

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Citation: J.S. vs. Aviva General Insurance, 2020 ONLAT 18-012528/AABS

**Release Date: 05/22/2020
File Number: 18-012528/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:

J.S.

Applicant

and

Aviva General Insurance

Respondent

DECISION

PANEL: Melody Maleki-Yazdi, Adjudicator

APPEARANCES:

For the Applicant: Alexei Antonov, Counsel
Samuel Gnanasegaram, Counsel

For the Respondent: Candace Mak, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] J.S. (“the applicant”) was injured in an automobile accident (“the accident”) on July 20, 2017, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the “Schedule”).
- [2] He applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) for dispute resolution when his claims for medical benefits and costs of examinations were denied by the respondent.

ISSUES

- [3] The following issues are in dispute for this hearing:
 - (i) Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$3,165.75 for chiropractic treatment recommended by Prime Health Care Inc. in a treatment plan (OCF-18) submitted on August 15, 2017, and denied on August 24, 2017?
 - (ii) Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$2,306.50 for chiropractic treatment recommended by Prime Health Care Inc. in an OCF-18 submitted on November 22, 2017, and denied on November 23, 2017?
 - (iii) Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$1,138.30 for chiropractic treatment recommended by Prime Health Care Inc. in an OCF-18 submitted on January 17, 2018, and denied on January 22, 2018?
 - (iv) Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$1,230.92 for an attendant care needs assessment recommended by Prime Health Care Inc., submitted on August 23, 2017, and denied on August 24, 2017?
 - (v) Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$2,000.00 for a chronic pain assessment recommended by Prime Health Care Inc., submitted on January 29, 2018, and denied on January 29, 2018?
 - (vi) Is the applicant entitled to payment for the cost of examination in the amount of \$2,000.00 (less the partially approved amount of \$1,229.19) for a psychological assessment recommended by Prime Health Care Inc. in a treatment plan (OCF-18) submitted on November 14, 2017, and denied on November 15, 2017?
 - (vii) Is the applicant entitled to an award under Ontario Regulation 664

¹ O. Reg. 34/10.

because the respondent unreasonably withheld or delayed the payment of benefits?

- (viii) Is the applicant entitled to interest on any overdue payment of benefits?
- (ix) Is the applicant entitled to costs under Rule 19.1 of the *Common Rules of Practice and Procedure*?

RESULT

- [4] The applicant is entitled to the following treatment plans because they are reasonable and necessary:
 - (i) Chiropractic treatment in the amount of \$3,165.75;
 - (ii) Attendant care assessment in the amount of \$1,230.92;
 - (iii) Chronic pain assessment in the amount of \$2,000.00; and
 - (iv) Psychological assessment in the amount of \$2,000.00 (less the partially approved amount of \$1,229.19).
- [5] The applicant is not entitled to the following treatment plans because they are not reasonable and necessary:
 - (i) Chiropractic treatment in the amount of \$2,306.50; and
 - (ii) Chiropractic treatment in the amount of \$1,138.30.
- [6] The applicant is entitled to interest on any overdue payments of benefits.
- [7] The applicant is not entitled to an award or costs.

ANALYSIS

Are the three treatment plans for chiropractic treatment reasonable and necessary?

- [8] Sections 14-16 of the *Schedule* provide that an insurer is only liable to pay for medical and rehabilitation benefits that are reasonable and necessary as a result of the accident. The applicant bears the onus of proving on a balance of probabilities that a treatment and assessment plan is reasonable and necessary.
- [9] There are three treatment plans for chiropractic treatment. These treatment plans also include massage therapy and acupuncture treatment. The applicant submits that these treatment plans correspond to the exacerbated accident-related injuries noted in his medical records. The first treatment plan was recommended by Dr. Vyvyen Le (chiropractor). It is in the amount of \$3,136.75

and was submitted on August 15, 2017. The second and third treatment plans were recommended by Dr. Chad Hefford (chiropractor). The second treatment plan is in the amount of \$2,306.50 and was submitted on November 22, 2017. The third treatment plan is in the amount of \$1,138.30 and was submitted on January 17, 2018.

