Citation: Capildeo Bissoon v. The Co-operators General Insurance Company, 2023 ON LAT 21-000652/AABS

Licence Appeal Tribunal File Number: 21-000652/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:

Capildeo Bissoon

Applicant

and

The Co-operators General Insurance Company

Respondent

DECISION

VICE-CHAIR: **Brett Todd**

APPEARANCES:

For the Applicant: Ariane Wiseman, Counsel

For the Respondent: Patrick M. Baker, Counsel

HEARD: **By Way of Written Submissions**

OVERVIEW

[1] Capildeo Bissoon (the "applicant") was involved in a motor vehicle accident on September 3, 2020 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The Co-operators General Insurance Company (the "respondent") denied certain benefits. The applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] The applicant submits that he sustained injuries to his head, neck, and shoulders as a result of the accident, most notably a left shoulder tear that has required physical therapy. He seeks entitlement to four treatment plans, interest on any overdue amounts incurred, and an award for the insurer's unreasonable withholding of benefits.

[3] The respondent counters that the applicant has not provided sufficient medical evidence to demonstrate that the treatment plans are reasonable and necessary. As the respondent holds that no benefits are due, it denies that any interest is applicable, and that it is liable to pay an award.

ISSUES IN DISPUTE

[4] The following issues are in dispute:

1. Is the applicant entitled to $1,465.43 for medical devices, recommended by Princeton Hill Medical Assessment in a treatment plan/OCF-18 dated April 21, 2021?

2. Is the applicant entitled to $2,460.00 for a physiatry assessment, recommended by Excel Medical in a treatment plan/OCF-18 dated November 3, 2021?

3. Is the applicant entitled to $1,417.70 for massage and chiropractic treatment, recommended by Mackenzie Medical Rehabilitation Centre in a treatment plan/OCF-18 dated November 18, 2021?

4. Is the applicant entitled to $2,635.40 for massage and chiropractic treatment, recommended by Mackenzie Medical Rehabilitation Centre in a treatment plan/OCF-18 dated January 20, 2022?

5. Is the respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?

6. Is the applicant entitled to interest on any overdue payment of benefits pursuant to s. 51 of the *Schedule*?

[5] The non-earner and attendant care benefit issues listed as issues #2 and #6 in the Case Conference Report and Order dated July 2, 2021 that set this matter down for a hearing have been resolved or withdrawn by the applicant. Issues #2, #3, and #4 above were added on consent in a motion order of the Tribunal dated March 14, 2022. One disputed treatment plan listed as 5. (d.) in that order was also resolved before this hearing.

RESULT

[6] I find that:

i. The applicant is entitled to $1,465.43 for medical devices, recommended by Princeton Hill Medical Assessment in a treatment plan/OCF-18 dated April 21, 2021.

ii. The applicant is entitled to $2,460.00 for a physiatry assessment, recommended by Excel Medical in a treatment plan/OCF-18 dated November 3, 2021.

iii. The applicant is entitled to $1,417.70 for massage and chiropractic treatment, recommended by Mackenzie Medical Rehabilitation Centre in a treatment plan/OCF-18 dated November 18, 2021.

iv. The applicant is entitled to $2,635.40 for massage and chiropractic treatment, recommended by Mackenzie Medical Rehabilitation Centre in a treatment plan/OCF-18 dated January 20, 2022.

v. The applicant is entitled to interest on all overdue and incurred amounts of the above plans.

vi. The respondent is not liable to pay an award.

ANALYSIS

The Treatment Plans

[7] To be entitled to a treatment plan under s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. The applicant

should identify treatment goals, how these goals would be met to a reasonable degree, and that the overall costs of achieving them are reasonable.

[8] In this dispute, the applicant relies on:

a. clinical notes and records ("CNRs") from the Brampton Civic Hospital emergency department on September 3, 2020;

b. CNRs of Dr. Lucia Nicoara, family physician, from 2020 to 2022;

c. CNRs of Dr. Mehdi Sadoughi, orthopaedic surgeon, from 2021 and 2022;

d. a chronic pain report completed by Dr. Yen-Fu (Tom) Chen, physiatrist, issued as the result of assessments on November 15-16, 2021;

e. MRI test results dated January 11, 2021, January 13, 2021, and February 7, 2022; and,

f. the OCF-18s in dispute.

