



Citation: Shea v. Aviva Insurance Company, 2021 ONLAT 20-006611/AABS

**Release date: October 27, 2021
File Number: 20-006611/AABS**

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, R.S.O. 1990, c I.8, in relation to statutory accident benefits.

Between:

Gregory Shea

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: Lindsay Lake

APPEARANCES:

For the Applicant: Maria Makarova, Paralegal

For the Respondent: Jonathan B. White, Counsel

HEARD: By Way of Written Submissions

OVERVIEW

- [1] The applicant, Gregory Shea, was injured in an automobile accident on March 6, 2018 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (Schedule)*¹ from Aviva Insurance Company, the respondent.
- [2] The respondent denied the applicant's claim for a work hardening program, various physical treatment, and assistive devices. As a result, the applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (Tribunal).
- [3] A case conference was held on October 29, 2020 and the matter proceeded to a written hearing.

ISSUES IN DISPUTE

- [4] The following issues are to be decided:²
1. Is the applicant entitled to \$972.85 (\$2,269.85 less \$1,297.00 approved) for a work hardening program recommended by New Wave Health Center in a treatment plan (OCF-18) dated July 9, 2018?
 2. Is the applicant entitled to \$3,203.79 for chiropractic treatment, massage therapy, osteopathy, acupuncture, and assistive devices recommended by 101 Physio Medical Rehabilitation Centre (101 Physio) in an OCF-18 dated November 20, 2018?
 3. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] I find that the applicant is not entitled to the unapproved portions of the July 9, 2018 OCF-18, the November 20, 2018 OCF-18 or interest. The application is dismissed.

¹ O. Reg. 34/10.

² In his submissions, the applicant advised that several of the issues in dispute as set out in the Tribunal's October 30, 2020 Case Conference Report and Order were resolved prior to the written hearing. As a result, paragraph [4] above sets out the remaining issues in dispute for the purposes of this written hearing.

ANALYSIS

Treatment Plans

- [6] Sections 14 and 15 of the *Schedule* provide that the insurer shall pay medical benefits to, or on behalf of, an applicant so long as the applicant sustains an impairment as a result of an accident and the medical benefit is a reasonable and necessary expense incurred by the applicant as a result of the accident.
- [7] I find that the applicant has failed to meet his onus of proving on a balance of probabilities that the unapproved portions of the July 9, 2018 OCF-18 and the November 20, 2018 OCF-18 are reasonable and necessary.

July 9, 2018 OCF-18

- [8] The July 9, 2018 OCF-18 was completed by Dr. Pawan Jit, chiropractor, and sought funding for twelve 1.41-hour sessions of a work-hardening program to be provided by Dr. Jit at the rate of \$156.06 per hour. The estimated length of the treatment plan was 6 weeks. The goals of this treatment plan were pain reduction, increase in strength, a return to activities of normal living and to continue to improve pain-free functional ability/endurance.
- [9] The additional comments portion of the treatment plan referred to the recommendation of a 12-session work-hardening program by Dr. Manoj Bhargava, orthopaedic surgeon, in the May 10, 2018 Insurer's Examination (IE) Orthopaedic Surgeon Assessment Report.³ The OCF-18 also explained that the proposed active therapy would focus on cervical and lumbar spine ranges of motion, scapular stabilization, core strengthening, work hardening, and postural endurance. The treatment plan also stated that the work hardening program was to include real and simulated work tasks and progressively graded conditioning exercises that were based on the applicant's measured tolerance. Each work hardening session was to include: education warm-up exercises; routine work activity program (job simulation activities/job specific activities); core muscle strength; and endurance exercises.
- [10] On July 25, 2018, the respondent approved \$1,297.00 of the total amount of the OCF-18 of \$2,269.85. The respondent stated that Dr. Bhargava recommended 12 work hardening sessions with a kinesiologist or a physiotherapist, but not with a chiropractor, as proposed in the OCF-18. As a result, the respondent agreed

³ Applicant's Document Brief, tab 32.

to fund the treatment plan but with one-hour sessions overseen by a physiotherapist at the rate of \$99.75 per hour.

