LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

Date: 2018-03-12
Tribunal File Number: 17-003906/AABS
Case Name: 17-003906 v The Guarantee Company of North America

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:

Applicant

Applicant

and

The Guarantee Company of North America

Respondent

DECISION

ADJUDICATOR: **Thérèse Reilly**

APPEARANCES:

For the Applicant Mutaz Hammuri, Counsel
For the Respondent: Shannon Mulholland, Counsel

Heard In Writing: **November 29, 2017**

OVERVIEW

[1] The applicant was injured in a motor vehicle accident on September 29, 2014 and sought accident benefits pursuant to the *Schedule*.[1] The applicant seeks the cost of an assessment for driver anxiety and the cost of a medical benefit for a hydrotherapy program. The applicant asserts the respondent did not validly deny the treatment plans and the applicant is entitled to payment of both treatment plans as they are both reasonable and necessary.

[2] The respondent asserts that its denial of the assessment is valid. Alternatively, if the denial of the assessment for driver anxiety is found to be defective, the defect was cured when the respondent delivered a denial dated July 14, 2015. The respondent further asserts that both treatment plans are not reasonable and necessary.

ISSUES

[3] The issues in dispute set out in the Order of Adjudicator Sharma, dated September 7, 2017, are as follows:

i. Is the applicant entitled to the cost of an assessment for $1,149.88 for driver anxiety pursuant to a treatment and assessment plan (an OCF 18 for Driver Anxiety) by Jennylyn Iszakovits, occupational therapist, submitted June 3, 2015 and denied by the respondent on June 17, 2015?

ii. Is the applicant entitled to a medical benefit for $2,744.37 for a hydrotherapy program in a treatment and assessment plan (OCF 18 for Hydrotherapy) submitted by Lindsay Orr, physiotherapist, submitted August 11, 2016 and denied by the respondent on October 25, 2016?

iii. Is the applicant entitled to interest on any overdue payments?

RESULT

[4] The respondent's denial of the OCF 18 for Driver Anxiety on June 17, 2015 was defective. However, the defect was cured by the respondent's denial by letter dated July 14, 2015. The applicant is not entitled to payment of the OCF 18 for Driver Anxiety.

[5] The applicant raised the validity of the denial of the OCF 18 for Hydrotherapy as an issue. However, the applicant advanced no evidence to support that claim. As such, no finding is made in that regard.

[6] The applicant is not entitled to payment of the OCF 18 for Hydrotherapy treatment.

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[1] The *Statutory Accident Benefits Schedule – Effective after September 1, 2010* (the "*Schedule*").

[7] The applicant is not entitled to interest as no benefits are overdue.

OCF 18 for Driver Anxiety – Is the denial valid?

[8] On June 3, 2015, the applicant submitted the OCF 18 for Driver Anxiety. The applicant asserts in their submissions that she continues to suffer from anxiety and post-traumatic stress disorder syndrome (PTSD) symptomology which continues to impair her ability to drive safely.[2]

[9] On June 17, 2015, the respondent sent a letter to the applicant advising the applicant that it had received the OCF 18 for Driver Anxiety, that it was denying payment, and that a physiatry paper review was required and would be completed by Dr. A.B. Death, physiatrist.

[10] The applicant claims the respondent failed in its denial letter of June 17, 2015[3]:

i. to provide any medical reasoning or explanation of benefits to explain the medical reasoning for the denial of the OCF 18 for Driver Anxiety as required pursuant to section 38 (8) of the *Schedule* and*,*

ii. to provide any medical or other reasons for requiring the applicant to attend a section 44 insurer examination as required under section 44 (5) of the *Schedule.*

The June 17, 2015 letter states the respondent received the treatment plan, does not agree to fund the treatment plan and requires a section 44 examination. No medical or other reasons are outlined in the letter.

[11] The applicant maintains the respondent failed to provide any medical reason or other reasons why the treatment plan is not reasonable and necessary. The applicant relies on the FSCO decision in *Augustin v. Unifund Insurance Company*,[4] which requires the respondent to provide medical reasons for refusing a treatment plan, which was applied by the Tribunal in the decision in *S.L. v. Certas Home and Auto*.[5]

[12] The respondent maintains that the denial of June 17, 2015 meets the requirements of sections 38 and 44 in that it provided notice that the paper review was required.

[13] I agree that the June 3, 2015 notice was defective because the respondent failed to provide any medical or other reasons why it would not fund the payment of the OCF 18 for Driver Anxiety or the reasons for the insurer examination as required by section 38 (8).

