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Ontario

RECONSIDERATION DECISION

Before: Rebecca Hines, Member

Date: July 30, 2019

File: 18-000838/AABS

Case Name: A.R. v. Aviva General Insurance

Written Submissions by:

For the Applicant: Lisa Bishop, Counsel

For the Respondent: Maia Abbas, Counsel

OVERVIEW

[1] The applicant was injured in a motor vehicle accident on March 4, 2016 and sought benefits pursuant to the *Statutory Accident Benefit Schedule – Effective September 1, 2010* (the "*Schedule*"). The applicant applied for medical benefits and a cost of examination which were denied by Aviva General Insurance (the respondent) on the basis that the treatment plans were not reasonable and necessary. The applicant applied to the Tribunal. A case conference was held, and the parties were unable to resolve the issues in dispute and the matter proceeded to a written hearing.

[2] On January 18, 2019, the Licence Appeal Tribunal (the Tribunal) issued its final decision in this matter finding that the applicant was entitled to two treatment plans for a psychological assessment and psychological treatment. The Tribunal also ordered the respondent to pay interest on another treatment plan.

[3] On February 8, 2019, the respondent requested a reconsideration of the Tribunal's decision.

[4] Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, S.O. 2009, c. 33, Sched. 5, I have been delegated responsibility to decide this matter in accordance with the applicable rules of the Tribunal.

[5] For the reasons that follow, the respondent's request for reconsideration on the issue of interest is granted. Its request for reconsideration on the treatment plans is dismissed.

Grounds for Reconsideration Request:

[6] The grounds for a request for reconsideration to be allowed are contained in Rule 18 of the *Tribunal's Common Rules of Practice and Procedure (Rule)*. The ground the respondent argues applies to this case is Rule 18 2(b) which provides:

(i) The Tribunal made a significant error of law or fact such that the Tribunal would likely have reached a different decision had the error not been made.

[7] The respondent maintains that the Tribunal made the following errors:

(i) Erred in finding that the treatment plan for psychological treatment in the amount of $2,130.00 was reasonable and necessary for the goal of reduction of pain where there was insufficient evidence that the treatment was intended for or satisfied this goal;

(ii) Erred in finding that the psychological assessment in the amount of $2,130.00 was reasonable and necessary as the applicant failed to give evidence as to the hourly rate charged or a breakdown of the services provided. Further, the Tribunal relied on the fact that the respondent

scheduled an insurer examination (IE) to justify that it was reasonable and necessary; and

(iii) Erred in awarding and in its calculation of interest for the treatment plan for physiotherapy submitted July 24, 2017 in the amount of $2,655.00, payable from the date it was submitted to the respondent, rather than from when the treatment was incurred pursuant to the Schedule.

[8] The applicant argues that the Tribunal's decision should be upheld and that there was no significant error of fact or law. In her view, the respondent is simply trying relitigate issues which failed at the hearing.

ANALYSIS & CONCLUSION:

Did the Tribunal error in fact or law in finding the treatment plan in the amount of $3,093.03 for psychological treatment reasonable and necessary pursuant to Rule 18(b)?

[9] Contrary to the submissions made by the respondent, I do not find that the Tribunal erred in fact or law in its decision on this issue.

[10] First, the Tribunal was entitled to consider and weigh the evidence as it saw fit. I see no error in the Tribunal's exercise of that discretion. The respondent relied on 16-000393 S.L. v. Pembridge Insurance Company, 2017 CanLII 12600, in support of its position that the Tribunal made a significant error in law. In particular, the respondent contends that 16-000393 upholds that a diagnosis of chronic pain is required in order for a treatment plan's goal to be for pain management. In the subject case, the applicant has not been diagnosed with chronic pain, therefore the treatment plan is not reasonable or necessary. I agree with the applicant that this is not an established legal test and that the goal of pain management could apply to address various ailments including a psychological impairment. I did not find this to be a compelling argument that the Tribunal made a significant error in fact or law.

[11] Second, I do not agree with the respondent's allegation that the Tribunal's decision was based on insufficient evidence. In my opinion, the Tribunal considered and weighed all of the evidence and at the end of the day preferred the applicants' evidence and found that the applicant met the burden of proof. For example, the applicant was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood by Dr. Shaul and S. Ramnaraine. I find that this finding was supported by the evidence presented to the Tribunal. Specifically, the evidence contained in Dr. Shaul's and S. Ramnaraine's psychological reports, progress notes and counselling logbook notes which included the following:

- The applicant was struggling to apply strategies due to feelings of helplessness and occasional pain in the head, neck and back.

