Citation: Gangani v. Pembridge Insurance Company, 2021 ONLAT 20-002998/AABS

Licence Appeal Tribunal File Number: 20-002998/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:

Nazlin Gangani

Applicant

and

Pembridge Insurance Company

Respondent

DECISION

ADJUDICATOR: **Stephanie Kepman**

APPEARANCES:

For the Applicant: Peter Cimino, Counsel

For the Respondent: Sonya Katrycz, Counsel

HEARD: **By way of written submissions**

REASONS FOR DECISION

BACKGROUND

[1] The applicant was involved in an automobile accident on August 9, 2018, and sought benefits pursuant to the Statutory Accident Benefits Schedule *Effective September 1, 2010 (the 'Schedule')*[1].The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

[2] The parties participated in a Case Conference on January 14, 2021 but were only able to resolve one issue in dispute, with the remaining issues sent to a written hearing for a determination to be made by the Tribunal.

ISSUES

[3] On consent, the parties agreed that the following issues are to be determined by the Tribunal:

a. 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 Minor Injury Guideline?

b. Is the applicant entitled to a medical benefit in the amount of $1,070.00 for physical rehabilitation, in a treatment plan submitted on September 24, 2018, denied on October 22, 2018?

c. Is the applicant entitled to a benefit in the amount of $2,797.60 for 16 physiotherapy sessions, submitted on May 27, 2019, denied on June 19, 2019?

d. Is the applicant entitled to a medical benefit in the amount of $2,443.80 for 14 sessions of physiotherapy, in a plan, submitted on September 12, 2019, denied on October 4, 2019?

e. Is the applicant entitled to interest on any overdue benefit owing?

[1] O. Reg. 34/10 as amended.

RESULTS

[4] The applicant's injuries are predominantly minor in nature. As she has exhausted the $3,500.00 monetary limit of the MIG, she is not entitled to the medical benefits in dispute, nor any interest on it.

LAW

[5] Section 3(1) of the *Schedule* states that a minor injury consists of one or more a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury. Section 3(1) of the Schedule also establishes the treatment framework regarding minor injuries.

[6] Section 18(2)of the *Schedule* provides that the $3,500.00 funding limit does not apply if an applicant provides compelling medical evidence that she has a pre-existing medical condition that will prevent her from achieving maximal recovery from the minor injury if she is subject to the MIG funding limit.

EVIDENCE & POSITIONS

Minor Injury Guideline

[7] The respondent denied the applicant's claims because it determined that all of the applicant's injuries fit the definition of "minor injury" prescribed by section 3(1) of the *Schedule*, and therefore, fall within the Minor Injury Guideline[2] ("the MIG"). The applicant's position is the opposite.

[8] If the applicant's position is correct, then I must address the issue of whether the medical treatments claimed are reasonable and necessary.

[9] If the respondent's position is correct, then the applicant is subject to a $3,500.00 limit on medical and rehabilitation benefits prescribed by s.18(1) of the Schedule, and in turn, a determination of whether claimed medical benefits are reasonable and necessary will be unnecessary as the $3,500.00 maximum benefit for minor injuries has been exhausted.

[10] The onus is on the applicant to show that her injuries fall outside of the MIG[3].

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

[3] *Scarlett v. Belair,* 2015 ONSC 3635 para.24

[11] The applicant argued that she should be removed from the MIG on the basis that she has a pre-existing condition and suffers from chronic pain.

Does the applicant have any pre-existing conditions?

[12] Section 18(2) of the *Schedule* provides that insured persons with minor injuries who have a pre-existing medical condition may be exempted from the $3,500 cap on benefits. In order to be removed from the MIG, the applicant must provide compelling evidence meeting the following requirements:

i. There was a pre-existing medical condition that was documented by a health practitioner before the accident; and

ii. The pre-existing condition will prevent maximal recovery from the minor injury if the person is subject to the $3,500 on treatment costs under the MIG.[4]

[13] The standard for excluding an impairment on the basis of pre-existing condition(s) is well-defined and strict. A pre-existing condition will not automatically exclude a person's impairment from the MIG: it must be shown to prevent maximal recovery within the cap imposed by the MIG.

[14] After considering the parties evidence and submissions, based on a balance of probabilities, I find that the applicant has not demonstrated that her pre-existing condition prevents her from reaching maximum medical recovery within the MIG for the following reasons:

a. The applicant submitted that just before the accident, she had been seen by her family physician, Dr. Martin Leung.

Dr. Leung[5] noted that the applicant had a "*marginal osteophyte formation anteriorly at L2-L3, associated with a mild degree of disc space narrowing at the former level*."

When the applicant returned to see Dr. Leung, he opined that the applicant's pain was likely Degenerative Disk Disease and prescribed the applicant Lyrica[6].

The applicant continued visiting Dr. Leung in 2018 and 2019 due to her complaints of pain. After a Magnetic Resonance Imaging ('MRI') of the

[4] Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act* page 5, Part 4, "Impairments that do not come within this Guideline".
[5] Dr. Leung's clinical notes and records dated June 18, 2018
[6] Dr. Leung's clinical notes and records dated July 26, 2018

applicant's lumbar spine[7], Dr. Leung noted global disc bulging at the L2-L3, L3-L4, L4-L5 and L5-S1 levels.

