Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Ontario

2021 CanLII 35591 (ON LAT)

Citation: F.C. v. Aviva General Insurance, 2021 ONLAT 19-003936/AABS

Release date: 04/27/2021
File Number: 19-003936/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:

[FC]

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR **Asad Ali Moten**

APPEARANCES:

For the Applicant: Dharshika Pathmanathan, Counsel

For the Respondent: Geoffrey Keating, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] The applicant (the "Applicant") was involved in an automobile accident on March 22, 2017. She seeks benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg. 34/10 (the "*Schedule*").

[2] At issue between the parties are a determination as to whether the Applicant: (a) falls within the Minor Injury Guideline ("MIG"); (b) is entitled to payment for the cost of a psychological assessment; (c) is entitled to four proposed physiotherapy treatment plans; and (d) is entitled to interest, if applicable.

[3] The Applicant contends that the accident exacerbated a significant pre-existing injury, taking her out of the MIG. She also argues that the psychological assessment plan and physiotherapy treatment plans are reasonable and necessary.

[4] The respondent, Aviva General Insurance (the "Respondent"), disagrees, arguing that the Applicant has not demonstrated that her pre-existing physical injuries would prevent maximal recovery under the MIG, and that she has not shown her psychological injuries to be sufficient to remove her from the MIG. The Respondent also argues that the treatment plans are not reasonable and necessary.

ISSUES

[5] The issues to be decided are:

a. Did the Applicant sustain predominantly minor injuries under the Schedule?

b. If not, is the Applicant entitled to the following rehabilitation benefits from Physio Fix and Fitness:

(i) $2,128.05 for a psychological assessment and denied on June 23, 2017;

(ii) $4,587.58 for physiotherapy treatment and denied on January 5, 2018;

(iii) $5,808.32 for physiotherapy treatment and denied on March 5, 2019;

(iv) $1,299.31 (less amounts approved) for physiotherapy treatment and denied on June 23, 2017;

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(v) $5,290.74 for physiotherapy treatment and denied on July 12, 2017; and,

c. Is the Applicant entitled to Interest on any applicable, overdue payment of benefits?

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RESULT

[6] I find that, for the reasons below, the Applicant's prior physical injury to her coccygeal region would prevent her maximal recovery if restricted to amounts under the MIG.

[7] I further find that the Applicant has demonstrated that the proposed treatment plans are reasonable and necessary. With respect to the psychological assessment, I find that the Applicant has not satisfied her onus to show that the assessment is reasonable or necessary under the *Schedule*.

[8] The Applicant is entitled to payment of the proposed treatment plans, and interest on any overdue payments pursuant to section 51 of the *Schedule*.

BACKGROUND

[9] The Applicant was involved in a car accident on March 22, 2017. She was driving eastbound on Steeles Avenue when her car was T-boned on the driver's side by a car travelling southbound on Creditview Drive.

[10] The Applicant sustained injuries to her neck, shoulders, upper and lower back, and her coccyx region. She was also diagnosed with adjustment disorder, mixed anxiety, and depressed mood.

[11] Before the accident, the Applicant had been recovering from pain in her tailbone. This was caused by an old, partial subluxation in two segments of the coccyx. The Applicant alleges that the accident exacerbated the injury.

[12] The Applicant has five children, who at the time of the accident were all under 12 years old. The youngest was seven months old. She is the primary caregiver for her children and shoulders the lion's share of household duties. She was on maternity leave at the time of the accident and intended to return to work in August 2017.

ANALYSIS

Has the Applicant sustained predominantly minor injuries under the Schedule?

[13] I find that there is compelling evidence that the Applicant's prior injury to her coccygeal region would prevent her from maximal recovery if she were limited to the MIG.

[14] The MIG establishes a framework for the treatment of minor injuries. Section 3(1) of the *Schedule* defines a minor injury as a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation. A minor injury also includes any clinically associated sequelae to the injuries noted above. An applicant who falls within the MIG is eligible for up to $3,500 in medical and rehabilitation benefits.