[9] In response, Co-operators relies on two insurer's examination ("IE") reports:

a. a physiatry report completed by Dr. Raymond Zabieliauskas, physiatrist, dated June 8, 2021 (an in-person assessment took place on May 13, 2021); and,

b. an occupational therapy report completed by Anna Maria Vogiatzis, occupational therapist, dated June 8, 2021 (an in-home assessment was conducted on May 17, 2021).

Is the applicant entitled to $1,465.43 for medical devices in an OCF-18 dated April 21, 2021?

[10] I find that the applicant is entitled to this treatment plan, as the respondent acted in contravention of s. 38(8) of the *Schedule*. I further find that the applicant has demonstrated that this treatment plan is reasonable and necessary.

[11] In dispute is a treatment plan completed by Amaresh Parikshya, occupational therapist, and dated April 21, 2021. It recommends the purchase and installation of a number of assistive devices for the applicant's bathroom such as grab bars, a long-handled bath sponge, non-slip mats, a shower chair, and a raised toilet seat with armrest, along with a cervical pillow, low back supporter, electrical heat pack, hot/cold gel packs, a long-handled shoehorn, ASD sock aid, bed rail, long-handled reacher, and a four-point cane.

[12] In addition to submitting that this treatment plan is reasonable and necessary, the applicant further holds that the respondent did not act in accordance with s. 38(8) of the *Schedule* when it denied this benefit. Section 38(8) reads as follows:

> (8) Within 10 business days after it receives the treatment and assessment plan, the insurer shall give the insured person a notice that identifies the goods, services, assessments and examinations described in the treatment and assessment plan that the insurer agrees to pay for, any the insurer does not agree to pay for and the medical reasons and all of the other reasons why the insurer considers any goods, services, assessments and examinations, or the proposed costs of them, not to be reasonable and necessary.

[13] Specifically, the applicant claims that the respondent did not inform him of the medical reasons for its denial in a letter dated May 19, 2021. This, the applicant submits, triggers s. 38(11)2 of the *Schedule*, which states that failure to provide notice in accordance with s. 38(8) means that an "insurer shall pay for all goods, services, assessments and examinations described in the treatment plan that relate to the period starting on the 11tth business day after the day the insurer received the applicant and ending on the day the insurer gives a notice described in subsection (8)."

[14] Further, the applicant submits that $1,353.44 of this treatment plan was incurred on May 26, 2021 and invoiced on May 27, 2021. The respondent did not provide proper denial notice until June 25, 2021, when it sent correspondence to the applicant with the results of an s. 44 IE that gave full medical reasons for the denial of this claim. So, the applicant argues that the respondent should be liable to pay $1,353.44 due to its non-compliance with s. 38(8), which triggers the shall-pay provisions of s. 38(11).

[15] The respondent denied this treatment plan in its May 19, 2021 correspondence on the basis that it required the applicant to undergo an examination under s. 44 of the *Schedule*. This letter noted that the insurer found that the applicant's proposed attendant care needs appeared to be "excessive" and would require a "second opinion." This second opinion would also address this treatment plan and another one not in dispute here, as the insurer did "not agree that the OCF-18s correctly reflect the need for these devices." No further explanation is provided aside from a statement that Co-operators required "further clarification to determine the extent, nature and cause of your ongoing need for these devices, given the effects of therapy you have received to date and the healing time that has elapsed." As noted above, the applicant acknowledges that the

respondent eventually did provide sufficient denial notice, but not until June 25, 2021, when it explained the results of the IE in correspondence.

[16] The respondent does not address the s. 38(8) argument in its submissions, focusing on its position that the applicant has not proven this treatment plan to be reasonable and necessary.

