



Citation: Diwa v. Allstate Insurance, 2022 ONLAT 20-008421/AABS

Licence Appeal Tribunal File Number: 20-008421/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:

Kimberly Diwa

Applicant

and

Allstate Insurance

Respondent

DECISION

ADJUDICATOR: Thérèse Reilly

APPEARANCES:

For the Applicant: Kimberly Diwa, Applicant
Sevda Guliyeva, Paralegal

For the Respondent: Anna Apalonskaya, Representative
Greg Specht, Counsel

Heard By Way of Written Submissions

BACKGROUND

[1] The applicant was injured in an accident on **November 12, 2018**, and sought various benefits from the respondent, Allstate Insurance pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010¹ ("*Schedule*"). The respondent denied the benefits in dispute on the basis of its determination that the applicant's accident-related impairments were predominantly minor injuries and therefore subject to treatment within the Minor Injury Guideline ("MIG").² The applicant disagreed and submitted an application to the Tribunal for resolution of the dispute.

ISSUES IN DISPUTE

[2] The following issues are in dispute:

- 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 MIG?
- b. If the answer to issue 2a is no, then,
 - i. Is the applicant entitled to payment for the cost of an examination for \$1,995.00 for a psychological assessment recommended by Harinder Mrahar in a treatment plan submitted on January 14, 2019?
 - ii. Is the applicant entitled to a medical benefit in the amount of \$2,925.60 for chiropractic services recommended by Dan Shlepakov in a treatment plan submitted on February 12, 2019?
 - iii. Is the applicant entitled to a medical benefit in the amount of \$3,963.64 for psychological services recommended by Aparna Sekhar³ in a treatment plan submitted on April 25, 2019?
 - iv. Is the applicant entitled to a medical benefit in the amount of \$2,907.68 for chiropractic services recommended by Adam Russell⁴ in a treatment plan submitted on February 12, 2019?

¹ O. Reg. 34/10, as amended.

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

³ The OCF-18 was recommended by Aparna Sekhar, psychologist and not Adam Russell as stated in the case conference report and order of February 16, 2021.

⁴ The OCF-18 was recommended by Adam Russell, chiropractor and not Dan Shlepakov as stated in the case conference report and order of February 16, 2021.

- v. Is the applicant entitled to \$2,748.64 for psychological services recommended by Harinder Mrahar in a treatment plan submitted on June 24, 2019?
 - vi. Is the applicant entitled to a medical benefit in the amount of \$1,923.04 for chiropractic services recommended by Dan Shlepakov in a treatment plan submitted on July 20, 2019?
 - vii. Is the applicant entitled to \$2,343.64 for psychological services recommended by Harinder Mrahar in a treatment plan submitted on October 2, 2019?
 - viii. Is the applicant entitled to a medical benefit in the amount of \$3,020.36 for chiropractic services recommended by Rudi Chen in a treatment plan submitted on January 8, 2020?
- c. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] For the reasons set out below, I find the applicant's injuries are predominantly minor injuries within the Minor Injury Guideline. As such the applicant is entitled to a maximum of \$3500 (the MIG limits) for medical and rehabilitation benefits and the cost of examinations. The evidence indicates the MIG limits have been exhausted.⁵ As I find the applicant is within the MIG, it is not necessary to consider whether the treatment plans in dispute are reasonable and necessary. The claim for interest is dismissed.

OVERVIEW

Applicability of the Minor Injury Guideline

- [4] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to \$3,500.00 if the insured sustains impairments that are predominantly a minor injury in accordance with the MIG. Section 3(1) defines a "minor injury" 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."

⁵ The respondent approved treatment up to the MIG limits, written submissions of the respondent, paragraph 41. The applicant incurred treatment over the \$3500 limit, written submissions of the applicant, paragraph 6.

- [5] An insured may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under s. 18(2), that they have a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition precludes recovery if they are kept within the confines of the MIG. The Tribunal has also determined that a psychological condition and chronic pain may warrant removal from the MIG. In all cases, the burden of proof lies with the applicant.
- [6] Sections 14 of the *Schedule* provides that an insurer is liable to pay for medical and rehabilitation benefits under sections 15 to 17. Sections 15 and 16 of the *Schedule*, which are subject to section 18, state medical and rehabilitation benefits shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured as a result of the accident.
- [7] The applicant has the onus of proving on a balance of probabilities that the benefits he or she seeks are reasonable and necessary.

