2024 CanLII 41007 (ON LAT)

Citation: Chen v. Aviva Insurance Canada, 2024 ONLAT 21-003111/AABS

Licence Appeal Tribunal File Number: 21-003111/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:

Lei Chen

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

VICE-CHAIR: **Brett Todd**

APPEARANCES:

For the Applicant: Sareena Samra, Counsel

For the Respondent: Geoffrey L. Keating, Counsel

HEARD **By Way of Written Submissions**

OVERVIEW

[1] Lei Chen (the "applicant") was involved in a motor vehicle accident on October 27, 2019 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). Aviva Insurance Canada (the "respondent") denied certain benefits. The applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

PRELIMINARY ISSUE

[2] The following preliminary issue is in dispute:

1) Is the applicant barred from a hearing for the following benefit(s) because the applicant failed to attend an insurer's examination?

   1. Is the applicant entitled to $2,042.03 for physiotherapy services, proposed by Easy Health Centre in a treatment plan/OCF-18 submitted October 23, 2021 and denied November 22, 2021?

[3] The applicant notes in his written submissions that there is "no preliminary issue to be heard" as he claims to have provided "reasonable explanations for the non-attendance" at the examination.

[4] However, the respondent does not agree. While the respondent does not respond directly in its written submissions to the applicant's claim that there is no preliminary issue to be heard (or no longer a preliminary issue to be heard), the respondent provides an argument regarding this preliminary issue in the context of addressing this treatment plan in total. It is clear that this dispute has not been resolved.

[5] As a result, I am considering this preliminary issue in the context of rendering my decision and am providing an analysis below.

SUBSTANTIVE ISSUES

[6] The following substantive issues are in dispute:

1. Is the applicant entitled to $2,042.03 for physiotherapy services, proposed by Easy Health Centre, in a treatment plan/OCF-18 submitted October 23, 2021 and denied November 22, 2021?

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2. Is the applicant entitled to $1,041.88 ($3,701.88 less $2,660.88 approved) for psychological services, proposed by Somatic Assessments & Treatment Clinic, in a treatment plan/OCF-18 submitted June 16, 2021 and denied July 26, 2021?

3. Is the applicant entitled to $4,334.50 for physiotherapy services, proposed by UHeal Rehab Centre, in a treatment plan/OCF-18 submitted August 3, 2022 and denied October 7, 2022?

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

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

[7] The written submissions of both parties confirm that the non-earner benefit ("NEB") issue listed in the Case Conference Report and Order ("CCRO") dated February 24, 2023 that set this matter down for a written hearing has been withdrawn. Accordingly, I have removed this from the list of issues in dispute.

RESULT

[8] **Preliminary Issue:** I find that the applicant is not barred from proceeding with the treatment plan listed as substantive issue #1 above.

[9] **Substantive Issues:** I find that the applicant is not entitled to the three treatment plans in dispute as they have not been demonstrated to be reasonable and necessary. As no benefits are due, it follows that the applicant is also not entitled to interest, nor is the applicant entitled to an award.

ANALYSIS

Preliminary Issue

[10] I find that the applicant is not barred from proceeding with issue #1, a treatment plan for physiotherapy services proposed by Easy Health Centre submitted on October 23, 2021.

[11] Section 44 of the *Schedule* permits an insurer to require an insured person be examined by one or more persons who are regulated health professionals or who have expertise in vocational rehabilitation. Failure to attend an examination under s. 44 can trigger s. 55(1) 2. of the *Schedule*. This section establishes that an insured person shall not apply to the Tribunal under s. 280(2) of the *Insurance*

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Act, RSO 1990, c I.8 if the insured person has not complied with the examination request of an insurer.

[12] In submissions, the respondent argues that the applicant failed to attend two insurer examinations ("IEs") scheduled to assess the reasonable and necessary nature of the treatment plan listed as issue #1. The first was scheduled to take place with Dr. John Presvelos, general practitioner, on November 19, 2021, while the second was set to be conducted by Dr. Michael Fung, general practitioner, on April 7, 2022. The respondent relies on an Explanation of Benefits and Notice of Independent Medical Examination letter sent by the insurer to the applicant dated November 9, 2021 and a Notice of Failure to Attend Examination letter dated September 26, 2023.

[13] Due to these failures to attend examinations, the respondent claims that it has been prejudiced in a manner that cannot be remedied before the hearing. It requests that the applicant be barred from disputing this treatment plan as the only appropriate way to remedy this issue. The respondent relies on *Smith v. Intact Insurance*, 2023 CanLII 1463 (ON LAT), a preliminary decision of the Tribunal that stayed a proceeding pending the completion of outstanding s. 44 examinations.

