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: **18-011027/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:

S.K.

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

PANEL: **Jesse A. Boyce, Adjudicator**

APPEARANCES:

For the Applicant: Ernest H. Toomath

For the Respondent: Gina Nardella

HEARD: **In Writing on: October 29, 2019**

OVERVIEW

[1] The applicant, S.K., was injured in an automobile accident on June 8, 2017. S.K. sought various benefits from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the *"Schedule").*

[2] S.K. submitted treatment plans that were partially approved by Aviva, with disputed amounts outstanding. Aviva denied the remaining treatment plans submitted by S.K. on the basis that the examinations were not reasonable and necessary. S.K. disagreed and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute. A case conference was held but the parties were unable to settle the issues in dispute and, thus, proceeded to this written hearing.

ISSUES IN DISPUTE

[3] The issues are outlined in the Case Conference Order dated May 30, 2019:

a) Is the applicant entitled to receive a medical benefit in the amount of $977.66 for psychological testing recommended by Sports Medicine Rehabilitation in a treatment plan submitted on October 31, 2017 denied by the respondent on November 8, 2017?

b) Is the applicant entitled to receive a medical benefit in the amount of $448.83 for psychological services recommended by Sports Medicine Rehabilitation in a treatment plan submitted November 11, 2017 denied by the respondent on November 27, 2017?

c) Is the applicant entitled to receive a medical benefit in the amount of $3,323.00 for physiotherapy services recommended by Sports Medicine Rehabilitation in a treatment plan submitted February 13, 2018 denied by the respondent on February 23, 2018?

d) Is the applicant entitled to receive a medical benefit in the amount of $3,323.00 for physiotherapy services recommended by Sports Medicine Rehabilitation in a treatment plan dated August 9, 2018 denied by the respondent on September 17, 2018?

e) Is the applicant entitled to interest on any overdue payment of benefits?

f) Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

RESULT

[1] O. Reg. 34/10.

[4] I find S.K. is entitled to the cost of one of the treatment plans for physiotherapy in the amount of $3,323.00 as it is reasonable and necessary. Interest on this overdue amount is payable pursuant to s. 51.

[5] I find S.K. is not entitled to the cost of the second treatment plan for physiotherapy or the unapproved amounts from the psychological testing and psychological services treatment plans, as they are not reasonable and necessary. On the facts, I decline to order an award.

ANALYSIS

Are the treatment plans in dispute reasonable and necessary?

[6] Section 14 of the *Schedule* provides that an insurer is liable to pay for medical and rehabilitation benefits that are reasonable and necessary as a result of an accident. The applicant bears the onus of proving on a balance of probabilities that each treatment and assessment plan is reasonable and necessary.

Medical benefit in the amount of $977.66 for psychological testing

[7] I find that S.K. is not entitled to the remaining amount for psychological testing as she has not demonstrated why it is reasonable and necessary.

[8] In submissions, S.K. details her psychological impairments at length, arguing that these impairments, combined with a recommendation from a medical professional makes the treatment plan reasonable and necessary by default.

[9] In response, Aviva reiterates that it partially approved the treatment plan in the amount of $1,322.07 and what is in dispute is the remaining amount. Aviva based its partial approval on the IE Report of Dr. Moshiri, who determined what was a reasonable time for the assessment. Aviva argues that just because the Schedule provides for up to $2,000 for an assessment, that it is still the applicant's burden to prove that the full cost is reasonable and necessary and that S.K. has not proven that here.

[10] I agree with Aviva. First, the treatment plan is not particularized, so it is difficult to discern what is necessary for the testing in order to determine whether the cost for same is reasonable. Second, Aviva's approval was based on Dr. Moshiri's estimation that psychological testing should be allocated approximately 7.5 hours at a rate of $149.61 per hour, plus $200 for completion of the OCF-18, totalling $1,322.07. S.K. has not provided evidence or submissions to account for why the $977.66 discrepancy is reasonable and necessary on these calculations.

[11] In sum, I agree with Aviva that simply because the *Schedule* provides for a maximum amount, it does not necessarily follow that an applicant is automatically entitled to that maximum amount. In my view, Aviva's denial was based on reasonable time and monetary estimations, which S.K. was required to rebut. In this case, S.K. did

not provide evidence to justify entitlement to the amount in dispute, so I find the remaining unapproved portion is not reasonable and necessary.

Medical benefit in the amount of $448.83 for psychological services

[12] I find S.K. is not entitled to the remaining unapproved portion of the treatment plan as she has not demonstrated that it is reasonable and necessary.

