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

Ontario

2017 CanLII 59515 (ON LAT)

Date: 2017-08-17
Tribunal File Number: 16-000438/AABS
Case Name: 16-000438 v The Personal Insurance Company

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:

Y. X. Y.

Applicant

and

The Personal Insurance Company

Respondent

DECISION

ADJUDICATOR: **Deborah Neilson**

SUBMISSIONS

For the Applicant: **Philip Kai Kwong Yeung, Paralegal**

For the Respondent: **Jocelyn Tatebe, Counsel**

HEARD: Written Hearing: February 6, 2017

OVERVIEW

[1]. The applicant, Y.Y., was a pedestrian involved in an automobile accident on December 9, 2014. She claimed benefits from the respondent, The Personal Insurance Company ("The Personal"), pursuant to *the Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*") consisting of attendant care benefits, chiropractic services, and payment for a psychological assessment and an attendant care assessment.

[2]. The Personal denied the benefits claimed. It takes the position that the applicant's injuries are predominantly minor injuries as defined in s. 3 of the *Schedule* and thus subject to a maximum amount payable of $3,500.00 for the cost of examinations, medical, and rehabilitation benefits (the "cap"). Accordingly, The Personal dealt with her treatment under the Minor Injury Guideline (the "MIG"). The Personal has not advised how much of the $3,500.00 cap is still available .

[3]. The applicant disagrees with The Personal's denials and its decision to deal with her treatment under the MIG. She claims that her injuries fall outside the MIG because of the onset of chronic pain and psychological injuries. She submitted an application for dispute resolution services to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[4]. The parties attended at a case conference, but were unable to resolve the issues in dispute.

ISSUES TO BE DECIDED

[5]. I have identified the issues to be determined from the Tribunal's order dated August 16, 2016 and the parties submissions as follows:

a) Are the applicant's injuries predominantly minor injuries as defined in the Schedule, subject to a cap of $3,500.00 and to treatment within the MIG?

2017 CanLII 59515 (ON LAT)

b) Is the applicant entitled to attendant care benefits at the rate of $2,431.64 per month from December 9, 2014 to date?

c) Is the applicant entitled to receive a medical benefit in the amount of $1,785.18 for chiropractic services at Perfect Physio and Rehab Centre, denied by the respondent on January 14, 2015?

d) Is the applicant entitled to payments for the cost of examinations in the amount of $2000.00 for a psychological assessment by Perfect Choice, denied by the respondent on March 11, 2015?

e) Is the applicant entitled to payments for the cost of examinations in the amount of $1340.00 for an attendant care assessment by Perfect Choice, denied by the respondent on January 14, 2015?

f) Is the applicant entitled to interest for the overdue payment of benefits?

g) Is the applicant entitled to her costs of the appeal because the respondent's conduct or course of conduct has been unreasonable, frivolous or vexatious or the respondent has acted in bad faith?

[6]. Whether the applicant's injuries are minor injuries or whether the MIG applies were not listed in the case conference Adjudicator's Order as issues to be decided by me. Both parties, however, indicated in their submissions that I must determine whether the applicant sustained predominantly a minor injury and the applicability of the MIG. To that end, they both made submissions on the issues and provided evidence of the nature of the applicant's accident injuries.

[7]. To prove that she is entitled to the benefits claimed, the applicant must prove on a balance of probabilities that she did not sustain a predominantly minor injury and that her chronic pain and psychological impairments are not just sequelae from her minor injuries. In this case, the applicant claims that her injuries are not captured by the *Schedule*'s definition of "minor injury." Specifically, she argues that neither the onset of chronic pain nor her psychological injuries are properly considered "clinically associated sequelae" of the minor physical injuries she suffered as a result of the motor vehicle accident. Indeed, she simply asserts that her "chronic pain" takes her out of the MIG.

2017 CanLII 59515 (ON LAT)

[8]. If the applicant's injuries are predominantly minor, then, pursuant to s. 18(1) of the *Schedule* and s.3 of the MIG*,* the MIG applies and the applicant's claim for medical benefits and the cost of examinations is limited by the $3,500.00 cap. Because this means that, if I find the applicant is unable to prove on a balance of probabilities that her injuries are not predominantly minor or that the MIG does not apply, I must determine whether the chiropractic services and the assessment expenses claimed are available under the MIG. Attendant care benefits would not be available to her pursuant to s. 14(2) of the *Schedule,* nor would payment for the cost of an in-home attendant care examination or assessment pursuant to s. 25(2) of the *Schedule.*

[9]. I must also determine whether the applicant is entitled to her costs of the proceeding. The issue of costs was not listed in the case conference Adjudicator's Order. However, the applicant indicated in her submissions that she is seeking her costs of the appeal.

