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: [S.H.S.K.] vs. Allstate Canada, 2019 ONLAT 18-003699/AABS

Date: September 16, 2019
File Number: 18-003699/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:

[S.H.S.K.]

Appellant(s)

and

Allstate Canada

Respondent

DECISION [AND ORDER]

ADJUDICATOR: **Tavlin Kaur**

APPEARANCES:

For the Appellant: [S.H.S.K.]**,** Applicant

Rizwan Wancho, Paralegal

For the Respondent: Ryan Kirshenblatt, Counsel

HEARD: In Writing **Hearing: April 1, 2019**

OVERVIEW

[1] The applicant was involved in a head on collision on May 28, 2012.

[2] The applicant was forty-two years old at the time of the accident. The applicant was self-employed and had a cleaning business. It is alleged that after the accident, the applicant could not work.

[3] Following the accident, the applicant sought benefits from the respondent under the *Statutory Accident Benefits Schedule-Effective September 1, 2010* (the '*Schedule*').

[4] A dispute arose with respect to medical benefits and costs of examination. The applicant applied to the Licence Appeal Tribunal – Automobile Accident Benefits Services (the "Tribunal") to resolve this dispute.

ISSUES

[5] The disputed issues in this hearing are:

i. Is the applicant entitled to payments for the cost of examination in the amount of $2,200.00 for an MRI of the left ankle and lumbar spine recommended by Dr. Bernard Green in a treatment plan submitted on May 8, 2017 and denied by the respondent on August 8, 2017?

ii. Is the applicant entitled to payments for the cost of examination in the amount of $2,200.00 for an orthopedic assessment recommended by Oshawa Physiotherapy and Rehabilitation Centre in a treatment plan submitted on May 3, 2017 and denied by the respondent on May 18, 2017?

iii. Is the applicant entitled to receive a medical benefit in the amount of $3,278.00 for physiotherapy recommended by Dr. Gallo of Oshawa Physiotherapy and Rehabilitation Centre in a treatment plan submitted on February 11, 2017 and denied by respondent on May 2, 2017?

iv. Is the applicant entitled to receive the cost of the completion of treatment plans in the amount of $200.00 completed by Dr. Gallo submitted on February 19, 2016 and denied by the respondent on August 28, 2017?

v. Is the applicant entitled to payments for the cost of examination in the amount of $2,200.00 for a chronic pain assessment recommended by

Oshawa Physiotherapy and Rehabilitation Centre in a treatment plan submitted April 2, 2018 and denied by the respondent on April 16, 2018?

vi. Is the applicant entitled to interest on any overdue payments of benefits?

RESULT

[6] The applicant is not entitled to payment for the following issues in dispute: i, ii, iii and v. The applicant withdrew issue iv.

[7] As there are no amounts overdue, the applicant is not entitled to interest.

REASONS

Issue 1: Is the applicant entitled to a cost of examination in the amount of $2,200.00 for the MRI of the left ankle and lumbar spine recommended by Dr. Bernard Green?

Issue 2: Is the applicant entitled to a cost of examination for an orthopaedic assessment recommended by Oshawa Physiotherapy and Rehabilitation Centre?

[8] The applicant is not entitled to payments for issues 1 and 2 because the payment of the benefits is available through a collateral provider.

[9] According to Section 25(1)3 of the *Schedule,* the insurer shall pay reasonable fees charged by a health care practitioner for reviewing and approving a treatment plan, including an assessment necessary for that purpose. [1]

[10] However pursuant to s. 268 of the *Insurance Act* and s. 47(2) of the *Schedule*, an individual who is injured in a motor vehicle accident must first seek coverage through any available collateral benefits provider before relying on the no-fault scheme contained in the Schedule.2

[11] In *G.T. v. Unifund*, the Tribunal's Executive Chair found that OHIP is an "insurance plan or law" for the purposes of s. 47(2).3 The operative test is whether the collateral benefits are "reasonably available". The Executive Chair found that the insurer must advance some evidence or submission that, on balance, establishes that the benefit at issue, whether in whole or in part, was reasonably available to the insured from a collateral provider.4

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[1] *Statutory Accident Benefits Schedule — Effective September 1, 2010*. O. Reg. 34/10, s. 25(1)3
2 Supra note 1 at 1, *s. 47(2), Insurance Act, R.S.O. 1990, CHAPTER I.8, s.268*
3 *G.T. v. Unifund Assurance Company*, 2017 CanLII 81567 (ON LAT)
4 Ibid.

[12] If an insurer has satisfied that onus, the burden then shifts to the insured to prove that the benefit was not, in fact, reasonably available.5 My analysis is as follows.

MRI

[13] The applicant claims entitlement for a cost of an MRI. He claims entitlement on the basis that he continued to experience pain and discomfort in his ankle. The purpose of the MRI was to determine the cause of the pain. It was argued that the MRI was a prerequisite for any further treatment.

