



Citation: Lin v. Pembridge Insurance Company, 2022 ONLAT 20-005622/AABS

Licence Appeal Tribunal File Number: 20-005622/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:

Tian Qiang Lin

Applicant

and

Pembridge Insurance Company

Respondent

DECISION

VICE-CHAIR:

Ian Maedel

APPEARANCES:

For the Applicant:

Yu Jiang, Paralegal

For the Respondent:

Jaimie Naumis, Counsel

HEARD:

By Way of Written Submissions

BACKGROUND

- [1] The applicant was involved in an automobile accident on November 10, 2017, when he was a pedestrian hit by a motor vehicle while crossing the street. He suffered open wounds to his hands, forehead and elbow. He did not lose consciousness and was transported to Scarborough and Rouge Hospital. Diagnostic imaging revealed no obvious fractures or dislocation and no acute abnormality of the cervical spine.
- [2] The applicant 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*”).

PRELIMINARY ISSUE

- [3] At the case conference the respondent raised the following preliminary issue:
 - i. Is the applicant barred from proceeding with his claim for chiropractic treatment in the amount of \$1,823,52 as he failed to commence his application within 2 years after the respondent refusal to pay the amount claimed?

ISSUES

- [4] The following substantive issues are in dispute:
 - 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 in the Minor Injury Guideline (“MIG”)?
 - ii. Is the applicant entitled to \$1,823.52 for physiotherapy and acupuncture treatment recommended by Easy Healthcare in a treatment plan (“OCF-18”) dated March 7, 2018?
 - iii. Is the applicant entitled to \$865.43 for medication expenses, submitted on a claim form (“OCF-6”) dated June 25, 2019?
 - iv. Is the applicant entitled to \$2,200.00 for a psychological assessment, recommended by Somatic Assessments & Treatment Centre in an OCF-18 dated January 23, 2019?

- v. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[5] I find:

- i. The applicant's injuries are predominantly minor and therefore subject to treatment within the \$3,500.00 limit and in the MIG;
- ii. The treatment plans for physiotherapy and acupuncture treatment are not reasonable and necessary as the \$3,500.00 MIG treatment limit has been reached;
- iii. The preliminary issue raised is moot and is dismissed;
- iv. Medication expenses are not payable as the applicant failed to comply with s. 38(2) of the *Schedule* and otherwise failed to meet his evidentiary burden on a balance of probabilities;
- v. The applicant is not entitled to \$2,200.00 for a psychological assessment, as Part 4 of the OCF-18 listed the injury as not predominantly minor and beyond the MIG;
- vi. No interest is payable.

ANALYSIS

The Minor Injury Guideline

- [6] The 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*.
- [7] Section 18(1) 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 cap 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. It is the applicant's

burden to establish entitlement to coverage beyond the \$3,500.00 cap on a balance of probabilities.¹

Physical Impairments and the MIG

- [8] The applicant submits he suffered serious physical impairments as a result of the accident. These include persistent and ongoing pain to the chest, neck, lower back, legs, and headaches. To substantiate these physical impairments, the applicant relies on the clinical notes and records of his Family Physician, Dr. R.L.L. Ling and Dr. H.W. Li and the records of Easy Health Centre, provider of physical therapy and chiropractic treatment.
- [9] The initial emergency room records of Scarborough and Rouge Hospital on the date of the accident indicate the applicant slipped and fell on ice onto his left side.² He did not lose consciousness, had a small laceration to his left brow, abrasions to his hands, and was complaining of upper left leg pain.³ A head CT scan revealed no intracranial abnormality, and an x-ray revealed no obvious fracture to his facial bones. An x-ray of his left hip detailed no fracture or dislocation and finally an x-ray of his cervical spine revealed no acute abnormality.⁴ He was ambulating well and was released from the hospital on the date of the accident.
- [10] At the first post-accident visit to Dr. Ling on November 27, 2017 the applicant indicated he was suffering from left chest pain and left-side head pain.⁵ On December 21, 2017 he complained of left side pain, lower back.⁶ In February 2018 he complained to Dr. Li of left frontal headaches and on January 11, 2019 he complained of lower back pain and a physical examination revealed tenderness at the lumbar spine.⁷ May 27, 2019 he complained of lower back pain.⁸ In November 2019 and May 2020, he continued to complain of chest pain.⁹ He continued to take Tylenol throughout this period for pain relief. On August 26, 2020, he reported to Dr. Li that he suffered leg and back pain since the accident

¹ *Scarlett v. Belair Insurance*, 2015 ONSC 3635, para. 24 (Div. Ct.).

