Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A14-007110

BETWEEN:

MOHAMMAD RAFI

Applicant

and

AVIVA CANADA INC.

Insurer

REASONS FOR DECISION

Before: Arbitrator Marshall Schnapp

Heard: In Hamilton on April 3 and 4, and by written submissions completed on June 16, 2017

Appearances: Mr. Paul Barrafato and Mr. Tamur Shah participated for Mr. Mohammad Rafi
Mr. Paul Belanger and Mr. James Schmidt participated for Aviva

Issues:

The Applicant, Mr. Mohammad Rafi, was injured in a motor vehicle accident on May 12, 2012 and sought accident benefits from Aviva Canada Inc. ("Aviva"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mr. Rafi, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

[1] *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

The issues in this Hearing are:

1. Is Mr. Rafi entitled to receive non-earner benefits from November 12, 2013 to the present and ongoing?
2. Is Mr. Rafi entitled to the following medical benefits:
    i. $3,103.00 for chiropractic care submitted by Healthmedica, treatment plan dated May 19, 2012; and
    ii. $1,918.58 for a psychological treatment plan by West Side Diagnostics, dated May 24, 2012?
3. Is Mr. Rafi entitled to the following cost of examinations:
    i. $978.50 submitted by West Side Diagnostics dated June 4, 2012;
    ii. $1,300.25 submitted by West Side Diagnostics dated June 29, 2012 for an In-Home Assessment;
    iii. $1,135.00 for an ultrasound submitted by West Side Diagnostics in a treatment plan dated July 31, 2012; and
    iv. $1,950.00 submitted by West Side Diagnostics dated September 14, 2012 for a Chronic Pain Assessment?
4. Is Mr. Rafi is entitled to interest on the amounts outstanding in accordance with the *Schedule*?
5. Is either party entitled to its expenses of the Hearing?

Result:

1. Mr. Rafi is not entitled to receive a non-earner benefit.
2. Mr. Rafi is not entitled to receive the medical benefits being claimed.
3. Mr. Rafi is not entitled to the cost of examinations being claimed.
4. Mr. Rafi is not entitled to interest for any overdue payments of benefits.
5. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

The Accident

The Applicant, Mohammad Rafi (hereinafter the "Applicant"), was involved in a motor vehicle accident on May 12, 2012. At the time of the accident the Applicant was a passenger in a vehicle being driven by his daughter. They were going to a grocery store and stopped at a red light, when their car was rear-ended by a van. Police attended after the accident but no ambulance was called.

Witnesses

Mr. Rafi

The Applicant was born in 1947. He presently resides in Kitchener and has lived there for 14 years. He lives in a home with his extended family. At the time of the accident, he was not working and was receiving ODSP (Ontario Disability Support Program) benefits. He explained he was receiving these benefits because his wife had a liver transplant, and he was taking care of her and not working.

Prior to the accident related to the issues in dispute, the Applicant was also involved in three previous motor vehicle accidents that took place in 1999 or 2000, 2009, and 2010.

When asked how his health was prior to the May 2012 accident, he testified that he was in a little pain after two prior motor vehicle accidents, but after the 2012 accident he became "like useless". He went on to testify that after the 2012 accident he cannot do anything, cannot help anyone at home, and cannot participate in daily activities because the tablets he takes make him sleepy. The Applicant testified that his activities prior to the 2012 accident included helping his children, grocery shopping, feeding his wife, taking out the garbage and visiting his mosque. He testified he went to mosque five times a day prior to the 2012 accident. He also took part in community activities and visited friends and family, but for these activities he qualified them by saying – "not much, a little".

The Applicant testified he was on medication for depression prior to the 2012 accident because he was also involved in motor vehicle accidents in 2009 and 2010. He could not recall the names of all the medications he had been taking. He recalled he suffered injuries to his neck and lower back in the 2009 accident. He testified that his condition got worse after the 2010 accident, and whatever he was doing a little bit before, he was not able to do after. He saw his family doctor and received massage, chiropractic and psychological treatment after the 2010 accident. As well, he was prescribed medication for pain and anxiety. When asked if there was any change in his activities after the 2010 accident, he testified with the treatment he was feeling a little better; he started walking a little, helping his family with grocery shopping, helping a little with laundry and started playing with his children.

