Citation: Alkhatlan v. Aviva Insurance Company of Canada, 2024 ONLAT 23-010231/AABS-PI

Licence Appeal Tribunal File Number: 23-010231/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:

Badreyah Alkhatlan

Applicant

and

Aviva Insurance Company of Canada

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR:	**Kate Grieves**
APPEARANCES:	
For the Applicant:	Avneet Kaur, Counsel
For the Respondent:	Sonya M. Katrycz, Counsel
Heard:	**By Way of Written Submissions**

OVERVIEW

[1] Badreyah Alkhatlan ("the applicant") was involved in an accident on January 31, 2023 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The applicant was denied benefits by Aviva Insurance Company of Canada ("the respondent") and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("the Tribunal") for resolution of the dispute.

[2] On November 7, 2023 the applicant submitted an OCF-6 to the respondent, seeking reimbursement for $455.5306.06 owed to Trillium Health Partners. By letter dated November 9, 2023, the respondent approved payment of remainder of the non-catastrophic policy limits for medical and rehabilitation benefits of $48,607.24. The balance was denied on the basis that she was not catastrophically impaired and has exhausted the limits to which she is entitled.

PRELIMINARY ISSUE IN DISPUTE

[3] The preliminary issue to be decided is:

i. Is the applicant is barred from proceeding to a hearing for all of the benefits claimed in this application because the applicant has reached the limit of non-catastrophic injury category of payment, and no catastrophic injury application has been filed?

[4] The substantive issues are as follows:

1. Is the applicant entitled to $10,033.28 for physiotherapy services, proposed by Total Wellness Clinic in a treatment plan/OCF-18 ("plan") submitted on August 21, 2023?

2. Is the applicant entitled to $2,203.50 for a Nutrition Assessment proposed by Jylie James, Occupational Therapist, Koru Nutrition Inc., submitted, July 26, 2023?

3. Is the applicant entitled to $932.67 ($2,200 less $1,267.33 approved) for Completion of Form 1, proposed by NCCO Rehabilitation Services, submitted, March 21, 2023?

4. Is the applicant entitled to attendant care benefits in the amount of $3,001.00 ($10,585.05 less $7,584.05 approved per month) proposed by NCCO Rehabilitation Services, from March 10, 2023 to ongoing?

5. Is the applicant entitled to $406,922.82 ($455,530.06 less $48,607.24 approved) in a treatment plan/OCF-6 (“plan”) for hospital care and treatment services proposed by Trillium Health Partners submitted on November 7, 2023?

6. Is the applicant entitled to medical benefits for a psychological assessment in a treatment plan/OCF-6 (“plan”) in the amount of $2,460.00 proposed by Dr. Zybina Ladick, Psychologist, Oshawa Physiotherapy and Rehabilitation Centre, submitted on January 30, 2024?

7. Is the respondent liable to pay an award under s. 10 of Reg. 664 because it unreasonably withheld or delayed payments to the applicant?

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

RESULT

[5] The applicant is not barred because it is not captured by the circumstances set out in section 55 of the *Schedule*. However, the applicant’s claim for issues (1) through (6) and (8) are dismissed as premature, without prejudice to the applicant bringing a future application where catastrophic impairment is either accepted or in dispute.

[6] The applicant may proceed to the hearing with respect to her claim for an award pursuant to Regulation 664.

ANALYSIS

The applicant's claim for benefits and interest is premature

[7] The applicant has consumed the funds available to her within the policy limits for accident benefits. She is not subject to the Minor Injury Guideline, and she has not been determined to be catastrophically impaired. Accordingly, a hearing is not necessary to make any findings about her entitlement to the disputed benefits, nor interest.

[8] The respondent has paid $65,000.00 in medical and rehabilitation benefits and the applicant’s non-catastrophic policy limit has been reached. The applicant is not able to apply for a catastrophic impairment determination until two years have elapsed since the accident, which is January 31, 2025 (section 3.1).

