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

2020 CanLII 80306 (ON LAT)

Citation: Watters vs. Aviva General Insurance, 2020 ONLAT 19-005152/AABS

Released Date: 09/22/2020
File Number: 19-005152/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:

Ryan Watters

Applicant

and

Aviva General Insurance

Respondent

DECISION AND ORDER

ADJUDICATOR: **Nathan Ferguson**

APPEARANCES:

For the Applicant: Ryan Watters, Applicant
Courtney Madison, Counsel

For the Respondent: Percy Laryea, Adjuster
Geoffrey Keating, Counsel

HEARD: **By way of written submissions**

REASONS

OVERVIEW

[1] The applicant (“RW”) was involved in an automobile accident on June 22, 2017, and sought benefits pursuant to the *Statutory Accident Benefits Schedule* - Effective September 1, 2010 (the "Schedule").

[2] RW applied for several treatment plans (OCF-18s) which were denied by the respondent and he disagreed with this decision. Therefore, RW submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service (“Tribunal”) to resolve the dispute.

[3] On April 20, 2020, the respondent changed its decision with respect to all of the OCF-18s in dispute. The parties agreed that the only issue remaining in dispute at the time of this hearing was therefore whether RW is entitled to an award as a result of the respondent’s conduct.

ISSUES

[4] The issue in dispute was identified and agreed to as follows:

a. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

RESULT

[5] For the following reasons, I find that RW is not entitled to an award under *Ontario Regulation* 664.

ANALYSIS

[6] As noted above, the respondent sent RW a letter reversing its decision with respect to all of the OCF-18s in dispute on April 20, 2020. The applicant’s counsel did not immediately receive notice of the reversal, but there is no evidence before me that the decision was not sent by mail at the time it was made. I find no persuasive basis to conclude that reversal was not communicated in the ordinary fashion.

[7] The evidence that informed my decision in this matter relates to the allegations made by RW about the award sought, specifically including the following:

a. that the respondent “blindly relied on” the physiatry report of Dr. Ko dated November 7, 2017;

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b. that the respondent did not seek an addendum report although Dr. Ko indicated an addendum may be required;

c. that the respondent did not refer the applicant to another specialist (or an additional s.44 assessment);

d. that the respondent ignored the evidence of Dr. Persaud and Dr. Abraham;

e. that the respondent relied on the minor injury guideline ("MIG") to deny the applicant's submitted OCF-18s when the applicant was removed from the MIG; and

f. that the respondent's conduct forced a hearing in this matter.

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Dr. Ko's Assessment

[8] The respondent relied on Dr. Ko's November 7, 2017 report to treat the applicant within the MIG "from a physical perspective" (p.5 of 8). RW's treatment was confined to the MIG until the log notes of the adjuster dated April 27, 2018 revealed that a "recent" report indicated the decision with respect to treatment in the MIG was reversed.

[9] This decision was communicated to RW by letter dated May 3, 2018 confirming that he was no longer confined to the MIG limits regarding treatment from a "*Psychological Perspective only*" [emphasis not added]. The reversal was based on Dr. Sethi's psychological report, dated March 7, 2018.

[10] As a result, I find on a balance of probabilities that the respondent did not blindly rely on Dr. Ko's assessment to deny treatment to RW. When new evidence was received indicating that additional treatment was necessary and removal from the MIG was warranted, the respondent altered the decision made.

Addendum Reports and Additional/Alternate S.44 Assessments

[11] I find that the *Schedule* does not include any obligation on the respondent to refer an insured to additional section 44 assessments or obtain addendum reports. There is no requirement to refer to another specialist or medical practitioner with a different area of specialization. Failing to do so does not demonstrate an award is necessary or appropriate in the absence of some evidence that this caused an unreasonable delay or withholding of a payment. I find no evidence to corroborate the same in this instance.

The Evidence of Dr. Persaud and Dr. Abraham

[12] Neither Dr. Persaud nor Dr. Abraham made any specific reference to an OCF-18 in dispute. Both sources were obtained many months after the treatment plans in dispute. Neither assess the entirety of the treatments suggested. Dr. Persaud recommended additional physiotherapy and stretching exercises in April 2019. Dr. Abraham, a sports medicine specialist, recommended a "good" and "hands on" physiotherapy program in May 2018. Again, neither source provided comments or analysis of any treatment plan in dispute concomitantly with their opinions.

