Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

2023 CanLII 58537 (ON LAT)

Citation: Javier v Aviva General Insurance Company, 2023 ONLAT 20-014826/AABS

Licence Appeal Tribunal File Number: 20-014826/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:

Romulo Javier

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Janet Rowsell**

APPEARANCES:

For the Applicant: Romulo Javier, Applicant
Darcie Sherman, Counsel

For the Respondent: Aviva General Insurance Company
Geoffrey Keating, Counsel

HEARD: In Writing **By way of written submissions**

OVERVIEW

[1] Romulo Javier, the applicant, was involved in an automobile accident on August 15, 2017, and sought benefits pursuant to the *Statutory Accident Benefits Schedule* - *Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The applicant was denied benefits by the respondent, Insurer, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] The applicant was a pedestrian at the time of the accident. First responders transported the applicant to Trillium Health Partners, Mississauga Hospital, where he stayed from August 15, 2017, to August 22, 2017. The applicant's diagnostic tests revealed the presence of a pelvic fracture on the left side treated by Orthopedic surgeon, Dr. Tajedin Yenus Getahun. The applicant's submissions describe that effective August 28, 2017, he began therapy at Mackenzie Medical Rehabilitation with massage, physiotherapy, chiropractic therapy and active/exercise therapy to address the accident-related injuries.

PRELIMINARY ISSUE

[3] In the Applicant's reply submissions, he objects to a conflict of interest in relation to a previous associate of the applicant's law firm, which associate is now alleged to be employed by the respondent law firm. The applicant mentions an intention to bring a motion to the Tribunal alleging that the associate had access to privileged information pertaining to the issues in dispute, acquired while employed with the applicant's law firm. It is mentioned in paragraph seven of the applicant's reply that alternate legal counsel has carriage of the file on behalf of the respondent law firm. There is no formal motion before me nor anything but unsubstantiated allegations of a conflict of interest. For that reason, I will not address the allegation of a conflict of interest, especially given that as far as I am aware another lawyer besides the lawyer with the alleged conflict, has prepared and provided submissions on behalf of the respondent insurance company.

ISSUES

[4] The issues in dispute are:

i. Is the applicant entitled to $1,384.70, for chiropractic services, proposed by Mackenzie Medical Rehabilitation Centre in a treatment plan/ OCF-18 dated December 11, 2018?

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ii. Is the applicant entitled to $2,200.00 for a Chronic Pain Assessment proposed by Princeton Hills Medical Assessments in a treatment plan/OCF-18 dated on January 7, 2019?

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

iv. Is the applicant entitled to an award under section 10 of Regulation 664 because the respondent insurer unreasonably withheld or delayed payment to the Applicant?

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RESULT

[5] The chiropractic treatment plan in the amount of $1,384.70 proposed by Mackenzie Medical Rehabilitation Centre in a treatment plan/ OCF-18 dated December 11, 2018, is reasonable and necessary pursuant to the *Schedule.*

[6] The Chronic Pain Assessment proposed by Princeton Hills Medical Assessments in a treatment plan/OCF-18 dated on January 7, 2019, in the amount of $2,200.00, is reasonable and necessary pursuant to the Schedule.

[7] The applicant is entitled to interest on any overdue payment of benefits.

[8] The applicant is not entitled to an award.

SECTION 18 – MONETARY LIMITS FOR MEDICAL AND REHABILITATION BENEFITS

[9] The applicant submits that the respondent denied the treatment plan proposed by Mackenzie Medical Rehabilitation Centre in the amount of $1384.70, solely on the basis that the medical and rehabilitation benefits were close to the expenditure limit for non-catastrophic injuries of $65,000.00. The respondent insurer's denial letter dated December 20, 2018, states in the explanation that, $6851.32 remains under the policy limit of $65,000.00. There is no other stated reason for the denial, including any referenced medical basis, pertaining to the reasonableness and necessity of the treatment plan. The applicant submits that on the basis that the treatment plan amount remained within the residual $65,000.00 limit, and, as stated by the respondent, $6851.32 was remaining, that the treatment plan was improperly denied. I agree with the applicant's submissions since based on the respondent's correspondence, the policy limit was not exhausted.

[10] Section 18(3)(a) of the Schedule stipulates that the sum of the medical, rehabilitation and attendant care benefits paid in respect of an insured person

who is not subject to the MIG, shall not exceed, for any one accident, $65,000.00 plus applicable harmonized sales tax. The respondent submits that the $65,000.00 limit was exhausted by the applicant at the time of the denials. In addressing entitlement to disputed medical benefits in the amount of $1,384.70, the respondent submits that the applicant was informed in the correspondence that approval of this amount would result in the total approved medical and attendant care benefit limit exceeding $65,000.00. The letter of explanation from the respondent insurer set forth that to date $58,148.66 had been paid as a result of the accident. However, there is no other basis mentioned for the denial beyond the remaining policy limits being close to the limit but there still remains funds available as described to pay for the treatment plan in the amount of $1384.70.

