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: Gyamfi v. Aviva General Insurance Company, 2020 ONLAT 19-011925/AABS

Released Date: 12/01/2020
File Number: 19-011925/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:

Georgina Gyamfi

Applicant

and

Aviva General Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: **Theresa McGee, Vice-Chair**

APPEARANCES:

For the Applicant: David Carranza, Paralegal

For the Respondent: Evan Argentino, Counsel

HEARD: **By way of written submissions**

REASONS FOR DECISION AND ORDER

OVERVIEW

[1] The applicant, ("G.G") was involved in an automobile accident on November 25, 2016, when her vehicle was rear-ended while stopped at an intersection. She sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*").[1]

[2] The respondent, ("Aviva") determined that G.G.'s injuries were predominantly minor and held her to treatment within the Minor Injury Guideline (the "MIG").[2] G.G. claimed certain benefits in excess of the $3,500.00 monetary limit in the MIG, which Aviva denied. G.G. then applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") for a resolution of the dispute.

ISSUES IN DISPUTE

[3] I am to decide the following issues:

i. Are G.G.'s injuries predominantly minor injuries as defined in s. 3 of the *Schedule* and therefore subject to treatment within the MIG and the $3,500.00 limit in s. 18(1) of the *Schedule*?

ii. Is G.G. entitled to $1,326.20 for chiropractic and physiotherapy services recommended by Dr. Jessica Kissoon of Westney Spine Care and Wellness Centre in a treatment plan dated May 31, 2018?

iii. Is G.G. entitled to $2,864.40 for physiotherapy services recommended by Mehul Gulabbhai Patel of Ajax Rehabilitation Centre in a treatment plan dated December 12, 2918, submitted on January 10, 2019?

iv. Is G.G. entitled to $2,652.10 for a physiatry assessment, recommended by Dr. Chen in a treatment plan dated November 13, 2018?

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

RESULT

[4] G.G. has failed to establish, on a balance of probabilities, that her accident-related injuries are not predominantly minor as defined in s. 3 of the *Schedule*. She is only entitled to $3,500.00 for the treatment of her minor injuries under the

[1] Ontario Regulation 34/10.
[2] Superintendent's Guideline No. 01/14.

MIG. As those funds have already been exhausted, she is not entitled to the treatment plans in dispute. I need not consider whether those treatment plans are reasonable and necessary as a result of the accident. No interest is payable.

ANALYSIS

[5] To be eligible for the benefits claimed in this application, G.G. must demonstrate that her accident-related injuries warrant treatment outside the MIG. Pursuant to s. 18(1) of the *Schedule*, medical and rehabilitation benefits for the treatment of an impairment that is predominantly a minor injury shall not exceed $3,500.00 in accordance with the MIG. Section 18(2) of the *Schedule* provides that the $3,500.00 funding limit does not apply if an applicant provides compelling medical evidence that she has a pre-existing medical condition that will prevent her from achieving maximal recovery from the minor injury if she is subject to the MIG funding limit.

[6] Section 3(1) of the *Schedule* defines a "minor injury" as "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." An applicant bears the onus of establishing entitlement to treatment outside the MIG.[3]

[7] If G.G. can establish, on a balance of probabilities, that she is entitled to treatment outside the MIG, she must then demonstrate, in accordance with s. 15(1) of the *Schedule*, that the treatment plans in dispute represent reasonable and necessary expenses incurred as a result of the accident.

[8] G.G. submits that she is entitled to treatment outside the MIG because of a pre-existing right shoulder injury, hypertension, diabetes and high cholesterol. She also submits that her accident-related injuries are non-minor because she received a diagnosis of a chronic pain disorder with associated psychological impacts. She also submits that she is entitled to payment for the disputed treatment plans because Aviva failed to provide adequate reasons for denying treatment, in contravention of s. 38(8) of the *Schedule*. I will deal with each of her submissions in turn.