[13] I agree with the respondent's submissions that to demonstrate a disputed treatment plan is reasonable and necessary there ought to be corroborating contemporaneous and objective medical evidence demonstrating this, and that generalized reference to additional or different treatment is not sufficient to do so.

[14] I find no evidence that suggests the respondent ignored the evidence of Dr. Persaud or Dr. Abraham. The testimony of the current adjuster, PL, confirmed that all available evidence was considered in a holistic manner.

Reliance on the MIG after Removal

[15] The timing of the decision letters issued are relevant in this instance as RW argues that the respondent relied on the limitations of MIG treatment to deny the applicant's OCF-18s after he was removed from the MIG.

[16] There is no indication in the log notes as to the date that Dr. Sethi's report was received by the respondent. It is dated March 7, 2018 and was plainly reviewed on April 27, 2018 as the notes reveal RW's removal from the MIG on that date.

[17] The most recent correspondence to RW before removal from the MIG was April 26, 2018 – and on that date, the respondent indicated that a "physical" treatment plan was denied on the basis of the MIG.

[18] There is no other communication to the applicant, after April 26, 2018, that indicates the denial of any treatment plan is based on the limits of treatment outlined in the MIG.

[19] While I find the respondent's apparent separation of treatment plans into differing physical and psychological branches with respect to the MIG puzzling in light of the absence of any such distinction in the *Schedule* (one is either treated within the MIG or is not, whatever the basis for removal might be), I am not aware of

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any communication to RW after the removal from the MIG that indicates treatment is denied on the basis of MIG limits.

[20] PL testified that all decisions made with respect to the approval or denial of OCF-18s was directly based on whether that particular treatment was “reasonable and necessary” and on a “holistic basis”. There is no evidence within the log notes updated contemporaneously by the adjusters on this file that a different approach was used.

[21] I agree with the applicant’s counsel that the log notes are not comprehensive. There is very little description of decision-making or file review. PL testified that the file is reviewed on a continuous basis, but provided little explanation regarding the nature of such review. Additionally, PL testified that he had reviewed the applicant’s submissions in this matter, but when asked questions about these submissions had very little knowledge of their content.

[22] However, I find the respondent’s argument that the basis for the claimed award in this instance is speculative, persuasive. There is no conduct by the insured in this instance that demonstrates RW was treated in an adversarial manner. There is no conduct that shows evidence was ignored or that the respondent failed to discharge its obligations.

[23] Fundamentally, the present application alleges the respondent ought to be liable for an award because the decisions in dispute were reversed at a late stage in this process. In my view this is a normal consequence of a hearing process. In the course of ongoing disputes and reviews pending a final hearing, it is not unusual for one side or the other to reverse their position or to find a compromise which avoids the necessity of a hearing. I do not consider a late reversal in itself suggestive of an unreasonable delay or withholding of payment.

Forced Hearing

[24] The respondent has no authority to compel RW or any applicant to participate in a hearing process. The hearing process is initiated by the insured and may be withdrawn by the insured. The parties considered it necessary that the Tribunal issue a decision with respect to award in this instance. This does not demonstrate an award is appropriate in the circumstances. This is underscored by the fact that I find RW is not entitled to an award and this was the only issue in dispute.

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CONCLUSION

[25] In order to be entitled to an award, the applicant must show that the respondent unreasonably withheld or delayed a payment to which he was entitled. RW did not do so in this instance.

[26] While the decision the respondent initially made was reversed shortly before this hearing, the conclusion that this was not based on an ongoing assessment of the reasonableness and necessity of the OCF-18s in dispute requires me to assume that a lengthy decision is unreasonable essentially on its face.

[27] This would also require me to disregard the testimony of PL, or find it incredible, that this decision was reviewed on an ongoing basis in light of a multitude of factors but on the underlying principle that the treatment would be approved if it were reasonable and necessary.

[28] I am not satisfied that this is an appropriate instance in which to order an award against the respondent on a balance of probabilities. The applicant sought the maximum award available (50%) and I find that the behaviour demonstrated by the respondent in this instance does not warrant such an order.

ORDER

[29] The respondent is not liable to pay an award under *Ontario Regulation 664*.

[30] The application is denied.

Released: September 22, 2020

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Nathan Ferguson
Adjudicator

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