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[11] The evidence in the correspondence from the respondent insurer dated December 20, 2018, does not support that the $65,000.00 funding limit had been exhausted on the denial date. There remained over six thousand dollars available before the policy limit was exhausted, as stated in the correspondence, therefore, the respondent's submission that the treatment plan was denied based on a lack of funds is incorrect. The Tribunal has considerable discretion to weigh the evidence before it. The evidence does not show that the applicant had exceeded the $65,000.00 funding limit at the time of the denial on December 20, 2018. I will review whether the treatment plan proposed by Mackenzie Medical Rehabilitation Centre in the amount of $1384.70, is reasonable and necessary in the next section, however, the respondent's submission that the spending limit had been exceeded on the date of denial is not corroborated in the letter referenced. The respondent stated $1384.70 remained within the non-catastrophic limit, therefore, the complete denial of the treatment plan on the basis of the limit being exceeded was not appropriate because the respondent was required to consider a partial approval of the treatment plan within the $65,000.00 cap.

[12] According to the recent Ontario Court of Appeal decision, *Varriano v. Allstate Ins. Company of Canada*, 2023 ONCA 78, and the principles established by the Supreme Court of Canada in *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129, a medical reason for a denial does not have to be provided if no medical basis for the denial was at issue. However, I find that the respondent is not in conformity with section 38(8) of the Schedule since the denial letter dated December 20, 2018, does not describe the non-catastrophic limit being exceeded, nor is there a medical ground offered for the denial.

[13] The respondent submits that as of March 8, 2019, the respondent insurer had paid $21,965.22 for attendant care benefits and $44,333.12 for medical benefits, resulting in a combined total paid of $66,298.34. The respondent submits that the applicant commenced the LAT proceeding in December 2020, once the $65,000.00 limit had been exhausted. However, none of that information is offered in the denial letter dated December 20, 2018, or in the denial letter dated January 7, 2019.

[14] According to the letter of denial dated February 21, 2019, $1,361.65 was remaining of the $65,000.00 non-catastrophic limit under section 18(3)(a) of the Schedule. The applicant submits that the treatment and assessment plan (OCF-18) dated January 7, 2019, submitted by Princeton Hills Medical Assessments Inc. for a Chronic Pain Assessment in the amount o $2200.00, was improperly denied in its entirety by the respondent due to $1,361.65 remaining in the applicant's policy limit of $65,000.00. Again, I agree with the applicant's submission but only to the extent that the amount of $1,361.65 remained within the spending limit of $65,000.00, as described in the respondent's letter of denial. I find that the respondent's denial letters are not in conformity with section 38(8) of the Schedule since the denial letter dated February 21, 2019, does not describe the non-catastrophic limit being completely exceeded, nor is there a medical ground offered for the denial. I will, therefore, consider whether a partial approval of the treatment plan submitted by Princeton Hills Medical Assessments Inc. for a Chronic Pain Assessment, dated January 7, 2019, is reasonable and necessary in the amount of $1,361.65, which is stated as remaining within the $65,000.00 non-catastrophic limit in the letter of denial dated February 21, 2019.

[15.] I, therefore, find that section 38(11) of the Schedule is triggered since the insurer failed to give notice in accordance with section 38(8), in respect of the treatment and assessment plans. In accordance with section 38(11)(2) the insurer shall pay for all goods and services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day the insurer received the application and ending on the day the insurer gives notice described in section 38(8) of the Schedule. Therefore, the respondent is responsible for the payment of the treatment plan in the amount of $1,384.70 proposed by Mackenzie Medical Rehabilitation Centre in a treatment plan/ OCF-18 dated December 11, 2018. The respondent is responsible for the partial payment of the Chronic Pain Assessment proposed by Princeton Hills Medical Assessments in a treatment plan/OCF-18 dated on January 7, 2019, in the amount of $1,361.65 ($2,200.00 less $839.35 above the spending cap), which according the respondent's explanation of benefits remained within the funding cap of $65,000.00 for a non-catastrophic claim.

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The Treatment Plan for physiotherapy services, proposed by Mackenzie Medical Rehabilitation Centre in the amount of $1,384.70 dated December 11, 2018?

[16] Section 14 and 15 of the Schedule state that an insurer shall pay medical benefits to, or on behalf of an applicant so long as said person sustains an impairment as a result of an accident, and that the medical benefit in dispute is a reasonable and necessary expense incurred by the applicant as a result of the accident.

