Citation: Balasubramaniam v. Aviva General Insurance, 2023 ONLAT 18-011950/AABS

Licence Appeal Tribunal File Number: 18-011950/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:

Kogul Balasubramaniam

Applicant

and

Aviva General Insurance

Respondent

DECISION

VICE-CHAIR: **Ian Maedel**

APPEARANCES:

For the Applicant: Rajwant Singh Bamel, Counsel

For the Respondent: Sonya Katrycz, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Kogal Balasubramaniam, the applicant, was involved in an automobile accident on January 24, 2017, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* ("*Schedule*"). The applicant was denied benefits by the respondent, Insurer, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] In a preliminary issue decision dated February 27, 2020, the Tribunal struck the chronic pain assessment from this application due to failure to attend insurer's examinations. The issue of repayment of the income replacement benefit ("IRB") was deferred to the substantive issue hearing.

[3] The videoconference hearing scheduled for September 7-8, 2021 was adjourned on consent of the parties. In a motion order dated October 21, 2021, the issues of IRB and an award pursuant to s. 10 of Regulation 664 were withdrawn. The matter was scheduled for a written hearing.

ISSUES

[4] The issue(s) in dispute are:

i. Is the applicant entitled to a medical benefit for physiotherapy in the amount of $1,790.85 recommended by the Downsview Healthcare Clinic in a treatment plan dated December 7, 2017?

ii. Is the applicant entitled to a medical benefit for a bone growth stimulator recommended by the Downsview Healthcare Clinic in a treatment plan dated February 15, 2017?

iii. Is the respondent entitled to a repayment of income replacement benefits in the amount of $1,027.85?

iv. Are either of the parties entitled to interest on any overdue payment of benefits?

RESULT

[5] The two treatment plans at issue are not reasonable and necessary pursuant to the *Schedule*. The applicant is not entitled to interest.

[6] The respondent is not entitled to repayment of IRB in the amount of $1,027.85, plus applicable interest pursuant to the *Schedule.*

The issue of an award is not in dispute

[7] The applicant submits the issue of an award was withdrawn in error and should remain live for the purposes of this written hearing. The respondent submits the issue was clearly withdrawn, as reflected in the Tribunal order of October 21, 2021.

[8] The October 21, 2021 order specifically states the parties consented to all procedures set out, and the issues of an IRB and an award were withdrawn. There is no record of the applicant seeking to vary this order prior to his written submission deadline of December 6, 2021. Instead, the applicant waited to address the award issue in its written submissions. The respondent opposes re-adding the award at this juncture.

[9] If there was an error in the October 21, 2021 order, the onus is on the parties to bring this to the Tribunal's attention. This was not done. Otherwise, I am not prepared to vary the previous order, and re-add the award issue. Written submissions are already complete. To allow additional award submissions at this stage of the hearing would compromise procedural fairness and hearing efficiency pursuant to Rules 3.1(a) and 3.1(b) of the Tribunal's *Common Rules of Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission (effective October 2, 2017)("Common Rules").*

[10] Thus, the issue of an award pursuant to s. 10 of Regulation 664 shall not be an issue in dispute for this hearing.

The repayment issue remains live

[11] The applicant submits the repayment issue was withdrawn with the substantive IRB issue in dispute at the motion hearing conducted in October 2021. The respondent submits this issue remain live for the purposes of the written hearing.

[12] The Tribunal order dated February 27, 2020 clearly states the issue of repayment of IRB is deferred to the substantive issue hearing. There has been no subsequent request to withdraw this issue, nor has there been a Tribunal order where this issue was struck from this proceeding. However, this issue was not reflected in the motion order dated October 21, 2021.

[13] I am satisfied this issue remains live for the purposes of this hearing. It was never formally withdrawn by the respondent. This does not contravene procedural fairness, as the applicant has had the ability to provide submissions related to the repayment issue. Thus, I am satisfied the issue of IRB repayment shall remain in dispute.

