



Citation: Liaw v. Aviva Insurance Company, 2022 ONLAT 20-009210/AABS

Licence Appeal Tribunal File Number: 20-009210/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:

Matthew Liaw

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: Laura Goulet

APPEARANCES:

For the Applicant: Arthur Semko, Paralegal

For the Respondent: April Snow, Counsel

HEARD: By way of written submissions

REASONS FOR DECISION

BACKGROUND

- [1] The applicant, Matthew Liaw, was involved in an automobile accident on October 1, 2017, and sought benefits pursuant to the Statutory Accident Benefits Schedule *Effective September 1, 2010 (including amendments effective June 1, 2016)* (“Schedule”)¹ from Aviva Insurance Company, the respondent.
- [2] The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).
- [3] After a psychological assessment by the respondent’s assessor in July of 2018, the applicant was removed from the Minor Injury Guideline.

ISSUES

- [4] The following issues are to be decided:
- (i) Is the applicant entitled to a medical benefit in the amount of \$3,948.91 for physiotherapy services recommended in a treatment plan (“OCF-18”) dated March 19, 2018 provided by Inline Rehabilitation Centre?
 - (ii) Is the applicant entitled to a medical benefit in the amount of \$2316.68 (\$3416.68 less \$1,100 approved) for psychological services recommended in an OCF-18 dated July 25, 2018 provided by Inline Rehabilitation Centre?
 - (iii) Is the applicant entitled to a medical benefit in the amount of \$3,191.25 for physiotherapy services recommended in an OCF-18 dated October 22, 2018 provided by Inline Rehabilitation Centre?
 - (iv) Is the respondent liable to pay an award under *Regulation 664* because it unreasonably withheld or delayed payments to the applicant?
 - (v) Is the applicant entitled to interest on any overdue payment of benefits?

¹ *Statutory Accident Benefits Schedule – Effective September 1, 2010, O. Reg. 34/10.*

RESULT

- [5] For the reasons outlined below, I find that the applicant has met his onus to demonstrate that the treatment plans for physiotherapy services dated March 19, 2018 and October 22, 2018 are reasonable and necessary pursuant to the *Schedule*. As such, he is entitled to receive these medical benefits.
- [6] For the reasons outlined below, I find that the applicant has not met his onus to establish entitlement to the unapproved balance of the treatment plan for psychological services dated July 25, 2018. As such, he is not entitled to receive these medical benefits.
- [7] The respondent is not liable to pay an award pursuant to *Regulation 664*.
- [8] The applicant is entitled to interest in accordance with the *Schedule* related to the treatment plans for physiotherapy services dated March 19, 2018 and October 22, 2018.

ANALYSIS

- [9] Sections 14 and 15 of the *Schedule* provide that the insurer shall pay medical benefits to, or on behalf of, an applicant as long as the applicant sustains an impairment as a result of an accident and the medical benefit is a reasonable and necessary expense incurred by the applicant as a result of the accident.

Are the OCF-18s for physiotherapy services reasonable and necessary?

- [10] The applicant bears the onus of proving entitlement to the proposed treatment by demonstrating the benefits are reasonable and necessary on a balance of probabilities.² To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs to achieve them are reasonable.
- [11] In both OCF-18s, the applicant's injuries are noted as chronic post traumatic headache, sprain and strain of cervical, thoracic and lumbar spine, sprain and strain of shoulder joint, other sleep disorders and post-traumatic stress disorder.
- [12] The OCF-18 dated March 19, 2018 recommended various sessions of physical rehabilitation and massage therapy over a period of seven weeks. It listed pain reduction, increase in strength, increase in range of motion ("ROM") as well as a return to activities of normal living as its stated goals. It listed the improvement at

² *Scarlett v. Belair Insurance*, 2015 ONSC 3635 (CanLII) at paras. 20-24.

the end of the previous plan as “VAS improvement.” There is no evidence before me to elaborate on the meaning of the acronym “VAS,” nor is there any indication with respect to the level of improvement that was achieved.

