



Citation: Macadangdang v. Economical Insurance Company, 2024 ONLAT 22-006786/AABS

Licence Appeal Tribunal File Number: 22-006786/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:

Cesario Macadangdang

Applicant

and

Economical Insurance Company

Respondent

DECISION

ADJUDICATOR: Rachel Levitsky

APPEARANCES:

For the Applicant: Elena Fetesko, Paralegal

For the Respondent: Yalda Aziz, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Cesario Macadangdang, the applicant, was involved in an automobile accident on October 7, 2020, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”). The applicant was denied benefits by the respondent, Economical Insurance Company, 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:
- 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 Minor Injury Guideline (“MIG”) limit?
 - ii. Is the applicant entitled to \$2,222.92 for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated October 13, 2020?
 - iii. Is the applicant entitled to \$1,300.00 for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated December 28, 2020?
 - iv. Is the applicant entitled to \$1,834.52 for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated March 15, 2021?
 - v. Is the applicant entitled to \$208.50 (\$1,300.00 less \$1091.50 approved) for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated December 28, 2020?
 - vi. Is the applicant entitled to \$933.72 for an occupational therapy (attendant care) assessment, proposed by Ways to Health Clinic in a treatment plan dated November 18, 2020?
 - vii. Is the applicant entitled to \$2,200.00 for a psychological assessment, proposed by Ways to Health Clinic in a treatment plan dated March 22, 2021?
 - viii. Is the applicant entitled to \$1,360.78 for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated October 3, 2022?

- ix. Is the applicant entitled to \$2,856.00 for a neurological assessment, proposed by Imperial Medical Assessments Inc., in a treatment plan dated December 23, 2020?
- x. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] The applicant has demonstrated that he sustained a concussion, an injury that is not predominantly minor. As a result, he is not subject to the MIG.
- [4] The applicant is entitled to \$2,222.92 for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated October 13, 2020.
- [5] The applicant is entitled to \$208.50 (\$1,300.00 less \$1,091.50 approved) for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated December 28, 2020.
- [6] The applicant is entitled to \$1,300.00 for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated December 28, 2020.
- [7] The applicant is entitled to \$2,856.00 for a neurological assessment, proposed by Imperial Medical Assessments Inc., in a treatment plan dated December 23, 2020.
- [8] The applicant is not entitled to the remainder of the treatment plans in dispute.
- [9] The applicant is entitled to the payment of interest on overdue benefits pursuant to s. 51 of the *Schedule*.

PROCEDURAL ISSUE

- [10] The applicant argues that the respondent's submissions were 11 pages, which exceeded the 10 pages allowed by the Tribunal in the case conference report and order of April 3, 2023. He submits that page 11 should be excluded from this hearing.
- [11] Pursuant to ss. 23(1) and 25.0.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, it is within my discretion to strike any submissions in excess of the 10-page limit specified in the order.
- [12] Although the respondent's submissions went half a page over the limit, it appears that the applicant's font size and line spacing is smaller than the respondent's. While Tribunal orders must be followed, I fail to see how the respondent gained a

tactical advantage over the applicant in this case. The applicant has not made any submissions as to how he would be prejudiced if I accepted all of the respondent's pages. As I am satisfied that there is no prejudice to the applicant, I will exercise my discretion and consider all of the respondent's submissions.

ANALYSIS

Application of the Minor Injury Guideline

- [13] 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. 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." It is recognized that psychological injuries, concussions, and chronic pain with functional impairment fall outside of the definition of minor injury. In all cases, the burden of proof lies with the applicant.
- [14] The applicant submits that he should be removed from the MIG as he sustained a concussion, anxiety, and chronic pain. The respondent disagrees.
- [15] I find that it likely that the applicant sustained a concussion in the accident, and therefore does not belong in the MIG.
- [16] The applicant visited his family physician, Dr. Atwal, on the same day as the accident. He complained of a headache, and advised Dr. Atwal that he hit his head on the right side, and possibly lost consciousness. Dr. Atwal diagnosed a concussion.
- [17] The applicant was subsequently assessed by Dr. Vincenzo Basile, neurologist, on February 5, 2021. He endorsed symptoms of anterograde amnesia, headaches, dizziness, light-headedness, movement of the room when changing positions, left sided tinnitus, photophobia and phonophobia, and visual issues. He was also experiencing personality changes, balance issues, delayed responses, periods of stuttering, word finding difficulties, mild confusion, trouble controlling emotions, disorientation and confusion, fogginess, and memory issues. Dr. Basile diagnosed the applicant with postconcussive syndrome.
- [18] The applicant reported headaches and memory issues to Dr. Kelly McCutcheon, s. 44 psychologist, on June 12, 2021, and expressed a desire to see a neurologist again. He reported blurred vision and occasions where he could not

hear. He would also occasionally forget appointments and misplace items. The applicant advised Dr. McCutcheon that he was worried about his memory issues.

