LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards Tribunals Ontario

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

File Number: 18-011170/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:

R. A. A.

Appellant

and

Aviva General Insurance

Respondent

DECISION

PANEL:	**Derek Grant, Adjudicator**
APPEARANCES:	
For the Applicant:	Sevda Guliyeva, Paralegal
For the Respondent:	Derek Greenside, Counsel
HEARD:	**In Writing on: July 29, 2019**

OVERVIEW

[1] The applicant ("R.A.A.") was involved in an automobile accident on September 30, 2016, and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule") . R.A.A. was denied certain benefits by the respondent ("Aviva") and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

[2] R.A.A. applied for benefits from Aviva and applied to the Tribunal when his claims were denied.

[3] R.A.A. submits that as a result of injuries sustained in the subject accident, the treatment he seeks is reasonable and necessary.

[4] Aviva argues that all of R.A.A.'s injuries fit the definition of "minor injury" prescribed by s. 3(1) of the *Schedule*, and further R.A.A. has not established that the treatment plans are reasonable and necessary. R.A.A.'s position is exactly the opposite.

[5] The issue of whether R.A.A.'s injuries are subject to the limit set by the Minor Injury Guideline is not in dispute, therefore, I will not be making a determination in that regard.

ISSUES

[6] The issues to be determined are as follows:

i. Is the medical benefit in the amount of $3,074.62 for chiropractic services recommended by Tam Pham in a treatment plan submitted on November 30, 2016, denied on December 2, 2016, reasonable and necessary?

ii. Is the medical benefit in the amount of $2,821.92 for chiropractic services recommended by Alexander Yu in a treatment plan submitted on January 23, 2017, denied on March 8, 2017, reasonable and necessary?

iii. Is the medical benefit in the amount of $2,460.80 for chiropractic services recommended by Tam Pham in a treatment plan submitted on March 15, 2017, denied on March 20, 2017, reasonable and necessary?

iv. Is R.A.A. entitled to interest on any overdue payment of benefits?

FINDING

[7] Based on a review of the evidence, I find the following:

i. R.A.A. is not entitled to the treatment plans in dispute;

ii. R.A.A. is not entitled to interest on any outstanding balance of payment; and

iii. The application is dismissed.

SECTION 38 COMPLIANCE

[8] R.A.A. submits that the following treatment plan should be approved because Aviva failed to comply with section 38 (8) of the *Schedule*:

i. Is the medical benefit in the amount of $2,821.92 for chiropractic services recommended by Alexander Yu in a treatment plan submitted on January 23, 2017, denied on March 8, 2017, reasonable and necessary?

[9] Sections 38 (8) and (11) of the Schedule set out strict notice requirements for insurers responding to treatment plans, with specific consequences if they fail to comply. Under section 38 (8), the insurer must notify the insured person within 10 business days whether it will pay for the goods and services requested. If it refuses to pay for them, it must state the medical and other reasons why it considers the goods and services not to be reasonable and necessary. As per section 38 (11), if an insurer fails to comply with any of these requirements, it is prohibited from taking the position that the MIG applies and must pay for any incurred treatment expenses until such time that it gives proper notice.

[10] Aviva does not address the section 38 compliance issue in its submissions, however, I find that there is no evidence Aviva did not comply with section 38 (8).

[11] My finding is based on the following evidence:

i. An insurer examination ("IE")[1] was conducted on February 21, 2017;

ii. Dr. Gallimore's assessment report is dated March 7, 2017. R.A.A. submits he received a denial letter on March 8, 2017. A second denial letter was provided to R.A.A. on March 20, 2017.

[12] By R.A.A.'s own admission, the denial letter was provided to R.A.A. the day after (March 8, 2017) the IE report was completed. Section 38 (8) requires denial notice within 10 business days. Aviva provided said denial notice the next day, as such, they have complied with the section 38 (8) denial notice requirement. Therefore, section 38 (11) does not apply in this proceeding. Aviva is not required to pay for treatment and can maintain its position that the treatment plans are not reasonable and necessary.

BACKGROUND

[13] R.A.A. submits that prior to the September 30, 2016 motor vehicle accident, he enjoyed participating in various activities of daily living, i.e.: going to the gym five or six days per week, participating in contact sports including boxing, wrestling, judo, rugby, and football, coaching a wrestling team and playing 'pick up' sports with friends.

[14] Prior to the September 30, 2016 motor vehicle accident, R.A.A.'s medical history with respect to his physical health was significant for numerous 'sports related' physical injuries, including fracture injuries to his right hand, and a rotator cuff tear to his left shoulder. R.A.A. underwent orthopaedic surgery to his left shoulder in 2010. R.A.A. was experiencing pain in his left and right shoulder shortly before the

[1] Insurer's Exa1nination Orthopaedic Surgery Assessment - Applicability of the Minor Injury Guideline dated March 7, 2017 by Dr. Christopher Gallimore, Orthopaedic Surgeon [Application Record, Tab 16, pg. 12

September 30, 2016 accident, and he attended the Brampton Urgent Care Clinic on August 19, 2016 and September 13, 2016 to address right and left shoulder pain[2]. A September 14, 2016 cervical spine X-ray showed mild DISH change anteriorly at C6-7.[3]

ANALYSIS

The "but for" test

[15] I find, on a balance of probabilities, that the disputed treatment plans are not reasonable and necessary because they are not related to the physical injuries R.A.A. sustained in the accident, but to his pre-existing medical conditions.

