

**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**

Tribunal File Number: **16-002529/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:

J.S.

Applicant

And

Aviva General Insurance Company

Respondent

DECISION

Adjudicator: Sandeep Johal

APPEARANCES:

Counsel for the Applicant: Afsoun Amirsolaimani

Counsel for the Respondent: Alexander Hartwig

Heard in-person on: April 19, 2017

INTRODUCTION:

1. The applicant was injured in an automobile accident on December 11, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule* – Effective September 1, 2010 (the "Schedule").
2. The applicant submitted an application for dispute resolution services to the Licence Appeal Tribunal - Automobile Accident Benefits Service (AABS) (the "Tribunal").

3. The Tribunal held a case conference on December 20, 2016 and the matter proceeded to an in-person hearing.

ISSUE IN DISPUTE

4. The following issue is to be determined at the hearing:
 - a. Is the applicant entitled to receive a medical benefit in the amount of \$2,920.62 for physical therapy as detailed in a treatment and assessment plan dated August 4, 2016 as recommended by Rehabilitation First Inc.?

RESULT

5. Based on the totality of the evidence before me, I find that the applicant is not entitled to payment for the physical therapy services requested in the treatment plan dated August 4, 2016.

PRELIMINARY ISSUES

6. Before the in-person hearing commenced, the respondent raised two preliminary issues which were addressed at the hearing orally and I will summarize them here briefly.

PREMATURE APPLICATION TO THE TRIBUNAL

7. The respondent took the position that the applicant's application should not have been commenced on August 26, 2016 as their letter dated August 24, 2016 was not a denial letter. The respondent's position is that their letter dated September 23, 2016 is the official denial date.
8. After hearing the submissions of the parties the respondent's preliminary issue motion is denied. The respondent's response to the Tribunal application was not due until after they had received their insurer examination report and further, the respondent had opportunities to bring a motion to have the preliminary issue determined prior to the hearing date. The case conference was conducted in December, 2016 and this issue could have been raised at that time, or it could have also been raised by way of a formal notice of motion at any time between the case conference date of December, 2016 and before the hearing date of April 19, 2017. The respondent failed to raise the issue in advance despite ample opportunity to do so and I do not find there to be any prejudice to the respondent.

EXCLUSION OF OCCUPATIONAL THERAPY WITNESS OF THE APPLICANT

9. The respondent stated that the specific name of the occupational therapist was not listed in the witness section of the Order dated January 3, 2017 and therefore the witness should be excluded. The preliminary issue motion is denied. There is only one treatment plan in dispute and it was signed by Allison Schmidt who is the person giving evidence. The Order required all documentation to be provided by a certain date and the respondent is in agreement that the applicant was in compliance with respect to the dates. The fact that the applicant submitted more documentation than they intend to rely upon for the hearing is not prejudicial to the respondent.

ANALYSIS

10. The onus is on the applicant to prove on a balance of probabilities that the treatment plan being requested is reasonable and necessary. The applicant relies on the evidence provided by his own in-person testimony and from the evidence provided by his occupational therapist, Allison O'Neill (also known as Allison Schmidt). The respondent relies on the evidence of the insurer examination doctor, Dr. Israel, an orthopedic surgeon.

APPLICANT'S EVIDENCE

11. The applicant's first witness was Ms. Allison O'Neill who has been a member of the Occupational Therapists of Ontario since 2012 and began practicing as an occupational therapist that same year. She currently sees about four to eight patients a week.
12. She met the applicant at the Rehabilitation First clinic around February or March of 2016 to help him with his ankle and back pain. She was also helping him emotionally as he was overwhelmed with his recovery.
13. On August 4, 2016 the treatment and assessment plan in dispute for this hearing was submitted to the respondent. Ms. O'Neill testified that the plan was to help manage the applicant's ankle pain and also his feelings of anxiety in leaving his house.
14. Ms. O'Neill testified that the services to be provided to the applicant under the treatment and assessment plan was to go with him into the community, such as to a coffee shop or to mini-golf in order to help him with his difficult situations of being in public. This was to be done for one and half hours at a time, twice a week.
15. Ms. O'Neill referred to her report dated February 14, 2017, marked as exhibit 23 for this hearing. In her report, she notes that she provided support to the applicant in

completing his Ontario Disability Support Program form (“ODSP”) as he would become overwhelmed trying to navigate the process.