[9] The respondent submits that the current application is premature and should have been withdrawn. The respondent submits that the applicant’s continued proceeding of the application interferes with the Tribunal’s ability to carry out a

fair, efficient, and effective process. The respondent seeks an order dismissing the application on the basis that there can be no entitlement to the benefits in dispute, as well as an order for costs.

[10] The applicant seeks an order that the application be heard on its merits. She submits that the Tribunal could rule on the reasonableness and necessity, while payment can be deferred subject to availability of policy limits or pending a catastrophic determination. The applicant submits that the concept of "reasonable and necessary" and "payable" are distinct. She suggests that the Tribunal could determine whether the applicant's impairments and/or injuries from the accident warrant the treatment/benefits to be deemed reasonable and necessary while payment may be deferred if policy limits become available in the future. The applicant submits that the Tribunal lacks the jurisdiction to make a determination regarding payment, its sole obligation is to determine if the plan or benefit in dispute is reasonable and necessary, independently of considering the insurer's payment based on policy limits. I am not persuaded by the applicant's argument, and she points to no case law in support of her position.

[11] I agree with the respondent that the application for benefits and interest is premature. The Tribunal has endorsed preconditions to entitlement, refusing to adjudicate entitlement to precondition-dependent benefits where the precondition has not been satisfied. For example, entitlement to treatment plans cannot be disputed without a determination that the insured has suffered a non-minor injury.

[12] I am persuaded by the reasoning in *Tlapale v. Wawanesa Insurance*, 2023 CanLII 72625 (ON LAT), wherein Adjudicator Bonnie Oakes Charron concluded that the applicant was not entitled to disputed treatment plans because she had consumed the funds available to her within the policy limits and had not been deemed catastrophically impaired. Adjudicator Charron noted that the fact that "the applicant's policy limit had been reached prefaces any other consideration in this matter".

[13] In order for the Tribunal to find the applicant is entitled to the disputed benefits, the applicant must be deemed catastrophically impaired. As that issue is not before the Tribunal, it follows that the Tribunal cannot find the treatment plans to be reasonable and necessary.

[14] As the application was filed on August 28, 2023, the Licence Appeal Tribunal Rules, 2023 (the "Rules") apply to this matter.

[15] Rule 3.1 mandates the Tribunal to facilitate a fair process, allow effective participation by all parties, and ensure efficient, proportional and timely resolution

of the merits of proceedings. That mandate permits the Tribunal to vary the Rules to support those goals.

[16] Similarly, s. 2 of the *Statutory Powers Procedure Act* ("*SPPA*") stipulates that any rule made by a Tribunal shall be liberally construed to secure the just, most expeditious, and cost-effective determination of every proceeding on its merits.

[17] Rule 3.4 of the LAT Rules allows the Tribunal to dismiss an application without a hearing in the following circumstances:

a) The application is frivolous, vexatious, or commenced in bad faith;

b) The application relates to matters that are outside the Tribunal's jurisdiction;

c) The statutory requirements for bringing the application have not been met; or,

d) The applicant is found to have abandoned the proceeding.

[18] Similarly, under section 4.6(1) of the *SPPA*, the Tribunal may dismiss a proceeding without a hearing if the proceeding is frivolous, vexatious or is commenced in bad faith; the proceeding relates to matters that are outside the jurisdiction of the Tribunal; or some aspect of the statutory requirements for bringing the proceeding has not been met.

[19] Further, pursuant to section 23 of the *SPPA*, the Tribunal may make such orders as it considers proper to prevent abuse of its processes. Here, it is an abuse of process to adjudicate something that the applicant cannot possibly gain from (at least not until she has a catastrophic determination, or it is in dispute).

[20] Where the applicant seeks to have the Tribunal adjudicate entitlement to benefits to which there cannot be entitlement, the principles enshrined in the SPPA and the Rules of proportionality, expediency and cost-efficiency are subverted.

