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Licence Appeal Tribunal

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Ontario

Date: 2017-03-28
Tribunal File Number: 16-001809/AABS
Case Name: 16-001809 v CUMIS General Insurance

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:

P. K.

Applicant

and

CUMIS General Insurance

Respondent

DECISION

ADJUDICATOR: **Chris Sewrattan**

APPEARANCES:

Counsel for the Applicant: **Colleen Burn**

Counsel for the Respondent: **Patrick Baker**

HEARD: Written Hearing: January 10, 2017

Overview:

[1] The applicant was injured in a motor vehicle accident on December 31, 2010. She applied for accident benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*"). CUMIS Insurance Company (CUMIS) denied payment for a number of benefits. The applicant appeals for payment to the Licence Appeal Tribunal – Automobile Accident Benefits Service.

Issues:

[2] There are nine issues in this proceeding:

1. Is the applicant entitled to $12,075.40 for out of pocket treatments with Body Poets, sent by letter dated March 19, 2014?
2. Is the applicant entitled to receive a medical benefit in the amount of $1,520.00 for a Treatment and Assessment Plan for chiropractic treatment dated January 22, 2016, submitted by Perth Family Health Centre?
3. Is the applicant entitled to $1,294.00 for out of pocket treatments with Family Physiotherapy Treatment, sent by letter dated March 19, 2014?
4. Is the applicant entitled to $2,2221.75 for out of pocket treatments with Ottawa Chriopractic, sent by letter dated March 19 2014?
5. Is the applicant entitled to a medical benefit in the amount of $14,366.59 for prescription medication, sent by letter dated March 19, 2014?
6. Is the applicant entitled to $3,271.85 for out of pocket treatments with Anne M. Flammond, sent by letter dated March 19, 2014?
7. Is the applicant entitled to receive medical benefits in the amount of $2,122.04 for a Treatment and Assessment Plan dated June 16, 2016 submitted by Perth Physiotherapy?
8. Is the applicant entitled to $826.00 for out of pocket treatments with Anne M. Flammond, sent by letter dated March 19, 2014?
9. Is the applicant entitled to interest on any overdue payments?

Result:

[3] The applicant's failure to submit a Treatment and Assessment Plan (OCF-18) disentitles her to payment for issues 1, 3, 4, 6, and 8. Issue 4 may be subject to the two-year limitation period in any event.

[4] By contrast, the operation of s. 32(2)(c)(i) entitles the applicant to $14,266.59 for prescription medication (issue 5) even though advanced notice of each expense was not provided to CUMIS.

[5] The applicant is not entitled to payment for physiotherapy (issue 7) because it is not a reasonable and necessary expense.

[6] The applicant is entitled to payment for chiropractic treatment (issue 2).
[7] Interest is payable on the expenses claimed under issues 5 and 2 in accordance with s. 51 of the *Schedule*.

Facts:

[8] The applicant is a 68-year old woman. The motor vehicle accident occurred on December 31, 2010. The applicant retained counsel to represent her for automobile accident benefit claims in 2012. On March 12, 2012 counsel advised CUMIS that it was representing the applicant.

[9] The applicant was initially treated within the limits of the *Minor Injury Guideline*. The *Guideline* caps her payable medical and rehabilitation expenses at $3,500. It is not meant to suggest that the applicant's injuries, which have caused her much pain, are minor. On June 5, 2012, CUMIS provided the applicant with an explanation of the treatments that had been approved within the limit of the *Minor Injury Guideline*. This served, in part, to notify the applicant and her counsel that her treatment was now capped by the *Guideline's* limits. The applicant was advised that she could submit compelling medical evidence to remove her from the *Minor Injury Guideline*.

[10] Almost a year later, on April 7, 2013, the applicant sent a Treatment and Assessment Plan to CUMIS in request of further treatment. CUMIS responded by arranging for the applicant to meet with two independent medical examiners. A physical examination conducted by Dr. Simard concluded that the applicant's physical injuries were predominantly minor and could be treated for physical injuries within the *Minor Injury Guideline* and subject to a $3,500.00 limit. A psychological examination conducted by Dr. Morrison, by contrast, concluded that the applicant should be removed from the *Minor Injury Guideline*. CUMIS removed the applicant from the *Minor Injury Guideline* for psychological reasons. The applicant's treatment was now capped by a $50,000 limit rather than a $3,500.