[15] There are at least two ways that an applicant can be taken out of the MIG. First, if the applicant suffers an injury in the accident that goes beyond the definition of a minor injury. Commonly, the Tribunal hears disputes about an whether an applicant's chronic pain or psychological conditions suffered as a result of the accident are sufficient to remove an applicant from the MIG. Second, section 18(2) of the *Schedule* provides that an applicant can fall outside of the MIG if his or her health practitioner determines and provides compelling evidence that the applicant has a pre-existing medical condition which prevents maximal recovery of an otherwise minor injury if the applicant is limited to the benefits under the MIG.

[16] The Applicant bears the burden of proving that the MIG does not apply.[1]

[17] The Applicant argues that her old tailbone injury, suffered in December 2010, is particularly vulnerable to re-injury. The accident, the Applicant claims, exacerbated the injury. The Applicant also argues that she suffers from psychological impairment as a result of the accident. Both of these injuries, in the Applicant's submission, are independently sufficient to take her out of the MIG.

[18] With respect to psychological impairment, the Applicant argues that her impairment existed in some fashion before the accident, and that in any case, the accident either resulted in, or exacerbated her psychological diagnosis.

[19] The Respondent argues that the Applicant has: (a) failed to show that her pre-existing coccyx injury will prevent maximal recovery; (b) not provided any evidence with respect to pre-existing psychological impairment; and (c) failed to prove that her post-accident psychological impairment rises to a level that would take her out of the MIG.

[1] *Scarlett v. Belair Insurance* (Appeal P13-0014, November 28, 2013), para. 42.

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The Applicant's tailbone

[20] There is no dispute that the Applicant suffered from a tailbone injury prior to the accident. The Applicant's family physician records indicate that the Applicant complained of lower back or tailbone pain at every visit to her doctors from 2012 to 2017. This includes a visit in February 2017, mere weeks before the accident, where the family physician considered the results of an x-ray and discussed with the Applicant physiotherapy to treat her coccygeal subluxation.

[21] There is also evidence to indicate that the accident made her injury worse. She visited her doctor the next day and described a worsening pain in her coccygeal region. An x-ray done a few weeks later, however, did not show that the coccygeal segments had subluxated any further. Her doctor prescribed physiotherapy, chiropractic treatments, and massage, and suggested that she may need a psychological assessment.

[22] As late as December 2018, the Applicant was still complaining to her doctor about significant tailbone pain. An MRI done in December 2018 confirmed the injury was still present. It should be noted that the Applicant may have been limited in her treatment during 2018 by the fact that she was pregnant for much of that year.

[23] The Respondent argues that the Applicant has failed to submit evidence from a health practitioner about the Applicant's prospects for recovery, given her pre-existing injury. I disagree.

[24] Section 18(2) of the *Schedule* requires the Applicant's health practitioner to submit "compelling evidence" about (a) the pre-existing injury; and (b) the pre-existing injury preventing maximal recovery under the MIG. The definition of a Health practitioner, under the *Schedule*, includes a variety of professionals, so long as they are qualified to treat the injury on which they are providing an opinion.

[25] In this case, that compelling evidence comes from the following places, in concert:

a. The Applicant's family physician, who catalogued the pre-existing injury, its extent, and symptomology.

b. The Applicant's family physician, who noted that the Applicant's symptoms worsened after the accident.

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c. A June 2017 OCF-18 completed by the Applicant's chiropractor notes in her progress report that the Applicant has made moderate overall improvement since starting treatment, and that a barrier to recovery is the "posterior subluxation of distal coccygeal segments".

d. A December 2017 OCF-18, completed by the same chiropractor, notes the same barrier to recovery.

e. A subsequent OCF-18 completed by a different chiropractor at the same office, which states that her posterior subluxation of coccyx segments could affect her response to treatment for the injuries identified.

f. The Applicant's progress report from her chiropractor in February 2018 which states that the Applicant has received cold laser treatment and reports improvements of 60% since the accident.

g. The Applicant's records from the chiropractic clinic indicate that the Applicant's treatment was limited as a result of the pain she was experiencing.

h. The Applicant's records from the chiropractic clinic show that the Applicant, after diligently and regularly attending treatment, did not attend for several months. I accept that she was not able to continue her treatment because her condition deteriorated. Upon return she had to be re-assessed.

