



Citation: Reid v. Economical Mutual Insurance Company, 2021 ONLAT 20-001973/AABS

**Release date: 05/12/2021
File Number: 20-001973/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:

Benjamin Reid

Applicant

and

Economical Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR: Lindsay Lake

APPEARANCES:

For the Applicant: Maurice Benzaquen, Counsel

For the Respondent: Chelsea Gilder, Counsel
Riley McIntyre, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] The applicant, Benjamin Reid, was injured in an automobile accident on June 20, 2018 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ from Economical Mutual Insurance Company, the respondent.
- [2] The respondent denied the applicant's claims for various treatment plans and assessments because it had determined that all of the applicant'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").² The respondent also denied the applicant's claim for weekly income replacement benefits. As a result, the applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").
- [3] Three case conferences were scheduled in this matter on August 10, 2020, September 23, 2020 and October 30, 2020 and the matter ultimately proceeded to a written hearing.

ISSUES IN DISPUTE

- [4] The following issues are to be decided:
- (i) Are the applicant's injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the \$3,500.00 limit and in the MIG?
 - (ii) Is the applicant entitled to physiotherapy recommended by Newmarket Health & Wellness Centre as follows:
 - (a) \$199.96 (\$1,299.96 less \$1,100.00 approved) in a treatment plan ("OCF-18") dated January 28, 2019?
 - (b) \$622.05 in an OCF-18 dated April 8, 2018?
 - (c) \$3,966.36 in an OCF-18 dated May 17, 2019?

¹ O. Reg. 34/10 (the "*Schedule*").

² Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act*.

- (iii) Is the applicant entitled to \$2,198.00 for a psychological assessment recommended by Imperial Medical Assessments Inc. in an OCF-18 dated December 3, 2018?
- (iv) Is the applicant entitled to \$200.00 for a psychological pre-screen interview fee recommended by Imperial Medical Assessments Inc. in an OCF-18 submitted on December 3, 2018?
- (v) Is the applicant entitled to an income replacement benefit (“IRB”) of \$400.00 per week from June 27, 2018 to July 23, 2018?
- (vi) Is the respondent liable to pay an award under O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?
- (vii) Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] I find that the applicant has not met his burden of proving that his accident-related impairments warrant removal from the MIG based on a psychological impairment or as a result of chronic pain. Accordingly, it is not necessary for me to determine whether the treatment plans are reasonable and necessary because the maximum amount of \$3,500.00 for medical and rehabilitation benefits under the MIG has been approved by the respondent.
- [6] I also find that the applicant is not entitled to IRBs pursuant to s. 36(3) of the *Schedule*, as he failed to file a completed Disability Certificate with the insurer until after the expiry of the period in dispute. The applicant is not entitled to an award under *O. Reg. 664* or interest, and the application is dismissed.

ANALYSIS

The Minor Injury Guideline (“MIG”)

- [7] 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*.

- [8] Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to \$3,500.00. An applicant may receive payment for treatment beyond the \$3,500.00 cap if they can provide evidence that they sustained a psychological impairment or chronic pain as a result of the accident. It is the applicant's burden to establish entitlement to coverage beyond the \$3,500.00 cap on a balance of probabilities.³
- [9] I find that the applicant has not met his burden of proving that his accident-related impairments require treatment beyond the MIG based on a psychological impairment or as a result of chronic pain.

Psychological Impairment

- [10] The applicant submitted that as a result of the accident, he sustained psychological impairments including depression, anxiety and driving anxiety/avoidance which all fall outside of the MIG.
- [11] To support his position, the applicant primarily relies upon the June 6, 2020 Psychological Report by Dr. Eugene W. Hewchuk, psychologist,⁴ in which Dr. Hewchuk diagnoses the applicant with Somatic Symptom Disorder with Predominant Pain.⁵ Dr. Hewchuk's report followed an initial December 1, 2018 Psychological Status Evaluation Report by Katerina Rzumova, registered psychologist, acting under the supervision of Dr. Hewchuk (the "pre-screen report"),⁶ in which the applicant was provisionally diagnosed with an Adjustment Disorder.⁷
- [12] I place little weight on Dr. Hewchuk's June 6, 2020 report in determining whether the applicant sustained a psychological impairment as a result of the accident for the following reasons:
- (i) As part of Dr. Hewchuk's June 6, 2020 report, the applicant was administered the Beck Depression Inventory-II ("BDI-II") questionnaire and the Multidimensional Anxiety Questionnaire ("MAQ"). Dr. Hewchuk noted that on the MAQ, the applicant reported elevated symptoms on the physiological panic scale, the social phobia scale, the worry-fears

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

⁴ Written Submissions of the Applicant, tab 7.