- [10] The respondent submits that these treatment plans are not reasonable and necessary. It relies on the opinion of its insurer's examination ("IE") assessor, Dr. Isa Mohammed (general practitioner) and submits that there is a lack of contemporaneous medical evidence.
- [11] Dr. Mohammed conducted an IE assessment on October 26, 2017, approximately three months after the accident. In his report dated November 9, 2017, he found no evidence of a neurological or radicular pathology related to the accident, and concluded that, strictly from a musculoskeletal perspective, the applicant has soft tissue injuries that would be consistent with minor injuries as defined by the *Schedule*. Dr. Mohammed prepared an addendum dated August 22, 2019, approximately two years and one month after the accident, after assessing the applicant on August 6, 2019. Dr. Mohammed again found that the applicant suffered soft tissue injuries that would be consistent with minor injuries as defined by the *Schedule*.
- [12] I find that only the first treatment plan in the amount of \$3,136.75 is reasonable and necessary. I find that the two other treatment plans, in the amounts of \$2,306.50 and \$1,138.30, are not reasonable and necessary.
- [13] The clinical note of Dr. Khin Myat, the applicant's family physician, dated July 26, 2017, approximately one week after the accident, indicates that the applicant is attending physiotherapy. Dr. Myat recommends the continuation of physiotherapy. The clinical note of Dr. Mary El Sabawy (family physician) dated May 6, 2019, approximately one year and 10 months after the accident, mentions the applicant's psychological diagnoses and Dr. El Sabawy refers him to a sleep study. Regarding the applicant's elevated right hemidiaphragm, I find that the results of the X-ray report dated July 24, 2017 (four days after the accident) and the CT report dated August 3, 2017 (approximately two weeks after the accident) concluded "no significant pathology is identified" and "no suspicious CT findings", respectively.
- [14] The information contained within the various assessments provides more insight into whether the applicant would benefit from chiropractic treatment. In the IE assessment dated November 9, 2017, Dr. Mohammed opined that limitations in the range of motion were found in the shoulders bilaterally, cervical spine and lumbar spine. In the addendum report dated August 22, 2019, Dr. Mohammed opined that the applicant's range of motion and strength testing presented normal findings across all joints even though some movements were painful. The report indicates that the applicant attended physiotherapy treatment once per week and the treatment began approximately one week after the accident.

The report notes that the applicant's most recent visit was in October of 2018.

- [15] The applicant's assessor, Dr. Andrew Shaul (psychologist), conducted a psychological assessment on January 22, 2019 (approximately one year and six months after the accident). In his report dated March 4, 2019, Dr. Shaul indicates that the applicant received a multidisciplinary treatment regimen at a rate of three times per week and then reduced his treatment frequency to two times per week. He notes that the applicant found that the treatment helped to alleviate his pain.
- [16] I find that the applicant is entitled to the treatment plan in the amount of \$3,136.75 because its comprehensive and multidisciplinary approach will help alleviate the applicant's pain. Dr. Mohammed opined in his report that the applicant experiences some painful movements and the applicant told Dr. Shaul that he found that the multidisciplinary treatment helped to alleviate his pain.
- [17] The treatment plan in the amount of \$3,136.75 would be beneficial in reducing the applicant's pain, increasing strength, increasing range of motion, and returning him to return of activities of normal living and to pre-accident work activities. The proposed treatment plan includes the following: chiropractic, massage therapy and acupuncture treatment, as well as a functional exercise program, back support and a cervical pillow, hot/cold gel packs and analgesic cream.
- [18] I find that the treatment plan in the amount of \$3,136.75 will provide a reasonable amount of treatment sessions to determine whether continuing treatment is beneficial to the applicant's long-term improvement or if he has achieved maximal medical recovery. Therefore, the applicant is not entitled to the two remaining treatment plans in the amounts of \$2,306.50 and \$1,138.30 because they include duplicative treatments and are less comprehensive than the approved treatment plan.

Is the attendant care assessment reasonable and necessary?

- [19] I find that the attendant care assessment, recommended by Dr. Vyvien Le (chiropractor) is reasonable and necessary. The applicant is entitled to this treatment plan because I am convinced that he requires an assessment to determine his future needs for attendant care as a result of the accident.
- [20] The applicant submits that this treatment plan is reasonable and necessary because the applicant's activity limitations and apparent work-related modifications necessitate this assessment.
- [21] The respondent relies on Dr. Mohammed's opinion, as well as a lack of contemporaneous medical evidence. The respondent also relies on surveillance evidence conducted of the applicant between April 17, 2019 and July 14, 2019,

approximately one year and nine months to approximately two years after the accident.

