Citation: Zhao v. The Personal Insurance Company, 2023 ONLAT 20-013013/AABS

Licence Appeal Tribunal File Number: 20-013013/SSBS

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:

Hai Yan Zhao

Applicant

and

The Personal Insurance Company

Respondent

DECISION

ADJUDICATOR: **Jacqueline M. Harper**

APPEARANCES:

For the Applicant: Yu Jiang, Paralegal

For the Respondent: Grace Ko, Counsel

HEARD: **By Way of Written Submissions**

OVERVIEW

[1] The applicant was involved in an automobile accident on March 27, 2019 and sought benefits from the respondent, The Personal, pursuant to the *Statutory Accident Benefits Schedule* – Effective September 1, 2010 and including amendments effective June 1, 2016 *(*the "*Schedule*"). The applicant was denied benefits by the respondent and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] The issues in dispute are as follows:

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 $200.00 ($1,300.00 less $1,100.00 approved) for chiropractic services recommended by EZ Physio in a treatment plan/OCF-18 (the "plan") submitted on August 7, 2019 and denied on August 19, 2019?

c. Is the applicant entitled to $2,200.00 for a psychological assessment recommended by Somatic Assessments & Treatment Clinic in a plan dated July 19, 2019 and denied on July 20, 2019?

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

RESULT

[3] I find as follows:

a. that the applicant sustained injuries which are not minor injuries as defined in s. 3 of the *Schedule,* and therefore, not subject to treatment within the MIG limit of $3,500;

b. that the treatment proposed in the treatment plans is reasonable and necessary; and

c. that the applicant is entitled to the payment of interest on the overdue payment of benefits.

ANALYSIS

Minor Injury Guideline ("MIG")

[4] Section 3(1) of the *Schedule* 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] Section 18(1) of the *Schedule* limits the entitlement for medical and rehabilitation benefits to $3,500 for any one accident if the injured sustains impairments that are predominantly a minor injury.

[6] The onus is on the applicant to show that her injuries are outside of the MIG. In order to do so, she must prove, on a balance of probabilities, that the accident-related injuries are not predominantly minor or, under s. 18(2), that there is a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition precludes recovery if the MIG limit is maintained. Chronic pain with functional impairment or a psychological condition may also be considered for removal from the MIG. In addition, with respect to the entitlement to treatment, the applicant must prove that it is reasonable and necessary for their recovery.

Did the applicant sustain predominantly minor physical injuries?

[7] The applicant claimed that she is out of the MIG due to sustaining serious physical and psychological injuries from the accident. Specifically, the applicant submitted that she should be removed from the MIG due to suffering from chronic pain with functional impairment. Additionally, she submitted that she should be removed from the MIG due to psychological impairment sustained as a result of the accident.

[8] I find that the applicant's evidence establishes that as a result of the accident, she sustained chronic pain, specifically in her neck, back and shoulders with functional impairment which is not a minor injury as defined in the *Schedule*. The MIG relates to "minor injuries" as defined by s. 3(1) of the *Schedule* and in consideration of s. 18(1) of the *Schedule*, I find that her injuries are not predominantly minor in nature. I accept that the applicant had multiple injuries which caused chronic pain and resulting functional impairment. This is not discomfort alone as argued by the respondent.

[9] The applicant relied on documentary evidence from several healthcare providers. I accept that the applicant suffered from pain in her left side chest and discomfort

in her neck as reported by her family physician, Dr. Wadhwa, on March 30, 2019, three days post-accident for which she subsequently sought chiropractic treatment, physiotherapy and acupuncture. Such treatment is noted in the reports from the extended healthcare provider to January 31, 2020. It is noted that she had 14 sessions of chiropractic and physiotherapy in that time frame through extended healthcare with Sunlife, ending on July 5, 2019 with a prescription on January 2, 2020.

[10] Further, I accept that on April 2, 2019, as noted in the initial assessment at EZ Physio, the applicant had a decreased range of motion throughout her body, pain, restrictions and positive orthopedic tests. I accept that as indicated in consultation records dated August 2, 2019 with physiotherapist, Maryam Azerang-Esfandiari at EZ Physio, the applicant suffered from neck pain with musculoskeletal signs, injury of her neck muscle and tendon, sprain and strain of her thoracic spine, ribs and sternum, chest pain on breathing, tension type headache, dizziness, tinnitus and fatigue. In addition, I accept that on August 2, 2019, at over three months post-accident, her injuries were ongoing causing chronic pain to the extent that they required additional intervention outside of the MIG – she continued to have impairment at the cervical, thoracic, lumbar spine and shoulder regions, with radicular symptoms, headaches and dizziness as noted in the OCF-24 completed by chiropractor, Dr. Rick Tavares upon re-assessment of the applicant.

