

**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: G.F. vs. Aviva Insurance Company, 2020 ONLAT 18-007850/AABS

Released: June 9, 2020

Tribunal File Number: 18-007850/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.F.

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR:

Brian Norris

APPEARANCES:

For the Applicant:

Gurdeep Nanua, Counsel

For the Respondent:

Geoffrey L. Keating, Counsel

Heard by way of written submissions

OVERVIEW

- [1] The applicant was injured in an automobile accident on **August 9, 2016** and sought benefits from the respondent pursuant to *Statutory Accident Benefits Schedule - Effective September 1, 2010, O. Reg. 34/10* (the “*Schedule*”). The respondent refused to pay for certain benefits and, in response, the applicant has applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “*Tribunal*”) for resolution of this dispute.

ISSUES

- [2] The disputed claims in this hearing are:
- (i) Did the applicant sustain predominantly minor injuries as defined under the *Schedule*?
 - (ii) Is the applicant entitled to medical benefits recommended by New Wave Health Centre and Mackenzie Rehab as follows;
 - (a) \$2,150.00 for a psychological assessment plan dated September 28, 2016;
 - (b) \$3,542.25 for a psychological treatment plan dated November 30, 2016;
 - (c) \$3,403.22 for a psychological treatment plan dated July 6, 2017;
 - (d) \$4,187.86 for a physiotherapy treatment plan dated August 18, 2016?
 - (e) \$2,933.62 for a physiotherapy treatment plan dated October 7, 2016;
 - (f) \$1,988.89 for a chiropractic treatment plan dated November 18, 2016?
 - (g) \$3,696.50, less \$465.03 approved by the respondent, for a physiotherapy treatment plan dated June 27, 2017; and
 - (h) \$1,977.05 for a chiropractic treatment plan dated September 6, 2017?
 - (iii) Is the applicant entitled to interest on the overdue payment of benefits?

RESULT

- [3] The applicant suffered injuries which are not included within the minor injury definition. As a result, he is not subject to the Minor Injury Guideline (the “MIG”) and the \$3,500.00 funding limit.
- [4] The applicant is entitled to the psychological assessment proposed in the treatment and assessment plan dated September 28, 2016, plus interest pursuant to section 51 of the *Schedule*. He is also entitled to the psychological treatment proposed in the treatment and assessment plan dated November 30, 2016 because it is reasonable and necessary.
- [5] The applicant is not entitled to the remaining treatment and assessment plans.

BACKGROUND

- [6] The applicant was the driver of a car which was struck from behind by another vehicle. Following the accident, he was taken to the hospital, x-rayed, given pain medication, and released with a recommendation to follow up with his family physician. He visited his family physician a few days later and was diagnosed with a low back strain and advised to start physiotherapy treatment.
- [7] The respondent characterized the applicant’s injuries as being predominantly minor injuries and subject to the MIG. The applicant completed treatment within the MIG and the \$3,500.00 funding limit provided by section 18 of the *Schedule*. He submits his injuries are not minor injuries and, as a result, he is entitled to medical benefits beyond the \$3,500.00 funding limit for minor injuries.

THE MINOR INJURY GUIDELINE

- [8] There is a monetary limit to medical benefits available to injured persons who sustain a minor injury as a result of an accident. A “minor injury” is defined in section 3 of the *Schedule* and includes sprains, strains, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae. Section 3 also notes that a strain is an injury to one or more muscles and includes a partial tear. Under section 18 of the *Schedule*, injuries that are defined as minor are subject to a \$3,500.00 funding limit on treatment.
- [9] If the applicant’s injuries are deemed to be minor injuries, the responsibility is on the applicant to establish that the MIG, and the related funding limit, should not apply.

