LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels enmatière de permis et des normes Ontario

Tribunal File Number: 17-001023/AABS

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:

G. Z.

Applicant

and

Aviva Insurance

Respondent

DECISION

ADJUDICATOR: **Chris Sewrattan**

APPEARANCES:

Representative for the applicant: Rajiv Kapoor

Counsel for Aviva: Alexander Hartwig

HEARD: Written Hearing: **July 26, 2017**

Overview

[1] The applicant was involved in a motor vehicle accident on October 24, 2015. The applicant applied for a number of automobile accident benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*"). Aviva Insurance Company ("Aviva") denied payment for some of the

benefits. The applicant appeals to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for the payment of those benefits.

Issues in Dispute:

[2] The following issues are in dispute before the Tribunal:

1. Is the applicant entitled to receive a weekly income replacement benefit in the amount of $400.00 per week for the 26-week period commencing October 31, 2015 and ending April 23, 2016?

2. Is the applicant entitled to receive a medical benefit in the amount of $758.62 for chiropractic services, recommended by Dr. Jit Pawan in a Treatment Plan dated November 27, 2015?

3. Is the applicant entitled to receive a medical benefit in the amount of $1,867.29 for chiropractic services, recommended by Dr. Jit Pawan in a Treatment Plan dated February 11, 2016?

4. Is the applicant entitled to receive a medical benefit in the amount of $1,196.94 for psychological services, recommended by Dr. Natasha Browne in a Treatment Plan dated March 10, 2016?

5. Is the applicant entitled to receive a medical benefit in the amount of $2,000 for an orthopaedic assessment, recommended by Dr. Khal Efala in a Treatment Plan dated February 24, 2016?

6. Is the applicant entitled to payment for the cost of examination in the amount of $1,542.88 for an attendant care assessment, recommended by Dr. Jit Pawan in a Treatment Plan dated February 11, 2016?

7. Is the applicant entitled to interest on any overdue payment of benefits?

8. Is Aviva entitled to costs under Rule 19.1?

Result:

[3] The applicant is only entitled to payment for the chiropractic services in the respective amounts of $758.62 and $1,867.29. Interest must also be paid on these amounts in accordance with s. 51 of the *Schedule*.

[4] The applicant's other four claims are dismissed.

[5] Aviva is not entitled to costs under Rule 19.1.

Discussion

1. Is the applicant entitled to receive a weekly income replacement benefit in the amount of $400.00 per week for the 26-week period commencing October 31, 2015 and ending April 23, 2016?

[6] The applicant is not entitled to an Income Replacement Benefit because between October 31, 2015 and April 23, 2016 he was substantially able to perform many of the essential tasks of his pre-accident employment. In order to receive an income replacement benefit, the applicant must prove that, as a result of the accident, he suffered a substantial inability to perform the essential tasks of his pre-accident employment. The applicant's claim can be analyzed in three parts:

1. What were the essential tasks of the applicant's pre-accident employment?

2. Did the accident cause his impairments ("causation"), and if so, to what extent?

3. During the relevant time period, did the applicant suffer a substantial inability to perform the essential tasks of his pre-accident employment?

[7] Looking at the first part, the applicant was employed as a Promotional Manager for a windows company prior to the accident. In his written submissions, the applicant submitted that his essential pre-accident tasks were the following:

- Travelling to residential homes (by automobile) to sell windows and related products
- Walking and carrying window samples and related products
- General learning ability to acquire and apply knowledge of selling techniques and to become familiar with products
- Verbal ability to communicate with customers when describing products
- Methodical interest in copying information to present sample products and catalogues, and to explain desirable qualities of products
- Social interest in persuading customers by soliciting sales of goods and services in private homes
- Directive interest in handling merchandise to canvass prospective customers; may develop lists of prospective customers or follow leads supplied by management, and may distribute advertising literature and provide samples.

Aviva submits that the applicant did not provide an evidentiary basis for this list of essential tasks. By contrast, Aviva commissioned a functional abilities evaluation and physical demands analysis from Ms. Breanna O'Grady. Ms. O'Grady produced a report for each assessment, both of which are in evidence. Each report is dated February 10, 2016. Ms. O'Grady's description of the applicant's essential tasks in her physical demands report dovetails with the list provided in the applicant's submissions, particularly with respect to the task of driving. As I will explain below, the applicants' claim for an income replacement benefit fundamentally fails because he could drive during the relevant time period. As a result, the issue of whether the applicant's list of pre-accident activities is in evidence is inconsequential. I accept and rely upon the applicant's list of essential tasks. There is no prejudice to Aviva in doing so.

