



Citation: Norton v. Co-operators General Insurance Company, 2022 ONLAT 20-009933/AABS

Licence Appeal Tribunal File Number: 20-009933/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:

Brandon Norton

Applicant

and

Co-operators General Insurance Company

Respondent

DECISION

ADJUDICATOR: Derek Grant

APPEARANCES:

For the Applicant: Christina Martin, Counsel

For the Respondent: Peter Durant, Counsel

HEARD: By way of written submissions

BACKGROUND

- [1] The applicant, B.N., was involved in an automobile accident on March 13, 2018, and sought benefits from the respondent, Co-operators, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)*. B.N. was denied certain benefits by Co-operators on the basis that the disputed benefits were not reasonable and necessary. B.N. disagreed and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

- [2] In accordance with the Tribunal Order, the following issues are in dispute:
- a. Is the medical benefit in the amount of \$8,809.50 for vocational/academic training, recommended by Michelle McArthur (occupational therapist) in a treatment plan (OCF-18) dated April 30, 2020, reasonable and necessary?
 - b. Is the medical benefit in the amount of \$3,599.10 for medical marijuana, recommended by Dr. Shiffman in an OCF-18 dated August 20, 2020, reasonable and necessary?
 - c. Is the medical benefit in the amount of \$398.99 (\$2,862.23, less partially approved amount of \$3,463.24) for assistive devices, recommended by Novus Rehabilitation Ltd. in an OCF-18 dated August 8, 2018, reasonable and necessary?
 - d. Is the rehabilitation benefit in the amount of \$899.96 for a gym membership, recommended by Rachel Korol, in an OCF-18 dated February 28, 2019, reasonable and necessary?
 - e. Is the medical benefit in the amount of \$6,166.10 for rehabilitation therapy, recommended by Rachel Korol, in an OCF-18 dated February 28, 2019, reasonable and necessary?
 - f. Is Co-operators liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to B.N.?
 - g. Is B.N. entitled to interest on any overdue payment of benefits?

FINDING

[3] B.N. failed to demonstrate that the OCF-18s are reasonable and necessary.

[4] B.N. is not entitled to an award.

ANALYSIS

Is the OCF-18 for vocational/academic treatment reasonable and necessary?

[5] I find that B.N. is not entitled to the disputed OCF-18 as he has not met his onus to prove that it is reasonable and necessary.

[6] In order to receive payment for a medical or rehabilitation benefit under the *Schedule*, an insured bears the burden of demonstrating on a balance of probabilities that the treatment sought is reasonable and necessary. The analysis should consider the reasonableness of the treatment goals, whether the goals are being met to a reasonable degree and if the overall cost of achieving the goals is reasonable.

[7] B.N. submits that the treatment plan dated April 30, 2020, recommended enrollment in the Ontario Truck Driving School course for work re-training to assist with the overall decrease in his pain symptoms and increase employment sustainability. The OCF-18 completed by occupational therapist, Michelle McArthur, indicates that the goal of the re-training is to allow B. N. to return to a job that is better suited to his abilities to assist with other activities of daily living such as home maintenance, caregiving and leisure. Ms. McArthur did not list any barriers to B.N.'s recovery. As there are no barriers to recovery indicated if B.N. does not undergo the training, I further find makes the OCF-18 not reasonable or necessary as it provides no overall benefit.

[8] In support of the OCF-18, B.N. relies on the clinical notes and records (CNRs) of Dr. Al-Dhaner, family physician, February 4 and March 31, 2020 letters from Ms. McArthur, a September 25, 2020 report and November 23, 2020 addendum from physiatrist, Dr. Sequeira, as well as additional medical reports.

[9] B.N. relies heavily on Dr. Sequeira's September 2020 report, particularly where it is noted that B.N. should consider a transition to alternate work that allows for the ability to change positions. Dr. Sequeira notes that B.N. has an interest in pursuing an AZ licence and engaging in truck driving. Dr. Sequeira goes on to opine that such an occupation would be light demand work (avoiding cargo manipulation). Dr. Sequeira supported a role that follows his limitations and requirements, as B.N. will not be able to consistently return to any work that is

similar to his pre-accident work intensity as a construction worker. Dr. Sequeira also noted that B.N. would not be able to sustain his HVAC position and any similar role would be difficult in the medium to long term. The November 2020 addendum essentially endorsed the disputed OCF-18s as reasonable and necessary as a result of B.N.'s accident-related injuries.