² A preliminary issue of whether this incident fit the definition of an “accident” pursuant to s. 3(1) of the Schedule was not raised before the Tribunal.

³ Written Submissions of the Respondent, Tab 1, Scarborough Grace Hospital Records dated November 10, 2017.

⁴ *Ibid.*

⁵ Applicant’s Application Record, Tab 3, Records from Dr. Ling.

⁶ *Ibid.*

⁷ Written Submissions of the Respondent, Tab 2, Dr. Ling Clinical Notes and Records, pg. 6.

⁸ *Ibid.* pg. 7

⁹ *Ibid.* pp. 8-9.

and continued to suffer headaches. Dr. Li diagnosed the applicant with post-traumatic headache.¹⁰

- [11] The treatment records of Easy Health Centre indicate that he was 80% “better” by late March 2018 and by May 2018 he was still suffering pain in the shoulder and lower back on a scale of 4.5/10.¹¹ Similarly, in the applicant’s Psychological Assessment Report he reported to Dr. S. McDowall that he continued to suffer stiffness in neck, mid-back, and shoulders. He also reported recurrent headaches and insomnia.¹² Otherwise, the applicant does not rely on any expert medical assessment reports related to his alleged physical impairments.
- [12] The respondent relies on the Insurer’s Examination (“IE”) reports completed by Dr. M. Nguyen, Physiatrist, dated May 16, 2018¹³ and March 16, 2021¹⁴. In the report dated May 16, 2018, the applicant self-reported that he suffered neck pain prior to the accident and continued to suffer neck pain. He also reported pain across the lower back, behind the right knee and numbness in the back of his head. However, following the examination, Dr. Nguyen noted the applicant had full range of motion through the neck, thoracolumbar spine, hips (with the exception of decreased hip internal rotation bilaterally), knees, and ankles.¹⁵ Dr. Nguyen further noted there were no objective findings of an accident-related musculoskeletal impairment. Any accident-related injuries were otherwise minor and fell within the MIG.¹⁶ Otherwise, his neck pain was the result of pre-existing multilevel anterior marginal osteophytes as identified in the x-ray taken on the date of the accident, this would not impact his complaints of mechanical and soft-tissue low back pain.¹⁷ In Dr. Nguyen’s second report dated March 16, 2021, she noted there was no change from a musculoskeletal perspective as a result of updated documentation received. She indicated the applicant’s physical injuries remained soft tissue sprain and strain – minor injuries within the MIG.¹⁸
- [13] I place the most weight upon the respondent’s two physiatry reports. While its clear the applicant continued to suffer some pain in the months following the

¹⁰ Applicant’s Application Record, Tab 3, Records from Dr. Li, pg. 3.

¹¹ Applicant’s Application Record, Tab 7, Easy Health Centre, pg. 10.

¹² Applicant’s Application Record, Tab 1, Psychological Assessment Report by Dr. S. McDowall, January 10, 2021 pg. 3.

¹³ Written Submissions of the Respondent, Tab 5, Physiatrist Report by Dr. M. Nguyen, May 16, 2018.

¹⁴ Written Submissions of the Respondent, Tab 12, Physiatrist Report by Dr. M. Nguyen, March 16, 2021.

¹⁵ Written Submissions of the Respondent, Tab 5, Physiatrist Report by Dr. M. Nguyen, May 16, 2018, pg. 11.

¹⁶Ibid., pg. 12.

¹⁷ Ibid., pg. 13.