[8] Turning to the second part, causation, I am going to assume that any physical inability to perform an essential task of pre-employment activity was caused by the accident. Like the issue of the applicant's essential pre-accident tasks, this issue is inconsequential at the end of the analysis. My decision turns on the fact that the applicant has the substantial ability to perform many essential pre-accident employment tasks.

[9] The third part of analysis is the most important in this case. I am not convinced that the applicant suffered a substantial inability to perform the essential tasks of his pre-accident employment between October 31, 2015 and April 23, 2016. It is clear from two sources that one of the most important of the applicant's pre-accident essential tasks was to drive to locations to sell windows. The two sources that provided this information are the applicant's list of pre-accident tasks and Ms. O'Grady's physical demands report. I find that the applicant was able to drive during this period because he told Dr. Woods. Dr. Woods is a psychologist who was retained by Aviva to assess the applicant. The assessment was conducted on February 10, 2016. During the assessment, the applicant advised Dr. Woods that the he can drive. He further advised that he does not enjoy driving because of the accident, but he still prefers it over being a passenger.

[10] The applicant can perform other essential tasks of his pre-accident employment. He can physically carry windows around. I arrive at this conclusion from Ms. O'Grady's functional abilities evaluation report. The report describes the applicant's ability to push and pull objects that are consistent with carrying windows around for a sales purpose. The only relevant physical task the applicant was unable to complete was lifting more than 5 pounds to his waist from the floor. This observation is inconsistent, however, with the applicant's demonstrated ability during the evaluation to push 50 pounds and pull 110 pounds. Due to this inconsistency, I do not accept on a balance of probabilities that the applicant is unable to lift more than 5 pounds from the floor.

[11] Another source of information on this issue is the applicant's Reply Submissions, in which the applicant's suggests that he told a number of sources that he was unable to perform his essential pre-accident employment tasks

[12] I prefer Ms. O'Grady's analysis over the applicant's self-reports on this issue. Ms. O'Grady's analysis is transparent about the tests she conducted, the results gleaned, and the conclusions drawn from those results. Ms. O'Grady's analysis is more reliable than the applicant's self-reports. Turning back to whether the applicant can lift heavy objects, even if I accept that the applicant cannot lift more than 5 pounds from the floor, the fact remains that he can drive and push and pull objects in a manner that would allow him to carry windows around. To be eligible for an income replacement benefit, the applicant must be substantially unable to perform all of the essential tasks of his pre-accident employment. In reality the applicant can drive and carry windows, which are 2 essential tasks of pre-accident employment.

[13] The applicant indirectly submits that his psychological condition prevented him from substantially *performing* the essential tasks of his pre-accident employment. In the context of this submission, the word "substantial" refers to the applicant's ability to physically perform a task without undue psychological pain. It is not enough that the applicant can physically perform an essential task. He must be able to do so without experiencing psychological anguish.

[14] To this end the applicant points to a psychological assessment from Dr. Sedigheh Nasi. Dr. Nasi diagnosed the applicant with a number of psychological disorders. Dr. Nasi also documented the anguish that the applicant experiences from driving. I do not need to go into the details of Dr. Nasi's findings too much because Aviva convincingly challenges the credibility of this submission. The applicant was involved in a subsequent motor vehicle accident in 2016. Aviva requested that the applicant disclose the accident benefit file for that accident so that, among other things, Aviva could determine whether at the time of the accident the applicant was driving for a business or leisure purpose.[1] The applicant has not disclosed the accident benefit file. There is no indication whether he was driving for a business or leisure purpose. If he was driving for a leisure purpose, it would lend great doubt to the applicant's claim that he experiences psychological anguish while driving to the extent that he is substantially unable to perform that task. I draw a negative inference on any issue relating to the effect of the applicant's psychological condition on his ability to perform an essential task of his pre-accident employment because of the applicant's failure to disclose the 2016 accident benefits file to Aviva. As a result, I am not convinced on a balance of probabilities that the applicant's

[1] The applicant returned to work in May 2016. On May 2, 2016 the applicant became self-employed, providing information technology services. The time period in which the applicant was self-employment is not captured in the income replacement benefit claim before the Tribunal.

psychological condition renders him substantially unable to perform his pre-accident essential employment tasks.

[15] For completeness, I will address the submission raised by the applicant that I find unconvincing. The applicant submits that reports prepared by the practitioners Aviva retained should not be relied upon because the practitioners did not take into consideration notes from the applicant's family physician and treating practitioners. The unconsidered notes indicate further physical and psychological injuries that the applicant has suffered over time, including before the accident.

