Citation: Hina v. Aviva Gen. Ins. Co., 2022 ONLAT 20-008029/AABS

Licence Appeal Tribunal File Number: 20-008029/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:

Saima Hina

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce, Vice-Chair**

APPEARANCES:

For the Applicant: Robert Lamot, Counsel

For the Respondent: Aviva General Insurance Company
Surina Sud, Counsel

HEARD: In Writing

BACKGROUND

[1] The applicant was injured in an automobile accident on January 25, 2018, and sought benefits from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("*Schedule*"). The applicant was denied the treatment and applied to the Tribunal for resolution of the dispute.

ISSUES IN DISPUTE

[2] The following issues are in dispute:

a. Is the applicant entitled to a medical benefit in the amount of $2,680.38 for chiropractic services recommended by Brampton Civic Care Centre in a treatment plan (OCF-18) submitted on June 14, 2018?

b. Is the applicant entitled to a medical benefit in the amount of $2,681.88 for chiropractic services recommended by Brampton Civic Care Centre in a treatment plan (OCF-18) submitted on August 7, 2018?

c. Is the applicant entitled to a medical benefit in the amount of $2,200.00 for other goods and services (chronic pain assessment) recommended by Ontario Independent Assessment Centre in a treatment plan (OCF-18) submitted on November 15, 2018?

d. Is the applicant entitled to a medical benefit in the amount of $2,230.64 for chiropractic services recommended by Brampton Civic Care Centre in a treatment plan (OCF-18) submitted on January 7, 2019?

e. Is the applicant entitled to a medical benefit in the amount of $2,305.64 for medical services (orthopaedic mattress) recommended by Ontario Independent Assessment Centre in a treatment plan (OCF-18) submitted on February 14, 2019?

f. Is the applicant entitled to a medical benefit in the amount of $1,996.13 for medical services (driver reintegration assessment) recommended by Ontario Independent Assessment Centre in a treatment plan (OCF-18) submitted on May 14, 2019?

g. Is the applicant entitled to a medical benefit in the amount of $1,850.00 for medical services (cognitive assessment) recommended by Ontario Independent Assessment Centre in a treatment plan (OCF-18) submitted on January 4, 2019?

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

RESULT

[3] The applicant is not entitled to payment for any of the treatment plans in dispute or interest as she has failed to meet her burden to demonstrate that they are reasonable and necessary as a result of the accident.

ANALYSIS

Are the treatment and assessment plans reasonable and necessary?

[4] To receive payment for a treatment plan under the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. The applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving same are reasonable.[1]

[5] The applicant submits that she sustained injuries to her head, neck, shoulders, back, arms and hands, as well as headaches, dizziness, anxiety, depression and sleeping difficulties, which cause functional limitations in her daily living. The applicant relies on an OCF-3, the clinical notes and records of her family physician, Dr. Baath, as well as two psychological reports from Dr. Langis, who diagnosed her with Adjustment Disorder with Mixed Anxiety with Depressed Mood and Specific Phobia (passenger).

[6] To be frank, despite being represented by counsel, the applicant's submissions and evidence were not assistive to the Tribunal. Of the seven treatment plans in dispute, three were purportedly prepared by Brampton Civic Care Centre (BCCC) and four were prepared by Ontario Independent Assessment Centre (OIAC). The applicant's submissions, however, only offer a blanket submission on the reasonableness and necessity of these OCF-18s and do not specifically detail the contents of any of these OCF-18s. The applicant did not identify the goals or the costs of same or explain why treatment was reasonable, as the test for entitlement requires. For example, it was not until a review of Aviva's submissions that it was clear that a chronic pain assessment, orthopaedic mattress, cognitive assessment or driver's reintegration assessment were even at issue because the applicant did not identify these benefits or provide her OCF forms. The applicant's reply submissions again do not reference any of these OCF-18s and do not specifically

[1] *See, General Accident Assurance Co. of Canada v. Violi* (FSCO Appeal P99-00047)

engage with the test to meet her burden of proof. Simply appending three OCF-18s to reply submissions for the first time does not meet the applicant's burden.

[7] Perhaps most problematically, while the applicant submits that her treating practitioners recommended further treatment, she did not actually provide several of the OCF-18s in dispute despite having the benefit of reply and after the Tribunal permitted her to file additional records following a motion hearing. It is the applicant's burden to prove entitlement to the benefits claimed and the applicant has only submitted three of the seven treatment plans and only did so on reply after Aviva indicated they were missing. The January 4, 2019 (cognitive assessment), February 14, 2019 (orthopaedic mattress) and May 14, 2019 (driver reintegration assessment) OCF-18s from OIAC are the only OCF-18s that are before me. This does not assist the Tribunal.

[8] Complicating the matter further is the applicant's insistence on reply that "material contribution remains the test for causation in Accident Benefits" and that this test be the one applied by the Tribunal. This is incorrect. Aviva is correct that the test for establishing causation in accident benefits cases is the "but for" test. It is well-settled that the leading case on causation was set out by the Divisional Court in *Sabadash v. State Farm*, 2019 ONSC 1121 (Ont. Div. Ct.), which is binding on this Tribunal. Only in rare situations will the material contribution test be applied. Other than stating that the January 25, 2018 accident materially contributed to her physical and psychological injuries, the applicant again did not elaborate on why her situation is a unique one where the but for test for causation would not apply.

