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: K. V. vs. Aviva General Insurance Company, 2020 ONLAT 19-006030/AABS

Tribunal File Number: 19-006030/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:

K. V.

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Jessica Cavdar**

APPEARANCES:

For the Applicant: Gjergji Laloshi, Paralegal

For the Respondent: Arijana Schrauwen, Counsel

Heard by way of written submissions

OVERVIEW

[1] The applicant, K.V., was injured in an accident on **May 25, 2016** and sought benefits from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the *"Schedule"*).

[2] The applicant was involved in a motor vehicle accident in which she reported sustaining injuries in her neck, left shoulder, upper back, mid back, left hip, left wrist, left thumb, and left knee. The applicant also fractured four metatarsals.

[3] The applicant applied for chiropractic services that were denied by the respondent on the basis that the Treatment Plan was neither reasonable or necessary. The applicant disagreed and applied to the Tribunal for resolution of the dispute.

PROCEDURAL ISSUES

[4] Before addressing the substantive issues in dispute before the Tribunal (which begin at para. 37), I must first deal with certain procedural arguments and issues raised by the respondent.

[5] The respondent sought an order that the applicant's written submissions in this case be struck in their entirety "on the basis they were submitted late and in breach of the [Case Conference] Order, without having sought an amendment of said order, resulting in a severe prejudice to the respondent."

[6] Adjudicator Paluch's November 5, 2019 Case Conference Order set a deadline of Friday, February 28, 2020 for the applicant's submissions.

[7] The applicant's submissions were served on the respondent and filed with the Tribunal on Monday, March 2, 2020, which was the next business day.

[8] The respondent further noted that the applicant submitted certain documentary evidence upon which it sought to rely on March 2, 2020, when the original document production and exchange date set out and agreed upon in the Case Conference Order was January 31, 2020.

[9] Accordingly, in the alternative to the request made in para. 4, the respondent sought an order that the applicant's submissions relying upon the evidence the applicant provided on March 2, 2020 "be struck in their entirety be struck [sic] on the basis they were submitted late and in breach of the Order and without a

[1] O. Reg. 34/10, as amended.

request to amend said Order; or, in the further alternative, the records submitted on March 2, 2020 be struck; or, in the further alternative, if allowed to rely on the records submitted in breach of the Order, the respondent be permitted a further right to respond, including the right to requisition responding expert reports."

THE PARTIES DISCUSS THE APPLICANT'S LATE SUBMISSIONS AND EVIDENCE

[10] The respondent raised these issues in email correspondence to the applicant dated March 2, 2020.

[11] The applicant's representative responded by email to respondent's counsel later in the day on March 2, 2020. The applicant's representative wrote that respondent counsel's concern was duly noted, and said that, "in order to avoid any prejudice to you, we'll happily accept the Respondent's submission a business day late and have our responding submission at the time scheduled."

[12] The applicant's representative continued:

> With respect to the Clinical notes and records received today from Physiomed Burlington, they were made available to you as soon as we received them. Unfortunately those documents were not in our possession prior to today so we had no way of producing them earlier. Those records are very relevant to the issue in dispute and not including would greatly prejudice the applicant.

[13] The applicant's representative then offered to consent to a respondent's motion to request further time to review the March 2, 2020 documents. The applicant's representative further offered to **consent to an adjournment of the hearing date as well as the setting of a later due date for the respondent's submissions**:

> Once again, we certainly have no intention of prejudicing the respondent on their position, so should you want to bring a motion to request time necessary to review the documents in question we would be happy to consent to the motion and adjourn the date of the hearing as well as date of respondent's submissions.

[14] Respondent's counsel rejected this offer in a subsequent March 2, 2020 email, writing to the applicant's representative that:

> I will of course be raising the multiple procedural breaches by your office in my submissions. Specifically, I will be asking for those documents to be struck. You had sufficient time to procure them given the deadlines mutually agreed upon and if you had any concern of not receiving them in time, you had the opportunity to

> contact the LAT and my office to ask for an extension. This was not done. I will be asking those to be struck because it is prejudicial to our side because we now have no time to review and have anyone comment on them. Hence why deadlines are in place. Again, thank you for sending them but the LAT will now be determining whether they will be allowed in their entirety and whether it's prejudicial to not adhere to the timeline accepted by you without any indication of issue.

