2024 CanLII 2644 (ON LAT)

Citation: Costa v. Economical Insurance Company, 2024 ONLAT 22-001015/AABS

Licence Appeal Tribunal File Number: 22-001015/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:

Nicola Costa

Applicant

and

Economical Insurance Company

Respondent

DECISION

ADJUDICATOR: **Dominique Setton**

APPEARANCES:

For the Applicant:	Nicola Costa, Applicant Nicole Walker, Paralegal
For the Respondent:	Economical Insurance Company, Earl Murtha, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Nicola Costa, the applicant, was involved in an automobile accident on September 13, 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, Economical Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] 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 Minor Injury Guideline ("MIG") limit? Note: The parties agree the MIG limits have been exhausted.

ii. Is the applicant entitled to a treatment plan in the amount of $3,212.36 for psychological treatment submitted on June 12, 2020, by Medi Assess Evaluations?

iii. Is the applicant entitled to a treatment plan in the amount of $2,486.00 for psychological treatment submitted on June 27,2020, by Medi Assess Evaluations?

iv. Is the applicant entitled to a treatment plan in the amount of $1,553.72 for physiotherapy treatment submitted on April 5, 2022?

v. Is the respondent liable to pay an award under s. 10 of the O.Re.664 because it unreasonably withheld or delayed payments to the applicant?

vi. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[3] I find the applicant's injuries are predominantly minor as defined by s. 3 of the *Schedule*. The applicant is subject to the MIG limits.

[4] I find the applicant is not entitled to the disputed treatment plans.

2024 CanLII 2644 (ON LAT)

ANALYSIS

Are the applicant's injuries predominantly minor as defined in s. 3 of the Schedule and therefore subject to treatment within the $3,500 Minor Injury Guideline limit?

[5] I find the applicant did not meet his onus to establish that removal from the MIG is warranted. I find the applicant's injuries are predominantly minor in nature as defined in s. 3 of the *Schedule* and therefore subject to treatment within the $3500.00 MIG.

[6] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3500.00 if the insured sustains impairments that are predominantly a minor injury. Section 3(1) defines "minor injury" as "one or more sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes clinically associated sequelae to such an injury."

[7] An injured person may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or under section 18(2), that 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. The Tribunal has also determined that chronic pain with functional impairment or a psychological impairment may warrant removal from the MIG. In all cases, the burden of proof lies with the applicant.

[8] The applicant attended the Mississauga Hospital (part of Trillium Health Partners) on September 14, 2019, the day after the accident, due to a complaint about lumbar sacral spine, or lower back pain. According to the medical documents provided by the applicant and the respondent there was no acute fracture or malalignment identified. It was noted that there was a lumbar type of vertebra with hypoplastic ribs, but there were no other notes about this. The applicant was discharged from the hospital, with a diagnosis of "soft injury-back". I find that the hospital records show that the applicant's injuries are considered "soft injury-back".

[9] The respondent submits that that the lumbar type of vertebra and hypoplastic ribs identified are a congenital abnormality that is unrelated to trauma or musculoskeletal injury. There is no further evidence regarding this evidence by the applicant. I accept that this is unrelated to the accident.

[10] The applicant saw his family doctor Dr. George Iwanchyshyn on September 17, 2019, who identified tenderness and soft injury. He prescribed Tylenol and

2024 CanLII 2644 (ON LAT)

Epsom salt baths. I find that this confirms that the family doctor found the injury to be a soft tissue injury.

[11] The applicant returned to see Dr. Iwanchyshyn on September 27, 2019, because he complained that his lower back was not better. His family doctor examined him and prescribed physiotherapy, and to reposition himself at night, since he was complaining of not sleeping as well. He noted that he had full range on motion in his neck and “good” lower back pain. No head injury was noted. I find that the applicant’s doctor has maintained the injury is a soft tissue injury, that can be treated with physiotherapy.

[12] The applicant noted having attended Physio Med for physiotherapy and that his back pain improved which improved his overall health. I find that the physiotherapy was successful in treating the back pain.