Psychological treatment had helped her effectively deal with her painful experiences which alleviated stress [1];

- There are references in Dr. Shaul's clinical notes and records (CNRs) in 2017 and 2018 which reflect ongoing psychological issues. In particular, vehicular anxiety, ongoing anxiety in general, her mood being impacted by physical changes since the accident to the point that she does not want to leave the house and that therapy has helped her anxiety. There are also references to physical pain and issues with sleep which resulted in her suffering from fatigue[2];
- Dr. Nemeth diagnosed the applicant with Specific Phobia in relation to vehicular anxiety. Prior to the last insurer examination, the applicant consistently reported her symptoms to Dr. Nemeth[3]. Dr. Nemeth was provided with Dr. Shaul's CNRs which provided information which conflicted with her report. Despite reviewing the conflicting records Dr. Nemeth did not change her opinion.[4]

[12] In my view, all of the above does not support the respondent's claim that the Tribunal's decision was based on insufficient evidence. The applicant submitted the Financial Services Commission of Ontario (FSCO) appeal decision of Truong and Lumbermens Mutual Casualty Company/Kemper Canada (Appeal P03-00007) 2004, which defines that an error of law is made if "the decision was based on a material finding of fact that was not supported by the evidence such that a reasonable tribunal acting judicially and properly directed in law could not have made the finding in question."[5] I find the Tribunal's findings in its decision were supported by the evidence.

[13] Lastly, the purpose of a request for reconsideration is not to reargue positions which failed at the hearing. In my view, this is what the respondent has attempted to do. The respondent has failed to establish any grounds upon which the Tribunal's decision should be overturned. The respondent's request for reconsideration on this issue is therefore dismissed.

Did the Tribunal error in fact or law in finding the treatment plan in the amount of $2,130.00 for a psychological assessment reasonable and necessary pursuant to Rule 18(b)?

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[1] Progress report and psychological reports of Dr. Shaul and S. Ramnaraine dated May 22, 2016 and July 20, 2016.
[2] CNRs of Dr. Shaula and S. Ramnaraine: entries dated September 29, 2017; October 27, 2017; January 19, 2018; February 22, 2019 and March 9, 2018.
[3] Dr. Nemeth's report dated June 9, 2016, pages 4 and 5.
[4] Dr. Nemeth's report dated July 5, 2018.
[5] Truong and Lumbermens Mutual Casualty Company/Kemper Canada (Appeal P03-00007) 2004, page 4.

[14] I do not find that the Tribunal made a significant error in fact or law on this issue.

[15] The respondent argued that the Tribunal erred in law or fact as one of the reasons why it determined the assessment to be reasonable and necessary was because the respondent conducted its own similar IE. Second, the respondent contends the Tribunal erred because the applicant did not provide any evidence with respect to the hourly rate or a breakdown of services provided and that the services were provided by a non-registered practitioner. Therefore, the applicant was not compliant with FSCO's Superintendent Guideline (Guideline) I disagree with the respondent for the following reasons:

[16] First, I find that the respondent is simply trying to relitigate an issue that had previously failed at the hearing. In my view, the Tribunal did not make a significant error in fact or law as it provided a detailed analysis for its reasons in paragraphs 22-26 of its decision pertaining to this issue. The Tribunal did not find the respondent's position regarding the Guideline (Guideline) compelling because:

- The respondent did not deny the benefit because the fees were unreasonable, nor did the IE assessor say it was excessive from a quantum perspective (paragraph 22);
- The Tribunal did not find the treatment plan excessive and did not find it to be mandatory that the number of hours be provided on part 12 of the treatment plan and provided its rationale (paragraph 25 &26);
- The Tribunal determined that to deny the treatment plan because there was no hourly rate would be a harsh result considering it is within the limits provided by the Schedule and the fact that the Schedule is consumer protection and remedial legislation (paragraph 26);

[17] In addition, the respondent had approved previous treatment plans and examination expenses by this same service provider and raised the issue of the fees and the qualifications of the service provider for the first time at the main hearing. I found the above analysis provided by the Tribunal in making its decision reasonable and evidence based.

[18] Second, I find the cases relied upon by the respondent in support of its reconsideration request distinguishable and further they are not binding on this Tribunal. For example, the respondent relied upon C.D v. Aviva, 2017 CanLII 81581 where the adjudicator determined that only 8 hours was reasonable for a psychological assessment. In the present case the respondent argued that if you divide the total of the treatment plan by the hourly rate of $149.61 the total time for the assessment would be 13 hours. The respondent contends this is excessive as it was conducted by a psychotherapist who is subject to different rates under the Guideline. I find the facts in C.D v. Aviva, are different from the present case as the adjudicator heard evidence from the IE doctor who provided an opinion regarding the time allotted for the various tasks involved in conducting a psychological assessment. From a review of the submissions made on this written hearing no such

evidence was submitted by the respondent and Dr. Nemeth's IE did not comment on the time in her report. Consequently, I find the Tribunal's findings justified.

