Citation: Baker v. Aviva Insurance Company of Canada, 2022 ONLAT 20-007040/AABS

Licence Appeal Tribunal File Number: 20-007040/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:

Carol Baker

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **Jeffrey Shapiro**

APPEARANCES:

For the Applicant: David Carranza, Paralegal

For the Respondent: Dale Stuckless and Eric Grossman, Counsel

HEARD: **By way of written submissions**

BACKGROUND

[1] Carol Baker ("C.B.") was involved in an automobile accident on September 13, 2017 and sought benefits pursuant to the *Schedule*.[1] C.B. was denied certain benefits by Aviva Insurance Company of Canada ("Aviva") and submitted an application to this Tribunal.

ISSUES

[2] The issues I must decide are:

1. Is C.B. entitled to $1,560.00 for chiropractic and physiotherapy services recommended by Kristian Dorken in a treatment plan dated October 8, 2020?

2. Is C.B. entitled to $13,399.19 for a chronic pain program recommended by Excel Medical Diagnostics in a treatment plan dated June 3, 2020?

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

RESULT

[3] C.B. is not entitled to either treatment plan or interest.

BACKGROUND

[4] At the time of the September 13, 2017 accident, C.B. was 50 years old and a Personal Support Worker ("PSW") at two different employers. Before discussing the accident's effect on her, I note C.B.'s pre-accident prior medical history is significant. In the three years prior to the accident, from 2014 to 2017, C.B. had received several mental health diagnoses, including a stress disorder, anxiety disorder and depression. C.B. also had physical issues, primarily focused on her shoulder, with diagnoses of right shoulder tendinitis, chronic pain, and reduced shoulder mobility. Several ultrasounds of her shoulder were conducted and they identified two partial tears of tendons. She also filed a WSIB claim, which was denied in 2016, and had missed work at various times due to physical issues.

[5] Following the accident, C.B. experienced pain and attended at the hospital with reports of pain in her joints and lower back, but no obvious injuries. She was evaluated without diagnostic imagining and discharged shortly after. The next day, C.B. attended her family doctor, who diagnosed neck strain, a thoracic

[1] *Statutory Accident Benefits Schedule - Effective September 1, 2010,* O. Reg. 34/10.

lumbar injury, and a head injury, although there is little evidence to support the head injury. C.B. was off work until March 2020 when she returned to one of the employers on modified duty but is working 60 to 65 hours per week.[2]

[6] C.B. received various passive physical therapies and psychological counseling, with evidence of improvement, but still complains of head and shoulder pain. The physical therapy was at Core Wellness from September 20, 2017 to March 14, 2019, with many complaints concerning her right shoulder. She felt the treatment helped. Dr. Bodnar's March 2, 2018 Psychologist Assessment diagnosed C.B. with Adjustment Disorder and Mixed Anxiety and Depressed Mood (discussed below) and she received counseling from June 6, 2018 to August 8, 2018.

[7] C.B. submits the two treatment plans are accident related, reasonable and necessary, and supported by the medical reports and evidence. In general terms, Aviva submits that she has returned to her pre-accident baseline and/or her current issues are not accident related,[3] and the treatment is not supported by the medical reports or evidence. More generally, the parties disagree over the extent that her pre-accident injuries impair her post-accident condition.

[8] To receive payment for the requested treatment under s. 15 and 16 of the *Schedule*, C.B. must establish on a balance of probabilities that it is "reasonable and necessary" (or "necessary" for short unless the context requires otherwise) as a result of the accident. To do so, C.B. must identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable. The parties agree that increased functionality, increased range of motion and pain reduction are valid treatment goals.

ANALYSIS - *Is C.B. entitled to $13,399.19 for the chronic pain program (June 3, 2020) or $1,560.00 for the chiropractic and physiotherapy services (October 8, 2020)?*

[9] No. I will address these plans together, as there is much overlap between them. Specifically, both (1) seek similar and reasonable goals of pain reduction, increased range of motion and return to activities of normal living, (2) generally deal with the same impairments, and (3) both were proposed around 2½ to 3

[2] C.B. Tab 28, page 8; Aviva Tab 9, page 5 of 28.

