



Citation: Xu v. BelairDirect, 2023 ONLAT 21-005966/AABS

Licence Appeal Tribunal File Number: 21-005966/SSBS

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:

Kai Xu

Applicant

and

BelairDirect Insurance Company

Respondent

DECISION

ADJUDICATOR: Jacqueline M. Harper

APPEARANCES:

For the Applicant: Sahereh Baghbani, Paralegal

For the Respondent: Shawna Bernetti, Counsel

HEARD: By Way of Written Submissions

OVERVIEW

- [1] The applicant was involved in an automobile accident on November 20, 2018 and sought benefits from the respondent, BelairDirect Insurance Company, pursuant to the *Statutory Accident Benefits Schedule* – Effective September 1, 2010 and including amendments effective June 1, 2016 (the “*Schedule*”). The applicant was denied benefits by the respondent and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

- [2] The issues in dispute are listed as follows:
- a. Is the applicant entitled to \$3,157.52 for chiropractic treatment, proposed by Total Recovery Rehab in a treatment plan denied on May 13, 2019?
 - b. Is the applicant entitled to \$4,063.90 for chiropractic treatment, proposed by Total Recovery Rehab in a treatment plan denied on June 7, 2019?
 - c. Is the applicant entitled to \$2,075.77 (\$3,981.00 less \$1,906.11 approved) for psychological treatment, proposed by Somatic Assessments in a treatment plan denied on October 11, 2019?
 - d. Is the respondent liable to pay an award under s. 10 of Reg. 664 because it unreasonably withheld or delayed payments to the applicant?
 - e. Is the applicant entitled to interest on any overdue payment of benefits?
- [3] Due to the discrepancy in the parties’ submissions and the case conference report and order dated May 10, 2022 regarding the issues in dispute, the issues above were determined based on the applicant’s email to the Tribunal dated July 27, 2023 and copied to the respondent, which confirmed that item nos. 3, 4, 5, 9 and 10 in the case conference report and order dated May 10, 2022, remain in dispute and that the claim for income loss had been withdrawn.

RESULT

- [4] I find as follows:
- a. that the treatment proposed in the treatment plans for chiropractic treatment is reasonable and necessary;
 - b. that the treatment proposed in the treatment plans for psychological treatment is reasonable and necessary regarding further treatment;

- c. that the respondent is not liable to pay an award under s. 10 of Reg. 664; and
- d. that the applicant is entitled to the payment of interest on the overdue payment of benefits in relation to the treatment at item nos. 2a, 2b and 2c above.

ANALYSIS

Is the proposed treatment reasonable and necessary?

- [5] The onus is on the applicant to prove, on a balance of probabilities, that the proposed treatment is reasonable and necessary for recovery from the injuries sustained in the accident.
- [6] The applicant submitted that he sustained serious physical and psychological injuries as a result of the accident on November 20, 2018 and that pre-existing injuries, including from an accident on December 17, 2017 to his left hip, neck and low back, were exacerbated. He further submitted that based on his injuries, he is entitled to the treatment proposed in the above-noted plans, in addition to interest on overdue payments and an award to be paid by the respondent for unreasonably delayed or withheld payments.
- [7] Based on the applicant's evidence, I find that the chiropractic treatment proposed by Total Recovery Rehab in the amounts of \$3,157.52 and \$4,063.90, is reasonable and necessary to achieve maximum recovery. I find that the applicant sustained serious physical injuries. I accept Dr. Palantzas's diagnosis set out in the OCF-18 dated April 15, 2019 that the applicant sustained a tear of the anterior superior labrum as confirmed by an MRI conducted on January 21, 2019 and impingement, gait abnormalities, radiculopathy and psychological issues. I also accept that according to the same OCF-18, the applicant's injuries resulted in him having a complete inability to carry on a normal life. It was noted in the OCF-3 completed by Dr. Palantzas on April 15, 2019 that the applicant had difficulty with sustained postures, standing, walking, sitting, bending, lifting, carrying and pushing and a marked decrease in capacity with respect to activities of daily living, in addition to not being able to carry on pre-accident activities.
- [8] I accept Dr. Vasandani's diagnosis of chronic left hip pain following a visit on December 5, 2018 as noted in his clinical notes and records. Dr. Vasandani remarked that the applicant demonstrated ongoing restrictions, had lower back pain for 11 months, along with left leg numbness and tightness in both hands, as

well as experiencing the inability to sleep at night and that there were no improvement or changes.

