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

Citation: M.T. vs. Aviva general Insurance Company, 2020 ONLAT 19-003346/AABS

Released Date: 06/09/2020
File Number: 19-003346/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:

M.T.

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce**

APPEARANCES:

For the Applicant: Ramy Akladios

For the Respondent: Ramandeep Kaur Pandher

HEARD: **By way of written submissions**

OVERVIEW

[1] M.T. was injured in an automobile accident on September 9, 2017, and sought benefits from the respondent, Aviva, pursuant to the Statutory Accident Benefits Schedule - *Effective September 1, 2010 (the "Schedule").* Aviva denied certain benefits based on its determination that M.T. sustained predominantly minor injuries as a result of the accident that are treatable within the Minor Injury Guideline ("MIG"). M.T. disagreed and submitted an application to the Tribunal for resolution of the dispute.

ISSUES

[2] The following issues are in dispute:

a. Are the applicant's injuries predominantly minor injuries, as defined in s. 3 of the *Schedule*, subject to treatment within the $3,500.00 limit of the MIG?

b. Is the applicant entitled to receive a medical benefit in the amount of $3,327.60 for physiotherapy services, recommended by Dr. Hefford in a treatment plan submitted September 28, 2017 and denied by the respondent on October 5, 2017?

c. Is the applicant entitled to receive a medical benefit in the amount of $2,136.60 for physiotherapy services, recommended by Dr. Le in a treatment plan submitted November 17, 2017 and denied by the respondent on December 1, 2017?

d. Is the applicant entitled to receive a medical benefit in the amount of $1,301.96 for physiotherapy services, recommended by Dr. Hefford in a treatment plan submitted December 18, 2017 and denied by the respondent on December 20, 2017?

e. Is the applicant entitled to receive a medical benefit in the amount of $974.64 for physiotherapy services, recommended by Dr. Hefford in a treatment plan submitted February 13, 2018 and denied by the respondent on February 28, 2018?

f. Is the applicant entitled to payments for the cost of examinations in the amount of $1,230.92 for an Attendant Care Assessment submitted October 10, 2017 and denied by the respondent on October 24, 2017?

g. Is the applicant entitled to payments for the cost of examinations in the amount of $2,000.00 for a Psychological Assessment recommended by Dr. Shaul, submitted November 14, 2017 and denied by the respondent on December 1, 2017?

h. Is the applicant entitled to $200.00 for an intake charge submitted to the respondent February 5, 2018?

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

j. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?

RESULT

[3] I find M.T. has not met her onus to prove that her accident-related impairments warrant removal from the MIG. As the MIG limits have been exhausted, none of the treatment plans in dispute are reasonable and necessary. An award, costs and interest are not appropriate.

ANALYSIS

Applicability of the MIG

[4] The MIG establishes a framework for the treatment of minor injuries, as defined in s. 3(1) of the *Schedule*. Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to $3,500, although an applicant may escape the MIG if they can demonstrate that a pre-existing condition, documented by a medical practitioner, prevents maximal medical recovery under the MIG of if they prove that psychological impairments or chronic pain cause functional impairment that requires treatment outside of the MIG. It is the applicant's burden to establish entitlement to coverage beyond the $3,500 cap on a balance of probabilities.

[5] In support of her position, M.T. submits that her accident-related impairments—identified in submissions as lumbar sprain and strain, cervical degenerative disc disease, right shoulder sprain and strain, adjustment disorder with mixed anxiety and depressed mood, sleep disturbances and chronic pain—warrant removal from the MIG because, cumulatively, these impairments prevent her maximal medical recovery. Specifically, M.T. submits that her psychological diagnosis, chronic pain and pre-existing shoulder injury justify treatment beyond the MIG limits. To this end, she relies on the notes from her family physician, Dr. King,

various clinical notes and OHIP records, the psychological report of Dr. Shaul, an OCF-3 dated September 14, 2017 and Tribunal caselaw for support.

[6] In response, Aviva submits that M.T. sustained predominantly minor physical injuries as a result of the accident that are treatable within the MIG framework. Aviva submits that the mere presence of a pre-existing shoulder condition or osteoarthritis does not automatically remove an applicant from the MIG because there must be proof that these impairments prevent recovery, which M.T. has failed to provide. In a similar vein, Aviva casts doubt on the psychological report submitted by M.T., on the basis that no validity measures were conducted and there are no psychological complaints or referrals for same from her family physician after the accident. Aviva also argues that there is no dispute over chronic pain, as there was in the Tribunal caselaw provided by M.T., because there has been no diagnosis of same and there is no evidence of functional impairment. In support of its position, Aviva relies on the s. 44 reports of Dr. Sekyi-Otu, who did not identify any ongoing impairments requiring treatment beyond the MIG, and Dr. Ratti, who determined that M.T. did not suffer from a DSM-V psychological diagnosis that would warrant removal from the MIG.

