**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**

Ontario

**Tribunal File Number: 17-007003/AABS**

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act,* RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

**U.S.**

**Applicant**

and

**Certas Home and Auto Insurance Company**

**Respondent**

# DECISION

**ADJUDICATOR:** **Lindsay Lake**

**APPEARANCES:** Carla Barcelo, Counsel for the Applicant

Thelson Desamour, Counsel for the Respondent

**HEARD IN WRITING ON:** **June 25, 2018**

## OVERVIEW

[1] U. S. (the "applicant"), was injured in an automobile accident on October 8, 2015 ("the accident") and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*") from the respondent.

[2] The respondent denied the applicant's claims because it had determined that all of the applicant's injuries fit the definition of "minor injury" as prescribed by section 3(1) of the *Schedule*, and therefore, fall within the Minor Injury Guideline (the "MIG").[1]

[3] As a result, the applicant submitted an application for dispute resolution services to the Licence Appeal Tribunal – Automobile Accident Benefits Service (AABS) (the "Tribunal") on October 17, 2017.

[4] The parties were unable to resolve their dispute at a case conference and the matter proceeded to a rescheduled written hearing on June 25, 2018. All submissions and evidence were filed with the Tribunal in advance of this date. No reply submissions from the applicant were received. A review of those documents forms the basis of this decision.

## ISSUES TO BE DECIDED

[5] The following issues are to be decided:

(i) Did the applicant sustain predominately minor injuries as defined under the *Schedule*?

(ii) If the answer to issue (i) above is "no," then I must determine the following issues:

(a) Is the applicant entitled to receive a medical and rehabilitation benefit for physiotherapy treatment recommended by Total Care Management in the following amounts:

1. $1,760.00 in a treatment plan submitted on February 10, 2016, and denied by the respondent on February 23, 2016?

2. $1,760.00 in a treatment plan submitted on June 6, 2016, and denied by the respondent on June 9, 2016?

3. $1,760.00 in a treatment plan submitted on September 7, 2016, and denied by the respondent on September 19, 2016?

[1] Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act*.

4. $1,760.00 in a treatment plan submitted on November 21, 2016, and denied by the respondent on November 28, 2016?

5. $1,760.00 in a treatment plan submitted on February 28, 2017, and denied by the respondent on March 10, 2017?

(b) Is the applicant entitled to interest on any overdue payment of benefits?

## RESULT

[6] I find that the applicant's injuries fall within the MIG and, therefore, it is unnecessary to consider the reasonableness or necessity of the treatment plans in dispute or the issue of interest because the maximum of $3,500.00 for medical and rehabilitation benefits under the MIG has been exhausted.

## ANALYSIS

### *The Minor Injury Guideline*

[7] 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 section 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 MIG.

[8] Section 18(1) of the *Schedule* limits the entitlement for medical and rehabilitation benefits for minor injuries to $3,500.00.

[9] The onus is on the applicant to show that his injuries fall outside of the MIG.[2]

### *Did the applicant sustain a predominately minor injury?*

[10] I find that the applicant has not provided the evidence necessary to establish on a balance of probabilities that his injuries are outside of the MIG.

[11] In his submissions, the applicant states he sustained injuries to his neck, shoulder, back and legs as a result of this accident. The respondent, however, argues that these injuries are soft tissue injuries that are, "common with most car collisions," and that these injuries belong in the MIG.

[12] On the date of the accident, the applicant attended the emergency room at Trillium Health Partners Credit Valley Hospital. According to the Emergency Treatment Record, the applicant complained of neck, back and left leg pain. The record also notes an abrasion on the applicant's left shin and states "muscular

[2] *Scarlett v. Belair,* 2015 ONSC 3635, para. 24 (Div. Ct.).

strain." The only discharging instructions to the applicant on the report are "Advil PRN" and to follow up with the family physician.

