Citation: Simpson v. TD General Insurance Company, 2022 ONLAT 20-007728/AABS

Licence Appeal Tribunal File Number: 20-007728/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:

Jason Simpson

Applicant

and

TD General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Derek Grant**

APPEARANCES:

For the Applicant: Ariane Wiseman, Counsel

For the Respondent: Anju Sharma, Counsel

HEARD: **By way of written submissions**

BACKGROUND

[1] The applicant, J.S. was involved in an automobile accident on June 11, 2018, and sought benefits from the respondent, TD, pursuant to the Statutory Accident Benefits Schedule - *Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule"*). TD denied the benefit in dispute because it determined that the treatment plan (OCF-18) was not reasonable and necessary. J.S. disagreed and applied to the Tribunal for resolution of the dispute.

ISSUES IN DISPUTE

[2] The following issues are in dispute:

a. Did J.S. submit to the insurer a complete Disability Certificate (OCF-3) within 104 weeks of the date of loss?

b. Is the medical benefit in the amount of $2,574.53 for chiropractic treatment, denied on May 31, 2019, reasonable and necessary?

c. Is J.S. entitled to interest on any overdue payment of benefits?

d. Is J.S. entitled to receive an award for unreasonably withheld or delayed payments?

[3] In his submissions, J.S. withdrew issue 2a. As such, this decision will focus on the remaining issues in dispute.

FINDING

[4] J.S. is entitled to the disputed OCF-18 as he has established that it is reasonable and necessary. Interest is payable in accordance with s. 51.

[5] J.S. is not entitled to an award.

[6] TD is not entitled to costs.

ANALYSIS

Is the OCF-18 in the amount of $2,574.53 reasonable and necessary?

[7] Sections 14 and 15 of the *Schedule* provide that an insurer is liable to pay for medical and rehabilitation benefits expenses that reasonable and necessary as a result of the accident.

[8] To be eligible to receive payment for a treatment and assessment plan under the *Schedule*, the applicant bears the onus of establishing that the treatment claimed is reasonable and necessary. In order to do so, the applicant must establish that the treatment goals are reasonable, that the goals are being met to a reasonable degree and that the overall costs of achieving the goals is reasonable.

[9] The issue in dispute is a treatment plan for chiropractic services in the amount of $2,574.53, recommended by Physiomed, with the goals of pain reduction, increase in strength, increased range of motion, with the functional goal of a return to activities of normal living and pre-accident work activities.

[10] J.S. submits the OCF-18 is reasonable and necessary based on his consistent and ongoing pain complaints to his family physician, treatment providers and specialists, and the fact that he has responded well to treatment. He submits that the goals are reasonable, and that TD has funded similar post-accident treatment.

[11] In response, TD submits that the OCF-18 is not payable because J.S. suffered uncomplicated injuries and has reached maximum therapeutic benefit from facility-based treatment.

[12] On review of the evidence, I find the OCF-18 is reasonable and necessary. The medical documentation shows positive responses to massage, physiotherapy and chiropractic treatment. The records of Physiomed between July 20, 2018 and April 23, 2019 note various improvements from the over-all left-sided pain J.S. experienced. The records of family physician, Dr. Wong, notably between July 19, 2018 to August 26, 2019, note visits where J.S presents with various accident-related pain complaints. Dr. Wong's records note physiotherapy treatments being received and a referral to 'ortho'. In addition, Dr. Wong prescribed ongoing physiotherapy on May 6, 2021. An April 22, 2019 progress note from rheumatologist, Dr. Hochman notes ongoing left sided pain as a result of the accident. I prefer J.S.' medical documentation over that of s. 44 assessor, occupational medicine physician, Dr. Sandhu, who opined that J.S. reached maximum medical recovery from myofascial strains. Dr. Sandhu went on to note that given the exacerbation of J.S.' trigeminal neuralgia, this pre-existing condition would fall beyond the scope of the Minor Injury Guideline. Despite this opinion, I find that Dr. Sandhu's opinion is not in line with the majority of the medical documentation and J.S.'s self-reporting, which I found to be consistent.

[13] TD's position is that the evidence contained in the disputed OCF-18 supports that the OCF-18 is not reasonable and necessary. Specifically, the notation by the author, chiropractor, Dr. Hildebrand, who noted that no improvement had been

observed after the second treatment plan. In addition, that J.S. is "despondent and frequently cancels his appointments. His physical condition has deteriorated over the last two months." TD submits that this is in line with Dr. Sandhu's report that further facility-based treatment is not reasonable and necessary.

