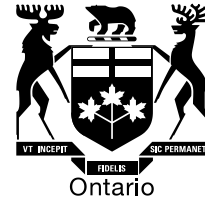


LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards
Tribunals Ontario



Date: **August 30, 2016**

Tribunal File Number: **16-000084/AABS**

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between: **S.S.**

Applicant

and

State Farm Mutual Automobile Insurance Company

Insurance Company

AMENDED

REASONS FOR DECISION AND ORDER

Adjudicator: Jeanie Theoharis

Written submissions provided by:

For the Applicant: Arvin Gupta, counsel for the Applicant

For the Insurance Company: Sharla Bandoquillo, counsel for the Insurance Company

Written Hearing: August 5, 2016

Overview

1. S.S. (the 'Applicant') was injured in an automobile accident on February 10, 2014. The automobile was insured by State Farm Mutual Automobile Insurance Company (the 'Insurance Company').
2. The Applicant brought an application before the Licence Appeal Tribunal – Automobile Accident Benefits Service (the 'Tribunal') pursuant to section 280(2) of the *Insurance Act*, R.S.O. 1990, c. I-8 (the 'Act'), and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the 'Schedule').¹
3. The parties were unable to resolve their dispute at a case conference held on June 20, 2016, and the matter proceeded to a written hearing. All submissions and evidence were filed with the Tribunal by August 4, 2016. A review of those documents form the basis of this decision.

Facts

4. The Applicant applied for a medical benefit pursuant to a treatment plan (OCF-18) dated October 8, 2014, and submitted by Dr. James Fung, Chiropractor, of Reddy's Physio Rehab Inc. for chiropractic treatment and massage therapy in the amount of \$2,233.46.
5. The Insurance Company denied the treatment plan on the basis that the Applicant's predominant injuries were minor injuries as defined in section 3 of the Schedule, and therefore treatment was pursuant to the *Minor Injury Guideline – Superintendent's Guideline No. 2/10* (the 'Guideline'), and would not be entitled to medical benefits beyond the maximum of \$3,500.00 as prescribed in section 18 of the Schedule.
6. The Applicant submits that the Applicant's injuries fall outside the Guideline because the Applicant's injuries, when looked at as a whole, amount to an injury of cervical radiculopathy, which would fall outside the definition of a minor injury.
7. The Insurance Company submits that the Applicant's injuries are more in line with a whiplash injury, which falls within the definition of a minor injury.

¹ Note that, pursuant to s. 68 of the *Schedule*, certain accident benefits are *deemed* to be included in a motor vehicle liability policy that is in effect on September 1, 2010, if an accident occurs on or after September 1, 2010 and before the earlier of (a) the first expiry date under the policy and (b) the day on which the policy is terminated by the insurer or the insured.

Issues in Dispute:

8. The issues in dispute are:
 - a. Do the Applicant's injuries fall outside of the Minor Injury Guideline?
 - b. Is the Applicant entitled to receive a medical benefit pursuant to a treatment plan (OCF-18) dated October 8, 2014, and submitted by Dr. James Fung, Chiropractor, of Reddy's Physio Rehab Inc. for chiropractic treatment and massage therapy in the amount of \$2,233.46?
 - c. Is the Applicant entitled to interest for the overdue payment of benefits pursuant to section 51 of the Schedule?
9. I answer each issue in the negative.

Law

10. Section 3 of the Schedule defines a minor injury as a "sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae."
11. "Minor Injury Guideline" means a guideline,
 - (a) That is issued by the Superintendent under subsection 268.3(1.1) of the Act and published in The Ontario Gazette, and
 - (b) That establishes a treatment framework in respect of one or more minor injuries.
12. Section 18(1) of the Schedule provides a maximum limit of \$3,500.00 for any one accident for medical and rehabilitation benefits for persons who have sustained a predominantly minor injury.
13. Section 18(2) states that the \$3,500.00 limit noted in section 18(1) "does not apply to an insured person if his or her health practitioner determines and provides compelling evidence that the insured person has a pre-existing medical condition that was documented by a health practitioner before the accident and that will prevent the insured person from achieving maximal recovery from the minor injury if the insured person is subject to the \$3,500

limit or is limited to the goods and services authorized under the Minor Injury Guideline.”

14. The objectives of the Guideline are to provide individuals with faster access to rehabilitation, improve health care resources, provide certainty around cost and payment to the parties, and be more inclusive in providing treatment for those who have minor injuries. The focus is on the application of a functional restoration approach.

Analysis

Burden of proof

15. The court in *Scarlett v. Belair Insurance Co.* [2015] OJ No. 2939, established that the Applicant has the burden of proof to establish that his injuries fall outside of the Guideline. The burden of proof is on a ‘balance of probabilities’, in that has the Applicant more likely than not established that the injuries fall outside of the Guideline, including to provide compelling evidence provided by his health practitioner to show that he falls outside the Guideline, such that the \$3,500.00 limit on the medical benefits would not apply.
16. The court found that compelling evidence looks at the sufficiency of evidence required to satisfy the balance of probabilities standard, and whether the evidence is sufficient to meet the test of compelling must be determined on the facts of each individual case having regard to what is reasonable in all of the circumstances.