[3] Causation is a factual determination. C.B. must show on a balance of probabilities that the impairments and loss would not have occurred "but for" the accident. I must take a "robust and pragmatic approach" to determine if the accident caused the loss and "scientific proof of causation is not required." The *Schedule* does not provide a "discount for apportionment of causation due to an insured's pre-existing injuries." A cause meeting the "but for" test need not be the only cause, or even major cause, but only a necessary cause. *Sabadash v. State Farm et al.*, 2019 ONSC 1121 (CanLII) at para. 31 to 40; A.*C. v Aviva Ins. CA*, 2020 CanLII 103675 (ON LAT), at para 38 (Dec. 17, 2020)

years after the accident. While both involve a combination of active and passive therapies and training/education, obviously there are differences such as the chronic pain program involves more modalities including acupuncture and psychological treatment.

[10] As starting point, the various assessors generally agree that C.B. sustained physical and some psychological impairments in the accident, and that as of the time of the plans, C.B.'s main complaints are her right shoulder, neck pain and mental health issues.[4] Her back issues have largely resolved.

[11] However, the evidence does not establish on a preponderance of evidence that her current complaints are accident related, or if they are, there is conflicting information as to the actual severity and if the proposed treatment is necessary.

[12] First, Aviva submits that I accept the opinions of Aviva's IE assessors, Dr. Rabinovitch and Dr. McCutcheon over the opinions of Dr. Alma, Dr. Elmaraghy and Dr. Bodnar regarding the necessity of the treatment because the latter did not have complete or accurate information or to the extent they did, they did not account for it. I generally accept that proposition.

[13] For example, on the psychological component, C.B.'s psychological assessor Dr. Bodnar, opined that C.B. suffers from an Adjustment Disorder with Mixed Anxiety, and Depressed Mood, and Somatic Symptom Disorder *as a result of the accident* and needs treatment to return to pre-accident functioning. Yet, it does not appear she had an accurate picture of C.B.'s pre-accident condition. C.B. denied to her any prior "difficulties with her physical functioning" or "receiving psychiatric or psychological assistance prior to the current accident"[5]. C.B. made similar comments to Aviva's psychological IE assessor, Dr. McCutcheon, implying she has never had or been diagnosed with a mental health condition.[6]

[14] However, C.B. clearly had physical issues resulting in her being off work and the positive ultrasound testing. In fact, her family doctor records contain a January 27, 2016 functional abilities form listing physical restrictions. Psychologically, she has complained of such issues and her family doctor's note records a mental health diagnosis.

[15] Thus, I prefer Dr. McCutcheon's opinion that as a result of the accident, C.B. appears to be experiencing some mild, subclinical depressive and anxious symptomatology in the context of her ongoing pain and physical concerns, as

[4] E.g., Dr. Brown's May 26, 2020 Chronic Pain Assessment Report, C.B. Tab 28, p. 6.
[5] See Dr. Bodnar's March 2, 20218 report, C.B.'s submission Tab 10 at pages 2-5
[6] See Dr. McCutcheon's November 2, 2018 report, Aviva submission, Tab 9, page18.

well as some in-vehicle anxiety, and worries related to her safety, possible future motor vehicle accidents, the safety of her family, and whether she will lose her job after the COVID-19 pandemic ends. His opinion also fits more with the evidence, including C.B.'s comment to him that she feels "basically good."

[16] In terms of incomplete information, C.B. submits that the accident aggravated her shoulder issue, including causing a pre-existing partial tendon tear to become a complete tear. Yet, initial complaints and diagnosis at the hospital and family doctor do not mention shoulder involvement. In fact, C.B. has undergone a series of shoulder ultrasounds before and after the accident that appear to isolate the accident's effects. In particular, the post-accident ultrasound showed partial tears as before. It's only two years post-accident on August 7, 2019 that an ultrasound shows a full-tear. While C.B. submits its speculative to draw an inference that the further tear is not accident related, I believe it is more speculative to assume it is accident related given the earlier post accident imaging.

[17] The physical exam examinations produced different opinions – even on such basic issue of range of motion. For instance, Dr. Auguste's Orthopaedic IE examination on May 2, 2019, the doctor found full range of motion in her shoulders, and no residual exacerbation of the pre-injury conditions. She opined that C.B. did not need any formal facility-based treatment. Dr. Rabinovitch, an IE Physiatrist, found C.B. had normal active and passive ROM in the shoulders in all directions, except for some active right shoulder flexion secondary to pain, and more generally, had full functional range of motion and strength in the affected regions.[7] She opined C.B. had sustained an aggravation of pre-existing injuries, but C.B. did not demonstrate any significant objective musculoskeletal remaining impairments attributable to the accident. C.B. reached maximal medical recovery and recommended a strengthen program, while finding that a comprehensive chronic pain program was not necessary.