Position of the Parties

- [8] The applicant submits that her injuries are not within the definition of a minor injury due to her physical and psychological injuries sustained as a result of a motor vehicle accident. Her physical injuries described in the disability certificates, the OCF-3s, discussed below includes injury to her upper and low back, left elbow, left shoulder and right knee and headache. She maintains that her psychological injuries and aggravation of her pre-existing injuries remove her from the MIG.⁶ No evidence or arguments were presented by the applicant that she is to be removed from the MIG due to chronic pain. The applicant maintains the treatment plans are reasonable and necessary. She submits that her consistent attendance at treatment, continuous complaints about her injuries to the assessors and practitioners, the diagnosis' provided by the assessors at the clinic, and continued support from her family physician to attend treatment and the fact the treatment plans are incurred is compelling evidence of the reasonableness and necessity of treatments incurred.⁷
- [9] The respondent maintains the applicant's injuries fall within the MIG. It advised the applicant⁸ that there is no compelling medical evidence provided to indicate that she had sustained injuries which were not predominantly minor in nature. It submits there is no compelling evidence of a documented pre-existing medical

⁶ Written submissions of the applicant, paragraphs 20 and 21.

⁷ Written submissions of the applicant, paragraph 23.

⁸ Explanation of Benefits ("EOB") dated January 18, 2019.

condition which would prevent her from achieving maximum medical recovery under MIG and no psychological impairment to remove her from the MIG.

The Applicant's Injuries

- [10] At the scene of the accident, the applicant stated she did not lose consciousness and was able to drive her car home from the collision. She went to the hospital that evening and reported to the emergency department physician that she had pain in her lower back, left ribs and left shoulder which radiated down her arm.⁹ The emergency records did not indicate a report of elbow pain at that time. No diagnostic imaging was ordered and no medications were prescribed.
- [11] The applicant saw her family doctor a few weeks after the accident. She saw Dr. Ung, on November 22, 2018¹⁰ and reported low back, shoulder and neck pain. The notes indicate she had good range of motion. She was told to take over the counter pain medication. She saw Dr. Ung again on November 29, 2018 and reported only decreased concentration and focussing. The applicant did not see the family doctor until March 26, 2019 where he notes her back pain is improving, she is back in school, and the only medication she is taking is over the counter medication, such as Advil.¹¹ On September 12, 2019 the notes (which are handwritten and difficult to read) refer to some anxiety. In her written submissions, the applicant states that on September 2019 she received a referral to a psychologist due to PTSD from her family doctor.¹² A review of the family doctor clinical notes,¹³ which are difficult to read, does not refer to the referral for PTSD. No evidence was presented by the applicant that she attended for any treatment for PTSD.
- [12] The applicant submits she continually complained about her injuries to the IE assessors and the family doctor. The Notes of the family doctor of September 12, 2019 refers only to "some anxiety while driving to work". In the notes of October 26, 2020, there is no notation of any ongoing pain complaints.¹⁴ I find the family doctor records provide little medical evidence that the applicant's physical injuries

⁹ Emergency records of the Scarborough General Hospital, Tab 14, written submissions of the applicant.

¹⁰ Clinical notes and records, Dr. Berton Ung, November 12, 2015 to February 2021, Application Record, tab 15.

¹¹ Clinical Notes of Dr. Ung, respondent document brief, tab E.

¹² The notes of the family doctor are summarized in the written submissions of the applicant, paragraph 17.

¹³ Clinical notes and records, Dr. Berton Ung, November 12, 2015 to February 2021, Application Record, tab 15.

¹⁴ Clinical notes and records, Dr. Berton Ung, tab 15. The notes are handwritten and illegible.

or psychological impairment fall outside of MIG. The injuries are soft tissue injuries.

- [13] The applicant submitted two OCF-3s. The first was completed by chiropractor, Dan Shlepakov and is dated December 10, 2018. The OCF-3¹⁵ indicates the applicant had returned to work on modified duties and that both of her jobs require physical labour. The list of injuries includes sprains and strains of the thoracic spine and cervical spine, the shoulder joint, contusion of the elbow, sequelae of fracture of arm and lower limb, insomnia, stress, fatigue and malaise. The OCF-3 does not indicate the applicant cannot carry on activities of daily living. It refers to prior injury of a fracture of left radius in 2016 (left elbow) due to snowboarding accident and a right MCL (the term MCL is not described) sprain in 2017 coupled with psychological symptoms. The second OCF-3¹⁶ is dated January 20, 2020, completed by Marko Pavacic, chiropractor, Life Point Medical. The OCF-3 lists the injuries as sprain and strain of the lumbar and sacroiliac joint, other chronic pain (this is not explained), low back pain and anxiety. There is no reference to any prior injuries. A psychological screening is suggested to deal with reported emotional disturbances. As the OCF-3s are completed by a chiropractor, any diagnosis of a psychological condition is outside the expertise of a chiropractor.
- [14] At the time of the accident the applicant was a full time university student studying accounting.¹⁷ She also worked two part-time jobs for a total of 15 hours a week. She worked with a clothes retailer and in her second role, she was a martial arts instructor. The OCF-2 filed by the applicant indicates she returned to work on January 4, 2019. The documentary records also indicate the applicant completed her accounting studies and graduated with distinction¹⁸ and received her accounting degree on May 10, 2019.