[14] The applicant submits that he provided reasonable explanations for his non-attendance and that the IEs were not "further rescheduled." Most notably, the applicant claims that he did attend a subsequent IE scheduled with Dr. Fung on September 22, 2022. The applicant relies on an email explanation sent to the respondent on January 25, 2023. He also relies on *Cao v. Allstate Canada*, 2023 CanLII 67918 (ON LAT), a Tribunal preliminary decision regarding a similar dispute involving s. 44 and s. 55 of the *Schedule* that resulted in the applicant not being barred from making an application to the Tribunal.

[15] As a result, the applicant takes the position that there was no violation of s. 44 that would trigger barring his disputing this treatment plan in accordance with s. 55(1)2.

[16] I agree with the applicant. While the applicant does not fully address the respondent's assertions that he failed to attend the first two IEs, the respondent has included in its submissions an IE report of Dr. Fung dated October 4, 2022 that resulted from an in-person assessment on September 22, 2022.

[17] With that said, the report indicates that this assessment was conducted to review the reasonable and necessary status of another treatment plan—the one for physiotherapy services that was submitted on August 3, 2022 and is at #3 in the

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list of items in dispute. However, the same examiner (Dr. Fung) listed to conduct the second (missed) examination regarding the treatment plan that is the subject of this preliminary issue also conducted this third (attended) examination. Both examinations with Dr. Fung were clearly to include what would likely have been the same or at least a very similar physical examination, as well.

[18] Given these factors, I fail to see how the applicant's failure to attend the first two scheduled examinations could have prejudiced the respondent. The applicant's attendance at the September 22, 2022 examination conducted by Dr. Fung would seem to have ameliorated any potential issue here. Even if there were any differences between the two scheduled Dr. Fung examinations, the respondent has not directed me to any evidence of how such differences would have negatively impacted on its ability to present its case regarding issue #1 on the list of substantive items in dispute.

[19] Lastly, I am not bound by other decisions of this Tribunal. I do not find either of the prior decisions cited by the applicant and the respondent to be relevant here, at any rate, as they each feature very different circumstances, despite both being centred on alleged contraventions of s. 44.

[20] In short, I am satisfied that the applicant attended an IE examination that fulfilled the criteria as specified in s. 44 of the *Schedule* and that no prejudice was done to the respondent as a result. The applicant is allowed to proceed with the issue in dispute listed as #1 above.

Substantive Issues

Treatment plans

[21] I find that the applicant is not entitled to the treatment plans in dispute, as he has not demonstrated them to be reasonable and necessary. Accordingly, he is also not entitled to interest.

[22] To be entitled to a treatment plan under ss. 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. The applicant should identify treatment goals, how these goals would be met to a reasonable degree, and that the overall costs of achieving them are reasonable.

[23] The specifics of these three treatment plans follow:

i. The plan for physiotherapy services valued at $2,042.03 proposed by Easy Health Centre submitted on October 23, 2021 was completed by

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Hadi Fateh Nemati, physiotherapist. It includes 10 sessions each of physical rehabilitation and range of motion exercises, six sessions of massage therapy, and a fee for completion of the OCF-18 itself. This plan lists whiplash associated disorder (WAD 2) with complaint of neck pain, sprain and strain of the lumbar spine, sacroiliac joint, and shoulder joint, cervicalgia, and low back pain as injuries and sequelae. Treatment goals include pain reduction and increases in strength and range of motion.

ii. The plan for psychological services with an unapproved amount of $1,041.88 ($3,701.88 less $2,660.88 approved) proposed by Somatic Assessments & Treatment Clinic submitted on June 16, 2021 was completed by Dr. Sharleen McDowall, psychologist. It includes 14 1.5-hour sessions of psychotherapy and documentation fees. Goals of this plan include addressing anxiety and depression symptoms detailed in an s. 25 psychological report completed by Dr. McDowall dated May 27, 2021.

iii. The plan for physiotherapy services valued at $4,334.50 proposed by UHeal Rehab Centre submitted August 3, 2022 was completed by Ahmed Afifi, physiotherapist. It features 16 sessions each of physiotherapy, active therapy, and massage therapy, along with fees for an initial assessment, an assessment report, and travel assistance. Symptoms and sequelae include chronic pain, dislocation/sprain/strain of joints and ligaments at neck level/lumbar spine and pelvis/hip, sprain and strain of thoracic spine, low back pain, headache, sleep disorder, insomnia, malaise and fatigue, and anxious personality disorder. The goals of this treatment are the same as those noted for the other physiotherapy treatment plan in dispute.

