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WHEN DOES CHRONIC PAIN FALL OUTSIDE THE MINOR INJURY GUIDELINE?

By Cary N. Schneider, Partner, Schneider Law Firm

Introduction

It is evident that the Licensing Appeal Tribunal ("LAT") decisions place a high onus on the claimant to prove that the injuries take him/her outside of the Minor Injury Guidelines ("MIG"). Bald assertions that a claimant suffers from "chronic pain" does not resonate with an Adjudicator unless there is solid evidence to support such a conclusion. The dispute over whether a claimant (1) suffers from chronic pain and (2) whether chronic pain in itself is a condition that takes a claim outside of the MIG is subject to much litigation. The challenges associated with assessing the legitimacy and legal consequence of a diagnosis of chronic pain is not surprising given that the nature of chronic pain is highly subjective and difficult to authenticate. Whereas nearly all of the decisions for the first 1.5 years of the LAT's inauguration were detrimental to claimants we can see that the trend is now changing.

The diagnosis of chronic pain appears to be gaining greater traction within the LAT and claimants have been able to prove that such injuries are outside of the MIG. With that being said, there still appears to be some inconsistency in the decisions as to the evidence required and the rationale applied to prove that a claimant's chronic pain take them outside of the MIG. It is incumbent on an astute counsel and adjuster to be familiar with the ever-changing law in order to effectively advocate for their position

Chronic Pain Takes Claimant Outside of the MIG

The ***T.S. v. Aviva General Insurance*** **(2018) Reconsideration** decision is one of the most important rulings emanating out of the LAT as it helps define

chronic pain in relation to the definition of a minor injury. In short, the Executive Chair concluded that a person suffering from chronic pain is outside of the MIG:

> "In my opinion, the Tribunal erred when it found that T.S.'s chronic pain falls within the minor injury framework and, thus, denied him reasonable and necessary medical benefits. A plain reading of the definition reveals a glaring absence of any reference to CPS in the list of enumerated injuries that are included in s.3. In addition, the minor injury framework provides a treatment model for the for the early resolution of minor impairments – chronic pain by its very nature does not fall within such a model. It should have found that T.S's chronic pain is not captured by the *Schedule*'s definition of "minor injury" and, in turn, "clinically associated sequela".

The Executive Chair pointed out three very important considerations that should be used to evaluate a case:

1. a claimant who suffers from chronic pain is outside of the MIG;

2. chronic pain is not on a list of enumerated grounds that defines the MIG and;

3. the minor injury framework provides a treatment protocol for an early resolution of a claimant's impairment but that chronic pain by its very nature does not fall within that framework

The Executive Chair interpreted the MIG to be more restricted than it had been historically in the past. The Executive Chair narrowed the types of injuries that would fall within the MIG to ones that do not cause any significant complications in someone's life: "A more reasonable interpretation is that the minor injury remains restricted to minor complications arising out of the injuries that are specifically listed in the definition".

YXY v. The Personal (2017) provides a well-reasoned analysis regarding the interaction between chronic pain and the MIG. This decision seems to input a new consideration as to the factors to be considered relevant to interpreting chronic pain; as there is a focus on the level of functional impairment suffered by the claimant.

For chronic pain to be considered more than simply sequelae from the soft tissues injuries enumerated in s. 3 of the *Schedule,* it must be: (1) chronic pain syndrome or continuous (in that the initial minor injury never fully healed) and (2) it must be of a severity that it causes suffering and distress accompanied by functional impairment or disability.

Some essential factors to consider is whether the chronic pain affects a claimant's functional abilities to engage in employment, housekeeping or caregiver activities. A diagnosis of chronic pain without any discussion of the level of pain, its effect on the person's function, or whether the pain is bearable without treatment will not meet the applicant's burden to show that chronic pain is more than mere sequelae. Unless an applicant provides evidence that the pain she experiences contains these elements, the pain is mere sequelae of the minor injury.

Some key take-aways from this decision is that if chronic pain prevents a claimant from performing functional activities such as working or housekeeping that this a consideration that would potentially take a claimant outside of the MIG. Unless an applicant provides evidence that the chronic pain she experiences contains these elements, the pain is a mere sequelae of the minor injury and the MIG applies.