After the 2012 accident, the Applicant testified that all his injuries got a lot worse. He recalled he attended at the hospital the night of the accident because he was experiencing a lot of pain in his neck, back and legs. X-rays were taken and he was given Oxycodone for pain. He attended at his family doctor over the next few days who prescribed Oxycodone. He recalls in the beginning his family doctor prescribed 60 tablets for one month. He was supposed to take 2 tablets daily, and now he takes them according to how much pain he is in. He now takes 200 Oxycodone tablets per month and he thinks it has been this many for about 1.5 years. The dosage has increased because of the amount of pain he experiences, specifically due to the constant pain in his neck and legs.

The medication's side effects make him feel drowsy, sleepy and confused. Due to the side effects he feels useless and cannot do anything. He is not comfortable driving to mosque because of feeling drowsy. He now only attends on Fridays, and he needs to sit on a chair to pray; he cannot pray on a mat as required. This makes him feel very bad and he feels like he is handicapped. When providing this testimony the Applicant became very emotional and started to cry. The Applicant testified that he takes medication for depression. He testified that he has not received any referrals from his family doctor.

The Applicant testified that he did receive some psychological treatment. He stopped after the insurance company stopped paying. He found the treatment helpful; the doctor tried to explain and

teach him to cool down. Since not receiving psychological treatment, he believes he loses his temper now and becomes angry with his family over small things. When asked if he thinks physiotherapy would be helpful, the Applicant said yes, he would go if the insurance company allowed it. He testified he believes his insurance company is not looking after him as he was not receiving any rehabilitation.

When asked what the biggest impact was from the 2012 accident, the Applicant replied it was being put on Oxycodone and depression pills for the last three years, and not receiving any physiotherapy and massage therapy. He also testified that the only activity his family does for him is to get him tea when he asks.

Cross-Examination

When the Applicant was cross-examined, the ODSP issue came up again. At first, the Applicant said it was only his wife who was receiving ODSP benefits, but he then said his doctor filled out forms for him at the same time of his wife's surgery because the Applicant was not working due to shoulder surgery he had in 2002 or 2003 because of a motor vehicle accident he had in 1999 or 2000. When asked why he did not mention these details to his lawyer during direct examination, the Applicant testified that the 1999 or 2000 motor vehicle accident was a long time ago and he was not asked.

Counsel then attempted to discuss a number of details in various medical reports with the Applicant. The Applicant testified that he could not recall many details or discussions with specific doctors, as he has seen so many doctors over the years. He did recall working at ATS as a machine operator for five years; he was working at ATS at the time of his 2000 accident. During direct examination, he testified that ATS put him on modified duties after his 2000 accident and then fired him. Under cross-examination, when shown the report and that it noted his employment ended when ATS closed, the Applicant said he did not remember that and he did not recall reporting to a Dr. Almas in 2009 that after his 2000 accident he worked part-time at the Dollar

Store.[2] He testified that he never worked at the Dollar Store. When asked if Dr. Almas' report was untrue about him working at the Dollar Store, the Applicant testified that he would not say it was incorrect, but he did not remember.

The Applicant testified that prior to 2009 he was the primary caregiver to his then-14-year-old daughter. He drove her to school, gym, and social activities, and inside the home both he and his wife looked after her. He testified he looked after her until she got married. He then clarified that both he and his wife were her primary caregivers, as his wife looked after the food, clothes and ironing.

Counsel then referred to a chiropractic assessment dated January 6, 2012,[3] and asked if the Applicant was having severe pain most of the day, every day prior to the May 12, 2012 accident. The Applicant responded that he was in pain, sometimes less and sometimes more, but was not in severe pain every day. He was then asked if the assessment, which documented him in severe pain most of the day every day prior to the May 12, 2012 accident, was incorrect. He replied that he didn't know. He went on to testify that when the assessors, the Insurer or anyone asked him how he was feeling at that time, whatever he felt at that moment, he told them. He never lied and he told them the truth, and he never told them incorrect information.

