Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

2023 CanLII 56079 (ON LAT)

Citation: Vald v. Aviva General Insurance Company, 2023 ONLAT 21-006430/AABS

Licence Appeal Tribunal File Number: 21-006430/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:

Aleksandra Vald

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Ulana Pahuta**

APPEARANCES:

For the Applicant: Anna Korolkova, Paralegal

For the Respondent: Rajesan Rajendran, Counsel

HEARD: **BY WAY OF WRITTEN SUBMISSIONS**

OVERVIEW

[1] Aleksandra Vald, the applicant, was involved in an automobile accident on March 1, 2016, and sought benefits pursuant to the *Statutory Accident Benefits Schedule* - *Effective September 1, 2010* (the "*Schedule*"). The applicant was denied benefits by the respondent, Aviva General Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

i. Is the applicant entitled to $2,486 for a chronic pain assessment, proposed by Polyclinic Rehab in a treatment plan ("OCF-18") dated July 5, 2019?

ii. Is the applicant entitled to $2,197.22 for chiropractic treatment, proposed by Polyclinic Rehab in an OCF-18 denied on June 26, 2019?

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

RESULT

[3] I find that the applicant is not entitled to the treatment plans in dispute. As no benefits are owing, no interest is payable.

ANALYSIS

Treatment Plans

[4] To receive payment for a treatment and assessment plan under s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.

OCF-18 dated July 5, 2019 for a chronic pain assessment

[5] I find that the chronic pain assessment is not reasonable and necessary. The applicant's medical record shows that she intermittently reported pain complaints in the years post-accident. However, the pain reported does not rise to the level to warrant a chronic pain assessment.

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[6] The clinical notes and records ("CNRs") of the applicant's family physicians indicate that soon after the accident, the applicant reported dizziness, headaches, neck and shoulder pain and nausea. She was diagnosed with whiplash injury. The applicant continued to report headaches, neck and thoracic pain in 2016 and 2017. An X-ray and MRI of the spine were obtained, which were normal. The applicant attended at the Wilderman pain clinic in October 2017 where it was noted that the applicant's symptoms were mostly suggestive of migraines and chronic whiplash associated disorder type II. However, the CNR entries of the family physician do not indicate that the recommendations of pain injections or a prescription for Naproxen were implemented or that the applicant's family physician continued to treat the applicant for ongoing pain.

[7] I agree with the respondent's submissions that after this initial period, the applicant did not appear to report any ongoing accident-related pain complaints to her family physician, for a period of almost four years. From January 2018 to November 16, 2021, the applicant attended at Dr. Chan's offices numerous times for unrelated medical issues, however, back, neck or shoulder pain complaints were never raised. The OCF-18 for a chronic pain assessment was submitted July 11, 2019, which was during this four-year gap of pain complaints. Had the applicant been experiencing ongoing pain such that a chronic pain assessment was warranted, I would have expected to have seen this reflected in the CNRs of the applicant's family physician, particularly as the applicant had been attending for medical appointments regularly. However, the CNRs during this period do not indicate any reports of accident-related pain, prescriptions for pain medication or discussion of chronic pain management.

[8] The applicant did not again report accident-related pain complaints to Dr. Chan until November 2021, two years after the submission of the OCF-18 and five years after the accident. At this point, the applicant reported that she had "constant" neck, upper and lower back pain, since the 2016 accident. Dr. Chan referred the applicant to a rheumatologist and to a pain clinic. Although the applicant relies on a report dated March 14, 2022 from Dr. Sidor, a rheumatologist, I do not find it persuasive on the issue of chronic pain. I agree with the respondent that Dr. Sidor did not make any finding that the applicant's reported chronic pain was due to the subject accident. Fibromyalgia was discussed, and Dr. Sidor suggested SNRI medication, which the applicant declined.

[9] The applicant also obtained a report from Dr. El-Batnigi at the Vaughan Pain Clinic dated January 13, 2022. However, when comparing this report to the s. 44 assessment conducted by the respondent's assessor Dr. Hanna, I prefer Dr.

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Hanna's report. Firstly, Dr. Hanna's assessment was conducted contemporaneously with the submission of the OCF-18 in dispute, as opposed to Dr. El-Batnigi's report, which was conducted almost six years after the subject accident and two and a half years after the OCF-18 was submitted. Secondly, I note that Dr. El-Batnigi did not appear to find significant functional limitation. While he noted some tenderness, he found that the applicant had active range of motion in the lower back, as well as normal shoulder range of motion.

