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

Ontario

Tribunal File Number: 17-004509/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:

Kevin McDonnell

Applicant

and

Certas Home and Auto Insurance

Respondent

DECISION

Adjudicator:	Amanda Fricot
Appearances:	Samiya Ahmad, Counsel for the Applicant
	Patrick Baker, Counsel for the Respondent
Heard in Writing:	January 8, 2018

OVERVIEW:

[1] K.M. ("the applicant") was involved in a motorcycle accident on April 27, 2014 and sought accident benefits from Certas Home and Auto Insurance ("the respondent") pursuant to the *Statutory Accident Benefit Schedule – Effective September 1, 2010* (the "*Schedule*"). The respondent denied the applicant's claim for payment of three treatment and assessment plans for examination expenses on the basis that they were not reasonable and necessary.

[2] The applicant submitted an application for dispute resolution services to the Licence Appeal Tribunal – Automobile Accident Benefit Services (the "Tribunal"). The parties were unable to resolve their dispute at a case conference and the matter proceeded to this written hearing.

[3] The applicant submits that he continues to suffer from impairments as a result of the accident and that the neurological, orthopaedic and chronic pain treatment and assessment plans sought are reasonable and necessary.

[4] The respondent does not dispute that the applicant sustained a number of injuries as a result of the accident, but submits that the applicant has recovered from his injuries and that none of the proposed treatment and assessment plans are reasonable and necessary.

ISSUES IN DISPUTE:

[5] The following issues are in dispute before the Tribunal:

1. Is the applicant entitled to payment for a cost of examination expense in the amount of $2,460.00 for a neurological assessment proposed in a treatment and assessment plan dated November 25, 2016 by Elite Specialist Group, denied by the respondent on January 18, 2017?

2. Is the applicant entitled to payment for a cost of examination expense in the amount of $2,460.00 for a chronic pain assessment proposed in a treatment and assessment plan dated November 25, 2016 by Elite Specialist Group, denied by the respondent on January 18, 2017?

3. Is the applicant entitled to payment for a cost of examination expense in the amount of $2,460.00 for an orthopaedic assessment proposed in a treatment and assessment plan dated November 25, 2016 by Elite Specialist Group, denied by the respondent on January 18, 2017?

4. Is the applicant entitled to interest for the overdue payment of benefits?

5. Is the applicant entitled to costs pursuant to Rule 19 of the *Licence Appeal Tribunal's Rules of Practice and Procedure*?

RESULT:

[6] For the reasons that follow, I find the following:

1. The neurological and orthopaedic assessments proposed in the treatment and assessment plans dated November 25, 2016 are not reasonable and necessary.

2. The chronic pain assessment proposed in the treatment and assessment plan dated November 25, 2016 is reasonable and necessary.

3. The applicant is not entitled to interest in respect of the amount claimed for the chronic pain assessment as no cost has been incurred.

4. The applicant is not entitled to any costs.

BACKGROUND:

[7] The applicant was injured on April 27, 2014 when the motorcycle he was driving struck a parked vehicle and he was thrown from his motorcycle over the vehicle and struck the ground landing on his head. A witness advised police that the applicant had been unconscious for 2-3 minutes. The applicant was taken to Lakeridge Hospital in Oshawa by ambulance and later that night he was transferred to the Neurosurgical Unit at Toronto Western Hospital where he remained until he was discharged on May 7, 2014.

[8] The records from the Toronto Western Hospital indicate that the applicant sustained numerous injuries, including multiple bilateral rib fractures, cervical and thoracic spine fractures, abrasions, a lip laceration, broken teeth and a right chin laceration. Those records also indicate that the applicant did not have any intracranial or intra-abdominal injuries.

[9] When the applicant was discharged from Toronto Western Hospital on May 7, 2014, it was noted that during his hospitalization he had remained neurologically intact, that he was on bed rest for a few days and had gradually began ambulating with assistance, and that his back pain had decreased with mobilization. The discharge summary indicates that the applicant was discharged home in good condition and that he was to return in 6-8 weeks for follow up.