[17] I agree with the applicant that the respondent did not provide sufficient notice to meet the requirement of s. 38(8). The applicant cites two prior Tribunal decisions in support of its argument: *T.F. v. Peel Mutual Insurance Company* 2018 CanLII 39373 (ON LAT) and *Pirzada v. Aviva Insurance* 2022 CanLII 35810 (ON LAT). While I am not bound by other decisions of this Tribunal, I am persuaded in this instance, most notably by Executive Chair Lamoureux's opinion in *T.F. v. Peel*. She held that a medical reason was required to satisfy s. 38(8), and that simply stating evidence about medical documentation was not a proper medical rationale but an "unsupported conclusion." In my view, this situation is very similar, although in some ways the reasons provided by the insurer here are more problematic, as Co-operators referred to the possible results of *pending* medical documentation.

[18] That is precisely what Co-operators offered here in place of a medical reason—an unsupported conclusion about the assistive devices that moreover was wholly dependent on speculation at time of the denial. Co-operators offered no medical reasons in its letter to the applicant. The insurer actually provided no reasons at all, other than somewhat enigmatic comments about therapy already received and the "healing time" that has elapsed. These vague sentences, to me at any rate, are not enough to satisfy the insurer's notice obligations under s. 38(8).

[19] Additionally, I find that the applicant has demonstrated that this treatment plan is reasonable and necessary. The medical evidence adduced is thorough and consistent from the time of the accident through early 2022. He was taken from the scene of the accident on September 3, 2020 to the emergency department at Brampton Civic Hospital, where he reported pain rated at 8-9/10 in his head, neck, mid- and low-back, and both shoulders. A CT scan performed at the hospital following the accident revealed a small intercranial hemorrhage.

[20] The applicant sought treatment from his family physician, Dr. Nicoara, beginning on September 21, 2020. He consistently made the same complaints throughout his visits to the doctor, which continued on a regular basis into 2022. An MRI ordered by Dr. Nicoara and conducted on January 11, 2021 revealed a left shoulder rotator cuff tear, while a second MRI conducted on January 13, 2021 showed mid- and lower-back degenerative changes. An additional left shoulder

MRI on February 7, 2022 essentially mirrored the results of the left shoulder MRI of a year earlier, showing once again the presence of a tear, although at this point it was “near complete.” Dr. Nicoara recommended that the applicant wear a neck brace, and she prescribed medications that included Tylenol with codeine, Baclofen, and Celebrex. She further recommended physiotherapy and a referral to an orthopaedic specialist.

[21] This orthopaedic specialist, Dr. Sadoughi, began seeing the applicant on February 19, 2021. He confirmed the “full-thickness tear of supraspinatus measuring 1 x 1 cm” as seen in the MRI, along with “perching of the long head of biceps over the lesser tuberosity which can be an indication of high-grade partial tear of superior fibers of subscapularis.” Dr. Sadoughi recommended physical therapy for at least two or three months and then a re-assessment to determine if this treatment had been successful or if surgical repair was warranted. The applicant further saw Dr. Sadoughi in appointments on May 20, 2021, August 19, 2021, and November 10, 2021. The physician recommended that the applicant continue physiotherapy at each of these three appointments, and noted in the latter two that the applicant had responded well to such treatment and that his left shoulder pain had been improving. Dr. Sadoughi also formally prescribed physiotherapy.

[22] Lastly, the applicant also submitted a physiatry report completed by Dr. Chen as the result of assessments completed on November 15-16, 2021. Although the applicant is no longer raising chronic pain as an issue, as the respondent removed the applicant from the Minor Injury Guideline early on in the course of this proceeding, Dr. Chen diagnosed the applicant with this condition largely due to his significant neck, left shoulder, and back pain. He also found that the applicant was permanently physically impaired due to this pain along with a loss of range of motion in his spine and limbs and a loss of physical endurance, reducing his tolerances for sitting and standing activities and his ability to perform self-care tasks such as bathing/showering, personal grooming, and using the toilet—all of which would be specifically aided by the assistive devices in this treatment plan. Dr. Chen recommended “intermittent rehabilitation therapies” to address pain management along with an “active stretching regimen.” I take this to mean physical therapy due to the context, although he did not specify exactly what he was referring to here.

