

**LICENCE APPEAL  
TRIBUNAL**

**Safety, Licensing Appeals and  
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE  
DE PERMIS**

**Tribunaux de la sécurité, des appels en  
matière de permis et des normes Ontario**



**Tribunal File Number: 18-011590/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:

**S. K-A.**

**Applicant**

and

**Aviva General Insurance**

**Respondent**

**DECISION**

**ADJUDICATOR: Brian Norris**

**APPEARANCES:**

For the Applicant: Harvey S. Consky, Counsel

For the Respondent: Jamie Min, Counsel

**HEARD: In Writing on August 19, 2019**

## OVERVIEW

- [1] The applicant was injured in an automobile accident on October 8, 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) Is the applicant entitled to receive medical benefits in the amount of \$4,347.30, less \$3,562.56 approved by the respondent, for a treatment plan which includes exercise equipment, chiropractic treatment, and massage therapy, recommended by Physio Fix in a plan dated February 4, 2017?
  - 2) Is the applicant entitled to interest on any overdue payment of benefits?
  - 3) Is either party entitled to costs?

## RESULT

- [3] The applicant is not entitled to the balance of the treatment plan dated February 4, 2017.
- [4] No interest is payable.
- [5] Neither party is entitled to costs.

## BACKGROUND

- [6] The applicant was the driver of a vehicle which was struck from behind by another vehicle. The applicant did not seek immediate medical attention but visited Dr. S. Strasberg, family physician, the following day with complaints of neck, shoulder, low back, and ankle pain. Dr. Strasberg prescribed pain medication and recommended the applicant engage in physiotherapy. During a visit a week later, Dr. Strasberg recommended the applicant engage in physiotherapy and massage therapy. The applicant returned to work immediately following the accident but was unable to do so after about 3 weeks and took nearly 2 months off work due to pain and limitations as a result of the accident.

- [7] Prior to the 2016 accident, in 2009, the applicant was involved in an accident for which he was off work for about 4 years due to chronic neck and shoulder pain. Despite suffering predominantly soft tissue injuries in the 2016 accident, the applicant was removed from the MIG due to the impact his chronic injuries from the 2009 accident would have on his recovery from injuries suffered in the 2016 accident.

## **PROCEDURAL ISSUES**

- [8] The Tribunal issued an Order dated April 18, 2019 which provided the applicant with a deadline of May 30, 2019 to produce a medical report by Dr. M. Moslehi, chiropractor. The respondent submits the applicant failed to produce the subject report by the deadline imposed by the Tribunal and only produced the document on July 8, 2019. The respondent requests Dr. Moslehi's April 23, 2019 report be struck from the hearing record as a result. The applicant contends the production of the report was delayed because it was not funded by the respondent.
- [9] Upon review of the submissions and the report, I will allow it to be included in the hearing because the probative value of the report outweighs the prejudice suffered by the respondent.

## **ANALYSIS**

- [10] The treatment plan in dispute was partially approved by the respondent. Only the funding for massage therapy has not been approved. At issue is whether massage therapy is reasonable and necessary for the applicant. For the following reasons, I find it is not.
- [11] While I acknowledge the treatment plan recommends it, there is no corresponding recommendation for ongoing massage therapy in the applicant's medical record. The insurer's examination report by Dr. M. Goldstein, physician, dated June 7, 2017 found the applicant had subjective pain in the shoulders and cervical spine during range of motion testing. In all other areas, Dr. Goldstein found the applicant exhibited full and pain free range of motion. In addition, upon completion of the assessment, Dr. Goldstein acknowledged the applicant's pre-existing neck and shoulder pain yet recommended only active therapy such as home exercises.
- [12] Dr. Goldstein's recommendation is the same as the applicant's family physician, Dr. S. Strasberg. Dr. Strasberg also recommended physiotherapy after the

accident and ongoing. There was only one time where Dr. Strasberg recommended massage therapy, it occurred one week following the accident.

- [13] Dr. Moslehi's report dated April 23, 2019 does not outweigh Dr. Goldstein's and Dr. Strasberg's recommendations. Dr. Moslehi's report was produced more than two years following the proposed treatment plan and, relative to the disputed treatment plan, is not as timely as Dr. Goldstein's and Dr. Strasberg's recommendations. The report by Dr. Moslehi concludes the applicant would benefit from treatment which may include various modalities such as massage therapy and psychological consultation. However, I don't see this as a clear indication massage therapy is a reasonable and necessary component of the applicant's treatment.

## **COSTS**

- [14] Pursuant to Rule 19.1 of the Licence Appeal Tribunal Common Rules of Practice and Procedure, costs may be awarded in the event that a party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith.
- [15] Although both parties requested costs be awarded as part of this hearing, I decline both requests for the following reasons.
- [16] The applicant's request for a cost award is declined because it is provided without any submissions on, or evidence of, behaviour which could be considered unreasonable, frivolous, vexatious, or of bad faith. Considering these four factors are the only grounds for which I may consider a cost award, I see no reason to award such.
- [17] The respondent's request for a cost award is declined despite the applicant's conduct. I find the applicant's untimely delivery of the report did not interfere with the Tribunal's ability to carry out a fair, efficient, and effective process. The hearing proceeded as scheduled and parties were provided opportunities to make submissions. In addition, the late submission of the report did not prejudice the respondent from successfully presenting its position.

## **INTEREST**

- [18] Interest is only payable on overdue payments of benefits. Having found no benefits payable or overdue, I find no interest payable as well.

## **CONCLUSION**

- [19] The applicant is not entitled to the balance of the treatment plan dated February 4, 2017.
- [20] No interest is payable.
- [21] Neither party is entitled to costs.

**Released: December 06, 2019**



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**Brian Norris, Adjudicator**