- [10] In response, Co-operators submits that the training would not be funded as B.N. is already employed. At the time of the May 11, 2020 explanation of benefits, B.N. was working in HVAC installation with Village Fireplace. Prior to this, he was a construction worker. Towards the end of January 2021, B.N. returned to Iacobelli Construction Ltd., the same job he was working at the time of the accident.
- [11] Co-operators' position is that there is no evidence to support that the truck driving course would enable him to engage in similar employment to that which he was engaged in at the time of the accident. It refers to the CNRs of Dr. Al-Dhaner, particularly a November 16, 2020 entry in which Dr. Al-Dhaner notes back pain from turning a shovel five days prior. Dr. Al-Dhaner recommended two days off work and returning with breaks. There is no indication in this entry of B.N. not being able to do his job or that retraining for another job was recommended.
- [12] In support of its position, Co-operators relies on the April 2, 2019 functional abilities evaluation (FAE) report of Brent Souter. Co-operators argues that Dr. Sequeira's opinion that the right shoulder pain was caused by the accident, does not appear to consider the November 27, 2019 records of Dr. Al-Dhaner. Dr. Al-Dhaner's CNRs note that B.N. reported no issues and the right shoulder pain having occurred after B.N. started working at the HVAC job. In addition, Co-operators argues that Dr. Sequeira did not consider imaging reports showing an anatomical predisposition to shoulder impingement.
- [13] I agree with Co-operators. While I find it reasonable that B.N. suffered significant injuries (the ankle fracture), I find that his return to strenuous work (construction) is not indicative of requiring re-training for a position that is not similar to his current line of work. Additionally, I prefer Mr. Souter's report over that of Dr. Sequeira, as Mr. Souter noted B.N.'s ability to complete actions similar to those required in his job as a construction worker (i.e.: various lifting tasks, carrying, walking, reaching, stooping, pushing and pulling). Mr. Souter concluded that B.N. demonstrated the ability to complete work duties occasionally to frequently at the medium to heavy strength level of work capacity. Again, confirming B.N.'s ability to work in the job he had returned to post-accident.

- [14] I note that B.N. refers to an endorsement by Dr. Al-Dhaner that he is “in favour” of an endorsement letter from Ms. McArthur. I do not interpret Dr. Al-Dhaner’s endorsement as a clear recommendation for vocational training, especially where Dr. Al-Dhaner also notes in the recommendation letter that he has not seen B.N. in some time.
- [15] For these reasons, I am not persuaded that B.N. requires re-training or that the OCF-18 for enrollment in truck driver training is reasonable and necessary.

Is the OCF-18 for medical marijuana reasonable and necessary?

- [16] I find that B.N. has not met his onus on a balance of probabilities that the OCF-18 for medical marijuana is reasonable and necessary.
- [17] B.N. relies on a report from Dr. Shiffman, the OCF-18 author, who indicates that the proposed treatment is intended to effectively manage ongoing pain, psycho-emotional symptoms and increase functionality. In addition, Dr. Shiffman noted that an anticipated improvement in the quality and quantity of sleep. B.N. also directed me to a report from Dr. Sequeira, where Dr. Sequeira stated that medical cannabis is appropriate for B.N. to manage his pain.
- [18] Co-operators submits that there was insufficient objective evidence that B.N. suffers from chronic pain, anxiety, or sleep disturbances as a result of the accident. In this vein, it relies on the report of Dr. Souter, who observed B.N. walking with a normal gait, good range of motion. It also notes the insurer examination (IE) report of Dr. Marchuk, who also noted that posture and gait were normal with no evidence of pain.
- [19] I find the evidence of Dr. Souter and Dr. Marchuk to be persuasive. In addition, I find B.N.’s own evidence does not support that medical marijuana is reasonable and necessary. First, Dr. Al-Dhaner noted in the CNRs that B.N. was managing his pain with Aleve as needed, and further that B.N. reported that he was trying to go without medication and that his pain was manageable. Second, I place little weight on the OCF-18 that is not supported with corroborative evidence. The OCF-18 on its own is not enough to determine that the treatment is reasonable and necessary. Dr. Sequeira endorsement of medical marijuana is not supported by objective evidence as to why the medical marijuana is required. Lastly, I find that B.N.’s reporting to Dr. Al-Dhaner that he has trying to go without medication and that his pain is manageable, is not a reasonable ground for the insurer to fund a treatment plan for additional pharmacological treatment.

