Safety, Licensing Appeals and Standards Tribunals Ontario
Licence Appeal Tribunal

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Ontario

Date: 2017-03-28
Tribunal File Number: 16-001038/AABS
Case Name: 16-001038 v RBC Insurance Company

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:

E.F.

Applicant

and

RBC Insurance Company

Respondent

DECISION

ADJUDICATOR: **Khizer Anwar**

APPEARANCES: **Rajiv Kapoor, representative for the Applicant**

Sabina Arulampalam, counsel for the Respondent

HEARD IN WRITING ON: **December 7, 2016**

OVERVIEW

[1] E. F. ("the applicant") was injured in an automobile accident on December 6, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("*Schedule*").

[2] The applicant applied for physiotherapy services and a functional abilities evaluation, both of which were denied by the respondent, as it held that the applicant had suffered predominantly minor injuries and that treatment of them fell within the *Minor Injury Guideline* ("the MIG"), as defined in s. 3 of the *Schedule*.

[3] The applicant disagreed with the respondent's decision and submitted an application for dispute resolution services to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[4] The parties participated in a case conference but were unable to resolve the issues in dispute.

ISSUES TO BE DECIDED

[5] The issues in dispute identified by the parties in their submissions and to be decided are:

1. Is the applicant entitled to a medical benefit in the amount of $3,427.52, for physiotherapy services, as outlined in the Treatment and Assessment plan (OCF-18) dated April 8, 2016, completed by Dr. Mitesh Rajodiya?

2. Is the applicant entitled to a medical benefit in the amount of $2,152.00, for chiropractic services, as outlined in the Treatment and Assessment plan (OCF-18) dated April 29, 2016, completed by Dr. Justin Guy?

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

RESULT

[6] Based on the totality of evidence before me, I find that:

1. The applicant suffered predominantly minor injuries as defined under the *Schedule*.

2. Neither party provided evidence with respect to any amounts that have already been paid out to the applicant within the MIG limit of $3,500 ("the Cap"). The applicant is entitled to receive treatment up to the Cap limit, minus

any amounts already paid, in accordance with the guidelines under the *Schedule*.

3. Based on my findings above, I do not need to assess the disputed treatment plans for reasonableness and necessity.

4. The applicant is not entitled to interest on overdue payment of benefits.

ANALYSIS

[7] As this is a written hearing, the only evidence before me is in the form of documentary evidence and I have considered all of the documents submitted.

[8] Although the parties did not list the application of the MIG as an issue to be decided by me, their submissions identify the MIG designation as a primary point of contention. Both parties have made extensive submissions on the nature of the applicant's injuries sustained as a result of the accident. Based on these submissions, I have sufficient information to determine whether the applicant's injuries are predominantly minor and treatment of them falls within the MIG.

1. The *Minor Injury Guideline* (the "MIG")

[9] The MIG establishes a framework for the treatment of minor injuries. Therefore, to understand the analysis with respect to the minor injury issue, it will be necessary to define some terms. The term "minor injury" is defined in s. 3 of the *Statutory Accident Benefits Schedule* ("the *Schedule*") as "one or more of a strain, sprain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury." The terms "strain", "sprain," "subluxation," and "whiplash associated disorder" are all defined in s. 3. I will refer to these terms collectively as "soft tissue injuries."

[10] S. 18(1) limits recovery for medical and rehabilitation benefits for such injuries to $3,500 minus any amounts paid in respect of an insured person under the MIG.

[11] Section 18(2) of the Schedule makes provision for some injured persons who have a pre-existing medical condition to receive treatment in excess of the Cap. To access the increased benefits, the injured person's healthcare provider must provide compelling evidence that the person has a pre-existing medical condition, documented prior to the accident, which will prevent the injured person from achieving maximal recovery if benefits are limited to the MIG cap.

[12] The respondent in this case relied upon a recent Divisional Court decision of *Scarlett v Belair Insurance*, 2015 ONSC 3635 (CanLII), to support its position that the applicant bears the onus of proving entitlement to the benefit beyond the Cap. I agree with the respondent. The Court in *Scarlett* reviewed

the minor injury provisions in the *Schedule* and found that they were a limit on an insurer's liability. This determination meant that the onus of proving entitlement to the disputed benefit(s) beyond the Cap rested with the applicant. Accordingly, in this matter, the applicant carries the onus of establishing his entitlement to a higher level of coverage than the $3,500 stipulated under the MIG.

