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

Ontario

Tribunal File Number: **17-001855/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:

G. C.

Applicant

and

Wawanesa Mutual Insurance Company

Respondent

DECISION

Adjudicator:	Anna Truong
Appearances:	Zoulfia Khassanova, Paralegal for the Applicant
	Domenic Nicassio, Counsel for the Respondent
	Bogdan Miscevic, Counsel for the Respondent
Heard in writing on:	July 26, 2017

OVERVIEW

[1] G.C. (the "applicant") was involved in an automobile accident on March 20, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*").

[2] The applicant applied for medical benefits that were denied by the respondent, because he 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").

ISSUES TO BE DECIDED

[3] The following are the issues to be decided:

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

2. If the answer to issue one is no:

    a. Is the applicant entitled to the cost of an attendant care assessment as outlined in the Treatment and Assessment Plan (OCF-18) dated April 28, 2015, recommended by General Med M. Inc., in the amount of $200?

    b. Is the applicant entitled to the cost of a psychological assessment as outlined in the Treatment and Assessment Plan (OCF-18) dated June 5, 2016, recommended by General Med M. Inc., in the amount of $1,995.91?

3. Is the applicant entitled to costs pursuant to Rule 19.1 of the *Licence Appeal Tribunal Rules of Practice and Procedure*?

RESULT

[4] Based on the totality of the evidence before me, I find the applicant sustained predominately minor injuries as defined under the *Schedule*. Since the answer to issue one is yes, the applicant is not entitled to any of the assessments in dispute. I also find the applicant is not entitled to costs.

ANALYSIS

[5] The only evidence submitted by the parties is documentary evidence. I have considered all of the documents submitted and summarized the ones I find relevant to my determination below.

1. Applicability of the Minor Injury Guideline

[6] The Minor Injury Guideline ("MIG") establishes a framework for the treatment of minor injuries. The term "minor injury" is defined in section 3 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 also defined in section 3. Section 18(1) limits recovery for medical and rehabilitation benefits for such injuries to $3,500 minus any amounts paid in respect of an insured person under the MIG.

[7] Section 18(2) of the *Schedule* makes provision for some injured persons who have a pre-existing medical condition to receive treatment in excess of the $3,500 cap. To access the increased benefits, the injured person's healthcare provider must provide compelling evidence that the person has a pre-existing medical condition, documented prior to the accident, which will prevent the injured person from achieving maximal recovery if benefits are limited to the MIG cap.

[8] The respondent submitted the decision of *Scarlett v. Belair Insurance*, 2015 ONSC 3635 (CanLII) ("*Scarlett*"). In this case, the Divisional Court reviewed the minor injury provisions in the *Schedule*, finding that they were a limit on an insurer's liability, not an exclusion from coverage, and the onus of establishing entitlement beyond the cap rests with the claimant. Applying *Scarlett*, the applicant must establish his entitlement to coverage beyond the $3,500 cap for minor injuries.

[9] The applicant's submissions are presented in a letter approximately five pages in length, single-spaced without any paragraph spacing. There are no proper pinpoint references to any of the supporting evidence provided with the submissions. The applicant does not use proper quotations and his arguments are interspersed between excerpts of evidence. It is very difficult to separate arguments from evidence quoted within his submissions. Furthermore, despite the explicit Order of the Case Conference Adjudicator, there is no index and the applicant's submissions are not paginated.

[10] The applicant's submissions appear to consist of four pages copied from Dr. Cheryl Walker's initial psychological pre-screening report of October 16, 2015, and her psychological report dated August 15, 2016. The remaining page of the applicant's submissions consists of a reference to workplace incidents, which appear unrelated to the accident. The applicant referenced two pages from his

employment file: pages 42 and 70. The applicant's employment file was not paginated, so I had trouble locating the two pages the applicant referenced in his submissions. Therefore, I only examined the excerpts the applicant provided in his submissions.

[11] The applicant referenced two workplace incidents post-accident. The first consists of the applicant failing to report to his supervisor about a temporary employee being intoxicated at work. The second incident consists of the applicant failing to perform a pre-shift inspection of his forklift. With respect to these incidents, the applicant argued he was exhausted and in a "bad mood" on these days, because he did not sleep well due to back pain and stress. However, the applicant does not specify the cause was accident-related. Furthermore, the applicant only makes submissions and does not provide any evidence to support this, not even an affidavit. There is no evidence before me that these workplace incidents were caused by his accident-related impairments. The applicant has not explained why these incidents support his removal from the MIG, or his entitlement to the assessments in dispute. Accordingly, I find these incidents have no bearing on whether or not the applicant has sustained a predominantly minor injury. I also find they have no bearing on whether or not the medical benefits in dispute are reasonable and necessary.

