

**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**

Date: 2018-02-27

Tribunal File Number: 16-004622/AABS

Case Name: 16-004622 v Aviva Insurance Canada

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

A. K.

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR:

Khizer Anwar

APPEARANCES:

For the applicant:

Michael Wentzel, legal representative

Loreto Scarola, legal representative

For the respondent:

M. Jennifer Cosentino, counsel

HEARD IN WRITING ON:

July 31, 2017

OVERVIEW

- [1] A.K. (“the applicant”) was injured in an automobile accident on September 2, 2011 (“the accident”), and sought benefits from his auto insurer (“the respondent”) pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (“Schedule”).
- [2] The applicant submitted three treatment and assessment plans (“OCF-18”) to the respondent, requesting funding for physiotherapy/chiropractic services, and an orthopaedic assessment. In addition, the applicant also requested payment for the expense of an OCF-3. The respondent denied funding for all the treatment plans as well as payment for an OCF-3, as it deemed them to be not reasonable and necessary.
- [3] The applicant disagreed with the respondent’s decision on all three treatment and assessment plans and submitted an application for dispute resolution services to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”).
- [4] The parties participated in a case conference but were unable to resolve the issues in dispute.

ISSUES TO BE DECIDED

- [5] The issues in dispute identified by the parties in their submissions and to be decided are:
 - 1. Is the applicant entitled to a medical benefit in the amount of \$1,418.00, for physiotherapy and chiropractic services, as outlined in the OCF-18 dated April 18, 2016, completed by Dr. Yuri Charko?
 - 2. Is the applicant entitled to a medical benefit in the amount of \$2,636.00 for physiotherapy and chiropractic services, as outlined in the OCF-18 dated September 29, 2016, completed by Marco Bianchi?
 - 3. Is the applicant entitled to a cost of examination in the amount of \$2,410.00, for an orthopaedic assessment, as outlined in the Treatment and Assessment plan (OCF-18) dated August 4, 2016, completed by Dr. Osama Benmoftah?
 - 4. Is the applicant entitled to payment of an OCF-3 in the amount of \$200.00?
 - 5. Is the applicant entitled to an award under s. 10 O. Reg. 664?
 - 6. Is the applicant entitled to interest on overdue payment of benefits?

RESULT

[6] Based on the totality of evidence before me, I find that:

1. The applicant is entitled to the medical benefit in the amount of \$1,418.00.
2. The applicant is entitled to the medical benefit in the amount of \$2,636.00.
3. The applicant is entitled to the cost of examination in the amount of \$2,260.00.
4. The applicant is not entitled to the payment of an OCF-3 in the amount of \$200.00
5. The applicant is not entitled to an award under s.10 O. *Reg. 664*.
6. The applicant is entitled to interest on overdue payments on above-noted benefits.

ANALYSIS

1. Pre-existing Medical History

[7] The applicant is now an 82-year-old elderly male, whose pre-existing medical history is largely undisputed. The parties agree that the applicant suffers from pre-existing, chronic neck and low back pain, for which he visited his family doctor, Dr. McFadden, frequently. Dr. McFadden made referrals for the applicant to confer with a rheumatologist on more than one occasion. The applicant also suffers from high cholesterol and hypertension.

2. Accident related injuries and Post-Accident health

[8] The applicant refers to the following as evidence of his accident related injuries in his submissions:

1. Clinical notes and records (CNRs) of Dr. Erin McFadden, family physician
2. Disability Certificate (OCF-3) submitted by Mahsa Gordanpour, November 9, 2015
3. OCF-18 submitted by Dr. Yuri Charko, April 18, 2016
4. OCF- 3 submitted by Bhalinder Pawan Sabharwal, May 19, 2016
5. OCF-18 submitted by Dr. Osama Benmoftah, August 4, 2016
6. OCF-18 submitted by Marco Bianchi, September 29, 2016
7. OCF-3 submitted by Mahsa Gordanpour, September 29, 2016