[3] *Scarlett v Belair Insurance*, 2015 ONSC 3635.

Pre-existing and accident-related injuries

[9] G.G. submits that she had a right shoulder condition documented prior to the accident that entitles her to treatment outside the MIG. In 2014, she consulted an orthopedic surgeon, Dr. C.P. Chang, about right shoulder pain, and he made a finding of right shoulder tendinitis and sternoclavicular joint arthritis.[4] There is also evidence, in the form of an x-ray report dated May 20, 2016, that G.G. had mild degenerative changes in her cervical spine, though the imaging showed that the surrounding soft tissues were normal. G.G. has presented no compelling evidence that her right shoulder condition, or any other condition documented before the accident, satisfies the requirements in s. 18(2) of the *Schedule*. She has not made submissions or directed me to any medical evidence that her condition prevents her from achieving maximal recovery from her minor injury if subject to the MIG finding limit.

[10] G.G. was seen by Dr. Chang again in August of 2018, nearly two years after the accident, but in his report from that consultation, he made no mention of G.G.'s pre-existing right shoulder tendinitis being a barrier to her recovery from her accident-related injuries. In his August 21, 2018 report, Dr. Chang refers only to a *subsequent* motor vehicle accident that G.G. was involved in November of 2017. Dr. Chang does note, in a report dated May 27, 2019, that physiotherapy had provided G.G. with some help, but her insurer had denied her funding. This passing comment, made well over two years after the accident, is not capable of supporting a finding that G.G. was prevented from achieving maximum recovery due to her pre-accident right shoulder tendinitis.

[11] As a result of the accident, G.G. sustained predominantly minor, soft tissue injuries as documented by Dr. Jessica Kissoon, Chiropractor, in a June 19, 2017 Disability Certificate (OCF-3), including whiplash associated disorder with neurological signs and sprains and strains of the thoracic and lumbar spine.[5] The medical documentation of G.G.'s pre-existing right shoulder injury does not compellingly show that it would hinder her recovery from these injuries. Additionally, the evidence is inconsistent as to the extent of G.G.'s pre-existing complaints:

i. In a March 5, 2019 Section 44 Insurer's Examination (IE) with Dr. Ko, Physiatrist, G.G. reported that she did have pre-existing right shoulder

[4] Applicant's Brief, Tab 7: Orthopedic Surgery Report of Dr. C.P. Chang, dated August 21, 2018.
[5] Applicant's Brief, Tab 2: Disability Certificate dated June 19, 2017.

pain, but it was completely resolved by the time of the 2016 motor vehicle accident;[6]

ii. In a June 12, 2019 consultation report, Dr. C.J. Peksun, Orthopedic Surgeon, noted, "[G.G.] notes the pain began back in *2017*. She was involved in a motor vehicle accident where she was struck from behind" (emphasis added).[7] Dr. Peksun's review of G.G.'s past medical history makes no note of any pre-accident right shoulder issues;

iii. In a June 17, 2019 Physiatry Assessment, Dr. Chen diagnosed G.G. with pre-existing right shoulder tendinopathy with post-traumatic aggravation but noted that she "denied a history of significant pre-existing injury and pain impairments."[8]

Chronic pain disorder and psychological impacts

[12] G.G. submits that she developed a chronic pain disorder with psychological impacts as a result of the accident, and that these are non-minor injuries that warrant removal from the MIG. She relies on the August 21, 2018 consultation report of Dr. Chang, who determined that she had developed chronic pain possibly related to cervical spine whiplash injury and cervical nerve root irritation resulting from the accident. I note that at the time of the accident, Dr. Kissoon documented injuries to G.G.'s thoracic and lumbar spine, not her cervical spine. Again, Dr. Chang's August 21, 2018 report specifically refers to a November 2017 accident and makes no mention of the accident that is the subject of this application.