The June 14, 2018, August 7, 2018 and January 7, 2019 OCF-18s

[9] In any event, where it is the applicant's burden to prove that the treatment she seeks is reasonable and necessary as a result of the accident, the minimum requirement is to provide the OCF-18's. This is the evidence required so that the Tribunal can confirm the goals, costs and duration of the treatment and to understand how the goals will be met. Where the applicant has failed to meet this minimal requirement and where she has also not provided specific submissions to support the goals and costs of the treatment she seeks, it follows that she has fallen well short of meeting her burden of proof on these issues.

[10] Accordingly, while I note there are two notations in Dr. Baath's clinical notes recommending physiotherapy (though Aviva asserts that the OCF-18s were actually for chiropractic treatment) and the treatment records in evidence show that the applicant attended at BCCC post-accident (the notes are largely illegible and provide virtually no insight into the applicant's progress), where the applicant did not submit the actual OCF-18's and did not provide specific submissions to meet

her burden, it follows that I have no basis on which to find that the OCF-18s from BCC, identified as issues 2(a), (b) and (d), above, are reasonable and necessary as a result of the accident. The Tribunal would have benefitted from specific submissions and evidence on these treatment plans.

The November 15, 2018 OCF-18

[11] In a similar vein, the applicant failed to submit an OCF-18 or make submissions on issue 2(c), which I understand from Aviva's submissions to be a $2,200 recommendation for a chronic pain assessment that has seemingly not been incurred by the applicant. The claim was denied by Aviva on the basis of a s. 44 report dated March 27, 2019 from Dr. Dharamshi, GP, who found there was no medical indication that the applicant has a chronic pain condition from a physical perspective and a s. 44 report from psychologist Dr. Seon, dated March 27, 2019, who determined that a chronic pain assessment would not be reasonable and necessary from a psychological perspective. While I note there are sporadic complaints of pain in Dr. Baath's notes, on the applicant's evidence and submissions, I can find no reason to interfere with Aviva's determination and find the OCF-18 is not reasonable and necessary or payable as a result.

The January 4, 2019, February 4, 2019 and May 14, 2019 OCF-18s from OIAC

[12] The OCF-18s that were submitted in reply and are before the Tribunal are as follows: a January 4, 2019 OCF-18 for a cognitive assessment, a February 14, 2019 OCF-18 recommending an orthopaedic mattress and a May 14, 2019 OCF-18 proposing a driver reintegration assessment. All of these treatment plans were proposed by OIAC.

[13] First, with regard to the cognitive assessment in the amount of $1,850, it does not appear that it was incurred and the applicant provided no specific submissions to support the goals of this assessment, to support the cost of same or why it was needed to assist with her recovery from her accident-related impairments. I glean from the additional comments in the OCF-18 that the assessment is needed to address the applicant's reports of concentration and memory difficulties to Dr. Langis. However, I agree with Aviva that there is no evidence to suggest the applicant sustained a neurological impairment in the accident that would require a cognitive assessment. The notes of Dr. Baath indicate normal neurological assessments and neither of Dr. Dharmashi or Dr. Seon identified issues from a neurological perspective. Without specific submissions speaking to the reasonableness and necessity of the OCF-18, I find the applicant has not met her burden of proof and the plan is not payable.

[14] Second, regarding the orthopaedic mattress (including heat pad, cushion and delivery) in the amount of $2,305.64, the applicant again did not provide specific submissions to support this plan. I note the applicant's submissions state she has sleeping difficulties and there is a single notation in Dr. Baath's notes advising that the applicant get an orthopaedic mattress and heat pad that seems to be the basis for the OCF-18, which states the goals of pain relief and a return to daily activities. Aviva submits that the applicant's reported back pain at this time was not as a result of the accident, but as a result of pain radiating to her back and neck as a result of other issues she was dealing with, and that she had not reported accident-related back pain in nearly one year. With respect, and in the absence of specific submissions, I agree with Aviva and find it difficult to accept that the orthopaedic mattress and assistive devices in dispute are reasonable and necessary expenses as a result of the applicant's accident-related impairments. The applicant has failed to demonstrate causation.

[15] Finally, OIAC recommended a driver reintegration assessment in the amount of $1,966.13. It does not appear that it has been incurred and the applicant provided no specific submissions to support it. On receipt of the OCF-18, Aviva advised that it required Dr. Baath's records and the records from OIAC in order to assess the claim, pursuant to s. 33(1). While selected records from Dr. Baath were provided in her submissions, the applicant has failed to provide the clinical notes and records from OIAC to date. In turn, Aviva submits that she is in non-compliance with s. 33 and that it is not liable to pay the benefit pursuant to s. 33(6). Further, Aviva submits that the applicant did not have her driver's licence at the time of the accident and that it has already funded psychological treatment that should have addressed her passenger phobia. On the evidence before the Tribunal, I agree with Aviva that the applicant has not demonstrated substantive entitlement and has not complied with its s. 33 requests. Accordingly, the OCF-18 is not payable. As no benefits are overdue, it follows that no interest is payable under s. 51.

CONCLUSION

[16] The applicant has not met her burden to demonstrate that any of the treatment plans in dispute are reasonable and necessary or payable or that interest applies. The application is dismissed.

Released: January 19, 2022

Jesse A. Boyce
Vice-Chair