

**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: 2018-06-20

Tribunal File Number: 17-004680/AABS & 17-008472/AABS

Case Name: 17-004680 & 17-008472 v Aviva Insurance Canada

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 Insurance Canada

Respondent

DECISION

ADJUDICATOR:

Christopher A. Ferguson

APPEARANCES:

Paralegal for the applicant:

Essam Elbasiouni

Counsel for the respondent:

Brian Yung

Written Hearing:

February 14, 2018

OVERVIEW

- [1] [The applicant] was injured in an automobile accident on June 2, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the "Schedule").
- [2] The applicant applied for benefits from the respondent, and then applied to the Licence Appeal Tribunal (the "Tribunal") when the disputed benefits were denied.

DISPUTED BENEFITS

- [3] The issues before me are:
 - i. Is the applicant entitled to payment in the amount of \$2,892.98 for psychological services as set out in a treatment and assessment plan by Dr. Jon Mills dated January 27, 2016, denied by the respondent on March 31, 2016?
 - ii. Is the applicant entitled to payment in the amount of \$2,725.00 for chiropractic services as set out in a treatment and assessment plan dated April 1, 2016 by Dr. Mansoor Sharif, denied by the respondent on August 15, 2016?
 - iii. Is the applicant entitled to payment in the amount of \$2,485.00 for chiropractic services as set out in a treatment and assessment plan dated November 1, 2016 by Dr. Mansoor Sharif, denied by the respondent on February 8, 2017?
 - iv. Is the applicant entitled to payment in the amount of \$2,260.00 for a chronic pain assessment by Dr. Getahun dated July 12, 2017, submitted on August 28, 2017, denied by the respondent on September 13, 2017?
 - v. Is the applicant entitled to payment of \$4,056.46 for chronic pain program by Dr. P. Badwall, as set out in a treatment plan submitted September 21, 2017 and denied by the respondent on September 28, 2017?
 - vi. Is the applicant entitled to interest for the overdue payment of benefits?
 - vii. Is the respondent liable to pay an award under Regulation 664² because it unreasonably withheld or delayed payments to the Applicant?

¹ O.Reg. 34/10

² i.e. s.10, Regulation 664, R.R.O. 1990, *Insurance Act*

FINDINGS

- [4] The applicant is entitled to payment of the benefits she claims in issues 1-3 and 5. Her appeal is allowed.
- [5] The applicant is not entitled to payment of the benefit she claims in issue 4. Her appeal on this issue is denied.
- [6] The applicant is entitled to interest on overdue payments from the respondent, at the prescribed rate.
- [7] The applicant's requests for costs and an award are denied.

REASONS

- [8] Sections 14 and 15 of the *Schedule* provide that an insurer is only liable to pay for medical expenses that are reasonable and necessary as a result of the accident. The applicant bears the onus of proving on a balance of probabilities that any proposed treatment or assessment plan is reasonable and necessary.³

Issue 1: Psychological Treatment

- [9] In support of her claims, the applicant relies on the following medical evidence:
 - i. The clinical notes and records (CNRs) of her family physician, Dr. Mireille Atalla, specifically a note dated April 5, 2018, which include a recommendation and referral for psychotherapy for PTSD.⁴
 - ii. The psychological evaluation by Dr. Jon Mills, psychologist, dated December 23, 2015, in which the applicant is diagnosed with somatic symptom disorder with predominant pain, moderate and persistent, PTSD, specific phobia (driver anxiety).
 - iii. A provisional diagnosis of PTSD by Dr. Sadiq Hasan, psychiatrist, in a report dated January 26, 2016.
- [10] The respondent relies on the respondent's insurer's examination report by Louise Koepfler, psychologist, dated March 26, 2016:
 - i. Dr. Koepfler administered three psychometric validity tests – TOMM, MSPQ and PSR-R⁵ – and the applicant's scores on all three indicate a very high likelihood of exaggeration and unreliable self-reporting by the applicant.
 - ii. Dr. Koepfler found that the test results and the unreliability of the applicant's self-reporting left her unable to make a diagnosis and unable to recommend

³ *Scarlett v. Belair*, 2015 ONSC 3635

⁴ i.e. Post-Traumatic Stress Disorder (PTSD)

⁵ i.e. Test of Memory Malingering (TOMM), Modified Symptomatic Perceptions Questionnaire (MSPQ), and Pain Symptoms Ratings – Revised (PSR-R)

psychological counselling and therefor unable to find the proposed treatment plan reasonable and necessary.

