



# Civil Resolution Tribunal

Original Decision Issued: September 27, 2023

Amended Decision Issued: September 27, 2023

File: VI-2022-004634

Type: Accident Claims

Category: Minor Injury Determination

Civil Resolution Tribunal

Indexed as: *Ampabeng v. Madden*, 2023 BCCRT 826

B E T W E E N :

JOSEPH KYEREMEH AMPABENG

**APPLICANT**

A N D :

DANIEL STEWART MADDEN

**RESPONDENT**

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## **AMENDED REASONS FOR DECISION**

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Tribunal Member:

Eric Regehr, Vice Chair

## **INTRODUCTION**

1. This dispute is about a motor vehicle accident that took place on June 5, 2019, between Joseph Kyeremeh Ampabeng and Daniel Stewart Madden, in Maple

Ridge, BC. Mr. Madden is the plaintiff in a BC Supreme Court action seeking damages for injuries he alleges he suffered in the accident. Mr. Ampabeng is the defendant in that action. In this Civil Resolution Tribunal (CRT) dispute, Mr. Ampabeng asks for a declaration that Mr. Madden's injuries are "minor injuries" under the *Insurance (Vehicle) Act* (IVA). Mr. Madden says his injuries are not minor.

2. Both parties are represented by a lawyer, Mr. Ampabeng by Herbert Dar Santos and Mr. Madden by Robyn Wishart.

## **JURISDICTION AND PROCEDURE**

3. These are the CRT's formal written reasons. The CRT has jurisdiction over motor vehicle injury disputes, or "accident claims", brought under section 133 of the *Civil Resolution Tribunal Act* (CRTA). Section 133(1)(b) of the CRTA gives the CRT exclusive jurisdiction over the determination of whether an injury is a "minor injury" under the IVA.
4. I note that Mr. Madden refers to the CRT's jurisdiction over motor vehicle claims with damages up to \$50,000, which is set out in section 133(1)(c) of the CRTA and section 7 of the *Accident Claims Regulation*. Mr. Madden provided evidence and submissions that his damages are over \$50,000, including an expert report about his alleged income loss. I agree with Mr. Ampabeng that the only matter before me is whether Mr. Madden's injuries are minor. I find it would be inappropriate for me to comment on his possible damages, and I make no findings in that regard.
5. Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness.
6. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate

that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice. While not determinative, I note that neither party requested an oral hearing, either to provide evidence or to cross examine expert witnesses.

7. Section 42 of the CRTA says that the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court.
8. Mr. Madden provided a copy of a March 7, 2022 MRI report on his left shoulder with his reply submissions. He says in his reply submissions that it supports his contention that he is on a waitlist for shoulder surgery (although it says nothing about surgery, let alone a waitlist). Mr. Ampabeng objects to this late evidence. He essentially submits that it is not proper reply because it does not respond to Mr. Ampabeng's evidence or submissions. I agree with Mr. Ampabeng. I find that Mr. Madden's initial submissions raise the possibility of future surgery. Mr. Madden provided his initial submissions well over a year after the MRI. He does not explain why he did not include it when he presented his main argument. While it is true that the CRT's mandate includes flexibility and informality, I find that these aspects of the CRT's mandate apply with less force when both parties are represented by lawyers, who are expected to understand the obligation to present a case in full and the limits of reply evidence. I therefore do not accept the MRI report into evidence.

## **ISSUE**

9. The issue in this dispute is whether Mr. Madden's injuries are minor injuries.

## **BACKGROUND**

10. Under section 4 of the *Minor Injury Regulation* (MIR), the party alleging that an injury is not minor bears the burden of proof. So, even though he is the respondent in this dispute, Mr. Madden must prove on a balance of probabilities that his injuries are not minor.

