



**Citation: Ahmed v. BelairDirect, 2023 ONLAT 21-006910/AABS**

**Licence Appeal Tribunal File Number: 21-006910/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:

**Mohamed Ahmed**

**Applicant**

and

**BelairDirect**

**Respondent**

**DECISION**

**ADJUDICATOR:**

**Anita John**

**APPEARANCES:**

For the Applicant:

Mohamed Ahmed, Applicant  
Andrew Suboch, Counsel

For the Respondent:

Glen Bushi, Counsel

Interpreter

Muna Mohamed, Somali Language

Court Reporter:

Sharon Kemp

Observer:

Monica Ciriello

**HEARD: by Videoconference: Scheduled for November 15, 16, 17 2022**

## REASONS FOR DECISION

### BACKGROUND

- [1] The applicant was involved in an automobile accident on **April 1, 2019** and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)*. The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).

### ISSUES

- [2] The issues to be decided in the hearing 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 limit and in the **Minor Injury Guideline**?
  - ii. Is the applicant entitled to a **non-earner benefit** of \$185.00 per week from April 29, 2019, to April 1, 2021?
  - iii. Is the applicant entitled to the **assessments** proposed by Community Health and Counselling Services Inc., as follows:
    - a. \$2,200.00 for a **chronic pain assessment**, in a treatment plan (plan) dated October 27, 2020, and denied November 2, 2020; and
    - b. \$2,179.22 for a **psychological assessment**, in a plan dated January 23, 2021, and denied March 8, 2021?
  - iv. Is the applicant entitled to **interest** on any overdue payment of benefits?

### RESULT

- [3] I find that the applicant’s injuries fall within the Minor Injury Guideline and, as such, the applicant is not entitled to any of the examinations in dispute. I also find that the applicant is not entitled to a non-earner benefit in the amount of \$185.00 per week for the time from April 29, 2019, to April 1, 2021. No interest is payable as I have found that no benefits are payable.

## ANALYSIS

[4] As the Divisional Court in *Scarlett v. Belair*, 2015 ONSC 3635, held, the applicant bears the onus of establishing, on a balance of probabilities that his injuries fall outside the confines of MIG. Section 3 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.” Subsection 18(1) of the *Schedule* caps recovery for predominately minor injuries at \$3,500.00. Treatment for minor injuries follows a treatment framework set out in the MIG.

### ***Did the applicant sustain predominantly minor injuries as defined under the Schedule?***

- [5] The applicant argues that his injuries fall outside the confines of the MIG due to his lower back pain and headaches.
- [6] In support of his case, the applicant is relying on his testimony, the clinical notes, and records (‘CNRs’) of treating family physician, Dr. Nabil Moharib, a psychological assessment assessed by psychologist Dr. Srinivasan and supervised by psychologist, Dr. Langis, dated March 30, 2021. He also relies on Dr. Louis’ and Dr. Ashraf’s chronic pain assessment.
- [7] The accident occurred near the intersection of Weston and Lawrence in Toronto, ON. The applicant states he was transferred from the accident scene to Humber River Hospital by ambulance. However, once at the hospital, he left against medical advice before being seen by a physician. He did not undergo any diagnostic imaging and was not prescribed any medication.
- [8] On April 1, 2019, the applicant visited and was assessed by his family physician, Dr. Moharib. He was not referred for any diagnostic imaging. Dr. Moharib prescribed pain and sleeping medication.
- [9] One week after the accident in April 2019, the applicant indicated he commenced physical therapy at Mount Sinai Wellness and Chiropractor. Upon his initial visit, he was assessed and advised to attend therapy at a frequency of two times per week. His sessions are one to two hours in duration and entail electrical stimulation, heat applications, chiropractic adjustments, massage therapy and participating in stretching and strengthening exercises for his back. He reported to IE assessor, Dr. Hershberg, that he was also instructed on a home-based exercise program consisting of similar stretching and strengthening exercises, which he performs “sometimes.” He reported to Dr. Hershberg that there was

improvement with physical therapy, which lasted two days and that he was provided with a soft lumbar brace. The applicant testified that he discontinued his physiotherapy sessions due to the COVID-19 pandemic.