¹⁸ Written Submissions of the Respondent, Tab 12, Physiatrist Report by Dr. M. Nguyen, March 16, 2021, pg.14.

accident as evinced by the clinical notes and records provided, I am not satisfied this evidence of a physical impairment would remove him from the MIG. I am persuaded these physical injuries are a result of soft tissue sprain and strain or their sequelae which fall directly within the definition of a minor injury and are thus treatable within the confines of the MIG. The applicant did not otherwise claim that his pre-existing neck pain would remove him from the MIG but did submit he suffered ongoing accident-related chronic pain.

Chronic Pain and the MIG

- [14] The applicant must demonstrate on a balance of probabilities that his functionality has been affected in order to be removed from the MIG. In this matter, I have been provided no evidence to indicate the applicant's accident-related injuries have had a detrimental impact on his functionality.
- [15] The applicant refers to the *American Medical Association Guides* ("AMA Guides")¹⁹ in attempting to establish the applicant suffers chronic pain as a result of the accident in this case. The *AMA Guides* state that at least three of the following criteria must be met for a diagnosis:
- (i) Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances;
 - (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; and
 - (vi) Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviors.
- [16] These criteria can provide helpful guidance as an interpretative tool for understanding how pain affects an individual's functional capacity.

¹⁹ American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 6th Edition, 2008, pp. 23-24.

- [17] Again, the applicant relies on the clinical notes and records provided to establish he exhibits pain that has persisted for more than 6 months as a result of the accident. The applicant complained to his Family Physician on six occasions in between November 2017 and August 2020. However, by June 2018 he reported to Easy Health Centre that his pain was 80 percent “better”, but he continued to have pain in his left shoulder, lower back, and left thigh.²⁰ Similarly, he complained of recurrent headaches that were formally diagnosed by Dr. Li as post-traumatic headache in August 2020.²¹ Although not required to be removed from the MIG, the applicant was never diagnosed with chronic pain, chronic pain syndrome, and never underwent a chronic pain assessment.
- [18] The applicant has not provided compelling evidence to establish his pain resulted in a functional impairment. Occasional aches and pains were treated with over-the-counter Tylenol, and he was well enough to travel to China for three months to visit family between March and June of 2019. The Minor Injury Treatment Discharge Report (“OCF-24”) indicated the applicant had returned to partial/modified regular activities as of January 24, 2018.²² The applicant reported to Dr. K. Spivak who conducted a Psychological IE in March of 2021 that he was independent with all of his personal care activities²³ and had resumed social activities with friends, going for walks in the park, and taking rides to go to brunch.²⁴ Otherwise, there is conflicting evidence regarding whether the applicant was a retired chef’s assistant, or was seeking employment at the time of the accident. However, the clinical notes and records provided by Dr. Ling indicated that by September 19, 2016, he had been retired for four weeks and additional notes from November 2016 and July 2017 indicate he was retired.²⁵ Additionally, the Application for Accident Benefits (“OCF-1”) dated November 14, 2017, specifically states in Parts 5 and 8 that the applicant is retired.²⁶
- [19] Based on the evidence adduced, and in consideration of the *AMA Guides* criteria, I find the applicant has failed to demonstrate on a balance of probabilities that his injuries fall beyond the treatment limits of the MIG. Simply put, more is required to establish to what extent a chronic condition, be it a

²⁰ Applicant’s Application Record, Tab 7, Easy Health Centre, pg. 17.

²¹ Applicant’s Application Record, Tab 3, Records from Dr. Li, pg. 3.

²² Written Submissions of the Respondent, Tab 8, Minor Injury Treatment Discharge Report (OCF-24).

²³ Written Submissions of the Respondent, Tab 3, Psychology Report by Dr. Spivak, March 16, 2021, pg. 12

²⁴ *Ibid.* pg. 16.

²⁵ Written Submissions of the Respondent, Tab 6, Dr. Ling Clinical Notes and Records. pp. 37-38.