[14] I disagree with TD's position. First, the medical record of Physiomed, discussed earlier, notes improvements as a result of treatment. In addition to the medical documentation, J.S.' self-reporting notes efforts to "keep up with some of the stretches" (August 13, 2018 Physiomed records entry). Second, while I am aware of that J.S. has occasionally reported that he has not done his home exercises, there are still notable improvements reported. I find this to be indicative of the benefits of both facility-based and home-based treatment/exercise. Lastly, I am persuaded by J.S.' consistent reporting of pain from 2018 to 2019, his regular attendance for treatment, and the reasonable goals of the OCF-18, particularly, pain reduction. Accordingly, I find that J.S. is entitled to payment for the OCF-18 when it is incurred, as it is reasonable and necessary. Interest is payable in accordance with s. 51 of the *Schedule*, on the payment of any overdue benefits.

AWARD

[15] J.S. sought an award under s. 10 of O. Reg 664, submitted that TD failed to continually adjust the file, despite additional medical records being provided. J.S. further submits that TD relied on Dr. Sandhu's report, which did not review any medical documents outside of the OCF-18, that TD failed to obtain an addendum report, where the medicals and family physician records supported the need for continued treatment.

[16] Pursuant to s. 10, the Tribunal may award up to 50 percent of the total of disputed benefits, if it determines that the insurer unreasonably withheld or delayed payment. In determining the type of conduct for which an award is appropriate, the adopted standard is set out in the FSCO case *Plowright v. Wellington Insurance Co.*[1] According to *Plowright*, the conduct must be found to be an "immoderate, imprudent, inflexible, and excessive" approach with respect to the insurer's decision-making. The award was less than 10% of the total benefits.

[17] Keeping with the standard set out in *Plowright*, an award should not be ordered simply because an adjudicator determined that an insurer made an incorrect determination. The insurer's conduct must rise to the level described in

1 1993 OIC File No.: A-003985 (FSCO) ["*Plowright*"].

Plowright, that is, excessive, imprudent, stubborn, inflexible, unyielding or immoderate. I find that TD has not demonstrated that type of conduct.

[18] While J.S. notes that TD approved an OCF-18 after the April 12, 2021 case conference, as another ground of conduct deserving of an award, I m not persuaded that the balance of these claims satisfy the test in *Plowright*.

[19] TD submits that J.S. has only consumed $3,105.00 in treatment, despite $3,513.02 being approved. Further, that there is no explanation for large gaps in treatment or why J.S. has seemingly voluntarily withdrawn from treatment.

[20] On reply, J.S. submits that only two OCF-18s have been submitted, with only one being approved following the case conference. His position is that this is not the "lackadaisical approach" alleged by TD, as he has nearly incurred all of the approved treatment.

[21] While I agree that J.S. has taken reasonable measures to address his accident-related injuries, I do not find TD's conduct to warrant an award. The timing of an approval of a benefit, is not clearly indicative of imprudent, stubborn, inflexible, unyielding or immoderate conduct. More is required than a "late" approval of a benefit. Further, despite the approval, J.S. has not fully consumed the approved amount. Similar to asking for "seconds" when the first serving is not yet finished, J.S. is asking for additional treatment when he has not yet finished his first "serving" of approved treatment. I find this difficult to recognize as TD unreasonably withholding or delaying payment.

[22] Accordingly, I find that an award is not appropriate.

COSTS

[23] TD seeks costs on the basis that it alleges that J.S. "deliberately misled the Tribunal" by submitting a backdated Disability Certificate (OCF-3) to support his claim for benefits. TD claims that the OCF-3 was backdated to July 16, 2018. TD seeks costs on the ground that J.S. acted vexatiously and in bad faith in this proceeding.

[24] Under Rule 19, a party may request costs if it believes another party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith. A cost award under Rule 19 is a discretionary remedy that is made in exceptional circumstances. A cost award is meant to deter and penalize behaviour that goes against the spirit of the dispute resolution process. To receive an award under Rule 19, there must be sufficient evidence that the other

party has conducted themselves in a way that is unreasonable, frivolous, vexatious or in bad faith.

