

2023 CarswellOnt 1734
Ontario Licence Appeal Tribunal

Harding v. Aviva General Insurance

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**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**

Dorothy Harding (Applicant) and Aviva General Insurance (Respondent)

Deborah Neilson Adjud.

Heard: December 30, 2022

Judgment: February 8, 2023

Docket: 20-014608/AABS

Counsel: Anthony Mancuso, Ramendeeep Minhas, for Applicant, Dorothy Harding
Gina Nardella, for Respondent

Deborah Neilson Adjud.:

BACKGROUND

1 The applicant was involved in an automobile accident on *September 21, 2018*, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010*. The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

2 The applicant is seeking a determination that she is entitled to treatment plans for chiropractic treatment, the cost of a psychological assessment that was partially approved, the cost of a chronic pain assessment, a Reg.664 award and interest. The respondent submits that it approved the chiropractic treatment and that its denial of the remaining treatment plans was reasonable.

3 Based on the evidence before me, I find that the applicant is entitled to the cost of a chronic pain assessment and interest in accordance with the Schedule. I have no jurisdiction to address the chiropractic treatment plans. The remainder of her application is dismissed.

ISSUES TO BE DECIDED

4 The issues set out in the case conference Order are as follows:

1. Is the applicant entitled to \$3,586.86 (less amounts approved) for chiropractic treatment, proposed by Reza Babloui, chiropractor, in a treatment plan/OCF-18 ("plan") denied on July 4, 2019?
2. Is the applicant entitled to \$3,037.60 for chiropractic treatment, proposed by Reza Babloui in a treatment plan/OCF-18 ("plan") denied on December 13, 2019?
3. Is the applicant entitled to \$2,298.00 for psychological treatment, proposed by Dr. Ilya Gladshiteyn in a treatment plan/OCF-18 ("plan") denied on April 16, 2019?

4. Is the applicant entitled to \$2,184.00 for a chronic pain assessment, proposed by Dr. Igor Wilderman in a treatment plan/OCF-18 ("plan") denied on May 29, 2019?

5. Is the applicant entitled to \$3,861.85 for medical services, proposed by Reza Babloui in a treatment plan/OCF-18 ("plan") denied on April 1, 2020?

6. Is the respondent liable to pay an *award under s. 10 of O. Reg. 664* because it unreasonably withheld or delayed payments to the applicant?

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

5 For the reasons set out below, the issues I must determine are not as set out in the case conference Order.

ANALYSIS

Medical Benefits

6 Under s.15 of the *Schedule*, the respondent is required to pay for all reasonable and necessary expenses incurred by the applicant as a result of the accident for medical benefits. Under s.16 of the *Schedule*, it is required to pay for all reasonable and necessary measures undertaken by the applicant for the purpose of reducing or eliminating the effects of any disability resulting from the impairment or to facilitate the applicant's reintegration into her family, the rest of society and the labour market. This can be determined by analysing whether the treatment goals are reasonable, whether they are being met, and whether the cost is reasonable. The applicant bears the onus of proving on a balance of probabilities that any claimed medical and rehabilitation expenses are reasonable and necessary.

7 The applicant submitted that a reasonable and legitimate goal is the reduction of pain and relied on a number of cases. More specifically, the case law he relied on determined that the reduction of pain together with either an increase in function, strength or an increase an insured's active range of motion are legitimate goals.¹ I am not bound by other Tribunal decisions. To the extent that *P.J. and Continental Insurance Company* stands for the proposition that the goal of reduction of pain only in a chronic pain patient and no other goal was a reasonable goal, I disagree. I find that the reduction of pain for an insured person with chronic pain syndrome or chronic pain that is functionally disabling is a reasonable goal as the reduction of pain in such a person will assist in reducing their dependency on medication, increasing their range of motion, or their function. I note that the applicant in *P.J. and Continental Insurance Company* reported that a reduction in pain helped restore the applicant's function.² Accordingly, I find that it does not stand for the proposition that only pain relief for a chronic pain condition is a legitimate goal. I find that there must be something more to the goal such as a reduction in the use of pain medication, increase in range of motion or function. Other criteria to be considered are whether the overall cost, including the frequency and number of sessions, of achieving the treatment plan goals is reasonable.

8 The applicant submits that all of the treatment plans in issue are necessary for the reduction of pain and her recovery from her injuries. She submitted that she is taking Hydromorphone and Gabapentin to control her pain. The evidence is that she was taking Hydromorphone prior to the accident for her chronic neck pain.³

Chiropractic Treatment

9 The respondent submitted that it approved the following treatment plans listed in the case conference Order:

1. Is the applicant entitled to \$3,586.86 (less amounts approved) for chiropractic treatment, proposed by Reza Babloui, chiropractor, in a treatment plan/OCF-18 ("plan") denied on July 4, 2019?