RESULT

[10]. I find that the applicant sustained predominantly minor injuries from the accident in accordance with the definition in the *Schedule*, and that the MIG applies to her. As a result, her claim for the following benefits is dismissed:

a) Attendant care benefits at the rate of $2,431.64 per month from December 9, 2014 to date; and
b) Cost of examination benefits in the amount of $1,340.00 for an attendant care assessment by Perfect Choice.

[11]. The claim in the amount of $1,785.18 for chiropractic services at Perfect Physio and Rehab Centre is a claim for a chiropractor's travel expenses, which is not covered under the MIG. Accordingly, this claim is dismissed.

2017 CanLII 59515 (ON LAT)

[12]. The applicant's claim for the cost of an examination in the amount of $2,000.00 for a psychological assessment by Perfect Choice is payable, subject to the limit of $215.00 in the MIG for the cost of an initial assessment.

[13]. The applicant's claim for costs is dismissed. I may be spoken to about the claim for interest.

WHETHER THE APPLICANT HAS A MINOR INJURY

[14]. A minor injury is defined in s. 3(1) of the *Schedule* to mean one or more of a sprain, strain (*i.e.*, an injury to one or more tendons or ligaments, muscles including a partial but not a complete tear), a whiplash associated disorder, contusion, abrasion, laceration or subluxation (*i.e.*, a partial but not a complete dislocation of a joint) and any clinically associated sequelae. The evidence indicates that the applicant suffered minor injuries consisting of soft tissue injuries to her right knee, leg, neck, hip and shoulder. The applicant submits that she also suffers from chronic leg pain and psychological impairments.

[15]. I have reviewed the affidavit of Dr. Yeung, the applicant's family physician, and all of the medical reports, medical records, disability certificates and treatment plans submitted by the parties, which indicate that the applicant was knocked to the road by an automobile and cut her right knee, for which she received three stiches. The evidence is consistent in disclosing that Y.Y. sustained soft tissue injuries. These soft tissue injuries, including the cut to the knee, are "minor injuries" according to the definition in s. 3 of the *Schedule.*

[16]. The following diagnostic reports were included in the medical records I have reviewed, all of which indicate that the applicant did not fracture or break any bones as a result of the accident:

2017 CanLII 59515 (ON LAT)

- x-ray of the right knee taken December 15, 2014 was normal;
- x-ray of the chest taken December 15, 2014 was normal;
- x-ray of the c-spine taken December 15, 2014 disclosed mild multilevel; osteoarthritis in the neck from c-4 to c-7;
- x-ray of the right knee taken March 9, 2016 disclosed minimal spurring at the superior pole of the right patella;
- x-ray of the right hip taken March 9, 2016 was normal; and
- ultrasound of the right hip and hamstring taken April 1, 2016 was normal.

[17]. No evidence was submitted to explain whether the spurring of the right knee disclosed in the x-ray taken March 9, 2016 or the osteoarthritis of the neck in the x-ray taken December 15, 2015 were related to the accident. Accordingly, I find that the osteoarthritis and the spurring are not accident-related.

[18]. Dr. Yeung states in his affidavit that the applicant also sustained a soft tissue injury to her neck and suffers from rib pain, low back pain, right hip pain, bilateral shoulder pain, bilateral knee pain, nightmares and difficulty sleeping.

[19]. Dr. Palantzas, Y.Y.'s chiropractor, reported that she diagnosed Y.Y. with a laceration to the knee and lower leg, muscle strain of the lower leg, dislocation, sprain and strain of the joints and ligaments of the knee, thorax, lumbar spine and pelvis, shoulder girdle and hip, sprain and strain of the ribs and sternum and injury of the muscle and tendon at neck level. She also diagnosed her with headaches, dizziness, giddiness, nonorganic sleep disorders and phobic anxiety disorders.

