Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Wang v. Aviva General Insurance Company, 2021 ONLAT 19-008149/AABS

Released Date: 02/03/2021
File Number: 19-008149/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:

Kevin Royce Yung -Chien Wang

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Monica Chakravarti**

APPEARANCES:

For the Applicant: Michael Krylov, Counsel

For the Respondent: Danielle Ralph, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] The applicant was involved in a motor vehicle accident on October 18, 2014 (the "Accident"). The applicant then sought medical and rehabilitation benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*").[1]

[2] The respondent denied the benefits and took the position that the applicant's Accident-related injuries were minor as defined in the *Schedule* and therefore subjected to the confines of the Minor Injury Guidelines (the "MIG"). The applicant disagreed with the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") for resolution of the dispute.

ISSUES TO BE DECIDED

[3] While seven issues were initially identified as being in dispute, prior to the hearing the parties resolved most of the issues, leaving only the following issues to be decided:

a. Are the applicant's injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 limit and in the Minor Injury Guideline?

b. Is the applicant entitled to $3,297.08 for physiotherapy recommended by North Toronto Rehabilitation and Physiotherapy in a treatment plan (OCF-18) submitted on December 8, 2016? (the "Treatment Plan").

c. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[4] The applicant has demonstrated that his injuries do not fall within the *Schedule's* definition of "minor injury". The applicant has also met his onus to show that the disputed Treatment Plan is reasonable and necessary and thus payable with interest.

MOTION

[5] In his reply submissions, the applicant requested that I accept into evidence a copy of the actual Treatment Plan that was not attached to his initial submissions. No explanation for not providing a copy of the Treatment Plan in the first instance was given. The applicant submits that no prejudice has befallen the respondent by providing a copy of the Treatment Plan in reply, as the respondent was aware of

[1] O. Reg. 34/10, as amended.

the Treatment Plan that was in dispute and made decisions based on the Treatment Plan.

[6] The respondent opposes the applicant's request and, in the alternative, requests that if the copy of the Treatment Plan is allowed to be submitted with the applicant's reply submissions that the respondent be permitted to make a sur-reply strictly limited to the Treatment Plan

[7] The copy of the Treatment Plan will be part of the evidence considered. I am guided by *J.R. v Certas Home and Insurance Company*[2] wherein the Tribunal's Executive Chair found that the Tribunal has an obligation to ask the parties to submit information that it believes that a party meant to rely upon as evidence in a hearing, and that the Tribunal in *J.R.* erred by failing to request copies of the treatment plans that were at issue as the applicant had failed to provide them before the hearing. The Tribunal found that the failure of the Tribunal to ask for complete copies of the treatment plans in dispute in the *J.R.* matter was a breach of procedural fairness.

[8] In the same vein, I find it would be a breach of procedural fairness to not allow the applicant to put before the Tribunal a copy of the one and only Treatment Plan in dispute. Further, a copy of this Treatment Plan was filed prior to the hearing and the respondent had a copy of the Treatment Plan well before the hearing.

[9] While I do not necessarily agree that the respondent is prejudiced by the fact that a copy of the Treatment Plan was provided in reply, the applicant in their motion submissions takes no issue with the sur-reply provided by the respondent. Therefore, neither do I.

[10] Any perceived prejudice to the respondent is therefore cured by allowing the sur-reply as part of the respondent's submissions and, given that the sur-reply is brief and pointed to the contents of the Treatment Plan, I do not think it would be unreasonable to consider these submissions and therefore they are accepted.

ANALYSIS

[11] The onus is on the applicant to prove on a balance of probabilities that he did not sustain predominately minor injuries as a result of the accident.[3]

[12] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500 if the insured sustains impairments that are predominantly a minor injury in accordance with the MIG. Section 3(1) defines a "minor injury" as "one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury."

[2] CanLII 13161 (ON LAT), 2018
[3] *Scarlett v. Belair Insurance,* 2015 ONSC 3635.

[13] Section 15(1) of the *Schedule* provides that, subject to Section 18, the insurer shall pay for all reasonable and necessary medical expenses incurred by or on behalf of the insured person as a result of the accident including expenses for physiotherapy services.

[14] The applicant submits that his injuries from the Accident do not fit the definition of minor injury because the applicant sustained a concussion in the Accident and a concussion is not part of the definition within section 3(1) of the *Schedule.* The applicant also submits that the Treatment Plan is a reasonable and necessary medical expense.