[18] In contrast, C.B. submits that on August 27, 2018, Dr. Shupak diagnosed C.B. with a chronic pain disorder.[8] However, I do not see that she made a formal referral based on that notation and appear to only be noting C.B.'s pain is chronic but not diagnosing a chronic pain disorder or syndrome.

[19] C.B. relies on Dr. Kam's May 2, 2019 Independent Physiatry Assessment, which occurred at C.B.'s request. Dr. Kam found C.B.'s conditions were caused by or made worse by the accident. Yet, C.B. had denied any pre-accident medical and psychological issues or chronic pain – which is incorrect. Interestingly, C.B.

[7] Aviva, Tab 9, p. 9, Question 1.
[8] C.B, Tab 14.

denied currently taking any medicine due to those conditions, except for Advil as needed. Dr. Kam found full range of motion in her shoulders, but reduced range in her left shoulder, though an impingement test was positive on her right. Her report is not clear that she reviewed all the ultrasounds, rendering her comments on causation as unpersuasive.

[20] Dr. Brown, a pain specialist, comments in the OCF-18 dated August 22, 2019, that C.B. is experiencing pain radiating from C.B.'s neck into both shoulders[9] but that complaint is rarely mentioned across the medical reports, and only then, as an irregular occurrence. His April 17, 2020 assessment mentions her symptoms have not improved, but the CNRs of Core note continual improvement. His report does not mention a medical history section but does list a few pre-accident diagnostic tests. While he concludes that C.B. suffers chronic right shoulder and cervical spine pain and psychiatric issues including anxiety and depressed mood, all directly related to the accident, the finding seems to be subjectively based, without an ample explanation of why the conditions are related to the accident, particularly when these issues existed before. He also accepts C.B. has accident-related psychological diagnosis, yet as above, I find Dr. McCutcheon's findings that C.B. to only have subclinical issues to be more accurate.

[21] Dr. Elmaraghy, an Orthopaedic Surgeon, evaluated C.B. on February 7, 2020. He found a decreased active range of motion, but no capsular restriction, and diagnosed a rotator cuff tear. Yet, he does not address causation in any depth, only making a few limited comments that the pain started around three years ago, which would only be about a half-year prior to the accident, and "it began subacutely, but she also had a motor vehicle accident in 2017." He records that she turned down surgery, she tried physiotherapy with some benefit, and "Overall, things are getting better with time."

[22] Dr. Esdaile of the Wilderman Medical Clinic saw C.B. in January and February of 2021. She records the shoulder pain starting 4.5 years before and being aggravated by the car accident, but her comments are focused on treatment rather than causation, and it's not clear she was aware of the severity of C.B.'s prior issues. She notes that C.B. turned down cortisone joint injections.

[23] In terms of other incomplete histories, in 2019 C.B. began seeing a new family doctor, Dr. Salama. The registration form, however, lists "past medical problems" only as the accident injury, but not prior shoulder or mental health issues.

[9] C.B., Tab 26, p 10.

[24] Aviva also points out that even while seeing two different providers at Core on the same day, C.B. has provided different descriptions of her symptoms. I did not find that observation to be the norm, but do note that there are some instances, such as November 9, 2017, where one provider notes her shoulder "is better today…", while another records "pain is more today."

[25] Thus, I find the evidence does not sufficiently tie the ongoing complaints to the accident.

[26] Finally, I note that while C.B. did attend at some of the treatment at issue, C.B.'s actions point to the requested treatment – particularly the chronic pain plan – as unnecessary. For instance, she had turned down several other available prescribed treatment options, such as surgery, injections therapy, physiotherapy[10], medication, and even replacement home stretching bands. C.B. is also working 60+ hours a week, and only takes Advil as needed.

[27] In conclusion, while I accept that C.B. has some on-going pain, it has not been established that it is from the accident, and to the extent that it is, it's not clear that this treatment is necessary to help it.

ORDER

[28] C.B. is not entitled to the requested treatment plans, or interest on those plans. The application is dismissed.

Released: October 5, 2022

Jeffrey Shapiro
Vice-Chair

[10] C.B., Tab 16, at pages 4 and 5.