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: Sheneece Maloney vs. Aviva General Insurance, 2020 ONLAT 19-005787/AABS

Released Date: 12/10/2020
File Number: 19-005787/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:

Sheneece Maloney

Applicant

And

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR: **Rebecca Hines**

APPEARANCES:

For the Applicant: Marc Golding, Paralegal

For the Respondent: Dale Stuckless, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Sheneece Maloney (the “applicant”) was involved in an automobile accident on December 16, 2016, and sought benefits from Aviva Insurance Company (the “respondent”) pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule").[1] The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).

[2] The parties participated in a case conference but were unable to resolve the issues in dispute. The matter proceeded to this written hearing.

ISSUES IN DISPUTE

[3] I have been asked to decide the following issues:

i. Is the applicant entitled to a medical benefit in the amount of $3,948.91 for physiotherapy recommended by In Line Rehabilitation Centre Inc. (“In-Line”) submitted May 29, 2017 and denied June 12, 2017?

ii. Is the applicant entitled to a medical benefit in the amount of $3,191.25 for physiotherapy recommended by In Line submitted February 21, 2018 and denied March 7, 2018?

iii. Is the applicant entitled to the cost of an examination in the amount of $2,200.00 for a chronic pain assessment recommended by Chinguacosy Physiotherapy submitted January 24, 2019 and denied February 4, 2019?

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

RESULT

[4] After reviewing the parties’ submissions and all of the evidence, I find the applicant is not entitled to any of the disputed treatment plans or interest.

BACKGROUND

[5] The applicant, a 30-year-old woman, was a passenger in a vehicle which was t-boned by another vehicle. She did not seek immediate medical attention and developed pain in her neck and upper, mid and low back one-week post-

[1] Ontario Regulation 34/10

accident. She took eight days off work in her position of sales associate with a beauty supply company.

[6] The applicant started attending In Line for physiotherapy and massage and was removed from the Minor Injury Guideline as a result of an accident related psychological impairment.

Is the applicant entitled to the two treatment plans for physiotherapy recommended by In-Line or the chronic pain assessment recommended by Chinguacosy Physiotherapy?

[7] The applicant is not entitled to any of the disputed treatment plans for the following reasons.

[8] Sections 14 and 15 of the Schedule provide that an insurer is only liable to pay for medical benefits and cost of examination expenses that are reasonable and necessary as a result of an accident. The applicant bears the onus of proving on a balance of probabilities that any claimed medical expenses are reasonable and necessary.

[9] The applicant argues that she is entitled to the two treatment plans for physiotherapy as she suffers from ongoing physical impairments that interfere with her ability to carry out her daily activities. Further, to date her impairments have not resolved and future physical treatment is required. In addition, because several years have transpired since the accident and she has ongoing pain, a chronic pain assessment is reasonable and necessary to assess whether she suffers from chronic pain and to explore future treatment options. The applicant relies on the clinical notes and records ("CNRs") of Dr. Abdulhussein, her family doctor, and the treatment plans themselves. She also maintains that the psychological assessment of Dr. Kleiman supports that a chronic pain assessment is reasonable and necessary as one of the psychometric tests the doctor administered revealed that the applicant was at high risk for developing chronic pain.

[10] The respondent submits that Dr. Abdulhussein's CNRs do not support that the applicant suffers from any ongoing accident-related physical impairments that require a chronic pain assessment or additional physiotherapy. The respondent relies on the insurer examination ("IE") of Dr. Ko, a physical pain and rehabilitation specialist who determined that applicant's physical impairments are minor and that a chronic pain assessment or further physiotherapy is not reasonable and necessary. For the following reasons, I agree with the respondent.

[11] First, I agree with the respondent that the CNRs of Dr. AbdhuIhussein do not support the applicant's position that she suffers from chronic pain or any ongoing accident-related physical impairment. From the date of the accident to May 22, 2018, the applicant has attended her family doctor's office five times. Nowhere in these five visits does the applicant report being involved in an accident. I agree with the respondent that the applicant's visits to her family doctor's office post-accident center around her pregnancy in 2017. The applicant heavily relies on one CNR dated February 26, 2018, which she maintains supports that she still suffers from accident-related pain which requires additional physiotherapy and massage. On that date, the applicant reported having neck pain and headaches for over two weeks and that she was not sleeping due to pain. She also reported muscle stiffness when carrying the car seat and baby. Dr. Abdulhussein prescribed Vimovo and recommended that the applicant attend physiotherapy and massage. Significantly, the accident is not mentioned at all in this note or any of the CNRs of her family doctor.

