

**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**

Citation: 17-008580 vs. Unifund Assurance Company, 2018 ONLAT

Date: 2019-02-19

File Number: 17-008580/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:

N. D.

Appellant(s)

and

Unifund Assurance Company

Respondent

DECISION

ADJUDICATOR: Rupinder Hans

APPEARANCES:

For the Appellant: Lawson H. Hennick, Counsel

For the Respondent: Geoffrey Keating, Counsel

HEARD In Writing: June 18, 2018

BACKGROUND

- [1] The applicant was injured in an automobile accident on September 30, 2012, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective after September 1, 2010* (the “Schedule”).
- [2] The applicant applied for medical benefits that were denied by the respondent Unifund Assurance Company. The applicant disagreed with this decision and appealed to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”), pursuant to subsection 280(2) of the *Insurance Act*, R.S.O. 1990, c. I.8 (the “Act”).
- [3] A written hearing was scheduled, and a review of the evidence and submissions forms the basis for the decision.

ISSUES IN DISPUTE

- [4] The following are the issues to be decided:
 - i. Is the applicant entitled to medical benefits for chiropractic services recommended by [Rehabilitation Services] in treatment plans as follows:
 - (a) the amount of \$3,349.08 submitted on November 24, 2015, and denied on December 8, 2015.
 - (b) the amount of \$2,585.50 submitted on February 17, 2017, and denied on March 20, 2017.
 - ii. Is the applicant entitled to the cost of an examination in the amount of \$2,486.00 for a psychiatric assessment recommended by Dr. Zohar Waisman, psychiatrist, of [an assessment clinic], submitted on December 23, 2016 and denied January 9, 2017?
 - iii. Is the applicant entitled to the cost of an examination in the amount of \$2,486.00 for a physiatry assessment recommended by Dr. Shariff Dessouki, physiatrist, of [an assessment clinic], submitted on December 21, 2016 and denied January 9, 2017?
 - iv. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] Based upon the totality of the evidence before me, I find that the applicant:
 - a. is entitled to receive the medical benefit for chiropractic services in the amount of \$3,349.08;

- b. is not entitled to the medical benefit for chiropractic services in the amount of \$2,585.50;
- c. is not entitled to the cost of examination for a psychiatric assessment in the amount of \$2,486.00;
- d. is entitled to the cost of examination for a physiatry assessment in the amount of \$2,486.00; and
- e. is entitled to interest on the incurred amounts for the treatment plans outlined above in a. and d. (for chiropractic services and an examination for a physiatry assessment).

DISCUSSION

Entitlement to the Chiropractic Treatment Plan in the amount of \$3,349.08

- [6] I find that the applicant is entitled to the medical benefit for chiropractic treatment in the amount of \$3,349.08.
- [7] The test for the payment of medical benefits as set forth in section 15 of the *Schedule* is whether the benefits claimed are reasonable and necessary expenses as a result of the accident. The onus is on the applicant to establish that she meets this test on a balance of probabilities. The applicant has met her burden.
- [8] The applicant submits that she should be entitled to chiropractic treatment because she found that they provide her with pain relief, as she continues to experience persistent neck, head and back pain as a result of the motor vehicle accident. I find her pain complaints credible and consistent with the evidence she presented. She relies upon the medical notes and records of Dr. Ana Diaz De Molnar, her family physician. She submits that for the period November 9, 2012 to November 9, 2016, she visited Dr. Molnar about 32 times complaining about a host of injuries related to the motor vehicle accident. For instance:
- a. A March 29, 2016 note states that the applicant continues complaining of the pain in the dorsal back up to the back of the neck, also pain in the left hand and increasing pain when she tries to make a fist.
 - b. During a May 17, 2016 visit, she complains of pain in the middle of the thoracic back at approximately the level of T6 to T8, and pain at the base of her neck in the midline at the junction of the cervical and thoracic spine, numbness in the left hand, and sharp pains like electric shocks going from her neck down to her arm, forearm and to her left hand. She is noted as

having pain when she tries to walk, and sitting for too long also causes pain.

