Citation: Ng v. Western Assurance Co., 2021 ONLAT 20-008181/AABS

Release date: 10/04/2021
File Number: 20-008181/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:

Cheong Sing Ng

Applicant

and

Western Assurance Company

Respondent

DECISION

ADJUDICATOR:	**Jesse A. Boyce, Vice-Chair**
APPEARANCES:	
For the Applicant:	Yu Jiang, Paralegal
For the Respondent:	Geoffrey Keating, Counsel
HEARD:	**By way of Written Submissions**

OVERVIEW

[1] The applicant's wife was involved in an automobile accident on October 18, 2015. The applicant sought physiotherapy from the respondent, Western, pursuant to the *Statutory Accident Benefits Schedule* - Effective September 1, 2010 (the "*Schedule*").[1] Western denied the benefit in dispute on the basis that the applicant was not involved in an accident, and because it was not reasonable and necessary. The applicant disagreed and applied to the Tribunal for resolution of the dispute.

ISSUES IN DISPUTE

[2] The issues in dispute are as follows:

a. Is the applicant entitled to a medical benefit in the amount of $2,028.78 for physiotherapy services recommended by Total Recovery Rehab Centre as per an OCF-18 dated January 31, 2019 and denied on February 27, 2019?

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

RESULT

[3] The applicant is not entitled to payment for the treatment plan in dispute or interest as it is not reasonable and necessary.

ANALYSIS

Is the treatment plan reasonable and necessary?

[4] To receive payment for treatment in an OCF-18 under the *Schedule*, the applicant bears the burden of proving on a balance of probabilities that the plan is reasonable and necessary as a result of an accident. To meet this burden, the applicant should demonstrate that the impairments requiring intervention would not have occurred but for the accident. Then, the applicant should identify the goals of the plan, how the goals are being met to a reasonable degree and whether the time and cost expended to achieve these goals is proportional to the benefit. The applicant has failed to meet his burden.

[5] As I understand it, the applicant submits that the treatment plan for physiotherapy and massage in dispute is reasonable and necessary because of the pain in his neck, shoulders and back, that he now experiences as a result of providing care

[1] O. Reg. 34/10, as amended.

to his wife—in the form of personal grooming, care tasks, massage and transport to medical appointments—as a result of the injuries she sustained in the accident. For support, he relies on a November 2018 psychological assessment where he complained of pain, a January 2019 consultation with Total Recovery Rehab that prompted the OCF-18 in dispute, an October 2019 ultrasound of his shoulder and a November 2020 psychological examination report. In addition, the applicant submits that Western's denial notice dated February 27, 2019 is deficient because it failed to provide a proper or meaningful medical reason under s. 38(8), triggering the mandatory payment provision of s. 38(11).

[6] In response, and as a threshold issue, Western submits that the applicant has not met the but for test required to establish causation, and therefore he is not entitled to the benefit claimed. Further, it submits that there is insufficient medical evidence to support the applicant's alleged impairments, or that the treatment is reasonable and necessary as a result of an accident, as it post-dates the accident by over three years. Finally, it submits that its February 27, 2019 denial meets the requirements of s. 38(8) as it states that the applicant was not in an accident, that he did not suffer physical impairments, that his purported shoulder injury is a result of providing massage to his wife, that it has approved massage treatment for the applicant's wife, and that his request is not reasonable as a result.

[7] I agree with Western that the applicant has fallen well-short of meeting his burden of proof. Under s. 14, Western is only liable to pay for medical benefits for impairments that are sustained "as a result of an accident." There is no dispute that the applicant's shoulder injury was not caused by an automobile accident, but rather it arose as a result of purportedly providing massage to his wife over the course of three years following her accident. Indeed, at Part 8(b) of the OCF-18 in dispute, it actually states that the applicant "injured his Rt shoulder by repetitively massage for his wife" [*sic*] and "Rt shoulder pain in massaging his wife." [*sic*].

[8] In any case, even if I accept that massage was provided by the applicant to his wife for injuries sustained in the accident, and I somehow accept that it was the massage that definitively led to the shoulder injury, I ultimately agree with Western that it was not reasonably foreseeable that the applicant would sustain a shoulder injury while providing massage to his wife three years after her accident. In a similar vein, it cannot be said that the applicant's wife's accident in 2015 was the direct cause of his massage injury and especially so where he did not even report his injury until 2018. Accordingly, the applicant has failed to meet his burden to prove that, but for the accident, he would not have sustained his

impairment. Western is not liable to pay for any medical benefits under s. 14 as a result.

[9] For completeness, the applicant has also failed to demonstrate that the treatment is reasonable and necessary. The applicant relies on his self-reporting of pain to two psychologists in reports produced in November 2018 and November 2020, which, putting causation and professional scope issues aside, is not evidence of an objective medical opinion to support physiotherapy treatment. The applicant also provided sparse clinical notes and medical records to support a need for ongoing treatment, let alone medical records evidencing the "continued struggle with ongoing physical pain" alleged. The October 2019 ultrasound report from four years post-accident revealed no evidence of a rotator cuff tear. Other than stating that pain relief is a legitimate goal of treatment, the applicant's submissions provided no other analysis to support the goals of treatment, how the goals would be met to a reasonable degree or why the cost of same is reasonable and necessary.

[10] Finally, the applicant's position that Western's denial was deficient under s. 38(8) because it failed to provide medical or other reasons is without merit. The notice dated February 27, 2019 unequivocally states that Western does not agree to pay for the services in the OCF-18. It provides the reason that the applicant was not involved in the accident, did not suffer physical impairments and that his shoulder injury is as a result of providing massage to his wife, making the proposed treatment unreasonable. The proper dispute resolution information is attached to the notice.

[11] I agree with Western that s. 38 notice does not exclude the mandatory language of s. 14 because proposed treatment must still relate to impairments sustained as a result of an accident. Further, where the OCF-18 being denied clearly linked the applicant's impairment to massage and not to an accident, Western was not required to conjure up or fabricate a medical reason in order to satisfy s. 38(8). In my view, not being in an accident, not suffering physical impairments as a result of an accident and injuring your shoulder as a result of providing massage are perfectly valid other reasons to support a denial. As no benefit is overdue, it follows that no interest is payable under s. 51.

ORDER

[12] The applicant is not entitled to payment for the treatment plan in dispute or interest under s. 51 as he has not demonstrated that it is reasonable and necessary as a result of the accident.

Released: October 4, 2021

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Jesse A. Boyce, Vice Chair