Pre-existing injuries

- [15] Under s.18(2) if there is a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition precludes recovery if the insured is kept within the confines of the MIG, an applicant may be removed from the MIG. The applicant submits that she sustained an exacerbation of pre-existing injuries that removes her from the MIG. The pre-existing injuries include a) fracture of left radius (left elbow) in 2016 due to snowboarding accident, and

¹⁵ Disability Certificate (OCF-3) by Dan Shlepakov dated December 10, 2018, Application Record, Tab 5 (a).

¹⁶ Disability Certificate (OCF-3) by Marko Pavacic, dated January 20, 2020, Application Record, Tab 5 (b).

¹⁷ Written submissions of the applicant, paragraph 7

¹⁸ Application record, Tab 22, Transcript University of Ontario Institute of Technology.

b) a right MCL sprain in 2017. The term MCL is not identified but often refers to an injury to a ligament in the knee. The medical records refer to a prior right knee injury. The applicant claims she had no pre-existing psychological conditions prior to the accident.

- [16] Limited evidence is presented by the applicant to substantiate her position that due to her pre-existing injuries she should be removed from the MIG.¹⁹ Her family doctor's records do not refer to the pre-existing conditions. In her report to Dr. Dumitrascu, psychologist, during an in-person psychological evaluation dated March 25, 2019²⁰ the applicant stated that physical therapy helped to relieve the pain temporarily ("for a day or two"). The applicant stated her overall pain symptoms had improved by approximately 15% to date. By March 25, 2019 she had incurred 28 sessions of chiropractic services, physiotherapy, massage and exercise. She stated further that she had treatment at the Scarborough Medical Centre and Life Point Medical for chiropractic, physiotherapy and massage for 1.5 years. Her last visit was January 20, 2020.
- [17] The applicant also attended an insurer examination (IE) to address the applicability of the MIG, entitlement to an income replacement benefit and the OCF-18 dated February 8, 2019 by Dan Shlepakov for \$2,925.60 (issue 2ii). The IE was conducted on March 18, 2019 by Dr. Marchie, physiatrist who concluded the applicant sustained soft tissue injuries to her lower back and potentially left elbow as a result of the accident. From a musculoskeletal perspective, the doctor opined that as these injuries are soft tissue in nature, they are considered minor injuries as defined in the Minor Injury Guideline.
- [18] The applicant reported to Dr. Marchie upper and lower back pain, left elbow and right knee pain with fatigue of her lower limbs and occasional headaches. Her main area of concern was her left elbow. In his report Dr. Marchie indicated the applicant reported that she was able to exit her vehicle without assistance following the accident. The applicant rated her intermittent left elbow pain as a 2-3/10. Dr. Marchie noted the applicant had full range of motion in both elbows, as well as in her shoulders, wrists, neck and legs. The only reduced range of motion was a slight decrease in her lumbar spine.
- [19] Dr. Marchie also did not find compelling evidence that there were any pre-existing medical conditions which would prevent the applicant from achieving maximal medical recovery from her accident-related injuries if subjected to the

¹⁹ Written submissions of the applicant, paragraph 21.

²⁰ Insurer Psychological Assessment Report by Dr. Tatiana Dumitrascu dated March 25, 2019, Application Record, Tab 12.

\$3,500.00 medical and rehabilitation limit, or if limited to the goods and services available under the MIG.