- [10] Over a year post-accident, on October 17, 2020, Dr. Lenus Louis, and chiropractor Dr. Adib Ashraf conducted a chronic pain assessment. Dr. Ashraf was involved in the gathering of patient's subjective data based on the completion pain and functional indices. Dr. Louis was involved in the focused physical assessment, review of history, rendering of clinical diagnosis and treatment recommendations for the patient. Dr. Louis and Dr. Ashraf did not rely on any diagnostic imaging, medical history or clinical notes and records to support their conclusions. Rather, the report relies exclusively on the applicant's self-reporting and the results of the physical examination and psychometric testing.
- [11] The applicant reported significant changes with his usual activities and social functioning since the subject accident. Prior to the subject accident, the applicant enjoyed socializing in the community, going for walks, playing soccer, exercising, watching television, and socializing with friends. He noted that he is currently unable to carry out his activities due to his pain. He indicated that he feels less interested and a loss of pleasure in things that used to be enjoyable. He reported feelings of frustration in response to the change with his normal routine. He gets support from his brother.
- [12] Dr. Louis's physical examination revealed the following. The cervical examination was within normal limits. The upper extremity was within normal limits. The lower extremity examination was within normal limits. Dr. Louis found that the loss of normal function of the lower extremity and spine (which interferes with his activities of daily life) in addition to the heightened emotional symptoms, are to be considered serious.
- [13] As a result, in their joint report, Dr Ashraf and Dr. Louis maintained his opinion that the applicant is suffering from a chronic pain disorder. Dr. Louis opines that in addition to the physical findings, the applicant experiences emotional symptoms and the worsening of psychological conditions. The applicant relies on Dr. Louis's opinion and submits that his injuries are not predominantly minor as defined by the *Schedule*.
- [14] The respondent relies on the evidence of Drs. Choi and Hershberg. Dr. Choi conducted examinations on behalf of the respondent in accordance with s. 44 of the *Schedule*. Active range of motion testing of the cervical spine demonstrated full forward flexion, extension, rotation, and lateral flexion bilaterally. Orthopedic

testing of the cervical spine revealed no remarkable findings. Orthopedic testing of the lumbar spine revealed no remarkable findings. An in-person examination was conducted on February 9, 2022, wherein Dr. Choi opined that from a musculoskeletal perspective, the applicant sustained soft tissue injuries, specifically, lumbar strain and tension type of headaches because of the accident.

- [15] In her IE report, dated July 22, 2019, Dr. Hershberg found that the applicant sustained minor soft injuries to his cervical and lumbar spine. She opined that active cervical spine range of motion testing demonstrated full and pain-free friction. She accounted for his decreased range of motion in his cervical and lumbar spine as being temporary. In no uncertain terms, Dr. Hershberg opined that the applicant's injuries should typically resolve within 3-6 months. This is in sharp contrast with Dr. Louis's and Dr. Ashraf's report. Dr. Louis and Dr. Ashraf also came to the same conclusion with pain lasting for at least a month to pain that recurs on and off for at least three months. However, despite administering a battery of tests on the applicant to arrive at this conclusion, Dr. Louis and Dr. Ashraf still felt further investigation and further testing was needed to be complete to make better informed discussion on various treatment modalities.
- [16] I prefer the evidence of Dr. Choi and Dr. Hershberg over Dr. Louis and Dr. Ashraf. First, there is an inconsistency in Dr. Louis's report where he finds he lower extremity examination within normal limits and then contradicts himself by stating that there is a loss of function in the lower extremity and spine which interferes with the applicant's activities of daily life. Second, the analysis of the case was based on examinee's own recall and not from reviewing the applicant's medical documentation or history from his treating practitioners. Third, I find that the evidence of two independent assessors, Dr. Choi, and Dr. Hershberg to be consistent with each other.
- [17] Based on a totality of the evidence before me, I find that the applicant's injuries are predominately minor as defined by the *Schedule*.