[13] On October 15, 2015, Tejinderpaul Dhotar, a Chiropractor with Total Health Care Management (Peel), completed both a Disability Certificate (OCF-3) and a Treatment and Assessment Plan (OCF-18) for the applicant. Mr. Dhotar describes the applicant's injuries on the OCF-3 as follows: Whiplash associated disorder [WAD2] with complaint of neck pain with musculoskeletal signs; Headache; Sprain and strain of shoulder joint; Sprain and strain of thoracic spine; Sprain and strain of lumber spine; Injury of muscle(s) and tendon(s) of anterior muscle group at lower leg level; and State of emotional shock and stress, unspecified. Mr. Dhotar also recommends that the applicant be referred to a, "neurologist, orthopaedic [surgeon], psychologist and/or physiatrist," if the applicant's condition does not improve or worsens.

[14] On the October 15, 2015 OCF-18, Mr. Dhotar states that the applicant's injuries do not fall into the MIG but no further information is provided to support this assertion. In this OCF-18, Mr. Dhotar also recommends a referral for, "x-rays/diagnostic ultrasound/MRI and/or CTSCAN."

[15] During the period of January 4, 2016 to February 8, 2017, Mr. Dhotar completes five additional OCF-18s for the applicant. The description of the applicant's injuries and Mr. Dhotar's recommendations for referrals remain unchanged since the initial October 15, 2015 OCF-3 and OCF-18. There is no evidence before me indicating that Mr. Dhotar's recommended referrals ever occurred.

[16] The applicant submitted clinical notes and records (CNRs) from Dr. Uzma Chaudhry, the applicant's family physician. There are only four entries after the date of the accident in the CNRs which occurred between December 29, 2016 and January 19, 2017. Two of these entries are for CNRs requests and the third and fourth entries relate to an immunization.

[17] The applicant attended two Insurer's Examinations (IEs) – one on December 21, 2015 and one on October 29, 2016. Both of these IEs were conducted by Dr. Michael Boucher, a General Practitioner with a practice focused on chronic pain medicine. On December 21, 2015, Dr. Boucher concluded that the applicant sustained soft tissue injuries to his neck in the form of cervical myofascial strain WAD I injury, a thoracolumbar myofascial strain, a bilateral shoulder strain, bilateral knee contusion and had associated cervicogenic headaches. Based on these injuries, it was Dr. Boucher's opinion that the applicant sustained soft tissue injuries that fall within the MIG.

[18] Dr. Boucher's opinion that the applicant's injuries were in the MIG remained the same after he completed the second IE on October 29, 2016. Dr. Boucher noted in his report dated November 8, 2016, after the second IE, that the applicant had not been referred to any medical specialists or for any diagnostic testing.

[19] Therefore, I conclude that the applicant sustained soft tissue injuries and a laceration, which alone would mean that he sustained a "minor injury" as defined in section 3 of the *Schedule*. In this case, however, the applicant argues that he should be removed from the MIG because he:

(i) sustained "bicipital tendinitis" and mild rotator cuff tendinopathy to his left shoulder as a result of the accident;

(ii) suffers from chronic pain as a result of his injuries from the accident;

(iii) sustained psychological injuries as a result of the accident; and

(iv) had pre-existing psychological conditions.

***Bicipital Tendinitis and Mild Rotator Cuff Tendinopathy***

[20] As evidence of his bicipital tendinitis and mild rotator cuff tendinopathy, the applicant relies upon a left shoulder ultrasound report completed by Medscan Healthcare and dated September 21, 2017. This report states, "Impression: bicipital tendinitis, mild rotator cuff tendinopathy."

[21] The respondent questions the cause of the bicipital tendinitis and mild rotator cuff tendinopathy given these impressions were made almost two years after the accident. Alternatively, the respondent argues that if I accept that the accident caused the applicant's bicipital tendinitis and mild rotator cuff tendinopathy, that these injuries would constitute "sprains/strains" and, therefore, still fall within the MIG.

