

**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: **C.M.C. vs. Aviva Insurance Canada, 2019 ONLAT 18-008644/AABS**

**Date: November 5, 2019**

**Tribunal File Number: 18-008644/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:

**C.M.C.**

**Appellant**

**and**

**Aviva Insurance Canada**

**Respondent**

**DECISION**

**PANEL:** Shannon Braun, Adjudicator

**APPEARANCES:**

For the Appellant: C.M.C., Applicant

Jeton Memeti, Paralegal

For the Respondent:

Ramandeep Pandher, Counsel

**HEARD:** In Writing: **August 19, 2019**

## OVERVIEW

- [1] C.M.C. (“the applicant”) was injured in an automobile accident (“the accident”) on April 15, 2016 and sought insurance benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*<sup>1</sup> (the “*Schedule*”).
- [2] Aviva Insurance Canada (“the respondent”) has determined that the applicant’s impairments are not “minor” as defined by the *Schedule* or subject to limited treatment coverage within the *Minor Injury Guideline*. However, the respondent denied the applicant’s claim for physiotherapy treatment as not reasonable and necessary.
- [3] The applicant appealed that denial to the Licence Appeal Tribunal – Automobile Accident Benefits Service (“the Tribunal”). The parties were unable to resolve the dispute and this written hearing was scheduled.

## ISSUES

- [4] The issues in dispute that I must decide are:<sup>2</sup>
  - i. Is the applicant entitled to a medical benefit in the amount of \$3,539.72 for physiotherapy services recommended by LV Rehabilitation in a treatment plan (OCF-18) submitted on January 19, 2018 and denied on March 20, 2018?
  - ii. Is the applicant entitled to interest on any overdue payment of benefits?
  - iii. Is the applicant entitled to an award under Ontario Regulation 664 on the basis that the respondent unreasonably withheld or delayed the payment of benefits?

## RESULT

- [5] I find the applicant has established on a balance of probabilities that the treatment plan in dispute is reasonable and necessary. The applicant is entitled to the medical benefit claimed for physiotherapy services as well as interest owing any overdue payments in accordance with the *Schedule*.
- [6] I find the applicant is not entitled to an award under section 10 of *Ontario Regulation 664* as it has not been established that the respondent unreasonably withheld or delayed the payment of benefits.

## ANALYSIS

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<sup>1</sup> O. Reg. 34/10.

<sup>2</sup> I note the applicant also claimed entitlement to payment for the cost of a neurological assessment in the amount of \$1,980.00. However, in a Motion Order dated April 11, 2019, Vice Chair Hunter ordered that the neurological assessment be removed as an issue in dispute for the purposes of this hearing and that issue will not be addressed as part of this decision.

- [7] In assessing the applicant's entitlement to the medical benefit sought, several provisions of the *Schedule* are relevant. Section 14 makes an insurer liable to pay medical and rehabilitation benefits for an insured person who sustains impairment as a result of an accident, while section 15 states that insurers shall pay for all reasonable and necessary medical expenses incurred by the insured person as a result of the accident.
- [8] The burden of proof rests with the insured person to establish on a balance of probabilities that the benefit sought is reasonable and necessary.