[20]. According to Dr. Palantzas' *curriculum vitae*, she is not qualified to diagnose psychological disorders, only disorders arising from the structures or functions of the spine and their effects on the nervous system, or from the structures or functions of the joints of the extremities. Dr. Palantzas stated that barriers to Y.Y.'s treatment were radiculopathy and nerve root impingement. She stands alone in this view and I give no weight to Dr. Palantzas opinions beyond Y.Y.'s

2017 CanLII 59515 (ON LAT)

musculoskeletal condition as supported by other evidence, given that she is willing to venture opinions on conditions for which she is not qualified.

[21]. The applicant relies on the in-home attendant care needs assessment report dated December 20, 2014 of Ms. Li Jing, nurse, who reported that Y.Y. was experiencing mobility problems. Ms. Jing described Y.Y. as having received six stiches to her knee, rather than the three stiches recorded in the emergency records and by Dr. Yeung, who removed the stiches. Ms. Jing's report contains a chart with a section where she can report her observations of Y.Y.'s attempts to perform her household and personal care tasks. Ms. Jing, for the most part, did not record any observations of Y.Y.'s actual attempts to engage in these activities, but instead provided her opinion on what she believed was Y.Y.'s ability to perform them. Ms. Jing recorded that Y.Y.'s first language is Mandarin and failed to indicate how she communicated with Y.Y. or whether she used an interpreter. On her application for appeal to the LAT, Y.Y. indicates she requires a Cantonese interpreter and, in fact, at the various insurer's examinations that The Personal scheduled for Y.Y., Cantonese interpreters were present for the assessments. For these reasons, I give little weight to the complaints reported by Y.Y. to Ms. Jing.

[22]. Dr. Hammatas, a family physician who conducted an insurer's examination of Y.Y. on behalf of The Personal on February 12, 2015 and December 8, 2016, diagnosed Y.Y. with a soft tissue injury to her neck, right knee and right shoulder from the accident.

[23]. The evidence supports that the applicant sustained soft tissue injuries, which taken alone would mean the applicant sustained a minor injury as defined in s. 3 of the *Schedule.* In this case, however, Y.Y. argues that the motor vehicle accident directly caused her chronic pain and psychological impairments, and that those impairments take her out of the MIG. To satisfy her onus that her injuries are not predominantly minor, Y.Y. must prove on a balance of probabilities that her chronic

2017 CanLII 59515 (ON LAT)

pain and psychological impairments are more than just sequelae or symptoms arising from her soft tissue injuries.

2017 CanLII 59515 (ON LAT)

a. Chronic Pain

[24]. The applicant submits that she has chronic pain and that this condition takes her out of the MIG. She relies on the Financial Services Commission of Ontario ("FSCO") arbitration decisions in *Ali and Ferozuddin and Certas Direct Insurance Company*[1] and in *Arruda and Western Assurance Company*.[2] Both decisions dealt with the diagnosis of chronic pain.

[25]. In *Ali and Ferozuddin and Certas*, Arbitrator Fadel found that the onset of the applicant's problems was temporally related to the accident. He accepted the explanation of chronic pain provided by Dr. Blitzer, a physician, whose evidence was that most soft tissue injuries heal and that only a small proportion of injuries do not heal properly and develop a chronic pain physiology. A soft-tissue injury, according to Dr. Blitzer, would have a short-to-medium duration healing in weeks or a few months. He stated that some soft-tissue injuries do not fully heal and lead to chronic pain which is a "different situation" from the actual original injury. Instead of the body's pain receptors turning off, as is expected, they are turned on more, "a physiology gone wrong." The receptors actually generate more pain in the area even though the original injury has subsided.

[26]. In *Arruda and Western Assurance*, Arbitrator Shapiro accepted that a diagnosis of chronic pain syndrome takes an insured person out of the MIG. In that case, the Arbitrator found that after 20 months the applicant's soft tissue injuries had not resolved, but had turned into something different, a chronic pain syndrome.

[1] *Ali and Ferozuddin and Certas Direct Insurance Company* (FSCO A13-002459 and A13-002460, March 23, 2016)
[2] *Arruda and Western Assurance Company,* (FSCO Al 3-003926, July 27, 2015)

[27]. I am not bound by FSCO decisions. However, I agree with the reasoning in *Ali and Ferozuddin* that, when chronic pain causes functional impairment and disability, it takes one out of the MIG. I also agree with the reasoning in *Arruda and Western Assurance Company* that it is not ongoing pain alone that takes an applicant out of the MIG, but rather chronic pain syndrome. In both cases, the applicants' pain affected their functional abilities to engage in, for example, their employment, housekeeping or caregiver activities. The point common to both decisions is that ongoing pain alone is insufficient to take one out of the MIG. Rather, that ongoing pain also must be accompanied by some functional impairment.