[20] For these reasons, I find that B.N. has not met his onus to establish that the OCF-18 for medical marijuana is reasonable and necessary.

Is the balance of the OCF-18 for assistive devices reasonable and necessary?

[21] I find that B.N. is not entitled to the balance of the OCF-18 as he is not established it is reasonable and necessary.

[22] In a March 14, 2018 report, occupational therapist Julie Adams recommends an electric mower and weed trimmer/blower combo in response to B.N.'s noted limitations due to the right shoulder and ankle injuries. Ms. Adams noted the challenges for B.N. to navigate uneven terrain as part of her opinion in recommending the electric equipment.

[23] B.N. also relies on the opinion of occupational therapist Rachel Korol, who, in her May 31, 2019 report, noted various limitations, decreased tolerances for reaching, lifting, carrying, as well as ongoing back, right shoulder, and right ankle pain, similar to the findings of Ms. Adams. In completing the OCF-18, Ms. Korol requests an electric mower and electric weed eater due to struggles with the pull cord on the gas mower and the weight of the gas-powered weed eater. Ms. Korol also noted B.N.'s challenges with managing lawn care and work tasks due to his ongoing range of motion limitations in the right ankle and right shoulder.

[24] Co-operators argues that the medical evidence does not support that B.N. has any functional limitations in starting a lawn mower. It relies on the July 9, 2019 Bluewater Hospital medical records, which note a fracture to his hand from punching a wall; suggesting that he indeed has the ability to start a lawnmower, if not with his fractured right hand/arm, then with his left.

[25] While I appreciate that B.N. had some range of motion challenges, I do not find that the recommendations properly address the issue of uneven terrain, or how an electric mower/weed trimmer/blower would assist in navigating uneven terrain due to right ankle mobility and balance issues. There is no evidence that the uneven terrain is somehow made less uneven through the use of the electric yard equipment. Despite the occupational therapists noting the uneven terrain, I find this issue is not addressed when explaining how the uneven terrain is resolved through a different type of yard equipment that operates in the same way as the current gas-powered yard equipment.

[26] For these reasons, B.N. is not entitled to the balance of the OCF-18 for the weed trimmer/blower and electric lawn mower.

Is the OCF-18 for a gym membership reasonable and necessary?

- [27] I find that B.N. has not met his onus to establish that the gym membership is reasonable and necessary.
- [28] In her May 31, 2019 occupational therapist report, Ms. Korol recommended the gym membership in order to increase activity engagement, improve functional and physical tolerances, strengthen upper extremities, enable social re-integration and promote routine. Social worker Carrier Martin, in a January 13, 2020 letter, endorsed the gym membership, noting that it may have a positive impact on B.N.'s mental health. This was in response to B.N. being diagnosed with an adjustment disorder (s. 44 IE assessor, psychologist Dr. Corbin). Ms. McArthur, in her January 19, 2020 report recommended a gym membership to help strengthen his muscles, so that B.N. was less likely to injure himself at work as an HVAC technician. Ms. McArthur went on to further note in a March 31, 2020 letter, that the physical labour is not sustainable for B.N. long term given his injuries and impairments.
- [29] In response, Co-operators relies on the September 26, 2019 report of Dr. Marchuk, who notes B.N.'s right shoulder, neck, right hip, right sided back, right rib and right ankle pain. B.N. also advised that he still experienced depression, anxiety, stress, problems initiating sleep, sleep interruptions and balance issues. Co-operators relies on the contemporaneous record of Dr. Al-Dhaner dated November 27, 2019, where he notes that B.N. is healthy with no active issues or concerns.
- [30] Dr. Marchuk opined that B.N. suffered an impairment as a direct result of the accident. Dr. Marchuk diagnosed B.N. with WAD 2, cervicothoracic bilateral shoulder myofascial dysfunction, lumbar muscle ligament dysfunction, right side rib cage myofascial dysfunction and right ankle myofascial dysfunction.
- [31] Dr. Marchuk went on to opine that B.N. had minimal decreased range of motion of the lumbar spine, tenderness to palpitation over the cervical, thoracic, lumbar, bilateral shoulder, right ribcage and right ankle musculatures. Dr. Marchuk concluded that B.N. reached maximum medical recovery, that his condition has plateaued, and the OCF-18 was not reasonable and necessary.
- [32] I find Dr. Marchuk's report somewhat contradictory in that he opines that B.N. suffered an impairment and yet has reached maximum medical recovery. However, I cannot ignore the contemporaneous records of Dr. Al-Dhaner, who reports that B.N. has no active issues or concerns. This is also contradictory to what B.N. reported to Dr. Marchuk. It would seem that the work-related pain