11. As mentioned above, the parties were in a motor vehicle accident on June 5, 2019, In Maple Ridge, BC. Mr. Madden started a BC Supreme Court action for damages in December 2019. Mr. Madden says that he suffered injuries in the accident. I note here that Mr. Madden's submissions repeatedly refer to his right shoulder, but I find this was likely a typo since the medical evidence all points to an ongoing left shoulder injury and no right shoulder injury.
12. Section 101 of the IVA and the MIR together provide a detailed definition of a minor injury. Section 101 of the IVA describes a minor injury, in part, as a physical injury, including a chronic injury, that does not result in a "serious impairment" and is one of a list of prescribed injuries. Relevant to this dispute, the list of prescribed injuries under section 101 of the IVA and section 2 of the MIR includes sprains (ligament injuries that are not total tears), strains (muscle injuries that are not total tears), and pain syndromes.
13. Section 101 of the IVA says, in part, that a "serious impairment" is a physical impairment that lasts more than 12 months and meets certain criteria, which are set out in section 3 of the MIR. Under section 3, an impairment must meet 3 criteria to be considered serious:
  - a. It must render the injured person substantially unable to perform (i) the essential tasks of their regular employment, (ii) their training or education program, or (iii) their activities of daily living. For (i) and (ii), the impairment must exist despite reasonable efforts to accommodate the impairment.
  - b. It must be primarily caused by the accident and ongoing since the accident.
  - c. It must not be expected to improve substantially.
14. Section 5 of the MIR says that if a person suffers more than one injury, each injury must be diagnosed separately as to whether it is minor or not. The medical evidence discussed below refers to several physical and mental injuries, some of which have some ongoing component. While his brief submissions are not explicit, I

find that the only injury Mr. Madden asserts is not minor is to his left shoulder. I say this because this is the only injury he mentions in his submissions. I find that if Mr. Madden considered his other injuries to be not minor, he would have said so, especially given he bears the burden of proof. I find this is sufficient to conclude that all of Mr. Madden's injuries other than the left shoulder injury are not minor under the IVA.<sup>i</sup>

15. I note that my conclusion is supported by the medical evidence. I find it unnecessary to discuss the evidence about the other injuries in any detail. I find that nothing in either expert report before me indicates that any of Mr. Madden's non-left shoulder injuries have resulted in a "serious impairment", as that term is defined above.

## **EVIDENCE AND ANALYSIS**

16. Mr. Madden relies on 3 expert reports: a February 1, 2022 medical-legal report from physiatrist Dr. Andrei Krassioukov, a May 24, 2022 functional capacity evaluation (FCE) from occupational therapist Nima Nassouti, and an income loss report from economist Darren W. Benning. For the reasons set out above, I find that Mr. Madden's income loss claim is not before me, and I find there is no relevant information contained in the income loss report. I will not refer to it further. I accept Dr. Krassioukov's report and the FCE as expert evidence under the CRT's rules. The report writers' qualifications are set out in their reports, which I find clearly establish their expertise in their respective fields. Also, Mr. Ampabeng does not dispute the admissibility of the reports as expert evidence.
17. Notably, Mr. Madden did not provide a statement or other direct evidence. So, the only evidence about the impact of his injuries on his life and work is contained in the expert reports. Mr. Madden did not explicitly rely on this hearsay evidence, but I find it implicit that he does because otherwise there would be no evidence about the impact of his injuries. As mentioned above, the CRTA authorizes the CRT to accept evidence that would not be admissible in court, including hearsay. Given that the

report writers' professional obligations include accurately summarizing what Mr. Madden told them, I find that evidence is reasonably reliable. In the circumstances here, and in the absence of any submissions from Mr. Ampabeng to the contrary, I find it appropriate to rely on that aspect of the reports. I do not, however, place any weight on Dr. Krassioukov's summary of other practitioners' clinical records, which contain descriptions of what Mr. Madden told those practitioners. That is double hearsay, and I find is too far removed from Mr. Madden's original words to be reliable. I pause to comment that it would be far preferable for injured parties to provide direct evidence about their injuries.

18. I note that there is no suggestion that Mr. Madden had any relevant pre-existing conditions. With that, I will address the 2 relevant expert reports.

*Dr. Krassioukov*

19. Dr. Krassioukov interviewed Mr. Madden on January 7, 2022, and performed a physical examination on January 8, 2022, about 2.5 years after the accident. At the time of the report, Mr. Madden was 37 years old. He reported the following to Dr. Krassioukov.
20. Immediately after the accident, Mr. Madden felt sharp pain in his left chest and shoulder, numbness in his left fingers, and back pain. In the following days, his left elbow and shoulder pain increased. He initially received message, chiropractic, and acupuncture treatment, but was no longer involved in any active treatments.
21. At the time of the report, Mr. Madden reported discomfort in his left shoulder, shoulder blade, and collarbone, discomfort in both elbows, numbness in his left hand, and emotional distress. He said the worst pain was to the left shoulder area and rated it as 8 out of 10, which was worse with movement and especially bad when raising his arms above shoulder level. He felt it had gotten worse since the accident.