RULE 3.1 OF THE TRIBUNAL'S COMMON RULES OF PRACTICE & PROCEDURE

[15] Rule 3.1 of the Tribunal's Common Rules of Practice & Procedure calls for a liberal interpretation and application of Tribunal rules, which "may be waived, varied or applied on the Tribunal's own initiative, or at the request of a party, to facilitate a fair, open and accessible process and to allow effective participation by all parties…[and] ensure efficient, proportional, and timely resolution of the merits of the proceedings before the Tribunal…"

MARCH 2, 2020 APPLICANT WRITTEN SUBMISSIONS (DUE FEBRUARY 28, 2020)

[16] The applicant's written submissions came in one business day late – on March 2, 2020, when they should have been submitted by February 28, 2020.

[17] I recognize that the above constitutes a technical breach of Adjudicator Paluch's November 5, 2019 Case Conference Order. At the same time, I am cognizant of the fact that the Tribunal must meet its mandate, which is enumerated in its rules.

[18] I am not persuaded that it would be procedurally fair to the applicant to strike these day-late submissions. In the spirit of Rule 3.1, this matter should instead be adjudicated on the merits. Eliminating one party's submissions means that an adjudicator cannot do his or her job correctly.

[19] This is not unduly prejudicial to the respondent because the prejudice of striking the applicant's day-late written submissions outweighs any prejudice the respondent would be subjected to by having one fewer business day to prepare its submissions.

[20] In any event, the applicant's representative offered, in his March 2, 2020 email, to "in order to avoid any prejudice to you, we'll happily accept the Respondent's submission a business day late and have our responding submission at the time scheduled."

EVIDENCE SENT ON MARCH 2, 2020 (THAT HAD BEEN DUE JANUARY 31, 2020)

[21] I now turn to the issue of the documentary evidence the applicant submitted on March 2, 2020, when the original document production and exchange date set out in the Case Conference Order was January 31, 2020.

[22] The applicant sent in this particular evidence approximately one month late, and at a time far closer to the respondent's own deadline for its reply submissions.

[23] On its face, allowing the evidence the applicant submitted on March 2, 2020 could be construed as prejudicial to the respondent for several reasons:

i. The respondent would be viewing documentary evidence that it should have been given a month prior for the first time mere weeks before its own submissions were due, denying the respondent sufficient time to consider its own arguments and how to incorporate said evidence into them; and

ii. The respondent would be learning about this evidence's existence at the same time as it has been given the applicant's submissions.

[24] Here, the applicant's representative explained that his office only came into possession of these documents on or around March 2, 2020. This alone would not excuse the monthlong breach of the production order.

[25] However, I note that, in his email to the respondent's counsel on March 2, 2020, the applicant's representative stated, "…should you want to bring a motion to request time necessary to review the documents in question we would be happy to consent to the motion and adjourn the date of the hearing as well as date of respondent's submissions."

[26] The applicant specifically consented to an adjournment of the hearing date as well as the due date of the respondent's submissions in response to the valid concerns raised by the respondent regarding the late submissions and productions.

SHOULD THE APPLICANT'S OVERDUE EVIDENCE BE ADMITTED IN THIS CASE?

[27] The applicant's response to the respondent's March 2, 2020 email is entirely reasonable:

[28] The respondent had accurately pointed out that it would be prejudiced by the applicant's breach of the production order in submitting crucial evidence a

month after it was due. The applicant replied on the same day, acknowledging the respondent's concern as valid and consenting to an adjournment of the hearing as well as an extension of time for the respondent to review the late evidence and draft its responding submissions.

[29] In this case, it would be procedurally unfair to strike the evidence adduced by the applicant on March 2, 2020, even though it was a month late and in violation of the Case Conference Order. This is because, in the present case, the applicant provided a clear avenue to the respondent to garner sufficient additional time to review said evidence and submit its responding arguments at a date that was mutually agreeable. The applicant's consent to pushing back the hearing date and the date of the respondent's submissions was reasonable in the circumstances.