- [22] Dr. Mohammed conducted an IE paper review assessment dated November 14, 2017. He notes that he had previously seen the applicant on October 26, 2017, and upon review of the additional documentation provided, his medical opinion has not changed. He concluded that, strictly from a musculoskeletal perspective, the applicant has soft tissue injuries that would be consistent with minor injuries as defined by the *Schedule*. He recommends that the applicant should return to his regular activities as tolerated using pacing and modifications as tolerated.
- [23] The respondent submits that the surveillance depicts the applicant performing the following: pulling a bin and green bin to the curb of his home; pulling the bins to the garage area of his home; securing a taxi roof light to the roof of his vehicle; walking and driving. The respondent submits that the applicant showed no apparent signs of disability or restrictions in his movements.
- [24] The applicant told Dr. Shaul on January 22, 2019, that his injuries and resulting pain have limited his ability to perform functional tasks, he has difficulties with household chores and his limitations affect his ability to perform many of his self-care activities. The applicant told Dr. Mohammed on August 6, 2019, that he has trouble performing most household chores and he mentioned that yard work is too hard for him to perform, although his personal care activities are not affected. Dr. Shahriar Moshiri (psychologist), an IE assessor, conducted an addendum in-person assessment on August 7, 2019 (approximately one year and six months after the accident) and prepared a report dated August 23, 2019. The applicant told Dr. Moshiri that he takes a shower independently, but sits on a stool due to a fear of falling. Furthermore, the applicant does the cooking and his daughter helps.
- [25] I find that the applicant's limitations, including his difficulties with performing household chores, warrant an assessment to determine his future needs for attendant care as a result of the accident.

Is the chronic pain assessment reasonable and necessary?

- [26] I find that the chronic pain assessment, recommended by Dr. Grigory Karmy (general practitioner with additional training in chronic pain management) is reasonable and necessary. The applicant is entitled to this treatment plan because I am convinced that he requires an assessment to determine whether he experiences chronic pain as a result of the accident.
- [27] The applicant submits that this treatment plan is reasonable and necessary as it seeks to address the physical and psychological sequelae that have persisted

beyond the six-month mark.

- [28] The respondent relies on Dr. Mohammed's opinion, as well as a lack of contemporaneous medical evidence.
- [29] I find that there is evidence before me that the applicant experiences constant and/or severe pain as a result of the accident. He told Dr. Shaul on January 22, 2019, that he experiences intense pain in his shoulders, right arm and chest. He also told Dr. Shaul that he has been having difficulty with his sleep due to his pain and anxiety. He told Dr. Mohammed on August 6, 2019, that he experiences constant and intense pain in his shoulders, lower back and chest. He also told Dr. Mohammed that his pain is the primary cause of his disturbed sleep. He told Dr. Moshiri on August 7, 2019, that he has pain in his shoulders, lower back and right leg, and that he does not feel any physical improvement.
- [30] There is also evidence that the applicant experiences some functional limitations as a result of physical pain caused by the accident. As noted above, the applicant told Dr. Mohammed on August 6, 2019, that he has trouble performing most household chores and he mentioned that yard work is too hard for him to perform. With regard to his occupation, he told Dr. Mohammed that he used to work approximately 10-12 hours per day as a taxi driver. He is presently working, but his hours have been reduced to 7-9 hours per day. Therefore, there is compelling evidence that the applicant requires an assessment to evaluate the extent of his chronic injuries and psychological complaints, and to provide a prognosis and recommendations for recovery.

Is the psychological assessment reasonable and necessary?

- [31] The treatment plan for the psychological assessment was recommended by Dr. Andrew Shaul (psychologist) in the amount of \$2,000.00, less the partially approved amount of \$1,229.19. I find that the total amount of this psychological assessment is reasonable and necessary.
- [32] The respondent's submissions indicate that the applicant was removed from the Minor Injury Guideline based on the psychological diagnosis from Dr. Moshiri's (psychologist) addendum report.
- [33] The applicant was assessed by Dr. Shaul on January 22, 2019, approximately one year and six months after the accident. In his report dated March 4, 2019, he diagnosed the applicant with Adjustment Disorder with Mixed Anxiety and Depressed Mood, and Specific Phobia (travelling in and around a vehicle).
- [34] Dr. Moshiri (psychologist) initially conducted an IE assessment on November 22, 2017, approximately four months after the accident. In his report dated December 6, 2017, he concluded that from a psychological perspective, the applicant did not sustain an impairment as a direct result of the accident. However, he then conducted an in-person addendum clinical interview on August 7, 2019, and in his report dated August 23, 2019, he concluded that the