[2] Applicant's written submissions, paragraph 9.
[3] *Ibid*., page 3.
[4] *Augustin v. Unifund Insurance Company,* FSCO A12-000452, at paras. 10-11.
[5] *S.L. v. Certas Home and Auto,* 2016 CanLII 60726 (ON LAT).

[14] Section 38 (8) states that within 10 business days after the insurer receives the treatment and assessment plan, the insurer must give the insured person a notice that identifies the goods, services described in the treatment and assessment plan that the insurer agrees to pay for, outline what it does not agree to pay for, and outline the medical reasons and other reasons why it does not consider the treatment and assessment plan to be reasonable and necessary.

[15] Under section 44 (5), if the insurer requires an examination, it is to arrange for the examination at its expenses and shall give the applicant a notice setting out the medical reasons and any other reasons for the examination.

[16] Alternatively, the respondent states that if there is a finding that the June 17, 2015 letter was deficient, the deficiency was cured by its letter of denial dated July 14, 2015.[6] It relies on the decision of the Tribunal in *M.F.Z. v. Aviva Insurance Company,*[7] in which a defective notice was held to be cured when the insurer provided medical reasons in an explanation of benefits and submitted the report of the doctor who completed the insurer examination.

[17] I agree with the respondent that the defective notice was cured by the July 14, 2015 letter of denial. I find the case of *M.F.Z.* persuasive as the facts there were similar to the fact situation at hand. In its letter dated July 14, 2015, the respondent provided the medical reasons for its denial of the OCF 18 for Driver Anxiety and included a copy of the report of Dr. Death. In his report, Dr. Death outlined the medical reasons for his conclusion that the OCF 18 was not reasonable and necessary.

Consequences of a Defective Notice

[18] The parties disagree on the consequences of a defective notice. As the initial refusal was deficient, the applicant asserts that the respondent must be prohibited from determining that the treatment and assessment is not reasonable and necessary.[8] The respondent states that the applicant has misinterpreted the consequence stated in section 38(11)(2) of the *Schedule*.

[19] Section 38(11)(2) provides that if an insurer fails to give a notice in accordance with subsection (8) in connection with a treatment and assessment plan, the insurer *"shall pay for all goods and services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day the insurer received the applicant and ending on the day the insurer gives a notice described in subsection (8)".*

[20] Relying on *M.F.Z.,* the respondent states that any obligation by the insurer to pay for goods and services applies to goods and services that are incurred (my emphasis) starting on the 11th day after receiving the application and ending on

[6] Respondent's written submissions, Tab F.
[7] *M.F.Z. v. Aviva Insurance Company,* 2017 CanLII 63632 (ON LAT), at paras 52 and 55.
[8] Applicant's written submissions, paragraph 14.

the date of the proper notice.[9] In *M.F.Z.,* Executive Chair Linda Lamoureux stated that "the tribunal should have considered the impact of this compliant OEB in limiting Aviva's obligation to pay in accordance with section 38 (11) (2)".[10] In *M.F.Z.,* the Tribunal reassessed the amount payable by the insurer to the three treatments provided to the applicant in the relevant time period. I agree with the respondent that the consequence of "curing" a defective notice, based on the *M.F.Z*. decision, relates to the obligation of an insurer to pay for incurred goods and services during the relevant time period set out in section 38 (11) (2) and not to "deeming" a treatment plan reasonable and necessary.

[21] The applicant did not invoice the respondent for any goods and services under the OCF 18 in dispute. No evidence was advanced by the applicant to show that the OCF 18 in dispute is incurred. Applying *M.F.Z.,* and in the absence of evidence that the OCF 18 is incurred, the respondent is not obliged to fund the OCF 18 for Driver Anxiety.

Is the OCF 18 for Driver Anxiety Reasonable and Necessary?

[22] The applicant bears the burden to establish on a balance of probabilities that the disputed treatment plan is reasonable and necessary. I find the applicant has not met her burden of proof. In her submissions, the applicant presents little to no medical evidence in support of her position that the disputed OCF 18 is reasonable or necessary.

[23] In her submissions, the applicant questions the credibility of the findings of Dr. Death in his report of July 6, 2015.[11] The report concluded that the OCF 18 for Driver Anxiety was not reasonable and necessary as the applicant's medical status did not cause safety issues requiring a driving assessment. The applicant advanced two reasons to question the report. First, when the applicant reported psychological issues with respect to driving to Dr. Death, the doctor suggested she be assessed by a psychologist. However, the applicant states that this appointment was never scheduled. Second, Dr. Death failed to consider the opinions of assessors from various disciplines.[12] The respondent takes issue with both arguments.