[11] I considered that the applicant did not seek emergency medical attention on the day of the accident and that there is little evidence that treatment for accident-related injuries was recommended by her family physician, other than an annotation that she was referred to the clinic. I considered that it is not uncommon that emergency medical treatment is not sought on the day of the accident and that there can be delays in initial post-accident family physician appointments. However, the evidence supports that she attended treatment with her family physician three days post accident during which she reported her injuries and symptoms, following which she underwent ongoing treatment. The documentary evidence supports treatment through her extended healthcare Sunlife for approximately four months post accident, with the last date of treatment in the Sunlife records up to January 31, 2020, on July 5, 2019. She sought further treatment for physical injuries as noted in the OCF-18 by Dr. Tavares dated August 2, 2019 as well as an appointment with Dr. Bhatia's on July 11, 2019.

[12] The respondent's submissions, which infer that that she did not seek specific treatment, are misleading. She sought various forms of treatment and continued to do so but, treatment was denied. By including COVID-19 pandemic lockdown and a period of reduced healthcare service availability in its 2.5-year calculation,

the respondent diminishes its credibility and reliability insofar as its submissions pertaining to gaps in treatment. I find that it is more likely than not that the applicant did not attend additional treatments because treatment was denied and following in 2020 and into 2021, her ability to attend treatment was related to the pandemic.

[13] I considered that the family physician did not report accident-related injuries in connection with the visit on September 18, 2019, close to six months post accident. I do not find this persuasive evidence of a MIG injury. The accident was already discussed in the first post accident visit on March 30, 2019 and she continued physical rehabilitation during this time period with other healthcare providers who spent more time with her and knew of her ongoing injuries. This treatment was through her extended healthcare and the documentary evidence supports same. In addition, as addressed above, it is unlikely that her family physician was conducting in person appointments after March 16, 2020, and even video appointments for a prolonged period following the onset of the pandemic. I am more persuaded of the severity of the impairments caused by her injuries due to the fact that she continued to seek treatment in 2019, and then continued to do so in 2021, and not as submitted by the respondent, her lack of treatment during COVID-19.

[14] As recorded in the Psychological Assessment Report by Dr. McDowell dated July 7, 2021, the applicant reported persistent pain at her neck, chest, back and shoulders, in addition to the psychological sequelae of mood disturbances, difficulty falling asleep and remaining asleep, nightmares, daytime fatigue, travel anxiety, social isolation, poor memory and feelings of irritability, impatience and frustration. As noted in Dr. McDowell's report, the applicant's pain was ongoing and caused her to have difficulty with her daily functioning which prevented her from completing her tasks at work. As a result, the applicant required modified hours and duties and was subsequently let go from employment. The EZ Physio records indicate that she was required to rely on friends to assist with housekeeping duties. The suggestion that this was reported for the purpose of the claim is not persuasive.

[15] The applicant has submitted compelling evidence of prolonged pain from her injuries from which she has not achieved maximal recovery. Further, contrary to the respondent's submissions relying on *Gong* v. *Unifund Assurance Company*, 2020 ONLAT 19-01412/AABS ("*Gong* decision") at paragraph 10, in this case, the respondent did not conduct s. 44 assessments or proffer contrary evidence on her physical condition. Rather, I find the medical evidence submitted by the applicant supports that she not only had pain for an extended period of time, but, that it caused functional impairment in her day-to-day life.

[16] While the respondent is not obligated to conduct s. 44 assessments of the applicant, I do not find the respondent's submissions compelling in the face of the applicant's consistent reports of pain from her injuries. The respondent was thorough in its examination of the documentary evidence submitted by the applicant, however, I am not convinced that the respondent's submissions alone, with no independent documentary evidence to support its position, succeeds in diminishing the applicant's case to the point that on a balance of probabilities, I preferred its evidence. As one would expect, the respondent defends its position by poking holes in the applicant's evidence, however, when weighed on a balance of probabilities, the documentary evidence submitted by the applicant supports the applicant's position that she suffers from accident-related chronic pain which have caused functional impairment. Moreover, there is no requirement for the applicant to have a dependence on drugs or healthcare providers to meet the burden of proving that she has chronic pain with functional impairment, or that she had social withdrawal due to her pain as in the AMA Guides as noted in the *Gong* decision. I considered that social isolation is reported by Dr. McDowell, and I do not find that this had more to do with the pandemic than choosing to isolate as a result of being unwell from her injuries.