[30] The respondent declined this offer. Instead, the respondent expressly opted to proceed to this hearing on the originally-scheduled date. The respondent argued in its submissions to the Tribunal that, "in filing these [March 2, 2020] records for the first time, without mention of their existence or intention to include, the Applicant has denied the Insurer a proper opportunity to respond, in breach of procedural fairness."

[31] The respondent went on to argue that it was "severely prejudiced by the late service and inclusion of these documents as they were not provided at the time of the denial, and subsequently are being used against it for the purpose a hearing. A portion of these submissions were forced to address the Applicant's breach, thereby limiting the ability to mount a full defence as we abide by the page limit within the Order."

[32] In its submissions, the respondent failed to mention its March 2, 2020 email exchange with the applicant. Nor did the respondent, in its submissions, provide any explanation as to why it rejected the applicant's offer of pushing back the hearing date and/or its own submission date.

[33] The "severe prejudice by the late service and inclusion of these documents" and "breach of procedural fairness" alleged by the respondent could have been obviated had the respondent consented to the applicant's March 2, 2020 suggestion of pushing back the hearing date and respondent submission deadline.

[34] The Tribunal is designed to deal with a case's merits in an efficient and proportional manner. The respondent had a reasonable opportunity to respond

to the new evidence since the applicant was willing to have the hearing and submission dates pushed back.

[35] It was the respondent's choice to press on with the case as scheduled and to forgo the opportunity to take additional time to review the late evidence. In the same vein, it also was the respondent's choice to elect to devote a portion of its written submissions to addressing the applicant's breach of the Case Conference Order.

[36] In light of the above, I decline to strike any of the evidence or submissions of the applicant.

[37] I will now deal with the substantive issues of this case.

ISSUES TO BE DECIDED

[38] The following issues must be determined by the Tribunal:

i. Is the applicant entitled to a medical benefit in the amount of $2,738.00 for chiropractic services in a treatment plan (OCF-18) submitted on May 4, 2017, and denied on July 24, 2017?

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

RESULT

[39] After reviewing the parties' submissions and documentary evidence, I find that the applicant has not adduced sufficient evidence to demonstrate that the proposed Treatment Plan for chiropractic services is both reasonable and necessary.

REASONABLE AND NECESSARY

[40] Under s.14 of the *Schedule*, an insurer must pay the medical and rehabilitation benefits under ss. 15 to 17 to an insured person who sustains an impairment as a result of an accident. Section 15(1) includes expenses for chiropractic treatment that is reasonable and necessary for the treatment of the insured person.

[41] The question I must decide is whether the applicant has established, on a balance of probabilities, that this particular chiropractic Treatment Plan is reasonable and necessary.

THE PARTIES' POSITIONS

[42] The applicant argues that she is entitled to the chiropractic services recommended in the Treatment Plan, stating that they are reasonable and necessary for her circumstances because she continues to suffer from consistent, ongoing pain stemming from her accident-related injuries. The applicant submits that a denial would be detrimental to her overall and long-term health.

[43] The respondent argues that the applicant is not entitled to the Treatment Plan because the applicant has not proven that the chiropractic services in question are reasonable and necessary to provide relief for the specific injuries that the applicant sustained in the accident.

ANALYSIS

[44] I find that the applicant has not led sufficient evidence to show that the specific chiropractic treatments outlined in the Treatment Plan are reasonable and necessary to treat the injuries she sustained as a result of the 2016 accident.

[45] Accordingly, the applicant has failed to establish, on a balance of probabilities, that the requested Treatment Plan for chiropractic services is reasonable and necessary.

[46] To support her submission that the Treatment Plan in question is reasonable and necessary, the applicant relies on, among other things, records from Physiomed Burlington, which she attended for physiotherapy between 2016 and 2018.

CONTEMPORANEOUS PHYSIOTHERAPY PRE- AND POST- TREATMENT PLAN

[47] The Treatment Plan in question, for chiropractic services, was submitted to the respondent on May 4, 2017.