[17] The treatment and assessment plan/ OCF-18 dated December 11, 2018, proposed by Vincent Ryan Pagnanelli of Mackenzie Medical Rehabilitation Centre, in the amount of $1384.70 for chiropractic and massage therapy treatment for a six-week period, is described as including therapy and manipulation of multiple body sites, stimulation of back muscles, hyperthermy of multiple body sites, and acupuncture of multiple body sites. The goal of the treatment plan is to address persistent pain in the thoracic and lumbar spine, sacroiliac joints and pelvis extending to hips. It is noted that the applicant's overall strength and endurance is slowly improving with treatment as discussed in the appendix to the treatment plan.

[18] An Orthopaedic Surgery IE Assessment by Dr. J. Auguste dated May 29, 2018, describes the applicant with no prior accidents, no work-related injuries, and taking no medications prior to the accident. The applicant underwent a CT scan in the ER at the time of the accident, which revealed the pelvic fracture extended to the left hip acetabulum. The applicant was placed on weight restrictions for three months to permit healing after which he walked with the assistance of a cane.

[19] At the time of Dr. Auguste's examination, the applicant, who is a family physician, had pelvic pain, lower back pain and upper back pain. Dr. Auguste opined in her assessment that the applicant sustained an impairment in weightbearing, and range of motion of the left hip as a result of the accident. She opined that the applicant also sustained injuries to the cervical, thoracic and lumbar spine. Dr. Auguste stated in her assessment that on the date of her examination of the applicant, which was May 16, 2018, his level of disability would not exist except for the accident.

[20] It is clear from the records from Mackenzie Medical Rehabilitation Centre Incorporated that the applicant was attending chiropractic treatment twice weekly from shortly after the accident in approximately August and September 2017 to December 2018, proximate to the treatment plan proposing further chiropractic treatment. The applicant submits that ongoing physiotherapy and chiropractic

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treatment, in addition to active therapy were recommended by Dr. Ryan Vincent Pagnanelli and Elad Granovsky to address the persistent pain experienced by the applicant in the thoracic and lumbar spines, sacroiliac joints and pelvis extending to the hips. Dr. Shannaa Riam comments in his report dated April 20, 2020, that the applicant's chronic back pain is alleviated by therapy.

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[21] I am persuaded by the Tribunal decision *Lagoudis v. Aviva Insurance Canada*, 2022 CanLII 6780 (ON LAT), where the Tribunal found that pain management or pain reduction is a reasonable goal for a treatment plan. In addition, treatment which relieves physical pain, and, improves function, is a legitimate medical and rehabilitative goal. As earlier referenced, the submissions of the respondent insurer focus on the funding limit for non-catastrophic benefits of $65,000.00 being exhausted without the respondent including any submissions respecting the reasonableness and necessity of the treatment plan proposed nor the inclusion of any insurance examinations responding to the applicant's medical evidence.

[22] I find that the treatment and assessment plan/ OCF-18 dated December 11, 2018, proposed by Vincent Ryan Pagnanelli of Mackenzie Medical Rehabilitation Centre, in the amount of $1384.70 for chiropractic and massage therapy treatment is reasonable and necessary by reason of the historic improvement in the applicant's symptoms based on his regular attendance at Mackenzie Medical Rehabilitation Centre for chiropractic treatment to alleviate the symptoms of injuries to the cervical, thoracic and lumbar spine following the accident. Considering the noted medical records and the IE Orthopaedic Surgery assessment of Dr. J. Auguste and by reason of Dr. Auguste's conclusions regarding the applicant's condition, I find that the treatment plan dated December 11, 2018, proposed by Vincent Ryan Pagnanelli of Mackenzie Medical Rehabilitation Centre, in the amount of $1384.70 for chiropractic and massage therapy, is reasonable and necessary.

Chronic Pain Assessment proposed by Princeton Hills Medical Assessments in a treatment plan/OCF-18 dated on January 7, 2019, in the amount of $2,200.00?

[23] Princeton Hills Medical Assessments Incorporated, proposed a treatment plan/ OCF-18 dated January 7, 2019, for a Chronic Pain Assessment in the amount of $2,200.00, which proposed that over a six-week period, the applicant would be assessed in consultation with a pain specialist as per the recommendation of Kumar Gupta, Occupational Therapist. The current complaints listed on the OCF-18 describe the applicant experiencing pain in his shoulder blades, neck, lower back and in his lumbar spine.

