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

Citation: Y.Y. vs. Allstate Insurance Company, 2020 ONLAT 19-005789/AABS

File Number: 19-005789/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:

Y.Y.

Applicant

and

Allstate Insurance Company

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce**

APPEARANCES:

For the Applicant: Lisa Bishop, Counsel

For the Respondent: Heather Kawaguchi, Counsel

Heard by way of written submissions

OVERVIEW

[1] Y.Y. was injured in an automobile accident on July 23, 2017 and sought benefits from the respondent, Allstate, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the *"Schedule"*). Y.Y. applied for medical and rehabilitation benefits and various assessments that were denied by Allstate because it determined his injuries were predominately minor and therefore subject to treatment within the Minor Injury Guideline ("MIG"). Y.Y. disagreed and applied to the Tribunal for resolution of the dispute.

ISSUES TO BE DECIDED

[2] The following are the issues in dispute:

Minor Injury Guideline

i. Did the applicant sustain predominantly **minor injuries** as defined under the *Schedule*?

Medical Benefits

ii. If the applicant did not sustain predominantly minor injuries:

a. Is the applicant entitled to a medical benefit in the amount of $346.89 ($2,546.89 less $2,200.00 approved) for **physiotherapy services** recommended by Downsview Healthcare Inc. as set out in a treatment and assessment plan dated August 20, 2017 and denied by the respondent on September 6, 2017?

b. Is the applicant entitled to a medical benefit in the amount of $1,242.56 for **physiotherapy services** recommended by Downsview Healthcare Inc. as set out in a treatment and assessment plan dated November 10, 2017 and denied by the respondent on November 14, 2017?

c. Is the applicant entitled to a medical benefit in the amount of $1,830.08 for **physiotherapy services** recommended by Downsview Healthcare Inc. as set out in a treatment and assessment plan dated December 9, 2017 and denied by the respondent on December 13, 2017?

[1] O. Reg. 34/10, as amended.

d. Is the applicant entitled to a medical benefit in the amount of $1,512.56 for **physiotherapy services** recommended by Downsview Healthcare Inc. as set out in a treatment and assessment plan dated February 9, 2018 and denied by the respondent on February 16, 2018?

e. Is the applicant entitled to a medical benefit in the amount of $2,887.14 for **psychology services** recommended by Downsview Healthcare Inc. as set out in a treatment and assessment plan dated February 26, 2018 and denied by the respondent on March 8, 2018?

f. Is the applicant entitled to a medical benefit in the amount of $2,306.45 for **physiotherapy services** recommended by Downsview Healthcare Inc. as set out in a treatment and assessment plan dated April 14, 2018 and denied by the respondent on April 26, 2018?

Cost of Examinations

g. Is the applicant entitled to the cost of an examination in the amount of $1,521.26 for an **assessment of attendant care needs** recommended by Downsview Healthcare Inc. as set out in a treatment and assessment plan dated August 29, 2017 and denied by the respondent on September 5, 2017?

h. Is the applicant entitled to the cost of an examination in the amount of $2,000.00 for a **psychology assessment** recommended by Downsview Healthcare Inc. as set out in a treatment and assessment plan dated November 21, 2017 and denied by the respondent on November 22, 2017?

i. Is the applicant entitled to the cost of an examination in the amount of $2,000.00 for a **chronic pain assessment** recommended by Downsview Healthcare Inc. as set out in a treatment and assessment plan dated April 30, 2018 and denied by the respondent on May 2, 2018?

j. Is the applicant entitled to the cost of a **disability certificate (OCF-3)** in the amount of $200.00 provided by Downsview Healthcare Inc. dated December 2, 2017 (no denial date indicated on the application)?

k. Is the applicant entitled to the cost of a **Psychological Pre-screen Interview** in the amount of $200.00 provided by Downsview Healthcare Inc. dated January 11, 2018 (no denial date indicated on the application)?

Other

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

iv. Is the applicant entitled to an award under *Ontario Regulation 664* because the respondent unreasonably withheld or delayed the payment of benefits?

RESULT

[3] I find that Y.Y. sustained predominantly minor physical injuries because of the accident which are treatable within the MIG. Further, I find he has not demonstrated that he sustained psychological impairments, that he suffers from a pre-existing condition that was exacerbated by the accident or is functionally impaired by chronic pain that would justify treatment beyond the MIG.

[4] Y.Y. is not entitled to payment for the treatment plans in dispute as the MIG limits have been exhausted. As no benefits are overdue, no interest is payable, and an award is not warranted.