[12] The applicant submits the evidence is "overwhelming" that his injuries do not fall within the MIG and the medical benefits in dispute are reasonable. However, he does not specifically explain why. The applicant makes several submissions generally with respect to his alleged "injuries post-accident". However, he does not provide any pinpoint references to evidence supporting these submissions. He only provides submissions and submissions are not evidence. The applicant must direct the adjudicator to the relevant evidence in support of his case and explain why he meets the test based on this evidence. An applicant cannot simply submit evidence and leave it up to the adjudicator to connect the dots and make his case. The applicant must explicitly explain why the evidence is supportive of his case. He has failed to do so.

[13] From his submissions, it appears the applicant is advocating for his removal from the MIG due to psychological impairments. While he does not explicitly state this, he reproduced portions of Dr. Walker's reports, which does advocate the applicant's removal from the MIG due to his psychological impairments. Furthermore, the applicant emphasizes that portion of Dr. Walker's report by underlining it within his submissions. Dr. Walker diagnosed the applicant with a Major Depressive Disorder, Single Episode, Unspecified, because he is experiencing difficulties with symptoms of depression, anxiety, worry, suspicious thoughts, and self-consciousness directly related to the accident. She opined a claimant diagnosed with a predominately psychological impairment cannot be treated within the MIG. Therefore, she concluded the applicant does not fall within the MIG.

[14] In the Insurer's Examination Psychologist Report of Dr. Karen Spivak dated December 1, 2015, she noted the applicant did not think psychological counselling would help when he was questioned directly about it. Furthermore, Dr. Spivak noted the applicant denied experiencing depressed or anxious mood. Dr. Spivak conceded the applicant was experiencing minimal to mild levels of emotional distress, but it was not enough to constitute a psychological impairment or substantially interfere with his activities of daily living. Dr. Spivak concluded the applicant did not meet the full criteria for a DSM-5 psychological diagnosis.

[15] The applicant's submissions and evidence are insufficient to establish he has any impairment that would remove him from the MIG. While the applicant provided portions of Dr. Walker's reports, this is not sufficient to establish his accident-related injuries are not predominantly minor. Given there are two conflicting medical opinions, one in favour of the applicant and one against, I must look for corroboration in the rest of the applicant's medical evidence. There is none.

[16] The applicant submitted the clinical notes and records of his family physician, Dr. Lim, from approximately December 24, 2014 to March 17, 2017, and records of Pro-Physiotherapy from approximately April 29, 2008 to May 8, 2017. However, the applicant made no reference to them in his submissions. From my independent review of the records, I did not find anything supporting his removal from the MIG. There were no references to any psychological symptoms. If there is anything contained in those records that could potentially remove the applicant from the MIG, he did not point me to them and he made no submissions with respect to them. Furthermore, the applicant made no submissions with respect to any pre-existing medical conditions which could prevent him from recovering under the MIG. Therefore, I do not need to decide whether or not he had a pre-existing condition which prevents his recovery under the MIG.

[17] Based on the evidence before me, I find the applicant has not met his onus of proving on a balance of probabilities he did not sustain predominately minor injuries as a result of the accident. Therefore, I find the applicant has sustained predominately minor injuries and can be appropriately treated within the MIG.

2. **Medical Benefits**

[18] Since I have found the applicant sustained predominately minor injuries as defined under the *Schedule*, the cost of the two assessments are not payable as the respondent has approved treatment up to the MIG limits.

3. **Costs**

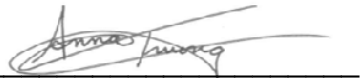
[1] Costs were not an issue raised at the Case Conference, but it was raised by the applicant in his initial hearing submissions. The *Licence Appeal Tribunal Rules of Practice and Procedure* (the "Rules") include a provision in Rule 19.1 for parties to request costs of the proceeding, if they believe that the other party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith. Rule 19.4 further sets out the requirements for that request, which must include the reasons for the request and the particulars of the alleged conduct.

[2] The applicant has alleged the respondent's conduct to be "grievous and unreasonable withholding of benefits" and argues he should be awarded costs. However, the applicant has not set out the reasons for the request or the particulars of the respondent's conduct which would attract a cost award. The applicant has failed to meet the threshold and requirements for costs set out in Rule 19. There is insufficient evidence of conduct that is unreasonable, frivolous, vexatious, or in bad faith before me, so I cannot make an order for costs in this matter. Therefore, no costs will be awarded.

CONCLUSION

[19] For the reasons outlined above, I find the applicant sustained predominately minor injuries as defined under the *Schedule* and he is not entitled to any of the medical benefits in dispute. I also find he is not entitled to any costs.

Released: October 27th, 2017



Anna Truong, Adjudicator