The Applicant also denied making extra money from a marble importing business. He said that it was his son's business, and he just would offer advice when asked. He did not know why the medical report from Dr. Valentin dated August 5, 2012 stated that he reported earning extra money from the marble importing business, as he has no interest in the business.[4] He also did not know why Dr. Valentin's report noted that his sons would help him work on the weekends in July 2012 selling marble at a Flea Market. When asked about this, he testified again that he couldn't remember.

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[2] Functional Abilities Evaluation by Dr. Almas dated July 4, 2009, Exhibit 1, Joint Arbitration Brief, Volume 1, Tab 32 at p. 7.

[3] Independent Chiropractic Assessment, January 6, 2012, Tab 38, Exhibit 1, Joint Arbitration Brief, Volume 2

[4] Dr. Valentin Report dated August 5, 2012, Tab 40, Exhibit 1, Joint Arbitration Brief, Volume 2

The Applicant's Position

The Applicant submits that as result of the accident of May 12, 2012, he exacerbated injuries from his first and second accidents, notably his shoulder, neck, back, headaches, in addition to hip pain and psychological injuries. With respect to causation, the Applicant submits he is not required to prove that the accident was the only cause of his injuries, but only required to prove the accident significantly contributed to an impairment that "continuously prevents" him from engaging in substantially all activities in which he ordinarily engaged before the accident.[5] According to the Applicant, he suffered impairment, otherwise the Insurer would not have paid for treatment. The Applicant's evidence is his condition became progressively worse after each accident, until he was effectively non-functioning compared to his activity levels prior to the accident.

The Applicant submits his prior consistent statements made to multiple assessors can be admitted to help assess his credibility.[6] The Applicant relied on his statements in the assessing and treating records of Dr. Almas, Ms. Hania Ksenycz, Dr. Mathoo, Mr. Muhammad Rashid, Mr. John Haratsis, Dr. Jason Nyman, Dr. Valentin, Dr. Bradley and Dr. Mills, which he submitted have always remained consistent.

The Applicant highlights several medical reports and assessments to demonstrate the significant impact of the 2012 accident. Dr. Nyman's Independent Chiropractic Assessment conducted on January 6, 2012 provides a baseline for the Applicant's condition after the second accident.[7] Dr. Nyman stated on page 13 of his report, under question 2, that "he is at his pre-accident status" and is able to do all his activities of daily living. In support of the Applicant's "complete inability" is a Psychological Assessment report by Dr. Irina Valentin conducted on July 25, 2012, where she diagnosed him with an adjustment disorder with mixed anxiety and depressed mood.[8] This report noted that the Applicant told the doctor he cannot speak to people because he feels nervous, feels

[5] *Mulhall and Wawanesa* (FSCO Appeal P06-00002, October 15, 2007), pp. 3-4.
[6] *R. v. Khan*, 2017 ONCA 114.
[7] Tab 38.
[8] Tab 40, Psychological Assessment report by Dr. Irina Valentin dated August 5, 2012, p. 13. Tab 40, Exhibit 1, Joint Arbitration Brief, Volume 2.

useless and if it was not for his religion he would have committed suicide.[9] The Applicant also relies on the findings of another Psychological Assessment Report by Dr. Rita Bradley, conducted on June 10, 2013 in support of his non-earner claim.[10] The Applicant noted that in denying the non-earner benefit, the Insurer did not conduct a psychological assessment.

It is important to determine what a "normal life" constitutes for the Applicant in assessing his eligibility for the non-earner benefit. Importance should be placed on activities the Applicant emphasizes and finds important in his daily life. In this context, the Applicant places extreme importance on family and religion. In support of this analysis is the decision of *Da Ponte and Motor Vehicle Accidents Claims Fund*.[11]

Medical Benefits and Cost of Examinations

The Applicant submitted, after hearing the medical evidence and assessing reports referred to at the Hearing, that an arbitrator can determine if the cost of examinations and treatment plans are reasonable and necessary without having an expert opinion on point.[12] The Applicant submits that the treatment and assessment plans in dispute were all denied in 2012, and were reasonable and necessary so soon after the accident. As well, in light of the Applicant's testimony and medical evidence presented at the Arbitration and referred to in closing submissions, the evidence clearly showed the Applicant was constantly in pain and required the treatment for the easing of his pain.