[10] Following his release from hospital the applicant was seen by Dr. Peter Noble, his family doctor, and by Dr. Kevin Graham, a walk-in clinic doctor. In late May 2015 Dr. Noble referred the applicant to Dr. Thomas John, a physiatrist. The reason for the referral was stated to be “neck and upper back stiff, tingles and cracking since motorcycle accident”.

[11] Other than annual appointments with Dr. John, there is no evidence that the applicant has sought or received any treatment for accident related impairments from either Dr. Noble or Dr. Graham or any other physician after 2015.

ANALYSIS:

[12] Section 25(1) of the *Schedule* is the relevant legislative provision. It provides that the insurer shall pay reasonable fees charged by a health care practitioner for reviewing and approving a treatment plan, including any assessment necessary for that purpose.

[13] Section 25(5) of the *Schedule* limits the amount of assessment and examination expenses in the amount of $2,000.00 per assessment.

[14] I found the cases submitted by the applicant to be of limited relevance as they did not deal with type of benefit in issue in this Application.[1]

[15] The applicant bears the onus of proving, on a balance of probabilities, that each of the treatment and assessment plans sought is reasonable and necessary. In order to meet this onus, the evidence must demonstrate that there is a reasonable possibility that the applicant has the condition the assessment will investigate and as well demonstrate that the assessment sought is reasonable and necessary in the circumstances.

Findings Relevant to the Determination of the Issues in Dispute

<u>The respondent's failure to conduct assessments to support the denial of benefits</u>

[16] The applicant submits that the evidence, legislation and jurisprudence supports a finding that the three assessments sought are reasonable and necessary and submits that as the respondent has neither produced evidence to contradict the medical evidence filed nor conducted a single assessment upon which to base its denials, that the applicant is entitled to the assessments sought.

[17] Section 38(10) of the *Schedule* provides that if an insurer denies a request for assessments described in a treatment and assessment plan, the insurer may notify the insured person that the insurer requires the insured person to undergo an examination under Section 44 of the *Schedule*.

[18] Although Section 38(10) of the *Schedule* gives an insurer the right to require the insured person to undergo an examination under Section 44 of the *Schedule*, it does not impose an obligation on the insurer to do so. The onus remains on the applicant to prove, on a balance of probabilities, that the treatment and

[1] *L.W. v. The Co-operators General Insurance Company,* 2016 CanLII 93133 (ON LAT) and 16-000282 v. *RBC General Insurance Company*, 2016 CanLII 93134 (ON LAT)]

assessment plans sought are reasonable and necessary, whether or not a Section 44 examination is conducted.

Evidence regarding the applicant's failure to receive treatment after mid-2015

[19] The respondent submits that the applicant's failure to seek additional treatment after mid-2015 is indicative of the level of recovery that he had experienced. The respondent contends that $7,722.52 of funding remains available to the applicant for approved treatment. In reply, the applicant maintained that he stopped attending for treatment because the respondent had stopped funding treatment and he could not afford to continue. Although the evidence confirms that there were a number of treatment plans approved, it is not possible to determine, based on the evidence, whether there was approved and unused funding available. There is insufficient evidence from which to infer, from the applicant's failure to continue to receive treatment after mid-2015, that he had recovered and that no further treatment was required.

Is the applicant entitled to payment for a neurological assessment?

[20] I find that the applicant is not entitled to payment for a neurological assessment for the following reasons.

[21] The applicant submits that there is sufficient evidence in the clinical notes and records of Dr. Graham, the functional capacity evaluation conducted on November 26, 2014 and the motor vehicle accident report dated April 27, 2014 to support a finding that the neurological assessment sought is reasonable and necessary to investigate ongoing symptoms to establish a diagnosis and recommend appropriate medical intervention from a neurological perspective.

