



Citation: Liu v. Certas Direct Insurance Company, 2023 ONLAT 20-012975/AABS

Licence Appeal Tribunal File Number: 20-012975/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:

Shu Hua Liu

Applicant

and

Certas Direct Insurance Company

Respondent

DECISION

VICE-CHAIR: Ian Maedel

APPEARANCES:

For the Applicant: Yu Jiang, Paralegal

For the Respondent: Candace Mak, Counsel

HEARD: By Way of Written Submissions

BACKGROUND

- [1] The applicant was involved in an automobile accident on June 23, 2019, and sought benefits pursuant to the Statutory Accident Benefits Schedule *Effective September 1, 2010 (including amendments effective June 1, 2016)* (“*Schedule*”). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“*Tribunal*”).

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 \$3,500.00 limit and within the Minor Injury Guideline (“*MIG*”)?
 - ii. Is the applicant entitled to a non-earner benefit (“*NEB*”) of \$185.00 per week from July 22, 2019 to September 20, 2019?
 - iii. Is the applicant entitled to a rehabilitation benefit in the amount of \$2,230.64 for chiropractic treatment recommended by Point Grey Physio in a treatment plan (“*OCF-18*”) dated January 10, 2020?
 - iv. Is the applicant entitled to \$2,200.00 for a psychological assessment recommended by Somatic Assessments and Treatment Clinic in an *OCF-18* dated October 23, 2019?
 - v. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] I find:
- i. The applicant’s injuries are not predominantly minor and therefore, not subject to treatment within the \$3,500.00 limit of the Minor Injury Guideline;
 - ii. The applicant is not entitled to a non-earner benefit;
 - iii. The *OCF-18* for \$2,230.64 in chiropractic treatment is not reasonable and necessary pursuant to the *Schedule*;

- iv. The OCF-18 for \$2,200.00 for a psychological assessment is reasonable and necessary pursuant to the *Schedule*;
- v. The applicant is entitled to interest on any incurred overdue payment of benefits pursuant to s. 51 of the *Schedule*.

ANALYSIS

Section 33 Requests

- [4] The respondent submits that it is not liable to pay any benefit in respect of any period in which the insured person fails to comply with a request for production of documents pursuant to ss. 33 and 36 of the *Schedule*.
- [5] The respondent made repeated requests for the clinical notes and records of the applicant's family physician from June 23, 2017, to present pursuant to s. 33.¹
- [6] The applicant made a request to Dr. Jaklin Awad, physician on December 20, 2019, requesting clinical notes and records "from June 23, 2017 to present and onwards".² As a result, three clinical notes from the Walk-In Clinic were provided, dated August 17, 2019, October 29, 2020, and April 21, 2021. These notes are the totality of clinical notes and records provided in support of this application.
- [7] I am also aware that the applicant is a Chinese national and was visiting her family on a "super parent visa" since 2019.³ It was clear from Dr. Awad's later records that she had planned to return to China but was unable to do so due to the COVID-19 pandemic.⁴
- [8] I have no evidence that there are any additional medical records outstanding pursuant to the s. 33 request. The applicant clearly requested all of Dr. Awad's clinical notes and records from June 23, 2017, to present. If the respondent had questions regarding any additional outstanding medical records required to further assess this matter, it could have conducted an Examination Under Oath pursuant to s. 33(2) to obtain further information. I also note that no s. 44 Insurer's Examinations were conducted for this application.

¹ Written Submissions of the Respondent, Correspondence dated August 1, September 10, December 4, December 27, 2019, January 24, February 24, April 8, June 3 and July 23, 2020, Tab 10.

² Written Submissions of the Applicant, Clinical Notes and Records of Dr. Jaklin Awad, Tab 2.

³ Written Submissions of the Applicant, Psychological Assessment Report by Mandy Fang, and Dr. Sharleen McDowall June 29, 2021, Tab 8, pg. 2.

⁴ Written Submissions of the Respondent, Clinical Notes and Records of Dr. Jaklin Awad, October 29, 2020, and April 21, 2021, Tab 1.

- [9] Given the totality of the circumstances, I am not persuaded the applicant's benefits should be suspended pursuant to s. 33(6) for failing to comply with the s. 33 requests for additional medical documentation.

Minor Injury Guideline ("MIG")

- [10] The Minor Injury Guideline ("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*.
- [11] Section 18(1) of the *Schedule* limits funding for medical and rehabilitation benefits for predominantly minor injuries to a cap of \$3,500.00. An applicant may receive payment for treatment beyond the \$3,500.00 limit if they can demonstrate that a pre-existing condition, documented by a medical practitioner, prevents maximal medical recovery under the MIG or, if they provide evidence of a psychological impairment or chronic pain with a functional impairment.
- [12] It is the applicant's burden to establish entitlement to coverage beyond the \$3,500.00 cap on a balance of probabilities.⁵
- [13] The applicant has already exhausted the \$3,500.00 MIG treatment limit.

