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

Citation: **V.R. vs. Aviva Insurance Company, 2019** ONLAT **18-002880/AABS**

Date: April 24, 2019
File Number: 18-002880/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:

V.R.

Applicant

and

Aviva Insurance Company

Respondent

DECISION

PANEL: **D. Gregory Flude, Vice-Chair**

APPEARANCES:

For the Applicant: V.R.
Arthur Semko, Paralegal

For the Respondent: Arsheena Harripaul, Claims Representative
Brittanny K. Tinslay, Counsel

Court Reporter: Greg Vaughan

HEARD: **In Person: March 13 & 14, 2019**

REASONS FOR DECISION

OVERVIEW

[1] The applicant was involved in an automobile accident on August 5, 2016, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010*, O. Reg. 34/10 (the "Schedule"). He was denied certain benefits by the respondent and submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service ("Tribunal").

[2] The dispute between the parties revolves around differing opinions about the best method to treat the applicant's injuries. Given that dispute, the parties differ on whether the treatment recommended by the applicant's healthcare professionals is reasonable and necessary. The applicant takes the position that he needs further chiropractic treatment. The respondent takes the position that the applicant requires no further treatment and, instead, is best served by a program of self-directed exercise, including attendance at the gym and possibly restorative yoga and aqua fit programs.

[3] The applicant also seeks an assessment to determine if he has chronic pain syndrome, a condition characterized by continued debilitating and diffuse pain long after the organic causes for that pain have resolved. None of the treatment plans proposed by the applicant are for the treatment of chronic pain syndrome; rather, they are for treating his spine with a view to decreasing pain in those areas, and increasing range of motion and strength so consideration of the chronic pain assessment stands separate from the treatments. I will address the three treatment plans first, and then address the assessment.

ISSUES

[4] At the outset of the hearing, the applicant withdrew his claim for a non-earner benefit. I am now asked to determine if the following treatment plans and the requested chronic pain assessment are reasonable and necessary given the impairments the applicant suffered as a result of the accident:

i. Is the applicant entitled to a medical benefit in the amount of $3,948.91 for chiropractic services recommended by Inline Rehab in an OCF-18 submitted on April 7, 2017 and denied on April 12, 2017?

ii. Is the applicant entitled to a medical benefit in the amount of $3,421.41 for chiropractic services recommended by Inline Rehab in an OCF-18 submitted on January 11, 2017 and denied on January 23, 2017?

iii. Is the applicant entitled to a medical benefit in the amount of $2,702.11 for chiropractic services recommended by Inline Rehab in an OCF-18 submitted on July 10, 2017 and denied on July 12, 2017?

iv. Is the applicant entitled to the cost of a chronic pain assessment in the amount of $2,259.69 recommended by MediAssess Evaluation in an OCF-18 submitted on September 22, 2017 and denied on October 3, 2017?

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

RESULT

[5] I find that the three treatment plans and the chronic pain assessment are not reasonable and necessary. The dispute between the parties with respect to the denied treatment plans turns on the question of whether further facility based treatment, such as chiropractic, physiotherapy and massage, was necessary to assist in the applicant's recovery. Contemporaneous medical records indicate that, once the applicant began an active exercise program at the gym, his symptoms improved dramatically. The applicant had substantially recovered from the impairments caused by the motor vehicle accident over the summer of 2017 and into January 2018.

[6] Ultimately, the treatment and assessment plan seeking a chronic pain assessment comes down to competing assessment reports. The applicant relies on an assessment report produced by Dr. Michael West, an orthopaedic surgeon. The respondent relies on an assessment by Dr. Todd Levy. I prefer the respondent's report by Dr. Levy. Dr. West placed heavy reliance on the applicant's self-reports as to the extent and nature of his impairments arising out of the accident. However, the impairments reported by the applicant to Dr. West are not supported in the contemporaneous medical records.

EVIDENCE AND ANALYSIS

[7] The motor vehicle accident occurred when the applicant "t-boned" another vehicle making an on-coming left turn. The airbags did not deploy and the applicant did not go to hospital following the accident. He stated that he stayed in the vehicle until the ambulance personnel told him to get out. They then checked him and found no serious injuries and gave him the option to go to the hospital, an option he declined.

[8] It was not until 12 days after the accident that the applicant first sought help from a healthcare professional. On August 17, 2016 he attended the Inline Rehabilitation Centre ("Inline"), where he underwent an initial chiropractic and massage assessment together with physical rehabilitation. Thereafter, for approximately a year, the applicant attended Inline approximately once a week.