[13] The applicant visited his family doctor again on February 25, 2020, and he complained of having some sleep issues and some anxiety. His doctor noted that this was likely due to issues related to sleep, and he was prescribed medications. No psychological issues such as suicidal ideation was noted and there were no complaints such as changes to vision, dizziness, or headaches. Dr. Iwanchyshyn noted some wz he noted a secondary concussion, which I noted both the applicant and respondent agree on.

[14] The respondent submits that there is no compelling evidence that the applicant suffered a concussion because there is no diagnosis of a concussion or of a post-concussive syndrome from the time he visited the hospital on September 14, 2019, the day after the accident or after during his visits with his family doctor in the months following the accident from September 2019 to February 2020.

[15] I agree with the respondent that there is insufficient evidence to establish that the applicant suffered a concussion. The family doctor refers to secondary concussion but stops there.

[16] A concussion is not included in the definition of the MIG. Although there were some symptoms, there was no diagnosis for a concussion. The applicant is there fore still in the MIG.

[17] I agree with the respondent, the applicant went to the hospital, and then to his family doctor, and it was determined he suffered from soft tissue injury, which is minor injury. When he went to his family doctor again September 27th, 2029, the doctor again noted he had full range of motion and good lower back pain, and when he attended the physiotherapy treatment recommended by his family

2024 CanLII 2644 (ON LAT)

doctor, it improved his health and successfully treated his back pain. When he attended in his family doctor in February 2020, and complained of sleep issues and some anxiety, his doctor prescribed medications, no psychological issues were noted, and he diagnosed symptoms of concussion, he did not diagnose a concussion.

[18] I conclude that the applicant's injuries are minor injuries, and he is subject to the MIG.

Are there pre-existing conditions which preclude recovery if kept in the MIG?

[19] The applicant's position is that he should be removed from the MIG, because he cannot be effectively treated within the confines of the MIG limits.

[20] An injured person may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or under section 18(2), that 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.

[21] There were no pre-existing conditions that were noted by the family doctor or in the hospital records.

Is there compelling medical evidence stating the condition precludes recovery if the applicant is kept with in the MIG?

[22] On April 5, 2022, Kaleem Shaikh prepared an OCF-18 for physiotherapy and identified the applicant's injuries as whiplash, headache, sprain and strain of the joints and ligaments of the thorax, lumbar spine, sacroiliac joint and ligaments at ankle and foot level, other anxiety, and other sleep.

[23] The applicant claims that the respondent denied the treatment on May 3, 2022, due to a lack of compelling medical evidence to support the treatment plan, that the respondent requested a s. 44 assessment, but it was never completed. The result is that the respondent denied the OCF-18, 20 days after it was submitted which is contrary to s. 38(8) because it is more than 10 days after the submission of the treatment plan, and it should therefore be deemed approved.

[24] The respondent submits that the OCF-18 was not submitted on April 5, 2022, it was signed then, and it was forwarded and received by the respondent on April 16, 2022, which is verified by the timestamp on the documents in the evidence.

2024 CanLII 2644 (ON LAT)

[25] In addition, the respondent wrote to the applicant requesting a s. 44 examination because the OCF-18 lacked medical documents to support reasonableness and necessity.

[26] An examination was conducted on June 21, 2022, by Dr. Pohang, who submitted a report on July 6, 2022. Dr. Pohang confirmed that there was no evidence that the applicant should be removed from the MIG. In the report, the doctor found there was no compelling evidence of a concussion because of the accident, or of a post-concussive syndrome at any time after the accident.

[27] I reject the position of the applicant that the denial was submitted late, as respondent provided the evidence of the timestamp.

[28] I prefer the examination report of Dr. Pohang, because of her examination, detail, and reference to other medical documents.

[29] I find, there are no pre-existing conditions raised that show that the applicant has any pre-existing conditions which could be a reason to take him out of the MIG. In addition, there is no compelling medical evidence stating that there is any condition that precludes recovery if the applicant is kept with in the MIG.

Were there psychological injuries that remove the applicant from the MIG?