[16] The applicant's argument misses the mark for a couple of reasons. The applicant did not disclose the notes of his family doctor and treating practitioners in a timely manner to Aviva so that the professionals Aviva retained could review the documentation. I appreciate that Aviva has an ongoing duty to adjust its file. However, if the applicant wanted Aviva's practitioners to consider his family doctor's and treatment practitioner's notes before their respective examination, he ought to have disclosed the notes to Aviva head of time. In any event, in the context of an income replacement benefit claim, I am concerned with function, not injury. The injury that an applicant sustained as a result of a motor vehicle accident is only relevant to the extent that it informs the applicant's ability to function. This is why the third part of the analysis is concerned with the applicant's substantial ability to *perform* his essential pre-accident employment tasks. Even though the practitioners retained by Aviva did not know about all of the applicant's injuries, they were still able to comment on the applicant's ability to function. This is particularly relevant to Ms. O'Grady's analysis in her two reports. I rely heavily on her reports in reaching my conclusion. Ms. O'Grady's failure to consider the applicant's family doctor's and treating practitioner's notes does not detract from her analysis. Ms. O'Grady described the applicant's ability to function in relation to his essential pre-accident employment tasks. That is all she should be asked to do; that is all I require

[17] The applicant is not entitled to an income replacement benefit between October 31, 2015 and April 23, 2016.

2. Is the applicant entitled to receive a medical benefit in the amount of $758.62 for chiropractic services, recommended by Dr. Jit Pawan in a Treatment Plan dated November 27, 2015?

[18] The applicant is entitled to $758.62 for chiropractic services. It is reasonable and necessary for the applicant to use the chiropractic service as a method to reduce his pain and thereby improve his function. The applicant has proven his entitlement on a balance of probabilities.

[19] By way of background, the Treatment Plan for chiropractic services was for $2,958.62. Aviva partially approved the plan up to the Minor Injury Limit of $3,500. The Minor Injury Limit was eventually removed for reasons relating to the

applicant's psychological condition. Aviva has denied the remaining portion of payment of the chiropractic plan on the basis that the expense is not reasonable and necessary.

[20] The applicant submits that the outstanding payment for the chiropractic service is a reasonable and necessary expense because the service will allow him to manage and reduce the pain caused by his injuries, and thereby improve his function. In response, Aviva submits two reports by Dr. Gilbert Ye, a medical doctor. Dr. Ye was retained by Aviva to assess whether the proposed Treatment Plan is reasonable and necessary. Dr. Ye produced two reports, the first dated February 8, 2016 and the second dated April 4, 2016. The second report is the product of Dr. Ye receiving additional documents and reconsidering his February 8, 2016 report. In both reports Dr. Ye diagnosed the applicant with myofascial strains of the cervical and thoracolumbar spine.

[21] The applicant challenges the soundness of Dr. Ye's conclusions because Dr. Ye did not receive or consider medical reports showing that the applicant suffered from a number of pre-existing physical conditions as a result of a previous motor vehicle accident.

[22] Aviva raises a causation issue. Aviva submits that it is not responsible for improving the applicant beyond his pre-accident condition. If the applicant was injured before the accident, Aviva argues, it does not have to pay for treatment for the purpose of improving those pre-existing injuries beyond their pre-accident condition. Aviva does not cite any authority for this proposition.

[23] I agree that Aviva does not have to pay for treatment for the purpose of improving the applicant beyond his pre-accident condition. However, the purpose of the remaining payment for the chiropractic service is not intended to achieve this end. Rather, as I understand it, the chiropractic service is intends for the applicant to manage and reduce the pain he suffers as a result of the accident so that he can improve his function. Dr. Ye's two reports shows me that, clearly, the applicant has suffered from injuries as a result of the accident that is the subject of this hearing. It is reasonable and necessary for the applicant to be permitted to manage and reduce the pain arising from those injuries so that he may improve his function.

3. Is the applicant entitled to receive a medical benefit in the amount of $1,867.29 for chiropractic services, recommended by Dr. Jit Pawan in a Treatment Plan dated February 11, 2016?

[24] The applicant is entitled to $1,967.29 for chiropractic services. The payment is reasonable and necessary for the same reasons discussed in the last section.

[25] Dr. Ye issued a report dated April 12, 2016 in relation to this Treatment Plan. Dr. Ye concluded that payment was not reasonable and necessary for the vast

majority of the Treatment Plan. In Dr. Ye's opinion, the accident caused the applicant to experience symptomatology related to myofascial strains of the cervical and thoracolumbar spine. There were no objective clinical findings to suggest any active radiculopathy or myelopathy. Dr. Ye concluded that much of the treatment plan was not reasonable and necessary because "massage therapy will [not] provide any long lasting clinical benefit."