- [13] The OCF-18 dated October 22, 2018 recommended various sessions of physical rehabilitation and massage therapy over a period of six weeks. It listed pain reduction, increase in strength, increase in ROM as well as a return to activities of normal living and return to pre-accident work activities as its stated goals. With respect to the improvement at the end of the previous plan, there is an indication of “N/A.”
- [14] The applicant argues that the goals of pain reduction, increased ROM, increase in strength, and to return to normal activities are vastly reasonable. The applicant submits that he continues to experience functional limitations as a result of his back and neck pain, such as a decline in sports activity and difficulty with prolonged posture. In the absence of treatment, the applicant suffers from sudden pain flare-ups and pain radiation.
- [15] The applicant submits that it is reasonable to infer that he has returned to his pre-accident employment duties and was able to perform most of his normal daily activities and self-care tasks as a direct consequence of frequent physiotherapy sessions combined with pain-relief medications.
- [16] The respondent argues that the applicant made subjective complaints to family physicians since the accident, however, his physical examinations have been unremarkable. The respondent relies on the lack of objective evidence to support physical injury as well as the fact that the applicant remains independent with his self care tasks, continues to attend the gym twice per week and participate in sports, although with some difficulty. In addition, the applicant missed only 3-4 days of work due to the accident. The respondent argues that there is no evidence that the applicant’s pain has improved with treatment as his complaints have been intermittent. Further, there is no evidence that more treatment would provide any benefit.
- [17] The applicant met with Dr. Nagy Awad, his family physician, two days after the accident, with complaints of dull aching pain in the neck and back. The applicant was assessed and diagnosed with a strain injury and referred to physiotherapy. He returned on October 31, 2017 with similar complaints and was also prescribed Naproxen, a pain medication. Another visit occurred on December 14, 2017, where he referenced the oncoming cold weather as a trigger for back pain. On another visit on January 23, 2018, the applicant complained of

increased back pain on flexion. Dr. Awad prescribed medication and recommended physiotherapy.

- [18] The treatment plans in question are dated March 19, 2018 and October 22, 2018. As such, I will focus my analysis on the medical records from this time period to determine whether the treatment plans were reasonable and necessary at that time.
- [19] The applicant attended his family doctor with complaints of back pain on February 13, 2018, March 27, 2018 and December 15, 2018.
- [20] On February 13, 2018, records indicate the applicant complained of recurrent back pain which was the same as before, worse with cold weather. Dr. AWARD renewed the applicant's prescriptions. On March 27, 2018, records note recurrent low back pain, getting worse lately but not radiating to legs, and reduced ROM in flexion. Dr. Awad recommended physiotherapy, renewed the applicant's prescriptions and made a referral for a spine x-ray, with an indication of "chronic low back pain."
- [21] Dr. Awad provided a letter dated November 16, 2019 where he indicated that the applicant was diagnosed with whiplash, chronic back pain, anxiety and depression since the accident. The letter indicated that the "prognosis is unchanged" and the doctor recommended physiotherapy, massage and chiropractor therapy. Dr. Awad also advised that the applicant cannot play sports, he has reduced physical activity and does not drive at night.
- [22] Although the applicant did not continuously report the same level of pain at every doctor's visit, it is significant to note that prior to the accident, it is undisputed that the applicant did not have any back pain. Since the accident, the applicant has made repeated complaints to his family doctor of back pain at some level.
- [23] The applicant submits that since the commencement of treatment, he has been achieving pain reduction, and using pain medication during flare-ups.
- [24] An Insurer's Examination was conducted by Dr. Hashmat Khan, a General Practitioner, on February 21, 2019 with respect to the OCF-18 dated October 22, 2018. The applicant reported that he missed 3 to 4 days of work after the accident, and then returned to his normal duties. He reported starting to feel tightness along the lower back and neck 1-2 weeks after the accident. With time, he also felt soreness in his left shoulder when lifting weights. The applicant began facility-based rehabilitation treatment within a few weeks to a month of the accident. Treatment included transcutaneous electrical nerve stimulation, heat,

massage, and stretching exercises. He was also instructed to perform home ROM and stretching exercises, which he submits that he continues to perform.