The Applicant submitted that the treatment plan submitted by West Side Diagnostics for Psychological Assessment & Treatment was reasonable and necessary as the Applicant's psychological issues were clearly identified in the reports of Dr. Mills, Dr. Bradley, and Dr. Valentin, and the Applicant would have benefited from this treatment. As well, the need for this psychological treatment was supported by the Insurer's own assessors.

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[9] *Ibid*, p. 8.

[10] Psychological Assessment Report by Dr. Rita Bradley dated June 10, 2013, Tab 45, Exhibit 1, Joint Arbitration Brief, Volume 2.

[11] *Da Ponte and Motor Vehicle Accidents Claims Fund* (FSCO A01-000486) October 28, 2002.

[12] *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25.

Insurer's Position

The Insurer submits that the Applicant does not meet the stringent test for the non-earner benefit, and has not proven on a balance of probabilities that the cost of exams and treatment plans in dispute are reasonable, necessary and incurred.

With respect to the non-earner benefit, the Insurer submits that on the evidence before this tribunal, the Applicant was very significantly limited prior to the May 12, 2012 accident, and failed to prove a continuous and complete inability to carry on that limited normal life. Both the Applicant and the Insurer agree that the "normal life" the Applicant was living prior to the May 12, 2012 accident was significantly limited. The Applicant provided sworn evidence that, as a result of the May 12, 2012 accident, he was continuously prevented from attending mosque 35 times per week and caring for his grandchildren in the same way as prior to that accident. The Insurer submitted that, even if the Applicant's evidence on those points is to be accepted, he still does not meet the non-earner test.

However, according to the Insurer, the Applicant's evidence with respect to his activity levels is unreliable, unsubstantiated, and probably confused. The Applicant's ability to recall activity levels during various intervals before, between and after his various motor vehicle accidents was a central issue in this matter, which came across as tainted. Further, throughout the medical evidence and his testimony during the hearing, the Applicant showed himself to be inconsistent in describing his various activity levels, and according to the Insurer his evidence depended on whether or not it would help his numerous claims or not.

It appears the Applicant is basing his non-earner claim on the significant reduction of the two activities that he was engaging in prior to the 2012 accident—attendance at the mosque and reduced ability to play with his grandchildren. However, he did not provide any corroborating evidence as to his level of pre-accident involvement, which creates a significant lack of reliability on his claims. Besides a lack of corroborating evidence, the medical evidence appears inconsistent with the Applicant's stated activity levels prior to the May 12, 2012 accident. The following are examples: Dr. Mistry opined that the Applicant suffered a complete inability to

carry on a normal life as a result of the 2010 motor vehicle accident, and as of March 30, 2010 the Applicant reported that "he has been unable to participate in many of his usual daily activities, such as... going to mosque."[13] He reported to Dr. Prigozhikh[14] on May 24, 2011 that "before the [2010] accident, he was very active in his community and also went to mosque every Friday, which he stopped going after the [2010] accident due to pain." As of January 6, 2012, the Applicant reported that he needed help with bathing and dressing. He felt unable to assist with laundry, grocery shopping or garbage removal. He continued to complain of headaches almost every day, neck and bilateral shoulder pain, left shoulder pain, mid and lower back pain . . . and bilateral heel pain.[15]

The Insurer submits the 2012 pre-accident medical records are inconsistent with the Applicant's claims of attending at the mosque 35 times per week, and his levels of physical engagement with his grandchildren. They are also inconsistent with post-2012 accident reports of pre-2012 accident activity levels to various assessors, including Dr. Valentin.

The Insurer also relies on an In-Home assessment dated November 19, 2012, completed by OT Pretti Driver, which found the Applicant remained capable of managing most activities of daily living.[16] As well, Dr. Heitzner, a physiatrist, in his report of December 4, 2012, concluded that the Applicant did not qualify for the non-earner benefit.[17]

Medical Benefits & Cost of Examinations

The Insurer submits that the various treatment plans and assessments submitted for this Applicant mirror those submitted for his family member in the companion arbitration. To the Insurer, this raises the issue of how much thought and assessment of what was reasonable and necessary was put into drafting these plans.