[11] In his May 10, 2018 report, Dr. Bhargava provided the following treatment recommendation:

Mr. Shea should undergo a 6-week active rehabilitation program with emphasis on cervical and lumbar spine range of motion, scapular stabilization, core strengthening, work hardening, and postural endurance. This can be facilitated over the course of 12 sessions, twice per week over a 6-week interval with a kinesiologist or physiotherapist.⁴

[12] I agree with the applicant that Dr. Bhargava's report did not provide:

- (i) any recommendation as to the duration of the twelve treatment sessions; and
- (ii) an explanation as to why the work hardening program must be conducted by a kinesiologist or a physiotherapist.

[13] Nevertheless, I also agree with the respondent that it is not the respondent's onus to *disprove* the reasonableness and necessity of the proposed work hardening program being conducted by a chiropractor for 1.41 hours per session at the rate of \$159.06 per hour (which I also agree exceeds the maximum hourly rate for payable of \$112.81 for services provided by chiropractors set out in the Financial Services Commission of Ontario's Professional Services Guideline).⁵

[14] I find that the applicant has failed to meet his onus of proving entitlement to the unapproved portions of the July 9, 2018 treatment plan. The applicant submitted a website print out of the Work Hardening Program with Health Bound Health Network⁶ that does not speak to the length of the program's sessions or to the chiropractor's role in the program aside from listing a chiropractor as a member of the network's multidisciplinary team of healthcare providers.

[15] The additional comments portion of the July 9, 2018 OCF-18 also fails to provide any information as to the reasonableness and necessity of Dr. Jit conducting the

⁴ *Ibid.* at page 8.

⁵ Superintendent's Guideline No. 03/14.

⁶ Applicant's Document Brief, tab 35.

work hardening program as a chiropractor or the length of the treatment sessions being 1.41 hours.

- [16] On the evidence before me, I find that the applicant has failed to prove the reasonableness and necessity of the unapproved portions of the July 9, 2018 OCF-18 on a balance of probabilities. As a result, the applicant is not entitled to the unapproved portion of the July 9, 2018 OCF-18.

November 20, 2018 OCF-18

- [17] The November 20, 2018 OCF-18 was completed by Dr. Wayne Coghlan, chiropractor, with an estimated length of eight weeks. The goals of the treatment plan were pain reduction, increase in strength, increased range of motion, and a return to activities of normal living. The OCF-18 noted that since the last treatment plan, the applicant had improved 75% with less pain and improved tolerance exertion. The OCF-18 sought funding in the total amount of \$3,203.79 for:

- (i) Twelve 1-hour sessions of chiropractic treatment;
- (ii) Eight 30-minute sessions of massage therapy;
- (iii) Five 1-hour sessions of osteopathy;
- (iv) Five 1-hour sessions of acupuncture;
- (v) A body pillow;
- (vi) TENS unit accessories;
- (vii) A total body assessment to be completed by Dr. Bill Nikols, chiropractor; and
- (viii) Completion of the OCF-18.

- [18] The applicant submitted that the November 20, 2018 OCF-18 is reasonable and necessary because the treatment proposed was required for the applicant to reduce his pain, improve his functionality and to return to work.

- [19] The applicant also relied upon the January 22, 2019 Independent Chronic Pain Assessment Report by Dr. Michael Gofeld⁷ to support his entitlement to this OCF-18. The applicant submitted that Dr. Gofeld confirmed in his report that the

⁷ Applicant's Document Brief, tab 22.

applicant had not yet reached maximal medical recovery at the time of his assessment and, as a result, Dr. Gofeld recommended ongoing facility-based treatment.