***Does the applicant have a psychological injury?***

- [18] The applicant claims that he sustained a psychological injury because of the accident that place her claims outside of the MIG.
- [19] Psychological injuries, if established, may fall outside the MIG, because the MIG only governs "minor injuries," and the prescribed definition does not include psychological impairments.

- [20] I do not find that the applicant's specific phobia of situational driving, as diagnosed in the applicant's treating psychologists, Dr. Srinivasan's, and Dr. Langis's report, to be persuasive in this matter. When queried about vehicular anxiety, the applicant reported severe driver and passenger anxiety. However, during cross-examination at the hearing, the applicant admitted to driving at least twice a week to Shoppers Drug Mart and Wal Mart to buy painkillers and food. Given that he continues to travel in cars, I find that there is no evidence before me to support a conclusion that the applicant's phobia requires treatment that is beyond the MIG.
- [21] The medical evidence of IE assessor, psychologist, Dr. Syed does not support this finding of moderate impairment as referenced in Dr. Srinivasan and Dr. Langis's report. In her assessment, dated April 16, 2021, Dr. Syed noted that the applicant's condition appears to have improved with the natural progression of time. In her evaluation, she found that the applicant does not appear to be significantly impaired psychologically as there are minimal indications that he may have any current or active depressive or anxiogenic experience. The nature and severity of his distress is below any diagnosable threshold and considered to be subclinical. She found that the applicant is not suffering from any psychological impairment that would warrant a diagnosis as per the DSM-5. I noted that in Dr. Syed's report, the applicant told her that he does not require psychological therapy and indicated he is not interested, motivated or willing to undergo psychological therapy.
- [22] In her independent psychological paper review, dated May 28, 2021, Dr. Syed noted that there is no documented pre-existing psychological condition.
- [23] I find the applicant does not have a psychological injury that would take him out of the MIG.

### **Non-earner benefit**

- [24] The test for entitlement to a non-earner benefit is set out in section 12(1) of the *Schedule*. The applicant must prove that he suffers from a complete inability to carry on a normal life within 104 weeks of the accident.<sup>1</sup>
- [25] Section 3(7)(a) of the *Schedule* states that a person suffers from a complete inability to carry on a normal life if, as a result of the accident, the person sustains an impairment that continuously prevents that person from engaging in

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<sup>1</sup> Statutory Accident Benefits Schedule, O Reg 34/10

substantially all of the activities in which that person ordinarily engaged before the accident.<sup>2</sup>

[26] [In order to establish entitlement to non-earner benefits, a variety of factors must be taken into consideration. The Court of Appeal confirmed in *Heath v. Economical Mutual Insurance Company*, that the analysis of the evidence should include the following<sup>3</sup>:

- i. A comparison of the applicant's activities and life circumstances before and after the accident.
- ii. A consideration of pre-accident life and circumstances involves more than a snapshot of life in the timeframe immediately before the accident, but rather an assessment of the activities and circumstances over a reasonable period prior to the accident.
- iii. All of the pre-accident activities in which the applicant ordinarily engaged in should be considered. Greater weight may be assigned to those activities which the applicant identifies as being important in his pre-accident life.
- iv. It is not sufficient to demonstrate that there were changes in post-accident life. Rather, it is incumbent to establish that those changes amounted to being continuously prevented from engaging in substantially all pre-accident activities.
- v. To look at whether the applicant is "engaging in" an activity, the activity must be viewed as a whole. The manner in which an activity is performed, and the quality of performance post-accident must also be considered.
- vi. An inquiry into whether the degree of pain experienced either at the time or subsequently to the activity is such that the applicant is practically prevented from engaging in those activities.