[30] The applicant visited Peter Waxer, a registered psychologist, of Medi Assess on January 25, 2020. After completing a pre-assessment, he recommended psychological assistance, and completed an OCF-18 where he stated that it was his impression that the applicant suffered from a Persistent Somatic Symptom Disorder with Predominant Pain, Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia: Situational Type: Vehicular Related.

[31] The respondent denied this treatment plan because the applicant had never complained of psychological issues to his family doctor prior to February 25, 2020. On February 25, 2020, the applicant complained of having some sleep issues and some anxiety. His doctor noted that this was likely due to issues related to sleep, and he was prescribed medications. No psychological issues such as suicidal ideation was noted and there were no complaints such as changes to vision, dizziness, or headaches.

[32] On February 27, 2020, the applicant participated in a s. 44 psychological assessment conducted by Dr. Douglas Saunders in person. The purpose was to determine if the MIG applied and whether the OCF- 18 for the psychological assessment of Dr. Waxer was reasonable and necessary. This assessment was

2024 CanLII 2644 (ON LAT)

conducted over 2 hours and 15 minutes, several medical documents were reviewed, several psychometric tests were applied. During the interview the applicant presented as normal, and his responses were appropriate. In his findings of March 12, 2020, Dr. Saunders noted that the applicant tended to present a more negative impression than revealed by the objective clinical results. As a result, he concluded that he suffered from mild symptoms, and from a psychological point of view he did not suffer from more than minor injuries that did not remove him from the MIG.

[33] The applicant had already met in a video conference call with Dr. Waxer who had assessed the applicant on January 25, 2020. Dr. Waxer had never previously met the applicant in-person. He did not know this applicant, did not have the advantage of meeting him in person, and observing his behaviour in person.

[34] I put weight on the report of the of Dr. Saunders's because of his objective and detailed methodology. In his report, he details, that he met the applicant, for two hours and fifteen minutes, advised him of the purpose of an interview, obtained brief medical and personal history, obtained details about the accident, identified what treatment he had had to date, tested him with respect to activities of daily living, his complaints, the assessor's own observations, and listed the psychometric tests, explained the tests and the results, reviewed medical documents, and wrote a report, based on these documents. I found the report to be clear, methodical, and based on factual results and reasoned observations.

[35] In contrast, the report of Dr. Waxer, states his reliance on the "the details of the MVA that was consistent with the information found in his file". Dr. Waxer does not detail the nature of the information; however, he relies on this information and the applicant's self reporting. In the report Dr. Waxer acknowledges that during the interview the applicant could not recall many of the answers to the questions or was vague.

[36] After conducting some psychological tests, and Dr Waxer relied on these tests, together with the applicant's self reporting because he states, "both these scores, in concert, with his narrative comments and behavioural symptoms…" and goes on to state his conclusions.

[37] I found his conclusions insufficient because there was no reference made to medical reports made by the family doctor, or the hospital records. I find he relied on the self-reporting of the applicant and did not investigate further.

[38] As a result, I put weight on the s. 44 assessor's report, and evaluation by Dr. Saunders, and little weight on Dr. Waxer's report and evaluation.

2024 CanLII 2644 (ON LAT)

[39] In conclusion I find that there were no psychological injuries that remove the applicant from the MIG.

[40] I find the applicant's injuries are predominantly minor as defined by s. 3 of the Schedule. The applicant is subject to the MIG limits.

[41] I find the applicant is not entitled to the disputed treatment plans.

[42] Interest, there are no overdue benefits due to the applicant therefore this does not apply.

[43] Award, the applicant sought an award under s. 10 of Reg. 664. Under s. 10, the Tribunal. The respondent insurer did not unreasonably withhold or delay the payment of benefits, so this award does not apply.

ORDER

[44] I order as follows:

i. I find the applicant's injuries are predominantly minor as defined by the Minor Injury Guideline.

ii. I find the applicant is not entitled to the treatment plans in dispute.

iii. The applicant is not entitled to interest or an award.

[45] The application is dismissed.

Released: January 12, 2024

_____

Dominique Setton
Adjudicator

2024 CanLII 2644 (ON LAT)