Citation: Whyte v. Aviva Insurance Company, 2024 ONLAT 22-002499/AABS

Licence Appeal Tribunal File Number: 22-002499/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:

Nicole Whyte

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: **Brian Norris**

APPEARANCES:

For the Applicant: Kim Mohammed-Sieudhan, Paralegal

For the Respondent: Kari-Anne Layng, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Nicole Whyte (“the Applicant”) was involved in an automobile accident on October 19, 2019, and sought benefits from Aviva Insurance Company of Canada (“the Respondent”) 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 the Respondent and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

i. Is the Applicant entitled to income replacement benefits (“IRBs”) in the amount of $210.00 per week for the period from September 20, 2020 to August 9, 2021?

ii. Is the Applicant entitled to a medical benefit in the amount of $4,281.08, for a chiropractic treatment plan proposed by Polymed Health Centre Inc., in a plan dated January 4, 2020?

iii. Is the Applicant entitled to interest on any overdue payment of benefits?

iv. Is the Respondent liable to pay an award under section 10 of Reg. 664 because it unreasonably withheld or delayed the payment of benefits?

RESULT

[3] I find that the Applicant is not entitled to IRBs.

[4] The chiropractic treatment plan is not reasonable and necessary as a result of the accident, nor is it payable by statute.

[5] No interest or award is payable.

BACKGROUND

[6] The Applicant was the driver of a vehicle which was struck on the driver’s side by another vehicle exiting a commercial plaza. She sought no medical attention at the scene of the accident but went to the hospital the following day with complaints of neck and back pain and an exacerbation of pain and stiffness that pre-dated the accident. She was examined and diagnosed with an exacerbation

of her prior soft-tissue injuries and discharged with instructions to follow up with her family physician and engage in physiotherapy.

[7] The Applicant commenced physiotherapy on October 22, 2019, with Polymed Health Centre Inc, which she was already attending due to an accident in 2018. She was initially treated within the Minor Injury Guideline ("the MIG") protocol but developed an adjustment disorder with mixed anxiety and depressed mood as a result of the accident and was no longer subject to the MIG and the $3,500.00 funding limit.

ANALYSIS

Income Replacement Benefits ("IRBs")

[8] Pursuant to section 5 of the *Schedule,* IRBs are payable to insured persons who, within the first 104 weeks following the accident, are substantially unable to perform the essential tasks of their pre-accident employment as a result of an impairment. The onus is on the Applicant to demonstrate that she is substantially unable to complete the essential tasks of a customer care representative during the period she claims entitlement to IRBs.

[9] The Applicant submits that the medical evidence before the Tribunal demonstrates her entitlement on a balance of probabilities and highlights that she was unable to return to her pre-accident employment and was forced to find new employment, which commenced August 9, 2021. She is critical of the Respondent's insurer's examination ("IE") reports and submits that they do not offer a reasonable explanation as to why she no longer suffers a substantial inability to complete the essential tasks of her pre-accident employment.

[10] The Respondent submits that the Applicant has not discharged her onus to demonstrate that she suffers a substantial inability to complete the essential tasks of her employment and that her subjective reports of pain are not substantiated by objective evidence of a functional impairment that would prevent her from working. I agree with the Respondent.

[11] The Applicant has not provided any contemporaneous medical documents that indicate she is substantially disabled from completing her tasks as a customer care representative. As a result, she has not met her onus to demonstrate entitlement to IRBs. The disability certificate completed by Dr. A. Narula, chiropractor, dated October 22, 2019 contemplated that the Applicant's disability period would last 9-12 weeks, or until mid-to-late January 2020. The report by Dr. J. Mills, psychologist, dated June 16, 2020, states that the Applicant returned to

work on a part-time basis by the time of the assessment. The report provides no opinion on the Applicant's ability to complete her essential tasks as a customer care representative and there is no indication that she is disabled from working due to psychological injuries sustained in the accident. Similarly, the CNRs from the walk-in clinic that the Applicant attends do not make any indication that the Applicant is disabled from completing her essential tasks of employment, whether it be from a physical or psychological perspective. In addition to the above, the record of employment from the Applicant's employer at the time of the accident states that her employment ended due to a shortage of work or the end of a contract – it does not indicate that the Applicant quit or was unable to work due to illness or injury.

[12] The IE reports concluded that the Applicant did not suffer a substantial inability to complete her pre-accident work tasks. Dr. E. Silver, physician, noted that the Applicant reported that she returned to work with her part-time business creating women's fashion accessories and remained independent with all her personal care activities. On examination, Dr. Silver noted that the Applicant had full range of motion ("ROM) throughout her body. Dr. Silver concluded that the Applicant sustained uncomplicated strains of the neck and back and did not exhibit a substantial inability to perform her essential tasks of employment.

[13] Dr. A. Marino, psychologist, assessed the Applicant and concluded that she did not suffer a substantial inability to complete her essential tasks as a customer care representative, despite suffering from an adjustment disorder with mixed anxiety and depressed mood. Dr. Marino's report states that the Applicant reported that no psychological impairment is preventing her from working though, the Applicant denies this reporting via her submissions. Nevertheless, Dr. Marino contemplated whether the Applicant suffered from a Somatic Symptom Disorder or Major Depressive Disorder, which would be more likely to impair the Applicant's ability to work and concluded that she did not meet the criteria for those impairments and that she did not suffer a substantial inability to return to her role as a customer care representative. To-date, the Applicant has provided no medical documents or opinion that is contrary and contemporaneous with Dr. Marino's report. Thus, I see no reason to interfere with Dr. Marino's opinion.

