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: AJ vs. Aviva General Insurance, 2020 ONLAT 19-010794/AABS

Released Date: 09/24/2020
File Number: 19-010794/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:

A. J.

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR: **Derek Grant**

APPEARANCES:

For the Applicant: Arthur Semko, Paralegal

For the Respondent: Sjawal Bhutta, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] The applicant ("A.J.") was injured[1] in an automobile accident ("the accident") on August 24, 2016 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* ("***Schedule"***), some of which were denied by the respondent ("Aviva").

[2] A.J. submits that, as a result of injuries he sustained in the accident, the treatment he seeks is reasonable and necessary.

[3] Aviva argues that A.J. has not established that the treatment plans are reasonable and necessary.

ISSUES TO BE DECIDED

Motion to Strike the Reply Submissions

[4] Before proceeding to decide the issues in dispute, Aviva submits I should strike portions of A.J.'s reply submission dated May 13, 2020. Aviva provides several grounds, including A.J. improperly introduced new evidence and argument. For the reasons that follow, I partially grant Aviva's request for portions of the reply submissions to be struck from the evidentiary record for the reasons below.

Did the reply improperly contain new evidence and/or argument?

[5] First, Aviva submits that A.J.'s reply submissions improperly "stated and restated his position on the OCF-18s, including re-referring to various treatment providers' opinions. In addition, that A.J. proffered new evidence and documents and referenced additional evidence. Aviva submits the new evidence that had not been part of A.J.'s main submissions, namely, at paragraph two, A.J. questions the expertise of the insurer examination assessor and advances argument that the report should be given little weight. At paragraph three, A.J. provides reasons for the lack of medical evidence and why documents were not provided by the exchange deadline. At paragraphs five, six and eight, Aviva contends that A.J. attempts to reformulate arguments regarding chronic pain, A.J.'s functionality and lack of treatment sought to date. Lastly, at paragraph nine, Aviva's position is that A.J. submits completely new information and argument.

[6] A.J. submits that the motion should be dismissed with costs. A.J. submits that he did not proffer new evidence "for the truth of the matter asserted, but purely for impeachment purposes attacking Dr. Naiman's credibility". Regarding

1 OCF-3 dated August 31, 2016 of Dr. Khandwalla, Chiropractor, indicates diagnosis of: injury of radial nerve at upper arm level, other sprain and strain of cervical spine, sprain and strain of thoracic spine, sprain and strain of lumbar spine, sprain and strain of sacroiliac joint, sprain and strain of shoulder joint, rotator cuff capsule, sprain and strain of shoulder joint, contusion of knee, injury of muscle and tendon at lower leg level, post-traumatic stress disorder, other sleep disorders and malaise and fatigue.

Aviva's claim on paragraph five of the reply submissions, A.J. submits that he was refuting Aviva's submission of Dr. Nathanson's expertise in chronic pain, by emphasizing that chronic pain was not an issue in dispute in this proceeding. In response to the claim regarding paragraph nine, A.J. submits that "admissibility of the evidence goes against the weight because the item of evidence is logically relevant".

[7] After carefully reviewing A.J.'s initial and reply submissions, I partially agree with Aviva that A.J. used the reply to introduce new information and arguments that should have been addressed in his initial submissions.

[8] In paragraph two of his reply submissions, A.J. responds to Aviva's position regarding the report of Dr. Naiman. Dr. Naiman opined that A.J. can be treated within the minor injury guideline ("MIG"). The evidence shows that the report is a 3-year-old report at the time of the proceeding and A.J. was taken out of the MIG. A.J. submits that this evidence "refutes Dr. Naiman's opinion and questions her expertise". I agree that this evidence refutes Dr. Naiman's opinion, however, there is no evidence in his initial submissions that A.J. puts forth regarding Dr. Naiman's expertise. The reply submissions are not the opportunity to do so.

[9] Regarding paragraph three of the reply submissions, A.J. indicates that he was not able to meet the documents exchange deadline and to provide updated records as a result of the COVID-19 pandemic. In considering this argument, I note that all parties participating in a Tribunal proceeding are expected to adhere to the Tribunal Rules governing the timeliness and efficiency of these proceedings.

[10] As a result of the late filing by A.J. of the updated records, Aviva was prejudiced by restricted timelines and denied the opportunity to respond with any necessary rebuttal of its own.

[11] Parties in a proceeding have a duty to ensure the Tribunal's Orders are adhered to. Should there be a delay, or a foreseeable reason for a delay, the parties have a duty to ensure the timeliness and efficiency of the proceeding is maintained, by notifying the other party of a foreseeable delay. Providing this notice helps to ensure a fair proceeding takes place.