8. CNRs of MacKenzie Medical Rehabilitation Centre (MacKenzie Medical)

- [9] The applicant further relies on the medical assessment report of Dr. Osama Benmoftah.
- [10] The applicant visited Dr. McFadden in relation to his accident related injuries on November 2, 2015 – two days after the accident. During his first two visits, Dr. McFadden noted the applicant's complaints and injuries to be: 1) neck pain and stiffness; 2) low back pain; 3) trouble sleeping due to neck pain; 4) overall muscle stiffness; 5) decreased range of motion in spine; 6) flexion/extension injury; and 7) headaches. Dr. McFadden recommended Tylenol, general physiotherapy, counselling for ongoing anxiety regarding driving and X-ray of the cervical and thoracic spine, which revealed multilevel degenerative changes but no fractures. Dr. McFadden also recommended a follow up for worsening pain, headaches, vertigo and other concerns.
- [11] The applicant submits that the accident has aggravated his pre-existing arthritic and chronic back and neck issues, as he experiences constant pain now. As a result, he is in need of treatment, such as physiotherapy, chiropractic treatment and massage therapy, which was consistently recommended by his family doctor and made a positive difference. In addition to consistent complaints about the above noted injuries, various entries in Dr. McFadden's CNRs confirm the applicant suffered from additional accident related impairments including: 1) anxiety and depression; 2) generalized anxiety disorder; 3) adjustment disorder with depressed mood. Dr. McFadden also made a referral for a social work assessment, which was conducted on January 28, 2016.
- [12] Collectively, the OCF-18s note the applicant's injuries to be related to neck, thorax, abdomen, lower back and pelvis, sprain and strain of shoulder and sacroiliac joint, radiculopathy, headache syndrome, dizziness, sleep disorders and anxiety disorder.

Dr. Osama Benmoftah

- [13] Upon examination, Dr. Benmoftah, an orthopaedic surgeon, found the applicant to be suffering from multiple pain behaviours, including shifting around, getting up and down, having an antalgic gait and multiple sighs. He found that the applicant suffered multiple sprains and strains, and aggravation of his pre-existing degenerative disc disease. Dr. Benmoftah also found Waddell's signs during his examination, which were positive for tenderness, distraction, simulation and overreaction. These signs, according to him, were consistent with features of: 1) a chronic pain syndrome with central sensitization; and 2) with a somatic symptom disorder under DSM-5.
- [14] Dr. Benmoftah's final diagnosis of the applicant's condition was that of a chronic pain syndrome ("the syndrome"). His recommendations included aggressive and comprehensive multimodal treatment and rehabilitation to avoid long term

functional impairments and return to pre-accident activities of daily living. Dr. Benmofteh opined that the applicant would benefit from: 1) referral to a multi-disciplinary rehabilitation facility that specializes in treating the syndrome; 2) services of a housekeeper to attend to and assist with the housekeeping duties; 3) appropriate pain management, as determined necessary by relevant experts; and 4) an x-ray of the right hip and ultrasound of bilateral shoulder.