- [11] The applicant argues that I should give less weight to the respondent's insurer's examination because:
- i. Dr. Koepfler failed to address the medical evidence amassed in the CNRs and reports by the applicant's various medical assessors.
 - ii. Dr. Koepfler failed to investigate potential reasons for the applicant's validation scores, which indicated that responses to psychometric testing were exaggerated.
 - iii. The applicant has diagnoses from OHIP-funded practitioners who had far more exposure to her than did the IE assessor – who spent two hours with her.
 - iv. Psychological diagnoses can be made without psychometric testing – as shown by the diagnoses reached by the applicant's medical assessors.
- [12] I have decided to give less weight on Dr. Koepfler's report because some of its contents create, in my mind, an apprehension of bias against the applicant:
- i. At page 10 of her report, Dr. Koepfler remarks that "Expectation of a financial settlement may also be motivating her [i.e. the applicant] to over-endorse symptoms on today's assessment." I find this to be speculative at best, and inconsistent with the scientific accuracy expected of a medical report.
 - ii. Dr. Koepfler's remarks appear to be driven by the applicant's history, which she notes at p.9 includes an earlier accident, in 2011, which involved "a similar mechanism of injury" and which, as in the 2015 accident, included a miscarriage shortly afterwards. Dr. Koepfler notes that the applicant reached a settlement of the claims related to the 2011 accident. Linked as this observation is to the above-noted remarks, as well as the groundless intimation that such an accident couldn't happen twice, I am again struck by the consideration of factors that are both speculative and outside of her medical expertise .
- [13] As the result of the foregoing findings, I find that the applicant has met the onus on her to prove that the claimed psychological treatment plan is reasonable and necessary.

Issues 2-3: Chiropractic Treatments

- [14] The respondent relies on the IE by Dr. Hashmat Khan, GP, dated June 14, 2016, in which the physician:
- i. diagnosed whiplash (WAD II), lumbar and right knee sprain/strain, post-traumatic headache and nasal fracture resulting from the accident;
 - ii. noted minimal functional impairments on objective evaluation; and,
 - iii. recommended that at one-year past the accident, the applicant should transition into a home-exercise program – and opined that chiropractic treatments would not be reasonable and necessary.
- [15] The respondent also relies on the IE by Dr. Michael Ko, physiatrist, dated February 7, 2017 in which the physician, after an in-person examination:
- i. noted the applicant's complaints of constant headaches, neck, bilateral shoulder and left arm pain;
 - ii. noted full range of motion except for mild limitation in left shoulder
 - iii. found no objective evidence of ongoing functional impairments or organic pathology; and,
 - iv. based on the foregoing clinical observations, concluded that the proposed chiropractic treatments were not reasonable and necessary.
- [16] I find that both chiropractic treatment plans are reasonable and necessary because:
- i. The treatment goals and modalities set out by Dr. Sharif in the OCF-18s appear reasonable to me. They aren't directly contested by the respondent, who notes that the applicant has improved with treatment.
 - ii. The respondent fails to effectively address the stated goal of pain relief and reduction, which is a valid objective of treatment. I do not accept the respondent's apparent argument that because pain has not been eliminated, but only reduced, further treatment is unwarranted.
 - iii. I do not accept the respondent's argument that "only modest" improvement in function to date invalidate proposals for further treatment. The respondent does not explicitly argue that the applicant has reached maximum medical recovery (MMR), and in fact MMR is ruled out by one of its own assessors, Dr. Chris Boulias. Without an explicit argument and evidence on MMR, I will not find that an applicant has reached that state.

- iv. The respondent speaks to the applicant's "long course of facility-based treatment" at what it calls "an alarming frequency", implying that this makes her current claims unreasonable. I reject this implication in the absence of any medical opinion that the applicant has reached MMR and in the absence of any other objective benchmark for a reasonable duration or frequency of treatment.
- v. I do not find the reports by Dr. Ko and Dr. Khan persuasive. They appear to overlook pain relief as a benefit of the proposed treatment plan and to underestimate some of their own findings in rendering diagnoses and treatment recommendations. Dr. Ko's report is undermined in probative value by his contradictory indications of whether or not the applicant sustained physical injuries from the accident.

[17] As a result of the foregoing findings, I conclude that both chiropractic treatment plans are reasonable and necessary.

Issues 4 and 5: Chronic Pain Assessment and Treatment

[18] To back her claims, the applicant relies on the following medical evidence:

- i. The clinical notes and records (CNRs) of her family physician, Dr. Mireille Atalla, specifically a note dated April 5, 2018, which include notes of the applicant's pain complaints and which note that her injuries had not resolved within the expected timeframe. Dr. Atalla also recommends a chronic pain program including physiotherapy and chiropractic treatments.
- ii. The psychological evaluation by Dr. Jon Mills, psychologist, dated December 23, 2015, in which the applicant is diagnosed with somatic symptom disorder with predominant pain, moderate and persistent.
- iii. The chronic pain assessment report by Dr. Sofian El-Samak, a pain specialist, dated August 31, 2016, which found the applicant's chronic back pain to be "in keeping with neuropathic and myofascial pain, and linked the pain to a number of psychological problems. The report recommends, among other things, physiotherapy and chiropractic treatment.
- iv. A pain assessment by the Rivlin Medical Group dated March 27, 2018, essentially confirming the above-noted findings of Dr. El-Samak.
- v. A chronic pain assessment by Dr. Tajedin Getahun, orthopedic surgeon, dated September 16, 2018 in which the physician opines that the applicant's complaints fit the diagnosis for chronic pain and recommends, among other things, a multidisciplinary chronic pain program including physiotherapy.
- vi. A report by Dr. Getahun, dated March 31, 2018, which notes flaws in the IE performed by Dr. Chris Boulias, including a failure to fully account for the applicant's pain and noted restrictions on shoulder range of movement, and opining that the treatment plan by Dr. Badwell is in keeping with a multi-faceted approach to chronic pain endorsed by the American Medical Association (AMA)

[19] To rebut the applicant's evidence, the respondent relies on:

- i. The IE – a paper review - by Dr. Michael Ko, physiatrist, dated September 19, 2017, which also included Dr. Ko's finding from his in-person examination of the applicant on January 27, 2017 in response to the claim set out as issue 3. Because he had found no objective evidence of functional impairment, and seeing no evidence in the medical evidence he reviewed to change his diagnostic opinion, Dr. Ko advised the respondent that a chronic pain assessment was not reasonable and necessary.
- ii. The IE by Dr. Chris Boulias, physiatrist, dated March 20, 2018 in which the physician:
 - (a) noted the applicant's complaints of intermittent right knee pain and pain in her neck and trapezius upper fibres;
 - (b) noted normal range of motion and flexion throughout the body (except cervical spine), including pain-free squatting and rising, pain-free lumbar extension, rotation and flexion, and normal tandem gait;
 - (c) noted no weakness in the applicant's upper extremities; and
 - (d) recommended that the applicant should pursue a home-exercise program – and opined that a chronic pain assessment would not be reasonable and necessary.

[20] After my review of the evidence, I find that:

- i. The applicant's evidence in support of the need for chronic pain treatment is more persuasive than the respondent's case against such treatment, because:
 - (a) I assign more persuasive value to the reports by Dr. Getahun, who is a certified chronic pain assessor, than I do to the IE assessors. Dr. Al-Samak is also a pain specialist.
 - (b) The applicant's history shows a consistent pattern of pain over time, observed by medical practitioners with more opportunity to observe and assess her than the IE assessors. Her pain, while improving, has clearly not resolved within the normal time frames expected of her injuries – an essential component of chronic pain findings.
- ii. The applicant has failed to show me why, after chronic pain assessments by Dr. Al-Samak and Dr. Getahun in 2016 and 2018, yet another chronic pain assessment is reasonable and necessary. My reading of her medical evidence is that her practitioners were focused on her need for treatment and not on further assessment. I find that further chronic pain assessment would not be reasonable and necessary at this time.

- [21] To clarify, my conclusions on chronic pain-related benefits are:
- i. The applicant is entitled to payment for a chronic pain program as set out in issue 5 above.
 - ii. The applicant is not entitled to payment for a chronic pain assessment set out in issue 4 above.

Interest

- [22] Section 51 of the *Schedule* sets out the criteria for assessing and awarding interest on overdue payments.
- [23] The respondent is liable to pay interest on overdue payments for the benefits that I have found to be payable, as the prescribed rate.

Award

- [24] Section 10 of Regulation 664 permits the Tribunal to award a lump sum of up to 50% of the amount to which the insured person (i.e. the applicant) was entitled at the time of the award together with interest on all amounts then owing (including unpaid interest) if it finds that that an insurer (i.e. the respondent) has “unreasonably” withheld or delayed payments.
- [25] The applicant has not established that the respondent acted unreasonably within the meaning prescribed in the regulation. Her request for an award is denied.

Costs

- [26] Rule 19.1⁶ permits a party to request that the Tribunal order the other party to pay costs, where the requesting party “believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith”.
- [27] The applicant seeks legal costs but makes no argument that the respondent has met the test of Rule 19.1 in its conduct in this proceeding.
- [28] The applicant’s cost request is denied.

⁶ All references to a “Rule” are made to the *Licence Appeal Tribunal Rules of Practice and Procedure, Version I (April 1, 2016)*

CONCLUSIONS

- [29] The applicant's appeal is allowed on the following issues:
- i. Treatment plan for psychological services – issue 1.
 - ii. Both treatment plans for chiropractic treatment – issues 2-3.
 - iii. Treatment plan for a chronic pain program – issue 5.
- [30] The applicant's claim for a chronic pain assessment (issue 4) is denied.
- [31] The applicant's requests for costs and an award are dismissed.

Released: June 20, 2018

**Christopher A. Ferguson
Adjudicator**