Psychological Impairment and the MIG

- [14] Psychological impairments, if established, fall outside of the MIG, because such impairments are not included in the prescribed definition of "minor injuries". I am not persuaded the applicant has established he suffers from a psychological impairment as a result of the accident.
- [15] The applicant relies on the OCF-18 by Dr. Maneet Bhatia, psychologist, dated October 23, 2019, to establish she suffers a psychological impairment as a result of the accident. Attached with this OCF-18 is a Psychological Pre-Screening Report by Xiao Lan Yang, registered psychotherapist and Dr. Bhatia, indicating the applicant suffers from psychiatric, cognitive, and behavioural difficulties in the wake of the accident.⁶

⁵ *Scarlett v. Belair Insurance*, 2015 ONSC 3635, para. 24 (Div. Ct.).

⁶ Written Submissions of the Applicant, Treatment and Assessment Plan ("OCF-18"), October 23, 2019, Tab 6.

- [16] I place little weight upon the OCF-18 and the attached Pre-Screening Report. There is no reference to any clinical notes and records to support any evidence that the applicant suffered a psychological impairment that would remove her from the treatment limits of the MIG. The Pre-Screening Report does not contain any evidence that objective psychometric testing was conducted as part of this initial assessment.
- [17] However, the applicant does rely on a Psychological Assessment Report by Mandy Fang, registered psychotherapist and Dr. Sharleen McDowall, psychologist, dated June 29, 2021. Following a clinical interview and the administration of psychometric testing, the applicant was diagnosed with major depressive disorder with mixed features as well as specific phobia (travel).⁷ The report indicated that the applicant's psychological impairment was significant and compelling enough to require psychiatric treatment. As a result, Ms. Fang and Dr. McDowall recommended a course of 14 sessions of cognitive behavioural therapy.
- [18] The respondent submits little weight should be attributed to this report, as it remains unclear about the level of Dr. McDowall's participation in the interview and psychometric testing. Similarly, it appears the report is based wholly on the applicant's self-reporting and not on any contemporaneous medical records.
- [19] Despite the respondent's submissions regarding the reliability of this report, it remains uncontradicted and is the sole psychological assessment before the Tribunal. Although based on the applicant's self-reporting, I have no reason to discount the results of the objective psychometric testing administered. As the sole commentary on the applicant's post-accident psychological condition, I must apportion weight to the diagnoses and findings provided by Ms. Fang and Dr. McDowall.
- [20] As a result, I must conclude the applicant has met her onus on a balance of probabilities standard. The applicant has established she suffers an accident-related psychological impairment as a result of the accident. As she has been diagnosed with major depressive disorder with mixed features and specific phobia (travel), which fall outside of the MIG and the prescribed definition of minor injuries.

⁷ Written Submissions of the Applicant, Psychological Assessment Report by Mandy Fang, and Dr. Sharleen McDowall June 29, 2021, Tab 8, pg. 7.

Non-Earner Benefit

- [21] I am not persuaded the applicant has established she qualifies for a non-earner benefit pursuant to the *Schedule*.
- [22] The test for entitlement to a non-earner benefit (“NEB”) is set out in s. 12(1) of the *Schedule*. It states that an applicant must prove that he or she suffers from a complete inability to carry on a normal life as a result of, and within 104 weeks of, an accident.
- [23] Section 3(7)(a) of the *Schedule* states that a person suffers from “a complete inability to carry on a normal life” if, as a result of an accident, the person sustains an impairment that continuously prevents that person from engaging in substantially all of the activities in which that person ordinarily engaged before the accident.
- [24] “Substantially all” is not defined in the *Schedule*. However, the phrase has been interpreted by the Tribunal to mean “more than most, a majority, but not all activities”.⁸
- [25] The Tribunal has also held that an applicant must provide evidence of the frequency and time commitments of the applicant’s pre-accident activities to compare how much less they are able to dedicate to the same activity post-accident to discharge their burden of proving that they are prevented from engaging in “substantially all” of the pre-accident activities in which they ordinarily engaged.⁹
- [26] The applicant relied on the Disability Certificate (“OCF-3”) completed by Dr. Georgia Palantzas, chiropractor, dated June 28, 2019. Dr. Palantzas noted the applicant suffered a complete inability to carry on a normal life due to significant impairment/injury, psychological issues, and decrease in pre-accident activities of daily living.¹⁰ The doctor found the applicant had difficulty with sustained postures, standing, walking, sitting, bending, lifting, carrying, pushing, pulling, squatting and overhead activities.¹¹
- [27] The applicant has not tendered any evidence of her pre-accident activities of daily living, nor made reference to the seminal case of *Heath v. Economical Mutual Insurance Company* regarding entitlement to non-earner benefits.¹²

⁸ 16-003195 v *State Farm Insurance Company*, 2017 CanLII 99136 (ON LAT) at para. 10.