[21] Using the applicant's approach, an absurdity could result whereby applicants confined to the Minor Injury Guideline ("MIG"), that do not dispute the applicability of the MIG, could bring applications regarding entitlement to hypothetical post-MIG benefits. Non-catastrophic applicants could bring applications for entitlement to catastrophic benefits that are not (yet) available to them especially if they have not yet submitted an OCF-19 and other documentation supporting an application for a catastrophic determination. Applicants who have failed to provide an OCF-1 or other prerequisite documentation of which the purpose is to found the basis for potential entitlement will nevertheless proceed with their disputes.

[22] The applicant has indicated an intention to eventually pursue a catastrophic impairment designation. She is not out of time to do so, nor is she out of time to dispute entitlement to any of the benefits in dispute. I find that the applicant's pursuit of her entitlement to benefits at this juncture would result in a waste of Tribunal resources and the resources of the parties.

The application for an award pursuant to Regulation 664 may proceed

[23] The applicant further submits that she ought to be able to proceed to a hearing on a "standalone" award. The respondent submits that, since the applicant has indicated an intention to dispute entitlement to the benefits in future once an OCF-19 is submitted, it would be unreasonable to proceed with a separate adjudication of her entitlement to a standalone award.

[24] However, if her hypothetical OCF-19 were accepted by the respondent and no further dispute regarding entitlement arose, or if she never files an OCF-19, then the applicant would be deprived of her opportunity to seek an award on any benefits that were unreasonably denied or withheld that form part of this dispute. Therefore I find that the applicant may proceed to a hearing on the issue of an award only.

The request for costs is denied

[25] The respondent seeks costs in the amount of $1,000.00 pursuant to Rule 19.1, 19.2 and 19.5.

[26] Pursuant to rule 19.1 where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs. The respondent submits that as a result of the applicant's frivolous application, the respondent was forced to initiate a motion, proceed with the case conference, and now this preliminary issue hearing.

[27] The applicant disputes the respondent's assertion that her conduct is unreasonable and submits that she legitimately pursued reasonable and necessary benefits.

[28] The respondent submits that the applicant's frivolous application, and vexatious refusal not to withdraw it, in a way that threatens to waste the resources of the Tribunal and the respondent, bringing no possible benefit to the applicant is deserving of a costs award.

[29] Rule 19.5 sets out the relevant factors that the Tribunal must consider in deciding whether to award costs and the amount of costs to be ordered. These factors include: the seriousness of the misconduct; whether the conduct was in breach of a direction or order issued by the Tribunal, whether or not a party's behaviour interfered with the Tribunal's ability to carry out a fair, efficient, and effective process; prejudice to other parties; and the potential impact an order for costs would have on individuals accessing the Tribunal system.

[30] While I agree with the respondent, the application for benefits is premature, and to allow it to proceed would interfere with the Tribunal's ability to carry out an efficient, effective process, I do not agree that such conduct should attract an award for costs. I accept that the applicant believes that she is pursuing a genuine claim for benefits. The seriousness of misconduct – pursuing a premature application – is not of a serious nature that, in my view, warrants costs. The alleged misconduct is not a breach of a direction or order of the Tribunal. Further, I have found that the applicant may proceed with her claim for an award. Finally, awarding costs against an applicant who pursued a premature application may deter other applicants in future with legitimate disputes from filing applications out of fear that their application may be deemed premature, and subject to a costs award.

ORDER

[31] The applicant is not barred because it is not captured by the circumstances set out in section 55. However, the applicant's claim for issues (1) through (6) and (8) is dismissed as premature, without prejudice to the applicant bringing an application in future after catastrophic impairment is at issue.

[32] The applicant may proceed to the hearing with respect to her claim for an award pursuant to Regulation 664.

[33] The request for costs is dismissed.

Released: May 8, 2024

Kate Grieves
Adjudicator