22. Mr. Madden had worked in construction essentially his entire adult life. At the time of the accident, Mr. Madden worked full-time as a self-employed contractor, putting in roughly 50 hours a week. He estimated that he spent half his time managing the business and half his time doing construction work, which included heavy lifting and using construction equipment. After the accident, he was unable to perform any construction duties and had to hire others to do the physical work he used to do. At the time of the report, he worked 40 hours a week.
23. On assessment, Dr. Krassioukov noted full range of motion in both shoulders, but with discomfort on his left side. External and internal rotation was “full and strong”. Parts of his left shoulder area were tender on palpitation.
24. Dr. Krassioukov diagnosed Mr. Madden with soft tissue injuries to the left shoulder, left shoulder blade, and left collarbone, and the development of a left rotator cuff injury. He also diagnosed Mr. Madden with chronic pain.
25. Dr. Krassioukov’s prognosis of these injuries was guarded. He noted that the longer a person suffers from pain, the more likely it is that the person will never fully recover. He said Mr. Madden would likely have some discomfort for the foreseeable future. However, he declined to provide a final prognosis on Mr. Madden’s left shoulder injury given a possible referral to an orthopaedic surgeon.
26. If an orthopaedic surgeon has assessed Mr. Madden’s shoulder, that evidence is not before me.

#### *The FCE*

27. Mr. Nassouti assessed Mr. Madden on May 19, 2022, and provided a report on May 24, 2022. As stated in the report’s introduction, the purpose of an FCE is to measure a person’s functional ability to perform certain tasks, such as work, homemaking, and recreational activities.
28. Mr. Nassouti reported that Mr. Madden had functional mobility but reported discomfort with shoulder-level and overhead actions. He also reported that Mr.

Madden's left shoulder fatigued over the course of testing such that he needed accommodation.

29. Mr. Nassouti outlined a detailed employment history from Mr. Madden, as follows. Before the accident, Mr. Madden worked on all aspects of his building and renovation business, including heavy lifting, demolition, delivering material, rebuilding, installing floors and drywall, framing walls, and building decks. After the accident, he stopped performing most construction duties. His work focused on quality control, project management, and supervision. The only physical work he still did was minor site preparations, shopping for and delivering building material, measuring, and helping with finishing touches.
30. Based on his observations and Mr. Madden's subjective reports, Mr. Nassouti concluded that Mr. Madden was unable to perform all his former duties as a contractor. He concluded that he should avoid all heavy lifting and carrying activities and limit any overhead lifting to 10 pounds. He noted that Mr. Madden modified his job duties by hiring more subcontractors and delegating tasks. Overall, Mr. Nassouti said that Mr. Madden remained incapable of returning to his previous duties. Mr. Nassouti declined to provide an opinion on Mr. Madden's prognosis, as it was outside the scope of his expertise.
31. Mr. Nassouti reported that Mr. Madden's limitations had little impact on his ability to do most general, day-to-day chores or attend to other personal matters. As for recreation, Mr. Madden reported he no longer went to the gym or played hockey.

***Is Mr. Madden's left shoulder injury minor?***

32. I note that in his brief submissions, Mr. Madden did not refer to the legal test set out in the IVA and MIR, which as described above includes several specific criteria. Mr. Ampabeng argues that Mr. Madden's "failure to provide meaningful analysis to prove his injuries are not minor is determinative". Mr. Ampabeng essentially invites me to punish Mr. Madden for his lawyer's failure to make meaningful submissions. I find that this would be manifestly unjust. While it would have been helpful and

appropriate for Mr. Madden's lawyer to make relevant submissions about Mr. Madden's injuries, the question of whether his injuries are minor ultimately comes down to what the evidence establishes. Here, there are 2 detailed expert reports before me. I find that I must assess whether that evidence supports Mr. Madden's allegation that his left shoulder injury is not minor, even in the absence of useful submissions from Mr. Madden's lawyer.