[11] The applicant was advised of her removal from the *Minor Injury Guideline* on July 16, 2013. Between June 12, 2012 and this date, the applicant had personally paid for over $20,000 of physical treatment. CUMIS was unaware of this. Treatment and Assessment Plans were not submitted to CUMIS before the treatment and expenses were incurred. After the applicant was advised of her removal from the *Minor Injury Guideline*, she submitted her expenses for reimbursement by letter to CUMIS.

[12] On May 19, 2015, the applicant sent CUMIS a claim for reimbursement for prescription medications that she paid for out of pocket.

[13] On August 1, 2015 the applicant sent CUMIS another claim for reimbursement for $2,538.86 for prescription medication and $400 for massage therapy treatments.

[14] On February 11, 2016 the applicant sent a Treatment and Assessment Plan to CUMIS for chiropractic services. This was five years after the motor vehicle accident.

[15] CUMIS responded by arranging for an Independent Medical Examination with Dr. Mark Aubry, a Sports Medicine Physician. Dr. Aubry issued a report on April 6, 2016, in which he deemed the treatment not reasonable or necessary. CUMIS denied the Treatment and Assessment Plan.

[16] CUMIS similarly denied a Treatment and Assessment Plan for physiotherapy services, dated June 16, 2016, on July 4, 2016.

[17] All of the applicant's out of pocket expenses were formally denied by CUMIS on May 10, 2016.

Discussion:

Issues 1, 3, 4, 6, an 8: The need for a Treatment and Assessment Plan (OCF-18)

[18] Section 38(2) of the *Schedule* governs the expenses claimed under issues 1, 3, 4, 6, and 8. The expenses were incurred by the applicant before a Treatment and Assessment Plan was submitted. Section 38(2) requires the applicant to submit a Treatment and Assessment Plan to CUMIS before treatment to receive a medical or rehabilitation benefit that is payable outside of the *Minor Injury Guideline*. A Treatment and Assessment Plan is filled out on an Ontario Claims Form 18, or OCF-18 for short.

[19] CUMIS submits that the claims under issues 1, 3, 4, 6, and 8 are not payable due to s. 38(2) of the *Schedule*. There are four exceptions to the rule. None are applicable in this case, however. I note there is no 'reasonable excuse' exception to s. 38(2). This exception exists elsewhere in the regulation (see e.g. s. 32 of the *Schedule*). What I draw from this is that the law does not allow an applicant to reasonably excuse him or herself from compliance with s. 38(2). As such, I have no discretion to waive this requirement.

[20] The applicant submits that it is unreasonable to expect treatment providers to continue to submit Treatment and Assessment Plans to an insurer during the period in which the insurer fails to remove a patient from the *Minor Injury Guideline*. The applicant also submits that CUMIS has not been prejudiced by the lack of OCF-18 forms. CUMIS' letter to the applicant advising that she had

been removed from the *Minor Injury Guideline*, dated July 16, 2013, advises that the higher coverage limit "would be impacted by other expenses 'not yet submitted or processed, such as outstanding treatment expenses, prescription medication, travel expenses, etc." In the applicant's view, this shows that CUMIS anticipated that the applicant was receiving treatment and would seek payment for the expense once she was removed from the *Minor Injury Guideline*.

[21] I appreciate deeply that the applicant incurred over $20,000 of expenses out of her own pocket. However, the applicant *must* submit an OCF-18 before she incurs an expense for a medical or rehabilitation benefit. This is required by the law (s. 38 of the *Schedule*). Unless the applicant falls within one of the four exceptions of s. 38(2), I have no ability to look past this requirement, regardless of what the party's intentions may have been.

[22] The applicant's claims under issues 1, 3, 4, 6, and 8 are dismissed because she did not submit an OCF-18 before incurring the expense. To be clear, the lack of entitlement is purely due to non-compliance with s. 38(2) of the *Schedule*. No finding is made on the reasonableness and necessity of the expenses.

Issue 4: Possible limitation period issue

[23] Under issue 4, the applicant claims $2,221.75 for out of pocket treatments with Ottawa Chiropractic. The applicant submitted an OCF-18 for payment of $1,796.70 in relation to this expense. CUMIS denied payment in a letter dated July 16, 2013.