- c. A July 15, 2016 clinical note states that the applicant is experiencing persistent pain in her neck, upper back and in her left upper extremity with numbness in the area of second and third fingers of her left hand.
 - d. An August 29, 2016 note states that she continues to have pain related to the motor vehicle accident, and has difficulty walking and it takes her an unusually prolonged time to walk from one place to another.
- [9] The Disability Certificate, dated May 3, 2013, completed by Dr. Molnar diagnoses the applicant with the following accident related injuries: neck and back strain, sprain of the right side, upper back, right upper extremity, right hand, right shoulder, right leg, right ankle, trauma and headaches. Dr. Molar also completed an additional October 30, 2013 Disability Certificate in which he diagnoses the following: chronic dorsal strain, chronic cervical strain, chronic lumbo-pelvic sprain, chronic post-traumatic headaches and post-traumatic stress disorder.
- [10] A May 6, 2013, x-ray of the applicant's cervical spine reveals a moderate degree of disc degeneration of the cervical spine most pronounced at the C5-6 and C6-7 levels, and C5-6 demonstrates a mild degree of bilateral neural foraminal stenosis secondary to osteophyte formation. The findings for the thoracic spine are a mild degree of scoliosis of the thoracic spine convex to the right with the apex convexity, and a slight exaggeration of the usual thoracic kyphosis.
- [11] A note from Dr. Charles M. Godfrey, dated August 21, 2013, states that the applicant complains of multiple aches and pains over her cervical spine, left arm, the lumbar spine with numbness and tingling in her hands and feet which results in her being unable to do normal housework or return to her normal work activities.
- [12] The applicant further relies upon the records from [the Hospital]. A medical note dated August 12, 2014 states that the applicant is experiencing post-traumatic stress disorder, right arm is numb, tingling in her extremities, and her back and neck pain is noted as chronic. The records on October 9, 2015, note that she has muscle and neck pain, frequent headaches and emotional distress since the motor vehicle accident. A June 14, 2017 note states that she struggles with chronic pain since the accident, and has a hard time being physically active as the pain is too severe. Medical records dated March 15, 2017 note that the applicant's main issue is chronic pain, and that she struggles to get moving each day because of pain.
- [13] On November 4, 2015, Dr. Satyendra Sharma of the Neuromuscular Clinic at [the Hospital] notes that there is a global weakness of proximal and distal muscles in

the left upper extremity, and that left bicep, supinator and triceps reflexes are diminished when compared to the right side. He diagnoses the applicant with C7 radiculopathy, left side.

- [14] Dr. Shariff Dessouki's physiatry report, dated January 5, 2017, notes that the applicant has reported an improvement of approximately 30 percent since the accident, and that she experiences pain in her neck, middle back as well as headaches. He notes that she continues to suffer from: chronic myofascial sprain/strain injuries of the cervical spine, left C6-7 cervical radiculopathy, chronic cervicogenic headaches, psychological/emotional sequelae, and chronic pain syndrome.
- [15] The respondent acknowledges that pain relief can be a valid treatment goal, but that it is not in this case. Instead, the respondent asserts that past passive modality chiropractic treatment has provided no tangible benefit, which suggest dependency. I disagree, and further note that the respondent has provided no compelling evidence to establish dependency on the part of the applicant.
- [16] In denying the treatment plans, the respondent relies upon the insurer examination completed by Dr. Dimitrios Leontidis, chiropractor, on April 7, 2015. Dr. Leontidis found that a chiropractic treatment plan similar to the proposed chiropractic treatment, and submitted by the same practitioner was not reasonable or necessary, and would not be of any additional benefit to the management of the claim. Dr. Leontidis noted that he was unable to identify any objectively reliable clinical finding substantiating any physical and/or musculoskeletal impairment as a direct result of the motor vehicle accident. He notes that previous chiropractic treatment have not afforded the applicant any significant improvement in her ongoing pain symptoms. He acknowledges that the applicant reports continued pain symptoms, but opines that the initial courses of formal, facility-based treatment would have been adequate in preparing her for self-directed home exercise.
- [17] I am persuaded by the applicant, and find that the medical evidence provided by the applicant from various medical professionals is compelling in establishing that she has physical impairments, and continues to experience pain which inhibits and impacts her daily activities. She has advised her medical professionals that she experiences pain in her neck, back, and left hand, and has difficulty with walking and conducting her normal housework. The goal of the treatment plan for chiropractic services is pain reduction, increase strength, increased range of motion, and endurance. I agree with the applicant that pain reduction, in particular, is a reasonable and legitimate goal of treatment so that she is able to engage in her daily activities.

[18] I find the applicant has met her burden and has persuaded me that the proposed treatment plan is reasonable and necessary to address her impairments resulting from the accident.

Entitlement to the Chiropractic Treatment Plan in the amount of \$2,585.50

[19] I find that the applicant is not entitled to the medical benefit for chiropractic treatment in the amount of \$2,585.50.

