

LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards
Tribunals Ontario



Date: **October 19, 2016**

Tribunal File Number: **16-000272/AABS**

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c 1.8., in relation to statutory accident benefits.

Between: **Michele Gilbertson**

Applicant

and

Aviva Insurance Canada

Insurance Company

REASONS FOR DECISION AND ORDER

Adjudicator: Terry Hunter

Appearances:

For the Applicant: Renee Reynolds, Counsel

For the Insurance Company: Geoffrey Keating, Counsel

Held by Written Hearing: August 30, 2016

OVERVIEW

1. The applicant, Michele Gilbertson, was injured in a motor vehicle accident on July 14, 2013, and sought benefits pursuant to the Statutory Accident Benefit Schedule, Effective September 1, 2010 (the "Schedule")
2. Ms. Gilbertson applied for accident benefits August 6, 2013 and received seven physiotherapy treatments.
3. Ms. Gilbertson has applied for further medical benefits for chiropractic and physiotherapy treatments. The dispute over the medical benefits centres on the nature and extent of her injuries. Aviva takes the position that her injuries are predominately minor injuries and there is no supporting medical evidence supporting further treatment. Ms. Gilbertson submits her injuries are extensive and she is entitled to access a maximum of \$50,000 of medical and rehabilitative benefits pursuant to s. 18(3) of the Schedule. The resolution of this matter depends on the sufficiency of the medical evidence put forward by Ms. Gilbertson.

ISSUES IN DISPUTE

Issues:

4. The following are the issues in dispute:
 - 1) Did Ms. Gilbertson suffer predominately minor injuries in the July 14, 2013 motor vehicle accident?
 - 2) If the answer to question 1. is no,
 - a. Is Aviva liable to pay the following medical benefits:
 - i. \$1,258 for a Chiropractic Treatment and Assessment Plan dated Dec. 7, 2015
 - ii. \$1,399.12 for expenses incurred by Ms. Gilbertson for treatment by Dr. Ferretti from Sept. 11, 2014 to April 13, 2016.
 - iii. \$3,042 for medical benefits for physiotherapy and massage treatment from Total Health Physio dated Dec. 15, 2015.
 - 3) Interest on all overdue payment of benefits.
 - 4) The applicant claims an Award pursuant to Section 10 in O. Reg. 664. Section 10 of O.Reg.664 came into force on April 1, 2016 replacing the repealed special award section 282(10) in the *Insurance Act*.
 - 5) The Insurance Company states the claim for an Award is unreasonable, frivolous and vexatious and requests costs in relation to that claim pursuant to Rule 19 of the *Licence Appeal Tribunal Rules of Practice and Procedure* (the "Rules").

DECISION

5. I am persuaded on the balance of probabilities that the bilateral carpal tunnel syndrome and the right sided sciatica are a direct consequence of the motor vehicle accident of July 14, 2013. I also find that the neurological injuries suffered by Ms. Gilbertson do not fall within the Minor Injury Guideline.
6. Ms. Gilbertson is not entitled to the treatments claimed, as they are not reasonable and necessary. The treatments claimed are for musculoskeletal disorders not the neurological conditions relied upon by the claimant.

ANALYSIS

Minor Injury Issue:

7. The Minor Injury Guideline establishes a framework for the treatment of soft tissue injuries. The term “minor injury” is defined in s. 3 of the Schedule as “one or more of a strain, sprain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury.” I will refer to these terms collectively as soft tissue injuries. Section 18(1) limits recovery for medical and rehabilitative benefits for such injuries to \$3,500.
8. The applicant’s position is that she has been diagnosed with neurological injuries as a result of the accident, specifically right sided sciatica and bi-lateral carpal tunnel syndrome. These injuries, she states, are not within the Minor Injury definition as defined in Section 3 of the Regulation.⁹ The evidence provided by both parties at the hearing was documentary. I have considered all of the evidence submitted by the parties. The documents disclose that following the accident the applicant’s family physician diagnosed right sciatica, low back strain, thoracic lumbar strain, whiplash, left shoulder strain, dizziness and right foot ecchymosis.
9. On December 29, 2014, Dr. Savelli, a neurologist, diagnosed Ms. Gilbertson with “right L5 radiculopathy, and bilateral carpal tunnel syndrome.” In his report to the applicant’s family physician, Dr. McCallum, he describes “intense lumbar pain which is persisting and irradiates to the right buttock and down the right leg to the foot and the first through fourth toes aggravated by standing and walking and sitting worsening with time.” Dr. Savelli further reports numbness of the hands. She states “symptoms seem to occur following the MVA when she was intensely

gripping the steering wheel.” Nerve conduction testing confirmed right L5 radiculopathy and bilateral carpal tunnel syndrome.

