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: P. K. vs. Aviva Insurance Canada 2020 ONLAT 19-006570/AABS

Released Date: 11/25/2020
File Number: 19-006570/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:

Prabir Kar

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce, Vice Chair**

APPEARANCES:

For the Applicant: Ariane Wiseman, Counsel

For the Respondent: Sjawal Bhutta, Counsel

HEARD: **Via written submissions**

OVERVIEW

[1] The applicant was injured in an accident on February 26, 2017, and sought various benefits from the respondent, Aviva, pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 ("*Schedule*"). Aviva paid benefits up to the $3,500.00 limit prescribed by the Minor Injury Guideline ("MIG") but denied the benefits in dispute based on its determination that the applicant's injuries were predominantly minor injuries, and therefore subject to treatment within the MIG.

[2] The applicant submits that he suffers from chronic pain and psychological impairments as a result of the accident that warrant removal from the MIG. He submitted an application to the Tribunal for resolution of the dispute.

ISSUES IN DISPUTE

[3] The following issues are in dispute:

i. Are the applicant's injuries predominantly minor injuries as defined in the *Schedule* and subject to treatment within the MIG?

ii. Is the applicant entitled to a medical benefit in the amount of $1,197.00 for physiotherapy services recommended by Pinnacle Multi Specialists Rehab Centre in a treatment plan submitted on June 5, 2017 and denied by the respondent on September 13, 2017?

iii. Is the applicant entitled to a medical benefit in the amount of $1,926.00 for physiotherapy services recommended by Activa Scarborough in a treatment plan submitted on October 25, 2017 and denied by the respondent on March 5, 2018?

iv. Is the applicant entitled to a medical benefit in the amount of $3,594.40 for physiotherapy services recommended by Activa Scarborough in a treatment plan submitted on March 10, 2018 and denied by the respondent on March 26, 2018?

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

vi. Is the applicant entitled to receive an award because the insurer unreasonably withheld or delayed the payment of benefits pursuant to s. 10 of O. Reg. 664?

RESULT

[4] The applicant has demonstrated on a balance of probabilities that his chronic pain warrants removal from and treatment beyond the MIG. He is entitled to payment for the OCF-18 in dispute totalling $1,197.00, plus applicable interest under s. 51, as it is reasonable and necessary.

[5] The applicant is not entitled to payment for the two remaining OCF-18s in dispute as he has not demonstrated that they are reasonable and necessary. An award under s. 10 is not appropriate.

ANALYSIS

Aviva's motion to exclude

[6] Shortly after the filing of the applicant's reply submissions, Aviva submitted a motion to the Tribunal. As all of the submissions had been completed, the Tribunal determined that the motion would be heard by the written hearing adjudicator assigned to the matter. Here, Aviva requests that parts of the applicant's reply submissions be excluded on the basis that the applicant advanced new argument and evidence, which is contrary to the purpose of reply submissions. Aviva asserts that the applicant introduced new argument in regard to his chronic pain claim and submitted a psychological report that was not available to Aviva at the time of its submissions. Aviva submits that this new evidence and submissions amounts to trial by ambush and should be struck.

[7] In response, the applicant submits that Aviva also relied on documents that were not produced by the Tribunal's deadline, that his psychological report was only received after the production deadline, that counsel wrote to Aviva to acknowledge the late submission of the report but never received a reply, that he has not reformulated or introduced new argument but rather rebutted Aviva's submissions and, finally, that he would be prejudiced if his reply submissions were excluded. In turn, the applicant asks the Tribunal to strike five paragraphs from Aviva's submissions that relate to evidence it did not produce by the deadline and further requests its costs.

[8] Rule 3.1 of the Tribunal's *Common Rules of Practice and Procedure* states that the *Rules* will be liberally interpreted and applied, and they may be varied or applied to facilitate a fair, open and accessible process to allow the effective participation by all parties and to ensure efficient, proportional and timely resolution of the merits of the proceeding before the Tribunal. On review of the parties' submissions, I disagree with Aviva that the applicant was reformulating

his position in reply. Rather, I find his reply submissions were rebuttals to arguments made by Aviva in its responding submissions, namely its arguments concerning the MIG, his functional impairment and the six chronic pain criteria from the *AMA Guides* that it referenced.

[9] With regards to the the introduction of the psychological report dated June 2, 2020 for the first time in the applicant's reply submissions, I agree that it was offered in response to Aviva's assertion that the applicant had not produced any medical evidence diagnosing a psychological impairment. However, I disagree that Aviva would face no prejudice if it was included as evidence. Allowing the applicant to submit a new medical report in his reply would deprive Aviva of the opportunity to provide a rebuttal report, to establish a position on same or to mount a proper defence. The applicant's offer of a sur-reply to Aviva does not, in my view, cure this prejudice and no sur-reply was provided by Aviva. Accordingly, I did not consider Dr. Singh's psychological report dated June 2, 2020 that was submitted by the applicant.