⁵ *Ibid.* at page 12.

⁶ The pre-screen report is contained on the December 3, 2018 OCF-18 that sought funding for the full psychological assessment, Written Submissions of the Applicant, tab 18.

⁷ *Ibid.*

scale and the negative affectivity scales.⁸ The applicant's score on the BDI-II for the June 6, 2020 report, however, was in the minimal range.⁹ In the pre-screen report the applicant was administered both the BDI-II and the Beck Anxiety Inventory ("BAI") questionnaire rather than the MAQ. For the pre-screen report, the applicant scored in the moderate range on both the BAI and the BDI-II. There is no explanation as to why the MAQ, which was the primary basis for Dr. Hewchuk's diagnosis of Somatic Symptom Disorder with Predominant Pain, was administered to the applicant as part of the June 6, 2020 report, as opposed to the BAI;

- (ii) The applicant's elevated reporting of symptoms on the MAQ on the physiological panic, the social phobia, the worry-fears and the negative affectivity scales are inconsistent with the applicant's self-reports to Dr. Hewchuk. The applicant reported that he had "largely overcome driving anxiety,"¹⁰ and Dr. Hewchuk noted that the applicant's responses, "suggest that he is satisfied with himself as he is, [and] that he is not experiencing marked distress;"¹¹
- (iii) Dr. Hewchuk opined that the applicant is, "substantially unable to perform the essential tasks of employment on a full-time basis as a result of the motor vehicle accident,"¹² but the applicant had returned to work on a full-time basis almost two years prior to Dr. Hewchuk's assessment in July 2018. Dr. Hewchuk's report itself noted that the applicant has returned to full-time duties;¹³
- (iv) Dr. Hewchuk's diagnosis and statements in his report that the applicant was overwhelmed with his pain which led the applicant to have increased feelings of frustration and depression is not supported by any other evidence before me. For example, in the June 5, 2019 In-Person Physician Insurer's Examination ("IE") Assessment report by Dr. Hasgmat Khan, physician,¹⁴ Dr. Khan noted that while the applicant initially felt anxious when driving after the accident, that the applicant reported that this had improved.¹⁵ Dr. Khan also noted that the

⁸ *Supra* note 4 at page 10.

⁹ *Ibid.* at page 9.

¹⁰ *Ibid.* at page 3.

¹¹ *Ibid.* at page 8.

¹² *Ibid.* at page 12.

¹³ *Ibid.* at page 2.

¹⁴ Written Submissions of the Applicant, tab 6.

¹⁵ *Ibid.* at page 5.

applicant did not report any psychological symptoms.¹⁶ Additionally, the applicant made no psychological complaints to his family physician, Dr. Sam Henein, following the accident. Dr. Hewchuk provides no analysis or discussion about his psychological diagnosis of the applicant against the absence of any psychological complaints made to the applicant's primary care physician; and

- (v) Dr. Hewchuk's report fails to list any other documents reviewed as part of his assessment of the applicant.

[13] In contrast, the respondent relied upon the July 19, 2019 In-Person Psychological IE Assessment Report by Dr. Michael Schwartz, psychologist.¹⁷ Dr. Schwartz opined that the applicant's psychological symptoms did not rise to the extent of an impairment and, as a result, Dr. Schwartz made no psychological diagnosis.¹⁸ I place greater weight on Dr. Schwartz's report than on Dr. Hewchuk's, because Dr. Schwartz reviewed the clinical notes and records ("CNRs") of Dr. Heinen as part of his assessment of the applicant. Additionally, Dr. Schwartz's opinion that the applicant's impairments did not warrant a psychological diagnosis is more consistent with the lack of any psychological complaints made by the applicant in Dr. Heinen's CNRs. I also agree with the applicant's submissions that Dr. Schwartz noted in his report that the applicant was still experiencing psychological symptomatology. However, it was Dr. Schwartz's opinion that the applicant's mild symptoms did not rise to the level of a psychological diagnosis and I accept his opinion.