[26] The Tribunal finds that the totality of the evidence above is compelling evidence that the Applicant's pre-existing coccygeal injury would prevent her from maximal recovery if she were limited to the MIG. While none of the evidence explicitly states this conclusion, it is the Tribunal's job to weigh the evidence available and determine if such a conclusion can be made.

[27] Further, the Respondent has not provided evidence that might contradict the Applicant's evidence. Reports by an orthopaedic surgeon do not address the coccygeal injury in any meaningful way. It appears the surgeon did not assess or examine that area of the Applicant's spine, attributing the pain to a "pre-existing condition".

[28] The Respondent argues that the subluxation appears to be the same pre-and post-accident, and that the MIG does not account for pain. The Respondent has not provided any authority to suggest that the MIG does not account for pain.

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Rather, this Tribunal has on many occasions found that various types of pre-existing pain are sufficient to remove an applicant from the MIG.

[29] The Respondent also argues that, in any case, a subluxation is a minor injury. This may be the case where the subluxation is caused by the accident. However, in this case, the subluxation is pre-existing, and the analysis is focused on whether its existence prevents maximal recovery, not on whether it would otherwise be a minor injury.

[30] Therefore, the MIG does not apply to the Applicant as a result of her pre-existing injury. She is entitled to treatment beyond the MIG as a result of meeting the criteria under s. 18(2).

Psychological Impairment

[31] As I have found that the Applicant's coccygeal injury is sufficient to remove her from the MIG, I need not consider whether she suffers from a psychological impairment which might also yield the same result.

Are the proposed treatment and assessment plans reasonable and necessary?

[32] Section 15(1) of the *Schedule* creates a liability on the part of insurers to pay for "all reasonable and necessary expenses" of an insured person for items including medical, chiropractic, and psychological services, assistive devices, and other goods and services of a medical nature that are essential for the treatment of the insured person.

[33] The onus is on the Applicant to demonstrate, on a balance of probabilities, that all the treatments in dispute are reasonable and necessary.[2] This requires the Applicant to demonstrate that the impairment for which the treatment is sought was sustained as a result of the accident. The causation test to be applied is the "but for" test.[3]

[34] Next, the Applicant must show ongoing impairment and adequate medical reasons to support the proposed treatment in the form of objective medical evidence.[4]

Proposed Treatment Plans

[2] *Scarlett v Belair Insurance*, 2015 ONSC 3635 (CanLII)
[3] *Sabadash v. State Farm et al.,* 2019 ONSC 1121.
[4] *17-002689 v. Aviva Canada Inc.,* 2018 CanLII 2311 (ON LAT). *17-00208 v. The Personal Insurance Company*, CarswellOnt, 1160, para 24.

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[35] Immediately after the accident, the Applicant complained to her family doctor about numbness in her extremities, stiffness up and down her back, numbness in her left leg, worsened coccygeal pain, and difficulty sitting. Many of these symptoms are noted on subsequent visits to the Applicant's doctor. Besides the pre-existing injury, none of these symptoms were reported present prior to the accident.

[36] The Applicant visited her chiropractor a few days after the accident, and the symptoms she complains about are reflected there, as well. And again, there is no evidence to indicate that these injuries existed before the accident. Therefore, it is reasonable to conclude that the pain, stiffness, and numbness of which the Applicant complains are the result of the accident. She has met the 'but for' test in that, on a balance of probabilities, but for the accident she would not be experiencing these symptoms.