[10] Finally, while I am alive to the applicant's requests for costs and that parts of Aviva's submissions be struck, I decline to allow either request. All of the submissions from both parties were allowed into evidence in order for the Tribunal to better appreciate the nature of the dispute. While it appears that both parties made procedural mis-steps along the way—missing production deadlines, submitting documents related to the wrong applicant, not acknowledging correspondence from counsel, referencing incorrect denial dates—I find these mis-steps do not rise to the level of impropriety, of trial by ambush, of splitting of the case, or of unclean hands, *etc.* as the parties allege, that would warrant an extreme action like excluding submissions. Similarly, I find no indication that Aviva acted unreasonably, frivolously, vexatiously or in bad faith in its request to warrant costs in favour of the applicant under Rule 19 of the *Common Rules*.

Applicability of the MIG

[11] I find the applicant has satisfied his burden to prove on a balance of probabilities that his accident-related impairments, chiefly his pre-existing and ongoing chronic pain, warrant removal from and treatment beyond the MIG.

[12] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured sustains an impairment that is predominantly a minor injury in accordance with s. 3(1). An insured may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under s. 18(2), that they have a documented pre-existing injury or condition combined with compelling medical evidence stating that the

condition precludes recovery if they are kept within the confines of the MIG. The Tribunal has also determined that an applicant may be removed form the MIG if they can demonstrate that chronic pain or psychological conditions cause functional impairment that necessitates treatment beyond the limit. In all cases, the burden of proof lies with the applicant to demonstrate that their accident-related impairments justify removal from the MIG on a balance of probabilities.

[13] The applicant submits that he has a history of back pain that was exacerbated by the accident that causes functional impairment, affects his ability to work and has led to psychological impairments. To this end, he submits that he suffers from chronic pain and psychological impairments that warrant treatment beyond the MIG and directs the Tribunal to various clinical notes and records, his OHIP summary, Disability Certificate ("OCF-3"), prescription summary and a Chronic Pain Report dated November 27, 2019.

[14] In response, Aviva submits that there is no compelling evidence that the applicant's injuries cannot be treated within the MIG and relies on the findings from the s. 44 Insurer Examination ("IE") that it conducted. Further, Aviva argues that the applicant has not demonstrated that his pain or psychological impairments were caused by the accident and not by his fall incident in 2018 and subsequent motor vehicle accident in 2019 or that his pre-existing condition prevents his maximal medical recovery under the MIG under s. 18(2).

[15] I find evidence in the clinical notes and records from Pinnacle Health Clinic and from the family physician, Dr. Sheeja, that the applicant began reporting back pain in May 2016, well before the accident giving rise to this dispute. I find these complaints led to a referral to a chronic pain specialist a month later and a series of injections to quell his pain. While I do not find that this alone meets the criteria for removal from the MIG under s. 18(2), I find there is a clear indication that his back pain was further exacerbated by the accident, which resulted in recommendations to continue the chronic pain program and to attend physiotherapy as well as further injections over the next two years. I find the applicant has chronic pain as a result of the accident.

[16] Aviva submits that the applicant has not been specifically diagnosed with chronic pain syndrome and does not meet any of the criteria for chronic pain outlined by the *AMA Guides*. While I agree with Aviva that the criteria in the *AMA Guides* provide a helpful analytical tool for assessing chronic pain claims, the applicant is correct that the six criteria are not binding on the Tribunal. In a similar vein, a diagnosis of chronic pain syndrome (as opposed to just chronic pain) is not strictly required for removal from the MIG. In any event, I agree with the applicant

that his pain has led to functional impairment where he has difficulty standing, sitting and walking for long periods of time. The applicant's pain has led to increased sleep issues, a reliance on pain-relieving injections, CBD oil and Gabapentin post-accident, modified work duties that have led to a four-day work week, two short-term leaves from his employment and recurring pain that continues over three years post-accident. Without intervention, he reports the pain as constant and being 8-9/10 in severity. In my view, even though the *AMA Guides* criteria are not binding, I find the applicant's chronic pain meets at least three of the six criteria required, primarily due to his dependence on pain relieving injections long after the accident, his short-term disability absences from work, inability to stand or sit for long periods of time and, potentially, his alleged development of psychosocial sequelae from the accident.

[17] Moreover, contrary to Aviva's position, I find the applicant has actually been diagnosed with chronic pain by his family doctor, by Dr. Chen and by Dr. Dhillon, who authored the report dated November 27, 2019 on which the applicant relies. I find the report to be thorough and detailed and agree that Dr. Dhillon diagnosed chronic lumbosacral back pain which has not been rebutted by a competing report or more recent opinion from Aviva. Further, while the report does not cite the *AMA Guides*, I find it discusses how the applicant's functional impairment as a result of his pain meets the criteria generally and it traces this functional impairment and pain to the accident. On the evidence, I prefer the report of Dr. Dhillon over the s. 44 IE report of Dr. Abounaja, which was completed six months post-accident and assessed the applicant as having minor injuries treatable within the MIG. I find the s. 44 report failed to take into consideration the applicant's pre-existing pain, how the accident exacerbated same, his persistent post-accident pain and the functional impairment that has resulted since.