3. Are the proposed treatment plans reasonable and necessary?

- [15] The respondent denied the treatment plans based on the opinion of Dr. Pravesh Jugnundan, general practitioner.
- [16] The respondent submits that the applicant suffered uncomplicated soft tissue injuries as a result of the accident and his disabilities and impairments are pre-existing, rather than caused by the accident, and have been treated appropriately in the past.
- (i) Treatment Plan # 1: For physiotherapy, massage and chiropractic services in the amount of \$1,418.00
- [17] This treatment plan identified the following impairments that necessitated treatment: 1) restrictions with repetitive tasks and movements of the upper limb; and 2) limitations in performing activities of daily and normal living due to pain and discomfort. The treatment plan also outlined the following goals: 1) pain reduction; 2) increased range of motion; 3) increase in strength; and 3) assisting the applicant in returning to activities of daily living and pre-accident social and recreational activities.
- [18] Furthermore, it outlined the following ways the progress of the above-noted goals would be monitored and evaluated: 1) range of motion (ROM); 2) visual analogue scale (VAS); and 3) orthopaedic testing. It was noted in the treatment plan that the applicant had shown slow improvements with facility-based care but he continued to have difficulties with activities of daily living. The applicant's pre-existing medical conditions and age were recognized as reasons for slow progress and barriers to a quick recovery and recommended advanced imaging, orthopaedic consult, psychological assessment and neurological assessment as key next steps to overcome barriers to recovery.
- [19] The respondent's denial of this treatment plan was based on the assessment and subsequent medical report of Dr. Jugnundan. According to Dr. Jugnundan, as a result of the accident, the applicant sustained soft tissue injuries to his neck, specifically a whiplash associated disorder II (WADII).
- [20] Dr. Jugnundan opines that the applicant has been receiving treatment for over six months and has reported about a 10% improvement. Therefore, considering the soft tissue nature of his injuries, the applicant has already received sufficient facility-based treatment and any additional formal, facility-based treatment and

physical therapy, as outlined in the treatment plan, is not reasonable and necessary.

Finding

- [21] I find that the disputed treatment plan is reasonable and necessary. The treatment plan stated that the applicant had been making slow progress with facility-based treatment and would benefit from continued treatment sessions outlined in the treatment plan. I accept this prognosis. The proposed treatment is related to accident-related impairments, the costs associated with the services are reasonable and the treatment plan sets out appropriate goals, such as pain reduction and increased range of motion, reasonable ways to monitor progress and identifies barriers to recovery.
- [22] I reject Dr. Jugnundan's position that the applicant will not benefit from continued facility-based treatment because his injuries are soft-tissue in nature and he has received treatment for over six months. In reaching this conclusion, Dr. Jugnundan fails to consider the applicant's prior medical history, particularly his pre-existing chronic back and neck pain and arthritis, as well as his age. He notes that the applicant complained of pain and discomfort in his back and right knee while doing range of motion testing but fails to account for these complaints or provide any explanation in his conclusion.
- [23] The accident aggravated the applicant's pre-existing chronic pain in his back and neck. The applicant was also diagnosed with the syndrome in a subsequent examination by Dr. Benmofteh, which I accept, and is a vital piece of information. Under these circumstances, I do not accept that home-based exercises are an appropriate alternative. Hence, I find the treatment plan reasonable and necessary.
- (ii) Treatment Plan # 2: For physiotherapy, massage and chiropractic services in the amount of \$2,636.00
- [24] Much like treatment plan #1, this treatment plan identified similar impairments, goals and ways to monitor and evaluate the applicant's progress. It outlined similar barriers to recovery as well. While outlining the applicant's physical limitations, the treatment plan notes noticeable restrictions in cervical and lumbar ROM and identifies that the applicant continues to experience difficulties in carrying out his daily activities of living, particularly with his wife being injured as well due to the same accident. The treatment plan also notes the applicant reporting increased pain and symptoms since the stoppage of treatment after the respondent denied funding.
- [25] The respondent denied this treatment plan based on Dr. Jugnundan's report, in which he maintained his original position that the applicant sustained soft-tissue injuries as a result of the accident. Dr. Jugnundan opines that the applicant would

not benefit further from facility-based treatment and recommends that the applicant engage in a self-directed home exercise program.

- [26] The respondent also relies on s. 15(1) and s. 3(7)(e) to argue that a medical benefit must be incurred (goods and services received by the applicant) for it to be payable by the insurer.¹ According to the applicant, he has not incurred/received the goods and services outlined in this treatment plan.