²⁶ Written Submissions of the Respondent, Tab 11, Application for Accident Benefits (OCF-1), November 14, 2017.

syndrome or chronicity of symptoms affects functionality. The applicant has not provided sufficient medical evidence to establish that his functionality is impaired and chronic pain is the cause of the disability.

Psychological Impairments and the MIG

- [20] Lastly, psychological impairments, if established, fall outside the MIG, because such impairments are not included in the prescribed definition of “minor injuries.” On December 21, 2017, Dr. Ling noted post-trauma anxiety in the clinical notes and records.²⁷ On January 12, 2019, the applicant requested a psychiatry referral from Dr. Ling whose notes indicated it was recommended by the applicant’s lawyer, but the applicant did not know why, just that it was related to the accident.²⁸ Otherwise, the applicant relies on the psychological assessment provided by Dr. S. McDowall, Psychologist in her report dated January 20, 2021.²⁹ The applicant reported to Dr. McDowall that he was unable to cope with the physical and psychological symptoms from the accident. He was depressed, helpless, anxious, fearful, and frustrated. The quality of his sleep deteriorated, and he had frequent nightmares, and his interrupted sleep resulted in recurrent headaches. He also reported a decline in cognitive function as he was less attentive, easily distracted, and had difficulty processing information. Dr. McDowall relied upon the Beck Depression Inventory II (“BDI-II”), the Beck Anxiety Inventory (“BAI”), the Patient Pain Profile (“P-3”), and the Impact of Event Scale – Revised (“IES-R”), clinical observations, and the applicant’s self-reporting to provide a diagnosis as per the DSM-V. She diagnosed the applicant with Major Depressive Disorder and Anxious Distress, specific phobia (travel).³⁰ Dr. McDowall concluded the accident materially contributed to the applicant’s impairment and the accident-related disabilities constituted a significant barrier to recovery and return to pre-accident levels of functioning.³¹ She recommended a course of behavioural therapy in 14 weekly 90-minute sessions.³²
- [21] The respondent relied on the psychological assessment undertaken by Dr. K. Spivak, Psychologist, as detailed in her report dated March 16, 2021.³³ The applicant self-reported to Dr. Spivak that he was stressed due to his financial

²⁷ Applicant’s Application Record, Tab 3, Dr. Ling Clinical Notes and Records, pg. 42.

²⁸ Written Submissions of the Respondent, Tab 2, Dr. Ling Clinical Notes and Records, pg. 6.

²⁹ Applicant’s Application Record, Tab 1, Psychological Assessment Report by Dr. S. McDowall, January 10, 2021.

³⁰ *Ibid.* pg. 9.

³¹ *Ibid.* pg. 9.

³² *Ibid.* pg. 10.

³³ *Ibid.* pg. 10.

situation, as his wife had been forced to quit her job to take care of him.³⁴ Dr. Spivak conducted the BDI-II, the Zung Self-Rating Anxiety Scale (“SAS”), the Symptom Checklist Revised (“SCL-90R”), and the Injustice Experience Questionnaire. Dr. Spivak indicated the applicant did not provide a clinical presentation of someone overly depressed or anxious, but ruminative and worried about his financial difficulties. In her opinion his condition did not meet the full criteria for a DSM-V diagnosis, as there was no constellation of symptoms consistent with a mood, anxiety, or somatic system disorder, nor with symptoms consistent with specific phobia, situational type (pedestrian and in-vehicle).³⁵ However, she indicated he did present with some adjustment difficulties secondary to his financial difficulties impacting his mood, sleep, and headaches. This moderate level of emotional distress was not of a magnitude to constitute a psychological impairment or to interfere substantially in his ability to engage in activities of daily living.³⁶ She concluded that the applicant did not present with a psychological impairment or serious emotional difficulties that warranted psychological intervention.³⁷