[23] All of the above forms a strong and steady accounting of the applicant’s physical difficulties and challenges that establishes a convincing foundation for this treatment plan’s recommendation of assistive devices for the applicant’s home. Lengthy medical records from numerous physicians, diagnostic results in the

form of MRIs, and an assessment of physical impairments prove the reasonable and necessary nature of these assistive devices, at least in my estimation.

[24] I prefer this evidence to that proffered by the respondent in the occupational therapy report of Ms. Vogiatzis. While Ms. Vogiatzis was the only occupational therapist to assess the applicant, I view her conclusions that the applicant was fully functional as an outlier due to the contrary opinions of the physicians described above. Ms. Vogiatzis also noted that the applicant demonstrated some decreased range of motion and that he complained of difficulties with self-care tasks. Despite this, she found that he demonstrated "sufficient" mobility, range of motion, and strength to resume all personal care tasks independently, and recommended that the assistive devices be denied. This finding came with an insufficient explanation, in my view. Ms. Vogiatzis acknowledged some physical limitations like balance problems (which would again support assistive devices here, such as the four-point cane, as one example), but she focused mainly on attendant care needs, which are not in dispute here. Her assessment of two treatment plans for assistive devices, including the one before me, are mentioned at the end of Ms. Vogiatzis' report and even then only in connection with her opinion that the applicant did not require attendant care services.

[25] Even more problematic, Ms. Vogiatzis did not review any medical information aside from the IE report of Dr. Zabieliauskas. As a result, she did not have a full understanding of the applicant's injuries, symptoms, and diagnoses. I assign Dr. Chen's report more weight as a result, because the physiatrist reviewed all of the pertinent medical records, including the CNRs of Dr. Nicoara and Dr. Sadoughi, the MRI results, and records from Mackenzie Rehabilitation Centre, where the applicant received physical therapy treatment.

[26] For the above reasons, I find that the applicant is entitled to the full amount of $1,465.43 for this treatment plan for assistive devices. The applicant is also entitled to interest on any overdue and incurred amount.

Is the applicant entitled to $2,460.00 for a physiatry assessment in an OCF-18 dated November 3, 2021?

[27] I find that the applicant is entitled to this treatment plan, as he has met his burden and proven this physiatry assessment to be reasonable and necessary.

[28] This treatment plan, completed by Dr. Chen, recommended a physiatry assessment to address the applicant's sprain and strain of the cervical, lumbar, and thoracic spine, along with headache. Its goals were to identify and prevent chronicity so that the applicant could reduce pain, increase strength, and

increase his range of motion. It included a fee for the assessment itself along with a documentation charge for the completion of the OCF-18.

[29] The applicant submits that he was experiencing continuing pain as a result of the accident and that the medical evidence of Dr. Nicoara, Dr. Sadoughi, and Dr. Chen demonstrate that it was reasonable for him to undergo a physiatry assessment.

[30] The respondent based its denial on the IE of Dr. Zabieliauskas, who concluded that the applicant was fully capable of resuming all aspects of his life that he was engaged in before the accident without any physical restrictions or functional limitations. In submissions, the respondent is taking an additional position, submitting that this assessment could have been available through OHIP. As such, the respondent argues that this assessment is not payable in accordance with s. 47(2) of the *Schedule*, which states that: “Payment of a medical, rehabilitation or attendant care benefit...is not required for that portion of an expense for which payment is reasonably available to the insured person under any insurance plan or law or under any other plan or law.” The respondent also argues that an adverse inference should be drawn from the fact that Dr. Nicoara referred the applicant to an orthopaedic surgeon, but not a physiatrist, and that billing for the physiatry assessment referred to a tort claim.

[31] I agree with the applicant. As explained thoroughly above, the applicant has presented a significant amount of medical evidence showing that he sustained left shoulder, neck, and back injuries in the accident, and that he was treated by multiple physicians for pain. His complaints were also supported by MRI testing. I accept this evidence and I accept that it meets the applicant’s burden to show that this assessment plan is reasonable and necessary.

