

**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**

Tribunal File Number: 17-005698/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:

T.C.

Applicant

and

Unifund Claims Inc.

Respondent

DECISION

ADJUDICATOR:

Robert Watt

APPEARANCES:

Counsel for the Applicant:

Lisa Bishop

Counsel for the Respondent:

Sarah Deol

HEARD: Written Hearing:

March 7, 2018

OVERVIEW

- [1] The applicant was injured in a motor vehicle accident on November 24, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule-effective September 1, 2010* (the “*Schedule*”)
- [2] The applicant submitted an application to the Licence Appeal Tribunal-Automobile Accident Benefits Service (the “Tribunal”)
- [3] The Tribunal held a case conference on December 4, 2017, and the matter proceeded to a written hearing on March 7, 2018.

ISSUES IN DISPUTE

- [4] The case conference order dated December 21, 2017 indicates that the following issues are in dispute:
 - a. Are the applicant’s injuries considered predominantly minor injuries as defined in s. 3.1 of the *Schedule*, and therefore subject to treatment within the Minor Injury Guideline (MIG)?
 - b. If the applicant’s injuries are not considered predominantly minor injuries,
 - i. Is the applicant entitled to payment in the amount of \$353.94 per month for attendant care benefits from November 24, 2015 to date and ongoing?(denial date not provided),
 - ii. Is the applicant entitled to payment in the amount of \$2,472.00 for physiotherapy services as set out in a treatment and assessment plan dated December 21, 2015, from Toronto Healthcare Clinic Inc., denied by the respondent on December 23, 2015,
 - iii. Is the applicant entitled to payment in the amount of \$1,276.00 for physiotherapy services as set out in a treatment and assessment plan dated March 2, 2016, from Toronto Healthcare Clinic Inc., denied by the respondent on March 7, 2016,
 - iv. Is the applicant entitled to payment in the amount of \$404.29 for assistive devices as set out in a treatment and assessment plan dated March 24, 2016,from Toronto Healthcare Clinic Inc., denied by the respondent on March 29, 2016,
 - v. Is the applicant entitled to payment in the amount of \$1,126.00 for physiotherapy services as set out in a treatment and assessment plan dated May 17, 2016, from Toronto Healthcare Clinic Inc., denied by the respondent on May 17, 2016,

- vi. Is the applicant entitled to payment in the amount of \$2,887.14 for psychology services as set out in a treatment and assessment plan dated June 9, 2016 from Toronto Healthcare Clinic Inc., denied by the respondent on June 13, 2016,
 - vii. Is the applicant entitled to payment in the amount of \$1,111.20 for physiotherapy services as set out in a treatment and assessment plan dated July 27, 2016 from Toronto Healthcare Clinic Inc., denied by the respondent on August 9, 2016,
 - viii. Is the applicant entitled to payment in the amount of \$8,895.34 for physiotherapy services as set out in a treatment and assessment plan dated January 25, 2017 from Toronto Healthcare Clinic Inc., denied by the respondent on January 30, 2017?
 - ix. Is the applicant entitled to payment in the amount of \$1,521.26 for an assessment of attendant care needs, dated February 22, 2016, from Toronto Healthcare Clinic Inc., submitted on February 13, 2016, denied by the respondent on February 16, 2016?
 - x. Is the applicant entitled to payment in the amount of \$2,000.00 for a psychology assessment dated March 30, 2016 from Toronto Healthcare Clinic Inc., submitted on March 22, 2016, denied by the respondent on March 22, 2016?
 - xi. Is the applicant entitled to payment in the amount of \$1,340.20 for a Functional Abilities Evaluation from Toronto Healthcare Clinic Inc., submitted on July 18, 2016, denied by the respondent on July 20, 2016?
 - xii. Is the applicant entitled to payment in the amount of \$2,000.00 for a chronic pain assessment dated September 28, 2016 from Toronto Healthcare Clinic Inc., submitted on September 30, 2016, denied by the respondent on October 3, 2016?
 - xiii. Is the applicant entitled to payment in the amount of \$1,950.00 for an MRI of the right knee, submitted on April 17, 2017 by Toronto Healthcare Clinic Inc., denied by the respondent on April 18, 2017?
 - xiv. Is the applicant entitled to payment in the amount of \$1,950.00 for an MRI of the left knee, submitted on April 17, 2017 by Toronto Healthcare Clinic Inc., denied by the respondent on April 18, 2017?
- [5] Is the applicant entitled to interest for the overdue payment of benefits?
- [6] Is the respondent liable to pay an award pursuant to s.10 RRO 1990 Reg.664, because it unreasonably withheld or delayed payments to the applicant?