[24] The respondent states that it obtained the opinion of two other assessors, Dr. Ferrari, psychologist and Dr. Murray, psychologist. The applicant was referred to Dr. Ferrari for a mental health assessment. The applicant reported driver anxiety as a main complaint to Dr. Ferrari but Dr. Ferrari did not conclude any psychological intervention was required.[13]

[9] Respondent's written submissions, page 3.
[10] Applicant's reply submissions, paragraph 3.
[11] Respondent's written submissions, page 1, report of Dr. Death, Tab D.
[12] Applicant's written submissions, paragraph 17. Dr. Death's report dated July 6, 2015.
[13] Written submissions of respondent, page 4, tab J, K, and L., copy of Dr. Ferrari's report dated October 22, 2015.

[25] The applicant was sent for an assessment by Dr. Murray who assessed the applicant's nervousness and safety concerns when driving, in regards to a claim for an income replacement benefit. Dr. Murray concluded there was no evidence to suggest that the applicant had PTSD. He found there was no evidence of profound anxiety symptoms or other emotional numbing regarding driving.[14] The applicant had returned to driving and, from a psychological perspective, had no limitations or restrictions with respect to the accident. There was no objective evidence of a psychological impairment from the accident.

[26] The applicant did not refer to or discuss the assessments by Dr. Ferrari and Dr. Murray in her submissions. I find that the additional medical opinions from Dr. Ferrari and Dr. Murray support the respondent's position that the disputed treatment plan is not reasonable and necessary. In the absence of competing evidence from the applicant, there is no medical basis upon which to substantiate that the treatment plan for driver anxiety is reasonable and necessary.

Is the applicant entitled to payment of the OCF 18 for a Hydrotherapy program?

Is the denial of the treatment plan valid?

[27] The applicant listed the validity of the respondent's denial of the treatment plan for a Hydrotherapy program as an issue. However, no evidence on that point is raised, and in her submissions, the applicant states that "in the notice letter dated September 1, 2016 the respondent provided sufficient medical reasons for the denial."[15] Given that the applicant advanced no evidence to support her claim for Hydrotherapy, I make no finding in that regard.

Analysis of the OCF 18 for Hydrotherapy

[28] I concur with the respondent that the applicant has not established that the disputed OCF 18 for Hydrotherapy is reasonable and necessary.

[29] Jurisprudence indicates the applicant must establish the effectiveness of ongoing treatment.[16] When the applicant fails to prove the effectiveness of a particular

[14] Report of Dr. Murray dated October 21, 2015, Tab M, page 89. Report included in the written submissions of the respondent.
[15] Written submissions of the applicant, page 1 and paragraph 19.
[16] Written submissions of the respondent, Tabs V and W. *Moschonissios and York Fire and Casualty Insurance Company,* FSCO A97-002196, December 23, 1999 and varied on other grounds POO-00008, March 12, 2001; *D. J. v. Aviva Insurance Canada* [2016] LAT 16-000098, paragraphs 36 and 39*; General Accident Assurance Co. of Canada and Violi,* Appeal P99-00047, at Tab W.

treatment, the Insurer can maintain that it is not obligated to continue to fund the treatment, as per *General Accident Assurance Co. of Canada and Violi.*[17]

[30] In *Violi,* as in this case, the effectiveness of the ongoing treatment was a central issue. In that case, the treatment plan for chiropractic services was allegedly providing temporary pain relief. The applicant's evidence, which was held to be key in the decision, was that the treatment in question provided temporary pain relief. The respondent argued there was no evidence of measurable or permanent improvement in functional ability. The arbitrator found there was evidence that the treatment provided pain relief and allowed for payment of the treatment plan. This was upheld on appeal. The respondent argued that to receive prolonged treatment, the applicant had to establish that: 1) the goals of the treatment were reasonable; 2) are being met; and 3) the costs of success, including financial costs, must be reasonable.

[31] In this matter, the respondent argues that the treatment plan in dispute is not providing effective treatment and as such it is not required to continue the funding of the additional treatment for Hydrotherapy.

[32] On August 11, 2016, the applicant submitted an OCF 18 for Hydrotherapy. The applicant maintains she continues to suffer from ongoing pain in her neck, left shoulder, arm, low back and hip/buttock radiating down her left leg. The applicant continues to suffer from broken sleep and emotional symptoms. It was recommended by the Rehab First clinic that the applicant participate in weekly sessions in a hydrotherapy program which would assist the applicant with her ongoing pain complaints. Starting in December 2015 and continuing into 2016, the applicant participated in a Hydrotherapy program for 24 treatment sessions. The disputed OCF 18 was to approve 12 additional weekly sessions for hydrotherapy.