- [20] Dr. Marchie acknowledged the applicant had sustained a left radius fracture 2 years prior to the accident, and has ongoing, very mild pain in the area. The doctor reasonably recognized there was a *possibility* that the accident aggravated the pain in the left elbow area but he suggested a diagnosis of left lateral epicondylitis (tennis elbow) was not accident related. Dr. Marchie suggested the injuries be treated with a gradual increase in aerobic activities and core strengthening exercises.
- [21] To warrant removal from the MIG on the basis of a pre-existing injury, there must be evidence that this pre-existing condition will prevent maximal recovery if the applicant is treated under the MIG limit. I find there is no evidence of pre-existing injury including for the elbow fracture and the right knee sprain that would prevent maximal recovery and affect her ability to recover from her accident-related soft tissue injuries. On this basis I find the applicant's injuries are within MIG.

Psychological Impairment

- [22] An applicant may also escape the MIG if they have sustained a psychological impairment as a result of the accident, as psychological impairments are not contained within the definition of minor injury under s. 3(1). The applicant asserts that her psychological impairments justify removal from the MIG. This is based on the psychological diagnosis of Dr. Konstantine Zakzanis, psychologist.²¹ In his report dated February 25, 2019 he diagnosed the applicant with an Adjustment Disorder with Mixed Anxiety and Depressed Mood. He suggested 16 psychotherapy sessions. The applicant states that after the accident she began experiencing concentration difficulties, tiredness with inability to focus and difficulties with sleep. This led her to reduce her hours working at the clothes retailer and to stop working at the Martial Arts School. The psychometric testing for the report was completed by a psychometrist. The doctor found no signs of symptom magnification. Dr. Zakzanis in his report stated the applicant described feelings of frustration and anger and described symptoms of anxiety due to financial stress, the litigation process and concerns about her health and recovery.²²
- [23] The applicant requested the psychological pre-screen evaluation with Dr. Harinder Mrahar dated December 4, 2018 be admitted into evidence. However,

²¹ Independent Psychological Evaluation, Dr. Zakzanis dated February 25, 2019, application record, tab 10.

²² Report of Dr. Zakzanis, Page 6.

the respondent requested that the pre screening report not be admitted into evidence as it was not provided prior to receipt of the applicant's written submissions in this hearing contrary to the date for productions set out in the case conference report and order of February 16, 2021. It maintains procedural fairness requires this report not be considered in the adjudication of this dispute. I agree. The psychological pre-screen evaluation with Dr. Harinder Mrahar dated December 4, 2018 is excluded from evidence.

- [24] Moreover, the applicant states her psychological impairments included difficulty concentrating and focussing, lack of motivation to do homework, being distracted by pain and difficulties with sleep. The evidence indicates however she completed her schooling after the accident and graduated with distinction. This is not evidence that her impairment was such that she could not complete her studies. She has commenced work in the accounting field after the accident. Moreover, although she had a temporary absence from her work she was absent only for one day at the retailer and returned to the martial arts school in January 2019, a short time after the accident.
- [25] The applicant attended a section 44 Psychological Evaluation²³ with Dr. Tatiana Dumitrascu, psychologist on March 29, 2019. The assessment was to assess the applicant's claim for an IRB and if the injuries fell within MIG as well as two treatment plans, one proposing a psychological assessment and a second proposing psychological treatment. During the evaluation the applicant reported difficulty focusing after the accident and it affected her motivation to do homework. This is consistent with the report to Dr. Zakzanis. Dr. Dumitrascu concluded following the assessment and examination of the applicant that the applicant did not have any accident-related clinically significant emotional symptoms, and that she does not meet the criteria for any DSM-5 psychological disorders. From a psychological perspective, the applicant did not require any treatment.
- [26] Dr. Dumitrascu in her April 4, 2019 report noted that several psychological diagnostic tests were administered to the applicant. On the Beck Anxiety Inventory, the applicant's resulting score did not suggest clinically significant symptoms of anxiety. Similarly, on the Clinical Assessment of Depression test, the applicant presented within the mild clinical risk range suggesting she did not experience clinically significant symptoms of anxiety or depression. With respect to score validity, Dr. Dumitrascu administered the Structured Inventory of

²³ Insurer Psychological Assessment Report by Dr. Tatiana Dumitrascu dated March 25, 2019, Applicant Application Record, tab 12.

Malingered Symptomatology (the SIMS test), which is a self-report measure specifically used to detect malingering. Dr. Dumitrascu noted that the applicant's score on validity testing was significantly elevated which indicates symptom magnification. The doctor indicated that the applicant, in her opinion, has a tendency to magnify her emotional symptoms which then likely affects the responses on all administered psychometric measures.