[22] While I do not dispute the findings of the September 21, 2017 ultrasound, I cannot conclude on a balance of probabilities that the applicant's bicipital tendinitis and mild rotator cuff tendinopathy were injuries caused by the accident. I have difficulty in relying upon an ultrasound dated almost two years after the accident when Mr. Dhotar recommended imaging as early as one week after the accident. Further, the impressions in the ultrasound report do not speak to causation and there is no evidence before me from any health care providers that expressly state that the bicipital tendinitis and mild rotator cuff tendinopathy observed in the ultrasound in the applicant's left shoulder were caused by the accident.

[23] Moreover, there is no evidence before me to demonstrate that the applicant complained of pain or injuries to his *left* shoulder within a reasonable timeframe following the accident. On the accident date, the Emergency Treatment Record did not mention the applicant experiencing any shoulder pain at all. On the OCF-3 dated October 15, 2015, Mr. Dhotar does not identify which shoulder joint is sprained/strained and plurals are not used to indicate that both of the applicant's shoulder joints are sprained/strained. The KIN Communication Sheet submitted by the applicant notes the applicant's injured area as "shoulder – right," and only the right shoulder is marked as injured on the accompanying body diagram,

which would still fall within the MIG. There is no mark indicating an injury to the applicant's left shoulder.

[24] It is not until Dr. Boucher's IEs on December 21, 2015 and October 29, 2016, that the applicant mentions any left shoulder pain. In the January 15, 2016 report following the first IE, which occurred two and a half months post-accident, the applicant self-reports that he has, "intermittent discomfort in the shoulders." In Dr. Boucher's November 8, 2016 report following the second IE, which occurred over a year post-accident, the applicant marked both the right and the left shoulder on the pain diagram indicating pain in both shoulders. The applicant informed Dr. Boucher that the pain in his neck is intermittent but sharp and radiates into his shoulders. Dr. Boucher noted in his November 8, 2016 report that upon physical examination, the applicant had no increased tone in the upper back/shoulder region.

[25] Based on the totality of the evidence before me, I find that only the applicant's *right* shoulder sustained minor injuries as defined in the *Schedule* as a result of the accident and, therefore, the applicant's bicipital tendinitis and mild rotator cuff tendinopathy observed in the applicant's *left* shoulder were not injuries caused by the accident. In arriving at this conclusion, I place significant weight on the fact that the applicant did not initially complain of any *left* shoulder pain as a result of the accident, the ultrasound report relied upon by the applicant to demonstrate these injuries is dated two years post-accident and there is no evidence before me that expressly states that the bicipital tendinitis and mild rotator cuff tendinopathy observed in the applicant's *left* shoulder were caused by the accident.

### *Chronic Pain*

[26] The applicant also argues that his chronic pain removes him from the MIG. The applicant states that he continued to seek treatment for his pain from his family physician and was advised to continue with physiotherapy treatment. The applicant argues that he has been receiving "regular treatment" for approximately two and a half years but that he still experiences pain in "various parts of his body." The applicant submits that prior to the accident, he lived a, "vibrant lifestyle," but after the accident as a result of his injuries his ability to, "live his life like he once did," has been greatly diminished.

[27] In order for "chronic pain" to remove the applicant from the MIG, the applicant must prove on a balance of probabilities that his or her chronic pain is more than just sequelae or a symptom arising from his or her minor injuries. Further, ongoing pain alone is insufficient to take one out of the MIG: the ongoing pain also must be accompanied by some functional impairment.[3]

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[3] See *16-000438 v. the Personal Insurance Company* 2017 CanLII 59515 (ON LAT) ("*16-000438*") at paras. 23 and 27. Also see *17-002337/AABS v. Wawanesa Mutual Insurance Company*, 2017 CanLII 99137 (ON LAT) at paras. 28 and 30.

[28] I have no evidence before me that supports the applicant's claim that he, "continued to seek treatment for his pain from his family physician." As stated above, I was only provided with four entries from Dr. Chaudhry dated after the accident and there is no reference to the applicant's pain in these entries.

[29] The first entry on the decoded OHIP summary to June 19, 2017 following the date of the accident is April 15, 2016, over six months after the accident. Further, there are only seven entries in total dated after the accident with the last entry being on January 19, 2017. None of these entries appear to be pain or accident related.