[28]. For chronic pain to be more than sequelae from the soft tissues injuries enumerated in s. 3 of the *Schedule,* it must be chronic pain syndrome or continuous (in that the initial minor injury never fully healed) and it must be of a severity that it causes suffering and distress accompanied by functional impairment or disability. A diagnosis of chronic pain without any discussion of the level of pain, its effect on the person's function, or whether the pain is bearable without treatment will not meet the applicant's burden to show that chronic pain is more than mere sequelae.

[29]. Unless an applicant provides evidence that the pain she experiences contains these elements, I find the pain is mere sequelae of the minor injury. With that threshold in mind, I turn to the evidence.

[30]. Dr. Yeung's affidavit evidence is that he started seeing Y.Y on March 9, 2016 for recurring pain in her right knee and leg, which he believes is chronic "because it has been nearly two years since the accident." I find that diagnosis problematic since it was made more than a year after he determined Y.Y.'s accident injuries had resolved. According to Dr. Yeung's clinical records, the applicant's injuries had resolved by March 25, 2015. His records are clear that, at that point in time, she had normal ranges of motion and no swelling. For almost a year after March 25, 2015, his records do not contain any hip, leg, back, neck, or shoulder

2017 CanLII 59515 (ON LAT)

complaints or nightmares, which supports Dr. Yeung's March 25, 2015 note that Y.Y.'s injuries had resolved. Y.Y. then saw Dr. Yeung on March 9, 2016 with complaints of intermittent right knee pain and right hip pain that, as Y.Y. indicated, had only started two weeks prior.

[31]. It is not clear whether Dr. Yeung's evidence is that the right leg pain was "recurring" because the pain complaints arose a year post-accident and continued for another two months into May 2016, or because in the two weeks prior to March 9, 2016 the pain was intermittent. Nor is it clear from his evidence whether the pain must be present at some level at all times to be diagnosed as "chronic" or whether a recurrence of pain without regard to the amount of time between occurrences is considered "chronic."

[32]. In any event, I find Dr. Yeung's diagnosis of chronic leg pain problematic as it is first recorded in Dr. Yeung's clinical notes on May 4, 2016, at which time he diagnosed the applicant with varicose veins with no knee swelling and recommended varicose vein stockings and orthotics. No other cause was provided by Dr. Yeung as to the leg complaints. While earlier notes refer to the leg pain from the motor vehicle accident, Dr. Yeung's May 4, 2016 note of leg pain does not mention the accident, and one is left to assume the pain is from the varicose veins and the need for orthotics. The applicant has not proven that the chronic leg pain diagnosed by Dr. Yeung was caused by the accident as his evidence on that issue is not clear.

[33]. The applicant relied on the clinical notes and records of Perfect Physio & Rehab Centre, which contain undated records. The handwritten records are difficult to read and, as best I can determine, the applicant attended at the clinic for treatment on December 18, 2014 and again on February 4, 2015. There is no record of any further complaints after February 4, 2015.

2017 CanLII 59515 (ON LAT)

[34]. Dr. Hammatas reported that, during his December 8, 2016 assessment of Y.Y., she actively resisted testing of her right knee and would not bend it while lying supine on the exam table. This was inconsistent with Dr. Hammatas' observation at the same assessment that Y.Y. was able to sit in a chair and bend her right knee 90° without difficulty. He had opined in March 2015 that Y.Y. may be experiencing some pain from the development of her keloid scar, but that this pain did not cause any significant functional limitations or physical restrictions. His opinion after reviewing the diagnostic reports and medical records in December 2016 was that Y.Y. sustained soft tissue injuries from the accident and had reached maximal medical recovery.

[35]. In any event, I do not accept that pain that lasts for more than six months without any discussion of the level of pain, its effect on the person's function, or whether the pain is bearable without treatment is more than mere sequelae. Without something more than the length of time the pain lasted, I do not accept that an applicant has "chronic pain syndrome" as discussed in *Arruda and Western Assurance Company* or or the type of "chronic pain" that was at issue in *Ali and Ferozuddin and Certas.*

[36]. I also find that Y.Y.'s so-called chronic pain does not have a temporal connection with the soft tissue injuries she sustained in the accident, unlike in *Ali and Ferozuddin and Certas* and in *Arruda and Western Assurance Company.* In both those cases, the applicants' soft tissue injuries did not resolve. I find that the Y.Y.'s soft tissue injuries did resolve by March 25, 2015.