[9] The Schedule provides that the respondent will pay for all reasonable and necessary medical expenses incurred by or on behalf of the applicant for, among other things, medical, chiropractic, psychological and physiotherapy services. That obligation is subject to coverage limits depending on the severity of the impairments. The first level of coverage is payment up to a maximum of $3,500 for "minor injuries." The next level is $50,000 for more serious but non-catastrophic

impairments. Finally there is $1 million available for medical benefits for a catastrophic impairment as that term is defined in the Schedule.

[10] Initially, the respondent took the position that the applicant's injuries fell within the definition of "minor injury" in the Schedule. A minor injury is "one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury." The applicant exhausted the $3,500 of treatment available to him and, on January 11, 2017, he submitted a treatment and assessment plan seeking further treatment at a cost of $3,948.91.

The Three Treatment Plans and the Respondents Assessment

[11] The treatment goals in the January 11, 2017 treatment plan are identified as pain reduction, increased range of motion, increased strength and return to the activities of normal living. Of interest, given that the proposed treatment followed on from earlier treatment, Dr. Barnes, the chiropractor who recommended the treatment, answered "N/A" to the question: "If this is a subsequent treatment and assessment plan, what was the applicant's improvement at the end of the previous plan based on your evaluation method." Dr. Barnes also noted that the applicant suffered from post-traumatic stress disorder, sleep disorders and malaise and fatigue.

[12] On receipt of the January 11, 2017 treatment and assessment plan, the respondent notified the applicant that it was denying the plan because his injuries were minor and it had approved treatment up to the minor injury limit of $3,500. It also advised the applicant that it was exercising its rights under s. 44 of the Schedule to have him medically assessed by a physician of its choosing to determine if the proposed treatment was reasonable and necessary. That assessment was then conducted by Dr. Alan Kruger on February 23, 2017.

[13] After a physical examination indicating no musculoskeletal abnormalities and normal ranges of motion, Dr. Kruger concluded that the applicant's injuries fell within the definition of minor injuries. That was not the end of his analysis, however. He was asked by the respondent if he thought the proposed treatment was reasonable and necessary. In answering "no" to that question, he determined that "no further facility based treatment as proposed is warranted at this time." In answer to further questions, he stated as follows:

> It is my medical opinion that it is unlikely that further supervised care will accelerate the resolution of the claimant's residual symptomatology. At this stage in time, he should be transitioned to a home-based exercise program.

[14] On April 6, 2017 and again on July 10, 2017, the applicant submitted further treatment and assessment plans virtually identical to the plan dated January 11. The April 6 treatment plan sought $3,421.41 in treatment, while the July 10 treatment plan sought $2,702.11. Again, the question relating to the effectiveness of earlier treatment was answered "N/A" on April 6 and "improved neck rotation" on

July 10. The respondent denied these treatment and assessment and plans by citing Dr. Kruger's report.

[15] It was the applicant's evidence that he incurred the denied treatment. The treatment plans together total approximately $10,000. The record indicates that the applicant last attended treatment on July 31, 2017 so the best that can be said for this amount of treatment is that the applicant had some improvement in his neck rotation.

Out of the Minor Injury – Psychological Treatment

[16] The respondent also arranged for the applicant to be assessed by a psychologist in response to an April 19, 2017 treatment and assessment plan prepared by a psychologist, Valerie Kleiman, seeking psychological counselling sessions. The assessor, Dr. Rakesh Ratti, assessed the applicant on June 14, 2017 and released his report on June 29, 2017. He determined that the applicant suffered from Generalized Anxiety Disorder and partially recommended the requested treatment to the extent of 12 one-hour sessions rather than the 1.5 hour sessions set out in the treatment and assessment plan. The applicant underwent 12 one hour sessions and this treatment plan is not in dispute before me. The treatment clinical notes, however, do disclose the progress of the applicant through the second half of 2017 into January 2018. I will refer to them in detail later.

[17] In his testimony, the applicant stated that, at the time of accident, he was in a program to become an optician. He was working sales-related activities where he had to deal with customers. He found that the continual need to be on his feet aggravated his back problems resulting from the accident so he had to quit his job. His contemporaneous statements to his psychologist, Valerie Kleiman, tell another story.

[18] Ms. Kleiman assessed the applicant to determine if he had psychological issues arising from the accident and issued reports dated August 22, 2016 and April 12, 2017. She kept notes of each session that, in my view, show the applicant progressing to a complete recovery by January 2018.

[19] Ms. Kleiman's initial assessment report of August 22, 2016 notes that the applicant would wake up multiple times during the night due to pain and anxiety. Her April 12, 2017 assessment report notes that prolonged sitting causes pain which affects his ability to work as he has to get up frequently to stretch. The latter report notes continued sleep problems due to pain and a need to shift constantly to find a comfortable position. It also notes less motivation to exercise "because he knows it will result in pain."

