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

2018 CanLII 13148 (ON LAT)

Date: 2018-02-16
Tribunal File Number: 17-003539/AABS
Case Name: 17-003539 v Aviva 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:

Applicant

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR: **Brian Norris**

APPEARANCES:

For the Applicant: David Carranza, Representative

For the Respondent: Karla Gnanasegaram, Counsel

HEARD: **In Writing on October 18, 2017**

OVERVIEW

[1] The applicant was injured in an automobile accident on June 15, 2015 and sought benefits from the respondent pursuant to Ontario Regulation 34/10, known as the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule").* The respondent refused to pay for certain medical benefits and the applicant has applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of this dispute.

ISSUES

[2] The disputed claims in this hearing are:

1) Has the applicant sustained a minor injury as defined under the *Schedule* as a result of the accident?

2) Is the applicant entitled to a medical benefit in the amount of $353.28 ($1,278.35 less $925.07 approved) for chiropractic services recommended by Physio Fix & Fitness in a treatment plan (OCF-18) submitted to the respondent on August 27, 2015?

3) Is the applicant entitled to a medical benefit in the amount of $4,249.31 for chiropractic services recommended by Physio Fix & Fitness in an OCF-18 submitted to the respondent on October 1, 2015?

4) Is the applicant entitled to the cost of a physiatry assessment in the amount of $1,983.72, recommended by Healthway Medical Management in an OCF-18 submitted to the respondent on July 10, 2015?

RESULT

[3] I find that the applicant sustained a minor injury as defined under the *Schedule*. The applicant has not provided compelling medical evidence to establish that maximum medical recovery cannot be reached within the *Minor Injury Guideline* (MIG) treatment funding limit of $3,500.00, as prescribed by section18(1) of the *Schedule*. The applicant is not entitled to the medical benefits claimed because they have exhausted the funding provided for under the MIG.

BACKGROUND

[4] The applicant was a driver in a vehicle which was struck from behind while waiting at a red light. The applicant visited Dr. M. Atalla, a family physician, the following day and was diagnosed with sprain/strain of the right shoulder, lower back, and legs. The applicant was referred for x-rays and an ultrasound, the latter of which noted that there appeared to be a partial thickness tear of the supraspinatus (shoulder).

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[5] The applicant engaged in treatment following the accident, which the respondent approved and funded. On July 10, 2015, the applicant sought funding for a physiatry assessment in the amount of $1,983.72. The respondent denied funding of the physiatry assessment on the finding of Dr. L. Weisleder, orthopaedic surgeon, in an insurer's examination. Dr. Weisleder opined that the assessment was not reasonable and necessary because the applicant suffered minor injuries as defined in the *Schedule* and was subject to the $3,500.00 funding limit.

[6] On August 27, 2015, the applicant submitted a chiropractic treatment plan in the amount of $1,278.35. The respondent partially approved the treatment plan in the amount of $925.07, approving treatment up to the funding cap in the MIG.

[7] On October 1, 2015, the applicant submitted another chiropractic treatment plan in the amount of $4,249.31. The respondent denied funding for the treatment plan entirely.

[8] The applicant disputes the respondent's denials of the treatment plans and the respondent's determination that the applicant's injuries are within the MIG.

THE MINOR INJURY GUIDELINE

[9] The MIG establishes a treatment framework available to injured persons who sustain a minor injury as a result of an accident. A "minor injury" is defined in the *Schedule* and includes sprains, strains, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae. The MIG provides that a strain is an injury to one or more muscles and includes a partial tear. Under section 18 of the *Schedule*, injuries that are defined as minor are subject to a $3,500.00 funding limit on treatment.

[10] The applicant relies on the exception to the $3,500.00 funding cap provided in section 18(2). Section 18(2) states that the $3,500.00 funding limit does not apply to injured people if their health practitioner determines and provides compelling evidence that they have a pre-existing medical condition that was documented by a health practitioner before the accident and that will prevent the injured person from achieving maximal recovery from the minor injury if they are subject to the MIG funding limit.

[11] Having reviewed the medical evidence regarding the applicant's injuries, I have determined the applicant falls within the MIG and is subject to its $3,500.00 funding limit, for the reasons that follow.

THE APPLICANT'S PHYSICAL INJURIES

[12] The applicant and respondent agree that the applicant suffered sprains and strains of the back, legs, and right shoulder.

[13] The applicant submits that in addition to the agreed-upon injuries, Dr. J. Wong, physiatrist, also identified pre-existing back pain and in the report dated February 10, 2016, diagnosed the applicant with a rotator cuff tear and chronic pain syndrome. The

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applicant submits that Dr. Wong's findings, the pre-existing back pain noted in the clinical notes and records of Dr. Atalla, and the ultrasound results constitute compelling evidence that allows the applicant to receive treatment outside the MIG.