[37]. The applicant has not provided any evidence to indicate the spurring on the patella or the varicose veins recorded in the x-rays are related to the accident. No explanation of why an accident injury would lie dormant for a year and then suddenly arise without provocation was provided. Y.Y. has not satisfied me, on the balance of probabilities, that her pain complaints, which arose a year after the accident, were caused by the accident. Even If the applicant's pain did not fully

2017 CanLII 59515 (ON LAT)

resolve after the accident, there is no evidence of disability, distress or impairment arising from the pain. This means that Y.Y. has not shown how Dr. Yeung's diagnosis of "chronic pain" is not merely sequelae of the soft tissue injuries or how it no longer qualifies as "predominantly minor."

2017 CanLII 59515 (ON LAT)

b. Psychological Impairment

[38]. Y.Y. submits that she sustained a psychological injury from the accident, as a result of which she does not have a minor injury. She has the onus of showing that she has a psychological impairment and not just psychological symptoms or sequelae arising from the soft tissue injuries. Support for this proposition is found in the MIG, which states that it is focused on the application of a functional restoration approach in the management of minor injuries in the acute and sub-acute phases of the injury. Functional restoration refers to an approach in which the health practitioner is oriented toward function and to the delivery of interventions that help the insured person to reduce or manage her pain and associated psycho-social symptoms. I find that this reference to "psychosocial symptoms" in the MIG is a recognition that a minor injury includes some psychosocial or psychological symptoms that are treatable within the MIG. This means that in order to prove on a balance of probabilities that her injuries are not predominantly minor injuries, the applicant must show that her psychological complaints are not merely psychological or psychosocial symptoms, but that she has a psychological impairment as a result of the accident.

[39]. Y.Y. submits that Dr. Ming Che Yeh, psychologist, found her to be suffering from mixed anxiety and depressive disorder. I have no reports from Dr. Yeh, only the OCF-18 treatment plan prepared by him dated January 19, 2015, recommending a psychological assessment. Attached to the treatment plan is a pre-assessment screening report prepared by Mandy Fang, who has her Masters of Social Work. Ms. Fang prepared the report based on her interview of Y.Y. and the subjective information provided by the applicant without clinical interview or testing. Dr. Yeh's

diagnosis appears to be based on that interview and report. Y.Y. advised Ms. Fang that she only sleeps three to four hours per evening since the accident, suffers from flashbacks of the accident and feels distressed, fatigued, anxious and nervous. I give little weight to Dr. Yeh's determination that Y.Y. suffers mixed anxiety and depressive disorder because he did not assess the applicant, but relied on Ms. Fang's interview. I give little weight to Ms. Fang's pre-assessment screening report and interview because the history provided by the applicant is not supported by the other evidence, there is no indication of what medical reports or records Ms. Fang reviewed and Ms. Fang offered no explanation of what language she used to conduct the interview.

[40]. Y.Y. reported to Ms. Fang that she lost consciousness in the accident, contrary to the Humber River Hospital emergency records, which state she did not hit her head and did not lose consciousness. Ms. Fang reported that Y.Y.'s family doctor put her on medication for her mood. However, the other medical records indicate that Y.Y. was not prescribed any medication for mood until a year and a half after the accident. Ms. Fang and Dr. Yeh recommended Y.Y. undergo a psychological assessment and a course of psychotherapy, but no treatment plan recommending psychotherapy was before me, even though Dr. Yeung advised he made a referral to a Chinese speaking psychologist in August 2016 and prescribed Ativan. As of December 8, 2016, Y.Y. still had not seen a psychologist. I was offered no explanation why and, thus, am, left to conclude that her psychological complaints were not serious.

[41]. Dr. Yeung recorded on August 4, 2016 that Y.Y. complained of increased nightmares and anxiety about her accident in December 2014. Y. Y. witnessed two more accidents that year. Dr. Yeung did not indicate whether or how the increased subjective nightmares and anxiety are related to the December 2014 accident or whether they were caused by Y.Y. witnessing two further motor vehicle accidents in 2016.