- [19] The respondent submits that Dr. Atwal only mentioned a concussion once, and it is unclear how the diagnosis was reached without testing, referrals for a CT scan, or specialist investigations. The respondent relies on *Stone v. BelairDirect Insurance Company*, 2022 CanLII 81513, and *Ly v. Aviva General Insurance*, 2022 CanLII 81525, stating that the Tribunal in those cases questioned the diagnosis of a concussion made by a family physician in similar instances.
- [20] I find that the cases relied on by the respondent are distinguishable from the one before me. In *Stone*, the concussion diagnosis was made by the family physician more than two weeks after the accident, and the diagnosis was repeated by the applicant to a chiropractor and optometrist, but they did not verify it themselves. In this case, the applicant underwent an assessment with a neurologist, who also made the diagnosis. Dr. Atwal's diagnosis was not an outlier, as it was in the *Stone* case. Further, Dr. Atwal's diagnosis was initially provided immediately after the accident, rather than some weeks later.
- [21] In *Ly*, the Tribunal questioned the diagnosis of the family physician because the only treatment suggested was rest and physiotherapy, no referral was made to a concussion clinic, a concussion diagnosis is usually made by a neurologist, and CT scans and x-rays of the applicant's spine and head were normal. I am not bound by other Tribunal decisions, and I disagree with the assertions made in that case. A concussion diagnosis does not have to be made by a neurologist in order for it to be legitimate, and I am not persuaded that such a diagnosis is necessarily contingent on positive imaging. In any event, the decision in *Ly* was subsequently cancelled and a new hearing was ordered.
- [22] The respondent also submits that Dr. Basile's report should be given less weight, as it was unclear whether his assessment was virtual or in person, the diagnosis one-year post-accident lacked support from Dr. Atwal's records, and the applicant did not report the symptoms to Dr. Atwal that he reported to Dr. Basile. Further, the respondent notes that the applicant did not follow Dr. Basile's recommendations, namely taking medication for headaches, undergoing MRI and EMG testing for alleged radiculopathy, an MRI of the brain, and a sleep study.
- [23] It appears that Dr. Basile's assessment was completed in person, even though he did not specify that in his report. He completed a physical examination of the applicant, including muscle strength testing and a sensory examination. He also mentioned in his report that several assistants were present for the assessment

as well. There is no reason for me to believe that it was a virtual assessment. Further, Dr. Basile provided his diagnosis only 4 months after Dr. Atwal's, not one year.

- [24] I agree that Dr. Atwal's records did not mention concussion symptoms after his diagnosis. However, I am not persuaded that this warrants a discounting of the diagnoses entirely, especially as the applicant also endorsed some of the same symptoms to Dr. McCutcheon. Further, whether the applicant followed Dr. Basile's treatment recommendations does not take away from the fact that he was diagnosed with a concussion and postconcussive syndrome. Those diagnoses are what remove him from the MIG, not whether he complied with treatment recommendations.
- [25] Finally, the diagnoses have not been refuted by other practitioners. Dr. Todd Levy, general practitioner, conducted a s. 44 assessment on May 29, 2021. Although he summarized Dr. Atwal's record of October 7, 2020, and Dr. Basile's report, he did not comment on their diagnoses of concussion and postconcussive syndrome. He did not defer comment to a neurologist.
- [26] For the reasons above, I find that the applicant has proven on a balance of probabilities that he sustained a concussion in the accident, and he is accordingly removed from the MIG.