- [10] The applicant claims injuries which fall outside the definition of a minor injury. Specifically, he claims to suffer from psychological injuries such as anxiety and depression as a result of the accident. The respondent submits there is no evidence to connect the applicant's concentration difficulties, vehicular fear, and anxiety to the subject accident. It further submits the applicant's depression symptoms relate to pre-accident issues, namely unemployment.
- [11] I find the applicant suffered psychological injuries as a result of the accident. Such injuries are not included in the MIG and, therefore, the applicant is not subject to the \$3,500.00 funding limit on treatment.
- [12] The applicant provided compelling evidence of an accident-related psychological injury. The clinical notes and records of his family physician, Dr. E. Chan, indicate the onset of psychological injuries in a November 25, 2016 entry. In it, the applicant complains of difficulty concentrating and advised he was afraid of being in cars, being rear-ended while driving, and has stopped driving. During the visit, Dr. Chan signed a referral note for a psychological assessment. In an entry dated May 12, 2017, the applicant complained of decreased memory but thought it was related to his blood pressure medication, so Dr. Chan prescribed a different medication. However, the applicant's psychological symptoms persisted and, in an August 3, 2017 entry in Dr. Chan's CNRs, the applicant admitted he was feeling depressed, nervous, and irritable. These symptoms caused Dr. Chan to prescribe antidepressant medication for the applicant. Dr. Chan noted the applicant's depression and anxiety again in notes dated November 13, 2017 and February 26, 2018. During the latter visit, Dr. Chan prescribed a second antidepressant.
- [13] Dr. Chan's concerns about the applicant's psychological health are echoed in the psychological assessment report by Dr. N. Belykova, dated December 8, 2016. Dr. Belykova diagnosed the applicant with an adjustment disorder with mixed anxiety and depressed mood and recommended ten sessions of psychotherapy. During the assessment, Dr. Belykova found the applicant answered questions in a candid fashion with no apparent attempt to mislead or be evasive and found no apparent effort to exaggerate his impairments or disability. Psychometric testing results, according to Dr. Belykova, found the applicant's depression to be in the severe range and anxiety in the moderate range. Dr. Belykova found the applicant's responses to testing "seemed to closely reflect his clinical presentation in the interview."
- [14] The respondent submits that Dr. M. Mandel's psychological insurer's examination report dated January 25, 2017 found no psychological impairment. It submits Dr.

Mandel's report should be preferred over Dr. Belykova's because, according to the respondent, it occurred after the applicant stopped mentioning accident related symptoms to his family physician and because it included psychometric testing with built-in validity testing.

- [15] The applicant's self-reported health concerns of back, neck and shoulder pain, as well as feelings of sadness and disappointment or frustration, all of which are noted in Dr. Mandel's report, are generally consistent with what was reported in Dr. Belykova's report. The reports are different in that Dr. Mandel's report administered different psychometric testing, which found the applicant's scores exceeded the cut-off for profile validity and, therefore, assumed the results were invalid. As a result of the invalid test scores, Dr. Mandel concluded there was a lack of consistent objective information to support a psychological impairment or diagnosis.
- [16] I prefer Dr. Belykova's report over Dr. Mandel's because it is consistent with the applicant's family physician's records and includes a clear conclusion. As previously noted, Dr. Chan signed a note for a psychological assessment on November 25, 2016, which I infer to be an endorsement for a psychological assessment. Dr. Chan has an ongoing relationship with the applicant and is in the best position to identify symptoms of a psychological injury, and refer the applicant to the appropriate professionals for any necessary assessments, which was the case here. Additionally, Dr. Chan prescribed antidepressant medication for the applicant. This is consistent with Dr. Belykova's report in that it indicated the applicant scored in the severe range for depression. Lastly, Dr. Mandel does not exclude the possibility the applicant suffers from depression or anxiety. Instead, Dr. Mandel discounts the applicant's test scores due to validity issues and, as a result, concludes there is no consistent objective evidence to support a psychological impairment or diagnosis.
- [17] An analysis of whether the applicant's pre-existing medical condition impacts his recovery within the MIG and the \$3,500.00 funding limit is unnecessary considering I found the applicant suffered from psychological injuries as a result of the accident.
- [18] Considering the applicant is not bound by the \$3,500.00 funding limit on treatment, I must consider whether the disputed treatment and assessment plans are reasonable and necessary.