2. Is the applicant entitled to \$3,037.60 for chiropractic treatment, proposed by Reza Babloui in a treatment plan/OCF-18 ("plan") denied on December 13, 2019?

5. Is the applicant entitled to \$3,861.85 for medical services, proposed by Reza Babloui in a treatment plan/OCF-18 ("plan") denied on April 1, 2020?

10 I find that, based on the respondent's letter dated August 18, 2021, it approved three treatment plans from the Malton Spine Clinic for the same amounts as the above noted treatment plans. For the reasons that follow, I find that the approval was for all the treatment plans in issue above listed in the case conference Order as issues 1, 2 and 5.

\$3,586.86 (less amounts approved) for chiropractic treatment

11 The applicant is seeking entitlement to \$3,586.86 less amounts approved for chiropractic treatment, proposed by Reza Babloui in a treatment plan. The case conference order is devoid of any information identifying the date of the treatment plan, the amount approved or the date it was submitted. The only treatment plan in the parties' submissions for this amount prepared by Reza Babloui of Malton Spine Clinic & Chronic Pain Centre is dated May 24, 2019 for chiropractic and acupuncture services.⁴ The date of Dr. Babloui's treatment plan is the same date as the one referred to in the respondent's August 18, 2021 letter approving the treatment plan of Malton Spine Clinic for the same amount. For these reasons, I find that the \$3,586.86 for chiropractic treatment the applicant is seeking entitlement to has been approved in full.

12 In her reply submissions, the applicant sought an order that the respondent pay for the treatment because Malton Spine Clinic submitted an invoice and it was not paid. In its August 18, 2021 letter, the respondent asked the applicant to have the Malton Spine Clinic submit the invoices for the now approved treatment plans through HCAI under 'exempt' once they are incurred. The invoice before me that was not paid was submitted by the Malton Spine Clinic to HCAI on July 3, 2019. I have no proof that the Malton Spine Clinic resubmitted the invoice to HCAI under "exempt" in accordance with the respondent's request, whether at the instruction of the applicant or otherwise. Accordingly, I find that there is no dispute. Without a dispute, I have no jurisdiction to make an order.

\$3,037.60 for Chiropractic Treatment

13 The applicant is seeking entitlement to \$3,037.60 for chiropractic treatment, proposed by Reza Babloui in a treatment plan denied on December 13, 2019. The case conference order is also devoid of any information identifying the date of this treatment plan, the amount approved or the date it was submitted. The only treatment plan in the parties' submissions for this amount prepared by Reza Babloui of Malton Spine Clinic & Chronic Pain Centre is dated November 25, 2019 for chiropractic services.⁵ The date of Dr. Babloui's treatment plan is the same date as the one referred to in the respondent's August 18, 2021 letter approving the treatment plan of Malton Spine Clinic for the same amount. For these reasons, I find that the \$3,037.60 treatment plan for chiropractic treatment the applicant is seeking entitlement to has been approved in full.

14 As with the first chiropractic treatment plan, I have no evidence that Malton Spine Clinic made any attempt to resubmit the invoices initially sent on December 4, 2019 for this treatment plan under "exempt" in accordance with the respondent's August 18, 2021 request. For the same reasons as with issue number one, I find that there is no dispute. Without a dispute, I have no jurisdiction to make an order.

\$3,861.85 for Medical Services

15 The applicant is seeking entitlement to \$3,861.85 worth of medical services, proposed by Reza Babloui in a treatment plan/OCF-18 ("plan") denied on April 1, 2020. I was unable to locate any treatment plan that recommended medical services different from the list of various services included in the drop down menu on the application. The applicant, in her submissions, referred to a treatment plan for \$3,861.85 for physical rehabilitation dated March 11, 2020. The only treatment plan prepared by Dr. Babloui in the parties' submissions that was of the same amount as the issue listed in the case conference Order was dated March 11, 2020 and was for chiropractic treatment to be provided by Dr. Babloui.⁶ The March 11, 2020 date of Dr. Babloui's treatment plan is the same date as the one referred to in the respondent's August 18, 2021 letter approving the treatment plan

of Malton Spine Clinic for the same amount. For these reasons, I find that the \$3,861.85 treatment plan for medical services that the applicant is seeking entitlement to has been approved in full.

