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

Tribunal File Number: 18-000061/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:

T.J.

Applicant

and

Aviva General Insurance

Respondent

DECISION

PANEL: **Brian Norris, Adjudicator**

APPEARANCES:

For the Applicant: Lisa Bishop, Counsel

For the Respondent: Shivani Mehta, Counsel

HEARD: **In Writing on: November 26, 2018**

OVERVIEW

[1] The applicant was injured in an automobile accident on January 31, 2016 and sought benefits from the respondent pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010*, O. Reg. 34/10 (the "*Schedule").* The respondent refused to pay for certain benefits and the applicant has applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of this dispute.

ISSUES

[2] The disputed claims in this hearing are:

1) Are the applicant's injuries predominantly minor injuries as defined in the *Schedule* and subject to the funding limit within the Minor Injury Guideline ("MIG")?

2) Is the applicant entitled to the medical benefits and costs of examinations for goods and services recommended by Prime Health Care Inc. as follows;

   a. $3,327.60 for a physiotherapy treatment plan dated March 8, 2016;

   b. $2,308.50, less $1,055.00 approved by the respondent, for a physiotherapy treatment plan dated May 9, 2016;

   c. $2,026.80 for a physiotherapy treatment plan dated June 17, 2016;

   d. $691.11 for assistive devices recommended in a treatment plan dated June 24, 2016;

   e. $1,886.80 for a physiotherapy treatment plan dated August 5, 2016

   f. $2,000.00 for a psychological assessment proposed in a treatment plan dated March 11, 2016;

   g. $2,443.81 for a psychological treatment plan dated September 18, 2016;

   h. $9,024.34 for a multidisciplinary chronic pain treatment plan dated February 3, 2017;

   i. $1,230.92 for an assessment of attendant care needs proposed in a treatment plan dated March 11, 2016; and

j. $2,000.00 for a chronic pain assessment proposed in a treatment plan dated August 5, 2016?

3) Is the applicant entitled to an award under Ontario Regulation 664?

4) Is the applicant entitled to interest on the overdue payment of benefits?

RESULT

[3] The applicant sustained injuries which fall outside the MIG and the applicant is not bound by the MIG funding limit.

[4] The applicant is not entitled to the physiotherapy treatment plans dated March 8 and May 9, 2016 and the assessment of attendant care needs plan dated March 11, 2016 because the respondent's refusal was valid pursuant to section 38(5) of the *Schedule*.

[5] The applicant is entitled to payment for the psychological assessment plan dated March 11, 2016, plus interest pursuant to section 51.

[6] The psychological treatment plan dated September 18, 2016 is reasonable and necessary.

[7] The chronic pain assessment plan dated August 5, 2016 and the chronic pain treatment plan dated February 3, 2017 are not reasonable and necessary.

[8] The applicant is entitled to an award pursuant to Ontario Regulation 664 in the amount of $1,110.95 because the respondent unreasonably withheld payment for the psychological assessment and treatment plans.

[9] No party is entitled to costs.

BACKGROUND

[10] The applicant was the rear-seat passenger of a vehicle which was struck from behind while stopped at a red light. The applicant was taken to the hospital following the accident and was diagnosed with soft tissue injuries and released. More than a month later, the applicant attended at Prime Health Care Inc and began treatment.

[11] The applicant claimed entitlement to medical benefits beyond the MIG however, the respondent characterized the applicant's injuries as predominantly minor in nature and falling within the MIG.

[12] The applicant disagrees with the respondent's characterization of the injuries as a result of the accident, submits the MIG and the funding limit it provides should not be applicable, and claims entitlement to the disputed treatment plans.

THE MINOR INJURY GUIDELINE

[13] There is a monetary limit to medical and rehabilitation benefits available to injured persons who sustain a minor injury as a result of an accident. A "minor injury" is defined in s. 3 of the *Schedule* and includes sprains, strains, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae. The MIG provides that a strain is an injury to one or more muscles and includes a partial tear. Under section 18 of the *Schedule*, injuries that are defined as minor are subject to a $3,500.00 funding limit on treatment.

[14] If the applicant's injuries are deemed to be minor in nature, the responsibility is on the applicant to establish that the MIG, and the related funding limit, should not apply.

[15] The applicant claims the MIG and the funding limit should not apply because the applicant has pre-existing back pain and the applicant has suffered chronic pain and a psychological injury as a result of the accident.

Psychological Injury

[16] The applicant claims to suffer from an Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia (Passenger). The applicant submits the findings in the psychological assessment report of Dr. A. Shaul, psychologist, dated August 10, 2016 ('the Shaul report") support of this position.