RESULTS

- [7] I find that the applicant's injuries are predominantly minor injuries as defined in sec 3.1 of the *Schedule* and therefore subject to treatment within the Minor Injury Guideline.
- [8] I therefore do not need to proceed with findings set out in paragraph 2 of the order issued on December 21, 2017.
- [9] I find that the applicant is not entitled to interest for the overdue payments of benefits as there were no overdue payment of benefits.
- [10] I find that the respondent is not liable to pay an award pursuant to s.10 RRO 1990 Reg. 664, because it did not unreasonably withhold or delay payments to the applicant.

BACKGROUND

- [11] The applicant was involved in a motor vehicle accident on November 24, 2015 when he was hit from behind. The airbags were not deployed. No paramedics attended at the scene of the accident. The applicant attended at Toronto Healthcare Services Clinic Inc. on December 2, 2015, 10 days after the accident. The OHIP Summary confirms that no radiographs or testing had been completed on the applicant, and that he was not taking any prescription drugs nor had he seen any specialists.¹
- [12] The applicant attended full time classes at Humber College pre accident and post -accident, totaling 15 to 20 hours per week. He was working part time at the time of the accident at a restaurant as a line cook. He was working part time also at the time of the accident at a hotel as a dishwasher. After the accident in December 2015, the applicant was promoted to a full time job at the Radisson hotel as a kitchen worker. He returned to work there, three days after the accident.²
- [13] The applicant self-reported that he was independent in his personal care, that he continues to drive and take public transportation to work and to school, that he continues to shoot basketball hoops, and that his social life is unchanged.³

MEDICAL EVIDENCE

- [14] Dr. Domenic Minnella, a chiropractor on December 5, 2105, diagnosed the applicant with knee sprain/strain; lumbar spine strain/sprain; cervical spine strain/sprain; shoulder girdle sprain/strain; thoracic spine strain/sprain; headache, post-traumatic; and behaviour symptoms and signs involving

¹ RDB Tab 42 P78

² Dr. Andrew Shaul's Reports-RDB Tab 22p85; RBD tab 40 p242

³ Dr. Andrew Shaul's Reports RDB tab 22, p87-88

emotional state. Dr. Domenic Minnella felt that the applicant's conditions would persist beyond a 12 week period and recommended an attendant care assessment and psychological screening to address the applicant's "nervousness and anxiety post-accident".⁴

- [15] On February 22, 2016, the applicant participated in an Assessment of Attendant Care needs. Pravin Kedar (OT Reg) made a report recommending several assistive devices for continued active and passive rehabilitation to increase the applicant's range of motion, strengthening, education and pain management (heating pad, back support, steam mop etc.). The applicant reported that he was having difficulty with prolonged standing due to his knee and back pain and had some difficulty in completing household duties. The applicant received assistance from Attendants With Care Inc. from March 1, 2016, until February 28, 2017.⁵ The respondent did not fund this assistance.
- [16] On March 20, 2016, the applicant saw Dr. Andrew Shaul a psychologist. His report indicated that the applicant had pain throughout his body; that his injuries and resulting pain have limited his ability to perform functional tasks, such as lifting, bending, carrying, sitting standing, kneeling, climbing, cooking, grocery shopping, taking out the garbage, gardening etc.⁶
- [17] Dr. Shaul diagnosed the applicant with Adjustment Disorder and Specific Phobia and recommended sessions of cognitive behavioural therapy. Dr. Shaul noted that the applicant indicated to him that because of the pain he lost interest in activities he used to enjoy, does not play basketball, and does not socialize often with friends and family. Dr. Shaul opined that the applicant's symptoms fell outside of the MIG.⁷
- [18] In his April 20, 2016 report, Dr. Andrew Shaul performed psycho-metric testing which revealed low levels of symptoms of depression and anxiety. The applicant reported that he sometimes feels irritable and frustrated and at times feels hopeless but was unsure if his feelings of hopelessness were related to the accident. The applicant indicated that he was fully recovered from injuries in the motor vehicle accident that he was involved in in 2009.
- [19] On April 22, 2016, the applicant attended an Insurer Examination with Dr. David Mula, GP. He was diagnosed with uncomplicated soft tissue injuries in the form of a lumbosacral myofascial strain, a myofascial strain of the bilateral knees, and tension headaches. His injuries were classified within the MIG.⁸
- [20] Dr. Rodney Day, a Psychologist, in his May 13, 2016 report indicated that the applicant denied a pervasive depressed mood but reported only an occasional