16 Again, I have no I have no evidence that Malton Spine Clinic made any attempt to resubmit the invoices initially sent on April 1, 2020 for this treatment plan under "exempt" in accordance with the respondent's August 18, 2021 request. For the same reasons as with issue number one, I find that there is no dispute. Without a dispute, I have no jurisdiction to make an order.

Psychological Treatment

17 According to the case conference Order, the issue I must decide is whether the applicant is entitled to psychological treatment. However, neither party made submissions on any treatment plan for psychological treatment. Nor was a treatment plan recommending psychological treatment contained in any of the parties' submissions. The applicant's submissions refer to a treatment plan of \$2,298.00 for a mental health and addictions assessment submitted by Dr. Gladshteyn on April 2, 2019 that was partially approved in the amount of \$1,496.10. Enclosed in the applicant's submissions was a treatment plan prepared by Dr. Gladshteyn, psychologist, on April 2, 2019 recommending an assessment by her at the rate of \$2,000.00 per assessment for a total of \$2,298.00. I find that based on both parties' submissions, the issue before me is entitlement to the remaining \$801.90 from the \$2,298.00 less \$1,496.10 approved for a psychological assessment recommended in Dr. Glaslyn's April 2, 2019 treatment plan.

18 Under s.25 (1) 3 of the *Schedule*, the respondent is required to pay reasonable fees charged by a health practitioner for reviewing and approving a treatment and assessment plan under s.38, including any assessment or examination necessary for that purpose, if any one or more of the goods, services, assessments or examinations described in the treatment and assessment plan have been approved by the insurer. The onus is on the applicant to prove on a balance of probabilities that the fees are reasonable and the assessment is necessary for preparing a treatment plan. Under s.25(3) of the *Schedule*, the respondent is not required to pay for the cost of an assessment that exceeds the maximum rate established under the *Professional Services Guideline*.⁷ The maximum hourly rate payable for a psychologist under the *Professional Services Guideline* is \$149.61 per hour.

19 The applicant relies on *17-003735 v. Certas Direct Insurance Company*, 2018 CANLII 39445 (ON LAT) which held that an insured person only needs prove on a balance of probabilities that it is reasonable and necessary that she explore the possibility that she suffers from a psychological impairment. The insured does not need to prove that she in fact suffers from a psychological impairment for a treatment plan for a psychological assessment to be reasonable. I agree with this reasoning because I find that the requirement under s. 25(1) for a "reasonable" assessment refers to the cost or the fees charged for the assessment required as a result of the accident. The reasonableness of the goal of the treatment plan is relevant only for determining whether the assessment is necessary for the purpose of preparing a treatment plan or an OCF-3 disability certificate as described by s.25(1) of the *Schedule*.

20 In this case, the respondent also agreed that the goals of the psychological assessment were necessary given that it approved the treatment plan at the rate of \$149.61 per hour for ten hours for Dr. Gladshteyn to conduct an assessment that would allow her to formulate a treatment plan. Accordingly, the real dispute is the reasonableness of the fees charged.

21 No hourly rate was provided on the treatment plan nor any breakdown on the time involved in doing the assessment that would allow me to determine whether the cost of the assessment recommended by Dr. Gladshteyn is reasonable. Dr. Gladshteyn reported that because the assessment would be conducted in stages that were dependant upon findings in the initial phase, she could not provide a definite description of each of the components and exact time that they would take. I find this approach is not unreasonable given that everyone is different and certain parts of the assessment may go slower or faster depending on how the applicant responds. The applicant submits that the full cost of the assessment in *17-003735 v. Certas* was found to be reasonable. However, there was no discussion about the reasonableness of the rate or cost of the assessment by the Tribunal in *17-003735 v. Certas*. Accordingly, I do not find that the case assists her or me in determining a reasonable amount or time for conducting a psychological assessment.

22 I expect that Dr. Gladshteyn has conducted numerous psychological assessments as the ordinary part of her practice and, therefore, should be able to estimate the average length of time it takes to conduct an assessment. At the very least, she should have indicated her hourly rates. Left as is, one can only guess about the time required for her to conduct the assessment in order to prepare a treatment plan.

23 The respondent relies on the insurer's examination ("IE") paper review report of Dr. Jonathan Siegel, psychologist, dated May 2, 2019,⁸ in which he assessed Dr. Gladshteyn's treatment plan. Dr. Siegel quoted from his April 30, 2019 report noting that he had recommended that the applicant undergo 12 sessions of psychological counselling. He determined that Dr. Gladshteyn's psychological assessment was reasonable and necessary, but the cost was unreasonable. Dr. Siegel reported that an assessment of the applicant had already been conducted and Dr. Gladshteyn did not appear to have a copy of the applicant's medical file. However, he felt it was reasonable for her to have the opportunity to assess the applicant in order to formulate a treatment plan. He determined that 10 hours at the rate of \$149.61 per hour should be sufficient. I agree. Dr. Gladshteyn should be able to use the review the information from the previous assessment to assist her in formulating a treatment plan within the ten hours recommended by Dr. Siegel.