[32] The arguments of the respondent are not persuasive. I am not convinced that a physiatry assessment would have been reasonably available through OHIP, due to wait times that exist within the public system as well as the added pressure that was placed on this system at the time in question in 2020 and 2021, when the province was dealing with the Covid-19 pandemic. I cannot presume to know why Dr. Nicoara did not refer the applicant to a physiatrist. At any rate, the applicant has demonstrated adequately to me through his medical evidence that the physiatry assessment was reasonable, regardless of who initiated it. And I do not find the mention of a tort action to be relevant. Again, the applicant has met his burden outside of the assessment, so the tort argument is immaterial.

[33] In accordance with the reasons above, I find that the applicant is entitled to the physiatry treatment plan, along with interest on any incurred amount.

Is the applicant entitled to $1,417.70 and $2,635.40 for massage and chiropractic treatment in OCF-18s dated November 18, 2021 and January 20, 2022?

[34] I find that the applicant is entitled to both of these treatment plans, as he has demonstrated that they are reasonable and necessary.

[35] The treatment plans in dispute were completed by Dr. Bita Soltan-Mohammadi, chiropractor, and Simon Spinks, massage therapist. Both were to address the same injuries, namely injury of muscles and tendon of the rotator cuff of the shoulder, injury of muscle and tendon of the long head of the biceps, concussion, abnormal findings on diagnostic imaging of the skull and head, headache, dizziness and giddiness, sprain and strain of the lumbar and thoracic spine, sprain and strain of the sacroiliac joint, injury of muscle and tendon at neck level, and other headache syndromes. Goals for both plans were listed as pain reduction, increased strength, and increased range of motion. The plan dated November 18, 2021 was for six sessions each of exercise, manipulation, massage therapy, and physical therapy, along with an assessment and personal protective gear. The plan dated January 20, 2022 was nearly identical, with the only difference being its recommendation of 12 sessions each of exercise, manipulation, massage therapy, and physical therapy instead of six sessions.

[36] The applicant submits that these plans have been proven reasonable and necessary due to the medical evidence on file from Dr. Nicoara, Dr. Sadoughi, and Dr. Chen, along with the medical diagnostic testing showing the rotator cuff tear in the applicant's left shoulder. The respondent replies that the plans propose physiotherapy, but have been completed by a chiropractor and a massage therapist with no apparent training in physiotherapy. Co-operators also asserts that the physiotherapy recommended by the applicant's physicians did not refer to the modalities of treatment in the treatment plans. It also denied these plans initially based on the IE report of Dr. Zabieliauskas, who found that the left shoulder tear was not related to the accident.

[37] I agree with the applicant. As noted above, the medical record shows that Dr. Nicoara, Dr. Sadoughi, and Dr. Chen all recommended physiotherapy to treat the applicant. Further, evidence was provided in the CNRs of Dr. Sadoughi showing that such physiotherapy was making a positive difference to the applicant's pain and left shoulder symptoms throughout 2021. While the respondent argues that these recommendations were for physiotherapy and not the exercise, chiropractic manipulation, massage therapy, and physical therapy listed on the treatment plans, I find this interpretation to be too narrow. It is clear to me from reading the CNRs that the physicians were using "physiotherapy" as a catch-all term referring to standard forms of physical therapy, including what was in these

treatment plans. In my opinion, this does not limit what the doctors are recommending to physiotherapy provided by a registered physiotherapist.

[38] Both Dr. Sadoughi and Dr. Chen also leave their recommendations open as to what physical therapy they are prescribing. Dr. Sadoughi mentioned and prescribed physiotherapy, but he wrote in positive terms of the current physical therapy that the applicant was undertaking. According to the submitted records of Mackenzie Rehabilitation Centre, the physical treatment praised by Dr. Sadoughi was essentially identical to what was recommended in these plans. It is hard to believe that Dr. Sadoughi would praise this treatment and the results, not to mention offer a prescription for more of the same, if he actually meant to prescribe physiotherapy from a registered physiotherapist. Dr. Chen used the term “intermittent rehabilitation therapies,” which I have to infer from the context to mean physical therapy. But he did not specify physiotherapy, particularly not in the limited sense that is suggested by the respondent. At any rate, I do not accept the respondent’s argument that these plans contain entirely different modalities of treatment than those that were recommended by the applicant’s treating physicians.