[24] The expense claimed in issue 4 is denied regardless of whether it is an out of pocket expense without an OCF-18, a claim under an OCF-18 only, or a combination of an OCF-18 ($1,796.70) and an out of pocket expense (the remainder, $425.05).

[25] The portion of the claim that involves an out of pocket expense with no OCF-18 is dismissed for non-compliance with s. 38(2) of the *Schedule*. Again, this is an automatic function of the law. I have no discretion to look past the fact that the applicant failed to submit an OCF-18 before incurring the expense for treatment.

[26] The portion of the claim that involves the OCF-18 that was denied in CUMIS' letter dated July 16, 2013 is dismissed because of the limitation period. The applicant has two years from the date of CUMIS' denial – July 16, 2013 – to submit an appeal to a mediator and arbitrator: see s. 56 of the *Schedule*. The applicant's appeal is outside of this two-year limitation period and, therefore, in this context, I cannot award payment.

Issue 5: Prescription medication

[27] The applicant claims reimbursement for $14,266.59 for prescription medication expenses. I agree that the applicant is entitled to payment for this entire amount.

[28] CUMIS submits that the applicant is disentitled to payment because she did not give proper notice. CUMIS' submission is akin to its submission for issues 1, 3, 4, 6, and 8. CUMIS points out that s. 32(1) of the *Schedule* requires an applicant to notify their insurer of their intention to seek a benefit within seven days of the circumstances giving rise to entitlement to that benefit. CUMIS further submits that the applicant only submitted claims for reimbursement on an Expense Claim Form (OCF-6) for $6,618.59 worth of expenses. Therefore, not only is the applicant arguably disentitled to reimbursement because she failed to give notice under s. 32(1), but, if she is entitled it is capped at $6,618.59.

[29] Section 32(1) of the *Schedule* relates to an insured person's duty to initially notify their insurer of their intention to seek benefits. CUMIS does not dispute that the applicant properly provided notice of her intention to seek medical and rehabilitation benefits. CUMIS takes issue with the applicant's failure to advise that she would seek payment for her prescription medication expenses. This issue is beyond the scope of s. 32. It falls within s. 38(2)(c)(i). That provision allows the applicant to seek repayment for prescription medication expenses without submitting a Treatment and Assessment Plan. There are three requirements for payment under s. 38(2)(c)(i):

1. The motor vehicle accident caused the impairment that necessitates the prescription medication;
2. The prescription medication is reasonable and necessary; and
3. A regulated health professional provides the prescription.

[30] With regard to the first requirement, causation, CUMIS submits that the applicant has not proved that the anti-depressant medication for which she claims reimbursement arose out of an impairment that was caused by the motor vehicle accident. Specifically, the submission is that it is "not an outlandish request to ask an injured person to provide a doctor's note that indicates that anti-depressants are required as a result of the accident." This is CUMIS main submission, along with the reasonableness of the medication.

[31] The applicant has proven causation. CUMIS commissioned an independent psychology examination by Dr. Morrison. On May 23, 2013 Dr. Morrison reported that the applicant presents with symptoms indicative of features of adjustment disorder and depression. CUMIS must have accepted that this diagnosis demonstrates an impairment caused by the motor vehicle accident deserving of treatment. It removed the applicant from the *Minor Injury Guideline* on this basis. I accept that the anti-depressant medication was purchased to treat the applicant's psychological impairment, which includes features of depression. Therefore, I accept that the motor vehicle accident caused a psychological impairment which necessitates anti-depressant medication. Indeed, I am satisfied

that the motor vehicle accident caused an impairment which necessitates all of the prescription medication for which the applicant seeks reimbursement.

[32] With regard to the second requirement, reasonableness and necessity, CUMIS submits that there is insufficient evidence that the prescription medication is reasonable and necessary. I disagree. The anti-depressants are reasonable necessary medications to treat the applicant's psychological impairment. The remaining medications are either to treat the applicant's physical impairment (namely migraines in this instance), or a compound to allow the applicant to take a medication to which she is allergic or physically uneasy with. In all instances, the medication is a reasonable method of effecting necessary treatment for an impairment.