[14] The applicant also relied upon the August 28, 2018 Disability Certificate ("OCF-3") completed by Andrea Glaschi, chiropractor, and the March 25, 2019 OCF-18 completed by Farhankhan Pathan, physiotherapist, as evidence that he sustained a psychological impairment as a result of the accident. While these documents list, among other conditions, "other anxiety disorders" in the injury and sequelae information section, it is settled that an OCF-3 or OCF-18 are not evidence in and of themselves of a diagnosis. Further, a diagnosis of "other anxiety disorders" is also outside the scope of practice of both a chiropractor and a physiotherapist.

[15] For completeness, I also do not agree with the applicant's submission that he was prescribed anxiety medication following the accident.¹⁹ Dr. Henein's CNRs

¹⁶ *Ibid.*

¹⁷ Written Submissions of the Applicant, tab 5.

¹⁸ *Ibid.* at page 11.

¹⁹ Written Submissions of the Applicant, page 2.

do not reflect any such prescription being made and the applicant consistently reported to several assessors that he was not taking any prescription medication following the accident.²⁰

- [16] For all the reasons set out above, I find that the applicant has failed to prove on a balance of probabilities that he sustained a psychological impairment as a result of the accident. Therefore, his injuries do not fall outside of the MIG on this basis.

Chronic Pain

- [17] The applicant submitted that his injuries are outside of the MIG as he suffers from chronic pain as a result of the accident. While the applicant submitted no evidence that he has been diagnosed with chronic pain or chronic pain syndrome, the applicant nonetheless submitted that he suffers from chronic pain as his pain complaints and associated physical limitations have persisted beyond 3-6 months post-accident. The applicant relies upon *T.S. v. Aviva General Insurance Canada*²¹ to support his position.

- [18] While I am not bound by other Tribunal decisions, I find that *T.S. v. Aviva* is persuasive in determining whether an applicant suffers from chronic pain and if, as a result, they should be removed from the MIG. In addition, the Tribunal has also consistently found that where pain is severe, constant and causes functional impairment, an applicant may be removed from the MIG. Removal from the MIG for chronic pain also does not require a diagnosis of chronic pain or chronic pain syndrome by a physician.

- [19] I accept that the applicant continued to report ongoing pain primarily in his left shoulder and in his neck and back well outside of the 3-6 months post accident period. This is evidenced in Dr. Henein's CNRs and in various assessment reports. However, I find that the applicant's ongoing pain has not adversely affecting his functionality or well-being.

- [20] Dr. Hewchuk's report is the only evidence before me in which the applicant is reported as having ongoing functional impairments. For example, Dr. Hewchuk reported that:

- (i) The applicant's ability to perform basic essential daily housekeeping tasks have been compromised and that his parents have taken over

²⁰ *Supra* note 17 at page 5 and *supra* note 14 at page 3.

²¹ 2018 CanLII 83520 (ON LAT) ("*T.S. v. Aviva*").

completion of many of these tasks.²² Dr. Hewchuk opines that the applicant suffers a substantial inability to perform housekeeping and home maintenance;²³

- (ii) The applicant is no longer able to golf, fish, play baseball and hockey with his friends;²⁴
- (iii) The applicant is substantially unable to perform the essential tasks of his employment on a full-time basis as a result of the motor vehicle accident;²⁵ and
- (iv) The applicant is currently unable to return to carrying out activities of normal life.²⁶

[21] In contrast, the applicant reported the following to Dr. Khan as part of his June 5, 2019 assessment and to Dr. Schwartz as part of his July 19, 2019 assessment:

- (i) He was not taking medication as a result of the accident;²⁷
- (ii) He was independent and able to maintain his activities of daily living;²⁸
- (iii) He was able to complete his own housework²⁹ and that he had returned to his pre-accident level of housekeeping including yard work and snow shovelling;³⁰
- (iv) He returned to work after a short time off to his usual responsibilities;³¹
- (v) He has experienced a reduction in his leisure activities and that he was still fishing, playing catch, road hockey and golf;³² and

²² *Supra* note 4 at pages 2-3.

²³ *Ibid.* at page 12.