IS THE APPLICANT ENTITLED TO THE DISPUTED TREATMENT PLANS?

- [19] The applicant submits all the disputed treatment plans should be approved. That said, I note he seeks payment for only the first proposed psychological treatment plan.
- [20] The respondent submits the applicant has failed to make arguments with respect to whether the disputed treatment plans are reasonable and necessary. It further submits there is no evidence to establish that the disputed treatment plans will meet the stated goals.
- [21] Pursuant to section 15 of the *Schedule*, the respondent is liable to pay for all reasonable and necessary expenses incurred by or on behalf of the insured persons as a result of an accident. It is the applicant's responsibility to prove the medical benefits claimed are reasonable and necessary.

Production of the disputed treatment plans

- [22] Despite being ordered to file documents for the hearing, the applicant failed to submit the disputed treatment plans with his written submissions. As a result, and pursuant to rule 9.1 of the *Common Rules of Practice and Procedure*, I requested the documents from the parties.
- [23] Despite my request, the applicant failed to submit the disputed treatment plans for review. As a result, I relied on the information in other documents, such as the insurer's examination reports and explanation of benefits, to determine the relevant details of the disputed treatment plans.

The applicant failed to address the disputed treatment plans

- [24] As noted by the respondent, the applicant has failed to make any argument in favour of a finding that the disputed treatment and assessment plans are reasonable and necessary. The respondent raised this concern in submissions and, although he made reply submissions, the applicant chose not to address them.
- [25] Considering the evidence and the applicant's failure to make submissions on the issues, I make the following findings;
- (i) The psychological assessment proposed in the treatment plan dated September 28, 2016 is reasonable and necessary considering the psychological symptoms exhibited by the applicant and recorded in Dr. Chan's CNRs;

- (ii) The psychological treatment plan dated November 30, 2016 and submitted January 17, 2017, proposing 10 sessions of psychotherapy, is reasonable and necessary. The treatment plan mirrors the recommendation from Dr. Belykova in the psychological assessment report dated December 8, 2016;
- (iii) According to the explanation of benefits provided by the respondent, the physiotherapy treatment plans dated August 18, 2016 and October 7, 2016 were denied pursuant to section 38(5) of the *Schedule* because the applicant was entitled to treatment within the MIG but had not yet claimed it. Pursuant to section 38(6), this refusal is final and is not subject to review. As a result, the applicant is not entitled to the treatment plans;
- (iv) The applicant has led no evidence or submissions in favour of a finding the remaining treatment plans are reasonable or necessary. Nor is there any compelling evidence clearly in favour of the physiotherapy and chiropractic treatment sought. As a result, and with consideration for the applicant's onus to prove entitlement, I find the remaining treatment plans are not reasonable and necessary.

INTEREST

- [26] Pursuant to section 51, interest is only payable on overdue payments. The applicant has only incurred the cost of the psychological assessment proposed in the treatment plan dated September 28, 2016. Only the assessment cost is subject to interest. No interest is payable for the remaining treatment and assessment plans because they were either never incurred or are not reasonable and necessary.

CONCLUSION

- [27] I find that the applicant sustained psychological injuries as a result of the accident and is not bound by the MIG and the \$3,500.00 funding limit. He is entitled to payment for the psychological assessment, plus interest. He has not incurred the cost of the psychological treatment plan dated November 30, 2016 but may do so now and the respondent is liable to pay it once properly invoiced.

[28] The applicant has failed to prove the remaining treatment and assessment plans are reasonable and necessary and, as a result, he is not entitled to them.

Released: June 9, 2020

**Brian Norris
Adjudicator**