Citation: Almayahi vs. The Co-operators General Insurance Company, 2021 ONLAT 20-001166/AABS

File Number: 20-001166/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:

Salam Almayahi

Applicant

and

The Co-operators General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Derek Grant**

APPEARANCES:

For the Applicant: Salam Almayahi, Applicant
Ariane Wiseman, Counsel

For the Respondent: The Co-operators General Insurance Company, Representative
Amanda Lennox, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] The applicant was injured in an accident on December 24, 2015, and sought various benefits from the respondent, Co-operators, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*"). Co-operators denied the benefits in dispute on the basis of its determination that the benefits were not reasonable and necessary. The applicant disagreed and submitted an application to the Tribunal for resolution of the dispute.

ISSUES

[2] The issues I am asked to decide are as follows:

a. Are the medical benefits consisting of chiropractic treatment recommended by Upper James Wellness Clinic Inc. in the amount of:

   i. $2,353.72 in a treatment plan (OCF-18) submitted January 10, 2018 and denied on March 12, 2018, reasonable and necessary?

   ii. $2,353.72 in an OCF-18 submitted April 4, 2019 and denied on May 19, 2019, reasonable and necessary?

b. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

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

FINDING

[3] The applicant is entitled to the treatment plans in dispute, plus interest pursuant to s. 51. The applicant is entitled to a s. 10 award in the amount of $470.74.

ANALYSIS

OCF-18s dated February 24, 2018 and April 4, 2019

[4] On the evidence, I find that the applicant is entitled to payment for the costs of the two OCF-18s on the basis that the medical documentation supports his reports of pain, that the pain is consistent and ongoing since the accident and that the goals of pain reduction; increase in strength; increase range of motion; and return to activities of normal living are reasonable and necessary.

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

Applicant's position

[5] The applicant relies on various medical records in support of his claim for entitlement to the disputed OCF-18s, including: the clinical notes and records ("CNRs") of Dr. Israel; McMaster Children's Hospital/Hamilton Health Sciences; Upper James Wellness; and diagnostic imaging reports. In a Treatment Confirmation Form prepared by chiropractor Dr. Malik, the applicant's injuries were noted to be an unspecified dislocation of the glenohumeral joint; pain in the thoracic spine; and iliotibial band syndrome.

Dr. Israel, Family Physician

[6] The applicant submits that the CNRs of Dr. Israel show that the shoulder pain complaints were consistent after the accident. Between January 18, 2016 and December 4, 2019, there are several visits noting left shoulder pain. Of note is an April 14, 2016 entry indicating that the applicant "had no dislocations of shoulder before December 24, 2015". Three visits on September 12, 2016, October 3 and 4, 2016 note the applicant complained of right shoulder pain.

McMaster Children's Hospital/Hamilton Health Sciences

[7] The applicant first sought treatment for chronic pain at McMaster Children's Hospital in 2016. In a May 24, 2016 entry, it notes that the applicant continues to receive physiotherapy since February 2016 with his symptoms improving and he has not experienced any dislocations since treatment. Between August 30, 2016 and March 22, 2019, the records note post-accident left shoulder instability; right shoulder pain; a referral to a chronic pain clinic by orthopaedic surgeon Dr. Ayeni; chronic pain program treatment; and a diagnosis of chronic left shoulder pain on March 22, 2019 by the treating physiatrist at the chronic pain program.

Upper James Wellness

[8] The records from Upper James Wellness indicate that the applicant first received treatment on January 9, 2016. Between December 2016 and May 16, 2018, there are numerous visits, with the report ranging from slightly improved function in 2016/2017 to a last noted report on May 16, 2018 of the "shoulders are ok today".

Respondent's position

[9] The respondent submits that the medical evidence does not support that the disputed OCF-18s are reasonable and necessary. The respondent points to the fact that the applicant did not seek medical attention for shoulder pain until

January 16, 2016, approximately 23 days post-accident. The respondent further points to x-ray reports of the left shoulder, completed January 19 and 22, 2016, which noted normal alignment of bones and soft tissues, and normal views of soft tissues, as well as no evidence of fracture, preserved joint spaces, and no evidence of joint displacement. The respondent's position is that aside from the applicant's subjective complaints of a shoulder dislocation, there is no objective medical evidence that he suffered the injury as a direct result of the accident.

[10] The respondent relies on its s. 44 insurer's examination report from orthopaedic surgeon Dr. Tansey. Dr. Tansey opined that the applicant suffered uncomplicated myofascial strain-type injuries, which the applicant has recovered from. In addition, Dr. Tansey noted that the pain symptomatology was consistent with multidirectional instability which Dr. Tansey concluded is not considered to be a result of a specific trauma. Based on Dr. Tansey's opinion, the respondent determined that the OCF18s were not reasonable and necessary.

[11] Respectfully, I disagree with the respondent for three reasons:

a. First, on April 14, 2016, Dr. Israel notes that "the patient had no dislocation at [left] shoulder before December 24, 2015". I am persuaded by the evidence of Dr. Israel, the applicant's main treatment provider, as he has extensive insight into the applicant's medical history, and would be most familiar with the applicant's pre- and post-accident well-being;

b. Second, the applicant has been diagnosed with and received treatment for chronic pain of the left shoulder. Although Dr. Tansey opines that the applicant is "fully recovered from his accident-related injuries", at the time of the proceeding, it has been approximately five years post-accident, and there have been consistent pain reports and treatment for the same shoulder injury; and,

c. Lastly, I place more weight on the chronic pain notes of McMaster's chronic pain program, which are as recent as 2019, than the comments of Dr. Tansey because I find that Dr. Tansey was unable to conclude that chronic pain is diagnosable through diagnostic imaging despite his comments on the ultrasound report which did not indicate tears or tendinosis and was otherwise normal.