Treatment Plans

- [27] To receive payment for a treatment and assessment plan under s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.
- [28] Section 38(8) of the *Schedule* requires an insurer to provide its medical and all other reasons for a denial within 10 business days after receipt of a treatment plan. If an insurer fails to provide the requisite denial, under s. 38(11)2, it is required to pay for all goods and services described in the treatment plan that relate to the period incurred from the 11th business day after the treatment plan was submitted until the proper denial is given.
- [29] The applicant argues that the respondent breached s. 38(8) with respect to the denial letters for the treatment plans listed as issues (ii), (iii), and (ix) above. I have determined below that these treatment plans are reasonable and

necessary, and therefore an analysis with respect to s. 38(8) is not required. The applicant does not make specific submissions regarding the application of s. 38(8) to the remainder of the treatment plans in dispute, so I will not undertake that analysis with respect to those plans.

\$2,222.92 for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated October 13, 2020 (issue (ii))

[30] I find that the applicant is entitled to this treatment plan.

[31] The goals of the treatment plan were pain reduction, increased range of motion, increase in strength, and reduced inflammation and swelling. The functional goals were a return to activities of normal living, work activities, and housekeeping and home maintenance. I find that, at the time the treatment plan was submitted, in the few weeks after the accident, it was reasonable and necessary for the applicant to undergo facility-based therapy in order to try and achieve these goals. I also find that the cost of the treatment plan was proportional to the proposed goals.

\$1,300.00 for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated December 28, 2020 (issue (iii))

[32] I find that the applicant is entitled to this treatment plan.

[33] The treatment plan proposed 10 sessions each of 10 sessions each of chiropractic treatment, massage therapy, active therapy, and IFC, TENS, and electrotherapy. The goals of the treatment plan were pain reduction, increased range of motion, increase in strength, and to reduce swelling and inflammation.

[34] Dr. Atwal's record of November 20, 2020, indicates that the applicant's physical symptoms were improving, and he was attending physiotherapy once per week. I find that at the time it was submitted, only a couple of months after the accident, 10 sessions each of those modalities was reasonable and necessary in order for the applicant to explore whether his improvement would continue. I also find that the cost of the proposed treatment is reasonable.

\$1,834.52 for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated March 15, 2021 (issue (iv))

[35] I find that the applicant is not entitled to this treatment plan.

[36] The applicant must provide evidence to establish how the specific treatment proposed would assist him in meeting the goals set out in the treatment plan,

which were pain reduction, increased range of motion, increase in strength, and return to activities of normal living, housekeeping, and home maintenance. Around the time the treatment plan was submitted, there is very little evidence as to how physical therapy was assisting the applicant. Despite apparently receiving physical therapy on a weekly basis until November 2021, there are no records from the clinic before me, so I cannot assess whether the therapy was reasonably beneficial such that further similar treatment would be justified. There is no evidence as to why he stopped attending therapy. The applicant reported to Dr. McCutcheon that the relief he was getting was temporary. He reported to Dr. Levy that his condition had not improved. He reported to Dr. Castro, pain physician, in September 2023 that physiotherapy and massage had provided mild relief. Although Dr. Atwal referred the applicant for physiotherapy one time in February 2022, there is no detail in Dr. Atwal's notes regarding why it was being recommended, whether it was due to a symptom flare-up, or whether it was because physiotherapy was previously helpful (or to what degree it was helpful). The applicant has the burden of proving that this treatment plan was reasonable and necessary, and I find that he has not done so.

\$208.50 (\$1,300.00 less \$1091.50 approved) for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated December 28, 2020 (issue (v))

- [37] I find that the applicant is entitled to the remaining \$208.50 with respect to this treatment plan.
- [38] The treatment plan proposed 10 sessions each of chiropractic treatment, massage therapy, active therapy, and IFC, TENS, and electrotherapy. The respondent partially denied this treatment plan because the applicant did not have any funds left in the MIG. The goals of the treatment plan were pain reduction, increased range of motion, increase in strength, and to reduce swelling and inflammation. I find that, at the time it was submitted, only a couple of months after the accident, the remainder of the proposed treatment was reasonable and necessary in order to try and achieve the stated goals. I also find that the cost of the remaining treatment proposed under this plan is reasonable.

\$933.72 for an occupational therapy (attendant care) assessment, proposed by Ways to Health Clinic in a treatment plan dated November 18, 2020 (issue (vi))

- [39] I find that the applicant is not entitled to this treatment plan.
- [40] The applicant has not made any specific submissions as to why an attendant care assessment was reasonable and necessary at the time it was proposed. He simply states that as his injuries fell outside of the MIG, he should be entitled to

the cost of an attendant care assessment. He does not make any submissions or point to any evidence regarding functional difficulties that he may have had at the time.