[17] The respondent concedes the applicant may suffer from Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia (Passenger) but submits the applicant's predominant injury is the collection of soft tissue injuries and the psychological injury is sequalae of them and within the MIG as a result. The respondent submits, as opined in the psychological assessment report of Dr. K. Zakzanis dated August 16, 2017 ("the Zakzanis IE"), the applicant's lack of desire for psychological intervention and self-reported improvement in mood are evidence of predominantly minor injuries.

[18] At issue is whether the diagnosis of an Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia (Passenger), a psychological injury

not listed within the MIG, upends the predominance of soft tissue injuries and renders the MIG and the funding limit inapplicable. I find it does.

[19] I find the applicant's psychological injuries are distinct and not sequalae of the soft tissue injuries suffered as a result of the accident. This is supported by the conclusion in the Zakzanis IE report, which found the applicant has a psychological impairment as a result of the accident and found no other causes for the psychological impairment. The Shaul report mirrors the Zakzanis IE report and concludes the applicant has been diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia (Passenger) as a result of the accident.

[20] Contrary to the respondent's position, I find the applicant's lack of interest in psychological treatment is not determinative of whether the MIG and the subsequent funding limit applies. This is because the MIG is based on a characterization of the applicant's injuries and not whether the applicant intends to engage in specific treatment.

Does the applicant have chronic pain or a documented pre-existing medical condition which would preclude maximal recovery within the confines of the MIG?

[21] I have found the applicant's injuries are not predominantly minor and not subject to the MIG. As a result, an analysis of whether the applicant's post-accident pain and pre-existing back pain removes the applicant from the MIG is not required.

THE DISPUTED TREATMENT PLANS

[22] The applicant did not address the treatment plans individually but submitted they are reasonable and necessary because they provide pain relief and focus on the functional restoration of the applicant. The applicant provided the clinical notes and records (CNRs) of Dr. Sundareswaran, and the assessment reports of Dr. Shaul, and Dr. G. Karmy, physician, but did not make any specific connection between the evidence and the disputed treatment plans.

[23] The respondent holds, in the event the applicant's injuries are considered non-minor, the applicant has failed to establish the treatment plans are reasonable and necessary for the injuries suffered as a result of the accident.

[24] I find some of the treatment plans are reasonable and necessary. My reasons are as follows:

The treatment and assessment plans dated March 8 and May 9, 2016 for physiotherapy and the in-home assessment proposed March 11, 2016

[25] I find the applicant initially presented with predominantly soft tissue injuries as a result of the accident but did not submit a treatment confirmation form pursuant to section 40(2) of the *Schedule*. A treatment confirmation form provides an insurer with the relevant information required to provide funding and facilitate speedy access to treatment under the MIG. During this time, there was no compelling evidence to indicate the applicant suffered from a psychological injury. Similarly, the applicant did not include any additional information with the March 8 & 11, and May 9, 2016 treatment plans which constitute compelling medical records to indicate recovery within the $3,500.00 funding cap is unlikely.

[26] I find the respondent's decision to deny funding for the March 8 & 11, and May 9, 2016 plans is valid pursuant to section 38(5). This section provides that during the period the applicant is entitled to receive treatment under the MIG, the respondent may refuse to accept a non-MIG treatment plan for that same period. The treatment plans submitted by the applicant are for treatment beyond the confines of the MIG.

[27] As noted above, and pursuant to section 38(5), the respondent had the right to deny the treatment plan and did so. The respondent also advised the applicant that the MIG applies, which is required pursuant to section 38(9).

The treatment plans dated June 17 & 24 and August 5, 2016

[28] These treatment plans were denied on account the applicant had exhausted the funding limit in the MIG. Additionally, the respondent submits the treatment plan dated June 17, 2016 for physiotherapy, is not reasonable and necessary according to Dr. Zabieliauskas, physiatrist, who examined the applicant on November 15, 2016 and found no sign of a physical injury.

[29] I find the physiotherapy treatment plans dated June 17 and August 5, 2016 are not reasonable and necessary.

[30] Following the accident, the applicant's family physician, Dr. Sundareswaran, recommended physiotherapy. This recommendation occurred during the period the applicant was entitled to treatment pursuant to the MIG. The last recommendation occurred during a clinical visit on April 30, 2016, about 6 weeks before any of these treatment plans were created. The applicant did not visit the family physician again until August 8, 2016, when the applicant complained about neck and shoulder pain. Remarkable however, is that during the August 8 visit,

Dr. Sundareswaran stopped recommending physiotherapy and instead recommended the applicant use over-the-counter pain medication and engage in an exercise program. In addition to Dr. Sundareswaran's opinion, Dr. R. Zabieliauskas, physiatrist, found the treatment was not reasonable and necessary not only because the applicant has predominantly minor injuries and had exhausted the MIG funding limit, but also because the applicant had no objective sign of any accident-related physical injuries. Dr. Zabieliauskas' opinion is from an insurer's examination on November 15, 2016 and a report dated January 6, 2017.