[25] It appears that Economical, was initially involved in the dispute, and maintained that the OCF-3 was not received until the Tribunal application was received in 2020. It is not clear in submissions the extent of Economical's role, however, at some point, TD took carriage of the file. TD argues that the evidence shows that J.S. intentionally backdated the OCF-3 and submitted it under false pretenses. It points to the following in support of its position:

a. OCF-3 lists the date of loss as June 11, 2018, not June 20, 2018;

b. The OCF-3 lists the insurance representative as Laura Leobach, who did not have carriage of the file until October 31, 2018, three months after the date of the OCF-3;

c. J.S. asserts that the OCF-1 was completed at the same time as the OCF-3, however, the OCF-1 indicated a different legal representative at a different firm. The update was not provided until November 2018. The updated contact (Ashley Batista) did not work at J.S.' counsel's office until January 2019, and appeared on correspondence in August 2019;

d. The OCF-3 references four surgeries for trigeminal neuralgia, with the most recent being September 4, 2018, which is after the date of the OCF-3;

e. The OCF-3 does not have a fax confirmation;

f. There is no mention of the OCF-3 in the Physiomed file, there is no request for an OCF-3 or an invoice for an OCF-3; and

g. The issue of the OCF-3 was not withdrawn until the eve of the hearing. Further, the OCF-3 was not included in J.S.' submissions as evidence. It was previously included with the Tribunal application and Case Conference Summary.

[26] In response, J.S. submits that there was no deliberate intention to mislead the Tribunal. He directs me to the following evidence:

a. The fax confirmation of the OCF-3 could not be located. As it was his burden to prove the OCF-3 had been sent, J.S. withdrew the issue of whether the completed OCF-3 was submitted within 104 weeks of the date of loss; and

b. It was reasonable to initiate an application based on non-earner benefits and an OCF-3 based on the information provided to J.S. at the time the Tribunal application was submitted. Further, it was reasonable to withdraw the issue of the OCF-3 after confirming there was no fax confirmation.

[27] J.S. submits that TD had not previously raised the issue of the backdated OCF-3 prior to its submissions. He argues that TD had ample time to raise the issue prior to the submissions due date, and that such action is equivalent to trial by ambush. J.S. submits that it contacted Physiomed following receipt of TD's submissions to address the issues raised by it regarding the OCF-3. Physiomed responded and advised as follows:

a. Ashley Batista's name was likely added following the completion of the OCF-3;

b. The name of the adjuster was likely added following the form being signed. The colour copy of the OCF-3 shows the name of the adjuster was removed and a different colour ink was used to show the amendment;

c. It was suspected that Dr. Hildebrand believed the date of loss was June 11 at the time of the assessment and then subsequently believe the accident occurred on June 20. This is also reflected in the colour copy of the OCF-3, which shows the date of loss removed and a different colour ink used for the amendment; and

d. There were three reported surgeries in total, with one upcoming scheduled for September 2018. This is consistent with the May 8, 2019 clinical notes and records of Dr. Tymianski (the physician performing the trigeminal neuralgia surgeries).

[28] J.S. submits that there is no prejudice to TD as the issue of the OCF-3 was withdrawn prior to the parties' submission deadlines. J.S. relies on *16-002705 v TD General Insurance* 2017 CanLII 43992 (ON LAT), in support of his position. In *16-002705*, the adjudicator determined that the Tribunal "no longer has any role to play in the proceedings following the withdrawal of a matter. This applies to motions brought by both the applicant and the respondent with respect to costs." While I am not bound by the decision of my fellow adjudicators, I am persuaded by the finding in *16-002705*.

[29] I find that J.S. withdrew the issue of the OCF-3 in a reasonable time. TD did not point me to any evidence that it had prepared its arguments on the issue and

was prejudiced by doing so, in advance of the issue of the OCF-3 being withdrawn. I find that J.S.' withdrawal of the issue, while not the matter in its entirety, does not meet the threshold for costs. Accordingly, as the issue was appropriately withdrawn, and sufficient reasons for same provided, I find that costs are not appropriate.

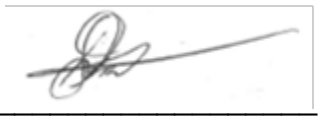
ORDER

[30] J.S. has established on a balance of probabilities that the OCF-18 is reasonable and necessary. Interest is payable in accordance with s. 51.

[31] J.S. is not entitled to an award.

[32] TD is not entitled to costs.

Released: November 1, 2022



Derek Grant
Adjudicator