[15] The respondent agrees that the applicant was diagnosed with a concussion as a result of the Accident[4] but submits at the time the applicant submitted the Treatment Plan the applicant did not have any concussive symptoms and therefore has only minor injuries from this Accident. The respondent also submits that if I find that the Treatment Plan is not reasonable and necessary or not payable for any other reason that I may not consider the issue of the minor injury, as that would be a "stand alone" issue and outside of the scope of this hearing.

[16] I disagree with the respondent that the minor injury is a stand-alone issue if I find that the Treatment Plan is not reasonable and necessary, because the treatment contemplated in the Treatment Plan falls outside of the MIG treatment protocols. In any case, I find the argument with respect to the MIG as a stand-alone issue is moot as I have found, for the reasons noted below, that the Treatment Plan is reasonable and necessary

Minor Injury

[17] Concussion does not fit the definition of a "minor injury" under the *Schedule*. The applicant has shown, based on the clinical notes and records of the hospital visited on the day after the Accident, that he was diagnosed with a concussion as a result of the Accident. The respondent in their submissions have accepted this.

[18] The family doctor's attending physician statement dated October 30, 2018, approximately 12 days following the Accident, confirmed the diagnosis of concussion as a result of the Accident and provided details of the symptoms that the applicant was experiencing.

[19] I find the respondent's position that the applicant was not suffering from symptoms of concussion in 2015 and therefore should not be removed from the MIG is not tenable. "Minor injury" has a definition under the *Schedule*. The injuries sustained by the applicant in the Accident include a concussion. Concussion does not fit into the *Schedule's* definition of minor injury. The respondent's position that the symptoms of the concussion are no longer present (which is not conceded by the applicant) and therefore the applicant no longer has a non-minor injury is provided

[4] Respondent's Submissions, para. 4.

without any support or jurisprudence. The jurisprudence from this Tribunal is clear that a concussion is not part of the definition of minor injury.

[20] Therefore, I find that the applicant's concussion, which he sustained as a result of the Accident, is not a predominantly minor injury and therefore not subject to the confines of the MIG.

The Treatment Plan: Causation and Reasonable and Necessary

[21] Both parties agree that the guiding principles to consider when determining if a treatment plan is reasonable and necessary includes determining whether the treatment goals are reasonable, whether the goals are being met to a reasonable degree and whether the costs, both financial and investment of time etc., of achieving these goals is reasonable taking into consideration the degree of success and the availability of other treatment alternatives.[5]

[22] The Treatment Plan recommends physical rehabilitation consisting of chiropractic services, massage and physiotherapy. The goals of the Treatment Plan are pain reduction, increase range of motion and increase in strength. The Tribunal has confirmed that pain reduction is a reasonable goal for treatment. Dr. Loritz, the insurer's s. 44 assessor ("I.E."), confirmed that the cost of the treatment recommended in the Treatment Plan is reasonable and there is no evidence from either party to the contrary.

[23] With respect to the Treatment Plan in dispute, the applicant submits that the treatment is reasonable and necessary because the treatment plan was formulated to help the applicant with pain management and to improve his functional levels as a result of the injuries sustained in the Accident. The applicant submits that these goals are achievable, and the costs are reasonable.

[24] The respondent submits that the applicant's physical injuries arising from the Accident were resolved at the time of the second accident of August 21, 2015. Further, it submits that, but for the second accident, the applicant would not require the treatment proposed in the Treatment Plan. Therefore, it submits that the Treatment Plan is not reasonable and necessary, as it does not relate to the injuries sustained in the subject Accident but rather relates to injuries sustained in a subsequent accident. As well, the respondent points to the fact that the Treatment Plan was recommended on or about December 8, 2016, two years after the subject Accident, meaning that the treatment must be for injuries or impairments sustained closer to the date of the Treatment Plan.

Causation

[25] I find the applicant has shown on a balance of probabilities that that he sustained injuries in this Accident that were then exacerbated by a second accident.

[5] Applicant's submissions, para. 22 and Respondent's submissions, para.11.

[26] The records of the hospital and the family doctor confirm that the applicant sustained injuries to his neck, left shoulder and lower back as a result of the Accident. The attending physician's statement for short-term disability, dated October 30, 2018 (completed by the family doctor), confirms that the applicant had the aforementioned injuries and confirms that the family doctor supports the applicant's inability to work following the subject accident.

[27] The applicant provided invoices for acupuncture, physiotherapy and massage therapy following the subject Accident as evidence of him receiving these treatments before and after the second accident. The letter from the insurer to the applicant dated June 8, 2015 also notes that his "new" OCF-1 indicates that he attended physiotherapy at MVMT Clinic.

[28] The clinical note and record of April 10, 2015 is the only treating medical record from the time of the subject Accident until the second accident. On review, I find it notes that the applicant's lower back pain is persistent, and the headaches continue to variable degrees. The family doctor recommends that the applicant continue with physiotherapy.