2017 CanLII 59515 (ON LAT)

[42]. The respondent submits that Dr. Yeh's diagnosis in the OCF-18 treatment plan does not meet the applicant's burden of proof in showing that she sustained a psychological impairment because Part 9 of Dr. Yeh's OCF-18 affirms that an in-depth interview and inventories are required to determine the presence and extent of any psychological impairment. I agree with the respondent. It is not clear to me how Dr. Yeh could provide a diagnosis of mixed anxiety and depressive disorder when he also claims he must conduct an in depth assessment first. I prefer the evidence of the respondent's psychological assessor, Dr. McCutcheon, because her opinion is based on her interview and testing of the applicant and was conducted with the aid of a Cantonese interpreter.

[43]. Every assessor except Ms. Fang has indicated that the applicant does not speak English. There is no indication Ms. Fang speaks Cantonese or used an interpreter for her interview, which makes me doubt the accuracy of the information the applicant reportedly told Ms. Fang, especially as it is not supported by the medical documents.

[44]. Y.Y. was assessed at the request of The Personal by Dr. McCutcheon, psychologist, with the assistance of a Cantonese interpreter on February 6, 2015 and again on October 20, 2016. Dr. McCutcheon's opinion is that Y.Y. has symptoms of mild to moderate anxiety and mild depression that are subclinical. She found no evidence to indicate the presence of a diagnosable psychological condition that takes Y.Y. out of the MIG.

[45]. In her February 27, 2015 report, Dr. McCutcheon recommended Y.Y. undergo a short course of four one hour sessions of treatment focused on education regarding pain management and behavioural activation that could be provided by her family physician. Y.Y. submits that the recommendation appears to be at odds with Dr. McCutcheon's opinion that she did not have a diagnosable psychological condition. However, Dr. McCutcheon's recommendation is in keeping with the MIG's focus of applying a functional restoration approach to manage an insured

2017 CanLII 59515 (ON LAT)

person's pain and associated psycho-social symptoms. That focus, as stated in the MIG, implies that psycho-social symptoms are expected to accompany the soft tissue injuries that constitute a minor injury. Y.Y.'s psycho-social symptoms would have to deteriorate to the point of becoming something more than subclinical symptoms for her soft tissue injuries to no longer be considered Y.Y.'s predominant injury. Y.Y.'s psycho-social symptoms would have to be more than subclinical symptoms to no longer be symptoms associated with or part of the minor injury.

[46]. Despite her complaints of nightmares, symptoms of depression and anxiety, Y.Y. returned to work by April 2015, including her pre-accident mode of travel to work consisting of walking, and to her socialising, which implies she did not suffer from any phobias related to the accident . She has not presented evidence that satisfies me on a balance of probabilities that her psychological symptoms are anything more than subclinical or that her injuries are not predominantly minor.

THE MINOR INJURY GUIDELINE

[47]. Although I have determined that the applicant sustained predominantly minor injuries, the MIG would not apply if Y.Y. suffered from a pre-existing health condition that prevented her from achieving maximal recovery from her minor injuries. However, Y.Y. does not allege she suffered from such a pre-existing condition, nor do her medical records disclose the requisite pre-existing condition. The applicant claims that she does not have predominantly minor injuries, because her psychological and chronic pain impairments take her out of the MIG.

[48]. I find that because the applicant sustained predominantly minor injuries, the MIG applies to Y.Y. pursuant to s. 3 of the MIG.

2017 CanLII 59515 (ON LAT)

ATTENDANT CARE BENEFITS

[49]. I was asked to consider evidence attached to the applicant's reply submissions in relation to whether Y.Y.'s attendant care provider, her daughter-in-law, sustained an economic loss. In order to be paid attendant care benefits, an attendant care expense must be incurred. If the care is provided by a family member who would not ordinarily provide care to people in the course of his or her employment, but for the accident, then the applicant is required to show the family member sustained an economic loss in order to provide the attendant care.

[50]. The new documentary evidence ought to have been filed with the applicant's initial submissions by September 15, 2016 in accordance with the Tribunal's August 16, 2016 Order. The issue of what economic loss may have been sustained by Y.Y.'s attendant care provider was a live issue addressed in the applicant's initial submissions on incurred expenses and was not a new issue raised by the respondent requiring new evidence. The evidence attached to the reply submissions was available to the applicant well before the filing deadline of September 15, 2016 and no explanation for the late filing or request to file that document was provided.