[30] The applicant has submitted a Treatment Record from Total Care Management with a start date of October 15, 2015. The treatment dates are largely illegible and the "Treatment & Comments" column only consists of one line entries for each treatment date which are also largely illegible. There is no information in this treatment record speaking to the applicant's pain although I do not dispute that he attended for treatment on a number of occasions.

[31] On all but the first OCF-18s prepared by Mr. Dhotar, he reports, "patient reports improvements and decrease [sic] pain," when asked what the applicant's improvement was at the end of the previous OCF-18.

[32] Dr. Boucher's January 15, 2016 report notes that the applicant was approximately 80% improved and that the applicant only uses Tylenol on a "p.r.n. basis" for headache and general discomfort. The respondent relies upon Dr. Boucher's findings in this report that, despite the applicant's, "subjective reports of intermittent neck pain, upper shoulder, low back pain, left leg pain and headache during the physical examination," Dr. Boucher did not, "identify objective evidence of ongoing musculoskeletal, neurological or orthopaedic accident-related injury or impairment." Further, Dr. Boucher reported that the applicant, "had a normal physical examination."

[33] Functionally, Dr. Boucher reported on January 15, 2016 that the applicant was independent with his personal hygiene and grooming, dressing and undressing, self-feeding, functional transfers, bowel and bladder management and ambulation. The applicant also reported to Dr. Boucher that prior to the accident, he enjoyed playing soccer and basketball with his friends and running. The applicant's mother, however, informed Dr. Boucher that the applicant was not overly social with children at school as he was quite self-conscious and that he tended to stay home and played with his siblings. The applicant's mother reported that this had not changed since the accident.

[34] The respondent highlights the discrepancies in the applicant's pain reporting between Dr. Boucher's first and second IE of the applicant. In his November 8, 2016 report, Dr. Boucher states that the applicant reported feeling better on October 29, 2016than what he did after the accident; however, the applicant only reported a 20% improvement as opposed to the 80% improvement reported back

in December 2015. The applicant also reported to Dr. Boucher that he, "continues to play soccer on the weekends and he is also cycling." The respondent argues that the applicant's actions, such as playing soccer and cycling, are not consistent with a person who reports only feeling 20% better.

[35] Dr. Boucher also noted in his November 8, 2016 report that the applicant's, "reports of pain did not match with any physical signs on examination," and, "despite the ongoing subjective complaints reported by [the applicant], during the physical examination, I did not identify objective evidence of ongoing musculoskeletal, neurological or orthopaedic accident-related injury or impairment. [The applicant] had a normal physical examination." Dr. Boucher reported that the applicant takes Tylenol 3s on an as-needed basis in order to manage his accident related pain but that the applicant had not been referred for any diagnostic testing or to any medical specialists as a result of the accident.

[36] I am not satisfied on a balance of probabilities that the applicant's pain is chronic pain that is more than just sequelae or a symptom arising from his minor injuries that would remove him from the MIG. Firstly, I am not satisfied that the applicant's pain has been ongoing since the accident because of the gap in time between the accident and the applicant's subsequent reporting of pain, the applicant's inconsistent reporting of pain levels (i.e. the OCF-18s that report decreased pain and the applicant's self-reporting of an initial improvement of 80% and then ten months later reducing that improvement to 20%) and there is no evidence to support the applicant's argument that he, "continued to seek treatment for his pain from his family physician." The applicant also only appears to rely upon relatively mild medicine for pain relief on an as-needed basis.

[37] Secondly, there is no evidence before me that would support a finding that the applicant's pain has been accompanied by a functional impairment. Dr. Boucher reports that the applicant was independent with self-care, successfully completed grade 10 and had returned to soccer and cycling in October 2016. The applicant did not provide any contrary evidence respecting the applicant's functionality. Therefore, I find that the applicant's uncontested activities evidences neither pain accompanied by a functional impairment nor supports the applicant's submission that his ability to, "live his life like he once did," has been greatly diminished.