**Physiotherapy treatment plan**

- [9] According to the applicant's reporting to various assessors, he was taken to hospital by ambulance immediately following the April 15, 2016 accident, as he was experiencing pain in his groin, lower back, neck and shoulder. At the time, he was given an analgesic medication and was instructed to follow up with his family physician. The following day, he attended at the hospital because his pain had worsened. He was prescribed a muscle relaxant and shortly thereafter began regular rehabilitative therapy sessions at LV Rehabilitation, which continued until December 2017.
- [10] The applicant argues that the disputed treatment plan is reasonable and necessary. In support of his position, he draws the Tribunal's attention to the treatment plan itself, which includes goals of pain reduction, increasing strength and range of motion, returning him to activities of normal living/work and identifies barriers to treatment in the form of multiple injury sites, reported psychological barriers of stress/anxiety/sleep disturbance, fear avoidance and fear of traveling in a vehicle along with a complicated medical history.
- [11] Additionally, he relies upon clinical notes and records of his family physician between May 2017 and January 2019, evidencing consistent reports of back, groin and shoulder pain and a disability certificate dated June 28, 2017 detailing low back, right shoulder and neck pain and limited mobility. There is also a neurological assessment authored by Dr. Jensen dated May 8, 2019, revealing that, over one year later, the applicant continued to complain of the same pains and aggravating/relieving factors that had previously been reported to the respondent's insurance examination ("IE") assessors and his physician.
- [12] Dr. Jensen's report, although authored some time after the denial of the treatment plan in dispute, indicates that the applicant complains of headaches and pain in his neck, low back, groin and right knee. He notes reporting from the applicant that his headaches and various body pains were improved with massage and physiotherapy. Dr. Jensen recommends the applicant continue with physical therapies for his neck pain and knee pain and continue an active therapy and core strengthening exercise for his back pain.

- [13] The respondent submits that the treatment plan is not reasonable and necessary and relies upon the IE assessments of Dr. Kleiner (neurologist) and Dr. Mohammed (family physician), both of which took place in February 2018.
- [14] Dr. Kleiner conducted both an initial IE assessment and an addendum following a review of further medical documentation. Although the stated purpose of Dr. Kleiner's assessment was to evaluate a different treatment plan (OCF-18 dated January 16, 2018 for \$1,980.00 for a neurological assessment), when asked if the applicant had reached maximum medical improvement ("MMI"), he notes:
- [F]rom a neurological point of view, he has made a substantial recovery. By his report, he still has occasional radicular symptoms in his groin. He could benefit from additional active exercise and would recommend aquatherapy.
- [15] When asked to provide "recommendations for ongoing treatment essential to assist in recovery in the event that MMI has not been reached", Dr. Kleiner opines the applicant would benefit from "aquatherapy in an intense fashion, three times a week for a period of 12 weeks".
- [16] By contrast, Dr. Mohammed opined in his assessment that the applicant's injuries did not require further facility-based treatment as "he has reached MMI any further rehabilitation should involve a home-based routine", ultimately concluding that the treatment plan was not reasonable and necessary.
- [17] The applicant submits that Dr. Mohammed failed to review the treatment plan to fully understand the applicant's injuries and complaints and failed to properly diagnose him, given the medical findings on file.
- [18] Dr. Mohammed indicates he reviewed diagnostic examinations in the form of lumbar, sacrum and coccyx x-rays dated April 13, 2016 which showed "multilevel DDD [degenerative disc disease], most prominent at L4-5" and also notes his examination of the applicant revealed reduced flexion in the lumbar spine. In addition, the list of documentation reviewed indicates he also considered a psychological assessment dated September 29, 2016, wherein the assessor, Dr. Kershner, diagnoses the applicant with "specific phobia, fear of injury and posttraumatic stress disorder".
- [19] Despite the foregoing, he states, "I have not identified any underlying present or past medical issues that would inhibit or delay his recovery". I note that he does not address evidence of underlying spinal pathology and psychological issues and/or why he is of the view that these would not represent complicating factors with respect to treatment and recovery.
- [20] I placed little weight upon Dr. Mohammed's assessment given his failure to address the applicant's underlying spinal pathology and psychological issues as outlined above. In addition, I found it significant that, although both IE assessments were conducted in February 2018, Dr. Mohammed comes to a

very different conclusion than Dr. Kleiner with respect to whether the applicant has reached MMI and requires any further treatment.