[24] With regard to the physiotherapy treatment plans, the applicant submits that they should be deemed reasonable and necessary as he suffered injuries to his neck, shoulders, and lower back as a result of the accident. The applicant argues that the unapproved amount of the psychological treatment plan should also be determined to be reasonable and necessary, due to the clinical notes and records ("CNRs") of Dr. Kris Cheng, family physician; a pre-screening psychological report completed by Dr. Maneet Bhatia dated February 22, 2020; the s. 25 assessment report of Dr. McDowall; and a progress report completed by Dr. Sedigheh Naisi, psychologist, dated January 13, 2023.

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[25] The respondent counters that there is little evidence of any medical treatment following the subject accident, and that the applicant began physiotherapy before he consulted a family physician. Further, the respondent argues that the applicant has not shown that these plans will assist in reducing pain or meet the other specified goals; that the applicant has failed to provide information on pre-accident levels of activity that the applicant is seeking to restore via treatment; and that the applicant appears to possess a functional range of motion and strength and is not impaired from carrying out his activities of normal living. In addition, the respondent relies on the IE report of Dr. Fung noted above, in which he found the August 3, 2022 plan to not be reasonable and necessary.

[26] When it comes to the psychological services plan, the respondent does not dispute that it is reasonable and necessary. However, the respondent maintains its denial of a portion of this plan due to a dispute over the hourly rate that should be payable to the social worker assigned to deliver the treatment proposed in this plan. Where the applicant submitted this plan with an hourly rate of $224.42, the respondent approved a rate of $100.00 per hour, accounting for the entire difference between the submitted and approved amounts.

[27] The respondent holds that the $100.00 hourly rate is both appropriate and fair, considering that the Financial Services Commissions of Ontario *Professional Services Guideline – Superintendent's Guideline no.03/14* (the "*PSG*") has established an hourly rate of $58.19 for unregulated providers like social workers.

[28] I agree with the respondent regarding all three treatment plans.

[29] First, the applicant has provided minimal evidence to support his claims that the physiotherapy treatment plans are reasonable and necessary. He has actually failed to present much of an argument or evidence outside of the OCF-18s, which are insufficient at demonstrating that the treatment therein is reasonable and necessary in and of themselves.

[30] For example, the only objective medical evidence adduced indicating that the applicant suffered injuries in the accident is the record of an appointment with Dr. Cheng on November 14, 2020. Even here, the applicant does not seem to have discussed any physical injuries that would require such physical therapy of the sort proposed in these two treatment plans. Instead, Dr. Cheng notes only that the applicant told him about the October 2019 accident, that he developed a fear of driving as a result, was anxious when riding as a passenger, and that he was experiencing nightmares and flashbacks of the accident. Nothing here indicates that the applicant suffered physical injuries requiring physiotherapy.

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[31] I am also persuaded by the IE report of Dr. Fung, which stands unopposed as the only dedicated physical assessment of the applicant. Even though this assessment specifically focused on the physiotherapy treatment submitted on August 3, 2022, I find it relevant to both physiotherapy plans, as Dr. Fung did a fulsome physical examination of the applicant. The physician's conclusion that the applicant suffered soft-tissue injuries in the accident and had likely reached maximum medical improvement at the time of this examination is applicable to both physiotherapy treatment plans, in my view, as they each propose similar physical treatment to address similar goals.

[32] Second, I concur with the respondent's position regarding the hourly rate for the social worker assigned to oversee the therapy proposed in the psychological treatment plan. The respondent's proposal to pay $100.00 per hour is more reasonable than the rate of $224.42 per hour in the OCF-18, particularly given that the *PSG* sets the rate for unregulated providers at a much lower $58.19.

[33] Also, the applicant fails to address this rate dispute in his written submissions. While the respondent makes it clear in its submissions that it does not dispute that the psychological treatment plan is reasonable and necessary, and that it only continues to take issue with the social worker hourly rate, the applicant argues solely that the plan is reasonable and necessary due to the overall medical evidence, such as the s. 25 report of Dr. McDowall.

[34] For the reasons above, the applicant is not entitled to the three treatment plans in dispute, nor interest.

Award

[35] An award under s. 10 of Reg. 664 for an insurer unreasonably withholding or delaying the payment of benefits is based on a percentage of the total benefits deemed payable. Since I have determined that no benefits are payable, it follows that the applicant is not entitled to an award.

ORDER

[36] The applicant is not entitled to the three treatment plans in dispute. As no benefits are due, the applicant is also not entitled to interest, nor an award.

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[37] The application is dismissed.

Released: May 9, 2024

Brett Todd
Vice-Chair

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