[20] I find that the applicant has failed to prove that the November 20, 2018 OCF-18 is reasonable and necessary on a balance of probabilities for the following reasons:

- (i) There is no evidence before me as to the purpose of the total body assessment by Dr. Niklos or what the assessment would entail;
- (ii) There is no evidence before me regarding the reasonableness and necessity of a body pillow or TENS unit accessories (or a description of what the accessories include);
- (iii) I give little weight to Dr. Gofeld's January 22, 2019 report. The applicant's version of Dr. Gofeld's report was submitted as an unsigned, Microsoft Word document that appears to be in draft form. The header on the first page states, "Insert Logo of Whoever Submitted OCF." It appears that this version of Dr. Gofeld's report was not the one provided to the respondent. The first page of Dr. Gofeld's report in the respondent's hearing evidence does not contain any wording in the header and the respondent's version appears to be signed by Dr. Gofeld. The information on the pages in the two versions of the reports also start and stop in different places of the text. In any event, Dr. Gofeld's report was not in existence prior to the November 20, 2018 OCF-18 being submitted to the respondent for consideration. Even if it was, the applicant provided no discussion or analysis as to why several non-pharmacological treatments recommended by Dr. Gofeld were not included in the disputed treatment plan whereas other modalities and assistive devices that were included on the November 20, 2018 OCF-18 were not recommended by Dr. Gofeld. Dr. Gofeld also did not list any clinical notes and records (CNRs) as reviewed as part of his report;
- (iv) The applicant received his primary care at Bathurst Walk-In Clinic and Family Practice (Bathurst) although the CNRs from this clinic do not show a treating practitioner name. In any case, the applicant did not attend at Bathurst for treatment between April 17, 2018 and November 27, 2018. The November 27, 2018 CNR entry is illegible. The applicant's next visit was not until June 9, 2019 and the CNR entry for this visit is also illegible. Therefore, it is unclear from the CNRs from Bathurst if there were any recommendations for any of the treatment

modalities set out in the November 20, 2018 OCF-18 in or about the date of the OCF-18;

- (v) The applicant also sought care after the accident from Dr. Sarit Shuldiner at Four Winds Medical Clinic. Dr. Shuldiner's CNRs show that the applicant's last visit prior to the November 20, 2018 treatment plan was on October 10, 2018. At this visit, the applicant required a "doctor's note" for a referral back to Dr. Corrin, neurologist, for a follow-up on his headaches. Dr. Shuldiner noted, however, that the applicant was feeling better at this visit and no other recommendations for treatment we made at this time; and
- (vi) The applicant also submitted treatment session reports from 101 Physio from August 28, 2018 to December 13, 2018.⁸ At the beginning of his treatment at 101 Physio in August 2018, the applicant reported that his neck and shoulders were stiff and sore, and that he also had a stiff back. In October 2018, after 20 treatment sessions, the applicant was still reporting a sore and stiff back, stiff neck and shoulder, and headaches. Unfortunately, there are no qualitative measures of the applicant's complaints that would allow a comparison of the duration and severity of his pain symptoms over his 20 treatment sessions. Therefore, I agree with the respondent that there is no evidence before me to support a finding that the applicant was benefiting from the treatment being provided at 101 Physio or that the treatment was achieving the stated goals of the November 20, 2018 treatment plan.

[21] For all these reasons, I find that the applicant has failed to prove the reasonableness and necessity of the November 20, 2018 treatment plan on a balance of probabilities. Therefore, he is not entitled to the November 20, 2018 OCF-18.

Interest

[22] As there are no benefits owing, no interest is payable.

Award

[23] Although not listed as an issue in dispute in the Tribunal's October 30, 2020 Case Conference Report and Order, the applicant requested an award under *Regulation 664* as part of the relief sought in this hearing.

⁸ Applicant's Document Brief, tab 26.

[24] I find that the issue of whether the applicant is entitled to an award under *Regulation 664* is not properly before me. Even if it was, I find that there would be no basis upon which to consider an award in this matter.

[25] Section 10 of *Regulation 664* provides that, if the Tribunal finds that an insurer has unreasonably withheld or delayed payment of benefits, the Tribunal may award a lump sum of up to 50 per cent of the amount in which the person was entitled. As I have found in that there are no payment of benefits or costs owing to the applicant, it follows that the applicant would also not have been entitled to an award.

CONCLUSION

[26] For the reasons outlined above, I find that:

- (i) The applicant is not entitled to the unapproved portions of the July 9, 2018 OCF-18 or to the November 20, 2018 OCF-18;
- (ii) No interest is payable; and
- (iii) This application is dismissed.

Released: October 27, 2021



Lindsay Lake, Adjudicator