[12] The purpose of the reply is for the party bearing the onus in the dispute to respond to any issues that were raised in the other party's submissions which could not have been reasonably raised in initial submissions. The reply is not an opportunity for the party to raise issues that should have been raised in initial submissions or to reformulate their argument.

[13] I will allow the argument raised in paragraph five, chronic pain is not an issue in dispute, despite the inference made by A.J. Although the submissions in

paragraph five was intended to infer that he has ongoing pain, there is no evidence that he has been diagnosed with chronic pain.

[14] I will strike the argument made in paragraph six, wherein A.J. states, "the applicant did not submit the treatment plans at issue seeking to achieve a recovery, as it is illogical to seek something which is not attainable….As there is no remedy that could help the applicant to recover from the injuries sustained in the accident what has left to the applicant is to live the remainder of his life with pain and try to manage it". There is no evidence that A.J. has tried every remedy that could help him recover from the injuries sustained. There are several broad allegation statements in paragraph six, that I find are not supported by any evidence. I will also allow the submissions made in paragraph eight, as I find there is no new argument or evidence raised in the paragraph.

[15] I agree with Aviva's position regarding the reply submissions made in paragraph nine. I find paragraph nine to contain new evidence and argument that is improperly raised in the reply submissions.

[16] I agree with Adjudicator Punyarthi in *L.B.*[2] The right of reply is a limited one. As a general rule, parties are expected to make the entirety of their cases in their main submissions. New evidence as part of a reply typically is not permitted, because the respondent does not have the opportunity to respond to new evidence that is tendered as part of a reply. To the extent that A.J. has filed new argument and evidence with his reply, that new argument and evidence is improper and should be struck.

Reply submissions struck

[17] I find that the combination of the reply being used to make new arguments and put forth new evidence is grounds to strike the aforementioned portions of the reply submissions.

[18] In addition, I find that there is no basis for a cost award to A.J. as a result of Aviva's motion. I find there was no evidence of unreasonable, vexatious or frivoulous behaviour on the part of Aviva to warrant costs. Further, as parts of A.J.'s reply submissions are struck, there was merit to Aviva's motion.

Substantive Issues

[19] Is the medical benefit in the amount of $2,630.10 for physiotherapy services, recommended by Inline Rehab in a treatment plan ("OCF-18") submitted on June 3, 2019, and denied on June 19, 2019, reasonable and necessary?

[20] Is the medical benefit in the amount of $678.88 ($2,366.41, less $1,6898.53 approved) for chiropractic treatment, recommended by Inline Rehab in an OCF-18 on April 12, 2018, and denied on April 27, 2018, reasonable and necessary?

2 *18-001471 v Economical Insurance Company*, 2019 CanLII 22187 (ON LAT)

[21] Is A.J. entitled to interest on any overdue payment of benefits?

FINDING

[22] Based on a review of the evidence, I find the following:

a. A.J. is entitled to the OCF-18 for physiotherapy, including interest; and

b. A.J. is not entitled to the OCF-18 for the balance of the chiropractic treatment, therefore no interest is payable.

LAW

[23] Sections 14 and 15 of the *Schedule* provide that an insurer is only liable to pay for reasonable and necessary medical expenses incurred as a result of an accident. The applicant bears the onus of proving on a balance of probabilities that any proposed treatment or assessment plan is reasonable and necessary.[3]

ANALYSIS

Issue 17 – OCF-18 for physiotherapy

[24] For the reasons that follow, I find that A.J. has met his onus on a balance of probabilities that the OCF-18 is reasonable and necessary.

[25] A.J.'s claims that the treatment he seeks is reasonable and necessary; I find the medical evidence supports his claims.

[26] A.J. was assessed by Dr. Nathanson, Chiropractor, on March 30, 2020. In his report[4], Dr. Nathanson diagnosed A.J. with "chronic pain with limitations observed in the cervical spine, lumbar spine, left sided thoracolumbar spasm and shifting to the left shoulder 2" elevation corresponding to expressed areas of pain".

[27] Dr. Nathanson opined that A.J. is experiencing prolonged pain that has gone beyond the typical time period of recovery for soft tissue injuries. Dr. Nathanson noted that A.J. has "pain that has been present now 3 years 7 months post-accident time". As a result of the injuries, Dr. Nathanson recommended that A.J. be provided with a 1-year facility-based rehabilitation program, with aquafit or stretch classes. A.J. also reported a 70% improvement in his symptoms since receiving treatment.

3 *Scarlett v. Belair Insurance*, 2015 ONSC 3635 (CanLII).
4 Independent Assessment of Function/Impairment Report dated March 31, 2020.

[28] Allstate relied on the report[5] of its assessor, Physiatrist Dr. Yuri Marchuk, in support of its position that the physiotherapy OCF-18 is not reasonable and necessary.