[31] I agree with the combined opinions of Dr. Sundareswaran, and Dr. Zabieliauskas and find the physiotherapy treatment plans are not reasonable and necessary.

[32] I find the treatment plan dated June 24, 2016, for assistive devices, not reasonable and necessary. The applicant's family physician made no recommendation for assistive devices during the 6 visits between the accident and the date of this treatment plan nor did the applicant complain of any functional impairment as a result of accident-related injuries during the visits. The occupational therapist, P. Kedar, who conducted a section 25 in-home assessment on May 4, 2016, only found minimal range of motion restriction in the applicant's neck, back, and shoulders. Occupational therapist Kedar also noted the applicant's functional impairments mostly arise out of prolonged and repetitive actions which can be mitigated through pacing and not through the use of assistive devices.

[33] Occupational therapist R. Kassam examined the applicant in an insurer's examination on August 23, 2016 and produced a report dated September 15, 2016. The conclusion of the report found the applicant had no significant objective limitations and recommended the applicant perform daily activities to resume previous roles and improve functional mobility, strength, and occupational performance.

The treatment plans dated March 11 & September 18, 2016 for a psychological assessment and treatment

[34] Considering the applicant was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia (Passenger) by both Dr. Shaul and Dr. Zakzanis and my other findings above, I find these treatment and assessment plans are reasonable and necessary. Of note, the psychological assessment plan is dated March 11, 2016, but it was submitted on May 30, 2016, after the respondent had approved treatment up to the MIG funding limits.

[35] I acknowledge the reports indicate the applicant is disinterested in engaging in psychological treatment. However, this reported disinterest should not automatically disentitle the applicant to psychological treatment. Considering the opinions of the psychologists and the outcome of this decision, the applicant may choose to engage in psychological treatment and it is important that such treatment be available to the applicant.

The treatment plan dated August 5, 2016 for a chronic pain assessment and the treatment plan dated February 3, 2017 for a chronic pain program

[36] The applicant claims to suffer from chronic pain and provided the report of Dr. Karmy dated December 2, 2016 to support this claim. Dr. Karmy found the applicant developed chronic pain in the neck, back, shoulders, and chest as well as chronic headaches, and proposed a chronic pain treatment plan. Dr. Karmy also noted the applicant's post-accident psychological injuries and recommended comprehensive physical and psychological treatment.

[37] The respondent submits the applicant does not have the functional impairment indicative of a chronic pain condition and provided the report of Dr. R. Zabieliauskas, physiatrist, to support this position.

[38] I find the chronic pain assessment and treatment plan are not reasonable and necessary for the following reasons.

[39] I prefer the opinions of Dr. Choi and Dr. Zabieliauskas over Dr. Karmy for several reasons. Dr. Karmy relies almost entirely on the applicant's own reports and only reviewed 3 documents are part of the assessment; the emergency room records from the date of the accident, the disability certificate completed by Dr. Le, chiropractor, and the physiotherapy treatment plan completed by Dr. Le, dated August 5, 2016. Notable is that Dr. Karmy was not provided with the insurer's examination reports of Dr. Choi and occupational therapist Kassam. In June 2016, Dr. Choi found the applicant had returned to all pre-accident child care and household duties and no further physiotherapy treatment was necessary. The September 15, 2016 in-home assessment by occupational therapist Kassam found the applicant independent with activities of daily living and encouraged the applicant resume previous roles as a means to improve functionality. Similarly, Dr. Karmy did not have an opportunity to review the CNRs of the applicant's family physician, Dr. Sundareswaran, who only recommended physiotherapy in the first 4 months following the accident and, in August 2016, no longer recommended physiotherapy and instead advised the applicant to engage in exercise instead of physiotherapy.

[40] Dr. Karmy's assessment did not include a translator, which is unlike the reports of Dr. Choi, Dr. Zabieliauskas, Dr. Zakzanis, and occupational therapist Kassam. This may explain why Dr. Karmy's report contains several inconsistencies or omissions when compared with the rest of the applicant's medical record. For instance, Dr. Karmy noted the applicant reported chronic headaches and chronic chest pain as a result of the accident however, Dr. Sundareswaran's CNRs contain no notes indicating the applicant is experiencing headaches and there is only one note where the applicant has complained of chest pain. Dr. Karmy notes in the report that chronic pain interferes with substantially all daily activities of the individual yet Dr. Karmy does not examine the applicant's daily activities and simply accepts the applicant has an inability to resume pre-accident activities. Dr. Karmy's finding of limited functionality is contrasted by the fact that following the accident the applicant was able to attend post-secondary classes each weekday and returned to all caregiving duties.