Finding

- [27] For the same reasons as treatment plan #1, I find this treatment plan reasonable and necessary as well. While the proposed services may be a duplication of those proposed in the first treatment plan, they are being proposed in increased frequency in order to properly address the applicant's accident-related impairments, which are chronic. I accept this approach.
- [28] With respect to the respondent's argument that the treatment plan is not payable as it has not been incurred, I disagree. The applicant is seeking a ruling from the Tribunal on whether the proposed treatment plan is reasonable and necessary. Depending on the outcome, the applicant may then receive the treatment or that treatment may be deemed incurred in accordance with the *Schedule*. In other words, I agree with the applicant that he is seeking approval for funding of this treatment plan, which if determined to be reasonable and necessary, can then be incurred and s. 15 of the *Schedule* becomes applicable.

(iii) Surveillance

- [29] The respondent submits a surveillance report with images, where for close to 27 accumulated minutes, the applicant was seen performing various movements, such as walking/standing without a cane, ascending/descending stairs, attending church, loading items in the car and opening and closing the trunk of the car, requiring him to raise his arms above the head level. The respondent argues that these (and more) movements were completed by the applicant without demonstrating any pain behaviour, restrictions or limitations. Hence, the surveillance confirms that all the goals listed in the treatment plans are not issues that need to be addressed.
- [30] The applicant argues that 27 minutes of surveillance is not sufficient to claim or prove that the applicant does not demonstrate the pain behaviours or suffer from the functional limitations listed in the treatment plans and/or in the expert reports. Moreover, the respondent did not provide this surveillance report to its assessors and did not rely on this report to deny the treatment plans. Hence, it should not be given any weight.

¹ O. Reg. 34/10: Statutory Accident Benefits Schedule, sections 3 and 15

Finding

[31] I find the surveillance report to be unpersuasive. The report depicted the applicant relied on a cane to navigate through most of his daily activities, if not all, which does reflect functional limitations. In the instance where he did walk without the cane, he did so with a slight limp. None of the medical documents claim that the applicant is completely immobile. Hence, I do not find the contents of the report to discredit the applicant.

[32] Furthermore, the activities undertaken by the applicant and outlined in the report do not, on a balance of probabilities, show that he does not suffer from pain, limitations or chronic pain syndrome, or has completely returned to all of his activities of daily living. In fact, the report itself recommends that additional surveillance be completed at two other occasions to further observe the applicant's social activity.

(iv) Treatment Plan # 4: For orthopaedic assessment in the amount of \$2,410.00

[33] One of the goals of this treatment plan identified assisting the applicant with returning to his pre-accident activities of daily living, such as: reading and video gaming for up to 31 hours each week, housekeeping, working 2-3 hours every day on both his vegetable garden and flower beds located at his community plot, going for 30-minute walks twice daily with his wife, hosting and visiting friends, playing cards, going to the movies, casino, shopping and restaurants and attending church and other religious activities regularly. The treatment plan also identified pain reduction/relief, increased strength and increased range of motion, as primary goals of the treatment.

[34] In addition to submitting and completing this treatment plan, Dr. Benmofteh conducted an assessment of the applicant (discussed earlier in my analysis), in which he diagnosed the applicant with chronic pain syndrome. The respondent denied the treatment plan based on the fact that it had sufficient medical information on file to deny this treatment plan. As a result, it found the proposed assessment to be redundant.

[35] The applicant submits that the respondent's denial was improper as it neither provided a medical reason, pursuant to s. 38(8) of the *Schedule*, nor scheduled an independent medical assessment. This provision of the *Schedule* stipulates that the insurer must provide a medical reason when it deems goods and services requested by the applicant to be not reasonable and necessary. The respondent contends that existing medical information it had on file qualified as a medical reason and was sufficient for it to deny the treatment plan. As such, it did not feel the need to commission an additional assessment to either address the diagnosis of the syndrome, or "other chronic pain" listed as an injury/sequelae in the treatment plan.