[48] The applicant had also been receiving physiotherapy treatment at Physiomed in the months leading up to and following that date.

[49] The applicant received physiotherapy on April 18, 2017. This was her last physiotherapy visit prior to her chiropractic appointment when the Treatment Plan in question was created on May 4, 2017.

[50] At this April 18, 2017 physiotherapy appointment, physiotherapist Sarah MacDonald noted that the applicant "reports both heels are feeling very sore.

She hasn't been back to her GP yet for a new [prescription]. Patient states she got called into work tonight, so she would like her feet worked on."

[51] On May 4, 2017, the applicant attended Physiomed and saw chiropractor Altaz Madhavji, who completed the chiropractic Treatment Plan in dispute and submitted it to the respondent.

[52] In the Treatment Plan, Dr. Madhavji identified the applicant's injuries and sequelae as multiple fractures of foot; injury of muscle and tendon at neck level; sprain and strain of thoracic spine; sprain and strain of lumbar spine; sprain and strain of carpometacarpal (joint) of hand; and sprain and strain of wrist.

[53] Dr. Madhavji noted that the activities limited by these impairments were "difficulty walking due to [the applicant's] foot fracture, heavy lifting, prolonged postures aggravating." He identified the goals of the Treatment Plan as pain reduction, increased range of motion, and increase in strength so that the applicant could return to activities of normal living and return to pre-accident work activities.

[54] Dr. Madhavji indicated that the applicant had "improved mobility and tolerance to adl's with respect to her thumb," and that her "foot is still very painful and progressing very slowly."

[55] The applicant's next visit with physiotherapist Sarah MacDonald took place on May 9, 2017, which was five days after the chiropractic Treatment Plan at issue was filled out and submitted to the respondent.

[56] At this visit, Ms. MacDonald noted that the applicant "reports she has been off work because of a family funeral, so her feet have actually been feeling good. Patient also states that the taping from last tx really helped. She got a nerve conduction test done and said the pain in her thumb area hurt so badly she fainted."

[57] The applicant returned to see Ms. MacDonald on May 12, 2017, eight days after the chiropractic Treatment Plan at issue was submitted to the respondent. Ms. MacDonald's notes state that the applicant "reports her thumb felt much better after last tx. Heels have been feeling really good since taping."

[58] At her May 29, 2017 visit to Physiomed for physiotherapy, Ms. MacDonald noted that the applicant "reports she went on vacation two weeks ago, and ever since, her foot has been very sore. [I] explained to [the applicant] that walking in

the sand, although it helps strengthen the muscles, is hard on the foot and most likely caused a flare up…Patient to get a prescription from GP for orthotics."

JULY 13, 2017 S. 44 EXAM

[59] The respondent refused to pay for the Treatment Plan in question and sent the applicant to be assessed under s. 44 by an orthopaedic surgeon, Dr. Fathi Abuzgaya, on June 20, 2017. Dr. Abuzgaya released his corresponding report on July 13, 2017.

[60] During this s. 44 assessment, the applicant reported that she had returned to her full-time office position as well as her part-time position as a server at a restaurant, with modified duties allowing her to sit and stand less than before her accident. This was consistent with what the Physiomed physiotherapist noted in her clinical records.

[61] Dr. Abuzgaya stated that, based on the medical history, physical examination, and review of the documentation provided, the applicant's injuries were consistent with cervical sprain, thoracic sprain, soft tissue injury to the left shoulder, wrist strain, fracture of the right foot, and right mid-foot plantar fasciitis.

[62] Dr. Abuzgaya wrote that the applicant "may also have carpal tunnel syndrome bilateral wrists, though I do not have the EMG results or the treating neurologist's report to verify the diagnosis or determine a causative relationship to the subject motor vehicle accident." He added that, "on today's clinical examination, there was limited range of motion of the subtalar movement of both feet. There was also sensitivity to deep palpation of the right fourth and fifth toe."

[63] He recommended that the applicant's family physician refer the applicant to her treating orthopaedic surgeon to receive cortisone injection for right mid-foot plantar fasciitis.