- [27] Dr. Dumitrascu also found no issues with concentration during the examination and noted the applicant had been highly functional, working two jobs and continuing as a full-time student. Based on the Trauma Symptom Inventory there were no reports of Post-Traumatic Stress Disorder. Although the doctor noted some "nervousness" about driving scenarios similar to the accident, the doctor noted this is understandable, however mere nervousness did not amount to a clinically significant symptom of vehicular anxiety. In addition to an absence of clinically significant vehicular anxiety, the applicant reported having returned to driving and being a passenger in motor vehicles.
- [28] Dr. Dumitrascu was provided with up-to-date records for review after the applicant provided same to the respondent on or around July 24, 2019 and completed a Psychological Material Review report dated July 24, 2019.²⁴ The doctor was given an opportunity to comment as to whether the updated documents changed her opinions given in her earlier report of April 4, 2019. Dr. Dumitrascu's opinion was unchanged.
- [29] I agree with the respondent that there is insufficient evidence to support a removal from the MIG based on psychological impairment.

ANALYSIS

- [30] I find based on the totality of the evidence that the applicant has failed to meet her onus to prove she should not be subject to the MIG and the monetary treatment limits of section 18(1) of the *Schedule*. She sustained only soft tissue injuries as a result of the accident and no psychological impairment to remove her from the MIG.
- [31] The family doctor records do not provide evidence that the applicant's physical or psychological injuries fall outside of MIG. The listing of injuries in the December 2018 OCF-3 are extensive and not consistent with the family doctor notes nor the

²⁴ IE Materials Review Report by Dr. Dumitrascu dated July 24, 2019. The new documents provided for review and a list of all the documents reviewed are identified in pages 2 to 5 of the report, application record, tab 13.

report of Dr. Marchie. The OCF-3s completed by a chiropractor also lists psychological injuries that are beyond the expertise of a chiropractor.

- [32] Further, the IE conducted on March 18, 2019 by Dr. Marchie, physiatrist concluded the applicant sustained soft tissue injuries to her lower back and potentially left elbow as a result of the accident. From a musculoskeletal perspective, the doctor opined that as these injuries are soft tissue in nature, they are considered minor injuries as defined in MIG. He also did not find compelling evidence that there were any pre-existing medical conditions which would prevent the applicant from achieving maximal medical recovery from her accident-related injuries.
- [33] As to the psychological impairments and assertion that this removes the applicant from the MIG, I find there is insufficient evidence to support this. Dr. Zakzanis in his report of February 25, 2019 diagnosed the applicant with an Adjustment Disorder with Mixed Anxiety and Depressed Mood. However, this finding is contrary to the findings and conclusions by Dr. Dumitrascu including his finding there is no symptom magnification.
- [34] I prefer the reports of Dr. Dumitrascu over the report of Dr. Zakzanis on the basis her report is more comprehensive in its analysis, discussion of the applicant's complaints and the tests administered. For example she administered the SIMS test in relation to symptom magnification. This test was not administered by Dr. Zakzanis. More important, Dr. Zakzanis noted some of the applicant's reported anxiety was due to financial stress and the litigation process, which are not accident related. Dr. Dumitrascu also completed a second review in July 2019. Her review of the additional medical documents did not change her opinion which remained unchanged and the applicant did not require any psychological treatment.
- [35] I also find that despite the applicant's statements that she missed some work and had difficulties with concentration and memory, the evidence indicates otherwise. She commenced work in the accounting field after the accident. Her absence from work was temporary. She was absent only for one day at the retailer and returned to the martial arts school in January 2019, a short time after the accident. She reported to Dr. Zakzanis that she had some modified duties following the accident but no details were provided on the modification. The evidence indicates she successfully returned to both of her pre-accident part-time jobs, as well as her full-time studies.
- [36] I find the applicant has not demonstrated on a balance of probabilities that her accident related impairments warrant removal from the MIG. The applicants injuries are within the MIG. The applicant is thus entitled to a maximum of \$3500

for medical and rehabilitation benefits and the cost of an assessment. As I have found the applicant's injuries are within MIG, I do not need to determine whether the treatment plans in dispute are reasonable and necessary pursuant to section 15 and 16 of the *Schedule*.

INTEREST

[37] The claim for interest is dismissed.

CONCLUSION

[38] I find the applicant's injuries are predominantly minor injuries within MIG. As such the applicant is entitled to a maximum of \$3500 for medical and rehabilitation benefits and the cost of examinations. The evidence is that the MIG limits have been exhausted. As I have found the applicant is within MIG, it is not necessary to determine whether the treatment plans in dispute are reasonable and necessary. The claim for interest is dismissed.

Released: March 11, 2022



Thérèse Reilly, Adjudicator