[13] Again, in submissions, S.K. points to her numerous impairments, as well as the recommendations from her medical professionals, as evidence that the treatment plan for psychological services is reasonable and necessary.

[14] In response, Aviva submits that this plan was partially approved in the amount of $1,795.32 on the basis of Dr. Moshiri's determination that 12 one-hour sessions of psychotherapy at an approved rate of $149.61 would be reasonable and necessary to help S.K. overcome her adjustment disorder. Aviva argues that S.K. has not provided evidence to support her contention that the unapproved amount of $448.83 is reasonable and necessary for this goal.

[15] Again, I agree with Aviva. While I find S.K.'s impairments are documented throughout the file, I reiterate that it is her onus to prove that the amounts claimed are reasonable and necessary. I find she has failed to justify why the amounts above what Aviva has already approved are required. While the parties are only arguing over three, one-hour sessions, S.K.'s submissions do not speak to why 15 sessions are so needed instead of 12, do not address any of the plan's goals for the treatment or what the breakdown for the sessions will even be. Absent information to rebut Aviva's partial approval, I see no reason not follow Dr. Moshiri's recommendation and find the unapproved portion to not be reasonable and necessary.

$3,323.00 for physiotherapy services dated February 13, 2018

$3,323.00 for physiotherapy services dated August 9, 2018

[16] I find on the evidence that S.K. is entitled to the cost of one of the treatment plans for physiotherapy services, but not both, as further treatment is reasonable and necessary. The OCF-18s in evidence are identical, save for the dates.

[17] Here, again, S.K. points to her numerous impairments, as well as the recommendations from her medical professionals, as evidence that the treatment plan for physiotherapy is reasonable and necessary. Additionally, she argues that further treatment is reasonable and necessary based on the fact that Aviva removed her from the Minor Injury Guideline and approved a similar treatment plan at the case conference stage.

[18] In response, Aviva relies on Dr. Gelman's report which found that further passive therapies would not be beneficial to S.K. because she sustained largely minor sprain and strain-type injuries, that it was likely that she had achieved maximum medical

improvement and that physiotherapy and TENS applications were not contributing to her recovery.

[19] I find S.K.'s physical impairments are well-documented throughout the file and continue to persist. While I am alive to Dr. Gelman's determination that it is likely that S.K. has achieved maximal benefit from passive modalities like those identified in the plan, I find it eminently reasonable to allow S.K. one more opportunity to see if greater benefit can be achieved from a continued slate of treatment. Indeed, if further treatment and applications do not provide tangible benefit to S.K., then the parties have confirmation that passive modalities are not contributing to recovery and that S.K. has actually achieved maximal recovery, and the second treatment plan is then redundant. Finally, given that Aviva recently approved a nearly identical treatment plan, I find the costs listed are a reasonable and necessary expense to determine if S.K.'s physical impairments can be improved for more than a few hours.

Award

[20] S.K. claims entitlement to an award under s. 10 of *Ontario Regulation 664* on the basis that Aviva unreasonably kept her in the Minor Injury Guideline and withheld payment of benefits. Under s. 10, the Tribunal may issue an award of up to 50 per cent of the amount to which S.K. is entitled if the Tribunal finds that Aviva has unreasonably withheld or delayed payments because of its conduct.

[21] On the facts and evidence before me, I find an award is not appropriate. First, Aviva was within its rights under the *Schedule* to maintain its position that the Minor Injury Guideline applied until it had objective medical evidence of its own to challenge S.K.'s contention. Second, Aviva was also within its rights to take the position that certain treatment plans were not reasonable and necessary given S.K.'s impairments and the benefits approved to date. While S.K. may disagree, I find there was nothing improper about Aviva's handling of the file and, in my view, nothing amounting to unreasonable conduct or bad faith sufficient to warrant an award.

Interest

[22] Interest is payable on all overdue amounts, pursuant to s. 51 of the *Schedule*.

CONCLUSION

[23] I find S.K. is entitled to the cost of one of the treatment plans for physiotherapy in the amount of $3,323.00 as it reasonable and necessary. Interest on this overdue amount is payable pursuant to s. 51.

[24] I find S.K. is not entitled to the cost of the second treatment plan for physiotherapy or the unapproved amounts from the psychological testing and psychological services treatment plans, as they are not reasonable and necessary.

[25] On the facts, I decline to order an award.

Released: November 8, 2019

Jesse A. Boyce, Adjudicator