24 I agree with the reasoning that the invoicing of professional services should be reflective of accurate timekeeping and not a default to the maximum allowed.⁹ Without any estimate from Dr. Gladshteyn on the number of hours she requires to assess the applicant and in the absence of any evidence to indicate that Dr. Siegel's estimate of ten hours is too low, I am unable to find that the applicant has satisfied her onus to prove on a balance of probabilities that the fees recommended by Dr. Gladshteyn are reasonable. The applicant has assumed that the fees approved by the respondent do not cover the cost of a full assessment, but has provided no evidence that is the case. Submissions are not evidence. Submissions on the "remainder of the treatment plan" in the absence of any evidence on the what the fees or cost are over and above what Dr. Siegel recommended does not satisfy the applicant's onus. Accordingly, the applicant's claim for the remaining \$801.90 from the \$2,298.00 recommended for a psychological assessment is dismissed.

Chronic Pain Assessment

25 The applicant is claiming entitlement to \$2,184.00 for a chronic pain assessment, proposed by Dr. Igor Wilderman, physician, in a treatment plan/OCF-18 ("plan") denied on May 29, 2019. It appears from the parties' submissions that the treatment plan in dispute is the May 24, 2019 treatment plan of Dr. Wilderman, physician from Golden Bars Medical Clinic, for \$2,184.00 recommending a chronic pain assessment.¹⁰

26 Dr. Wilderman's treatment plan recommends 4 hours for the assessment at the rate of \$744.00 per 1.5 hours. This works out to \$496.00 per hour. The functional goal of the treatment plan is to restore pre-injury functional capacity and return the applicant to her activities of normal living. In the additional comments section, the purpose of the assessment was to determine the nature of the applicant's syndromes and arrange an appropriate multi-disciplinary pain management program to assist with her recovery. It was noted that the applicant had difficulty with extending, bending, lifting, carrying, sustained standing and walking, housekeeping and daily living activities. Dr. Wilderman wrote that an assessment with a chronic pain specialist is beneficial in determining the exact nature of patient's syndrome. He did not state why or if it was necessary to determine the exact nature of the applicant's syndrome in order to determine what treatment she requires as a result of her accident injuries. With respect to the recommendation for multidisciplinary pain management, the other treatment plans identified as being in dispute all dealt with pain management.

27 The respondent relies on Tribunal case law that holds that the applicant is required to prove that the assessment is reasonable and necessary for assessing the applicant's accident related injuries and that there should be some evidence that a chronic pain condition exists.¹¹ I am not bound by decisions from other adjudicators. I find that the case law relied upon by the respondent did not address s.25's wording. Accordingly, I prefer my analysis that the reasonableness of the goal of the treatment plan is relevant only for determining whether the assessment is necessary for the purpose of preparing a treatment plan or an OCF-3 disability certificate as a result of the accident as described by s.25(1) of the *Schedule*.

28 The applicant submits that her clinical notes and records record that she has chronic pain as a result of the accident. She submits that her records disclose that she complained that her pre-accident chronic pain became worse as a result of the accident and that she developed chronic back and bilateral shoulder pain.

29 The respondent relies on the IE report of Dr. Todd Walters, general practitioner, dated July 11, 2019.¹² Dr. Walters noted that the claimant suffered from pre-existing chronic pain secondary to prior left neck surgery and left shoulder surgery in May 2009. The claimant has a history of neurofibroma of the neck, which was removed in 2011 and subsequently treated with chemotherapy over the next 18 months. Her pre-accident medications include hydromorphone 12 mg twice daily and Lyrica twice daily.

30 Dr. Walters determined that the treatment plan for a chronic pain assessment was not reasonable or necessary on the basis of injury sustained in the motor vehicle accident. His reasoning was because the applicant was back to her pre-accident status from a chronic pain perspective, which predates the accident. However, the applicant's continued complaints of low back pain or headaches at the time of Dr. Walter's assessment is not consistent with his reasoning. The only complaint of back pain or headaches in applicant's medical records is recorded on June 19, 2014. Otherwise, her complaints were of chronic left neck pain following surgery in 2012 for a neurofibroma that, by May 2018, was occasional when checking blind spots.¹³ Without any explanation of how Dr. Walters arrived at his conclusion that the applicant's chronic pain had settled down to her pre-accident levels, I am unable to give his opinion much weight.