2. Injuries and Post-accident health status

[13] I will now review medical records and other documentation submitted by the parties to determine whether the applicant's injuries fall outside the MIG and whether he is entitled to treatment beyond the Cap limit.

[14] The applicant referred to the following as evidence of his accident related injuries in his submissions:

1. Clinical notes and records (CNRs) of Dr. Toman, family physician
2. CNRs of Northgate Doctors Office

[15] The applicant referred to the following as evidence of his post-accident health status in his submissions:

1. Treatment and Assessment Plan (OCF-18) by Dr. Mitesh Rajodiya
2. Treatment and Assessment Plan (OCF-18) by Dr. Justin Guy
3. Functional Abilities Evaluation (FAE) by Dr. Justin Guy
4. Social Emotional Assessment (SEA) by Joshua Pugen

Accident Related Injuries

[16] The applicant started visiting his family doctor, Dr. Toman, the day after the accident. For approximately five months, starting from the applicant's first visit to Dr. Toman on December 7, 2015 up until May 2016, Dr. Toman's CNRs noted the applicant's accident related injuries to be: **a)** thoracic and lumbar myofascial strain; **b)** pain in both shoulders and lower back; **c)** myofascial strain of neck and right shoulder; **d)** headaches; and **e)** insomnia. Dr. Toman recommended that the applicant undergo an x-ray on both his shoulders but the CNRs did not indicate any recommendations for further assessments with any medical specialists.

[17] The applicant also intermittently attended the Northgate Doctors Office, a walk-in clinic, where in addition to neck and shoulder problems, he was diagnosed with stiffness, pain and swelling in left knee, resulting in issues with walking, standing and bending, and decreased range of motion at that knee. The CNRs attributed

these impairments to the accident, and the applicant was prescribed Naproxen 500mg and Flexril 10mg.

[18] Based on my review of the CNRs for both Dr. Toman and Northgate Doctors Office, I find that the applicant was diagnosed with soft tissue injuries suffered as a result of the accident. Specifically, the diagnosis of Dr. Toman falls within the very definition of minor injuries under the *Schedule*.

[19] I will now consider the examinations conducted by the applicant's treatment providers to evaluate the applicant's post-accident health status, and whether they provide evidence that takes the applicant out of MIG.

Post-Accident Health Status

[20] The treatment and assessment plan completed by Dr. Rajodiya lists the applicant's injuries and sequelae in Part 6 as: 1) sprain and strain of various parts of the body; 2) WAD1; 3) Chronic post-traumatic headache; 4) Nonorganic sleep disorders; 5) Depressive episode; and 6) Nervousness.

[21] The applicant underwent a Functional Abilities Evaluation (FAE) with Dr. Justin Guy on May 6, 2016. Dr. Guy diagnosed the applicant with the following in his report and treatment and assessment plan: 1) Whiplash Associated Disorder (WAD1); 2) Multiple sprains and strains in various parts of the body; 3) Chronic post-traumatic headache; 4) Nonorganic sleep disorders; 5) Depressive episode; and 6) Nervousness.

[22] Dr. Guy also made recommendations in his FAE report, which, amongst others, included 1) chronic pain assessment; 2) orthopaedic assessment; 3) psychological assessment; and 4) social emotional assessment.

[23] The applicant underwent a Social Emotional Assessment with Joshua Pugen on June 7, 2016. Based on the applicant's responses during the assessment, Mr. Pugen's concluded that the applicant suffered from psycho-social impairments that are: 1) pre-cursors to serious psychological impairment, 2) clinically associated sequelae to his physical pain and 3) outside the definition of MIG.

[24] Mr. Pugen's recommendations for the applicant included a) psychotherapy; and b) a chronic pain assessment.

[25] The applicant attended an insurer's examination on June 17, 2016, where he was assessed by Dr. Dessouki, an orthopaedic surgeon. Dr. Dessouki concluded in his report that the applicant's injuries fell within the MIG, as "there was no objective evidence of any residual musculoskeletal impairment attributable to the injuries sustained in the subject accident."

[26] The applicant has submitted and I note that the respondent did not provide Dr. Dessouki with the reports of Dr. Guy and Dr. Pugen for review for the purposes of his assessment. This leaves a question of whether Dr. Dessouki had all the pertinent information at the time of assessment and whether he could have reached a different conclusion had he been provided with the said reports.

[27] While the oversight in providing all available medical records to its assessor is duly noted, I have placed little importance on this oversight, as the applicant bears the onus of establishing his entitlement beyond the Cap limits.