[37] Over the course of the next year or more, the Applicant visited her chiropractor regularly, often several times a week. Her chiropractor proposed the following treatment plans, as documented by the OCF-18's at issue:

a. June 13, 2017, in the amount of $1,299.31, proposing 8 sessions of chiropractic care, exercise, and massage therapy.

b. July 4, 2017, in the amount of $5,290.74, proposing:

(i) 21 sessions of chiropractic care, laser therapy, exercise, and massage therapy;

(ii) Completion of OCF-18, re-assessment, and progress report

(iii) Comfort pillow;

(iv) Aromatherapy wrap; and,

(v) Back support and seat.

c. December 11, 2017, in the amount of $4,587.58, proposing:

(i) 18 sessions of chiropractic care, laser therapy, exercise, and massage therapy;

(ii) Completion of the OCF-18, re-assessment, and progress report;

(iii) Shiatsu massager;

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(iv) Exercise ball and mat; and,

(v) Heating pad.

d. February 7, 2018, in the amount of $5,808.32, proposing:

(i) 18 sessions of chiropractic care, laser therapy, exercise, and massage therapy;

(ii) Completion of the OCF-18, re-assessment, and progress report;

(iii) 18 sessions of acupuncture; and,

(iv) TENS unit machine.

[38] The goal of all of these proposed treatment plans is the same: reduce pain, increase strength and range of motion, return to pre-accident household chores, and return to work activities in some capacity.

[39] While the Tribunal has not been provided with the denial letters from the Respondent providing reasons for the denial of each of the above treatment plans, there is no dispute that they have been denied. The Respondent, through its submissions to this Tribunal, contends that the Applicant has not provided any evidence that the proposed treatment plans in succession work towards restoring the Applicant to pre-accident levels. The Respondent also argues that all of the proposed treatment modalities are passive.

[40] I disagree with the Respondent's arguments. The Applicant has shown, on a balance of probabilities, that the treatment to date has improved her condition, and that her proposed treatment plans are a continuation of that treatment. The Applicant's goals are clear, the modalities are reasonably connected to those goals, including the use of exercise, and the Respondent's own surveillance evidence supports the finding that the Applicant is motivated and pursuing these goals.

[41] Over the course of the Applicant's chiropractic visits, the Applicant experienced some improvement in her symptoms. This is indicated by her chiropractors' notes, as early as August 2017. The treatments described are similar to the ones proposed in the OCF-18's at issue, including chiropractic manipulation, and laser therapy. As an example, on September 5, 2017, the Applicant reported "feeling better, ongoing lower back and tailbone pain reported. Upper back feeling better."

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[42] Between September 2017 and December 2017, the Applicant stopped attending treatment. The Applicant argues that her condition worsened in the intervening period, and the Respondent does not dispute this. Assuming this to be true then, it provides an opportunity to understand how the Applicant's treatment improved her condition and how not continuing it set her progress back. By late December 2017, after a few visits to her chiropractor, the Applicant reported "slight improvement."

[43] Looking at the totality of the Applicant's progress, in June 2017 the Applicant reported a pain intensity of 9/10. By February 2018, the Applicant's reported pain intensity had decreased to 6-7/10. The February 2018 progress report also states that the Applicant has "completed a trial of care of cold laser therapy, and reports improvement with its application." The chiropractor recommended that laser therapy continue as part of the Applicant's rehabilitation program.

[44] This is, simply put, progress in the right direction. Because the Applicant's history demonstrates what happens when she pauses treatment, I am led to conclude that the improvement that she has experienced is a function of the treatment regimen. This is further supported by the fact that the Applicant has been consistently and frequently attending treatment for more than a year. I find it difficult to believe that, were she not experiencing benefit, especially given her significant responsibilities at home, the Applicant would continue to attend treatment with such dedication.

[45] In sum, the treatment plans proposed on June 13, July 4, and December 11, 2017 all speak to a continuation in therapeutic modalities that the evidence showed yielded benefit to the Applicant. All of these treatment plans are fairly similar, with minor adjustments in the recommended equipment. The Applicant's improvement during the course of the proposed treatments speaks to their necessity. The fact that she attended with such frequency speaks to the reasonableness of the number of sessions proposed.