10. Dr. Savelli in a report to Dr. McCallum Dated May 4, 2015 documents extreme pain in both lower extremities. Her clinical examination detailed “reduced sensitivity to pin and vibration right leg particularly compared to the left.”
11. The Insurer’s Independent Evaluation by Dr. Jaroszynski dated Feb. 1, 2016 report notes there is no evidence of an ongoing traumatic musculoskeletal impairment attributable to the motor vehicle accident. It is interesting to note that Dr. Jaroszynski in his report states, “Issues pertaining to her neurological condition, is [sic] deferred to a neurological assessor.”
12. It is the applicant’s position that the bilateral carpal tunnel syndrome and the chronic right L5 reinnervation (right sided sciatica) had an immediate onset post-accident so are a direct result of the motor vehicle accident. Ms. Gilbertson provided internet search material on sciatica that I did not find helpful. It would have been preferable to have Dr. Savelli express an opinion on causation. However, I am left with the Applicant’s history of immediate onset of symptoms following the accident, with consistent medical reporting detailing symptoms related to the accident and no challenge on the neurological evidence from Aviva. I do not find the neurological signs reported are covered under the definition of soft tissue injury or the sequelae to such an injury. By analogy I find support for this position in the definition of “whiplash associated disorder” in the “Schedule” which includes that disorder as within the Minor Injury Guideline if the disorder “(a) does not exhibit objective, demonstrable, definable and clinically relevant signs”. On the evidence, the Applicant’s sciatica and carpal tunnel exhibit objective, demonstrable, definable and clinically relevant signs taking these neurological injuries out of the Minor Injury Guideline. However, this is not the end of the inquiry.
13. I must now consider the next question concerning medical benefits requested by the applicant.

Are the Proposed Treatment Plans Reasonable and Necessary

14. It is not automatic that when an applicant is out of the MIG they are entitled to all medical and rehabilitation benefits beyond \$3,500. The test set out in s.15 of the *Schedule* is that the benefits must be “reasonable and necessary.” The onus is on the applicant to prove entitlement to specific benefits.
15. I find on the evidence before me, the applicant has failed to prove entitlement to the medical benefits claimed.

16. An OCF-18 dated Dec. 15, 2015 for \$3,042.25 submitted by Total Health Physio proposed treatment for whiplash associated disorder, lumbar and other intervertebral disorders with radiculopathy, sprain and strain of the wrist, vertigo of central origin and sprain and strain of thoracic spine. Apart from vertigo, these are musculoskeletal complaints. Dr. Jaroszynski's IE medical assessment report of Feb. 1, 2016 notes there was no evidence of traumatic musculoskeletal impairments attributable to the motor vehicle accident.
17. The applicant claims chiropractic treatment, in the amount of \$1,258.00 submitted by Dr. Ferretti dated Dec. 7, 2015 and incurred expense for treatment received from Dr. Ferritti in the amount of \$1,399.12.
18. There is no evidence before me that physiotherapy or massage treatment would benefit these neurological conditions. Ms. Gilbertson in her written submissions states, "she suffers predominately from sciatica and carpal tunnel as a direct result of this accident." She relies on a report by Dr. Savelli, dated Dec. 29, 2014. Dr. Savelli recommends pregabalin, wrist splints and vitamin B supplements. He does not recommend physiotherapy or massage treatment. Further reports from Dr. Savelli dated May 4 and June 9, 2015 do not recommend physiotherapy or massage treatment. There is no evidence before me that physiotherapy or massage treatment would benefit these neurological conditions.
19. The OCF-18 dated Dec. 7, 2015 by Dr. Ferretti in Part 6 details the injuries to be treated are subluxation complex (vertebral), lumbar region, subluxation complex (vertebral), cervical region, sprain and strain of lumbar spine and whiplash disorder (WAD2) with complaint of neck pain with musculoskeletal signs. These are not the injuries relied upon by Ms. Gilbertson in her written submission. There is no evidence provided to rebut the conclusions of the IE medical assessments of Dr. Khaled and Dr. Jaroszynski that there is no evidence of an ongoing traumatic musculoskeletal impairment attributable to the motor vehicle accident and no further treatments are necessary. Dr. Savelli's reports are compatible with these opinions.]

Award

20. Ms. Gilbertson is claiming a (special) award pursuant to section 10 of O. Reg. 664 on the basis that Aviva unreasonably denied her medical expenses. An award may only be awarded in the case where benefits are found payable. I have denied Ms. Gilbertson's claim for medical benefits. Accordingly, Ms. Gilbertson is not entitled to an award.

Costs

21. Aviva claims costs. It is its position that the special award claim is unreasonable, frivolous and vexatious. For conduct to be considered unreasonable, it would be designed to harass the other side rather than advance the resolution of the case. In this case, the award was sought as a potential remedy available to the Applicant under O.Reg. 664. I am not persuaded that the applicant's conduct in claiming an award meets an objective standard of conduct in this case that is unreasonable.

DECISION

22. In light of the foregoing, I find that:

- 1) Ms. Gilbertson's injuries do not fall under the Minor Injury Guideline.
- 2) Ms. Gilbertson is not entitled to the treatments claimed, as they are not reasonable and necessary.
- 3) Ms. Gilbertson is not entitled to a special award.
- 4) Aviva is not entitled to an award of costs.

Released: October 19, 2016



Terry Hunter,
Vice-Chair