- [36] The respondent further submits that in the event this treatment plan is found to be reasonable and necessary, the cost of the treatment plan should be capped at \$2,000 pursuant to s. 26(5)(a) of the *Schedule*. This provision provides that an insurer shall not pay more than a total of \$2,000 in respect of fee and expenses for conducting any one assessment.²

Finding

- [37] I find the treatment plan to be reasonable and necessary. The proposed assessment is in relation to the injuries and impairments caused by the accident. The goals of this treatment plan are consistent with the applicant's impairments and other treatment plans, namely pain reduction, increased strength, ROM and a return to his pre-accident lifestyle. The purpose of the assessment was to identify the applicant's ongoing physical limitations and make recommendations from an orthopaedic perspective to overcome barriers to recovery.
- [38] In his report, Dr. Benmofteh diagnosed the applicant with chronic pain syndrome. Dr. Benmofteh is the only expert on either side who possesses the expertise to examine and assess the applicant for chronic pain syndrome. Much of his examination revealed similar pain behaviours in the applicant as found in Dr. Jugnundan's report, except that Dr. Benmofteh identified Waddell's signs, which according to him are consistent with chronic pain syndrome. In light of Dr. Benmofteh's expertise, I accept his diagnosis and find the treatment plan to be reasonable and necessary.
- [39] With respect to the amount of \$2,410 proposed in the treatment plan, the applicant does not make any reply submissions in response to the respondent's position that the amount of the treatment plan should be capped at \$2,000.00 pursuant to the *Schedule*. In the absence of any submissions from the applicant and upon reviewing the treatment plan, I find no reason why the applicant will not receive sufficient treatment within the amount outlined in the guidelines. Therefore, I find that the cost of this treatment plan is appropriate and reasonable at \$2,000 plus HST (\$260.00 at 13%) for a total of \$2,260.
- (v) Payment for an OCF-3 in the amount of \$200.00
- [40] The applicant seeks payment for the expense of a health practitioner completing the OCF-3. The respondent submits that this was the third OCF-3 submitted by the applicant and contained no new injuries or additional information not previously found in the two OCF-3s already submitted by the applicant. Hence, this OCF-3 was redundant and unnecessary. In addition, the respondent contends that it did not request the applicant to complete and submit another OCF-3. The respondent relies on s. 25(5) of the *Schedule*.³

² *Ibid*, section 26(5)(a)

³ *Ibid*, section 25(1) & (5)

[41] I agree with the respondent and find that submission of a third OCF-3, containing the same information as found in the previous two OCF-3s already submitted to the respondent, was unnecessary. The document did not add to the existing information the respondent already had on file regarding the applicant's injuries and impairments. Therefore, I find that the respondent is not liable to pay for this expense.

4. Is the applicant entitled to an award under s. 10 of O. Reg 664?

[42] The applicant seeks a special award under s. 10 of O. Reg. 664, on the basis that the respondent unreasonably withheld or delayed payments to the applicant. However, the applicant failed to make submissions outlining his position and reasons as to why the respondent's act of withholding payments was unreasonable. In addition, there is nothing in the evidence before me in respect of the other claims that would lead to me making such a finding. Therefore, the applicant is not entitled to an award under s. 10 of O. Reg. 664.

5. Is the applicant entitled to interest on overdue payments?

[43] I find that the applicant is entitled to interest as the medical benefits are payable. Interest will be payable on the applicable amount of benefits owed to the applicant to the date of this decision in accordance with s. 51 of the *Schedule*.

CONCLUSION

[44] For the reasons noted above, I find that:

1. The applicant is entitled to the medical benefit in the amount of \$1,418.00.
2. The applicant is entitled to the medical benefit in the amount of \$2,636.00
3. The applicant is entitled to the cost of examination in the amount of \$2,260.00.
4. The applicant is not entitled to payment for an OCF-3 in the amount of \$200.00
5. The applicant is not entitled to an award under s.10 O. Reg. 664.
6. The applicant is entitled to interest on all overdue payments.

Released: February 27, 2018

Khizer Anwar, Adjudicator