16. Ms. O’Neill’s recommendations on page 4 of her report are that the applicant continues to suffer physical and emotional difficulties and he has difficulty completing higher level cognitive tasks. As a result, she recommends participation in occupational therapy sessions to increase his functional tolerance for community based activities and continuing to implement a consistent routine. She does not provide any recommendations about his physical pain and how it can be treated.

CROSS EXAMINATION OF OCCUPATIONAL THERAPIST

17. During cross-examination, Ms. O’Neill agreed that she is not a doctor and cannot offer an opinion on the applicant’s bone fracture and whether it has healed. She also testified that part 6 of the treatment and assessment plan lists his injuries as “pain in joint, ankle and foot”, “fracture of lower leg, including ankle”, “acute stress reaction”, “symptoms and signs involving emotional state” and “difficulty walking not elsewhere classified.” She testified that this list is only a list of the applicant’s injuries and not a proposal for treatment.
18. The proposed treatment is listed in part 12 of the treatment and assessment plan and the recommendation is for “exercise of multiple body sites”, the rest is seeking reimbursement for travel and document preparation. Ms. O’Neill testified that she is aware that if she submitted the treatment and assessment plan for psychological injuries, there would have to be psychological codes entered into the form in part 12 and that she is also aware that the form only lists “exercising body sites” and that it is not a form of treatment for the applicant’s psychological issues.
19. I do not find the evidence of Ms. O’Neill to be compelling or persuasive evidence in support of the treatment and assessment plan for physical therapy. Her assessment of the applicant is that he suffers from anxiety and her recommendations are to help him reintegrate into the community. The treatment and assessment plan does note that one of the goals is to help the applicant from an emotional perspective, however, the actual treatment being recommended does not support anything other than physical rehabilitation.

APPLICANT’S TESTIMONY

20. The applicant testified about the injuries he suffered as a result of the accident and that he was unable to do any daily activities on his own after the accident. He gave details of the accident and that he broke a bone in his foot and was told by his

treatment providers that there is more to healing than just the bone, there are ligaments and muscles that require treatment.

21. The applicant testified that his foot was in a cast for approximately five weeks and he still feels he has limitations on how long he can be on his feet since the accident. He does not feel fully recovered from his injuries and he still has ankle pain, back pain and continues to suffer from nightmares.
22. He notes that he does not have any swelling in his ankle but he does feel pain and sometimes it is a sharp and dull pain and his sessions with his occupational therapist, Ms. O'Neill, have helped him. However, once the treatments were stopped by the respondent, the applicant feels his condition has worsened.
23. The applicant states that he has been trying to do treatments on his own in the gym since the respondent stopped paying for the treatments, however, he does not know what he should or should not be doing and whether the exercises he is doing would help him or hurt him even more.
24. The applicant testified that he does recall visiting Dr. Israel; at the request of the respondent and that he felt scared going there and was not sure why he had to attend. He testified that he explained to Dr. Israel his current symptoms and his psychological problems. He notes that Dr. Israel completed a physical examination of him including his foot.
25. The applicant stated he was diagnosed with psychological issues before the accident and they have become worse since the accident. No evidence was provided as to when the psychological diagnoses was made or by whom.

CROSS EXAMINATION OF THE APPLICANT

26. During cross-examination, the applicant testified that he was able to return to biking and that he was now able to jog up to three and half kilometers. The applicant was directed to exhibit 35 which was a Rehabilitation Therapy Progress Report from Rehab First dated June 6, 2016 which was prepared by Alexandra Campbell, a rehabilitation therapist and Lyndsay Orr, the regional manager of the clinic. In that report, the applicant acknowledged that he was able to alternate between running for two minutes and then walking for one and a half minutes for a total of four and half kilometres.
27. I find the applicant to be credible and honest in his testimony, however, the evidence the applicant provided predominantly refers to how his occupational therapist has helped him with his anxiety. According to Ms. O'Neill's report, as well as the report from Alexandra Campbell and Lyndsay Orr, all three were helping him with his

anxiety and reintegration into the community. The assistance provided by the Occupational Therapist and by the personnel at Rehab First are consistent in the description of concentrating predominantly on the applicant's anxiety and reintegration into the community, rather than a plan for physical therapy. In this regard, I find the treatment plan which deals only with physical treatment to be neither reasonable nor necessary.