[10] Most importantly, the respondent's s. 44 assessor Dr. Hanna considered the applicant's functionality and applied the six diagnostic criteria for chronic pain established by the American Medical Association's Guidelines ("AMA Guidelines"). While not binding, the Tribunal has used the AMA Guidelines criteria as an interpretive tool for chronic pain claims. I agree with Dr. Hanna's assessment that the applicant has not provided any evidence that she met three out of the six diagnostic criteria. Namely, there is no evidence that she is dependent on prescription pain medication, is excessively dependent on health care providers or family, that she has withdrawn from social, work or recreational activities due to pain, or that she suffers from secondary physical deconditioning due to fear-avoidance of pain. Other than self-reports of functional limitations the applicant has not led any evidence demonstrating functional impairment.

[11] As such, I find that the applicant has not led sufficient evidence that a chronic pain assessment is reasonable and necessary.

OCF-18 dated March 29, 2019 for chiropractic treatment

[12] I find that the applicant has not established that the treatment plan for chiropractic treatment is reasonable and necessary.

[13] This OCF-18 was submitted more than a year after the applicant's last pain complaint to her family physician and more than three years after the subject accident. The applicant does not direct me to any contemporaneous evidence that at the time the OCF-18 was submitted, additional chiropractic treatment was recommended by any treating physician. I further agree with the respondent's submissions that the applicant had reported to her family physician that physical therapies had not previously helped for her pain symptoms.

[14] Moreover, although the applicant reported that she had been attending physical treatment regularly since the accident, no records were provided from any treating clinic to indicate the applicant's progress with the treatment, nor were any progress reports or summaries provided by the applicable practitioner. Without such evidence, I am unable to assess the efficacy of treatment, and

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whether the stated goals of the plans were being met to a reasonable degree. Although the applicant submits the OCF-18 itself as evidence, it is well-settled that an OCF-18 alone is not sufficient evidence of the reasonableness and necessity of a claim.

[15] The respondent denied the applicant's claim on the basis of two s. 44 chiropractic assessments. Dr. Kopansky-Giles, chiropractor, found that the applicant's WAD II of the neck and upper back and sprain/strain of the lower back had objectively resolved, that she had pain free ranges of movement and good strength. Dr. Kopansky-Giles opined that the applicant had received sufficient facility-based treatment and that maximum therapeutic benefit had been reached. In the subsequent addendum report, Dr. Kopansky-Giles reviewed the updated CNRs of the applicant's family physician, and noted that they indicate that the applicant rarely attended her physician for musculoskeletal pain complaints during the period in dispute. As such, her opinion remained unchanged.

[16] I find that the applicant has not submitted sufficient evidence to refute Dr. Kopansky-Giles findings, or to establish that ongoing chiropractic treatment is reasonable and necessary.

Minor Injury Guideline

[17] In her submissions for this written hearing, the applicant provided a brief argument as to why her impairments warrant removal from the Minor Injury Guideline ("MIG"). Although the applicant did not expressly request to add the MIG as an issue in dispute, I infer that she is attempting to add this issue to this written hearing. However, I note that the Case Conference Report and Order dated January 11, 2022, did not include the MIG as an issue in dispute. Nor did the respondent provide any submissions on, or reference to, the issue of the applicant's removal from the MIG.

[18] If the applicant had wanted to include the MIG as an issue in dispute for this written hearing, the appropriate way would have been to bring a motion under Rule 15. This was not done. Nor has the applicant provided any explanation as to why the MIG should be added as an issue at this late date or included any correspondence to indicate that she had attempted to contact the Tribunal to add the MIG as an issue in dispute prior to this written hearing. Additionally, I note that pursuant to s. 20 of the *Schedule*, where the maximum duration for the payment of a medical benefit is 260 weeks, or five years, the applicant has now exceeded this period and would be unable to claim further medical benefits, rendering the issue of removal from the MIG moot.

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[19] As such, I decline to add the MIG as an issue in dispute in this written hearing.

Interest

[20] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule.* As no benefits are payable, the applicant is not entitled to interest.

ORDER

[21] The applicant has not demonstrated that the disputed OCF-18s are reasonable and necessary. Accordingly, no interest is payable.

[22] The application is dismissed.

Released: June 21, 2023

Ulana Pahuta
Adjudicator

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