[13] G.G. further relies on the Physiatry Assessment report of Dr. Chen, dated June 17, 2019, in which Dr. Chen diagnosed G.G. with chronic pain disorder with associated psychological impacts. Those psychological impacts are not explored in a level of detail capable of supporting a psychological diagnosis. There is reference in the conclusion of the report to post-traumatic sexual dysfunction "as reported by the examinee" and post-traumatic insomnia "as reported by the examinee" but these do not amount to a psychological diagnosis. Furthermore, it falls outside the scope of expertise of a physiatrist to diagnose a psychological condition. The diagnosis of chronic pain disorder is supported only by a finding that G.G. continued to report pain long after the accident. Chronicity of pain complaints alone do not warrant treatment outside the MIG. There is no evidence of significant functional impairment as a result of the pain. G.G., a

[6] Respondent's Brief, Tab 2: Physiatry Examination of Dr. Ko dated March 19, 2019.
[7] Applicant's Brief, Tab 13: Orthopedic Surgery Report of Dr. C.J. Peksun, dated June 12, 2019.
[8] Applicant's Brief, Tab 14: Dr. Y. Chen Physiatry Assessment Report, dated June 17, 2019.

personal support worker, went to work immediately after the accident and completed a shift. She continued to work after the accident. She reported to Dr. Chen that she stopped work for two weeks in January 2017 due to pain but resumed regular duties soon after.[9] The evidence shows that G.G. was able to work despite her injuries.

[14] Aviva raises a causation defence to G.G.'s submission that the injuries and impairments documented in the reports of Dr. Chang in August 2018 and Dr. Y. Chen in June 2019 were as a result of the accident. It submits that G.G. was involved in another motor vehicle accident in November 2017, and that she sustained a right shoulder injury in the workplace in December of 2018. G.G. submits that these other causes should not be considered because she consistently complained of right shoulder pain, headaches, pain in her neck, right arm, upper and lower back from the time of the accident onward. G.G. relies on the clinical notes and records of her family physician, Dr. Vimal Amarasekera, to establish the timeline of her complaints. G.G. did not visit her family physician until two months after the accident, on January 26, 2017. By this time, she was reporting resolution of her symptoms to her chiropractic care provider, Dr. Kissoon, at Westney Spine Care & Wellness Centre.[10] I am unable to base any conclusions about G.G.'s accident-related diagnoses or treatments on the clinical notes of Dr. Amarasekera, because they are handwritten, not transcribed, and almost completely illegible.

Aviva's reasons for denying treatment

[15] G.G. submits that she is entitled to the treatment plans in dispute because Aviva failed to provide adequate "medical reasons and all of the other reasons" why it did not consider the proposed treatment and assessment reasonable and necessary in accordance with s. 38(8) of the *Schedule*. Pursuant to s. 38(11) of the *Schedule*, an insurer that fails to give notice in accordance with s. 38(8) in connection with a treatment and assessment plan is prohibited from taking the position that the MIG applies and is liable to pay for the expenses contained in the plan until providing such notice.

[16] Aviva submits that as a matter of procedural fairness, G.G. should be barred from raising the issue of its compliance with s. 38(8) because she failed to raise it at any time prior to making hearing submissions. G.G. submits that nothing in the *Schedule* requires an insured person to raise the issue of adequate notice

[9] Applicant's Brief, Tab 14: Dr. Y. Chen Physiatry Assessment Report, dated June 17, 2019.
[10] Respondent's Brief, Tab 6: Clinical notes and records of Westney Spine Care and Wellness.

under s. 38(8) prior to addressing it in hearing submissions. G.G. is not barred from raising the issue.

[17] G.G. relies on this Tribunal's decision in *M.B. v. Aviva Insurance Canada*[11] for its position that Aviva's denials failed to satisfy the requirement for reasons in s. 38(8) of the *Schedule*. In *M.B.*, the Tribunal held that an insurer's reasons for denying a benefit should include:

i. specific details about the insured's condition forming the basis for the insurer's decision; and

ii. a reference to the specific benefit or determination at issue.