BACKGROUND

[14] The applicant was a passenger in a vehicle that was involved in a front-end collision. He was extricated from the vehicle by emergency services. He suffered a brief loss of consciousness, a right ankle fracture, a right tarsal head fracture in his foot, a lung contusion, and a pneumothorax (partially collapsed lung). Two-days post-accident surgery was conducted, and two screws were inserted to repair his ankle fracture. His foot was placed in a cast to allow his ankle and foot fracture to heal for a period of six weeks.

ANALYSIS

Treatment and Assessment Plans (OCF-18s)

[15] To receive payment for a treatment and assessment plan under s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should 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.

Physiotherapy treatment is not reasonable and necessary

[16] I am not persuaded physiotherapy treatment in the amount of $1,790.85 is reasonable or necessary pursuant to the *Schedule*.

[17] The OCF-18 dated December 7, 2017 by Dr. O. Pivtoran, chiropractor, lists injuries that include a right ankle fracture with surgical repair, right foot fracture, sternum and thoracic spine, cervical joint dysfunction with myofascial symptoms, thorax – pneumothorax, lumbar spine – chronic lumbar joint dysfunction, post concussion syndrome, and thorax – costovertebral joint dysfunction. The goals listed include pain reduction, increase in strength and range of motion, restoration of core mobility, return to activities of daily living and pre-accident work activities.

[18] The applicant submits that physiotherapy treatment is supported by the OCF-18 in dispute. Otherwise, the applicant's submissions do not direct me to any additional medical evidence in support. The respondent submits the applicant has not met his onus, as the medical evidence, surveillance, and insurer's examination ("IE") reports all support a conclusion that this treatment is not reasonable and necessary.

[19] The clinical notes and records provided by the applicant's family physician, Dr. O. Rampersad do not establish this treatment is reasonable and necessary. Following the initial surgery on his ankle in the immediate post-accident period, the applicant only visited Dr. Rampersad twice in 2017.

[20] Otherwise, the applicant tendered no additional medical evidence or expert reports related to physiotherapy treatment. Instead, the applicant relies on the IE report of Dr. G. Soon-Shiong, orthopaedic surgeon, dated May 30, 2017 who concluded the applicant suffered from muscular atrophy and stiffness following the ankle fracture and immobilization. He noted the applicant's ankle was healing well and there appeared to be no complications following his ankle fracture and surgery.

[21] The respondent relies on several sources of evidence to establish this treatment is not reasonable and necessary. First, the respondent conducted surveillance upon the applicant for a three-day period in June 2017. It depicted the applicant walking unaided and without any assistive devices in a series of observations between June 22-24, 2017.

[22] Second, the respondent relies on the IE report tendered by Dr. J. Guerra, orthopaedic surgeon, dated January 26, 2018. In specific reference to the treatment in dispute, he concluded that physiotherapy was not reasonable and necessary, as the applicant had reached maximum medical improvement from his musculoskeletal injuries. He specifically noted the applicant was able to walk without discomfort, had no swelling, and did his activities of daily living without any problems. In his opinion, further facility-based treatment was unnecessary.

[23] Third, the diagnostic imaging report from December 18, 2020 notes that previously-healed fractures of the right distal tibia, and no hardware complications were demonstrated.

[24] The balance of the medical evidence tendered is not compelling to establish that additional facility-based treatment is reasonable and necessary. The residual ankle pain suffered is sequelae of the accident-related impairments. The

evidence tendered clearly establishes the applicant has reached maximum medical improvement. Given the totality of the evidence, I am not persuaded this treatment plan is reasonable and necessary pursuant to the *Schedule*.

Bone Growth Stimulator is not reasonable and necessary

[25] I am not persuaded the cost of a bone growth stimulator in the amount of $4,809.72 is reasonable or necessary pursuant to the *Schedule*.

[26] The applicant relies on the OCF-18 signed by Dr. O. Pivtoran, chiropractor, dated February 15, 2017. The goals of this plan included safe treatment to aid in the healing of the applicant's ankle and foot fracture, and a return to activities of daily living.

[27] Again, the applicant relies almost solely on the OCF-18 provided, rather than additional medical evidence to establish this treatment plan is reasonable and necessary. The respondent submits a bone grown stimulator serves no rehabilitative purpose. I agree with the respondent.