[12] The goals of the OCF-18s are pain reduction; increase in strength; increase range of motion; and a return to activities of normal living. Given the evidence which supports the applicant suffers from chronic pain as a result of the accident, I find the goals of the OCF-18s to be reasonable. The applicant has continued to

seek treatment for his bilateral shoulder pain, as evidenced through the medical documentation and the treatment has shown to be helpful in relieving the pain. I find that the recommended course of treatment set out in the OCF-18s is also reasonable and necessary. Finally, the cost (both time and monetary investment) is also reasonable and necessary and within the regulated limits.

[13] For these reasons, I am persuaded by the applicant's evidence that the left shoulder dislocation was caused by the accident, that it has developed into chronic pain as a result of the injuries sustained in the accident, and that the recommended treatment is reasonable and necessary in response to treating his injuries and chronic pain.

AWARD

[14] If I find that the respondent has unreasonably withheld or delayed payment of benefits, s. 10 of O. Reg. 664 gives me the discretion to award a lump sum of up to 50 percent of the amount to which the applicant is entitled to at the time of the award.

[15] The applicant submits he is entitled to an award because the respondent failed to continually adjust the file by failing to review new medical records that contradicted Dr. Tansey's report. He argues that the respondent relied on Dr. Tansey's report, which did not consider or comment on the right shoulder pain/complaints/injury. The applicant further submits that the respondent failed to consider the medical opinions of the family physician, which recommended the need for continued chiropractic treatment.

[16] The respondent submits that it relied on its s. 44 report and, based on the conclusion in the report, it determined that the applicant was not entitled to the disputed benefits. Its position is that this does not amount to an unreasonable withholding or delay in the payment of benefits. The respondent submits that the applicant failed to provide updated medical records until the case conference on June 18, 2020. Prior to the case conference, the medical records were only provided up to December 2017. The respondent's position is that the applicant failed to provide compelling medical evidence for Dr. Tansey to consider. Lastly, the respondent argues that the applicant failed to comply with the recommendations of his treating physicians, namely, not consistently doing the recommended physiotherapy exercises and not following through with recommendations for cortisone injections. The respondent's position is that its

handling of this file does not amount to conduct that is "excessive, imprudent, stubborn, inflexible, unyielding or immoderate."[2]

[17] I find that the applicant's claim of entitlement for treatment was unreasonably withheld because the respondent failed in its ongoing adjustment of the claim, as evidenced by the respondent being provided family physician clinical notes and records on June 28, 2019. The family physician records were for the period of January 28, 2017 to June 28, 2019 however, the respondent did not take any action in considering those records.

[18] Insurers have an obligation to continue to adjust their files as new information becomes available. I find that the respondent unreasonably denied the applicant's claim of entitlement to treatment even when presented with convincing evidence from his family physician and the chronic pain treatment providers.

[19] The respondent's failure to acknowledge or respond to the medical evidence presented on June 28, 2019 weakens its position that the applicant has failed to establish that the treatment is reasonable and necessary. Further, the respondent continued to rely on the report of its assessor, despite the medical records, reports and referrals from treatment providers that challenged the conclusions of its assessor that the respondent relied on in denying the OCF-18s. I find this conduct led to an unreasonable delay in the applicant receiving treatment that I have found to be reasonable and necessary.

[20] Case law has established the criteria for the consideration of granting an award. The award should be proportionate to: a) the level of blame to be placed on the insurer's conduct; b) the vulnerability of the insured; c) the potential or actual harm to the insured; d) the necessity of deterring future such conduct from the insurer; d) the advantage gained through the insurer's misconduct; and e) a consideration of any other action that has been or will be taken against the insurer due to its conduct. Through subsequent case law, an additional consideration has been the overall length of the delay. These are the factors that the Tribunal has considered assistive when determining a s. 10 award.[3]

[21] The applicant submits that the maximum amount payable should be levied against the respondent. As indicated earlier, s. 10 of O. Reg. 664 provides that I may award up to 50 percent of any amounts owing. I do not find the respondent's actions warrant the maximum in these circumstances. The respondent relied on

[2] *Plowright v. Wellington Insurance Co.,* 1993 CarswellOnt 4786
[3] *Plowright v. Wellington Insurance Co.,* 1993 CarswellOnt 4786, pg. 17.

its assessor's report, which it is entitled to do. Following the recommendations of its assessor is not a ground for an award. However, I find the respondent did not take appropriate steps in its ongoing duty to continue adjusting the applicant's claim, which led to payment for the disputed OCF-18s being unreasonably withheld. The applicant relied on his insurance provider to dutifully adjust his claim and consider the impact of his injuries on his ability to function near to or at the same level he did pre-accident. The evidence of his lack of ability to do so, and subsequent chronic pain condition, should have resulted in further consideration on Aviva's part in reconsidering its determination to deny the OCF-18s.

[22] Bearing this in mind, I find that an award of 10% is appropriate in this case. I find that the award is payable on the total of the treatment plans, being $4,707.44, with 10% calculated to equal $470.74, plus interest on the award.

ORDER

[23] The applicant is entitled to both of the OCF-18s, plus interest, pursuant to s. 51.

[24] The applicant is entitled to an award in the amount of $470.74, plus interest, pursuant to s. 10 of O. Reg. 664.

Date of Issue: March 19, 2021

Derek Grant, Adjudicator