[27] Furthermore, *Heath* states it is not sufficient for an applicant to demonstrate that there were changes in his or her post-accident life. Rather, it is incumbent on him to establish that those changes amounted to him being continuously prevented from engaging in substantially all of his pre-accident activities. The phrase "continuously prevents" means the applicant must prove "disability or

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<sup>2</sup> Ibid.

<sup>3</sup> 2009 ONCA 391 at para 50.

incapacity of the requisite nature, extent or degree which is and remains uninterrupted.

[28] In support of his case, the applicant is relying on his testimony, the CNRs of family physician, Dr. Nabil Moharib, a psychological assessment assessed by Dr. Srinivasan and supervised by Dr. Langis, dated March 30, 2021. He also relies on Dr. Louis' and Dr. Ashraf's chronic pain assessment which summarized his pre-accident and post-accident activities:

<b>Pre-accident</b>	<b>Post-accident</b>
<b>Employment:</b> The applicant worked full-time, in 2 physically demanding jobs.	<b>Employment:</b> The applicant collected CERB during COVID. Interpreter: He said he just got the money from the COVID time. Mr. Suboch: Okay, it was COVID money (lines 17-20, p. 13 of transcript)
<b>Social:</b> The applicant played soccer twice a week, went out with friends from soccer and went to the gym.	<b>Social:</b> The applicant has not played soccer or socialized and has not gone to the gym. We [my friends and I] talk on the phone, but we don't see as much (lines 13-14, p. 45 of transcript).
<b>Driving:</b> The applicant was unrestricted as to how far or how long he could drive.	<b>Driving:</b> The applicant can only drive for short periods of time and short distances.
<b>Household/Home Maintenance Activities:</b> The applicant fully participated in the upkeep of his residence.	<b>Household/Home Maintenance Activities:</b> The applicant only makes his bed now. p. 4 of Dr. Srinivasan's psychological report: At times, he performs light cooking, like boiling eggs.
<b>Religion:</b> The applicant had no restrictions on how he could pray and where he would pray.	<b>Religion:</b> The applicant now must pray in a seated position. He only prays at the mosque once per day and four times per day at home. He is not comfortable at the mosque given he must be seated when praying and all others are kneeling.



- [29] The applicant submits that his ongoing pain has continuously prevented him from engaging in substantially all these activities.
- [30] In her IE report, dated July 22, 2019, Dr. Hershberg found that the applicant did not suffer a complete inability to carry a normal life as a result of the accident.
- [31] In her IE report, dated July 30, 2019, occupational therapist, Lyndy Goldlust found that by using pacing strategies and modified techniques, the applicant has demonstrated that he continues to complete his personal care tasks independently and will eventually return to resume his pre-accident activities of daily life.
- [32] As noted in *Heath*, where pain is a primary factor, it must be considered whether performing the activity with pain is such that the individual is practically prevented from engaging in those activities. Although the applicant has reported that he experiences pain, his pain is clearly manageable and does not practically prevent him from carrying out his pre-accident activities.
- [33] Further, although the applicant demonstrated that there were some changes in post-accident life with respect to the scope, frequency, and duration which he engaged in some activities, he failed to establish that those changes amounted to his being continuously prevented from engaging in substantially all his pre-accident activities. Therefore, based on the totality of the evidence before me, I find that the applicant does not suffer from a complete inability to carry on a normal life.

## **CONCLUSION**

- [34] For the reasons outlined above, I find that:
- i. The applicant's injuries fall within the Minor Injury Guideline.
  - ii. The applicant is not entitled to the non-earner benefits for the period in dispute.

- iii. The applicant is not entitled to the cost of examinations.
- iv. No interest is payable as I have found that no benefits are payable.

**Released:** March 11, 2023

A handwritten signature in black ink, appearing to read "Anita John", written in a cursive style.

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**Anita John  
Adjudicator**