ANALYSIS

Applicability of the Minor Injury Guideline

[5] The MIG establishes a framework for the treatment of minor injuries, as defined in s. 3(1) of the *Schedule* as one or more of a sprain, strain or whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically-associated sequalae to such an injury. Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to $3,500, although an applicant may escape the MIG under s. 18(2) if they can demonstrate that a pre-existing condition documented by a health practitioner prevents maximal medical recovery under the MIG. Similarly, an applicant may be entitled to treatment beyond the MIG if they can demonstrate that psychological impairments or chronic pain causes functional impairment that frustrates their maximal medical recovery. In all cases, an applicant must establish entitlement to coverage beyond the $3,500 cap on a balance of probabilities.

[6] I find the medical evidence indicates that Y.Y. sustained predominantly minor physical injuries as a result of the accident. Indeed, on review of the first OCF-3 in evidence, the hospital, clinical and family doctor notes following the accident, I find it clear that the impairments affecting Y.Y. are sprain and strain-type injuries to his cervical and lumbar spine, headaches and a right shoulder sprain. To his credit, Y.Y. does not submit that his physical injuries remove him from the MIG.

[7] Rather, Y.Y. submits that he should be removed from the MIG based on his chronic pain resulting from his accident-related impairments, his diagnosed psychological impairments and a pre-existing shoulder injury. To this end, Y.Y. relies on the second OCF-3 completed by Dr. Pivtoran, dated November 14, 2017 as well as various clinical notes and records. The impairments identified in the disability certificate are nearly identical to the first OCF-3, with the addition of a self-reported history of right shoulder separation and a left wrist fracture in the prior conditions section and the modifier "chronic" added to all of the impairments listed previously. In addition, he relies on an Assessment of Attendant Care Needs ("Form-1") from September 2017 recommending $658.85 in monthly attendant care service, a psychological assessment from Dr. Shaul diagnosing him with Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia (driving a vehicle) and documented issues with shoulder separation. Y.Y. argues that his maximal medical recovery is impeded if he is kept within the MIG.

[8] In response, Allstate submits that Y.Y. is being properly treated within the MIG, as his physical impairments are predominantly minor injuries. Further, it submits that there is no compelling medical evidence that his pre-existing shoulder injury was exacerbated by the accident, that he suffers from a psychological impairment or that his pain causes functional impairment and prevents maximal medical recovery under the MIG. To that end, Allstate relies on Y.Y.'s self-reporting and the s. 44 reports of Dr. Bentley, physiatrist, and Dr. Marino, psychologist, who both determined that Y.Y.'s accident-related impairments were treatable within the MIG.

Pre-Existing Conditions

[9] With regards to his pre-existing conditions, Y.Y. submits that he suffers from a significant history of right shoulder injury/dislocations allegedly dating back to high school which were exacerbated by the accident. He relies on the OCF-3, clinical notes and a consultation note from Dr. Henry, dated July 9, 2019, stating that an MRI indicated that surgical intervention was recommended.

[10] In response, Allstate directs the Tribunal to the clinical notes and records of Y.Y.'s family physician from 2014 up to the date of the accident, his decoded OHIP summary and the report from Dr. Henry to demonstrate that there is no compelling evidence of a pre-existing impairment that was exacerbated by the accident. Specifically, Allstate submits that Dr. Baker's visit notes reveal the complete absence of medical complaints, including any related to the right shoulder, from August 2014 up to the date of the accident. Further, while Dr. Baker's post-accident notes indicate pain, Allstate submits that the notes reveal normal range of motion and strength. Similarly, Allstate argues that the decoded OHIP summary reveals no visits in all of 2015 and 2016 and the other visits provide no basis for a pre-existing shoulder condition. Finally, in reply to Y.Y.'s use of Dr. Henry's report, Allstate submits that there is no mention of the accident in that report, that the report indicates he dislocated his shoulder playing basketball in 2019 and that the report confirms there were no dislocations in the previous 4-5 years.

[11] On the evidence, I agree with Allstate. Simply having experienced medical issues like a dislocated shoulder in the past is not sufficient for removal from the MIG in the present. I find this is especially so where there is no compelling evidence that these issues have been exacerbated by the accident and where it is more likely that the issues arose as a result of a return to normal activities, in this case basketball. While I am alive to Y.Y.'s reports of pain, I find the clinical notes and OHIP summary fall well short of the type of compelling evidence required from a health practitioner of a pre-existing medical condition preventing maximal recovery. In a similar vein, while the second OCF-3 does identify the shoulder as a potential barrier to recovery, I find no analysis, other than subjective reports of pain, explaining why this shoulder issue prevents maximal recovery from the injuries he sustained in the accident if Y.Y. remains subjected to the MIG. More fatal, in my view, is the fact that the shoulder issues, which Y.Y. characterizes as "significant," are not documented in the medical records prior to the accident, which is required under s. 18(2), but rather based only on Y.Y.'s self-reporting to assessors. That Dr. Henry then links the shoulder issue to a basketball injury in 2019 and not the accident severely undermines this argument.