In ***D.P. v. Cheiftain (2018)*** the Adjudicator conducted a good analysis of the competing case law interpreting chronic pain and ultimately agreed that a person suffering from chronic pain with functional impairments is outside of the MIG. The Adjudicator concluded that that not "any ongoing pain, at any level, automatically takes an applicant out of the MIG". Rather the "ongoing pain also must be of a significant level or accompanied by some

functional impairment or disability". He found that the claimant must suffer from:

> "…chronic pain syndrome *or* continuous (in that the initial minor injury never fully healed) and it must be of a severity that it causes suffering, distress or is accompanied by functional impairment or disability. A diagnosis of chronic pain without any discussion of the level of pain, its effect on the person's function, or whether the pain is bearable without treatment will not meet the applicant's burden to show that chronic pain is more than mere sequelae.

In this case the claimant was credible, took Percocet medication, had supportive medical reports, and proved that her ability to engage in her caregiving, recreational activities, as well as housekeeping had been affected. There was no clear diagnosis that she suffered from chronic pain syndrome but this did not prevent the Adjudicator from finding that her chronic pain took her outside of the MIG:

> "D.P. has proven that her pain has been continuous since the accident and it is of a severity that it is causing her suffering and distress that is accompanied by substantial functional impairments. As a result, we find that D.P. is removed from the MIG".

The decision of ***Applicant v. Unifund*** **(2018)** is important as the adjudicator rejected that the claimant suffered from any psychological problems but still found that he suffered chronic pain that took him outside of the MIG. Claimants often rely on psychological reports to support arguments that their injuries call outside of the MIG and / or that emotional problems are a significant component of their chronic pain. In this case, the Adjudicator found that the claimant's injuries were only physical in nature but that this was still significant enough to cause him to suffer from a diagnosis of chronic pain.

The Adjudicator found that the applicant suffered from a chronic pain condition which caused him to suffer functional impairments due to pain with respect to limited housekeeping and modified work for a period of 10 months after the accident. The claimant did not see his family doctor very often but did work diligently to improve his health on his prescribed exercise programs. This case supports the proposition that physical based chronic pain that impacts a person's ability to engage in their day-to-day functions is sufficient to take a claimant outside of the MIG. The injury need not prevent a claimant from working outright and nor be supported by a psychological diagnosis.

Chronic Pain Does Not Take the Claimant Outside Of The MIG

Despite the fact that the above cases seem to establish that a diagnosis of chronic pain with evidence of some functional limitation takes a claimant outside of the MIG; the law is far from clear. Claimants are still obligated to prove that they have truly suffered chronic pain and there is a wide fluctuation as to what is considered to be a functional limitation. In ***MNM v. Aviva (2018)*** the Adjudicator applied a detailed and comprehensive criteria which a claimant must meet in order to evaluate chronic pain. This criteria places a greater onus on claimants to advance their case and has not been universally applied by Adjudicators. This results in uncertainty in the law as to the standard that a claimant must establish in order to prove their case.

The following six criteria were applied from the AMA Guides as "key factors" to assess chronic pain:

1. Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances.

2. Excessive dependence on health care providers, spouse, or family.

3. Secondary physical deconditioning due to disuse and or fear-avoidance of physical activity due to pain.

4. Withdrawal from social milieu, including work, recreation, or other social contracts.

5. Failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family or recreational needs.

6. Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviors.

In this particular case the Adjudicator found that applicant's self-reported activities and lifestyle were "inconsistent with the experience of chronic pain at the level required to establish the necessity for chronic pain management". While the section 25 assessors diagnosed chronic pain they "did not elaborate (on) how the diagnoses were reached, against what criteria and accounting for the applicant's everyday activities". The Adjudicator concluded that chronic pain had not been established.

n ***C.R. v. Aviva (2019)*** the claimant presented evidence from an orthopaedic surgeon (with a chronic pain specialty), and physiatrist to support that she suffered from chronic pain syndrome. The claimant had reduced her hours to 15-20 hours a week, her housekeeping was limited, and she was not able to engage in the same level of recreational activities. In return the insurer relied on an IE report from a general practitioner and lifestyle evidence to show that she went snowshoeing at least on one occasion, performing some gardening, and had gone on an active vacation (the details were not elaborated on in the decision).