[26] The home-based portion of the Treatment Plan was deemed reasonable and necessary. This portion of the Treatment Plan was geared toward education. Payment for this portion was approved, leaving $1,867.29 remaining and the subject of this hearing.

[27] The purpose of the massage therapy portion of the Treatment Plan is to assist the applicant in managing and reducing his pain, thereby improving function. As in the last section, I deem this to be a reasonable and necessary goal in the circumstance. For the same reasons articulated in the previous section, the applicant has proven his entitlement to payment on a balance of probabilities.

[28] Parenthetically, I note that the applicant challenged Dr. Ye's qualifications in the applicant's Reply submissions. This is not a valid Reply submission because Aviva did not provide new information relating to Dr. Ye in its response submissions. If the applicant wanted to challenge Dr. Ye's qualifications he should have done so in his initial submissions. He is not allowed to split his case by introducing new arguments in Reply. I do not rely on the applicant's challenge to Dr. Ye's qualifications in making my decision.

4. Is the applicant entitled to receive a medical benefit in the amount of $1,196.94 for psychological services, recommended by Dr. Natasha Browne in a Treatment Plan dated March 10, 2016?

[29] The applicant is not entitled to payment for $1,196.94 in psychological services. He has failed to prove that the expense is more likely than not to be necessary. Given my conclusion, I do not need to determine whether the expense is reasonable.

[30] $1,196.94 is the outstanding portion of a partially approved Treatment Plan. Aviva approved 10 sessions of mental health therapy. The applicant seeks more than 10 sessions.

[31] I am not satisfied that the additional therapy sessions are necessary to treat the injuries caused by the October 24, 2015 accident. The applicant was involved in another motor vehicle accident on March 20, 2016. The Treatment Plan in dispute is dated March 10, 2016. Aviva submits that it is possible that the applicant is receiving psychological treatment through accident benefits for the 2016 accident. As noted earlier in paragraph 14 of this decision, Aviva requested the disclosure of the 2016 accident benefits file but the applicant did not comply.

Aviva's submission cogently arises from the evidence in this hearing. There is a reasonable possibility that the applicant is receiving psychological treatment through accident benefits for the 2016 accident. The applicant has not demonstrated through evidence that he is not receiving additional psychological treatment. In the specific circumstances of this case, he needs this evidence to sufficiently satisfy me on a balance of probabilities that payment for the psychological services is a necessary expense. I conclude that the applicant has not proven on a balance of probabilities that payment for the requested psychological services is necessary.

5. Is the applicant entitled to receive a medical benefit in the amount of $2,000 for an orthopaedic assessment, recommended by Dr. Khal Efala in a Treatment Plan dated February 24, 2016?

[32] The applicant is not entitled to a $2,000 payment for an orthopaedic assessment. He has not shown why the assessment is a reasonable and necessary expense for the specific injuries he suffered as a result of the accident.

[33] The applicant's submission on why the orthopaedic assessment is reasonable and necessary is an almost verbatim restatement of the Treatment Plan submitted by Dr. Khal Efala. In short, the claim is that the assessment will pave the way for the prescription of treatment that will reduce the applicant's pain. I do not quarrel with the assessment's objective. However, there is no indication – indeed, no submission – on why the assessment's objective is reasonable and necessary in light of the applicant's specific injuries. This alone prevents me from concluding that the orthopaedic assessment is a reasonable and necessary expense.

[34] Aviva retained Dr. Ye to determine if the expense is reasonable and necessary. In a report dated April 4, 2016, Dr. Ye again diagnosed the applicant with residual symptomatology related to myofascial strains of the cervical and thoracolumbar spine. Dr. Ye commented that that the applicant had already undergone a recent orthopaedic evaluation and had been appropriately followed up by his family physician. In Dr. Ye's opinion, an orthopaedic assessment was not reasonable and necessary. I am mindful that Dr. Ye did not consider the medical notes of the applicant's family doctor, which chronicle the injuries that he sustained in a previous accident. However, even if Dr. Ye is wrong in his analysis this does not make the applicant right. I cannot see why the applicant's injuries and his progress thus far render him a suitable candidate for an orthopaedic assessment. There may be a reason, but the applicant has not directed me to it.

6. Is the applicant entitled to payment for the cost of examination in the amount of $1,542.88 for an attendant care assessment, recommended by Dr. Jit Pawan in a Treatment Plan dated February 11, 2016?