33. Mr. Ampabeng does not deny that Mr. Madden suffered injuries. He says that the left shoulder injury is presumptively a minor injury under section 101 of the IVA and section 2 of the MIR because it is a sprain, strain, and/or a pain syndrome. Dr. Krassioukov does not diagnose the left shoulder injury using the language found in the IVA and MIR, but I agree the injury is some combination of a sprain, strain, and pain syndrome. I further find it obvious from both expert reports that Mr. Madden's left shoulder injury led to an impairment lasting more than 12 months.
34. Mr. Ampabeng argues that Mr. Madden failed to provide any evidence that his inability to perform work tasks was caused by the accident. He says this because Mr. Nassouti candidly states that causation is beyond the expertise of an occupational therapist. However, I find that the 2 expert reports must be read together. I find that Dr. Krassioukov's expert report clearly establishes that the accident caused the left shoulder injury.
35. The remaining question is whether Mr. Madden's left shoulder injury resulted in a "serious impairment".
36. Mr. Ampabeng relies on *Sparrowhawk v. Zapoltinsky*, 2012 ABQB 34, an Alberta court decision that sets out a framework for determining whether an injury results in a "serious impairment" under Alberta's minor injury scheme, which is similar to BC's. I find it unnecessary to explicitly adopt the approach in *Sparrowhawk* because the court essentially restates Alberta's 3-part statutory test as a set of 5 questions, without adding any analysis that I consider relevant to this dispute.

37. Turning to the test for serious impairment under the MIR, I find that neither expert report identifies any restrictions to suggest that Mr. Madden was substantially unable to perform his activities of daily living. There is also no suggestion that Mr. Madden was enrolled in a training or education program.
38. This leaves Mr. Madden's work. Mr. Ampabeng argues that neither expert report sets out what Mr. Madden's pre-injury work tasks were. I find this submission inaccurate. I find that both reports explain that Mr. Madden's pre-injury role involved a considerable amount of heavy labour. The FCE, in particular, sets out in detail the heavy physical labour Mr. Madden used to do. I also find that the FCE clearly establishes that he can only do a small amount of what he used to on a jobsite. I find that Mr. Madden's left shoulder injury substantially impaired his ability to perform the essential tasks of his regular employment at the time of the accident.
39. Mr. Ampabeng argues that Mr. Madden was able to continue with his work functions with accommodation, namely by moving from a mixed role to an almost entirely administrative and supervisory role. I disagree. I find that Mr. Madden's former physical duties generally involved heavy labour that could not be reasonably accommodated. I find that Mr. Madden's left shoulder injury frustrated his chosen career path and forced him onto a very different path. He used to perform around 25 hours of heavy labour a week, and now he performs none. In short, I find that I find that this is substantial even though he has been able to move into a less physically demanding role within the same industry.
40. As set out above, a serious impairment must also be ongoing and not expected to significantly improve. Mr. Ampabeng does not specifically dispute either of these points. I find that the evidence clearly establishes that Mr. Madden's shoulder injury is ongoing. The evidence is somewhat more equivocal about prognosis because Dr. Krassioukov accounted for the possibility of a future surgery, which introduced some uncertainty. There is no evidence from an orthopaedic surgeon. Mr. Madden only says in reply that he is waitlisted for a shoulder surgery.

41. On balance, I find that the evidence establishes that significant improvement is unlikely. I find that Dr. Krassioukov says that the longer soft tissue injuries linger, the more likely they are to linger further. He further notes that they are typically expected to resolve within months. By then, Mr. Madden was 3 years post-accident with no improvement in his left shoulder. I find that the obvious inference from that evidence is that Mr. Madden is past the point where significant improvement is likely.
42. In summary, I find that Mr. Madden has established that his left shoulder soft tissue injury is not a minor injury under the IVA.

## **FEES AND EXPENSES**

43. Under section 49 of the CRTA, and the CRT rules, a successful party is generally entitled to the recovery of their tribunal fees and dispute-related expenses. Mr. Madden was substantially successful, and as the respondent paid \$25 in CRT fees. I order Mr. Ampabeng to reimburse this amount. I dismiss Mr. Ampabeng's claim for CRT fees.
44. Neither party claimed any dispute-related expenses, including reimbursement for legal fees, so I award none.

## **ORDERS**

45. I order that Mr. Madden's left shoulder injury suffered in the June 5, 2019 accident is not a minor injury under section 101 of the IVA.
46. I order that Mr. Madden's remaining injuries suffered in the June 5, 2019 accident are minor injuries under section 101 of the IVA.

47. I order Mr. Ampabeng to pay Mr. Madden \$25 in CRT fees.

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Eric Regehr, Vice Chair

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<sup>i</sup> Amended under section 64(a) of the CRTA to correct a typographical error.