[14] I find that the applicant is not entitled to the cost of examination for the MRI because he failed to prove that the payment for the MRI was not reasonably available through the Ontario Health Insurance Plan (OHIP).

[15] In the Explanation of Benefits dated August 8, 2017, the respondent informed the applicant that the MRI was covered under OHIP and that he should speak to his family physician about obtaining one.6 On April 17, 2018, the applicant underwent an MRI for his left ankle.7

[16] Based on the decoded OHIP summary that was submitted by the respondent, the applicant was able to have the MRI done five days after his orthopedic surgeon made the referral. The MRI was covered by OHIP.

[17] The applicant did not provide any evidence about the MRI not being reasonably available. In his submissions, the applicant alleges that it took many months to get an appointment for the MRI. However, there is no evidence to corroborate this. In fact, the evidence shows the contrary.

[18] Based on the evidence before me, I find that the applicant failed to prove that the MRI was not reasonably available from a collateral provider.

Orthopaedic Assessment

[19] The applicant seeks entitlement to a cost of an orthopaedic assessment in the amount of $2,200.00. The applicant claims that he was continuing to experience pain and needed to consult with an orthopaedic specialist.

[20] The respondent disputes the entitlement to the cost of examination because it is not reasonable and necessary. Moreover, the insurer argued that it is not liable to pay for it because it was never incurred. And finally, section 47(2) of the

5 Ibid.
6 Explanation of Benefits dated August 8, 2017
7 MRI of the left ankle dated April 17, 2018

Schedule relieves the Respondent from the obligation to pay the cost of examination as it was available through OHIP.

[21] For reasons provided below, I find that the applicant is not entitled to the orthopedic assessment because it is not reasonable and necessary. Furthermore, the orthopaedic assessment was reasonably available through OHIP.

Orthopaedic Assessment not reasonable or necessary

[22] On May 3, 2017, an OCF-18 for an orthopaedic assessment was submitted to the insurer. The insurer denied the assessment on May 18, 2017. The applicant did not see his family physician, Dr. Alidina, until November 30, 2017. It should be noted that prior to this appointment, the applicant last saw Dr. Alidina on October 8, 2013. There is a gap of approximately four years.

[23] Dr. Alidina referred the applicant to see Dr. Abuzgaya, who is an orthopaedic surgeon that had previously treated the applicant for his accident-related injuries. The applicant was assessed by Dr. Abuzgaya on April 12, 2018. It should be noted that prior to this appointment, the applicant last saw Dr. Abuzgaya on June 21, 2013. There is a gap of approximately five years.

[24] I am not persuaded that the applicant required an orthopaedic assessment. If the applicant was experiencing pain and needed to be assessed, it begs the question why he waited so long to see his doctors. The applicant did not provide any reasonable explanation for the delay in seeing his doctors. The applicant should have provided some evidence that explained the reason for the delay.

[25] Furthermore, the evidence that was submitted in support for this assessment fails to explain why the orthopedic assessment is reasonable and necessary. For example, the letter from Dr. Alidina dated July 10, 2018 merely states that treatments, investigations and referrals made by Dr. Gallo and Dr. Green should be authorized. The letter fails to address the issue in dispute. Dr. Alidina does not explain why the applicant requires an orthopedic assessment. Moreover, there is a lack of evidence that shows a history of pain-related complaints.

Orthopaedic Assessment available through OHIP

[26] The respondent advanced evidence that the orthopaedic assessment was reasonably available through OHIP. Based on the decoded OHIP summary that was provided by the respondent, the applicant was able to see Dr. Abuzgaya

approximately four and half months after the referral was made by Dr. Alidina. This illustrates that the orthopaedic assessment was reasonably available.

[27] The applicant failed to prove that the orthopaedic assessment was not reasonably available through OHIP. The applicant did not advance any evidence that the orthopedic assessment was not reasonably available. If the applicant had met with his family physician sooner, the orthopaedic assessment could have been done in a timely manner.

[28] Therefore, based on my reasons above, I find that the applicant is not entitled to the cost of examination for the orthopedic assessment.

Issue #3: Is the applicant entitled to physiotherapy treatment in the amount of $3,278.00

[29] In order to be entitled to a medical benefit under the *Schedule*, the onus is on the applicant to prove on a balance of probabilities that the expenses are reasonable and necessary (s.15).8

[30] The applicant claims entitlement to the medical benefit in the amount of $3,278.00 submitted on February 11, 2017 and denied on May 2, 2017. The applicant did not provide coherent submissions as to why he was claiming entitlement to this benefit.

[31] The respondent disputes the entitlement to the medical benefit on the basis that it is not reasonable or necessary and because it was not incurred. Moreover, the respondent submits that there is a significant causation issue concerning this treatment plan.

Is physiotherapy treatment reasonable and necessary?