[33] The applicant asserts the treatment plan is reasonable and necessary. She relies on the notes of Ms. Gilles, kinesiologist and the expert report[18] of Ms. Lyndsay Orr, physiotherapist, whom the applicant claims stated that the proposed rehabilitation therapy would assist the applicant with "physical conditioning and management of her ongoing pain symptoms".[19]

[34] On September 1, 2016, the respondent sent a letter to the applicant stating it required a second medical opinion and required the applicant to attend an insurer examination to be completed by Dr. Hosseini, physiatrist, to determine her entitlement to the medical benefit for Hydrotherapy.

[35] On October 5, 2016, Dr. Hosseini completed the insurer examination. Dr. Hosseini concluded that the treatment plan was not reasonable and necessary.[20]

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[17] *General Accident Assurance Co. of Canada and Violi* , Appeal P99-00047, at Tab W
[18] The applicant refers to the report but a copy is not attached to the submissions.
[19] Written submissions of the applicant, paragraph 26.
[20] Written submissions of the respondent, page 6.

He reported that the applicant reported no improvement in her symptoms despite ongoing physical therapy. Dr. Hosseini found there was no impairment identified in the assessment. He concluded the applicant had received sufficient and appropriate facility-based treatment. He suggested four to five physiotherapy sessions to provide the applicant instructions on how to exercise properly.[21]

[36] On October 25, 2016, the applicant was advised of Dr. Hosseini's findings and the report was attached. The applicant challenges the credibility of Dr. Hosseini's findings and report on the basis that he did not conduct a complete review of available documentation (The report refers to 33 documents that were provided to the assessor. The applicant did not identify which documentation was not reviewed). I find there is no credible evidence to support this allegation.

[37] The respondent asserts the applicant has failed to establish, as per the decisions in *Moschonissios v. York Fire and Casualty Insurance Company, D.J. v. Aviva Insurance Canada,* and *General Accident Assurance Co. of Canada v. Violi,* the effectiveness of the ongoing treatment. I concur with the respondent that she has not done so. The notes of Ms. Orr and Ms. Grills, summarized by the respondent in its submissions, do not support the applicant's assertion she was making significant progress in terms of pain relief and functional recovery. Further, Dr. Hosseini's insurer examination concluded that the treatment plan was not reasonable and necessary as the applicant reported no improvement in her symptoms despite ongoing physical therapies which included the hydrotherapy treatment.

[38] Unlike the *Violi* case, the notes of Ms. Grills for the hydrotherapy treatment starting in December 2015 to August 2016, suggest that, despite receiving ongoing hydrotherapy treatment, the applicant's pain symptoms continued, particularly on the left side of her body. In many instances, after receiving the hydrotherapy treatment, the pain increased and symptoms were aggravated.[22]

[39] The applicant had ongoing pain complaints throughout treatment. However, she also often complained of increased fatigue and hip pain from the treatment. This is unlike the treatment in *Violi* where the applicant stated the treatment provided temporary pain relief.

[40] Further, the notes of Ms. Grills suggest that the hydrotherapy caused the applicant anxiety because she did not know how to swim.[23]

[41] I find based on the *Violi* decision and the report of Dr. Hosseini, the evidence does not show the proposed additional treatment would provide a permanent improvement in functional ability.

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[21] *Ibid*., page 6. Dr. Hosseini's report dated October 19, 2016, Tab P.
[22] Written submissions of the respondent, Tab R, notes of Ms. Gilles dated May 2016, July 2016, August 2016.
[23] Written submissions of the respondent, page 7, Ms. Gilles notes, various dates, Tab R and the notes dated November 16, 2015 and November 30, 2015, Tab S.

[42] The respondent questions the expert report of Ms. Orr and argues that her notes raise doubts about the usefulness of the hydrotherapy program and, in fact, "despite participation in physiotherapy and supervised hydrotherapy", the applicant continued to complain of pain in her left side.[24] I find there is insufficient medical evidence on the usefulness of the recommended Hydrotherapy program.

[43] Based on the medical evidence presented, I find the goals of pain relief and improvement in the applicant's medical condition are not being met with continued Hydrotherapy. I agree with the respondent in applying the *Violi* decision to the facts of this case, that it is not obliged to continue to fund treatment that is not established as effective.

Conclusion

[44] The denial of the driving assessment by the respondent dated June 17, 2017 is defective. It provided no medical reasons or other reasons for the denial. However, the denial was cured by the respondent's letter dated July 14, 2015.

[45] The applicant failed to prove, on a balance of probabilities, that the disputed plans are reasonable and necessary. As such, the applicant is not entitled to payment of the disputed treatment plans.

[46] [The applicant is not entitled to interest as there are no overdue payments.

Released: March 12, 2018

Thérèse Reilly, Adjudicator

[24] *Ibid*., page 8 and Tabs T and U.