[16] Chiropractors Pham and Yu, list numerous injuries in Part 6 of the treatment plans under 'Injuries and Sequelae'. Many of the physical (pain/sprains/strains) injuries listed would fall under the definition of 'minor'. In addition, both treatment providers list several psychological-based injuries/impairments and some that are work-related.

[17] I place little weight on the information provided in the treatment plans for the following reasons:

i. Chiropractor Pham lists nearly identical information in the treatment plans, which are approximately four months apart;

ii. Injuries/impairments listed that are work-related, suggest R.A.A. suffered injuries which are not automobile accident-related. No distinction is made regarding the extent of the work-related injuries versus the accident-related injuries;

iii. Both Chiropractor Pham and Yu note R.A.A. suffered from psychological impairment(s) and/or sequelae (as a result of the minor injuries) suffered in

[2] Clinical Notes and Records from Brampton Urgent Care (Application Record, Tab 27, pg. 10; Clinical Notes and Records from Dr. Duong Nguyen (Application Record, Tab 28, pg. 3

[3] September 14, 2016 x-ray of the left shoulder and cervical spine (Application Record, Tab 31(a)

the accident. Any psychological findings are beyond Chiropractors Pham and Yu's area of expertise. Therefore, I place little weight on any psychologically-based diagnoses from Chiropractors Pham and Yu.

[18] The medical evidence shows that R.A.A. suffered psychological impairment as a result of the subject accident. However, I do not have any treatment plans before me recommending psychological treatment, so I make no determinations regarding the reasonableness or necessity regarding psychological treatment.

[19] Aviva submits that they are not liable to pay for the treatment plans in dispute because R.A.A.'s shoulder, neck, chest and back issues were not caused by the subject accident.

[20] Under section 14 of the Schedule an insurer is only liable to pay for medical benefits for impairments that are "as a result of an accident."[4] The primary test for establishing whether injuries were caused "as a result of an accident" (or establishing "causation") under the Schedule is the "but for" test.[5] The "but for" test is the default test and only in "rare situations will the material contribution test be relevant."[6] The "but for" test is the appropriate test in this matter.

[21] I agree with Aviva that the "but for" test is appropriate in this proceeding. R.A.A.'s shoulder, neck, back and chest pain for which he is claiming medical benefits existed prior to his involvement in the motor vehicle accident on September 30, 2016. Therefore, the "but for" test has not been met in this case.

[22] My finding that the "but for" test has not been met, is based on the following medical evidence:

i. Approximately six years prior to the accident, R.A.A. underwent arthroscopic shoulder stabilization followed by 6 months of intensive therapy.[7] R.A.A.

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[4] *Scarlett v. Belair*, 2015 ONSC 3635 (CanLII)
[5] Sabadash v. State Farm et al., 2019 ONSC 1121 (CanLII) at para 31
[6] Ibid at para 37
[7] Orthopaedic Surgeon Report dated June 14, 2017 by Orthopaedic Surgeon, Dr. Omar Dessouki (Application Record, Tab 9, para 9 at p 4

claims that he was asymptomatic in his left shoulder prior to the subject accident but had in fact been seeking medical intervention due to pain in his shoulder, neck, back and chest.

ii. On August 19, 2016, R.A.A. attended the Brampton Urgent Care Clinic complaining of right shoulder pain, pain in his left neck, trapezius and shoulder which was going into his upper back and chest.[8]

iii. On September 13, 2016, R.A.A. again attended Brampton Urgent Care Clinic complaining that the left shoulder and neck pain were continuing. He stated that the left arm pain felt worse than his initial visit and was radiating to his inner left armpit.[9]

iv. On September 16, 2016, R.A.A. visited Brampton Urgent Care Clinic again complaining of pain in the left side of his neck radiating down his left arm and to his chest wall.[10]

v. R.A.A.'s own expert, Dr. Dessouki, Orthopaedic Surgeon, diagnosed him with "recurrent left shoulder instability with likely disruption of previous arthroscopic shoulder stabilization."[11]

[23] The treatment plans are clearly set out to address injuries that I find were not caused by the accident. Chiropractors Pham and Yu recommended treatment for R.A.A.'s arm, neck, chest, back and shoulder pain. All of which, I find R.A.A. suffered from prior to the accident and not as a result of the accident.

[24] I am persuaded by the medical evidence that the pain in R.A.A.'s left arm, neck, chest and back pre-existed the subject accident. The pain R.A.A. suffers from was not caused by the accident. The "but for" test has not been met as R.A.A. would

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[8] Clinical Notes and Records for Brampton Urgent Care Centers dated August 19, 2019, found at Tab 9 of the Respondent's Index Brief at p 16

[9] Clinical Notes and Records for Brampton Urgent Care Centers dated September 13, 2019, found at Tab 9 of the Respondent's Index Brief at p 14

[10] Clinical Notes and Records for Brampton Urgent Care Centers dated September 16, 2019, found at Tab 9 of the Respondent's Index Brief at pp 10-11.

[11] Dr. Dessouki Report, supra para 9 at p 8

still have had the left arm, neck, chest and back pain if the accident had not occurred.

[25] Since the "but for" test has not been met, R.A.A. has not established on a balance of probabilities that the treatment plans are reasonable and necessary for any accident-related injuries. Aviva is therefore not liable to pay for treatment plans.

CONCLUSION

[26] R.A.A. has not met the onus on him to prove his injuries were caused by the subject accident. Further, R.A.A. is not entitled to the treatment plans in dispute, therefore no interest is owing. R.A.A.'s claim is dismissed.

Released: November 1, 2019

Derek Grant
Adjudicator