[12] Second, I find that relying on the treatment plans on their own without any objective evidence to support the recommendations made in the plans is not sufficient evidence to prove that the treatment plans are reasonable and necessary. In addition, the applicant did not submit the CNRs of In-Line to support her position that past physiotherapy had been beneficial in reducing her symptoms of pain or resulted in any improvement to her strength, range of motion or function. Nor did the applicant submit the CNRs of Chinguacosy Physiotherapy to provide context for why the chronic pain assessment was being recommended.

[13] Third, I do not find the fact that the applicant reported her symptoms of pain and functional limitations to Dr. Kleiman to be persuasive evidence that the treatment plans for physiotherapy or the chronic pain assessment are reasonable and necessary. The applicant contends that the psychological assessment of Dr. Kleiman supports her position that the treatment plan for the chronic pain assessment is reasonable and necessary because the test results on the pain catastrophizing scale revealed she was vulnerable to developing chronic pain. In my view, this is not strong evidence that the applicant suffers from any ongoing physical impairment that requires a chronic pain assessment or additional physiotherapy. I find Dr. Kleiman's report was based on the applicant's self-reported symptoms and limitations and was not supported by objective evidence. In addition, this assessment was completed five months post-accident, which in my opinion does not support any ongoing physical impairment. I also find that the purpose of Dr. Kleiman's report was to assess the applicant's psychological status, not her physical impairments. For these reasons, I give this

assessment little weight as far as determining the applicant's entitlement to the disputed treatment plans.

[14] By contrast, the respondent relied on the IE of Dr. Ko who conducted a physical examination of the applicant. The doctor determined that the applicant's physical impairments were minor and that the chronic pain assessment and further physiotherapy treatment were not reasonable and necessary. The applicant argued that the IE of Dr. Ko should be given limited weight because he did not have Dr. Abdulhussein's CNRs when he rendered his opinion. Further, Dr. Ko's physical examination of the applicant's shoulders revealed that she had limited range of motion. Therefore, this supports her position that she has an ongoing physical impairment as a result of the accident.

[15] For the reasons already highlighted, I did not find Dr. Abdulhussein's CNRs support that the applicant had any ongoing accident-related physical impairment. Therefore, I do not find the CNRs would have been helpful to Dr. Ko. In addition, even if the IE of Dr. Ko was flawed, the onus is on the applicant to prove that the treatment plans are reasonable and necessary as a result of her accident-related impairments. To the contrary, I find Dr. Ko's opinion more consistent with the rest of the evidence before me.

[16] The parties submitted case law in support of their positions regarding the test to determine whether a chronic pain assessment is reasonable and necessary. As a starting point, there needs to be evidence of an accident related impairment with a direct connection to the examination being sought. I find the case law consistently sets out that in order to prove that a chronic pain assessment is reasonable and necessary an individual must suffer ongoing pain beyond the regular healing time, which has led to disability and functional impairment.

[17] Based on the evidence before me, I find the applicant has not proven on a balance of probabilities that a chronic pain assessment is reasonable and necessary. As already noted above, I did not find the family doctor's CNRs persuasive evidence that she suffers from any ongoing accident related impairment. Further, there was insufficient evidence to support that the pain experienced by the applicant resulted in any functional impairment. The applicant submits that post-accident she has had attendance issues at work and one of the assessors noted she worked modified duties. However, what I found lacking from the applicant's evidence was anything to prove these facts. For example, by submitting the employment file or a letter from her employer. In my view, the applicant's self-reports to a few assessors about her functional limitations was not sufficient to prove that she has any functional limitations as a

result of the accident. Further, the respondent's submission that the applicant was promoted to management post-accident contradicts the applicant's argument.

[18] The applicant has not met her onus in proving on a balance of probabilities that she likely suffers from chronic pain or any ongoing physical impairment that would entitle her to the treatment plans for physiotherapy or the chronic pain assessment. Interest is not payable pursuant to s.51 of the *Schedule* as I do not find that any benefits are overdue.

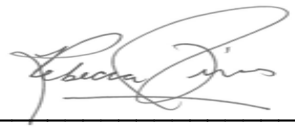
CONCLUSION

[19] For all of the above reasons, I find:

i. The applicant is not entitled to the disputed treatment plans or interest.

ii. The application is dismissed.

Released: December 10, 2020



Rebecca Hines
Adjudicator