[20] The respondent asserts that at the time the treatment plan was denied, it had requested, in accordance with Section 44, an insurer's examination with Dr. Leontidis. In response, the applicant noted that she had previously been assessed by Dr. Leontidis, and he had advised that a similar chiropractic treatment plan was not reasonable or necessary. As such, the applicant took the position that she would not attend the upcoming insurer examination.

[21] The respondent submits that an insurer examination had been requested as almost two years had passed since the last chiropractic assessment, and it was reasonably required. Furthermore, the applicant is not in compliance with section 44, and is therefore, precluded from proceeding to a written hearing on this issue per section 55(1)2.

[22] In her reply submissions, the applicant points out that section 44(1) provides for an examination "for the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit... but not more often than is reasonably necessary, an insurer may require an insured person to be examined..." The applicant submits that she was previously assessed on April 7, 2015 by Dr. Leontidis, who concluded that a similar treatment plan was not reasonable or necessary, and the respondent issued a denial on December 8, 2015. The applicant asserts that that denial was about thirteen months prior to the date of the treatment plan at issue, and that the section 44 assessment was not reasonably necessary given the respondent's previous chiropractic treatment determination. The applicant further submits that it would be unreasonable and prejudicial to compel the applicant to undergo a further chiropractic examination. I disagree.

[23] I am persuaded by the respondent's argument. The entitlement to chiropractic treatment had not been assessed by the respondent in almost two years. The respondent submits that during that time, there had been several diagnoses and medical developments, and that it would be appropriate to allow reassessment. I note that the applicant's medical records make clear that during that two year period she continued to seek the assistance of medical professionals to assist with her accident related injuries, including her physical impairments. Conversely, it is reasonable on the part of the respondent to request the examination to assist in its own determination, and to gain a more recent and up to date complete

picture of the applicant's condition. Further, an insurer has an obligation to continually adjust a file, and is permitted to gather evidence to respond to a position taken by the insured person. I find that the respondent's request for the insurer examination was reasonably necessary.

- [24] Consequently, the applicant is not in compliance with section 44, and per section 55(1)2 the applicant is precluded from proceeding to a hearing with respect to this issue.

Entitlement to a Psychiatric Assessment

- [25] I find that the applicant is not entitled to the treatment plan for a psychiatric assessment for the below reasons.
- [26] The respondent notes that the treatment plan was submitted to it on December 23, 2016. The associated psychiatric report by Dr. Waisman indicates that the assessment took place on December 8, 2016, a total of fifteen days prior to the date the treatment plan was submitted to the respondent. The respondent denied the benefit on the basis that the psychiatric assessment was completed before the related treatment plan was submitted to the respondent in contravention of section 38(2).
- [27] The applicant acknowledges that the assessment took place fifteen days prior to submission of the related treatment plan. However, she counters that a mere fifteen days is close enough in proximity that there could be no prejudice to the respondent. Furthermore, that the consumer protection objective of the insurance legislature should be interpreted and applied in a manner that is consistent with its purpose.
- [28] I find the respondent's position compelling. I note that section 38(2) provides that an insurer is not liable to pay an expense in respect of an assessment or examination that was incurred before the insured person submits a treatment and assessment plan. There are exceptions listed in the section, however, the applicant does not submit or provide any evidence that an exception applies in this case. I find that no exception applies.
- [29] Given the above, I find that the applicant is not entitled to payment on the psychiatric assessment.

Entitlement to a Psychiatry Assessment

- [30] In its submissions, the respondent conceded that the applicant is entitled to this benefit. Therefore, this treatment plan is no longer in dispute.

The Applicant's Entitlement to Interest

[31] The applicant is entitled to interest in accordance with the *Schedule* on those overdue benefits that I have found the applicant entitled to.

ORDER

[32] After considering the evidence and submissions, pursuant to the authority vested in this Tribunal under the provisions of the Act, I order that:

- a. The applicant is entitled to the following:
 - i. the amount of \$3,349.08 for chiropractic services submitted on November 24, 2015, and denied on December 8, 2015;
 - ii. the amount of \$2,486.00 for a physiatry assessment submitted on December 21, 2016, and denied January 9, 2017; and
 - iii. Interest on the incurred amounts for these treatment plans in accordance with the *Schedule*.
- b. The applicant is not entitled to the following:
 - i. the amount of \$2,585.50 for chiropractic services submitted on February 17, 2017, and denied on March 20, 2017; and
 - ii. the amount of \$2,486.00 for a psychiatric assessment submitted on December 23, 2016, and denied January 9, 2017.

Released: February 19, 2019

**Rupinder Hans
Adjudicator**