[17] In addition, while she attended her family doctor on one occasion in the time following her accident and discussed her accident-related injuries, I find she went to other healthcare providers for chiropractic services, physiotherapy and acupuncture, as previously noted. Further, the absence of a discussion on her accident-related injuries with the family physician at an appointment on September 18, 2019, is not compelling because it appears that she did not seek treatment through him initially. In addition, following that visit, she continued to seek treatment with healthcare providers who proffered documentary evidence supporting an account of her injuries.

[18] I agree with the applicant's position that she suffered from chronic pain causing functional impairment. I concur with *C.G.* v. *The Guarantee Company of North America,* 2020 CanLII 63599 (ONLAT) at paragraph 37, in that chronic pain is "a condition that persists for three to six months and a formal diagnosis of chronic pain is not required to remove from the MIG". In this case, based on the applicant's evidence, I find that the applicant sustained pain for a period in excess of three months which caused impairment in her functioning.

[19] Moreover, while I find that the applicant has chronic pain with functional impairment, and it is unnecessary to address the other exclusion criteria that the applicant is claiming related to psychological injuries, I also find that as a result of the accident the applicant sustained psychological injuries which would result in

being removed from the MIG. In consideration of Dr. McDowell's Psychological Assessment report dated July 7, 2021, which states that the applicant was diagnosed with Major Depressive Disorder with Anxious Stress and Specific Phobia (Travel), as well as the records from EZ Physio submitted on August 26, 2021 which noted that she suffered from sleep disturbances, fatigue, poor concentration, agitation, driving anxiety and depression, I find that she meets the test to be removed from the MIG on the basis of psychological injuries.

[20] I considered the respondent's submissions that EZ Physio was not engaged in providing psychological treatment and the symptoms are self-reported, however, they are consistent with Dr. McDowell's assessment findings. I considered the respondent's submissions that the proposed plan is based on a pre-screen interview however, this was followed up with the proposed assessment being conducted by clinical psychologist, Dr. McDowell, and the weight of her findings is significant. I find that the psychological injury is not a predominantly minor injury and therefore, her entitlement to benefits is not limited to the MIG limit.

TREATMENT PLANS

Is treatment reasonable and necessary?

[21] There are two treatment plans in dispute. The test set out at s. 15 of the *Schedule* is that the medical benefits be reasonable and necessary. Based on the evidence and the submissions of the parties, I find that the treatment plans are reasonable and necessary.

[22] The treatment plan from EZ Physio in which there remains a $200.00 balance from a plan in the total amount of $1,300.00, is reasonable and necessary. The respondent partially approved the treatment plan in the amount of $1,100.00, leaving the remaining amount denied because it is outside of the MIG limit. Based on the documentary evidence of her condition and the recommended treatment of active therapy, acupuncture and chiropractic services, I find that the treatment is reasonable and necessary to achieve maximum recovery.

[23] The treatment plan in the amount of $2,200.00 for a psychological assessment is reasonable and necessary given her psychological status, supported by Dr. McDowell's report as well as by remarks from her healthcare providers at EZ Physio of her ongoing psychological injuries. I considered the respondent's submissions that a chiropractor is not qualified to diagnose her psychological issues, however, the records from the healthcare provider serve at least to corroborate the symptomology that was reported by the applicant at EZ Physio and, where she sought regular treatment for months following the accident, it

follows that an assessment into her psychological impairments is reasonable and necessary. Dr. Bhatia is also a clinical psychologist. In addition, the respondent's submissions are not based on independent assessments, so I assign less weight to its submissions and find the applicant is entitled to the plan.

INTEREST

Is the respondent liable to pay interest on overdue payments?

[24] As a result of the above-noted findings, interest in respect of a benefit is due pursuant to s. 51 of the *Schedule*.

ORDER

[25] For the reasons provided above, I order the following:

a. that the applicant be removed from the MIG treatment limit;

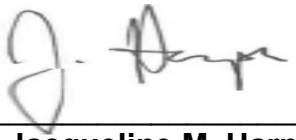
b. that the applicant is entitled to payment for the following:

   i. $200.00 for physical therapy in the treatment plan proposed by EZ Physio noted above;

   ii. $2,200.00 for the psychological assessment in the treatment plan proposed by Somatic Assessments & Treatment Clinic, noted above; and

c. that the respondent pay to the applicant interest on overdue payments in accordance with s. 51 of the Schedule.

Released: June 20, 2023



Jacqueline M. Harper
Adjudicator