[18] On balance, and for these reasons, I find the applicant has provided enough evidence to demonstrate that he has chronic pain as a result of the accident that warrants removal from the MIG, as his pre-existing pain was exacerbated by the accident, it is persistent, causes functional impairment and he has received an unrebutted diagnosis of same.

Are the treatment and assessment plans reasonable and necessary?

[19] Having determined that the applicant's accident-related chronic pain warrants removal from the MIG, an analysis of whether the treatment and assessment plans in dispute are reasonable and necessary under s. 15 is required.

[20] The three physiotherapy treatment plans in dispute are all generally the same in scope and were submitted consecutively between June 2017 and March 2018.

The applicant submits that all three plans are reasonable and necessary because his treating practitioners continued to recommend physiotherapy treatment and because pain reduction is a legitimate goal for treatment. The applicant refers to Dr. Dhillon's recommendation of engagement in a multidisciplinary multimodal pain program, Dr. Sheeja's recommendation for continued physiotherapy and massage and Dr. Chen's recommendation for continued therapy.

[21] In response, Aviva submits that the applicant has failed to establish that any of the treatment plans in dispute identify reasonable treatment goals that were being met to a reasonable degree and that the cost of achieving those goals were reasonable. Further, Aviva asserts that where Dr. Dhillon diagnosed him with chronic pain in November 27, 2019, the three treatment plans submitted prior to that diagnosis cannot be reasonable and necessary as they do not address any treatment goals. It submits that given the applicant's argument that Dr. Dhillon's chronic pain diagnosis took the applicant out of the MIG, these treatments plan could not be reasonable and necessary without that diagnosis before November 27, 2019.

[22] I find the first treatment plan in the amount of $1,197.00 as recommended by Pinnacle Health to be reasonable and necessary. I agree with the applicant that pain reduction is a legitimate goal for treatment and find support for physiotherapy in the clinical notes and the recommendations from his treating practitioners. Having determined that the applicant suffers from chronic pain that warrants removal from the MIG, I agree that physiotherapy treatment at the time this OCF-18 was proposed would have been reasonable and necessary in order to assist in his recovery and relieve some of his ongoing pain, goals which were being met to a reasonable degree based on the treatment records in evidence. Further, I find the cost of this treatment plan to be reasonable and find that since the applicant has also incurred this treatment plan in its entirety, it is payable with interest pursuant to s. 51.

[23] With regards to the remaining two treatment plans in the amounts of $1,926.00 and $3,594.40, I agree with Aviva that the applicant has not provided specific analysis explaining why recurring OCF-18s recommending the same treatment modalities at an increasing cost are reasonable and necessary expenses where it is well-documented that the applicant's pain was not necessarily improving or was only improving temporarily from the previous treatment. The Tribunal would have benefitted from more analysis to explain why the specific goals of these plans and the cost of same were reasonable and necessary expenses.

[24] Problematically, the applicant's submissions do not address any of the items listed in the two remaining OCF-18s individually, explain how the costs of each constitute reasonable expenses nor do they explain how these treatment plans are tailored to his ongoing complaints of pain or maintenance/recovery of his chronic pain condition. I agree with Aviva that Dr. Dhillon's chronic pain diagnosis and recommendation for a "multidisciplinary multimodal pain program" came in November 2019, well after these treatment plans were submitted. In my view, without an explanation to justify how the seemingly general passive treatments in these OCF-18s are necessary or how these plans constitute the type of "multidisciplinary multimodal pain program" recommended nearly two years later, I cannot find that they are reasonable and necessary at the cost proposed simply in order to provide temporary pain relief.

Award

[25] The applicant seeks an award of 50% under s. 10 of O. Reg. 664 due to Aviva's unreasonable withholding and delaying the payment of his benefits, for keeping him within the MIG and for relying on a single s. 44 IE report. Under s. 10, the Tribunal may award a lump sum of up to 50% of the total benefits and interest to which an insured person was entitled under the *Schedule* if it determines that an insurer unreasonably withheld or delayed the payments.

[26] I find an award is not appropriate. In order to attract a s. 10 award, the insurer's conduct must be excessive, imprudent, stubborn, unyielding or immoderate. An award is not punishment for payment which is simply delayed because of a differing view of the file. I find that is the case here; the parties had opposing views of whether the applicant's pain constituted a minor injury subject to treatment within the MIG. While I agree with the applicant that his chronic pain warrants removal from the MIG and that one of the OCF-18s is payable, I find limited evidence to suggest that Aviva's conduct was unreasonable, despite the fact I have reached a different conclusion on the applicant's entitlement.

CONCLUSION

[27] The applicant has demonstrated on a balance of probabilities that his chronic pain warrants removal from and treatment beyond the MIG. The applicant is entitled to payment for the OCF-18 in dispute totalling $1,197.00, plus applicable interest under s. 51, as it is reasonable and necessary.

[28] The applicant is not entitled to payment for the remaining OCF-18s in dispute as he has not demonstrated that they are reasonable and necessary. An award under s. 10 of O. Reg. 664 is not appropriate.

Released: November 25, 2020

Jesse A. Boyce
Vice Chair