

**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**

Citation: **Kerron Blair vs. Aviva Insurance Canada, 2019 ONLAT 18-007308/AABS**

Date: June 14, 2019

File Number: 18-007308/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:

Kerron Blair

Appellant

and

Aviva Insurance Canada

Respondent

DECISION AND ORDER

PANEL: Monica Chakravarti, Adjudicator

APPEARANCES:

For the Applicant: Lisa Bishop, Counsel

For the Respondent: Greg Specht, Counsel

HEARD: In Writing on: March 25, 2019

OVERVIEW

- [1] The applicant was injured in an automobile accident on May 4, 2016 (the "Accident") and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "Schedule").
- [2] The applicant applied for medical benefits that were denied by the respondent on the basis that the medical benefits were not reasonable and necessary. The applicant disagreed with that decision and submitted an Application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

ISSUES TO BE DECIDED

- [3] The following are the issues to be decided:
 - i. Is the applicant entitled to receive a medical benefit in the amount of \$3,080.12 for physiotherapy services recommended by Toronto Healthcare Clinic Inc. in a treatment plan submitted on January 19, 2018 and denied by the respondent on February 2, 2018?
 - ii. Is the applicant entitled to receive the cost of an examination in the amount of \$2,000.00 for a chronic pain assessment recommended by Toronto Healthcare Clinic Inc. in a treatment plan submitted on January 25, 2018 and denied by the respondent on March 14, 2018?
 - iii. Is the applicant entitled to interest on any overdue payments of benefits?
 - iv. Is the applicant entitled to receive an award for unreasonably withheld or delayed payments pursuant to section 10 of Reg. 664, R.R.O. 1990?

RESULT

- [4] Based on the submissions and the totality of the evidence before me I find as follows:
 - i. The applicant is entitled to receive a medical benefit in the amount of \$3,080.12 for physiotherapy services recommended by Toronto Healthcare Clinic Inc. in the treatment plan submitted on January 19, 2018;
 - ii. The applicant is entitled to receive the cost of an examination in the amount of \$2,000.00 for a chronic pain assessment recommended by Toronto Healthcare Clinic Inc. in the treatment plan submitted on January 25, 2018;

- iii. The applicant is entitled to interest on any overdue payments of benefits; and
- iv. The applicant is not entitled to receive an award for unreasonably withheld or delayed payments pursuant to section 10 of Reg. 664, R.R.O. 1990.

ANALYSIS

a) Treatment Plan for Physiotherapy Services

- [5] According to s. 15 of the Schedule, the respondent is liable to pay for all reasonable and necessary medical expenses incurred by the applicant as a result of the Accident. The applicant carries the onus of establishing that treatment plans meet the "reasonable and necessary" standard. Thus, in reviewing the treatment plans in dispute, the Schedule requires that the applicant convince me on a balance of probabilities that they are reasonable and necessary to treat impairments sustained by the applicant in the Accident
- [6] The applicant submits that the treatment plan for physiotherapy services submitted on January 19, 2018 (the "Treatment Plan") to the insurer listed goals of pain reduction, increasing strength and range of motion and assisting the applicant with a return to his normal activities of daily living. Further the impairments and injuries listed included chronic lumbar spine sprain/strain and chronic shoulder sprain/strain.
- [7] The respondent submits that the Treatment Plan was denied because there were no complaints of issues to the applicant's neck or shoulder, that there has been a gap in treatment between July 26, 2016 and January of 2018 and that as a result of the insurer examination with Dr. Walters, Dr. Walters concluded that there is no causal link between the shoulder impairment and the subject motor vehicle accident.
- [8] After reviewing the totality of the evidence I find that on a balance of probabilities that treatment plan is reasonable and necessary based on the types of injuries and impairments that the applicant sustained as a result of the Accident and the evidence indicating the need for physiotherapy.
 - i. **Injuries and Impairments:**
- [9] On the day of the Accident the applicant was taken to the hospital via ambulance. The hospital records indicate the applicant had complaints of "Pain to right hip, right elbow and lower right back. Bruising to right hip, no obvious deformity."¹