[33] To explain the reasonableness of the medications, the applicant submitted notes his doctors, Hamilton, Gruder, and Armstrong. CUMIS submits that these notes are either irrelevant or, in the case of Dr. Gruder, unreliably biased. I disagree. The three notes, taken together, show me that the applicant requires his prescription medications to treat his physical impairment (namely migraines), psychological impairment (namely features of depression), and avoid an allergic reaction or sickness in the process. These are reasonable and necessary goals.

[34] With regard to the third requirement, a valid prescription, CUMIS does not dispute that the prescriptions are provided by regulated health professionals. I have looked at the prescription receipts and am satisfied that they were provided by a regulated health professional.

[35] I am satisfied that by operation of s. 38(2)(c)(i) of the *Schedule*, the applicant is entitled to $14,266.59 for reimbursement of prescription medication expenses.

Issues 2 and 7: The reasonableness and necessity of chiropractic and physiotherapy treatment

[36] The applicant claims $1,520.00 on a Treatment and Assessment Plan dated January 22, 2016 for chiropractic services from the Perth Family Health Centre,[1] and $2,122.04 on a Treatment and Assessment Plan dated June 16, 2016 for physiotherapy services from Perth Physiotherapy. CUMIS submits that these treatment plans are not reasonable and necessary. CUMIS points out that the applicant has failed to submit expert medical reports opining on his entitlement to the treatment plans, nor has he provided medical records past February 2014. In CUMIS' submission, there is a severe lack of medical information indicating that the requested treatment is reasonable and necessary.

[1] CUMIS submits that the treatment plan is dated February 11, 2016. I have reviewed the OCF-18 to confirm that it is dated January 22, 2016.

[37] Although the medical evidence dating after February 2014 is limited, after considering all of the clinical notes and records and the three reports from Independent Medical Examiners, I am convinced on a balance of probabilities that the chiropractic treatment sought by the applicant is reasonable and necessary. In particular, I reach my conclusion largely on strength of the report and conclusions of Dr. Mark Aubrey.

[38] Dr. Aubrey is a Sport Medicine Physician retained by CUMIS to conduct an independent medical evaluation of the applicant. In 2016, Dr. Aubrey reviewed the documentation relating to the applicant's physical condition since the accident and conducted a physical examination of the applicant. Dr. Aubrey reported that the applicant "continues to have intermittent episodes of neck pain with radiation into or pain in both shoulders with some radiation intermittently in both arms." Chiropractic and massage therapy had in the past helped the applicant decrease her pain. Conversely, Dr. Aubrey believed that the applicant's history of 7 to 8 months of physiotherapy produced no real improvement in her pain management. Ultimately, Dr. Aubrey concluded that the applicant has reached a stable status in which her pain intensity has not changed for the last few years. She has intermittent periods of pain.

[39] I accept Dr. Aubrey's findings relating to the applicant's physical condition and response to chiropractic and physiotherapy treatment. If Dr. Aubrey does not believe that pain reduction is a reasonable treatment goal for the applicant, I respectfully depart from the conclusions he draws from his findings. It is unclear to me what his position on this issue is. Regardless, I find that pain reduction for the applicant, who is 68-years old, is a reasonable and necessary treatment goal. Chiropractic treatment which helps to reduce the applicant's pain, even intermittent pain, is reasonable and necessary in the applicant's circumstance. Chiropractic and massage therapy had in the past helped the applicant decrease her pain. Conversely, physiotherapy has not achieved this effect and, therefore, does not appear to be a reasonable method of reducing the applicant's pain at this time.

[40] The applicant is entitled to payment for the Treatment and Assessment Plan for chiropractic treatment, dated January 22, 2016, and not entitled to the Treatment and Assessment Plan for physiotherapy treatment, dated June 16, 2016.

Issue 9: Interest

[41] Given my decision, the applicant is entitled to interest on payment for the following:

1. The Treatment and Assessment Plan for chiropractic treatment, dated January 22, 2016.
2. $14,266.59 for prescription medications.

[42] Interest must be paid in accordance with s. 51 of the *Schedule*.

Conclusion:

[43] The applicant is entitled to payment under issues 2 and 5. Interest must be paid in accordance with s. 51 of the *Schedule*.

[44] The applicant is not entitled payment under issues 1, 3, 4, 6, 7 and 8.

Released: March 28, 2017

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Chris Sewrattan,
Adjudicator