[20] The applicant started his sessions with Ms. Kleiman on April 26, 2017. He completed his last session on January 4, 2018. While I will highlight some extracts from the reports, it is fair to say that they show a constant improvement from anxiety and lack of motivation to feeling "back to normal" on January 4, 2018:

vi. On April 26, 2017, the applicant reports having "gone to the gym approximately 10 times since the accident, and has felt pain afterwards."

vii. On May 7, the applicant "went to the gym for the first time today…he is not feeling as sore as he thought he would be."

viii. On May 11, the applicant "stated he is confused with his career path…although he finished school to be a license [sic] optometrist, he does not feel happy doing that job every day…he went to the gym twice this past week and this has increased his overall mood."

ix. On July 12, the applicant "reported that he is currently on vacation or [sic] 2 months…his mood, appetite and sleep are back to normal."

x. On July 20, the applicant "reported that he has been going to the gym 4 times a week and feels as though he is getting stronger…he continues to feel positive…and that his sleep is back to normal."

xi. On September 14 and again on September 28, the applicant "reported that his mood, motivation, energy and sleep are back to normal…he is "happy"…he quit his job and is looking to become an aviation engineer."

xii. On November 2, 2017, the applicant reported that he has been focussing on what his life purpose is…he wants to find out what he wants to do with his life and what makes him happy."

xiii. On November 20, he reported "having a difficult time finding what his passion is."

xiv. Finally, at his last session on January 4, 2018, he reported "he feels like he is "back to normal." He reported no pain behaviours and minimal passenger anxiety.

[21] An objective review of the psychology treatment notes indicates that almost as soon as the applicant began to seriously engage in a home-based exercise program as recommended by Dr. Kruger, his pain symptoms diminished and disappeared. By mid-July 2017, when he was going to the gym four times per week, pain was no longer a factor in disturbing his sleep. By January 2018, he had no pain behaviours. The evidence also notes that his reason for leaving his position was to pursue more fulfilling career opportunities, not because he was driven out by pain.

Family Doctor Records

[22] Contrary to the statement in Dr. West's report that the applicant attended his family doctor within a week of the accident and was referred to physiotherapy, the applicant did not discuss the accident with his family doctor within a week. He did not advise his family doctor that he had been in a motor vehicle accident until June 8, 2017, 10 months after it occurred. In response to questions about why he had

delayed so long, he stated that he was under the care of other healthcare practitioners for his back problems and did not need to discuss his back issue with his family doctor. He only raised it when the respondent stopped funding his treatment.

[23] The applicant's evidence is problematic. The record shows that he attended his family doctor for back pain caused by bending down to tie his shoelace in March 2017, a time when he was actively attending treatment with his other healthcare professionals. The applicant does not link his March back pain with the motor vehicle accident and, moreover, later reports indicate that this same back pain subsided on its own in two weeks.

[24] On his next visit about back pain, on June 8, 2017, the applicant reported experiencing pain for four days before the visit. However, while the doctor notes a "PMH" (previous medical history) of back pain from a motor vehicle accident in August 2016," the applicant's back pain was caused by the accident. It is not clear what the source of the "PMH" was, as, despite numerous medical visits, the applicant did not mention the accident until June 8. Thereafter, on each visit to the family doctor, the doctor refers to back pain which started after the motor vehicle accident, a position which his own records negate. On March 20, 2018, the family doctor reports complaints of low back pain "on and off" since the accident.

[25] The applicant's family doctor ordered a spinal X-ray. The result came back "normal study." It noted that the alignment was satisfactory, disc spaces were normal and facets joints and sacroiliac joints were normal.

[26] The respondent relies on a decision of the Financial Services Commission of Ontario ("FSCO"), *Jennifer Esterreicher and Non-Marine Underwriters, Mbrs. of Lloyds*, FSCO A04-001750, December 18, 2008. In that case, the adjudicator set out a three part test for determining if a treatment plan is reasonable and necessary:

xv. The treatment goals, as identified, are reasonable;

xvi. The goals are being met to a reasonable degree; and

xvii. The overall costs [not just financial, but also investment of time, etc.] of achieving these goals is reasonable taking into consideration both the degree of success and the availability of other treatment.