Are the Applicant’s injuries outside of the Minor Injury Guideline?

17. I do not find that the Applicant provided the evidence necessary to establish that his injuries are outside of the Guideline.
18. It is not disputed that as a result of the motor vehicle accident, the Applicant sustained neck pain and headaches. The issue in dispute is whether the Applicant sustained an injury of cervical radiculopathy, an injury which the Applicant argues falls outside the Guideline.
19. The Applicant relies on an OCF-18 dated October 8, 2014, wherein Dr. James Fung noted that treatment was needed. The injuries noted on the OCF-18 include sprain and strains of joints, shoulder ligaments and spine, low back pain, cervical radiculopathy, and headache symptoms.
20. The Applicant also relies on Dr. James Fung’s rebuttal report dated July 12, 2016, to support the position that the Applicant’s injuries are outside of the

Guideline. In the report Dr. Fung determined that the Applicant sustained cervical radiculopathy, and that cervical radiculopathy cannot be characterized as a sprain or strain type injury.

21. The Applicant submitted that in the case of *Qasimi v. State Farm Mutual Automobile Insurance Co.* [2015] O.F.S.C.D. No. 303, (Ontario Financial Services Commission) the arbitrator found that a cervical radiculopathy injury would not fall within the definition of a minor injury.
22. The Insurance Company does not contest the finding in *Qasimi* that a cervical radiculopathy injury would not fall within the definition of a minor injury. The Insurance Company argues that the evidence in the present case does not support a finding that the Applicant sustained a cervical radiculopathy injury. The Insurance Company argues that the Applicant sustained a whiplash injury, which by definition is a minor injury, and that the Applicant did not have any pre-existing condition which would prevent him from being treated within the \$3,500.00 limit.
23. The Insurance Company relies on a report from their s. 44 assessor Dr. H. Platnick, M.D., dated November 24, 2014, Dr. Ramzy's (the Applicant's family doctor) clinical notes and records, an x-ray report and CT scan report, and a Treatment Confirmation Form (OCF-23) dated February 28, 2014, from Dr. Frederick Levenston, Chiropractor, of Reddy's Physio Rehab Inc.
24. I do not find that the Applicant's evidence, taken as a whole, supports a finding of cervical radiculopathy. The diagnosis that I accept is that of the Applicant's family doctor, Dr. Ramzy, and that of Dr. Platnick, being a whiplash injury.
25. The Insurance Company relies on a report from Dr. H. Platnick, M.D. dated November 24, 2014. Dr. Platnick disagrees that the Applicant has cervical radiculopathy and opines that the Applicant sustained a cervical myofascial strain WAD I, and a lumbosacral myofascial strain. Based on this diagnosis, Dr. Platnick concludes that the Applicant's injuries fall within the Guideline, the OCF-18 Treatment Plan dated October 8, 2014, is not reasonable and necessary because the Applicant's injuries can be treated within the Guideline, and that there was no compelling evidence that the Applicant had a pre-existing medical condition that will prevent them from achieving maximal recovery within the Guideline.
26. Dr. Ramzy, the Applicant's family doctor, provided a copy of his clinical notes and records to be reviewed. Upon review of the clinical notes and records, many notations were made indicating a whiplash injury, neck pain, and cervical strain.

27. On March 4, 2014 the doctor made an assessment that an x-ray is required to look further into the neck sprain. On the requisition, Dr. Ramzy notes that there was a motor vehicle accident, whiplash injury.
28. The x-ray report dated March 5, 2014, indicates that the alignment from the skull base to C7 was intact, no fracture or subluxation visible, no prevertebral soft tissue swelling, no significant disc space narrowing, the atlantoaxial alignment is intact and no foraminal narrowing. The report did note there is a mild degenerative disc disease from C3 to C6 with endplate osteophytes.
29. Dr. Ramzy, on March 8, 2014, recommended a CT scan because the x-ray was not clear. Moreover, the clinical notes and records indicate that the Applicant is still having neck pain and has a tender cervical spine. The Applicant attended the Scarborough Hospital for a CT scan of the cervical spine from the base of the skull to T1 on March 14, 2014. The CT Scan Report concluded that there was no pathology. Generally the observations made indicated that the alignment was normal, the facet joints showed no significant abnormalities, discs were not bulging, thecal sacs were not compressed and exiting nerve root canals were not compressed, and no fracture seen at the base of skull and C1.
30. Dr. Ramzy's March 14, 2014, notes indicate a whiplash injury, neck and upper back pain, CT scan negative, and notes to continue physiotherapy.
31. Moreover, on a Treatment Confirmation Form (OCF-23) dated February 28, 2014, Dr. Frederick Levenston, Chiropractor, of Reddy's Physio Rehab Inc. described the Applicant's injuries as being chronic post-traumatic headache, non-organic sleep disorder, sprain and strain to the elbow, lumbar spine, ribs, sternum and thoracic spine, and whiplash associated disorder (WAD2) with complaint of neck pain with musculoskeletal signs.
32. Dr. Platnick's report dated November 2014, noted that the Applicant had neck pain, back pain and headaches. He also stated that the Applicant did not report radicular symptoms into the extremities or associated weakness, numbness or tingling, nor did he report associated vertigo, syncope, or visual complaints. Dr. Platnick also noted that there was no evidence of nerve root tension or muscle wasting in the extremities.
33. The present case can be distinguished from *Qasimi* because in *Qasimi* the health practitioners had assessed a cervical radiculopathy injury having considered a number of medical records and reports, including for instance a disability certificate, HRM Cervical Evaluation, Vernova Baseline/Benchmark Evaluation, Surface Thermography (Thermal Scan), Activities of Normal Life Intervention, Surface Electromyography (sEMG), Nerve Conduction Test,