- [25] The applicant reported a constant tightness in the low back and advised his symptoms may be relieved after therapy / massage for 1 to 2 days. He rated the intensity of the pain at 8-9/10 on average. He reported intermittent stiffness in the neck on average every 6 days. He advised the stiffness is alleviated with physical therapy and stretching and he rated the intensity of the pain at 7-8/10. The applicant also reported intermittent pain of the left shoulder which only occurs when he does moderate to heavy lifting with the left arm. He rated the intensity of the pain as 9/10.
- [26] Dr. Khan conducted physical examination of the applicant and concluded that it was overall unremarkable in that the applicant demonstrated a normal musculoskeletal and neurological examination. Dr. Khan diagnosed the applicant with whiplash, left shoulder sprain/strain and lumbar spine sprain/strain.
- [27] In Dr. Khan's opinion the applicant has reached maximum medical improvement. The doctor found no compelling objective indication for ongoing formal facility-based rehabilitation treatment as proposed in the OCF-18 dated October 22, 2018. Dr. Khan concluded that the treatment was not reasonable and necessary as related to the impairments sustained in the motor vehicle accident.
- [28] I prefer the recommendation of Dr. Awad over Dr. Khan. Dr. Awad's recommendations for physiotherapy are contemporaneous with the treatment plans. The applicant's family doctor recommended physiotherapy on March 27, 2018, shortly after the first treatment plan was submitted. At this time, the applicant's ROM was reduced. Dr. Khan, the insurer's assessor, examined the applicant approximately eleven months after the first treatment plan and four months after the second one. Further, Dr. Khan only provided an opinion with respect to the treatment plan dated October 22, 2018.
- [29] Although the applicant's back exams are reported to be "normal," he repeatedly complained of back pain. The fact that the applicant had no pre-accident back pain is compelling. I find that the applicant's family doctor, who had a regular professional relationship with the applicant pre and post-accident, is in the best position to make recommendations regarding the applicant's care.
- [30] The applicant attended appointments with his family doctor on many occasions after the accident. His family doctor recommended physiotherapy to treat his back pain. I find that the applicant's family doctor's opinion holds a considerable

amount of weight. Further, the applicant reports that physiotherapy, in combination with pain relief medications, provides him with pain relief.

- [31] On a consideration of the evidence as a whole, I find that the applicant met his onus to demonstrate on a balance of probabilities that he sustained an impairment as a result of the accident that occurred on October 1, 2017 and that the treatment plans for physiotherapy services dated March 19, 2018 and October 22, 2018 are a reasonable and necessary expense incurred by the applicant as a result of the accident.

Is the applicant entitled to payment in the amount of \$2316.68 (\$3416.68 less \$1,100 approved) for psychological services?

- [32] The OCF-18 dated July 25, 2018 recommended twelve weeks of psychotherapy by Anna Prudovski, psychologist.
- [33] The applicant submitted that the treatment was provided by Sabrina Simmons, a psychometrist who was in the process of fulfilling the requirements to become a member of the College of Psychologists of Ontario, under the supervision of Anna Prudovski, a registered psychologist.
- [34] The respondent only made partial payment as they submitted they paid the appropriate rate for treatment provided by a psychometrist. The respondent paid for the treatment at a rate of \$75 per hour (higher than the usual hourly rate of \$58.19). The applicant argued that the respondent should have paid for the treatment at the rate of \$149.61, the rate for a psychologist.
- [35] In addition, the applicant advised that the respondent deemed the following services not reasonable and necessary: client supervision services, any goods and services related to planning and preparation (which they included in the \$200 fee for OCF-18 completion) and a progress report fee. The applicant did not make any submissions with respect to why these would be reasonable and necessary.
- [36] The respondent submitted that it requested information from the applicant with respect to who was actually providing the treatment to the applicant. The respondent advised that this information was not provided by the applicant. No documents were filed in this regard, with the exception of correspondence from the College of Psychologists of Ontario indicating that in order to be issued with a certificate authorizing supervised practice as a psychological associate, 6000 hours were required under the supervision of a regulated member of the profession of psychology. The respondent submitted that the applicant provided