⁴ Disability Certificate (OCF-3) dated December 5, 2015, p13

⁵ Assessment of Attendant Care Needs and Form 1- Report dated February 22, 2016

⁶ Psychological Report dated April 20, 2016

⁷ Ibid, p 6 of the Report

⁸ RDB Tab 22

low mood. The applicant reported that occasionally he has a low mood which he attributed to others who were more successful than he was. The report did not indicate any psychological distress with the applicant confirming that he has no anxiety problems in driving. The applicant stated that he “drives through any anxiety” when driving.

- [21] The applicant went for a Chronic Pain assessment on September 28, 2016. Dr. Karmy in his report dated November 22, 2016 diagnosed the applicant with chronic post-traumatic headaches and post-concussion syndrome; chronic mechanical neck pain, chronic upper and mid back pain; chronic mechanical lower back pain, chronic bilateral knee pain, myofascial pain syndrome. Dr. Karmy recommended psychological treatment and that the applicant would not reach maximum medical recovery under MIG.⁹

ANAYLYSIS

- [22] The term “minor injury” is defined in section 3(2) of the *Schedule* as one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury. In respect of an insured person who sustains a predominately minor injury, section 18(1) of the *Schedule* limits the recovery for medical and rehabilitation benefits under the Guideline to \$3,500.
- [23] 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 insured person from achieving maximal recovery if benefits are limited to the Guideline cap.
- [24] The Divisional Court in *Scarlett v. Belair Insurance*, reviewed the minor injury provisions in the *Schedule*, finding that they were a limit on an insurer’s liability and not an exclusion from coverage. The court stated that the onus of establishing entitlement beyond the cap rests with the claimant. Therefore, the applicant must establish her entitlement to coverage beyond the \$3,500 for minor injuries.¹⁰
- [25] I find that the applicant’s own statements about his functionality and his working full time are in sharp contrast to what Dr. Minella, Pravin Kedar, and Dr. Shaul indicate in their analysis of the applicant. Their reports, in summary, state that the applicant’s accident injuries have limited his functional abilities and that the applicant has chronic pain in his neck, back, and in his knees.

⁹ RDB at Tab 42

¹⁰ *Scarlett v. Belair Insurance* ONSC 3635

- [26] The applicant has stated to the doctors the following: that his school activities were not interrupted; that he now works 35-40 hours per week (although not doing heavy lifting); that he still shoots hoops but does not do running and/ or play basketball like he used to; that he had fully recovered from his accident that he incurred in 2009; that there is no change in his social life; that he is independent in his personal tasks and that getting psychological assistance “would be a waste of time”. These statements contradict the chronic pain assessment report of Dr. Karmy.
- [27] I find that the findings set out in the medical report of Dr. Mula are supported by what the applicant has stated about his functionality. I prefer the applicant’s statements and Dr. Mula’s report over the other medical reports as outlined above, as there is consistency in findings in Dr. Mula’s Report and what the applicant has stated about his functionality.
- [28] Dr. Karmy in his report indicated that the applicant suffered from chronic pain syndrome, at the same time that the applicant was able to work as a full time cook and go to school as well. No explanation was given by Dr. Karmy in his analysis as to how the two functional positions could co-exist. Dr. Karmy’s report also diagnosed that the applicant was suffering from pre-existing bilateral knee pain, without indicating in his report that he had seen any radiographs of the knees.
- [29] I find that the applicant’s injuries are predominantly minor injuries as defined in section 3.1 of the *Schedule* and therefore subject to treatment within the Minor Injury Guideline. My finding that the injuries as minor injuries are based on Dr. Mula’s report and on the applicant’s own admissions.
- [30] I find that the applicant does not have a pre-existing medical condition, documented prior to the accident, which would prevent the applicant from achieving maximal recovery, if benefits are limited to the Guideline cap.
- [31] I therefore do not need to proceed with findings set out in paragraph 2 of the order dated September 21, 2017.

ORDER

- [32] I order that the application be dismissed.

Released: May 7, 2018



Robert Watt, Adjudicator