31 I find that the applicant has shown on a balance of probabilities that it is necessary that she explore the extent of her pain complaints as a result of the accident and whether she has a pain syndrome, the cause of her present pain complaints, and what treatment is reasonable and necessary for her as a result of her accident injuries.

32 The *Professional Fee Guideline* does not list any fee for physicians. Under the *Professional Fee Guideline*, it is expected that parties will negotiate a fee for services that are not listed. Dr. Walters made no comment about the reasonableness of the fee charged by Dr. Wilderman. Accordingly, I draw an inference from the lack of comment that the fees recommended by Dr. Wilderman are reasonable. The non-tax portion of the fee is within the maximum \$2,000.00 payable under s.25(5) of the *Schedule*. Accordingly, I find that the fee recommended by Dr. Wilderman is reasonable. For these reasons, I find that the applicant is entitled to the cost of the chronic pain assessment recommended by Dr. Wilderman.

Reg. 664 Award

33 Under s. 10 of O. Reg. 664, the applicant may be entitled to an award of an amount up to 50% of the benefits and interest owed to her if I find that the respondent unreasonably withheld or delayed payments. I find that the applicant has failed to show that is the case.

34 The applicant submits that she has personally incurred expenses for the treatment and the assessments, but has provided no evidence that is the case. However, that is not the test for entitlement, but may be a factor to consider in determining the amount of an award. I must determine whether the insurer acted unreasonably in denying the treatment plans that I have determined the applicant is entitled to. I find that it was not unreasonable for the respondent to rely on Dr. Walters' report and opinion in denying the claim for a chronic pain assessment.

35 Any delay in the payment of the invoices for the chiropractic treatment that was approved in 2021 is because the non-action of the Malton Spine Clinic, not the respondent. The delay is because of the inaction of the Malton Spine Clinic to resubmit its invoices in the manner requested by the respondent. I find this was a reasonable request and take judicial notice that when HCAI is advised by an insurer that a treatment plan is denied, invoices submitted in the usual manner will be rejected, even if subsequently approved.

36 Accordingly, for these reasons I do not find that the respondent unreasonably delayed payments and the applicant's claim for a Reg.664 award is dismissed.

Interest

37 Since I have determined that the applicant is entitled to a chronic pain assessment recommended by Dr. Wilderman, the applicant is entitled to interest in accordance with the *Schedule*.

CONCLUSION AND ORDER

38 The applicant is entitled to the chronic pain assessment recommended by Dr. Wilderman in his May 24, 2019 treatment plan for \$2,184.00.

39 The applicant is entitled to interest in accordance with the *Schedule*.

40 The applicant's request for an order that she is entitled to the payment for the chiropractic treatment plans is dismissed as there is no evidence these are issues in dispute.

41 The applicant's claim for remaining \$801.90 from the \$2,298.00 for a psychological assessment is dismissed.

42 The applicant's claim for a s.10 Reg.664 award is dismissed.

Footnotes

1 *L.D. and Aviva*, 19-000065, 2020 CanLII 57402 ON LAT, at para. 23, *P.J. and Continental Insurance Company*, 16-004272, 2017 CanLII 63661 ON LAT, at para. 48, *Applicant and Wawanesa Mutual Insurance*, 17-002589,, 2018 CanLII 83505 ON LAT, at para. 25

2 *P.J. and Continental Insurance Company*, para. 35

3 Applicant's submissions: Tab E, p. 69, clinical notes and records of Dr. Joseph Sertic from July 11, 2018 to September 17, 2018.

4 Applicant's submissions: Tab F, p.90. The treatment plans were lumped together under one tab and bookmark in contravention of the case conference order.

5 Applicant's submissions Tab F, p. 108

6 Applicant's submissions: Tab F, p.145

7 *Professional Services Guideline, Superintendent's Guideline No. 03/14*, September 2014 ("*Professional Services Guideline*")

8 Respondent's brief: Tab 10

9 *16-002947 v Wawanesa Mutual Insurance Company*, 2017 CanLII 93461 (ON LAT), at para 29-31

10 Applicant's submissions: Tab F, pp.127 to 135

11 *Musah v. Zenith Insurance Company*, 2021 CanLII 64235 (ON LAT)

12 Respondent's brief: Tab 18

13 Respondent's brief: Tab 19, clinical notes and records of Dr. Joseph Sertic from 2013 to Sept 17, 2018