RESPONDENT'S MEDICAL EVIDENCE

28. Dr. Israel is an orthopedic surgeon and has been a medical doctor since 1968. He has been completing assessments since 1972 but more recently for lawyers and insurers and currently completes roughly two assessments per week.
29. Dr. Israel assessed the applicant on two different occasions and he acknowledges that the applicant advised him about his mental health issues but because mental health is not a practice area of Dr. Israel's he did not ask further about it.
30. Dr. Israel did complete an examination of the applicant and testified that according to his review of the medical notes, the applicant sustained an uncomplicated fracture of the left fibula. During the physical examination, the applicant was able to walk comfortably, on the tips of his toes and heels without difficulty. He could squat fully and come up from the squatting position well and his movements were pain-free and unrestricted.
31. Dr. Israel's examination report, dated September 14, 2016 notes that he found mild fullness throughout the left ankle, but no oedema. The dorsi and plantar flexion of the left ankle was full and equal to the opposite side. He noted some swelling but no tenderness in the area and no neurological or strength deficits bilaterally.
32. Dr. Israel's notes that the applicant's right elbow contusion has healed, however, that the applicant reports some mild persistent symptoms in the left ankle and the lower back. The doctor did not find correlating objective findings. He notes that the applicant has returned to most of his activities and there are no objective findings that would support recommendations for restrictions of activities. For these musculoskeletal problems, Dr. Israel opines that the applicant should continue with his self-directed activity program and does not need further facility-based treatment.

CROSS EXAMINATION OF DOCTOR ISRAEL

33. During cross-examination, Dr. Israel's opinion as an orthopaedic surgeon, stated that the respondent sought his opinion regarding the reasonableness and necessity of the treatment proposed in the disputed plan. He found the treatment to be no longer required and that the applicant's self-directed program was adequate at this point in his recovery from the physical injuries. He was asked to give his

professional opinion on the psychological component of the signs and symptoms described in Part 6 of the OCF-18. He stated he could not comment on the psychological component as he is not qualified in that discipline.

IS THE TREATMENT PLAN REASONABLE AND NECESSARY?

34. The treatment plan is for physical therapy and according to the respondent's independent medical examining doctor, Dr. Israel, the applicant's fracture has healed and no further treatment is required or necessary.
35. According to the testimony of the applicant, he has been able to resume his physical activities such as walking and running but his main complaint seems to be that of his anxiety in dealing with people and going out into the community. His occupational therapist has been helping him re-integrate back into society with the sessions he has been attending.
36. I prefer the evidence of Dr. Israel, over that of the applicant's occupational therapist for the following reasons: It is clear that the applicant suffers from anxiety issues and his treatment providers have been helping him to address those issues. However, the treatment plan in dispute provides only the recommendation for "exercise of multiple body sites". As this treatment plan is for physical therapy, I prefer the evidence of Dr. Israel over that of the applicant's occupational therapist, Ms. O'Neill's.
37. My finding is that the applicant has not convinced me on a balance of probabilities that this treatment plan for physical therapy is reasonable or necessary. I do acknowledge that the plan lists in addition to his physical injuries, his stress and emotional state, however, the proposed treatment the clinic is recommending is only for "exercise of multiple body sites." There is no mention of anything to treat his stress and emotional state.

CONCLUSION

38. Based on my above findings, the applicant is not entitled to the treatment and assessment plan for physical therapy as I am not convinced that the applicant has proved his onus that the plan is reasonable or necessary.
39. This application is dismissed.

Released: November 6, 2017



Sandeep Johal, Adjudicator