- [21] Dr. Kleiner concludes MMI has not been reached and further treatment in the form of an aquatherapy program would benefit the applicant, whereas Dr. Mohammed opines MMI has been reached and only a home-based routine is necessary going forward.
- [22] I also note that, more than one year after these assessments were completed, the applicant's neurological assessor, Dr. Jensen, concludes that further therapy is still required, making a specific distinction between the need for an active exercise and strengthening program to address the applicant's back pain and continued physical therapies to address his neck and knee pain.
- [23] Although the applicant's evidence also included an October 2016 MRI indicating that, when compared to a previous study of 2011, there had been significant worsening of his DDD, the respondent correctly points out there is no evidence of a causal link between the worsening of his spinal pathology and the subject motor vehicle accident.
- [24] I did not base my findings on the 2016 MRI or any evidence of worsening spinal pathology but rather, the applicant's consistent reporting of pain and aggravating/relieving factors as well as the fact that two of three assessors, including one of the IE assessors, opine that further treatment would be of benefit. Although they differ with respect to the type of therapy that would benefit the applicant (Dr. Kleiner recommends strictly active therapy, while Dr. Jensen recommends a combination of both active and passive treatment), it is nevertheless clear that some form of treatment is appropriate.
- [25] The respondent argues "the treatment plan is for **passive** therapy, specifically massage therapy" and notes that both Dr. Kleiner and Dr. Mohammed's recommendations are for treatment/exercise that "require movement of the body by the Applicant's (sic) themselves and not by another individual (which is passive therapy)".
- [26] I note that the treatment plan's proposed goods and services include:
- (i) manipulation, multiple body sites;
  - (ii) therapy, multiple body sites; and
  - (iii) exercise, multiple body sites
- involving:
- (a) chiropractic treatment;
  - (b) massage therapy;

- (c) osteopathic therapy; and
- (d) functional and strengthening exercise program

- [27] It is clear from the above that the treatment plan is not strictly passive in nature involving only massage therapy, as suggested by the respondent. While massage is included, it is simply a portion of an overall plan which includes both active and passive components.
- [28] On a review of the totality of the evidence before me, I am persuaded that the treatment plan is reasonable and necessary on a balance of probabilities. The applicant consistently reported to all assessors that he continues to experience pain in his shoulder, neck and low back and that his pain is aggravated with physical activity and improved with physiotherapy. Two of three assessors, including one of the respondent's IE assessors, indicate that the applicant would benefit from further therapy of some sort and confirm that he has not yet reached maximal medical improvement.
- [29] In addition, given the applicant's consistent reporting with respect to aggravation of his pain with physical activity and relief thereof with physiotherapy, it is possible that continued participation in passive modalities may help him to consistently participate in the more active components of his treatment plan.
- [30] Given the above, I am satisfied on a balance of probabilities that the treatment plan for physiotherapy services is reasonable and necessary.

***Is the applicant entitled to an award under Ontario Regulation 664?***

- [31] Section 10 of *Ontario Regulation 664* permits the Tribunal to award a lump sum of up to 50 per cent of the amount to which the applicant was entitled at the time of the award together with interest on all amounts owing if it finds that the respondent has unreasonably withheld or delayed such payments.
- [32] The applicant submits that the respondent acted in bad faith when adjusting this claim; that denials did not comply with the notice requirements in section 38(8) of the SABS; and the "unreasonable denial of access to physical therapy has also caused her (sic) condition to significantly deteriorate, to the point where he is having difficulty with his vocation, family, and the rest of society".
- [33] There is no compelling medical evidence before me to support the assertion that the respondent's denials resulted in a significant deterioration in the applicant's condition to the point where he is having difficulty with his vocation, family and the rest of society. I also note that the applicant did not provide any particulars with respect to the claim that the respondent's denials violated the notice requirements in section 38(8) of the *Schedule*, nor did he provide specific evidence that the respondent acted in bad faith.

[34] The respondent's act of denial, in and of itself, does not constitute behaviour meeting the threshold to justify an award claim. I have not been directed to any specific conduct or behaviour on the part of the respondent which would support an award under *Ontario Regulation 664*.

**ORDER**

[35] The applicant is entitled to the treatment plan for physiotherapy services and any interest owing in accordance with section 51 of the *Schedule*.

[36] The applicant is not entitled to an award under *Ontario Regulation 664*.

**Released: November 5, 2019**

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**Shannon Braun  
Adjudicator**