¹ Applicant's documents, tab 2 page 9

- [10] The applicant attended at, what appears to be a walk in clinic, Milner Health Centre on May 11, 2016 with documented complaints as follows: "MVA x few days ago complaining from lower back right side and right shoulder pain".
- [11] Treatment commenced at Toronto Healthcare Clinic with clinical notes and records noting treatment from May 18, 2016 and the last visit of July 25, 2016. The clinical notes and records state the areas treated include elbows, shoulders, hips, cervical spine, and lumbar spine.
- [12] The report of Dr. Sethi, psychiatrist, dated February 7, 2017 who assessed the applicant pursuant to section 44 of the Schedule noted that the applicant reported ongoing pain in his back, and right shoulder which was made worse by things like lifting, sleeping on the shoulder, bending and reaching.
- [13] Dr. Shaul in the report of January 23, 2017 noted that the applicant experiences pain in various parts of his body including his shoulders, arms and back.
- [14] Neither Dr. Sethi nor Dr. Shaul have any issues with the credibility of the applicant and therefore I find that there is no reason to doubt the credibility of the self-reporting of the applicant's injuries, pain related complaints or limitations as they are documented in the reports of Dr. Sethi and Dr. Shaul.
- [15] The respondent relies on the report of Dr. Walters who was engaged pursuant to section 44 of the Schedule (on behalf of the respondent) to examine the applicant in response to the treatment plan of January 19, 2018.
- [16] Dr. Walters completed a physical examination and in his report of February 28, 2018 found that there were issues with abduction and extension of the right shoulder (but no issues with rotation). Dr. Walters diagnosed the applicant with rotator cuff tendinitis of the right shoulder and then asserts that the shoulder impairment is not causally linked to the Accident.
- [17] While I accept the evidence of Dr. Walters with respect to the diagnosis of rotator cuff tendinitis of the right shoulder, which is based on his physical examination of the applicant, I place no weight on the conclusion that the right shoulder impairment is not causally linked to the Accident. Dr. Walters fails to provide any reason or explanation for the right shoulder impairments to be the result of anything other than this motor vehicle accident.
- [18] The clinical note of Dr. Gostelow, the family doctor, on March 24, 2018 specifically states that there is no "antecedent" for the increase in functional right shoulder pain.
- [19] I find that on a balance of probabilities that the shoulder impairments are a direct result of the Accident.

ii. Recommendation for Physiotherapy

- [20] On March 24, 2018 Dr. Gostelow noted that the applicant was having “increasing pain and stiffness R [ight] shoulder... no specific antecedent w[ith] most recent symptoms... associated neck pain, stiffness.” Dr. Gostelow ordered an ultrasound of the right shoulder and an x ray of the cervical spine. Dr. Gostelow stated that the “plan” for the applicant to manage his symptoms was to continue with physiotherapy.
- [21] The respondent submits that the applicant continued to work and continued with his activities of daily living without seeking any further modalities, treatment or any follow up for his physical injuries and impairments.
- [22] I place considerable weight on the notes of Dr. Gostelow who documented and identified that the applicant was two years post-Accident, that the applicant “never had a family doctor before” and that the right shoulder pain and stiffness was an increased symptom which was causing “significant functional pain”.
- [23] I find that Dr. Gostelow’s recommendation for physiotherapy persuasive in finding that on a balance of probabilities the Treatment Plan is necessary to deal with the “functional pain” which the Tribunal recognizes as a legitimate goal.
- [24] In terms of the amount of treatment proposed in the Treatment Plan the applicant relies on the conclusion of Dr. Karmy who agrees with the type of modalities outlined in the Treatment Plan.
- [25] The respondent’s position is that the Treatment Plan should be rejected outright based on the report of Dr. Walters who finds that the applicant does not suffer from Chronic Pain and that the right shoulder is not causally related to the Accident.
- [26] Given that I have already found that the Treatment Plan is necessary and given that I have found that the right shoulder injury and impairments are related to the Accident it is not necessary for an analysis and finding with respect to chronic pain.
- [27] The respondent provided no submissions on the issue of the quantum of the treatment proposed. The applicant has met his onus that on a balance of probabilities that the Treatment Plan in its entirety is reasonable and necessary.

b) Chronic Pain Assessment

- [28] The applicant seeks the cost of an examination for a chronic pain assessment recommended by Toronto Healthcare Clinic Inc. submitted in a treatment plan on January 25, 2018 (the “Chronic Pain Assessment”).
- [29] The applicant takes the position that the Chronic Pain Assessment is reasonable and necessary because the goal is to "evaluate the extent of the patient's chronic injuries and psychological complaints and to provide a

prognosis and recommendations for recovery," to assist the applicant in a return to activities of normal living.