[41] Dr. Choi, Dr. Zabieliauskas, and occupational therapist Kassam all examined the applicant and did not identify a chronic pain condition. All three found the applicant had functional range of motion for the neck, back, and shoulders and did not identify any significant objective limitations. Likewise, Dr. Choi and Dr. Zabieliauskas found the applicant's soft tissue injuries required no further facility-based treatment. This mirrors the advice of Dr. Sundareswaran, the applicant's family physician, where the applicant was no longer referred to physiotherapy for the injuries but instead to engage in exercise.

INTEREST

[42] The applicant incurred the disputed psychological assessment and is entitled to interest pursuant to section 51 of the *Schedule* as payment of the benefits are overdue.

AWARD

[43] The applicant submits the respondent unreasonably withheld payment of the disputed benefits and claims an award pursuant to section 10 of Regulation 664 of the *Insurance Act*. The applicant did not specify which disputed benefits were unreasonably withheld but claims the respondent failed to adjust the applicant's file in a fair and even-handed manner. The applicant submits the respondent failed to provide medical or other reasons to deny treatment and assessment plans, second-guessed medical findings and recommendations, denied benefits contrary to recommendations, failed to adhere to the *Schedule*, and took an adversarial approach to adjusting the applicant's claim. The respondent did not address this claim in submissions.

[44] I have reviewed the evidence and find the respondent unreasonably withheld payment of the psychological assessment and treatment plan when it accepted the advice of Dr. Zakzanis who found the applicant suffered from a psychological injury as a result of the accident, but concluded the MIG still applied because the applicant expressed a disinterest in participating in psychological treatment. As I noted early, an insured's disinterest in participating in psychological treatment is irrelevant when characterizing the applicant's injuries as a result of the accident. The effect of the respondent's decision is the applicant was denied the opportunity to seek reasonable and necessary treatment for psychological injuries in the event the applicant decided to engage in psychological treatment. While I understand the respondent has an obligation to consider the opinion of a medical professional, it cannot do so when the professional has misinterpreted the *Schedule*.

[45] As a result of disregarding the applicant's psychological injury, the respondent has unreasonably refused payment for the psychological assessment and psychological treatment plans totalling $4,443.81. Considering this, I find the applicant is entitled to an award. I recognize the refusal to pay was on the recommendation of a medical professional and find this partially mitigates in favour of the respondent but it does not absolve the respondent from it's responsibility to provide funding for reasonable and necessary medical benefits. I set the award at $1,110.95, or 25% of the amounts unreasonably withheld.

COSTS

[46] The applicant seeks the "reasonable costs" of the proceedings. Costs of the proceeding are addressed in rule 19 of the *Common Rules of Practice & Procedure* (the Rules). Pursuant to rule 19, costs may be awarded in the event that a party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith.

[47] I find the applicant is not entitled to costs. I see no example or evidence that the respondent has, during the proceeding, acted unreasonably, frivolously, vexatiously or in bad faith. The applicant has not given me any basis to make a finding that the respondent's actions warranted a cost award in favour of the applicant

CONCLUSION

[48] I find that the applicant sustained injuries which fall outside the MIG and the applicant is not bound by the MIG funding limit.

[49] The applicant is not entitled to the physiotherapy treatment plans dated March 8 and May 9, 2016 and the assessment of attendant care needs plan dated March 11, 2016 because the respondent's refusal was valid pursuant to section 38(5) of the *Schedule*.

[50] The applicant is entitled to payment for the psychological assessment plan dated March 11, 2016, plus interest pursuant to section 51.

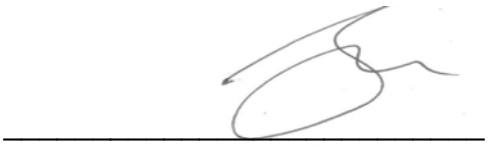
[51] The psychological treatment plan dated September 18, 2016 is reasonable and necessary. The applicant may incur the services and the respondent is liable to pay once properly invoiced.

[52] The chronic pain assessment plan dated August 5, 2016 and the chronic pain treatment plan dated February 3, 2017 are not reasonable and necessary.

[53] The applicant is entitled to an award pursuant to Ontario Regulation 664 in the amount of $1,110.95.

[54] No party is entitled to costs.

Released: September 18, 2019



Brian Norris
Adjudicator