When the applicant returned to Dr. Leung, she continued to complain of lower back pain, and weakness and numbness in her legs.

b. The respondent did not refute that the applicant had Degenerative Disk Disease prior to the accident. Instead, it submitted that the applicant's pre-existing condition did not require treatment outside of the MIG, and that the applicant had failed to meet her burden to prove such

c. The respondent stated that the applicant had not provided any medical legal reports to contradict its section 44 assessments, which found that the applicant's injuries fell within the MIG.

The respondent's section 44 assessor Dr. Rajika Soric, Physiatrist, prepared a report[8] following a physical exam of the applicant. Dr. Soric found that the applicant may have suffered from minor, soft tissue injuries from her accident, but that in Dr. Soric's opinion, those injuries are resolved. Dr. Soric couldn't explain the applicant's on-going symptoms, and found that the applicant was fully functional. She opined that the applicant's injuries were treatable within the MIG.

d. I preferred the respondent's position, namely that the applicant had not demonstrated that her Degenerative Disk Disease required treatment outside the MIG to reach maximum medical recovery, as it was able to substantiate this position with medical evidence.

The respondent drew the Tribunal's attention to Dr. Leung's clinical notes and records of May 19, 2020, which stated: "*MRI shows no change in lumbar DDD from 2018*".

Since the applicant's own family doctor noted no change in her Degenerative Disk Disease, or DDD, since 2018, I find that the applicant's pre-existing condition does not prevent her from reaching maximum medical recovery within the MIG.

[7] Dated August 28, 2018
[8] Dated February 11, 2021

Does the applicant suffer from chronic pain?

[15] The applicant submitted that she suffers from chronic pain or fibromyalgia, which removes her from the MIG, because the prescribed definition of "minor injury" does not include chronic pain conditions.

[16] After considering the parties evidence, based on a balance of probabilities, I find that the applicant has not established that she suffers from chronic pain or fibromyalgia, for the following reasons:

a. The applicant submitted that she has had on-going pain, which has not resolved within the expected time period. She relied on the medical records of her family doctor, Dr. Leung, from 2018, 2019, and 2020. These showed that she has been expressing concern for her pain level since before the accident and after. The applicant directed the Tribunal's attention to Dr. Leung's clinical notes and records[9], which state "*body pains/lumbar DDD Likely fibromyalgia".*

b. Based on this, she was referred to Dr. Yen-Fu ('Tom') Chen[10], Physiatrist for chronic back and leg pain. Dr. Chen had a telephone consultation with the applicant, which was based on the applicant's self-reporting.

   Dr. Chen proposed that Dr. Leung refer the applicant to multidisciplinary chronic pain treatment as well as to her own therapist/doctors for accident related issues such as disability and pain issues.

   On August 12, 2020, during a phone consultation, the applicant again brought up her pain issues. Dr. Leung opined that this was "likely lumbar back pain with exaggerate response as per MRI. Patient will go to Wilderman pain clinic first".

c. The respondent submitted that the applicant had not fulfilled the Tribunal's required factors[11], based on the AMA Guides, to establish chronic pain, which are:

   i. Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances;

[9] Dated October 10, 2019
[10] On June 9, 2020
[11] 17-007825 v Aviva Insurance Canada, 2018 CanLII 98282 (ON LAT) at para 6.

ii. Excessive dependence on health care providers, spouse, or family;

iii. Secondary physical deconditioning due to disuse and or fear-avoidance of physical activity due to pain;

iv. Withdrawal from social milieu, including work, recreation, or other social contacts;

v. Failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family or recreational needs;

vi. Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviors.

The respondent argued that the applicant does not overuse prescription medication, works full-time, and has no accident-related limitations to her activities of daily living ('ADL's).

Based on all of the above, the respondent submitted that the applicant has not shown that her pain meets the severity threshold of the AMA Guides and causes her a level of impairment that rises to remove her from the MIG.

d. I preferred the respondent's position, which rejected that the applicant suffers from chronic pain; Although I am not bound by the AMA Guides in respect of chronic pain and the *Schedule* does not incorporate the AMA Guides in this context (unlike for catastrophic impairment), I find the AMA Guides to be a useful tool.

In this case, the applicant does not have a diagnosis of chronic pain from a medical practitioner, nor has she demonstrated that she fits within the criteria of the AMA Guides for a diagnosis of chronic pain.

Though the applicant may not need a formal diagnosis of chronic pain[12], without demonstrating that the applicant's pain impairments fit within the AMA Guide criteria, I cannot find that the pain she is experiencing is such.

[12] C.D. v Aviva Insurance Company, 2020 CanLII 63601 (ON LAT)

Though I do believe that the applicant continues to experience on-going pain, I am not persuaded that this pain meets the AMA Guides' threshold.

Furthermore, I agreed with the respondent's concerns that the applicant had not visited Dr. Leung between November 2018 and October 2019. In a case of chronic pain, I would have expected the applicant to not have a visitation gap of nearly a year.

[17] Since the applicant has not demonstrated that she suffers from an injury or impairment that would remove her from the MIG, I do not need to consider if the treatment plans in dispute are reasonable and necessary.

Interest on any overdue payment of benefits

[18] Since no benefits in dispute are overdue, no interest is owing.

CONCLUSION AND ORDER

[19] I find that the applicant's injuries are predominately minor injuries as defined by the *Schedule*. Since the applicant has exhausted the $3,500.00 monetary limit of the MIG is, her medical benefits in dispute will not be considered.

[20] I find no benefits are overdue and the applicant is not entitled to interest. Therefore, the application is dismissed

Released: December 8, 2021

Stephanie Kepman
Adjudicator