complaints that B.N. reported to Dr. Marchuk would also have been reported to Dr. Al-Dhaner, and yet no such pain complaints were noted by Dr. Al-Dhaner, two months after B.N. saw Dr. Marchuk.

- [33] B.N. does not explain why there is a discrepancy between what was reported to Dr. Marchuk and Dr. Al-Dhaner. As his regular treating practitioner, I place more weight on the records of Al-Dhaner. I am persuaded that if B.N. were having any accident-related pain complaints due to the nature of the HVAC job, he would have reported same to Dr. Al-Dhaner as he consistently has in the past after the accident. I find this variation in reporting to be a glaring discrepancy that calls in to question whether the treatment is reasonably required. I find it is not.

Is the OCF-18 for rehabilitation therapy reasonable and necessary?

- [34] I find that this OCF-18 is not payable as B.N. has not established that it is reasonable and necessary.
- [35] B.N. relies on similar evidence that was considered in connection with the OCF-18 for the gym membership. The occupational therapists recommended this OCF-18 in connection with the gym membership for the purposes of a rehabilitation therapist being helpful to remind B.N. of important meetings, striking a balance between addressing his goals and working towards those of his family, as well as helping him understand and practice recommended strategies.
- [36] In response, Co-operators relies on the April 17, 2019 report of Matt Sutherland, occupational therapist. Mr. Sutherland noted that B.N. reported the ability to complete light housekeeping tasks, but right shoulder pain impacted engaging in heavier tasks.
- [37] Objective testing results indicated full range of movement with moderate resistance in all extremities, with right shoulder pain reported in manual muscle testing. Mr. Sutherland also noted that B.N. demonstrated full active range of motion in all extremities with mild restriction on flexion, abduction and external rotation in the right shoulder.
- [38] On the evidence, there is little corroborative evidence in support of funding for a rehabilitation therapist. Aside from the OCF-18 and report of the occupational therapist (the author of the OCF-18), there is no recommendation from Dr. Al-Dhaner. I find that B.N. has not directed me to persuasive evidence that a rehabilitation therapist is required to assist with his accident-related impairments. Further, as the rehabilitation therapist was recommended in connection with the

gym membership, and I have found that the gym membership was not reasonable and necessary, it follows that this OCF-18 is also not reasonable and necessary.

INTEREST

[39] As no benefits are payable, B.N. is not entitled to interest.

AWARD

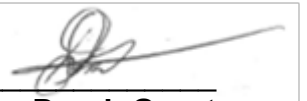
[40] B.N. sought an award under s. 10 of Regulation 664, submitting that Co-operators unreasonably withheld and delayed payment of the disputed benefits. I find that an award is not appropriate. Co-operators properly denied the OCF-18s under s. 38 on the basis of its s. 44 IEs. The test for a s. 10 award is whether an insurer's actions are excessive, imprudent, stubborn, inflexible, unyielding or immoderate. As I have found the disputed OCF-18s to not be reasonable and necessary, it follows that Co-operators actions were justified.

CONCLUSION

[41] B.N. has not demonstrated that the disputed OCF-18s are reasonable and necessary. Accordingly, no interest is payable.

[42] B.N. is not entitled to an award.

Released: September 30, 2022



**Derek Grant
Adjudicator**