- [41] The treatment plan was submitted by Dennis Bishev, registered nurse. In the “additional comments” section, Mr. Bishev indicated that the applicant reported the following difficulties: dressing and grooming, getting in and out of bed, going up and down stairs, taking a bath and washing himself, bending down to pick clothing up off the floor, reaching overhead, and getting in and out of the car.
- [42] Aside from the treatment plan itself, there is very little corroborating evidence of the applicant’s functional difficulties around the time the treatment plan was submitted. The evidence before me is that the applicant had returned to work as a baker 4-5 days after the accident on modified duties. After a few weeks, he returned to full duties. Dr. Atwal’s note from November 20, 2020, two days after this treatment plan was submitted, indicates that the applicant’s neck pain and stiffness had improved, his right hand grip was improving, and he was not taking any medication for pain. There are no indications of functional limitations within Dr. Atwal’s notes around this time.
- [43] The applicant subsequently advised Dr. Basile, Dr. Levy, and Dr. McCutcheon that he was independent in his self-care activities. He reported to Dr. Basile that he was unable to complete all of his housekeeping tasks independently, but no specifics were provided as to which tasks he was limited in completing. He also advised Dr. Levy and Dr. McCutcheon that he still assisted with all of the household chores.
- [44] Without further evidence, I find that the applicant has not met his burden in proving that an attendant care assessment was reasonable and necessary.

\$2,200.00 for a psychological assessment, proposed by Ways to Health Clinic in a treatment plan dated March 22, 2021 (issue (vii))

- [45] I find that the applicant is not entitled to this treatment plan.
- [46] The applicant submits that he is entitled to this treatment plan because Dr. Atwal’s clinical notes indicate that he continued to have driving anxiety, he reported symptoms such as anger, anxiety in a vehicle, worry, and memory issues to Dr. McCutcheon, and he scored “moderate” in terms of depression during Dr. Levy’s assessment. In addition, he argues that he was referred to a psychiatrist, Dr. Neger, by Dr. Atwal, and was diagnosed with Adjustment Disorder with Anxiety.

- [47] I find that Dr. Neger's note from June 28, 2023, does not provide much assistance to the applicant. Although the applicant advised Dr. Neger that he was anxious as a passenger, this was not explored in detail, and the applicant missed his second appointment where a differential diagnosis was supposed to be explored. He denied flashbacks, intrusive memories, nightmares, negative alterations in cognitions, and marked alterations in arousal or reactivity associated with the accident. The applicant's main complaint was due to anxiety, irritability, difficulty relaxing, sadness, and financial strain after a nephrectomy in January 2023. This had affected his life and ability to work. There is no elaboration as to whether Dr. Neger's diagnosis pertained to the accident, or to the nephrectomy.
- [48] There are indications throughout Dr. Atwal's records of the applicant experiencing some anxiety while in a vehicle. The applicant did not drive prior to the accident, but explained to Dr. McCutcheon that while travelling as a passenger, he would tell his wife how to proceed, and he was nervous. He also told Dr. Levy that he had passenger anxiety, although his scores for anxiety were normal. From a functional perspective, there is no evidence before me as to whether the applicant's feelings of anxiety limited him from being a passenger at all, or if so, to what extent.
- [49] Further, although the applicant's depression score during his assessment with Dr. Levy was "moderate", Dr. Levy also indicated that the validity of his reporting was in question, on account of his poor effort on the Rey-15 Item visual memory test. In addition, although Dr. Atwal mentioned depression during the applicant's initial visit on October 7, 2020, he did not mention it again. Dr. McCutcheon indicated that the applicant was experiencing some mild depressive symptomatology, but it was subclinical. I accordingly do not find that Dr. Levy's test score weighs heavily in this analysis.
- [50] The treatment plan was prepared by Larisa Levitas, registered psychotherapist. A pre-screening report was conducted on March 22, 2021, and was included in the treatment plan. Ms. Levitas indicated that the applicant was precautious and anxious when "travelling in a car as a driver", and "tries to stay away from traffic". Ms. Levitas noted that the applicant "reported difficulty with the tasks of his employment, due to driving anxiety". The evidence before me is that the applicant does not drive and only travels as a passenger. He works as a baker, and there is no evidence that his ability to work was somehow curtailed by passenger anxiety. I accordingly question the accuracy of the pre-screening report, and afford it little weight.