⁹ 16-003141 v *Aviva Insurance Canada*, 2017 CanLII 46352 (ON LAT) at para. 17.

¹⁰ Written Submissions of the Applicant, Disability Certificate (“OCF-3”), June 28, 2019, Tab 3.

¹¹ *Ibid.*

¹² 2009 ONCA 391 (CanLII).

Without additional evidence, it is impossible to establish a clear baseline to compare her pre-accident and post-accident activities of daily living. Aside from the OCF-3 cited above, the applicant relies solely on the clinical note by Dr. Awad dated August 17, 2019. Simply put, this evidence is insufficient to establish a claim for NEB.

- [28] When I consider the evidence tendered in relation to the claim for non-earner benefits, I am simply not persuaded the applicant has established she suffered an impairment that continuously prevented her from engaging in substantially all of the activities she was ordinarily engaged in before the accident. As a result, the applicant's claim for a non-earner benefit is denied.

OCF-18 for Chiropractic Treatment

- [29] Though I have found the applicant's psychological impairments are not minor injuries, and therefore not subject to the treatment limits of the MIG, the applicant must still establish the treatment and assessments sought are reasonable and necessary pursuant to sections 14 and 15 of the *Schedule*.
- [30] I am not persuaded the OCF-18 for \$2,230.64 in chiropractic treatment is reasonable and necessary pursuant to the *Schedule*.
- [31] The applicant relies on an OCF-18 provided by Dr. Palantzas, dated January 10, 2020. Dr. Palantzas notes the applicant suffers from chronic injuries, persistent pain, and decreased range of motion in the cervical, thoracic, and lumbar spine, and shoulder region. The applicant also reportedly suffers from difficulty with standing, sitting, walking, lifting and is unable to participate in full social activities.¹³
- [32] However, the applicant provides only a single clinical note and record provided by Dr. Awad, dated August 17, 2019 in support of this treatment plan. Specifically, the note states the applicant is experiencing pain originating from her mid-back, radiating in her lower back and hip area. She was advised to attend physiotherapy, obtain an x-ray of her back and hips, and prescribed Vimovo for pain.¹⁴

¹³ Written Submissions of the Applicant, Treatment and Assessment Plan ("OCF-18"), January 10, 2020, Tab 4.

¹⁴ Written Submissions of the Applicant, Clinical Notes and Records of Dr. Jaklin Awad, August 17, 2019, Tab 2.

- [33] The subsequent entries by Dr. Awad on October 29, 2020, and April 21, 2021, do not reference the accident whatsoever, but include treatment for shingles and requests for blood pressure medication.¹⁵
- [34] Otherwise, the applicant has provided no basis to establish that additional chiropractic treatment is reasonable and necessary. I have no contemporary medical evidence to support the physical impairments described by Dr. Palantzas in the OCF-18 dated January 10, 2020.
- [35] Given the evidence tendered, I remain unpersuaded that this treatment plan for additional chiropractic treatment is reasonable and necessary pursuant to the *Schedule*.

Psychological Assessment

- [36] I am persuaded that the psychological assessment in the amount of \$2,200.00 is reasonable and necessary pursuant to the *Schedule*.
- [37] In determining whether an assessment is reasonable and necessary, it must also be noted that assessments, by their nature, are speculative. The purpose of an assessment is to determine if a condition exists. Notwithstanding their speculative nature, the applicant bears the onus of establishing on a balance of probabilities that an assessment is reasonable and necessary.
- [38] Given the weight I have attributed to the psychological assessment conducted by Ms. Fang and Dr. McDowall above, which diagnosed the applicant with major depressive disorder and specific phobia (travel), I am satisfied the applicant has provided objective grounds for this psychological assessment. Therefore, I find this assessment is reasonable and necessary pursuant to the *Schedule*.

Interest

- [39] Interest is payable on the overdue payment of benefits. The applicant is only entitled to applicable interest on incurred treatment pursuant to s. 51 of the *Schedule*.

¹⁵ Written Submissions of the Respondent, Clinical Notes and Records of Dr. Jaklin Awad, October 29, 2020 and April 21, 2021, Tab 1.

ORDER

[40] I find:

- i. The applicant's injuries are not predominantly minor and therefore not subject to treatment within the \$3,500.00 limit of the Minor Injury Guideline;
- ii. The applicant is not entitled to a non-earner benefit;
- iii. The OCF-18 for \$2,230.64 in chiropractic treatment is not reasonable and necessary pursuant to the *Schedule*;
- iv. The OCF-18 for \$2,200.00 for a psychological assessment is reasonable and necessary pursuant to the *Schedule*;
- v. The applicant is entitled to interest on any incurred overdue payment of benefits pursuant to s. 51 of the *Schedule*.

Released: January 9, 2023

**Ian Maedel
Vice-Chair**