no details regarding the supervision services conducted by Dr. Prudovski, including confirming the manner in which supervision was provided.

- [37] The respondent argued that simply stating that Ms. Simmons is required to be supervised without details of active supervision is not sufficient to warrant paying a psychologist rate.
- [38] The applicant submitted new evidence in his reply. The reply is not an opportunity for the applicant to submit new evidence that they could have submitted before and that they chose not to rely on. As such, I have not considered this evidence in making my decision.
- [39] I agree with the respondent's position.
- [40] I follow the reasoning set out in *S.M.Z. v. Aviva Insurance Company*, a decision referred to by the respondent.³ In that case, the treatment plan was prepared by a psychologist but the treatment was provided by a psychotherapist under the supervision of the psychologist. There was no evidence of "active supervision." The tribunal found that there was no legislative authority to support that even if a psychotherapist was supervised, they were entitled to the hourly rate of a psychologist.
- [41] Similarly, in this case, the treatment plan was prepared by a psychologist but the treatment was provided by a psychometrist under the supervision of the psychologist. In addition, there is no evidence of the level of supervision that was provided by Ms. Prudovski. In the event that there was evidence of active supervision in this case, the applicant has not provided me with any authority to warrant paying a psychometrist at the hourly rate of a psychologist.
- [42] Taking all of the above into consideration, I find that the applicant has not established entitlement to the unapproved balance of the treatment plan dated July 25, 2018 for psychological services.

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

- [43] Section 10 of *Regulation 664* provides that, if the Tribunal finds that an insurer has unreasonably withheld or delayed payment of benefits, the Tribunal may award a lump sum of up to 50 per cent of the amount in which the person was entitled together with interest on all amounts then owing to the insured (including

³ 2020 CanLII 27401 (ONLAT)

unpaid interest) at a rate of 2 per cent per month, compounded monthly from the time the benefits first became payable under the *Schedule*.

- [44] It is well settled that an award should not be ordered simply because an insurer made an incorrect decision. Rather, in order to attract an award under *Regulation 664*, the insurer's conduct must be excessive, imprudent, stubborn, inflexible, unyielding or immoderate.
- [45] The applicant did not make any submissions with respect to why an award under *Regulation 664* would be warranted. Further, the applicant only requested an award with respect to the psychological counseling.
- [46] There is no evidence before me that supports a finding that the respondent's actions rose to the level of excessive, imprudent, stubborn, inflexible, unyielding or immoderate. In addition, having found that there are no benefits payable with respect to the psychological services, I find that there is no basis for considering an award under *Regulation 664*.

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

- [47] The applicant is entitled to interest in accordance with s. 51 of the *Schedule* related to the treatment plans for physiotherapy services dated March 19, 2018 and October 22, 2018.

CONCLUSION

- [48] For the reasons outlined above, I find that:
- a. The applicant is entitled to a medical benefit in relation to the treatment plans for physiotherapy services dated March 19, 2018 and October 22, 2018;
 - b. The applicant is not entitled to a medical benefit in relation to the unapproved balance of the treatment plan for psychological services dated July 25, 2018;

- c. The applicant is not entitled to an award under *Regulation 664*; and
- d. The applicant is entitled to interest in accordance with the *Schedule* related to the treatment plans for physiotherapy services dated March 19, 2018 and October 22, 2018.

Released: September 12, 2022



Laura Goulet
Adjudicator