²⁴ *Ibid.* at page 3.

²⁵ *Ibid.* at page 12.

²⁶ *Ibid.*

²⁷ *Supra* note 14 at page 3 and *supra* note 17 at page 5.

²⁸ *Supra* note 14 at page 4 and *supra* note 17 at page 7.

²⁹ *Supra* note 17 at page 7.

³⁰ *Supra* note 14 at page 4.

³¹ *Supra* note 14 at page 5 and *supra* note 17 at page 7.

³² *Supra* note 17 at page 7.

(vi) He continues to drive.³³

[22] In addition to the issues concerning Dr. Hewchuk's report, as discussed above at paragraph [12], I place more weight on the applicant's reported level of post-accident functioning to Dr. Khan and Dr. Schwartz because the information included in their reports is more consistent with Dr. Henein's evidence. For example, Dr. Henein never prescribed pain medication to the applicant following the accident, Dr. Henein's CNRs contain no notes regarding the applicant's functionality outside his temporary period of being off work after the accident and Dr. Henein completed a Return to Work Assessment form dated July 16, 2018 which permitted the applicant's return to work on full duties and hours.³⁴

[23] For all these reasons, I find that the applicant has failed to prove that he has chronic pain that adversely affected his well-being and functionality as a result of the accident. Therefore, he is also not removed from the MIG based on chronic pain.

The Disputed Treatment Plans

[24] As I have found that the applicant's injuries fall within the MIG, it is unnecessary for me to consider the reasonableness and necessity of the disputed treatment plans because the respondent has approved the maximum amount of medical and rehabilitation benefits of \$3,500.00 available under the MIG as of February 7, 2019.³⁵

[25] Moreover, as indicated on page 2 of the two treatment plans dated December 3, 2018 and the May 17, 2019 treatment plan, these disputed OCF-18s propose treatment outside the MIG framework which I have determined the applicant is not entitled to.

Income Replacement Benefits

[26] The applicant is seeking payment of IRBs for the period of June 27, 2018 to July 23, 2018.

[27] Section 36(3) of the *Schedule* provides that an applicant is not entitled to income replacement benefits until a completed OCF-3 is submitted to an insurer.

³³ *Ibid.*

³⁴ Hearing Brief of the Respondent, tab 29.

³⁵ February 7, 2019 correspondence from the respondent to the applicant, Hearing Brief of the Respondent, tab 12.

- [28] The only OCF-3 before me is dated August 28, 2018, and the respondent submitted that it received this OCF-3 on or about August 31, 2018.³⁶
- [29] The applicant provided no evidence or submissions regarding the submission date of the August 28, 2018 OCF-3. Instead, the applicant's submissions on the issue of IRBs focused on the submission of an Employer's Confirmation Form ("OCF-2"), which was not disputed by the respondent.
- [30] Section 36(3) of the *Schedule* is clear: the applicant is not entitled to IRBs for any period prior to a completed OCF-3 being submitted to the respondent. As the only OCF-3 before me was dated outside of the period that the applicant is claiming IRBs, I find that the applicant is not entitled to IRBs in this matter.

Award

- [31] Section 10 of *O. Reg. 664* provides that, if the Tribunal finds that an insurer has unreasonably withheld or delayed payment of benefits, the Tribunal may award a lump sum of up to 50 per cent of the amount in which the person was entitled.
- [32] As I have found that there are no payment of benefits or costs owing, there is no basis upon which to consider an award in this matter.

Interest

- [33] As there are no benefits owing, no interest is payable.

CONCLUSION

- [34] For the reasons outlined above, I find that the applicant:
- (i) has not met his burden of proving that his accident-related impairments warrant removal from the MIG. Accordingly, it is not necessary for me to determine whether the treatment plans are reasonable and necessary because the maximum amount of \$3,500.00 for medical and rehabilitation benefits under the MIG has been approved by the respondent;
 - (ii) Is not entitled to payment of IRBs;
 - (iii) Is not entitled to an award under *O. Reg. 664* or interest; and

³⁶ Responding Submissions of Economical Insurance, para. 3.

(iv) This application is dismissed.

Date of Issue: May 12, 2021

A handwritten signature in black ink, appearing to read "Lindsay Lake", positioned above a horizontal line.

Lindsay Lake, Adjudicator