Ultimately, in order to serve the *Schedule*'s consumer protection goal, an insurer's reasons should be clear enough allow an unsophisticated person to make an informed decision to either accept or dispute the decision at issue.[12]

[18] Upon review of Aviva's denials of the three treatment and assessment plans in dispute, I conclude that each denial was accompanied by reasons satisfying the requirements of s. 38(8) of the *Schedule*. The denials made specific reference to the available medical documentation as indicating that G.G.'s impairment arose from predominantly minor, soft tissue injuries, and cited the absence of compelling medical evidence to suggest otherwise as another reason for its denials. Aviva clearly communicated each denial and gave reasons capable of allowing G.G. to make an informed decision to either accept or dispute the decisions at issue. Specifically:

i. On June 28, 2019, Aviva denied the treatment plan identified in issue ii. above on the grounds that the injuries outlined in the documentation Aviva had received to date are soft tissue in nature and appear to be consistent with the definition of a minor injury, and that G.G. had not provided compelling evidence that the impairment she sustained is not predominantly a minor injury;[13]

ii. On January 24, 2019, Aviva denied the treatment and assessment plan identified in issue iii. above, citing the available medical documentation that indicated G.G.'s impairment is predominantly a minor injury, and that the maximum payable for a predominantly minor injury had already been reached. Aviva also cited the lack of compelling evidence form a health

[11] 2017 CanLII 87160.
[12] *M.B. v. Aviva Insurance Canada*, 2017 CanLII 87160 at para. 26.
[13] Respondent's Brief, Tab 27: Denial letter for Issue #2 dated June 28, 2019.

practitioner that the injury G.G. had sustained was not a predominantly minor injury;[14]

iii. On December 5, 2018, Aviva denied the treatment and assessment plan identified in issue iv. above on the grounds that the medical documentation it had reviewed to date indicated G.G.'s impairment was predominantly a minor injury, and that that there was no compelling evidence that the impairment sustained was not predominantly a minor injury;[15]

iv. On April 1, 2019, Aviva restated its denials of all three plans based on the opinion of Dr. Ko, Physiatrist, whose March 5, 2019 IE determined that G.G. sustained, as a result of the accident, sprain/strain injuries to her right trapezius and right parascapular region, and a sprain/strain injury to her lower back.[16]

Conclusion

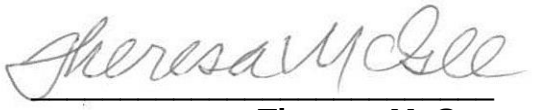
[19] G.G. has failed to discharge her onus of establishing that her accident-related injuries are not predominantly minor. As such, she is subject to treatment within the MIG. The evidence of her pre-existing right shoulder injury does not satisfy the requirements set out in s. 18(2) of the *Schedule*. I am not persuaded that G.G. suffered chronic pain or psychological issues beyond the *sequelae* of her minor, soft tissue injuries. G.G. has not persuaded me that I should disregard her November 2017 motor vehicle accident and December 2018 workplace injury as possible causes of her continued pain complaints. As the funding limit under the MIG has been exhausted, Aviva is not liable to pay for any further treatment. As such, I do not need to consider whether the disputed treatment and assessment plans are reasonable and necessary. No benefits are owing, and no interest is payable.

[14] Respondent's Brief, Tab 28: Denial letter for Issue #3 dated January 24, 2019.
[15] Respondent's Brief, Tab 30: Denial letter for Issue #4, dated December 5, 2018.
[16] Respondent's Brief, Tab 31: Denial letter for all three issues in dispute dated April 1, 2019.

ORDER

[20] G.G. has failed to establish that her accident-related injuries warrant treatment outside the MIG. As such, she is not entitled to the treatment and assessment plans in dispute. No interest is payable. The application is dismissed.

Released: December 1, 2020



Theresa McGee
Vice-Chair