[24] In correspondence dated April 20, 2020, Dr. Shannaa Riam of the Canadian Centre for Regenerative Therapy, describe the ongoing chronic pain experienced by the applicant bilaterally in the lumbar paraspinal area of his back. In a fracture clinic note dated February 4, 2019, Dr. Tajedin Getahun describes that the applicant suffers significant degenerative changes in his thoracic and lumbar spine following the accident. In an outpatient note by Dr. Michael Cooke, Anaesthesiologist, dated July 22, 2019, Dr. Cooke describes that the applicant benefits from cervical epidural injections to address pain subsequent to the accident-related pelvic fracture. Dr. Shannaa Riam describes that the applicant takes Tylenol daily to address back pain. Dr. Shannaa Riam further describes that as a family physician, the applicant's work is substantially limited and reduced following the accident due to pain causing an avoidance of activities.

[25] The Tribunal has adopted the American Medical Association (AMA) Guide as an interpretive tool for evaluating chronic pain claims in the absence of a formal diagnosis. The AMA Guide states that at least three of the following six criteria must be present for a diagnosis of chronic pain syndrome to be established:

(i) Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances;

(ii) Excessive dependence on health care providers, spouse, or family;

(iii) Secondary physical deconditioning due to disuse and or fear-avoidance of physical activity due to pain;

(iv) Withdrawal from social milieu, including work, recreation, or other social contacts;

(v) Failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family or recreational need; and

(vi) Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviors.

[26] I find on a balance of probabilities that the applicant meets three of the criteria in the AMA guideline described above, based on a review of the medical records, describing the applicant withdrawing from his work as a family physician following the accident-related injuries and accompanying pain (criteria v described above); relying on cervical epidurals prescribed by his Anaesthesiologist, Dr. Micheal Cooke (criteria I described above), and having reviewed the records from

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Mackenzie Medical Rehabilitation Centre, it is clear that the applicant has an excessive dependence on health care providers and a fear-avoidance of physical activity due to pain (criteria ii described above). I am satisfied that the Chronic Pain Assessment is a reasonable and necessary expense, which the respondent will cover the cost of partially to the extent that funds are available as described in the correspondence and denial letter dated January 7, 2019, from the respondent insurance company. Section 18 (3)(a) of the Schedule stipulates that the sum of the medical, rehabilitation and attendant care benefits paid in respect of an insured person who is not subject to the MIG, shall not exceed, for any one accident, $65,000.00 plus applicable harmonized sales tax. According to the denial letter and explanation of benefits, dated February 20, 2019, $1,361.65 remained for available benefits.

INTEREST

[27] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the Schedule. As I find that the applicant is entitled to the treatment plans, interest is payable by the respondent.

AWARD

[28] The applicant submits an award should be imposed against the respondent for its improper withholding of the benefits pursuant to the Schedule and the policy and consumer protection objectives of insurance law.

[29] For the following reasons, the applicant's request for an award is denied. Regulation 664 under the Insurance Act states that the Tribunal may award a lump sum of up to 50 percent of the amount to which the applicant was entitled if the respondent unreasonably withheld or delayed the payment of benefits.

[30] However, the applicant has not provided any submissions or evidence of unreasonable withholding or delayed payment of benefits by the respondent. The fact that the Tribunal has found in the applicant's favour for the payment of benefits for the two treatment plans in dispute is not in and of itself evidence of unreasonably withholding or delaying the payment of benefits.

[31] The onus is on the applicant to prove on a balance of probabilities an award is owing, and the applicant has not done so in this case; therefore, no award is payable.

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COSTS

[32] The respondent submits it is entitled to costs in the proceeding since the applicant by commencing the proceeding had no prospect of success and acted in a manner which has been unreasonable, frivolous and vexatious. The respondent submits that the applicant was aware when the proceeding was commenced that the non-catastrophic limits of $65,000.00 had been exhausted. Section 17.1 of the Statutory Powers and Procedures Act ("SPPA"); and Rule 19.1 of the Common Rules of Practice and Procedure empower the Tribunal to order a party to pay another party's costs in a proceeding according to the rules made under section 17.1(4). Section 17.1(2) states the Tribunal shall not order a party to pay costs unless the conduct or course of conduct of that party has been unreasonable, frivolous or vexatious, or the party has acted in bad faith.

[33] I do not find that the applicant's conduct or course of action demonstrates anything approximating being unreasonable, frivolous or vexatious nor has the applicant acted in bad faith. As stated, I have found the applicant has met the onus demonstrating that the two treatment plans in dispute are reasonable and necessary. The respondent's application for costs is dismissed.

ORDER

[34] I find that the applicant is entitled to the treatment plans in dispute.

[35] Given that there are benefits owed, the applicant is entitled to interest pursuant to s. 51 of the Schedule.

[36] The applicant is not entitled to an award.

[37] The application is allowed to the extent that the applicant is entitled to the two treatment plans in dispute and interest.

Released: July 4, 2023

Janet Rowsell
Adjudicator

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