[14] The Applicant's arguments that the IEs are greatly undermined are without merit. The Applicant submits that the IEs failed to investigate the severity of her psychological issues and her pre-existing neck and back pain and that they fail to provide a reasonable explanation as to why the Applicant does not suffer a substantial inability to complete her tasks of employment. I disagree with her analysis of the reports. As noted above, the reports address the Applicant's pre-

existing condition as well as the extent of her psychological injuries. In any event, it is not the Respondent's onus to disprove entitlement to a benefit. Rather, it is the Applicant's onus to demonstrate entitlement to the benefit. Here, she has not met her onus.

Chiropractic treatment plan

[15] To be entitled to a treatment and assessment plan under section 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. This plan proposes 24 one-hour chiropractic sessions and 24 massage therapy sessions, along with a personal massager, hot and cold gel packs, and a heating pad.

[16] I find that the Applicant has not met her burden to demonstrate that the plan is reasonable and necessary.

[17] The Applicant has not demonstrated that the plan is reasonable and necessary. She has not identified any of the goods or services recommended in the plan and has not demonstrated how the goals of the plan are reasonable. Instead, she asserts that it is reasonable and necessary because she met the test for disability for IRBs at the time the plan was submitted and because she sustained physical injuries. The Applicant's entitlement to IRBs and to medical benefits are independent issues and she may be entitled to one benefit and not the other. Here, no medical practitioner outside of the person submitting the treatment plan made a contemporaneous recommendation for chiropractic treatment, massage therapy, and the other goods proposed. The CNRs from the walk-in clinic include a recommendation on March 15, 2020 for the Applicant to continue with physiotherapy, not chiropractic and massage therapy. The Applicant then followed up with Dr. R. Lall, family physician, on March 23, 2020, and discussed an at-home stretching routine and tens machine, but no recommendation for chiropractic treatment or massage therapy was made.

[18] Dr. Silver assessed the Applicant for an IE on August 13, 2020 and concluded that the chiropractic treatment plan was not reasonable and necessary as a result of the accident. Dr. Silver noted that the Applicant had fully recovered from her neck and back strains and that further facility-based treatment is not reasonable and necessary. I find that the Applicant has provided no compelling evidence to upset Dr. Silver's conclusion that further facility-based treatment is not reasonable and necessary and I see no reason to interfere with it.

[19] The Applicant is not entitled to the plan by way of statute. Contrary to the Applicant's submissions, I find that the Respondent replied to the plan with the requisite medical and other reasons, as outlined in section 38(8) of the *Schedule*. The January 9, 2020 letter states that "Upon review of all documents received on your file and the Minor Injury Guideline (MIG), your impairments appear to be predominantly a minor injury. The policy limit for a minor injury is $3500 which you have already reached. Therefore no further funding is available. In order to determine if this treatment is reasonable or necessary we require compelling medical evidence indicating your injuries are outside the Minor Injury Guideline." This is sufficient because it states the reasons for the denial: that it believes that the Applicant sustained a minor injury, is subject to the MIG, and has exhausted that funding.

[20] The Respondent issued a second, valid, denial of the treatment plan on September 15, 2020, following the reports of Dr. Silver and Dr. Marino. That letter directs the Applicant to the IE reports and states that the IE assessors determined that the plan is not reasonable and necessary as she has achieved maximal medical recovery from a musculoskeletal standpoint. This is a valid denial in because it provides the medical reasons for the denial, being that Dr. Silver concluded it was not reasonable and necessary.

[21] In any event, the Applicant has not demonstrated that she incurred the goods and services outlined in the plan. Pursuant to section 38(11)1 of the *Schedule*, the Respondents failure to comply with section 38(8) and 38(9), preclude it from taking the position that the Applicant sustained an impairment to which the MIG applies, and it must pay for all goods and services incurred during the period starting on the 10th business day and ending on the day a compliant notice is provided. Here, the Applicant has not demonstrated that she incurred the goods and services outlined in the plan. Thus, she is not entitled to the plan by statute.

[22] Considering the above, I find that the Applicant has not met her burden to demonstrate her entitlement to the chiropractic treatment plan.

Interest

[23] Interest applies on the payment of any overdue benefits pursuant to section 51 of the *Schedule.* Having found that the Applicant is not entitled to any benefits, it follows that no payment of benefits went overdue and the Applicant is not entitled to interest.

Award

[24] The Applicant sought an award under section 10 of Reg. 664. Under section 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits.

[25] Having determined that no benefits are payable, it follows that no benefits were unreasonably withheld or delayed and the Applicant is not entitled to an award as a result.

CONCLUSION AND ORDER

[26] The Applicant has not met her onus to demonstrate that she is entitled to IRBs and the chiropractic treatment plan.

[27] No interest or award is payable.

[28] The application is dismissed.

Released: January 25, 2024

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Brian Norris
Adjudicator