[7] On the evidence, I find M.T. has not met her burden to prove that her accident-related impairments justify treatment beyond the MIG. The OCF-3 following the accident lists physical impairments that fall squarely within the definition of minor injuries under the *Schedule*, as they are sprain and strain injuries and headaches. On this basis, I question how the author of the OCF-3 determined that M.T. was substantially unable to perform her work duties where she returned to work almost immediately following the accident and there are no contemporaneous reports of impairment with daily activities. On review, I also query the expected recovery period of more than 12 weeks on the basis of sprain and strain injuries and the emotional and sleep disturbances that M.T.'s chiropractor identified as the barriers to recovery.

[8] In submissions, M.T. asserts that the "right shoulder pain, which is pre-existing, acted as a barrier to recovery because it was noted immediately after the accident and M.T. regularly complained of it immediately after the accident." However, the OCF-3 also does not indicate any pre-existing barriers to recovery, despite M.T. urging that pre-existing conditions affect her, and only mentions a shoulder strain/sprain. On review of the notes of Dr. King in the months prior to the accident, while there is mention of joint pain in her shoulders, back and knees, it remains unclear how the right shoulder pain acts as a barrier to M.T.'s recovery, as alleged. Indeed, Dr. King's diagnosis on September 18, 2017 was cervical and lumbar strain and a chest contusion—there is no mention of a

shoulder injury and nothing linking it to a pre-existing issue—and the note indicates that M.T. was attending physiotherapy on her lawyer's suggestion, not on Dr. King's, as asserted. The x-ray report of the right shoulder from April 2018 found no evidence of injury or arthritis and was a normal study. There are two handwritten office visit notes in evidence that date back to 2013 and 2014 that, while largely illegible, do seem to mention shoulder and knee pain. The notes may be from Polyclinic, but it is unclear who authored them. M.T. does not speak to this evidence in submissions or demonstrate how this documented shoulder or knee pain prevents maximal medical recovery under the MIG. Further, M.T. does not provide authority for the contention that age-related conditions like osteoarthritis or disc degeneration warrant removal from the MIG.

[9] With regards to chronic pain, M.T. is correct that removal from the MIG for chronic pain does not necessarily require a diagnosis of chronic pain or chronic pain syndrome by a physician. The Tribunal has found that where pain is severe and constant and causes functional impairment, an applicant may be removed from the MIG. However, contrary to M.T.'s submissions, I agree with Aviva that the evidence does not support chronic pain that causes functional impairment in this case. On review of the medical evidence, while there are sporadic complaints of pain every few months in Dr. King's notes, M.T. has not demonstrated that this pain is related to the accident and not from her osteoarthritis or her work at a sewing machine in a factory, both of which Dr. King opines is the cause of her shoulder and back pain. In the same vein, I find, even on a balance of probabilities, that M.T. has not furnished evidence to demonstrate that this pain is of a severity that causes functional impairment and is constant. While I am alive to her self-reports of pain to Dr. Shaul that the pain can rise to 9/10, there must be more evidence of functional impairment than subjective self-reporting. Like the x-ray report mentioned above, in the x-ray and ultrasound report from February 2019, the lumbar spine was normal and there was only mild osteoarthritis observed in M.T.'s shoulder.

[10] Against these facts, I prefer the s. 44 reports of Dr. Sekyi-Otu, orthopaedic surgeon, from January 2018 and January 2020. These reports followed physical examinations that did not identify any ongoing impairments in M.T. requiring treatment beyond the MIG, as her range of motion was normal despite pain complaints of 5/10 in her neck and shoulder and 6/10 in her lower back and she had resumed her work activities after the accident and continued to do so. I am alive to M.T.'s reply submissions that Dr. Sekyi-Otu's report and addendum do not accurately capture her impairments because he was not in possession of certain records and diagnostic reports. However, the Tribunal was not provided with a competing report or any compelling medical evidence from M.T. to speak

to how M.T.'s impairments and pain as a result of the accident cause functional impairment and prevent maximal medical recovery under the MIG in order to rebut Aviva's position.

[11] With respect, while I have no reason to doubt M.T.'s self-reporting, pain is subjective and, as noted, her actual physical impairments from the accident were diagnosed as quite minor by separate physicians and there appears to be other factors in play that cause her pain that are unrelated to the accident, namely her well-documented osteoarthritis, disc degeneration and her means of employment. All of the other diagnostic imaging reports in evidence reveal normal study. Put another way, although a diagnosis of chronic pain is not required for removal from the MIG on that basis, in the absence of a diagnosis indicating that M.T.'s chronic pain prevents maximal recovery, I agree with Aviva that the evidence put forward by M.T. falls short of meeting her burden.

[12] Lastly, M.T. asserts that her psychological diagnosis warrants removal from the MIG because it prevents her maximal medical recovery and psychological impairments are not captured by the MIG. She relies on the report of Dr. Shaul/Ms. Ilios, who determined that she sustained an Adjustment Disorder with Mixed Anxiety and Depressed Mood as a result of the accident. M.T. submits that her psychological diagnosis came as a result of having her sleep and energy levels affected post-accident and that she started feeling frustrated, angry and sad. Aviva submits that Dr. Shaul's report should not be afforded any weight because of the dearth of psychological complaints in the file, that the diagnosis was not based on any validity measures and it is not supported by the findings.

