useful to one's case, the very paragraphs cited by the Applicant in support of his case also discuss contrary evidence and conclusions. Taken in context and as a whole, the Applicant's references to the section 44 report do not assist him in concluding that he has suffered a psychological injury as a result of the accident.
- [43] Second, I prefer the evidence contained in the section 44 examination by Dr. Direnfeld to the pre-screening done in March 2019 by Dr. Keeling for the purposes of a proposed treatment plan. The section 44 examination is more thorough, and includes self-reports, assessment tools, and a file review in arriving at its conclusions. The pre-screening report must be discounted in weight because it is based solely on a self-report given two months after the section 44 examination. I recognize that a pre-screening may not be the appropriate place to apply assessment tools, but there is nothing to corroborate the Applicant's self-report (e.g., a consideration of the Applicant's file). Further, there are significant inconsistencies between what the Applicant reported during the section 44 examination and during the pre-screening, all of which favour the Applicant's position in the pre-screening. For example, the pre-screening contains no mention of the Applicant's reported prior psychological challenges, to the point where the pre-screening explicitly concludes that his mental health was good before the accident.
- [44] Third, and significantly, there is nothing in the record, aside from what is noted above, to indicate that the Applicant suffered psychological impairment as a result of the accident. If there were evidence available that would assist the Applicant in his case, I would presume it would be included in the record.
- [45] Finally, the Applicant relied on two cases in respect of his position.⁴ Both cases are highly distinguishable from the current instance. Neither case involved a question of whether the MIG applies or not. Both cases are about whether

⁴ *L.W. v. The Co-Operators General Insurance Company* 2016 CanLII 93133 (ON LAT), and *17-006460 v Scottish and York* 2018 CanLII 112111 (ON LAT).

treatment plans are reasonable and necessary. Even then, they are distinguishable from the remaining issues in this case. In *L.W.* the issue was causation and exacerbation of previous injuries, and whether that made the proposed treatment plans reasonable and necessary. The Tribunal found they were, in large part because the existence and extent of the injuries were well-documented in the applicant's medical records. In *17-006460*, the applicant's basis for a proposed treatment plan for a psychological assessment was well-triangulated. There were two independent assessments and a pre-screening which all showed consistent findings. With respect to chronic pain, there was ample evidence of treatment over the years, and the need for greater treatment.

[46] In sum, the Applicant has not, on a balance of probabilities, discharged his onus to demonstrate compelling evidence that he has a pre-existing condition, or that if he has a pre-existing condition that it would prevent him from maximal recovery. Further, the Applicant has not, on a balance of probabilities, discharged his onus to demonstrate that he suffered a psychological injury as a result of the accident which would warrant his removal from the MIG.

b. Is the Applicant entitled to the proposed treatment plans?

[47] Given my findings above, I need not consider whether the Applicant is entitled to the proposed treatment plans. However, even if I am wrong in my assessment above, I cannot conclude on a balance of probabilities that the Applicant's proposed treatment plans are reasonable and necessary for the following reasons.

[48] First, neither party has provided me with copies of the impugned treatment plans. I cannot, therefore, consider them in light of the Applicant's injuries and determine whether they are reasonable and necessary.⁵ It is the Applicant's burden to discharge, and he has not done so.⁶

[49] Second, with respect to the November 22, 2018 treatment plan for a psychological assessment, and the March 2019 proposed treatment plan for the cost of a psychological assessment, the only evidence available is that of the section 44 examination. And the section 44 report indicates that the Applicant has not suffered a psychological injury as a result of the accident, nor were there any accident-related emotional or behavioural symptoms causing him impairment.

c. Is the Applicant entitled to interest on any overdue payments?

⁵ See: section 15(1) of the Schedule.

⁶ *Scarlett v Belair Insurance*, 2015 ONSC 3635 (CanLII)

[50] Given my findings above, I find that the Applicant is not entitled to interest on any overdue payments.

d. Is the Respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the Applicant?

[51] Given my findings above, I find that the Respondent did not unreasonably withhold or delay payments to the Applicant, and is not liable for a special award.

ORDER

[52] The Applicant has not discharge his onus to demonstrate, on a balance of probabilities that (a) his injuries are not predominantly minor; (b) the proposed treatment plans are reasonable and necessary; (c) he is entitled to interest on any overdue payments; and (d) that the Respondent is liable for a special award. The application is dismissed.

Released: May 26, 2022



Asad Ali Moten, Adjudicator