[64] Dr. Abuzgaya continued, "Given the possible evidence of carpal tunnel syndrome (query causation), [the applicant] may also benefit from referral to a plastic surgeon for carpal tunnel release or cortisone injections."

APPLICANT'S MEDICAL RECORDS FROM FAMILY DOCTOR AND ORTHOPAEDIC SURGEON

[65] The applicant visited her family doctor, Dr. Sandsome, several times following the accident. In June 2016, the applicant complained of numbness in her toes,

which Dr. Sandsome advised was an impingement on her nerves which would resolve on its own.

[66] In July 2016, Dr. Sandsome diagnosed the applicant with mechanical back pain due to back pain that radiated down her leg, for which she was encouraged to take Gabapentin.

[67] The applicant returned to see Dr. Sandsome in September 2016 to report headaches and tingling in her toes. In response, his notes indicate that she would continue with physiotherapy.

[68] The applicant saw Dr. Sandsome again in February 2017, complaining of of headaches, neck pain, and problems walking due to her fractured toes. Dr. Sandsome examined the applicant and found soft tissues injuries to her back. He noted that the applicant was continuing with physiotherapy for which she was finding toe pain relief.

[69] The applicant visited Dr. Sandsome again in March 2017 and then in June 2017. At her June visit, Dr. Sandsome made note of a cyst on her left ankle that should be removed since it interfered with putting on her shoes. Dr. Sandsome recommended that the applicant attend an orthopaedic surgeon for cyst removal.

[70] The applicant also sought treatment from Dr. Jarozynski, an orthopaedic surgeon at Joseph Brant Hospital's fracture clinic, following her accident. On May 27, 2016, Dr. Jaroszynski recommended physiotherapy for the applicant in addition to wearing her aircast boot.

[71] At her next visit to the fracture clinic in June 2016, Dr. Jaroszynski noted that the applicant's fractures were healing well, she could discard the boot, and could resume her normal activities.

[72] The applicant returned to the fracture clinic for the last time in August 2016, complaining of lateral toe pain. Dr. Jarozynski noted that the applicant's toe pain was "not necessarily unusual given that some remodelling was likely happening. Beyond that, it is not uncommon that forefoot pain persists with metatarsal fractures."

[73] As her treating orthopaedic surgeon, Dr. Jarozynski recommended that the applicant get an orthotic at her last visit with him, in August 2016. He continued that she "should engage in an exercise program to recondition the leg, rather than the passive treatment modalities that she has had at physiotherapy."

[74] Based on my review of the evidence and submissions of the parties, the applicant has not demonstrated how the specific treatments outlined in the chiropractic Treatment Plan were reasonable or necessary to treat the injuries she sustained as a result of the 2016 accident.

[75] The applicant's contemporaneous medical and physiotherapy records from the time period leading up to and following the drafting of the Treatment Plan demonstrate that she indeed was suffering from foot pain, toe pain, heel soreness, an ankle cyst, and nerve pain in her thumb and hand. However, it is unclear how the proposed chiropractic treatment outlined in the Treatment Plan would specifically help the applicant with these ailments.

[76] The applicant's treating physicians as well as the s. 44 physician suggested the following solutions for the applicant's ailments:

i. Orthotic and exercise;

ii. Cortisone injection for right mid-foot plantar fasciitis; and

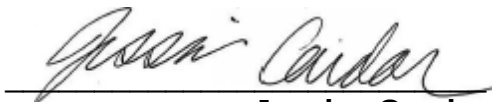
iii. Carpal tunnel release or cortisone injections.

[77] Chiropractic treatment was not recommended. The Treatment Plan does not shed light on how the proposed chiropractic services would provide relief to the applicant based on the symptoms she was suffering at the time.

[78] Accordingly, I find that the applicant has not demonstrated why the specific treatments outlined in the Treatment Plan are reasonable and necessary to treat her injuries. Therefore, I find the Treatment Plan in dispute is not reasonable or necessary.

[79] As no benefits are overdue, no interest is payable under s. 51 of the *Schedule*.

Released: August 10, 2020



Jessica Cavdar
Adjudicator