Psychological Impairments

[12] Y.Y. also argues that he sustained psychological impairments as a result of the accident that warrant removal from the MIG. He relies on the pre-screen and psychological report of Dr. Shaul / Ms. Ilios, who diagnosed him with Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia (driving

a vehicle). In the report, Dr. Shaul states that Y.Y.'s psychological symptoms are "clearly having an adverse affect on his overall functioning, and if left untreated will likely impede his recovery and delay his return to pre-accident activities of daily living," ultimately recommending treatment to address Y.Y.'s "significant" psychological symptoms including managing stressors, anxiety reduction and relaxation techniques.

[13] In response, Allstate relies on the s. 44 report of Dr. Marino, who determined that although Y.Y. had residual issues with irritability and driving-related anxiety, that he did not present with any significant psychological impairments and did not offer a diagnosis. Allstate submits that the testing data used by Dr. Marino revealed reliable results, with Y.Y. testing in the minimal range for depression and anxiety and below-average for depression, anxiety and somatization in comparison to other pain patients. Allstate submits that the report reveals Y.Y. self-reporting that his day to day function and work activities were unchanged, that his prognosis was "excellent" and that Y.Y. stated that he was not interested in participating in psychological counselling.

[14] I prefer the report of Dr. Marino and find limited evidence of a psychological impairment. On review of the medical documentation and clinical notes provided, I agree with Allstate that there is no evidence of any ongoing, substantive, post-traumatic symptomology or clinically significant psychological distress in Y.Y. as a result of the accident. There are no mentions of psychological issues to the family physician or any psychological visits in the OHIP summary. I find it odd that the referral for psychological assessment with Dr. Shaul and the OCF-18 associated with same came from Y.Y.'s chiropractor. In any event, Dr. Shaul's testing results, which do not contain any validity measures, indicate that Y.Y. is "experiencing minimal and mild levels of emotional distress" but he then discounts these scores based on Y.Y.'s self-reporting without analysis as to why. While self-reporting provides valuable insight into psychological impairments and Y.Y. may suffer from anxiety and nervousness around vehicles, there is limited evidence of any ongoing or continuous psychological complaints elsewhere to support Dr. Shaul's finding and no mention of same in any of the pre-accident clinical notes to support this conclusion.

[15] I find Dr. Shaul's ultimate diagnosis that Y.Y. is suffering from "significant" psychological symptoms to be so out of line with the bulk of the medical documentation and I find the concluding remarks to be so disproportionate to the bulk of the file and Y.Y.'s own self-reporting elsewhere that I assign Dr. Shaul's findings no weight. Indeed, I struggle to reconcile the alleged testing

results and the dearth of complaints from Y.Y. in the rest of the file with statements from Dr. Shaul like: “Y.Y. is experiencing significant psychological symptoms as a result of the index accident” and “he is experiencing considerable levels of emotional distress” and Y.Y.’s “current psychological condition has increased to a level of impairment that prevents him from performing activities of daily living”. By his own admission to Dr. Marino, Y.Y. returned to work full-time after the accident, never required attendant care, was capable of all his own personal care tasks and was apparently unaware that he was requesting psychological treatment.

[16] On this basis, I find it very troubling that Y.Y. reported to Dr. Marino that he was “feeling fine” and was unaware that he had previously undergone a psychological assessment with Dr. Shaul or that psychological treatment was being recommended on his behalf where he expressly stated that he did not want psychological treatment. As no reply submissions were offered to refute Dr. Marino’s report, to provide context for Y.Y.’s self-reporting and apparent confusion over his benefit claims or even to explain Dr. Shaul’s diagnosis, I find the report to be so disingenuous that I cannot rely on it as evidence to support Y.Y.’s assertion that he suffers from a psychological impairment warranting treatment beyond the MIG. On the contrary, I find Dr. Marino’s report to be thorough and fair, supported by validity measure testing and tied to the medical evidence before the Tribunal and Y.Y.’s own self-reporting. I cannot find that Y.Y.’s alleged psychological impairment warrants removal from the MIG on the evidence available.