[29] A.J. reported to Dr. Marchuk that he continued to experience back, mid-back, left elbow pain and headaches. Dr. Marchuk noted that these pain complaints neither improved nor worsened since the subject accident.

[30] Upon examination, Dr. Marchuk made the following observations:

a. Examination of the cervical spine revealed active range of motion to be reduced by 5% of normal, in all directions, secondary to pain, with tenderness to palpation identified over the cervical musculatures;

b. Examination of the lumbar spine revealed active range of motion to be within full limits, in all directions, with tenderness to palpation identified over the lumbar musculatures;

c. Examination of the thoracic spine revealed tenderness to palpation identified over the paravertebral musculatures;

d. Examination of the bilateral shoulders revealed active range of motion to be within full limits, in all directions, with discomfort noted at the end range of all movements, along with tenderness to palpation identified over the bilateral shoulder blade musculatures;

e. Examination of the left elbow revealed active range of motion to be within full limits, in all directions, with tenderness to palpation identified along the lateral epicondyle musculatures; and

f. Examination of the right elbow revealed active range of motion to be within full limits, in all directions. Normal exam.[6]

[31] Based on the accident history, self-reporting and assessment, Dr. Marchuk diagnosed A.J. with: Whiplash Associated Disorder (WAD2), cervicothoracic bilateral shoulder myofascial dysfunction (superimposed over slight degenerative change and possible bicipital tenosynovitis – as per imaging), lumbar musculoligamentous dysfunction and left elbow myofascial dysfunction.

[32] Dr. Marchuk opined that A.J. may benefit from cortisone injections to the left elbow as well as continued use of a lumbar support brace and elastic elbow support brace.

[33] I find there to be significant similarities in the reports of Drs. Nathanson and Marchuk in that both Drs. noted that A.J. still suffered from physical limitations[7]

5 Insurer Examination Physiatry Assessment Report dated August 12, 2019.
6 Dr. Marchuk report pg. 14 – Respondent Document Brief

as a result of accident-related injuries. However, neither report supports the need for further physiotherapy treatment. Dr. Nathanson does not specifically recommend physiotherapy, and Dr. Marchuk only recommends exercise and injections. As such, I look to A.J.'s self-reporting to consider whether the physiotherapy OCF-18 is reasonable and necessary.

[34] Both reports found A.J. to be reliable and did not raise any questions regarding symptom magnification. A.J. reported substantial improvement in his symptoms as a result of treatment, specifically physiotherapy. As such, I consider A.J.'s self-reporting to be persuasive. There is evidence that physiotherapy treatment has provided A.J. with pain relief, which is a reasonable goal of treatment. I find the medical evidence and A.J.'s self-reporting support indications that physiotherapy treatment would be reasonable and necessary.

[35] Consequently, I am satisfied that A.J. has met his onus that the physiotherapy OCF-18 is reasonable and necessary.

Issue 18 – OCF-18 for chiropractic treatment

[36] For the reasons to follow, I find that the balance of the chiropractic treatment plan is not reasonable and necessary.

[37] A.J. submits that under Part 12 of the OCF-18 that item #9 proposes "exercise, multiple body sites". The service being provided by Chiropractor, Dr. Khandwalla. A.J.'s position is that he has been regularly participating in stretching and strengthening exercises as a part of the recommended and previously approved treatment plan. As such, that similar exercise would be used by the same treatment provided to achieve the goals of the disputed OCF-18.

[38] The denial of the remaining amount was for item #9 of the OCF-18. As per its Explanation of Benefits, Aviva requested details of the specific services to be rendered by Dr. Khandwalla. Aviva submits that to date, neither A.J. or the clinic have provided details in relation to the type of exercises that require the skill of a chiropractor to be performed at a clinic. Aviva's position is that treadmill/bike exercise does not require to be supervised by a chiropractor and 8 sessions of 45 minutes duration are excessive and not reasonable and necessary.

[39] There is no evidence that A.J. was not capable of participating in any recommended home exercise routines without supervision. I agree with Aviva, A.J. has not proven on a balance of probabilities that the remaining amount of the OCF-18 is reasonable and necessary.

CONCLUSION

7 A.J. reported the following limitations to Dr. Marchuk: Sweeping, vacuuming, bed making, cleaning the bathrooms, dusting, washing the floors, cleaning the oven, cleaning the refrigerator, garbage removal, washing/drying, ironing, sewing, grass cutting, gardening and snow shoveling.

[40] For the reasons stated above, I find that A.J. is entitled to the OCF-18 for physiotherapy, including interest, pursuant to s. 51 of the Schedule; and

[41] A.J. is not entitled to the balance of the OCF-18 for chiropractic treatment, therefore interest is not payable.

Released: September 24, 2020

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Derek Grant
Adjudicator