[28] Having reviewed all the medical reports and documents before me, for the reasons stated below, I find that the applicant's accident related injuries continue to fall within the MIG and he has failed to establish entitlement beyond the Cap limits.

[29] Dr. Guy diagnosed the applicant with WAD1, along with sprains and strains of shoulder and lumbar spine, in his report as well as in the treatment and assessment plan completed by him. These diagnoses fall within the very definition of MIG under the *Schedule*. While he concluded that, based on applicant's reporting, the symptoms and complaints appear to be chronic, this conclusion does not constitute a medical diagnosis, which is why he made a recommendation for chronic pain assessment for the applicant. The applicant, however, has not undergone one.

[30] Dr. Guy also recommended that the applicant undergo a psychological assessment. I find this recommendation to be outside the scope of Dr. Guy's practice and expertise. As a result, I have assigned little weight to the recommendation for psychological assessment.

[31] Similarly, Mr. Pugen's conclusion in his report is primarily based on subjective responses of the applicant to his questions. There is little to no objective medical evidence in his report that supports his conclusions. Mr. Pugen also went on to make recommendations for treatments and assessments that are outside his scope of practice, such as a chronic pain assessment and individual psychotherapy. Hence, in my deliberation, I have assigned little weight to these specific recommendations made by Mr. Pugen.

[32] The applicant argues in his reply submissions that he suffers from chronic pain and relies on case law to argue that chronic pain falls outside the parameters of the MIG. However, the applicant has failed to provide medical evidence for me to consider that would provide a diagnosis of chronic pain syndrome.

[33] In the absence of objective medical evidence then, I find that the applicant's injuries fall within the MIG. I will, however, add that despite assigning little weight to some of the recommendations made by Dr. Guy and Mr. Pugen, considering the nature of the applicant's injuries, it would have been prudent for the applicant

to have sought one or more of the chronic pain, orthopaedic and psychological assessments with appropriate experts to address the issue of MIG.

[34] I will now consider if there is compelling evidence that the applicant suffered from a pre-existing condition, documented by a healthcare practitioner before the accident, which prevents him from achieving maximal recovery under MIG.

3. Pre-existing Conditions

[35] The applicant outlines in his submissions that he does not suffer from any pre-existing medical conditions, and despite being involved in various accidents, his resulting injuries had fully healed. The applicant outlines the following:

1. A prior motor vehicle accident, approximately 12 years ago, resulting in a minor whiplash. The applicant submitted that he had fully recovered since then.

2. Work-related injury sustained 5-6 years ago, resulting in a left shoulder injury. The applicant submitted that the pain had subsided completely since then.

3. Surgery for an infection under his foot for draining a cyst in 2013, resulting in the applicant being bedridden for one month.

4. Asthma.

[36] The medical reports of Dr. Guy and Dr. Dessouki corroborate the applicant's submissions with respect to his pre-existing medical history. There is no other documented medical evidence in respect of pre-existing medical conditions before of me from any health practitioner that shows otherwise.

[37] Based on the evidence before me, I find that the applicant does not suffer from any pre-existing conditions documented by any health practitioner that would prevent him from achieving maximal recovery under the MIG. Hence, the applicant is not entitled to treatment beyond the Cap limit.

4. Disputed Treatment Plans

[38] Since I've found that the applicant suffered predominantly minor injuries, as defined under the *Schedule*, I do not need to assess the treatment and assessment plans in dispute for reasonableness and necessity.

CONCLUSION

[39] For the reasons noted above, I find that:

1. The applicant suffered predominantly minor injuries as defined under the *Schedule*.

2. The applicant is entitled to treatment up to the MIG limit of $3,500, minus any amounts already paid, in accordance with the guidelines in the *Schedule*.

3. Based on my findings above, I do not need to assess the treatment and assessment plans in dispute for reasonableness and necessity.

4. The applicant is not entitled to interest on overdue payment of benefits.

COSTS

[40] The respondent requested costs in its submissions. However, it did not set out the reasons for the request and failed to set out the particulars of the other party's conduct that are alleged to be unreasonable, frivolous, vexatious, or in bad faith, as required under *Rule 19.4* of the *Licence Appeal Tribunal Rules of Practice and Procedure* (*"the LAT Rules"*).

[41] Hence, no costs are awarded against the applicant.

Released: March 28, 2017

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Khizer Anwar,
Adjudicator