applicant's psychological condition had declined since the last assessment and he diagnosed the applicant with Adjustment Disorder with Mixed Anxiety and Depressed Mood. He found that the treatment plan is partially reasonable and necessary as follows: 1.5 hours of clinical interview, 1.5 hours of psychological test, 1.5 hours of evaluation and interpretation of test results, 2 hours of report preparation, 1 hour of feedback interview and completion of the OCF-18. As a result, the respondent partially approved the treatment plan for in the amount of \$1,229.19.

- [35] Both Dr. Shaul and Dr. Moshiri concluded that the applicant experiences psychological impairments as a result of the accident. Both psychologists diagnosed the applicant with Adjustment Disorder with Mixed Anxiety and Depressed Mood, although Dr. Shaul also diagnosed him with Specific Phobia (travelling in and around a vehicle). I agree with the assessors that the applicant experiences psychological impairments as a result of the accident. Therefore, Dr. Shaul's psychological assessment is reasonable and necessary in evaluating the applicant's psychological condition following the accident.
- [36] I find that the applicant is entitled to the total amount of the psychological assessment because the assessment is within the \$2,000.00 payment limit for the completion of an assessment as stipulated in s. 25(5)(a) of the *Schedule*.

Is the applicant entitled to an award under Regulation 664?

- [37] Pursuant to section 10 of Ontario Regulation 664, if an insurer has unreasonably withheld or delayed payments, the Tribunal may award a lump sum of up to 50 percent of the amount to which the insured was entitled at the time of the award, together with interest on all amounts then owing.
- [38] I find that an award is not warranted.
- [39] The applicant submits three reasons in support of his claim for an award. First, the respondent held sufficient knowledge and had compelling medical evidence to determine that the treatment plans in dispute were reasonable and necessary. Secondly, the respondent failed to provide the applicant with necessary psychological treatment between November 7, 2017 and September 3, 2019, and that this failure resulted in his significant psychological decline. Thirdly, the respondent's assessors have deviated from the prerequisite requirements to formulate impartial reports.
- [40] I find that there is no evidence that the respondent unreasonably withheld or delayed the payments of benefits. The respondent was within its rights under the *Schedule* to challenge whether the applicant was subject to the Minor Injury Guideline limit and whether the treatment plans were reasonable and necessary. The applicant was removed from the Minor Injury Guideline as a result of Dr. Moshiri's addendum report and the respondent partially approved the psychological assessment in dispute based on Dr. Moshiri's

recommendation. Therefore, the applicant is not entitled to an award.

Is the applicant entitled to costs in this proceeding?

- [41] As part of the applicant's initial submissions, he requested costs. Rule 19.1 of the Tribunal's *Common Rules of Practice and Procedure* permit me to award costs where a party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith.
- [42] The applicant submits that the respondent has been disrespectful of this Tribunal's process by continuing to deny the various treatment plans and failing to consider objective medical evidence in their possession.
- [43] The applicant's request for costs is denied because there is no evidence that the respondent's conduct was unreasonable, frivolous, vexatious or in bad faith. Therefore, no costs are awarded.

CONCLUSION

- [44] The applicant is entitled to the following treatment plans because they are reasonable and necessary:
 - (v) Chiropractic treatment in the amount of \$3,165.75;
 - (vi) Attendant care assessment in the amount of \$1,230.92;
 - (vii) Chronic pain assessment in the amount of \$2,000.00; and
 - (viii) Psychological assessment in the amount of \$2,000.00 (less the partially approved amount of \$1,229.19).
- [45] The applicant is not entitled to the following treatment plans because they are not reasonable and necessary:
 - (iii) Chiropractic treatment in the amount of \$2,306.50; and
 - (iv) Chiropractic treatment in the amount of \$1,138.30.
- [46] The applicant is entitled to interest on any overdue payments of benefits.
- [47] The applicant is not entitled to an award or costs.

Released: May 22, 2020

Melody Maleki-Yazdi
Adjudicator

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