[29] The clinical notes and records of August 26, 2015 are the first notes following the second accident. The family doctor notes the applicant's "flare up" in his lower back pain, that he has no neck pain and no headaches. On February 3, 2016, the family doctor notes the applicant's lower back pain has mostly resolved with some residual pain. However, by October 13, 2016, the applicant reports to his family doctor that he has been experiencing left shoulder joint pain for the last six months, and his headaches increased lately. On October 20, 2016, the applicant reports that his lower back pain has flared up again. The family doctor confirms the lower back pain is as a result of a motor vehicle accident. On November 29, 2016, the lower back pain is reported as persistent and severe and his left shoulder is still sore, and the applicant is doing physiotherapy and massage.

[30] On August 2, 2017, the applicant attended an I.E. with Dr. Loritz, general practitioner. At the I.E., the applicant reported that following the Accident he had painful symptoms in his neck, left shoulder and lower back as well as headaches, sleep disturbances and memory difficulties. He reported that as a result of the second accident, he sustained injuries which were an exacerbation of his injuries from this subject Accident and that the exacerbation lasted 2-3 months. He reported that he had no pre-Accident issues with his back, neck or shoulder. Based on the examination, Dr. Loritz concluded that the applicant sustained uncomplicated myofascial sprain/strain injuries of his cervical spine, left shoulder and lumbar spine as a result of the subject Accident.

[31] Therefore, based on the above and as shown in the records of the hospital and the family doctor, I find the applicant sustained injuries to his neck, left shoulder and lower back as a result of the Accident. These injuries were then exacerbated in a second accident.

Treatment Plan Reasonable and Necessary

[32] With respect to the Treatment Plan in dispute, the applicant has met his onus of showing the Treatment Plan is reasonable and necessary to treat his Accident-related injuries and I find the goals are reasonable and achievable.

[33] The family doctor's clinical note of April 10, 2015 confirms that the applicant's back pain is severe. The clinical notes as a whole show that the back pain was in fact exacerbated by the second Accident, and as noted in the clinical note of November 29, 2016, the family doctor takes no issue with the ongoing physiotherapy that the applicant reports he is doing. In the clinical notes of March 6, 2017, the family doctor recommends that the applicant continue with physiotherapy when he can and as well takes no issue with the chiropractic and massage therapy that the applicant is reporting to him.

[34] I do note that by June 29, 2017 the family doctor states that the physiotherapy and chiropractic treatment is less effective, however, by this point the applicant had completed the recommended treatment of the Treatment Plan.

[35] Dr. Loritz opined that the Treatment Plan is not reasonable and necessary, but that the fees were reasonable. His report found that the applicant had reached maximum medical recovery and no further therapy is indicated. However, I am not persuaded by the thoroughness of the report of Dr. Loritz, as he also opined that the applicant is in the MIG and does not acknowledge the diagnosis of "concussion" despite indicating that he reviewed the hospital clinical notes and records.

[36] The Treatment Plan which is dated December 8, 2016 aims to treat the lower back pain, the cervical pain, the left shoulder pain and address the headaches experienced by the applicant. By the time of the I.E. on August 2, 2017, the applicant reported that the only lingering issue for him was the lower back pain and the headaches. The inference that can be drawn on a balance of probabilities is that the treatment in some way at least helped with the cervical injuries and to some extent the left shoulder, although that issue re-emerges following the I.E. There is no evidence that the applicant had any issues in his back, neck or shoulder prior to the Accident and therefore I find the cause of the injuries was the Accident.

[37] Based on the above clinical notes and records, and specifically the recommendations of the family doctor, I find the applicant has met his onus of showing on a balance of probabilities that the Treatment Plan is reasonable and necessary. Specifically, I find that the Treatment Plan will help achieve the stated goals of pain reduction and increased functionality. The achievement of the goals was demonstrated by the reporting of the applicant to the I.E. doctor that his cervical pain and shoulder pain had subsided. Further, based on the notes of the family doctor, there was no other alternative therapies being recommended. On a

balance of probabilities, I find the applicant has demonstrated that the Treatment Plan is reasonable and necessary.

Interest

[38] As I have found that the applicant is entitled to the Treatment Plan, the interest on the overdue amount is payable in accordance with section 51 of the *Schedule.*

ORDER

[39] The applicant's injuries are not minor injuries as defined in the *Schedule*. The Treatment Plan in dispute is reasonable and necessary and payable, with interest, in accordance with section 51 of the *Schedule*.

Released: February 3, 2021

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Monica Chakravarti
Adjudicator