***Psychological Impairment***

[38] In his submissions, the applicant states he sustained psychological injuries, as well as anxiety, stress, frustration, irritability and difficulty initiating and maintaining sleep as a result of the accident. The applicant claims that these psychological injuries place his claims outside of the MIG.

[39] The respondent argues that the applicant has not advanced supporting evidence for psychological injuries arising from the accident, such as records from the applicant's family doctor diagnosing the applicant with a psychological issue.

[40] I agree with the applicant that psychological injuries, if established, would fall outside the MIG, because the MIG only governs minor injuries, and the prescribed definition does not include psychological impairments.

[41] In this case, however, I cannot conclude on the evidence before me that the applicant suffered a psychological injury as a result of the accident that would remove him from the MIG.

[42] The only evidence from a health care provider of any psychological issues allegedly suffered by the applicant after the accident comes from Mr. Dhotar. In the OCF-3 dated October 15, 2015, Mr. Dhotar lists, "state of emotion shock and stress, unspecific," as an injury sustained by the applicant. Further, all of the OCF-18s completed by Mr. Dhotar identify "psychological issues" as a barrier to the applicant's recovery. I place very little weight on these general remarks made by Mr. Dhotar because as a chiropractor he is not qualified to make any psychological diagnosis. This is evident from Mr. Dhotar's recommendation to refer the applicant to a psychologist and/or physiatrist if his condition worsens. There is no evidence before me that such a referral was made.

[43] The KIN Communication Sheet from Total Care Management notes that the applicant reported dizziness, nausea, fear, anxiety and sleep disturbance; however, there is no further information about the frequency, duration or intensity of these symptoms, no further follow-up is reported and it is unclear who completed this form.

[44] The applicant has also submitted a psychological intake form from the Toronto Assessment Centre. On this self-assessment tool, the applicant, through his mother who completed the form, reported that his fear is "severe" when traveling in a vehicle and that he has feelings of sadness, depression, irritability and nervousness as a result of the accident. The applicant also reports sleep difficulties, flashbacks, difficulties in dealing with his pain and carrying out daily activities.

[45] The applicant has failed to provide me with any submissions or evidence of any testing that was done to confirm whether the applicant sustained any psychological issues as a result of the accident and, therefore, sustained a psychological injury that would take him outside of the MIG. The only evidence before me on any potential psychological impairment comes from a chiropractor and from the applicant's self-reporting through his mother. I agree with the respondent that the applicant has not provided any clinical notes and records from his family doctor that demonstrate that the applicant reported any psychological issues or symptoms to Dr. Chaudhry after the accident. In the absence of any other supporting evidence of a psychological condition sustained by the applicant as a result of the accident, I am unable to assign any weight to the applicant's self-reports or to Mr. Dhotar's observations and, therefore, I cannot conclude that the applicant suffered a psychological injury as a result of the accident.

***Pre-existing Psychological Condition***

[46] Section 18(2) of the *Schedule* provides that insured persons with minor injuries who have a pre-existing medical condition may be exempted from the $3,500 cap on benefits. In order to do so, the applicant must provide compelling evidence meeting the following requirements in order to be removed from the MIG:

(i) There was a pre-existing medical condition that was documented by a health practitioner before the accident; and

(ii) The pre-existing condition will prevent maximal recovery from the minor injury if the person is subject to the $3,500 on treatment costs under the MIG.[4]

[47] The standard for excluding an impairment on the basis of pre-existing condition(s) is well-defined and strict. A pre-existing condition will not automatically exclude a person's impairment from the MIG: it must be shown to prevent maximal recovery within the cap imposed by the MIG.

[48] The applicant argues that his pre-existing psychological conditions should remove him from the MIG. The applicant submits that since 2008, he has experienced psychological issues in the nature of behavioural issues and problems with academics. The applicant also relies upon notations in his OHIP records from five years before the accident to show that he had, "injuries that related to physical and psychological 'pre-existing injuries that may pose a barrier to recovery.'"