[27] I find the adjudicators articulation of a three-part test helpful in the current case. On each treatment plan, the goals are identified as "pain reduction, increase in strength, increased range of motion and return to the activities of normal living. These are clearly reasonable goals. It is on the other two branches of the test that the applicant fails. Only one goal was met, and that in a minor way. The applicant had an improvement in neck range of motion. The overall cost for such a minor improvement cannot be justified and is unreasonable in the circumstances of this

case. In addition, there is evidence that alternative treatment, the home exercise program suggested by Dr. Kruger, achieved greater results at much less cost.

[28] On a review of all of the evidence, I find that the applicant has not met his burden of proof on a balance of probabilities that the three treatment and assessment plans for further chiropractic, physiotherapy and massage treatment are reasonable and necessary. There is the obvious fact of their lack of effectiveness. After the expenditure of approximately $10,000, the only achievement would appear to be increased neck rotation.

Chronic Pain Assessment

[29] The applicant submitted a treatment and assessment plan for a chronic pain assessment on September 27, 2017. At the hearing he relied on a report by Dr. Michael West, an orthopaedic surgeon. Dr. West concluded that the applicant had chronic pain syndrome, a condition he characterized as:

> Pain that continues beyond the normal recovery period…[that] interferes with substantially all of the patient's daily activities.
>
> The pain is diffuse in nature and non-anatomic with secondary disuse of muscles of the musculoskeletal system including those of the spine. Often accompanying chronic pain are psychological problems and emotional difficulties…

[30] Dr. West notes that the applicant had a number of subjective complaints upon which he based his opinion. With respect to back pain, he noted that the applicant told him:

> Pain of a constant nature in the lumbar spine since the subject motor vehicle accident. He has pain daily. He rated the pain on average 8 out of 10 in severity from day to day.

[31] My difficulty with the applicant's subjective reports of back pain is that they are not supported in the medical record. It will be recalled that his first report of back pain to his family doctor was in March 2017 when the pain was attributed to bending down to tie a shoelace. It resolved within two weeks. He next complained of back pain in June 2017 that had started four days earlier. In March of 2018, his family doctor records "low back pain on and off." This is far short of the severe and constant pain he reported to Dr. West.

[32] Likewise, the balance of the reported complaints in Dr. West's report – severe headache, nervous anxiety, fatigue, stress, insomnia – stand in stark contrast to his reports to his treating psychologist of increased energy, normal sleep, and no pain behaviours, and, in particular, his January 2018 report that he was "back to normal."

[33] The respondent relies on the assessment report and oral evidence of Dr. Todd Levy, a physician with a practice focussed on chronic pain management. I held that

Dr. Levy was qualified to give opinion evidence on the diagnosis and treatment of soft tissue injuries and chronic pain.

[34] Dr. Levy's definition of chronic pain syndrome, sometimes referred to as somatic symptom disorder with pain, differed somewhat from Dr. West's. He identified the condition as one in which pain is the patient's major focus. The pain must have persisted for more than six months and extends beyond the area of injury to become wide spread. In testing for chronic pain syndrome, Dr. Levy noted that, if chronic pain syndrome is present, then pain inflicted on the periphery of the body becomes centralized in the central nervous system. He failed to find this type of response in the applicant and concluded that there are no indications of chronic pain syndrome.

[35] The most that Dr. Levy noted with respect to the applicant was that, in some areas, the applicant's range of motion was less than the normal range. He pointed out that the normal range is an average and some people may exceed it in certain areas and not reach it in others. In fact, the applicant exceeded the normal range in some areas. Dr. Levy did not consider these variations in ranges of motion to be material.

[36] I prefer the evidence of Dr. Levy to that of Dr. West. Dr. Levy's examination was based much more broadly on objective factors and was less reliant on the applicant's self-reporting, which, as explained above, is contracted by the record. It identified essential features of chronic pain syndrome and pointed out how they were not present in the applicant.

[37] In determining whether an assessment is reasonable and necessary, it must be borne in mind that assessments, by their nature, are speculative. The purpose of an assessment is to determine if a condition exists. Notwithstanding their speculative nature, the applicant still bears the onus of establishing on a balance of probabilities that an assessment is reasonable and necessary. To do so, the applicant must point to objective evidence that there are grounds to suspect the applicant has the condition for which he seeks the assessment. I find that the applicant has failed to satisfy that onus. Dr. Levy's report and evidence indicate that there are none of the markers to be expected in a case of chronic pain syndrome. Of particular note is the absence of pain centralization, which I understand from Dr. Levy to be the minimum diagnostic requirement.

ORDER

[38] On a review of all of the evidence, I find that the applicant is not entitled to any of four treatment and assessment plans that are the subject of this appeal. The applicant's appeal is dismissed.

Released: April 25, 2019

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D. Gregory Flude
Vice-Chair