[22] The applicant submits that he has consistently exhibited numerous signs and symptoms of neurocognitive and neurological deficits, including memory loss, headaches, speech hesitancy, and tingling sensations along the spine.

[23] Shortly after admission to the Lakeridge Hospital, the doctor's order sheet dated April 27, 2014 notes that at 2100 hours the applicant was stable, had a Glascow Coma Score of 15 and had no neurological deficits. The discharge summary from the Toronto Western Hospital dated May 7, 2014 notes that there was no evidence of motor or sensory deficits and that the applicant remained neurologically intact during his hospitalization.

[24] The applicant's evidence is that he has numbness around his mouth, delayed verbal response time, extremely slow word recall, worsened memory, a diminished ability to focus and concentrate and headaches. I do not find the applicant's evidence relating to these symptoms credible for the following reasons. There is insufficient evidence that the applicant complained to or sought treatment from any medical professional for these issues. The clinical notes and records and reports

of the applicant's physicians contradict some of this evidence and confirm that the applicant advised his physicians in 2015, 2016 and 2017 that he did not suffer from headaches. Additionally, I note that the applicant returned to work in May 2015 to the position of a truck driver.

[25] Other than immediately following and during the several months after the accident in 2014, there is no record of the applicant having complained to any medical professional regarding any of the neurological symptoms alleged, other than the speech hesitancy and the tingling sensation in his back.

[26] The single reference to speech hesitancy is in the clinical notes of Dr. Noble and Dr. Graham on January 20, 2015. I do not accept the applicant's submission that "even one finding by a physician of 'speech hesitancy' is sufficient to warrant further neurological examination" for the following reasons. The physician who noted the speech hesitancy on January 20, 2015 continued to see the applicant. He made no further mention of any 'speech hesitancy' nor did he investigate this further or refer the applicant to a specialist. There were no further complaints or follow up with respect to the applicant's complaints of speech hesitancy after January 20, 2015. There is no objective evidence to support the conclusion that this was an ongoing issue.

[27] Based on the medical evidence, the only symptom relied upon by the applicant in support of the need for a neurological assessment is the ongoing tingling sensation in his back. The applicant reported this to Dr. Noble until May 2015 and to Dr. John at each of his annual visits in November 2015, November 2016 and October 2017. Dr. John was aware of this complaint when he reported that his neurological examination of the applicant revealed normal sensation and symmetrical reflexes and concluded that there was no neurological deficit. Dr. John did not recommend any further neurological assessment, but rather recommended stretching, strengthening and postural correction exercises.

[28] Based on a review of all of the evidence, the applicant has not proven, on the balance of probabilities, that the neurological assessment sought is reasonable and necessary.

Is the applicant entitled to payment for a chronic pain assessment?

[29] I find that the applicant is entitled to payment for a chronic pain assessment for the following reasons.

[30] The applicant submits that there is sufficient evidence in the functional capacity evaluation conducted on November 26, 2014 and in the clinical notes and records of Dr. John to support a finding that the chronic pain assessment sought is reasonable and necessary.

[31] The functional capacity evaluation conducted on November 26, 2014 by Dr. Magna sheds no light on the applicant's current condition.

[32] Although Dr. John's reports dated November 23, 2015, November 9, 2016 and October 18, 2017 all state that the applicant has no "major" low back pain, there are references in all three reports to complaints of ongoing stiffness in the applicant's neck and upper back and a specific reference to ongoing pain in Dr. John's October 18, 2017 report.

[33] I find, on the balance of probabilities, that there is a reasonable possibility that the applicant suffers from chronic pain and that the chronic pain assessment sought is reasonable and necessary for the following reasons:

a. The applicant sustained numerous serious injuries in the accident. Although the applicant's condition improved steadily following the accident, there is evidence of continuity of complaints of pain, soreness and stiffness from accident related injuries since the time of the accident. The applicant continues to see Dr. John annually, most recently in October 2017 when the applicant advised Dr. John that he has ongoing pain.

b. Based on a consideration of all of the evidence, it is reasonable and necessary for the applicant to explore, through the chronic pain assessment sought, whether he suffers from chronic pain and whether further treatment is reasonable and necessary.