[13] Dr. Mistry Report, Joint Arbitration Brief, Tab 65, p. 3.
[14] Dr. Prigozhikh Report, Joint Arbitration Brief, Tab 72, p. 3.
[15] Dr. Nyman Report, Joint Arbitration Brief, Tab 38, pp. 5-7.
[16] In-Home assessment by OT Pretti Driver dated November 19, 2012, Joint Arbitration Brief, Tab 41.
[17] Dr. Heitzner's Physiatrist report dated December 4, 2012, Joint Arbitration Brief, Tab 42.

The Insurer submits the Applicant failed to provide any evidence to suggest that the exams and/or treatment in dispute will provide any benefit. The Applicant did not lead evidence to establish that any treatment goals in regards to the disputed benefits were identified, reasonable, or being met. Thus, the Applicant failed to comply with the case law requirements of establishing the reasonableness and necessity of the disputed exams or treatment,[18] and has not met the onus of establishing that the disputed benefits are reasonable and necessary.[19]

Findings

The Applicant's Credibility

Essential to my analysis and findings on the issues in this dispute is the Applicant's credibility. The Applicant chose to call no other witnesses to corroborate his testimony. Rather, he relied on his own testimony and the voluminous medical documentation produced to prove on a balance of probabilities he is entitled to a non-earner benefit after the 2012 accident and entitled to the various medical and cost of examination benefits denied. Unfortunately, I find the Applicant's credibility questionable for a number of reasons, some of which were noted by the Insurer. I found that while he had a good recollection of events, and provided his testimony in a straight-forward and credible manner during direct examination, under cross-examination, when questioned further on certain aspects of his direct testimony or faced with an inconsistent fact from the medical documentation, his memory became very faulty, he would reply that he could not remember, and at times his testimony appeared to be evasive. A few examples are as follows: the reasons for him being terminated from ATS, working part-time at the Dollar Store, and selling marble at a flea market with his sons on weekends.

I find it very difficult to understand how these unique facts could be reported by medical practitioners after they assessed the Applicant, and the Applicant does not remember telling them these things or recall these events. I also note the Insurer highlighted several examples where the

[18] *General Accident Insurance Company and Violi* (Appeal P99-00047, September 27, 2000), p. 5.
[19] *Ali and Ferozuddin and Certas* (FSCO A13-002459, March 23, 2016), para. 42.

Applicant reported information to assessors that proved to be inconsistent with either his testimony or his reporting in subsequent medical assessments.

Non-Earner Benefit

The only witness who provided evidence in support of this benefit was the Applicant and his evidence was not persuasive and was at times unreliable. I note that there is conflicting medical documentation on file; some documentation shows he was essentially unable to carry on with his "normal life" prior to the May 12, 2012 accident, some note it was after the 2012 accident, and other documentation notes he is still able to carry on with his normal life now. As well, the medical documentation is conflicting on exactly when the Applicant claimed he was no longer able to participate in family activities and his religious practices. Based on the above, the Applicant has not proven on a balance of probabilities that he is entitled to the non-earner benefit as a result of the May 12, 2012 accident.

Medical Benefits & Cost of Examinations

There was only testimony provided by the Applicant with respect to the psychological treatment plan in dispute. It consisted of the Applicant explaining that he found psychological treatment helpful, and since not receiving psychological treatment he believes he loses his temper now and becomes angry with his family over small things. There was no corroborating evidence from other witnesses, including any health practitioners, on these issues.

Based on the above and due to no evidence being provided with respect to the other treatment plan and assessments, I find the Applicant has not met the onus of establishing that the disputed benefits are reasonable and necessary.

EXPENSES:

The parties are encouraged to resolve the issue of expenses for this matter on their own. If they are unable to do so, they may schedule an Expense Hearing in writing before me according to the provisions of Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Marshall Schnapp
Arbitrator

September 6, 2017
Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A14-007110

BETWEEN:

MOHAMMAD RAFI

Applicant

and

AVIVA CANADA INC.

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario *Regulation 664*, as amended, it is ordered that:

1. Mr. Rafi is not entitled to receive a non-earner benefit.
2. Mr. Rafi is not entitled to receive the medical benefits being claimed.
3. Mr. Rafi is not entitled to the cost of examinations being claimed.
4. Mr. Rafi is not entitled to interest for any overdue payments of benefits
5. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Marshall Schnapp
Arbitrator

September 6, 2017
Date