[14] The respondent relies on the August 20, 2015 Orthopaedic Report completed by Dr. L. Weisleder, orthopaedic surgeon, in support of its position that the applicant's injuries fall within the MIG. Dr. Weisleder notes the applicant's complaints of back pain and finds that the applicant sustained right shoulder strain, thoracic strain, and lumbar strain as a result of the June 15, 2015 accident. Dr. Weisleder reviewed the clinical notes and records from the applicant's family doctor, and the x-ray and ultra sound reports for the purposes of the report. Like Dr. Wong, Dr. Weisleder identified a rotator cuff tear but says that the rotator cuff tear is partial and within the MIG. Dr. Weisleder concludes that there is no compelling evidence of a pre-existing medical condition that would prevent the applicant from achieving maximal recovery.

[15] Dr. Wong's findings are generally consistent with Dr. Weisleder's. The inconsistency is with respect to the applicant's abduction of the right shoulder. Dr. Weisleder reports abduction at 150 degrees and, about seven months later, Dr. Wong reports abduction limited to 90 degrees. The significant decrease in the applicant's range of motion is inconsistent with the medical records and is not reflected anywhere else in the applicant's evidence. This suggests it is inaccurate and leads me to give Dr. Wong's report less weight than Dr. Weisleder's. In addition, the Medical Diagnosis section in Dr. Wong's report identifies a ***left*** shoulder rotator cuff tear as noted in the ultrasound report however, the Medical Opinion section refers to ***right*** shoulder rotator cuff tendonitis. I prefer the report of Dr. Weisleder as it has fewer errors and is more consistent with the applicant's medical record than Dr. Wong's.

[16] After reviewing the submissions and evidence, I agree with the respondent and find that the partial tear of the applicant's rotator cuff, as identified in the ultrasound report, is an injury included in the MIG. Additionally, I find that the notations of back pain in the clinical notes and records do not constitute a compelling pre-existing injury which would preclude recovery within the MIG funding limit. Back pain, absent any objective evidence or a diagnosis, is not a pre-existing condition which will excludes the applicant from the MIG.

THE APPLICANT'S PSYCHOLOGICAL INJURIES

[17] The applicant refers to psychological injuries identified by Dr. Wong, which would fall outside the MIG. The applicant, if diagnosed with psychological injuries that require clinical treatment, would not be bound by the $3,500.00 MIG funding cap on treatment.

[18] The respondent submits that the MIG applies because the applicant does not have any accident related psychological injuries which would remove the applicant from the MIG. The respondent relies on Dr. S. MacKay's psychological insurer's examination report in support of this position.

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[19] Dr. MacKay is a qualified psychologist and is more suitable than Dr. Wong, a physiatrist, to identify and treat psychological injuries. I prefer the evidence of Dr. MacKay and reject Dr. Wong's conclusions for this and the following reasons.

[20] Dr. MacKay's report includes the different psychological tests conducted during the evaluation: Pain Diagram and Modified Somatic Perceptions Questionnaire. Dr. MacKay attempted to administer the Minnesota Multiphasic Personality Inventory-2-Restructured Form however, the applicant declined to complete the questionnaire. Based on the two tests completed, Dr. MacKay concluded that there is no indication that the applicant suffered a significant accident-related psychological impairment and that there is no indication of an accident-related psychological disorder. Dr. MacKay included the applicant's complaints in the report, yet still found that there was no diagnosable psychological injury.

[21] Dr. Wong did not conduct any psychological testing to identify the level of the applicant's psychological impairment, if any. The report notes that the applicant had complaints of feeling stressed and depressed. Dr. Wong concludes that a chronic pain treatment program would benefit the applicant because of the complaints and because, in Dr. Wong's opinion, the applicant showed signs of anxiety during the assessment. From this evidence, Dr. Wong concludes that the applicant suffers from chronic pain syndrome. Dr. Wong notes that the MIG does not provide sufficient funding for a chronic pain program but does not conclude that chronic pain syndrome is the reason for the applicant to receive treatment outside of the MIG. In the report, it is Dr. Wong's opinion that the applicant ought to be removed from the MIG because of pre-existing lower back pain – not due to chronic pain syndrome or any psychological injury.

[22] For the reasons above, I agree with Dr. MacKay and find that the applicant has not suffered a psychological injury which warrants treatment outside of the MIG.

IS CHRONIC PAIN SYNDROME WITHIN THE MIG?

[23] The applicant submits the FSCO decision in *Arruda*[1] establishes that the respondent cannot confine the applicant within the MIG when the applicant has been diagnosed with chronic pain syndrome. The respondent did not provide submissions with respect to this argument.

[24] I agree with the applicant's interpretation of *Arruda* but find that it is distinguishable from this matter. In *Arruda*, the arbitrator found that the undisputed medical evidence supported a diagnosis of chronic pain syndrome, which included a psychological injury (post-traumatic anxiety and distress disorder with depressive episodes). In the matter before me, I was not provided with any medical evidence to support a finding of a psychological injury which would require clinical treatment or preclude recovery within the MIG.

CONCLUSION

[1] *Arruda v Western,* FSCO A13-003926, 2015

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[25] Based on the medical evidence before me, I find that the applicant's injuries as a result of the accident fall within the MIG. The medical evidence provided by the applicant does not demonstrate on a balance or probabilities that the applicant has a pre-existing medical condition which would preclude recovery within the MIG. The applicant is subject to the funding limit prescribed in the MIG.

[26] The applicant's appeal on all issues in dispute is dismissed.

Released: February 16, 2018

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Brian Norris, Adjudicator

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