[46] On the other hand, I cannot conclude that the February 7, 2018 proposed treatment plan is reasonable or necessary for the following reasons. First, there is no evidence that the Applicant continued attending treatment after February 2018. In fact, by March 2018 she was pregnant and unable to continue her treatment because of challenges with her pregnancy. Second, if the course of treatment thus far was working, then why change the treatment plan to include acupuncture and a fairly expensive TENS unit? There is insufficient evidence to indicate the reasonableness of this proposal. Third, if the Applicant were to propose to now, three years later, attend sessions for the treatment proposed,

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there is insufficient evidence before me with respect to her current condition and whether attending treatment now would make a significant difference in her pain so as to make the proposed treatment plan reasonable and necessary.

[47] While the Respondent argues that all of the proposed treatment plans are not reasonable and necessary, I find the Respondent's evidence in support of its argument unpersuasive. The Respondent, for its part, points only to a report of surveillance conducted on the Applicant in November and December 2019. The surveillance shows the Applicant shoveling snow, shuttling her children to and from daily activities, and attending fitness appointments with a trainer. This evidence provides little in the way of understanding the Applicant's level of pain, especially since the surveillance was done more than 30 months after the accident. It is possible that the Applicant experienced significant improvement in that time and may continue to improve.

[48] I find that the Applicant has satisfied her onus to demonstrate that the treatment plans proposed on June 13, 2017, July 4, 2017 and December 11, 2017 are reasonable and necessary. The Applicant is entitled to payment of these proposed treatment plans.

Psychological Assessment

[49] The Applicant has not, however, demonstrated that the proposed psychological assessment is reasonable and necessary.

[50] The proposed OCF-18 was completed in June 2017 by a social worker under the supervision of a psychologist. The OCF-18 proposed an assessment, testing, planning and preparation, counselling, documentation, and transportation. The total cost of the proposed assessment is $2,128.05.

[51] There seems to be little question that the Applicant struggles with psychological impairment. I do not believe it a stretch to also say that the Applicant could be assisted in her daily life by a psychological assessment and subsequent treatment. The issue in this case, once the Applicant has moved out of the MIG, is whether the impairment is caused by the accident, in other words, whether her psychological impairments occurred 'but for' the accident.

[52] In the Applicant's evidence, her family physician suggests psychological impairment, and the psychologist completing the OCF-18 identifies psychological impairment symptoms. The Applicant's family physician does not suggest that the accident caused any psychological impairment, though she notes the

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possible psychological impairment soon after the accident. The psychologist attributes much of the symptomology to the accident.

[53] On the other hand, the Respondent points to three assessments completed by a clinical psychologist. All of these assessments diagnose the Applicant with various psychological impairments including anxiety, depression, and mood disorder. They attribute these impairments, however, to the Applicant's personal and social history, in particular the difficulties in her family life, and not to the accident.

[54] It is not clear that the Respondent's evidence is correct in its causation attribution. But to the Tribunal it raises sufficient doubt to off-set the Applicant's evidence and assertions that it was the accident that caused her psychological impairments. In other words, the Applicant has not satisfied her onus to demonstrate that the accident caused her to suffer a psychological impairment.

[55] Consequently, I cannot conclude that the proposed assessment is necessary or reasonable. The Applicant, therefore, is not entitled to payment of the cost of the proposed assessment.

Is the Applicant entitled to interest on the claimed benefits?

[56] As I find that the Applicant is entitled to payment for the proposed treatment plans for chiropractic care, the Applicant is also entitled to interest on those payments pursuant to section 51 of the *Schedule*.

ORDER

[57] For the reasons above, I find that the Applicant has satisfied her onus with respect to the following proposed treatment plans:

a. $4,587.58 for physiotherapy treatment and denied on January 5, 2018;

b. $1,299.31 (less amounts approved) for physiotherapy treatment and denied on June 23, 2017;

c. $5,290.74 for physiotherapy treatment and denied on July 12, 2017;

[58] She is, therefore, entitled to payment of same and interest on any overdue amounts.

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[59] The Applicant has not satisfied her onus to show that the proposed treatment plan in the amount of $5,808.32, denied on March 5, 2019, or the proposed psychological assessment are reasonable and necessary.

Released: April 27, 2021

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Asad Ali Moten, Adjudicator

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