[32] The applicant relies on an OCF-18 submitted by Dr. John Gallo for physiotherapy. The goals identified are pain reduction, increased range of motion and increase in strength. The functional goals of this treatment plan are for the applicant to return to activities of normal living, help him tolerate regular work/ADLS and prevent future functional impairments.

[33] To rebut the applicant's claim, the respondent relies on the IE examination conducted by Dessouki on June 6, 2017. Dr. Dessouki's physical examination showed that the applicant had functional range of motion. It was his opinion that the treatment plan was neither reasonable nor necessary.

8 Supra note 1 at 1, s. 15

[34] I find that the applicant has not met the onus on him to prove entitlement to the disputed medical benefit for the following reasons.

[35] The evidence that was submitted by the applicant in support of his case does not explain why he requires physiotherapy and how he would benefit from it. For example, the applicant relies on a letter from Dr. Alidina, which states that the applicant is unable to work and requires further investigation and treatment.9 According to Dr. Alidina, “in light of my examination, I suggest that he be authorized to have treatments, investigations and referrals as proposed by Drs. Green and Gallo (dated 2016, 2017, 2018).”10

[36] Simply stating that one should authorize something based on an examination is not sufficient enough. There must be a basis and evidence for such recommendations.

[37] The applicant also relies on a report by Dr. Zahavi. In his submissions, the applicant has copied certain points from Dr. Zahavi’s report. However, many of the points are irrelevant and do not speak directly to why this treatment is reasonable and necessary. In the report itself, Dr. Zahavi recommended a multimodal chronic pain management program which includes a graduated exercise program, education about hurt versus harm and the benefits of an active lifestyle, increasing physical activity and engaging in low impact activities such as yoga and pilates.11 He does not mention physiotherapy in his recommendations.

[38] Based on the evidence before me, I find that the physiotherapy treatment is not reasonable or necessary. Therefore, the applicant is not entitled to this medical benefit.

Issue #4: Is the applicant entitled to receive the cost of the completion of treatment plans by Dr. Gallo?

[39] The applicant withdrew this issue and as such, the Tribunal will not be addressing it.

Issue #5: Is the applicant entitled to a chronic pain assessment in the amount of $2,200.00?

[40] The applicant claims entitlement for a chronic pain assessment. The treatment plan states that “the OCF-18 is being submitted to facilitate a Chronic Pain

9 Supra note 3 at 3
10 Ibid.
11 Supra note 4 at 3

assessment, which is required to investigate the ongoing pain symptoms the patient is experiencing as a result of the accident."12

[41] The respondent disputes the entitlement to the cost of the examination on the basis that it is not reasonable or necessary. The respondent relies on the fact that there is no evidence submitted by the applicant to support that he suffers from chronic pain and that it needs to be further investigated. Furthermore, the respondent argues that Dr. Zahavi's report is unreliable.

[42] I find that the applicant has not met the onus on him to prove entitlement to the disputed medical benefit for the following reasons.

[43] In his submissions, the applicant states that "it is perfectly appropriate and reasonable to expect that a person still having pain and sequalae of the injuries 6 years after the accident has passed into the chronic pain stage."13 One cannot assume this. It must be supported by evidence.

[44] The applicant has not provided any clinical notes and records that illustrate a history of ongoing pain complaints. The only evidence that the applicant has provided is a report from Dr. Zahavi. Dr. Zahavi states that "given that he has been in pain for over five years, his ongoing complaints and injuries would be considered to be chronic and complete resolution would not be expected. Ongoing symptoms at this point would be compatible with a Chronic Pain Syndrome."14

[45] I am not persuaded by Dr. Zahavi's opinion. Dr. Zahavi was not provided with any documentation such as previous investigations and consultations. Moreover, the applicant did not complete the forms such as the Brief Pain Inventory and Pain Catastrophizing Scale that Dr. Zahavi provided him. The opinion was based on the applicant's self-reports. I find it questionable that Dr. Zahavi has concluded that the applicant is suffering from chronic pain without reviewing the clinical notes and records. Therefore, I am assigning less weight to Dr. Zahavi's report.

[46] The applicant also relies on a letter from Dr. Alidina dated July 10, 2018. I am assigning little weight to this letter because it is a summary of the applicant's conditions. The letter does not provide any information regarding the applicant's ongoing pain symptoms and fails to explain why this assessment is warranted.

12 OCF-18 for the Chronic Pain Assessment dated April 2, 2018
13 TAB A-Applicant's submissions at p.8
14 Supra note 4 at 3

[47] Based on the evidence before me, I find that the chronic pain assessment is not reasonable or necessary. Therefore, the applicant is not entitled to this cost of examination.

INTEREST

[48] Having determined no benefits are payable, I do not need to consider if interest is payable.

ORDER

[49] For the reasons provided above, I order that the application be dismissed.

Released: September 17, 2019

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Tavlin Kaur
Adjudicator