[19] Finally, I agree with the applicant that the respondent did not submit any evidence to supports its allegation that S. Ramnaraine does not qualify as a regulated service provider under the Guideline. By contrast the applicant submitted evidence that demonstrates that Ms. Ramnaraine qualifies as a psychological associate under the Guideline. Even if I were to accept the respondent's position the Guideline specifically states that the rates do not apply to an unregulated professional that is not mentioned in the guideline. In situations dealing with unregulated health professionals it is up to the parties to figure out what the appropriate fee is and if they cannot agree the Tribunal will decide for them. I do not find that the Tribunal made a significant error in law in exercising its discretion in that regard and in its assessment of the quantum of the treatment plan.

Did the Tribunal error in fact or law in awarding interest or in its calculation of interest?

[20] I find the Tribunal made an error in law in its calculation of interest payable on the treatment plan for physiotherapy based on the date it ordered interest payable. The Tribunal determined that interest was payable as of the date that the applicant submitted the treatment plan to the respondent. I agree with the respondent that the Tribunal misinterpreted the *Schedule* in its calculation of interest in terms of the start time of the interest provision but not in awarding interest period.

[21] The respondent argued that interest is payable only on benefits that have been incurred. It relied on s.38(15) of the *Schedule* which states that an insurer shall pay for goods and services it agreed to pay within 30 days after receiving the invoice for them. In my view, the respondent did not correctly interpret the application of this section as s.38(15) deals with interest on benefits that an insurer agreed to pay for and not benefits that are in dispute or overdue.

[22] I find the applicable section of the *Schedule* pertaining to when interest is payable is s. 51(1) which states that "an amount payable in respect of a benefit is overdue if the insurer fails to pay the benefit within the time required under this regulation". Section 51(2) indicates that interest is payable from the date the amount became overdue. Section 38(8) of the Schedule provides that upon receipt of a treatment plan the respondent has 10 days to approve the benefit, deny the benefit or schedule an IE.

[23] The respondent contends that the Tribunal also erred in awarding interest as the respondent did not have important medical records that it received long after the treatment plan was submitted and was therefore unable to assess the treatment and respond within the timeline contemplated by section 38(8). However, I find that the Tribunal addressed this in its decision as it determined that the respondent had enough information to approve the treatment plan when it was received. Since the Tribunal determined that the respondent had enough medical information to approve

the treatment plan when it was submitted I find the benefit was overdue 10 days following the submission of the treatment plan in accordance with s.38(8) of the Schedule and not from the date the treatment plan was submitted as ordered by the Tribunal in paragraph 28 of its decision.

[24] Rule 18.4(b)(i) of the Tribunal's Rules provides for the remedies available on a request for reconsideration where there is a finding that an error of fact or law is made. The Tribunal may confirm, vary or cancel the Tribunal's decision. Since I find the Tribunal errored in its order on the date interest became payable I vary the Tribunal's decision and order interest payable 10 days from the submission of the treatment plan in accordance with the Schedule.

Is the applicant entitled to costs as a result of the respondent's request for reconsideration?

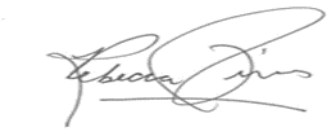
[25] In her reply submissions the applicant requested costs in response to the respondent's request for reconsideration on the basis that it was frivolous as it only sought to challenge the Tribunal's assessment of the evidence. Rule 19 provides that the Tribunal may make an award of costs, where a party has proven that the other has acted unreasonably, frivolously, vexatiously or in bad faith during the course of the hearing. I found the applicant's submissions with respect to costs insufficient as she did not explain how the respondent's behavior during this proceeding was frivolous. Further, I have granted part of the respondent's request. In my view, the applicant's submissions on this issue did not meet the high threshold to award costs. The applicant's request for costs is dismissed.

CONCLUSION

[26] For the reasons noted above,

(a) The respondent's request for reconsideration on the two treatment plans is dismissed;
(b) The Tribunal's decision is varied in accordance with Rule 18.4(b)(i) and interest on the treatment plan for physiotherapy is payable 10 days from the submission of the treatment plan.

Released: July 30, 2019



Rebecca Hines
Adjudicator