- [51] The goals indicated in the treatment plan are a return to activities of normal living, and a return to pre-accident level of mental health functioning. The stated reason for the assessment was to determine his clinical diagnosis and psychological treatment needs. However, the applicant expressly stated to Dr. McCutcheon that he is not interested in receiving any counselling. Even after being referred to Dr. Neger, the applicant only visited him once and did not return to continue the assessment.
- [52] The applicant relies on *16-002951 v. Primmum Insurance Company*, 2017 CanLII 33672, where the Tribunal preferred the test results of two psychologists over the insured person's self-report that she did not have any issues with depression or anxiety. The test results in that case showed a severe level of anxiety, and a moderate level of depression. In the case before me, Dr. McCutcheon's test scores indicated mild anxiety and mild depression, and she opined that the applicant's symptoms were subclinical, and found no evidence of a diagnosable psychological condition. This is not a situation where the applicant's self-report is far removed from his test scores or diagnosis, as it was in *16-002951*. I accordingly do not find that case to be analogous to the one before me.
- [53] The applicant also relies on *17-003735 v. Certas Direct Insurance Company*, 2018 CanLII 39445, where the Tribunal stated that the insured person only needed to prove on a balance of probabilities that it was reasonable and necessary that she explore the possibility that she suffered from a psychological impairment. She did not have to prove that she in fact suffered from one. I agree in principle. However, based on the facts before me, I have not been convinced of the reason to explore the possibility of whether the applicant suffers from a psychological impairment. He is not interested in treatment, and did not wish to complete the assessment to explore his psychological impairment with Dr. Neger, without any explanation. The applicant has not explained why this assessment is any different.
- [54] For those reasons, I find that the applicant has not proven on a balance of probabilities that a psychological assessment is reasonable and necessary.

\$1,360.78 for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated October 3, 2022 (issue (viii))

- [55] I find that the applicant is not entitled to this treatment plan.
- [56] There is no compelling evidence before me that the therapy proposed in the treatment plan was recommended around the time it was submitted. There is very little evidence regarding the applicant's pain complaints or limitations around

that time, or whether the proposed therapy would help with this. The applicant visited Dr. Castro, a pain physician, in September 2023, and he encouraged activity as tolerated, advised the applicant to take Tylenol as needed, and told him to reach out if he wanted pain injections. Notably, there were no specific recommendations for the kinds of therapy proposed in this treatment plan (chiropractic care, massage therapy, active therapy, and muscle stimulation). I find that the applicant has not met his burden in proving that this treatment plan is reasonable and necessary.

\$2,856.00 for a neurological assessment, proposed by Imperial Medical Assessments Inc., in a treatment plan dated December 23, 2020 (issue (ix))

[57] I find that the applicant is entitled to this treatment plan. There is evidence that the applicant sustained a concussion in the accident. It was appropriate for the applicant to explore this further through an assessment.

[58] The respondent submits that Dr. Atwal could have made a referral to a neurologist under OHIP, thus obviating payment under the *Schedule* pursuant to s. 47(2). However, other than a bald assertion, the respondent has not provided any evidence of the extent to which OHIP would cover an assessment such as this, if at all. I accordingly do not accept this argument.

Interest

[59] I find that interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*.

ORDER

[60] The applicant has demonstrated that he sustained a concussion, an injury that is not predominantly minor. As a result, the applicant is not subject to the MIG.

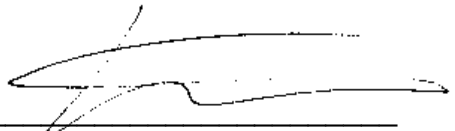
[61] The applicant is entitled to \$2,222.92 for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated October 13, 2020.

[62] The applicant is entitled to \$208.50 (\$1,300.00 less \$1,091.50 approved) for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated December 28, 2020.

[63] The applicant is entitled to \$1,300.00 for physiotherapy, proposed by Ways to Health Clinic in a treatment plan dated December 28, 2020.

- [64] The applicant is entitled to \$2,856.00 for a neurological assessment, proposed by Imperial Medical Assessments Inc., in a treatment plan dated December 23, 2020.
- [65] The applicant is not entitled to the remainder of the treatment plans in dispute.
- [66] The applicant is entitled to the payment of interest on overdue benefits pursuant to s. 51 of the *Schedule*.

Released: September 24, 2024



Rachel Levitsky
Adjudicator