[49] The respondent argues that the applicant has provided no evidence that the applicant had a pre-existing condition that would prevent him from recovering within the MIG. The respondent argues that it is not enough for the applicant to allege a pre-existing issue, but that the applicant must also prove that because of the pre-existing issue, the applicant would not be able to recover within the MIG limit.

[50] The respondent argues that a single notation in a decoded OHIP summary is not a sufficient basis to prove a pre-existing psychological issue. The respondent also does not dispute Dr. Avigail Ram's findings in the TDSB Psychological Services Report from June 2010 that the applicant has a, "mild developmental disability;" rather, the respondent takes the position that the applicant has:

(i) conflated his learning disability with a "psychological issue;"

(ii) provided no evidence of the correlation between the two "distinct types of mental issues;" and

[4] Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act* page 5, heading 4, "Impairments that do not come within this Guideline".

(iii) provided no evidence as to how the applicant's learning disability would make the applicant unable to recover within the MIG.

[51] I accept the findings of Dr. Ram that in 2010, the applicant had a mild developmental disability. I do not find it necessary, however, to decide the issue of whether or not a "developmental disability" constitutes a "psychological issue" because the presence of a pre-existing condition alone is not sufficient to remove the applicant from the MIG: the applicant bears the onus and must adduce compelling evidence to demonstrate that the pre-existing condition prevents him from achieving maximal recovery within the MIG.[5] The applicant did not point me to any evidence that demonstrates this.

[52] Dr. Ram's report was completed five years before the accident and does not speak to the effect that mild developmental disability may have, if any, on the applicant's ability to achieve maximum recovery within the MIG limits. The OHIP summary also does not speak to the effect of any pre-existing conditions may have on the applicant's ability to achieve maximum recovery within the MIG limits.

[53] The KIN Communication Sheet from Total Care Management indicates "no" as an answer to the question, "Do you have any pre-existing health conditions?" with the area being entirely struck out by the author.

[54] The only information provided to me about the effect of any pre-existing conditions on the applicant's ability to recover within the MIG limits comes from Mr. Dhotar. On all six OCF-18s, the OCF-3 and the OCF-23, Mr. Dhotar provides the response of "no" to the inquiry, "prior to the accident, did the applicant have any disease, condition or injury that could affect his/her response to treatment for the injuries identified."

[55] Based on the evidentiary record before me, I find that the applicant has not met his onus to show through compelling evidence that any pre-existing condition of his would prevent maximal recovery from his injuries if he's subject to the $3,500 limit on treatment costs under the MIG.

***Treatment Plans for Physiotherapy Services***

[56] The respondent has submitted a Standard Benefit Statement showing that $3,500.00 has been paid since the accident. The applicant has not disputed this amount or the respondent's position that the MIG limit was exhausted in February 2016.

[57] Since I have found that the applicant's injuries as a result of the accident fall within the MIG, I do not need to determine whether or not the treatment plans are

[5] *16-001517 v Royal SunAlliance Insurance*, 2017 CanLII 19203 (ON LAT) at para. 25 and M.(M.) v. Wawanesa Mutual Insurance Company, 2016 CanLII 93132 (ON LAT) at para. 15.

reasonable and necessary as the maximum of $3,500.00 for medical and rehabilitation benefits in the MIG has been exhausted.

***Interest***

[58] Because I have found that there are no benefits or costs that are overdue, no interest is payable.

**CONCLUSION**

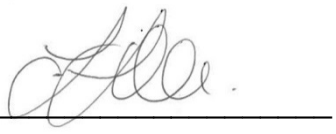
[59] For the reasons outlined above, I find:

(i) The applicant sustained predominately minor injuries as defined under the *Schedule*; accordingly, it is not necessary to determine whether or not the treatment plans are reasonable and necessary because the maximum of $3,500.00 for medical and rehabilitation benefits under the MIG has been exhausted;

(ii) The applicant is not entitled to interest; and

(iii) The application is dismissed.

**Released: August 10, 2018**



**Lindsay Lake, Adjudicator**