- [30] The applicant also relies upon the report of Dr. Sethi, who conducted a section 44 assessment at the behest of the respondent on February 22, 2017. Dr. Sethi, a psychologist, did recommend that the applicant be evaluated by a Pain Specialist to rule out a Pain Disorder. Dr. Sethi also recommended that the appropriate medical specialist should comment on the physical pain and the risk of chronicity.
- [31] The respondent relies on the report of Dr. Walters and Dr. Walters' finding that the applicant does not suffer from chronic pain and therefore a chronic pain assessment is not reasonable or necessary. Further the respondent takes the position that the pain complaints the applicant told to Dr. Sethi were self-serving and therefore should not carry any weight.
- [32] It is not necessary for me to make a finding of chronic pain as the issue in dispute is whether or not the assessment is reasonable and necessary.
- [33] I disagree with the analysis of the respondent and prefer the analysis of the applicant that the treatment plan for the Chronic Pain Assessment is reasonable and necessary. The respondent's assessor Dr. Sethi is the first doctor to recommend the assessment. The respondent in its letter dated February 27, 2017 to the applicant reiterated this recommendation and told the applicant that the "pain issues should be assessed by a pain specialist."
- [34] Dr. Sethi in making the recommendation for the applicant to be assessed by a pain specialist, did not voice concerns regarding the credibility of the applicant's reports of pain and therefore I accept the applicant's pain complaints made to Dr. Sethi and other assessors (Dr. Shaul, and Dr. Walters) as valid.
- [35] The goal of the Chronic Pain Assessment is to evaluate the extent of the applicant's injuries. This is a reasonable and necessary goal and a goal that the respondent reiterated in their letter to the applicant on February 7, 2017.
- [36] Therefore I find that the Chronic Pain Assessment is reasonable and necessary.

INTEREST

- [37] The applicant is entitled to interest on the approved incurred treatment plans in accordance with the Schedule.

AWARD

- [38] The applicant requests an award citing in his submissions on the treatment plans that the respondent acted in bad faith when adjusting the claims. Further, the applicant argues that the respondent did not comply with section 38(8) of

the Schedule requiring notice of the services the insurer agreed to pay for or not and the reasons why and, as a result, the applicant was denied treatment.

[39] I deny the applicant's request for an award for the following reasons.

[40] Regulation 664 states that the Tribunal may award a lump sum of up to 50 per cent of the amount to which the applicant was entitled if the respondent unreasonably withheld or delayed the payment of benefits.

[41] The respondent submits that the applicant had a gap in treatment and had not submitted any treatment plans for physical therapy for over 16 months and continued to work. The request for a medical assessment following receipt of the treatment plans in dispute was reasonable and prudent.

[42] The applicant has not satisfied his onus to persuade me of how the respondent failed to comply with the Schedule and how it failed to review all available medical evidence when making its determination. I have not been directed to evidence of conduct on the part of the respondent that constitutes unreasonable withholding or delaying of the payment of benefits. More is required than to point out a potential oversight on the part of the respondent or that the applicant disagrees with the insurer's assessor's conclusions. As a result, I find that the applicant is not entitled to an award.


ORDER

[43] For the reasons outlined above, I find that the applicant is entitled to:

- i. A medical benefit in the amount of \$3,080.12 for physiotherapy services;
- ii. Cost of an examination in the amount of \$2,000.00 for a chronic pain assessment; and
- iii. Interest in accordance with the *Schedule* on the above approved treatment plans.

[44] The applicant is not entitled to an award.

Released: June 14, 2019



**Monica Chakravarti
Adjudicator**