[34] I find that the fees proposed for the chronic pain assessment are reasonable as they are in accordance with Section 25(5) of the *Schedule*.

Is the applicant entitled to payment for an orthopaedic assessment?

[35] I find that the applicant is not entitled to payment for an orthopaedic assessment for the following reasons.

[36] The applicant submits that there is sufficient evidence in the clinical notes and records of Dr. Graham, the functional capacity evaluation conducted on November 26, 2014 and the motor vehicle accident report dated April 27, 2014 to support a finding that the orthopaedic assessment sought is reasonable and necessary to establish ongoing orthopaedic issues and recommend appropriate medical intervention.

[37] Neither the functional capacity evaluation conducted on November 26, 2014 nor the motor vehicle accident report dated April 27, 2014 shed any light on the applicant's current condition.

[38] The applicant's affidavit evidence is that he currently suffers from reduced functioning of his upper extremities, constant pain between his shoulders and upper back; tingling sensation down his spine, persistent neck stiffness/discomfort, unwavering rib area soreness/pain and cracking noises and sensations around his hips and waist area that elicit pain. In his reports dated November 23, 2015, and November 9, 2016, the only complaints noted by Dr. John were ongoing stiffness in the applicant's neck and upper back and some tingling sensation in his mid-back. Dr. John also notes in his reports that the applicant suffered multiple fractures and strain injuries and that he had ongoing myofascial tightness affecting the paracervical, shoulder girdle, parathoracic and lumbosacral and hip girdle regions. In his October 18, 2017 report Dr. John for the first time notes that the applicant had ongoing pain.

[39] In November 2015 Dr. John instructed the applicant in stretching, strengthening and postural correction exercises as well as proper body mechanics and modified core stabilization. He advised the applicant that he would benefit from an Obus Forme supporting roll and footstool and from weight reduction. Dr. John's advice was essentially the same in November 2016 and in October 2017. In his October 18, 2017 report Dr. John noted that the applicant was not performing the stretches on a regular basis and advised him that he had to perform regular stretching and exercises indefinitely. Despite having been made aware of a number of the applicant's orthopaedic complaints, no further treatment for or assessment of orthopaedic issues was recommended by Dr. John in 2015, 2016 or 2017.

[40] Based on a review of all of the evidence, the applicant has not proven, on the balance of probabilities, that the orthopaedic assessment sought is reasonable and necessary.

Is the applicant entitled to interest?

[41] The applicant is not entitled to interest on the amount claimed for the chronic pain assessment as it has not been incurred as per Section 51 of the *Schedule*.

Is the applicant entitled to costs?

[42] The applicant requested costs in his submissions. Rule 19.1 of the *Licence Appeal Tribunal's Rules of Practice and Procedure* provides that a party may request costs where a party believes that the other party has acted unreasonably, frivolously or vexatiously, or in bad faith. There is no evidence that the respondent acted unreasonably, frivolously or vexatiously, or in bad faith in this proceeding. Accordingly the applicant's request for costs is dismissed.

ORDER

1. The applicant is not entitled to the neurological assessment submitted in the treatment plan dated November 25, 2016 as the proposed plan is not reasonable and necessary.

2. The applicant is entitled to the chronic pain assessment submitted in the treatment plan dated November 25, 2016 as the proposed plan is reasonable and necessary.

3. The applicant is not entitled to the orthopaedic assessment submitted in the treatment plan dated November 25, 2016 as the proposed plan is not reasonable and necessary.

4. The applicant is not entitled to interest in respect of the chronic pain assessment in accordance with Section 51 of the *Schedule*.

5. The applicant is not entitled to costs pursuant to Rule 19 of the *Licence Appeal Tribunal's Rules of Practice and Procedure*.

Released: March 7, 2018

Amanda Fricot

Amanda Fricot, Adjudicator