[28] The clinical notes and records tendered do not make any reference to a bone growth stimulator. The applicant relies on the expert medical report of Dr. G. Karmy, chronic pain specialist, dated July 8, 2019. While Dr. Karmy concludes this treatment is reasonable and necessary to accelerate the applicant's recovery process, he indicates this issue should be redirected to an orthopaedic specialist, as it is outside his area of expertise.

[29] The respondent relies on the IE reports by Dr. J. Guerra, dated December 1, 2017 and January 26, 2018. In the first report, Dr. Guerra notes the applicant was walking normally, without any difficulties and was able to resume his pre-accident employment. In his subsequent report, he noted the right ankle incisions had "well-healed", and he had reached maximum medical improvement. Otherwise, he had no further recommendations from an orthopaedic point of view.

[30] When I consider this evidence, in concert with the diagnostic imaging from December 18, 2020, I am persuaded that the applicant's ankle fracture had fully healed without the use of a bone growth stimulator. The medical evidence tendered simply does not demonstrate this treatment is reasonable and necessary pursuant to the *Schedule*.

The respondent is not entitled to a repayment of income replacement benefits

[31] I am not persuaded the respondent is entitled to a repayment in the amount of $1,027.85.

[32] Section 52 of the Schedule concerns the repayment of benefits. Under s. 52(1)(a), as person is liable to repay the insurer any benefit that is paid to the person as a result of an error on the part of the insurer, the insured person or any other person, or as a result of wilful misrepresentation or fraud. Sections 52(2) and (3) provide timelines for repayment requests if a person is liable to repay an amount to an insurer. The insurer shall give the person notice of the amount that is requested to be repaid. If the required notice is not given within 12 months after the payment of the amount that is to be repaid, the person to whom the notice would have been given ceases to be liable to repay the amount, unless it was originally paid to the person as a result of wilful misrepresentation or fraud.

[33] The respondent has the burden of proving that an IRB was paid as a result of an error, wilful misrepresentation or fraud on a balance of probabilities. I find that the respondent has not demonstrated it requested repayment within 12 months, as per s. 52(3).

[34] The applicant was paid an IRB in the amount of $4,755.99 for the period of January 31, 2017 to August 11, 2017, with the exception of the period of April 16-30, 2017 when he received a paid internship and his IRB was reduced to zero.

[35] On April 6, 2018, Crawford and Company Canada, on behalf of the respondent provided the applicant with notice of an overpayment of $1,027.85. It was noted there was a discrepancy in income between the Employers Confirmation of Income (“OCF-2”) and the applicant’s pre-accident pay stubs. This correspondence noted the respondent was not seeking a repayment but reserved the right to pursue repayment at a later time, in accordance with s. 52 of the *Schedule*.

[36] It was not until correspondence dated October 8, 2018 that the respondent formally requested repayment of $1,027.89, noting numerous unsuccessful attempts to contact the applicant’s employer to verify information in the OCF-2. The respondent requested full repayment within 21 days of the date of the correspondence.

[37] Given that the IRB was terminated on August 11, 2017, the formal request for repayment was required by August 11, 2018, as per s. 52(3). I do not view the correspondence dated April 6, 2018 as a formal request for repayment. By

October 8, 2018, the statutory 12-month period had lapsed and the applicant was no longer liable to repay the IRB overpayment.

[38] Given the totality of the circumstances, the respondent's request for a repayment is denied.

ORDER

[39] The application is dismissed, and I find:

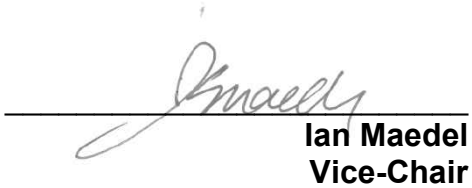
i. The treatment plan for physiotherapy in the amount of $1,790.85 is not reasonable or necessary pursuant to the *Schedule*;

ii. The treatment plan for bone growth stimulator in the amount of $4,809.72 is not reasonable or necessary pursuant to the *Schedule*;

iii. The respondent's request for repayment of IRB in the amount of $1,027.85 is denied.

iv. Neither party is entitled to interest.

Released: April 11, 2023



Ian Maedel
Vice-Chair