The Adjudicator found that the claimant has not established that she suffers from chronic pain as there was: (1) no objective evidence of impingement, tenderness or instability; (2) were doubts regarding the severity of her chronic pain and whether it causes objective functional impairment, and (3) cannot reconcile the applicant's activity level with a diagnosis of chronic pain. This decision seems to focus on the lack of any objective evidence to support the nature of the claimant's injuries and questions to what degree that the claimant suffers from a functional impairment. The fact that the claimant has reduced her working hours less than half of her pre-accident employment history, and that she has introduced expert medical evidence of specialists as opposed to the IE general practitioner, would seem to be highly supportive evidence consistent with the rationale set-out by the Executive Chair in *T.S. v. Aviva General Insurance.*

The decision ***F.A. v. Certas (2019)*** shows the challenges that claimants have to overcome to prove that they suffer from chronic pain. In that case the claimant asserted that the accident related injuries impacted his ability to work, attendant care, and perform his housekeeping activities. However, the Adjudicator found that the claimant's psychological report was not very compelling as there was no review of the diagnostic testing and treatment records. There was a lengthy gap of treatment for a period of about 1.5 years and the family doctor records showed that the claimant had full range of motion, no muscle wasting, and normal strength. There was no diagnosis in the claimant's medical evidence of any chronic pain condition and the totality of the evidence did not support that he should be removed from the MIG on the basis of chronic pain.

Key Takeaways

It is still unclear as to what evidence and rationale is to be applied to determine whether chronic pain is simply sequelae from the soft tissue injuries enumerated in s. 3 of the *Schedule* that falls within the MIG or something more substantial. This is perhaps understandable as chronic pain is difficult to evaluate and is historically subjective in nature. The inconsistent reasoning of the Adjudicators seems to reflect the challenges in evaluating chronic pain from a medical-legal basis.

The Reconsideration decision *T.S. v. Aviva* is a strongly worded decision which asserts that the MIG was never designed to include claimants that are suffering from chronic pain. A claimant who suffers from chronic pain must be taken outside of the MIG and access is to be granted to the higher level of medical coverage. The decisions *YXY v. The Personal* and *D.P. v. Chieftain* provide guidance that a key factor that is relevant for the determination of chronic pain from a MIG standpoint is the impact of the injuries on a claimant's functional limitations. As such, if someone is limited in their ability to work, housekeeping and / or recreational activities this is an important consideration to show that the claimant is outside of the MIG due to chronic pain. The *Applicant v. Unifund* case supports the proposition that chronic pain may be solely physical in nature without a requirement for a psychological sequela.

While as the aforementioned decisions seem to set a lower bar for a claimant to prove that their chronic pain complaints take them outside of the MIG, there are a slew of cases that found otherwise. In *MNM v. Aviva* the Adjudicator relied on a detailed and challenging criteria for claimants to overcome in order to establish that they have suffered chronic pain that takes them outside of the MIG. In *C.R. v. Aviva* the adjudicator appears to have focussed on the lack of objective evidence of injuries to support his decision-making despite the opinion of the qualified experts and the impact on the claimant's employment. In *F.A. v. Certas* the claimant did not have sufficient medical records to support a diagnosis of chronic pain.

In summary, there is no definitive chart to follow that will guide us to determine when chronic pain is legitimate and when it is significant enough to take a claimant outside of the MIG. However, a good analysis of the existing case law will provide an informed party the tools to use to evaluate a case and advocate on one's behalf. The more knowledgeable a party with respect to the law results in the better the opportunity to evaluate risk and become a better negotiator.

Cary N. Schneider is a co-founder of Schneider Law Firm who specializes in civil litigation including personal injury litigation, real estate litigation, cyber / privacy breaches, and commercial litigation. After working on behalf of insurance companies for 19 years he now uses that inside knowledge to the benefit of his clients. He is proud to have received referrals from insurance defence lawyers and represents adjusters in their personal injury matters. If you or a loved one has suffered a personal injury contact Cary to let him assist them in their time of need. Email cschneider@schneiderlawfirm.ca or call at 905-889-5300. www.schneiderlawfirm.ca.