[51]. It is not necessary for me to consider the evidence submitted by the applicant's representative in his reply submissions, because I have found that the applicant sustained minor injuries as defined under the *Schedule.* This means that she is precluded from claiming attendant care benefits pursuant to section 14(2) of the *Schedule*, which states attendant care benefits are not available for insured persons who sustain minor injuries. Accordingly, it is not necessary for me to consider whether the attendant care expenses were incurred as alleged in the affidavit of Y.Y.'s daughter- in-law.

2017 CanLII 59515 (ON LAT)

COST OF EXAMINATIONS

a. Attendant Care Needs Assessment

[52]. The Personal submits that the attendant care needs examination conducted by Perfect Choice in the amount of $1,340.00 is an in-home assessment and not payable pursuant to s. 25(2) of the *Schedule* because Y.Y. sustained a minor injury. Neither party provided any treatment plans from Perfect Choice. The only treatment plan before me for an attendant care needs examination or assessment in the amount of $1,340.00 was prepared by Dr. Palantzas dated December 18, 2014. It states that Ms. Jing of Perfect Physio & Rehab Centre would conduct the examination. Based on the amount in the December 18, 2014 treatment plan and the type of examination recommended in it, I accept that it is the treatment plan in issue, rather than a treatment plan by Perfect Choice.

[53]. According to the correspondence from The Personal dated January 20, 2015, the $1,340.00 treatment plan dated December 18, 2014 was received by The Personal on December 30, 2014. I have an attendant care assessment report by Ms. Jing dated December 20, 2014, prepared pursuant to Ms. Jing's examination of Y.Y. on December 18, 2014, almost two weeks before the $1,340.00 treatment plan dated December 18, 2014 was received by The Personal. Ms. Jing recommended in her report that an in-home examination be conducted. It is not clear whether the treatment plan is for Ms. Jing's December 20, 2014 report.

[54]. No submissions were made by the applicant's representative with respect to the $1,340.00 treatment plan. Under the MIG, the only fee that is payable for an examination or assessment is the $215.00 fee for the initial visit and includes the fee for the completion of the Treatment Confirmation Form (OCF-23). If Ms. Jing's December 20, 2014 report was the $1,340.00 report contemplated in the treatment plan, it is payable only in accordance with the MIG and subject to the limits remaining in the MIG to a maximum of $215.00. There is, however, no indication

2017 CanLII 59515 (ON LAT)

that the $1,340.00 examination is for a first visit assessment and for the purpose of preparing a Treatment Confirmation Form (OCF-23). Instead, the purpose listed in the treatment plan is for assessing an attendant care benefit, which is not available to insured persons who sustain predominantly minor injuries. On this basis, the cost of the $1,340.00 attendant care needs examination claimed is not payable.

[55]. If Ms. Jing's report was prepared in support of the $1,340.00 treatment plan, then I would draw an inference from Ms. Jing's recommendation that the treatment plan in issue contemplates an in-home assessment or examination. Section 25 of the *Schedule* describes what payments for cost of examinations insurers are required to make. According to s. 25(2) of the *Schedule,* in-home assessments are available only if Y.Y. sustained an impairment that is not a minor injury. Since I have determined that Y.Y. sustained a minor injury, to the extent that the treatment plan contemplates an in-home assessment, it is not payable.

b. Psychological Assessment

[56]. The treatment plan recommending the psychological examination states the reason for the assessment is to compile further information to assist in case planning. The pre-screening report of Ms. Fang was attached to the treatment plan stating the purpose of the report was to explain and provide evidence to show why the applicant will require a psychological assessment and counselling. Ms. Fang recommended, in addition to an examination, that the applicant receive a series of psychotherapy sessions. The number of sessions was not detailed in the treatment plan in issue or in any other treatment plan that was before me.

[57]. Section 25(1) of the *Schedule* states that an insurer shall pay reasonable fees incurred for assessments or examinations conducted under specific circumstances. The *Schedule* does not describe any difference between the meaning of an "examination" and "assessment" and seems to use the terms interchangeably. The only circumstance listed in the *Schedule* that appears to

2017 CanLII 59515 (ON LAT)

apply to Y.Y. is set out in s. 25(3). That section requires an insurer to pay for fees charged in accordance with the MIG by a person authorized by the MIG for preparing a treatment confirmation form and for conducting an assessment or examination and preparing a report as authorized by the MIG.