Isokinetic Evaluation, In-Home Assessment Report, Functional Capacity Evaluation, Balance Evaluation, and Worksite Assessment. One of the health practitioners in *Qasimi* stated that a diagnosis of nerve radiculopathy was based on the Nerve Conduction Test; and the other health practitioner stated that the Nerve Conduction Test is not solid proof of radiculopathy, but does support the diagnosis and is strong evidence that requires further testing.

34. In the present case, the Applicant's health practitioners did not present sufficient documentary evidence, supporting reasons and analysis to establish that the Applicant had cervical radiculopathy. For instance, in the present case, the Applicant's health practitioners did not conduct a Nerve Conduction Test, nor did they have supporting reasons and persuasive analysis to establish a finding of cervical radiculopathy. The absence of further testing, supporting reasons and persuasive analysis diminishes the weight of Dr. Fung's conclusion. Coming to a conclusion that the Applicant has cervical radiculopathy based on the Applicant's complaints of pain and not conducting further tests and assessments does not satisfy, on a balance of probabilities, Dr. Fung's diagnosis of cervical radiculopathy. I prefer the evidence of Insurance Company over the evidence presented by the Applicant.
35. The Applicant argues that in *Qasimi*, the adjudicator suggested that the Insurance Company ought to have conducted various tests to support their diagnosis that the Applicant did not have cervical radiculopathy. The Applicant suggests that since Dr. Platnick did not conduct a Nerve Conduction Test, then his conclusion of WAD should not be preferred. This is incorrect reasoning, because in *Qasimi*, the insured had established a condition that was outside the Guideline. The insurance company in *Qasimi* was trying to refute the diagnosis without having conducted the same thorough analysis. In the present case, I do not find that the Applicant met its burden to establish that the injuries fell outside of the Guideline.
36. The Applicant also did not provide compelling evidence that he had a pre-existing condition which would prevent him from being treated within the \$3,500.00 Guideline limit.
37. Dr. Platnick's report noted that any injuries sustained by the Applicant in a prior accident had been resolved, and no pre-accident medical condition was identified to prevent the Applicant from achieving maximal recovery within the \$3,500.00 Guideline limit.
38. Moreover, the Treatment documents, completed by Dr. Fung and Dr. Levenston also noted that the Applicant did not have any pre-existing conditions that could affect his treatment to the injuries.

39. The Applicant's injuries are predominantly minor injuries, and the Applicant has not provided compelling evidence of a pre-existing injury that would prevent him from achieving maximal medical recovery. As such, I find that the Applicant's injuries and respecting treatment fall within the Guideline.

Interest

40. Section 51 of the Insurance Act states:

51. (1) An amount payable in respect of a benefit is overdue if the insurer fails to pay the benefit within the time required under this Regulation.

(2) If payment of a benefit under this Regulation is overdue, the insurer shall pay interest on the overdue amount for each day the amount is overdue from the date the amount became overdue until it is paid, at the rate of 1 per cent per month, compounded monthly.

41. The benefits claimed in the OCF-18 from Dr. James Fung, are not overdue, and as such, no interest is payable.

ORDER

After considering the evidence, pursuant to the authority vested in it under section 280(2) of the Act, the Tribunal orders that:

- (i) The Applicant's injuries fall within the Minor Injury Guideline.
- (ii) The Applicant is not entitled to receive a medical benefit pursuant to a treatment plan (OCF-18) dated October 8, 2014, and submitted by Dr. James Fung, Chiropractor, of Reddy's Physio Rehab Inc. for chiropractic treatment and massage therapy in the amount of \$2,233.46.
- (iii) The Applicant is not entitled to receive interest.
- (iv) The Applicant's application is dismissed.

Released: August 30, 2016

Jeanie Theoharis
Adjudicator