Chronic Pain

[17] Last, Y.Y. submits that he should be removed from the MIG on the basis of persistent pain that he classifies as chronic pain on the basis of Dr. Pivtoran’s second OCF-3 indicating that his sprain and strain injuries were chronic. Y.Y. argues that the accident significantly contributed to his pre-existing shoulder issues and chronic pain diagnosis and that it is reasonable to explore whether he has chronic pain given that he still has pain more than 12 weeks post-accident.

[18] In response, Allstate relies on the report of Dr. Bentley and submits that there is no compelling evidence that Y.Y.’s pain affects his day to day or work function or that his pain justifies removal from the MIG. Allstate refers to the post-accident follow up notes of Dr. Baker dated September 5, 2017 that indicates the pain was improving and makes no mention of functional impairment in his daily or work activities, or with sleeping. Allstate submits that Y.Y. continued to

work and began playing basketball post-accident and did not complain to his family physician about accident-related pain or functional limitations because of it.

[19] I agree with Allstate. While pain reduction is a legitimate goal for treatment, I agree that Y.Y. reported a reduction in his pain post-accident, as he reported the pain as a 6/10 in the Form 1 but then described it as 3-4/10 at the psychological assessment and reported a 70% improvement to Dr. Bentley. While Dr. Pivtoran classifies the impairments as chronic injuries in the OCF-18, I agree with Allstate that it is difficult to reconcile how this pain causes functional impairment requiring treatment beyond the MIG with the fact that Y.Y. continued to work full-time, reported no issues with personal care or in his daily activities and was back to playing basketball when Dr. Pivtoran recommended the chronic pain assessment. The OCF-18 recommending a chronic pain assessment is dated April 12, 2018 and, oddly, indicates that Y.Y.'s pain affects his ability to work and carry out his daily activities, despite the fact that Y.Y. reported no issues with either well before.

[20] Indeed, there are no pain complaints to Dr. Baker to corroborate Y.Y.'s submission of ongoing, continuous pain affecting his function and no mention of pain from the post-accident follow up in September 2017 into 2018 or 2019. Even the recommendations in the Form-1 for assistance with tasks that allegedly caused pain were never followed up on or incurred by Y.Y. and those recommendations were based on subjective reporting and otherwise normal range of motion testing. While I accept that Y.Y. experienced pain post-accident, I find the evidence does not support his claim that the accident-related pain affects his function or range of motion, that he is dependent on pain medication or family for daily assistance to overcome it or that his family physician made an objective referral for treatment.

[21] Accordingly, I find Y.Y. has not demonstrated that he suffers from chronic pain causing functional impairment that would justify removal from the MIG. As a result of my findings that Y.Y. has not demonstrated, on a balance of probabilities, that he suffers from a pre-existing condition or psychological impairments that justify treatment beyond the limits of the MIG, I see no reason to interfere with Allstate's determination—on the basis of two s. 44 reports confirming same—that Y.Y.'s accident-related impairments are treatable within the MIG.

Are the treatment plans reasonable and necessary?

[22] Having determined that Y.Y.'s impairments are properly within the MIG, it is my understanding that the MIG limits have been exhausted and that Allstate has even paid for some treatment over and above the $3,500 limit in adjusting this file. Accordingly, it is not necessary to conduct an analysis of whether the various treatment plans in dispute are reasonable and necessary.

Award and Interest

[23] Y.Y. seeks an award under s. 10 of *O. Reg. 664* due to Allstate unfairly and improperly keeping him within the MIG and obstructing his access to treatment. Under s. 10, the Tribunal may award up to 50% of the total benefits payable if the insurer unreasonably withholds or delays payment of benefits.

[24] On the evidence, I disagree. As above, I find no reason to deviate from Allstate's determination that Y.Y.'s impairments are treatable within the MIG and certainly no evidence that it acted unreasonably in adjusting the file. In my view, the evidence relied on by Y.Y. to meet his onus was underwhelming and Allstate complied with all of its obligations under the *Schedule* in adjusting the claim. In any event, as the MIG applies and no benefits are overdue, it follows that an award and interest are not payable.

CONCLUSION

[25] For the reasons outlined above, I find that Y.Y. sustained predominantly minor physical injuries because of the accident which are treatable within the MIG. Further, I find he has not demonstrated that he sustained psychological impairments, that he suffers from a pre-existing condition that was exacerbated by the accident or is hindered by chronic pain justifying treatment beyond the MIG.

[26] Y.Y. is not entitled to payment for any of the treatment plans in dispute as the MIG limits have been exhausted. As no benefits are overdue, no interest is payable, and an award is not warranted.

Released: May 14, 2020

Jesse A. Boyce
Adjudicator