[35] The applicant is not entitled to $1,542.88 in payment for an attendant care assessment. He has failed to prove that it is reasonable and necessary.

[36] The applicant's submissions are located at paragraph 21 of his factum. His submissions again consist of an almost verbatim restatement of the Treatment Plan prepared by Dr. Jit Pawan. The submissions tell me of what the attendant care assessment will consist. The submissions say says nothing of how the assessment is a reasonable and necessary expense in the applicant's circumstance.

[37] By contrast, Aviva retained Dr. Ye to conduct a paper review in relation to the requested attendant care assessment. In a report dated April 12, 2016, Dr. Ye advised that the applicant told him he was independent with personal care tasks. The applicant had functional range of motion in all areas about which he complained of pain.[2]

[38] The applicant's claim is dismissed because he self-reported that he is independent with personal care tasks and he has not shown me why an attendant care assessment is a reasonable and necessary expense in his particular circumstance.

7. Interest

[39] The applicant is entitled to interest on the outstanding payments of $758.62 and $1,867.29 for chiropractic services. Interest must be paid in accordance with s. 51 of the *Schedule*.

Costs for Aviva

[40] I decline to order costs in Aviva's favour. The applicant's conduct has not been exemplary but it does not rise to the level required to issue costs against an applicant under Rule 19.1. There have been alternative ways of addressing the concerns raised by Aviva.

[41] Aviva sought costs under Rule 19.1 on four grounds. First, the Tribunal's Order for this hearing directed the applicant to serve his submissions by June 28, 2017. The applicant emailed a copy of his material to Aviva one day after the deadline, on June 29, 2017. Aviva did not receive a hardcopy of the material until July 4, 2017.

[2] I reiterate that Dr. Ye's failure to consider some of the applicant's medical notes from his family doctor and treating practitioner does not seriously prejudice his ability to analyze the applicant's ability to function. Injury and function are distinct topics [assessments?].

[42] Second, the Tribunal's Order set a 15-page limit on written submissions. The submissions were to be double spaced and 12-point font. The applicant provided submissions within the page limit, but with 1.5 spacing. In large swaths of the submissions the applicant listed blocks of clinical notes with single spacing. In actuality, the applicant's submissions exceed the 15-page limit.

[43] Third, the Tribunal's Order directed for documents to be exchanged between the parties by June 14, 2017. Aviva requested specific documents at the case conference hearing. Aviva followed up with written requests in letters dated May 17 and June 13, 2017. Some of the outstanding documents include the accident benefits file for the accidents that precede and follow the accident that is the subject of this hearing; that is, the 2009 and 2016 accidents. These documents were not supplied.

[44] Fourth, the Tribunal's Order and Rule 9.2 of the Tribunal's *Rules* required both parties to serve a copy of all documents upon which they intend to rely at the hearing at least 10 days in advance. The failure to provide the requested documents runs afoul of the Tribunal's Order and Rule 9.2.

[45] Rule 19.1 costs are available when a party has acted unreasonably, frivolously, vexatiously, or in bad faith in a proceeding. The test is not easily met. The Tribunal's proceeding exists as a result of consumer protection legislation. Although the Tribunal will Order costs where they are deserved, given this proceeding exists as a result of consumer protection legislation, the Tribunal must also consider that costs can have a chilling effect on applicants who wish to use the Tribunal's appeal process. In this case, three of Aviva's four grounds for costs have some merit. The third and fourth grounds are pretty much two sides of the same coin. While the applicant's conduct is less then exemplary, it does not rise to the level of unreasonable or bad faith conduct to a sufficient degree to warrant to exceptional use of a costs.

[46] In addition, Aviva received a remedy in other ways. I have drawn negative inferences against the applicant more than once for failing to provide the 2009 and 2016 accident benefit files. The negative inferences were critical to my decision.

[47] The applicant's violation of the page limit for submissions was poor advocacy. I recognized and was upset with the violation even before reading Aviva's response submissions.

[48] In conclusion, the applicant failed in multiple ways to comply with the Tribunal's order for the hearing. The non-compliance was not severe enough to warrant the issuance of costs under Rule 19.1. The non-compliance was poor advocacy, however, and the applicant's submissions to the Tribunal were poorer as a result.

Conclusion:

[49] The applicant is entitled to payment for chiropractic services in the respective amounts of $758.62 and $1,867.29, plus interest. The applicant's four other claims are dismissed. Aviva is not entitled to costs under Rule 19.1.

Released: 24/10/2017

Chris Sewrattan,
Adjudicator