[22] I find the report provided by Dr. Spivak more persuasive, first, it is unclear how Dr. McDowall arrived at her diagnostic conclusion with regard to the psychological impairments diagnosed. There is no reference to the diagnostic criteria and elements of the disorder(s), specifically, Dr. McDowall’s report fails to state what part of the diagnosis the applicant meets and why. This leads me to believe that the diagnoses were based largely on the applicant’s self-reported symptoms, rather than the objective psychometric results. Second, the report does not list any of the previous clinical notes and records or documents that were reviewed in order to reach the diagnoses. There is no evidence that any of the applicant’s previous clinical history was reviewed, instead the report appears to rely on the self reporting provided and the psychometric testing conducted. Third, the applicant’s self-reporting regarding his activities of daily living directly conflicts with the information provided to Dr. Spivak in March 2021. Specifically, that he was independent with his personal care activities, had resumed social activities with friends, resumed going for walks in the park, and taking rides to go to brunch.³⁸ While I do not deny that the applicant does suffer some level of

³⁴ Written Submissions of the Respondent, Tab 3, Psychology Report by Dr. Spivak, March 16, 2021, pg. 13.

³⁵ *Ibid.*, pg. 15.

³⁶ *Ibid.*, pg. 16.

³⁷ *Ibid.*, pg. 17.

³⁸ *Ibid.*, pp. 12, 16.

emotional distress, I am not satisfied this is directly the result of the accident, but rather tied to financial stress otherwise unrelated to the accident.

- [23] Based on the totality of the evidence related to alleged physical and psychological impairments I find the applicant has not demonstrated on a balance of probabilities that his accident-related impairments warrant removal from the MIG.

Treatment Plan, Expenses, and the Assessment in Dispute

- [24] As detailed in the Explanation of Benefits dated April 4, 2018, the applicant had reached the MIG treatment limit of \$3,500.00 (technically, only \$1.70 of funding remained within the limit).³⁹ Given that I have found the applicant's impairments fall within the limits of the MIG, a determination regarding whether the OCF-18 for physiotherapy and acupuncture in the amount of \$1,823.32 is reasonable and necessary is not required. Given that no analysis is required, the preliminary issue related to s. 56 and the limitation period is also moot.
- [25] The applicant is barred from claiming \$865.43 in medical expenses incurred while in China as per the OCF-6 dated June 25, 2019. Contrary to s. 38(2) of the *Schedule*, these expenses were incurred prior to the submission of the treatment plan, and none of the exceptions in s. 38(2)(a)-(d) apply. Similarly, the amount of these expenses is in excess of the \$250.00 cap imposed on expenses in 38(2). Even if I were to otherwise consider this claim, the applicant has not met his burden of establishing these expenses are payable. The corroborating documents to support these expenses have not been translated from Cantonese into English. This is a similar situation to regular medical clinical notes and records which are illegible. Given these documents are unreadable, I could not otherwise make any determination on whether these expenses are reasonably necessary as a result.
- [26] The OCF-18 for a psychological assessment in the amount of \$2,200.00 specifically indicates at Part 4 that this impairment is not predominantly a minor injury as referred to in the MIG. Given that I have found these injuries fall within the MIG, there is no requirement to undertake any further analysis regarding whether this assessment is reasonable and necessary pursuant to the *Schedule*.

³⁹ Applicant's Application Record, Tab 9, Explanation of Benefits, April 4, 2018.

Interest

[27] Given there are no overdue payment of benefits, the applicant is not entitled to interest pursuant to s. 51 of the *Schedule*.

ORDER

[28] The application is dismissed, and I find that:

- i. The applicant's injuries are predominantly minor and therefore subject to treatment within the \$3,500.00 limit and in the Minor Injury Guideline;
- ii. The treatment plans for physiotherapy and acupuncture treatment are not reasonable and necessary as the \$3,500.00 MIG treatment limit has been reached;
- iii. The preliminary issue raised is moot and is dismissed;
- iv. Medication expenses are not payable as the applicant failed to comply with s. 38(2) of the *Schedule* and otherwise failed to meet his evidentiary burden on a balance of probabilities;
- v. The applicant is not entitled to \$2,200.00 for a psychological assessment, as Part 4 of the OCF-18 listed the injury as not predominantly minor and beyond the MIG;
- vi. No interest is payable.

Released: July 8, 2022

**Ian Maedel
Vice-Chair**