[13] On review of the report, I agree with Aviva. Putting aside the fact that there were no validity measures identified in the report, M.T.'s testing still only resulted in minimal levels of depression, anxiety and distress. The report indicates that as a result of her psychological impairments from the accident, M.T. has "experienced a dramatic lifestyle change, resulting in difficulty adjusting, characterized by a variety of symptoms of depression and anxiety." Again, with great respect, the Tribunal was not directed to evidence of a "dramatic lifestyle change" or difficulty adjusting to life post-accident in line with Dr. Shaul's reporting. M.T.'s own self-reporting to various assessors does not indicate a dramatic turn and her submissions do not reveal any changes in her daily activities or work life as a result of these psychological impairments. The referral to Dr. Shaul seems to have come from the OCF-3 authored by a chiropractor listing "other anxiety disorder" and "other sleep disorder" despite there being no complaints of same to Dr. King. Further, I find Dr. Shaul's report—which was not prepared until May 2019, nearly two years post-accident—is not consistent with the bulk of the file.

[14] On review of M.T.'s family physician's notes, there are no notations of psychological or emotional stressors post-accident. There is no indication that a psychological impairment has caused a dramatic lifestyle change for M.T. and at no point does Dr. King refer M.T. for a psychological assessment or treatment in the three years post-accident. In this vein, despite Dr. Shaul's diagnosis that her psychological issues are outside of the MIG, it does not appear that M.T. ever sought treatment for her psychological issues or followed through with Dr. Shaul's recommendation. For these reasons, I prefer the s. 44 reports of Dr. Ratti from January 2018 and 2020, who determined that M.T. did not suffer a DSM-V diagnosis as a result of the accident. This conclusion was based on psychological testing and validity measures and M.T.'s own self-reporting that she gets 7-8 hours of sleep per night, can perform her self-care tasks independently, that her social life is normal, that her memory and concentration are normal, that she continues to drive normally, does not experience nervousness in a vehicle, is currently working full-time on normal duties and that her family relationships remain strong. Given the dearth of psychological complaints in the rest of the file, I see no reason to interfere with Aviva's determination based on Dr. Ratti's report in favour of Dr. Shaul's.

[15] For these reasons, I find M.T. has failed to meet her burden to prove that her accident-related impairments warrant treatment beyond the MIG.

Are the treatment plans in dispute reasonable and necessary?

[16] Under s. 15, an insurer is liable to pay for all reasonable and necessary expenses incurred by or on behalf of an insured as a result of the accident. The applicant bears the onus of proof. Having determined that M.T. has not satisfied her burden to prove that her accident-related impairments warrant treatment beyond the MIG, an analysis of whether the various treatment plans in dispute are reasonable and necessary is not required. It is the Tribunal's understanding that the MIG limits have been exhausted and it remains unclear whether M.T. has even submitted the OCF-23 form requested by Aviva for the first block of treatment she did incur. Even if the Tribunal were to have found M.T. out of the MIG, I find her substantive submissions on the reasonableness and necessity of the treatment plans in dispute fall well short of meeting her burden of proof as they defer entirely to the OCF-18s and, given that M.T. returned to work, continues to work without modifications and reports no difficulties with housekeeping or personal care, it is unclear why an attendant care assessment would be reasonable and necessary for impairments within the MIG.

Award, Costs and Interest

[17] M.T. claims entitlement to an award under s. 10 of O. Reg. 664 on the basis that Aviva unreasonably kept her within the MIG despite her incurring treatment and because "its generic reasons for denial attest to a lack of due diligence." Under s. 10, the Tribunal may award up to 50% of the total benefits claimed if it determines that an insurer unreasonably withheld of delayed payment of a benefit. On review, I find an award is not appropriate. Ultimately, I agree with Aviva's determination on the evidence that the MIG is applicable and, since no benefits are overdue, it follows that there cannot be an award.

[18] M.T. also sought her costs in this proceeding, pursuant to Rule 19 of the Tribunal's *Common Rules of Practice and Procedure*, submitting that Aviva acted frivolously, unreasonably and in bad faith in denying her claims and "turning a blind eye to an objective diagnosis of degenerative disc disease and osteoarthritis." Again, I find no evidence that Aviva acted unreasonably, frivolously, vexatiously or in bad faith in this proceeding to warrant a costs award where M.T. was also not successful.

[19] Finally, as no benefits are overdue, it follows that interest is not applicable under s. 51 of the *Schedule*.

CONCLUSION

[20] I find M.T. has not satisfied her onus to prove that her accident-related impairments justify removal from the MIG. As the MIG limits have been exhausted, none of the treatment plans in dispute are reasonable and necessary. An award, costs and interest are not appropriate.

Released: June 9, 2020

Jesse A. Boyce
Adjudicator