[58]. An assessment is payable under the MIG to a maximum of $215.00, but only if it is for a first visit and for the purpose of preparing a Treatment Confirmation Form (OCF-23), which is different from a treatment plan, as each document triggers different obligations with an insurer. It is not clear whether the assessment with Dr. Yeh was for a first visit because Ms. Fang had already conducted a pre-screening assessment of the applicant under the supervision of Dr. Yeh. For these reasons, and because I have found that Y.Y. sustained a minor injury and the MIG applies, Dr. Yeh's treatment plan is payable only in accordance with the MIG and subject to what remains of the $3,500.00 minor injury limit for medical benefits and payment for cost of examinations to a maximum of $215.00.

MEDICAL BENEFITS

[59]. The applicant is claiming $1,785.00 for chiropractic services. The Personal submitted that the $1,785.18 in issue for chiropractic services at Perfect Physio and Rehab Centre, denied on January 14, 2015, is actually for travel expenses. The applicant's materials included a treatment plan prepared by Dr. Palantzas dated December 18, 2014 for $4,918.98, of which $1,785.18 is for travel time and mileage of an unidentified treatment provider and the remainder is for chiropractic services. No other treatment plans recommending chiropractic treatment were submitted in the parties' materials that deal with the specific amount of $1,785.18. The applicant did not comment on or deny the respondent's submission that the $1,785.18 in issue is for travel expenses, even though she had the opportunity to do so. Nor is there any explanation for why the applicant has not disputed the denial for the remainder of the December 18, 2014 treatment plan, except that an invoice attached to the application for appeal to the LAT set out expenses

2017 CanLII 59515 (ON LAT)

consisting of two hours of travel time and mileage of Dr. Palantzas on December 18, 2014 and the mileage and the travel expenses of an unidentified person from Perfect Physio adding up to $1,785.84. I, therefore, accept that the $1,785.18 expense in issue is for the travel expenses of an unidentified treatment provider as set out in Dr. Palantzas treatment plan dated December 18, 2014, and not as set out in the Tribunal's Order dated August 16, 2016.

[60]. The Personal submits that the distance between Y.Y.'s home and Perfect Physio and Rehab Centre estimated on the treatment plan in issue is 50 kilometers. The respondent submits that in accordance with the *Superintendent's Guideline* No.04/16, travel expenses are subject to a 50 km deductible. The applicant did not make any comments on the travel costs in her initial submissions. She had an opportunity in her reply to address The Personal's submission that she failed to show any reason why transportation of the service provider to her house was required. The applicant advised Ms. Fang that she was bed-ridden for two weeks after the accident, but, if so, that would not explain how Y.Y. was able to attend at her family physician's office six days after the accident without help, again ten days after the accident and at the assessment with Ms. Jing nine days after the accident. Nor was any explanation provided as to why Y.Y. could not travel after December 18, 2014. In fact, Y.Y.'s daughter-in-law provided affidavit evidence that she assisted Y.Y. in attending at the clinic for her physiotherapy.

[61]. I am not satisfied that the travel time and mileage of a treatment provider are available under the MIG. The MIG schedule of fees refers to blocks of treatment for specific periods of time, but makes no reference to fees for the travel time or mileage of the treatment provider. Since I have found that the $1,785.18 in issue is for an unidentified treatment provider's travel time and mileage and the MIG applies to the applicant, this claim is dismissed.

2017 CanLII 59515 (ON LAT)

INTEREST

[62]. The only benefit claimed that may be payable is the psychological assessment up to a maximum of $215.00 if it is a first visit assessment and subject to the limits remaining in the MIG. I am prepared to receive submissions from the parties on whether interest is owed and in what amount.

COSTS

[63]. The applicant indicated in her submissions that she is seeking her costs of the appeal. The award of costs is an exceptional remedy requiring evidence before the Tribunal that the opposing party has acted unreasonably, frivolously, vexatiously, or in bad faith in the Tribunal's proceeding. The applicant has presented no evidence or submissions to indicate the respondent acted in such a manner. Accordingly, I dismiss the claim for costs.

CONCLUSION

[64]. The applicant is entitled to payment for the cost of a psychological assessment to a maximum of $215.00 only if it is a first visit, and subject to the limits remaining in $3,500.00 cap for minor injuries and whether the amount was already paid for the pre-screening psychological assessment of Ms. Fang. Other than the issue of interest, of which I remained seized, the remainder of the applicant's claims are dismissed.

Released: August 17, 2017

_____

Deborah Neilson, Adjudicator

2017 CanLII 59515 (ON LAT)