[39] Further, I do not accept the opinion of Dr. Zabieliauskas that the applicant’s left shoulder rotator cuff tear had to have happened long after the subject accident. All of the medical evidence before me indicates that the applicant reported left shoulder pain from the day of the accident through all of his appointments with his three primary treating and examining physicians. The tear was also shown in MRI imaging. To me, this evidence must be given greater weight than the supposition of Dr. Zabieliauskas, who wrote in his IE report that the rotator cuff had to have taken place after the accident because otherwise “the pain would have been excruciating and investigations would have taken place immediately.” Given what is before me, investigations into the applicant’s injuries did take place immediately, or as immediately as possible given health care system waiting times for MRI testing. Also, the injury seems to have progressed from a partial tear to a complete tear over the year between the two MRI tests, so it is presumptuous to assume that the tear took place “at the time of the motor vehicle accident,” as Dr. Zabieliauskas wrote in his report.

[40] I also do not concur with Dr. Zabieliauskas’ conclusion that the applicant sustained nothing but “uncomplicated soft tissue strain injuries” in the accident. This just does not align with a preponderance of the documented medical evidence, as has been already noted.

[41] Due to the above reasons, I find that the applicant is entitled to both treatment plans, plus interest on any overdue and incurred amounts.

AWARD

[42] I find that the respondent is not liable to pay an award.

[43] The applicant seeks an award under s. 10 of O. Reg. 664, submitting that Co-operators unreasonably withheld and delayed payment of the benefits in dispute due to its failure to accurately assess all medical information. He specifically notes that Co-operators relied too heavily on the opinion of Dr. Zabieliauskas with regard to the timing of the left shoulder tear, ignored the medical evidence of Dr. Sadoughi and Dr. Chen, and did not comply with s. 38(8) of the *Schedule*. He requests an award of 50 per cent of all amounts owing, the maximum award allowable.

[44] Co-operators responds that it adjusted this claim in accordance with medical evidence and that what the applicant's categorizes as the insurer not acting in good faith is actually the result of a difference of opinion. The insurer holds that it did not act in an arbitrary or heavy-handed manner, and should not be liable to pay an award.

[45] I agree with the respondent. To warrant an award, an insurer's behaviour must be excessive, imprudent, stubborn, inflexible, unyielding, or immoderate. Even though I have ruled in favour of the applicant and found the treatment plans to be reasonable and necessary, and that the insurer acted in contravention of s. 38(8) of the *Schedule*, an award requires evidence of insurer conduct that goes beyond simply "getting it wrong."

[46] Such conduct is not in evidence here, at least in my estimation. Co-operators denied benefits in accordance with the medical opinion of Dr. Zabieliauskas, which it held as a reasonable counter to the CNRs of Dr. Sadoughi and Dr. Chen. While this placed the insurer in opposition to the applicant and the evidence of his treating medical practitioners, this was due to a difference of opinion, not excessive, stubborn, inflexible, or unyielding behaviour that would warrant an award. The same can be said about the respondent's contravention of s. 38(8) of the *Schedule*. This was an error, not imprudent or immoderate behaviour requiring an award.

[47] Correspondingly, I do not find that the respondent is liable to pay an award.

ORDER

[48] I find that:

i. The applicant is entitled to $1,465.43 for medical devices, recommended by Princeton Hill Medical Assessment in a treatment plan/OCF-18 dated April 21, 2021.

ii. The applicant is entitled to $2,460.00 for a physiatry assessment, recommended by Excel Medical in a treatment plan/OCF-18 dated November 3, 2021.

iii. The applicant is entitled to $1,417.70 for massage and chiropractic treatment, recommended by Mackenzie Medical Rehabilitation Centre in a treatment plan/OCF-18 dated November 18, 2021.

iv. The applicant is entitled to $2,635.40 for massage and chiropractic treatment, recommended by Mackenzie Medical Rehabilitation Centre in a treatment plan/OCF-18 dated January 20, 2022.

v. The applicant is entitled to interest on all overdue and incurred amounts of the above plans.

vi. The respondent is not liable to pay an award.

Released: May 16, 2023

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Brett Todd
Vice-Chair