- [9] Moreover, I considered the clinical notes and records of his family physicians, Dr. Wang and Dr. Ireland, which confirm continued physical and psychological impairments and are consistent with the findings of Dr. Palantzas insofar as remarking on the applicant's left hip pain resulting from the accident. Dr. Wang noted the applicant's self-reported physical injuries of left hip pain and the inability to work as a result of the accident, along with a difficulty with prolonged sitting. The applicant underwent physiotherapy and Dr. Wang recommended exercise, physiotherapy and analgesics. Dr. Ireland noted that the applicant experienced left hip pain following the accident.
- [10] Further, I considered that on December 28, 2022, more than 3 years after the proposed treatment plans, the applicant underwent a catastrophic impairment assessment based upon which Dr. Wong diagnosed the applicant with a left hip labrum tear according to the MRI report, as well as insomnia, chronic pain, chronic pain syndrome and psychological problems.
- [11] The applicant's evidence also establishes that he sustained psychological injuries as a result of the accident. Specifically, Dr. Cook diagnosed the applicant with adjustment disorder with anxiety and moderate depressive episodes and reported that the prognosis for his recovery without treatment was fairly poor as the applicant continued to struggle with residual trauma. In his report dated March 3, 2019, Dr. Cook recommended psychotherapy in 1.5 hour sessions to improve his psychological functioning and long term goals, including alleviation of depression and anxiety. According to his clinical notes and records, Dr. Wang also assessed the applicant with anxiety and possible post-traumatic stress disorder and advised that he continue psychological treatment. Dr. Ireland noted that the applicant reported experiencing anxiety when driving and in his notes, Dr. Palantzas remarked that the applicant sustained psychological issues.
- [12] The medical documents confirmed that the applicant was undergoing psychotherapy with Dr. McDowall. She noted in her records that the applicant reported feeling hopeless, along with having sleep difficulties and nightmares. Moreover, in her progress report dated May 20, 2022, Dr. McDowell noted that the applicant was experiencing a slight improvement in regulating his mood swings and further treatment was recommended.
- [13] Section 15 of the *Schedule* sets out the test for medical benefits which is that the treatment be reasonable and necessary. As noted above, there is no doubt that the applicant sustained physical injuries from the accident which was established

based on the medical documentation proffered. The medical evidence also supports that he had chronic pain which caused functional impairment in his day-to-day life and from which he has not achieved maximum recovery. He has continued to seek treatment with healthcare providers who supported an account of his injuries, including objective testing by way of an MRI. Further, there is consistent evidence that treatment for his accident-related injuries was recommended by his physicians, chiropractor and psychologists to aid in recovery. I concur with the applicant's submissions that the insurer has a duty to treat an applicant fairly and reasonably. I am satisfied that the chiropractic treatment is reasonable and necessary to achieve maximum recovery.

- [14] I note that the respondent did not provide evidence for the hearing in connection with the chiropractic treatment plans and contrary to the applicant's submissions, indicated that they had been approved.
- [15] With respect to the psychological treatment in dispute, I find that the remaining amount for treatment at line 1 of the OCF-18, in the amount of \$1,745.38 (\$3,141.88 less \$1,396.50 approved) is reasonable and necessary to achieve maximum recovery.
- [16] There is no doubt that the applicant sustained psychological injuries which was supported by Dr. McDowell's and Dr. Cook's reports, as well as by remarks from his family physicians, chiropractor and Dr. Wong. In addition, as previously noted, a portion of the OCF-18 had previously been approved. According to the OCF-18, Dr. Cook is the health care provider who is directly providing the goods and services during the applicant's treatment sessions. The respondent submitted a number of reasons for which it denied the remaining portion of the plan. These included that according to section 25 of the *Schedule*, voluntary supervision is not covered. In addition, a denial was based on there being no objective evidence in support of the denied psychological treatment in consideration of the *Schedule* and the Guideline. Further, insurers are not liable for certain administration or other costs that have the result of increasing the effective hourly rates or the maximum fees payable for completing forms, beyond what is permitted under the Guideline, including at the Appendix of Revised Rates and Fees (the "Appendix").
- [17] In consideration of the evidence and submissions, I find that the balance of the treatment in the OCF-18 which was previously denied in the amount of \$1,745.31 is reasonable and necessary for the applicant to achieve maximum recovery. The Guideline and the Appendix set out the rate of psychologists and psychology associates at \$149.61 per hour. This is the rate which was used by Dr. Cook in the

OCF-18 in his calculation of 14 sessions with a 1.5 hour duration each, for a total of \$3,141.81.

- [18] In addition, insofar as requiring further reasons to increase the 1 hour long sessions to 1.5 hours, I find that the evidence is compelling that the applicant sustained serious psychological impairment and that more fulsome 1.5 hour sessions are reasonable and necessary as proposed by Dr. Cook, for maximum recovery.
- [19] The document preparation in the amount of \$200.00 for an OCF-18 while also set out in the Guideline is not reasonable and necessary – the fee for completion of the OCF-18 by Dr. Cook at \$149.61 is reasonable and necessary and consistent with the balance of services provided by him.
- [20] In consideration of the transportation expenses claimed, pursuant to section 3 of the *Schedule*, there is a fifty (50) kilometres deductible per trip, unless the injuries have been deemed to be catastrophic. Therefore, I find that it is reasonable for the respondent not to fund the proposed transportation services. I concur with the respondent's submissions in that they do not appear to constitute authorized transportation expenses and there is no reasonable explanation regarding the provider travel time in terms of the reasons for which the service provider would require travel to the treatment session above regular business practice. The applicant failed to address this in his submissions.
- [21] With respect to the claim for document support activity in the amount of \$360.00, there is insufficient evidence to find that this amount is reasonable and necessary.

AWARD

Is the applicant entitled to an award pursuant to s. 10 of Regulation 664?

- [22] I find that the applicant is not entitled to an award pursuant to s. 10 of Regulation 664. I concur with the applicant's basic submissions that an applicant and an insurer are in a good faith relationship and an insurer has a duty to treat an applicant fairly and reasonably, relying on *Smith v. Co-operators General Insurance Company* 2002 SCC 30, 2 SCR. Further, I agree that an insurer has an ongoing duty to assess and reassess a claim as new information is available as submitted by the applicant, relying on *Cowans and Motor Insurance Company* FSCO AO9-003237 October 15, 2010. However, in making a finding in favour of an award pursuant to Regulation 664, the onus remains on the applicant to prove that the respondent unreasonably withheld or delayed payment and I see no

evidence of those allegations. I find that the respondent acted dutifully in responding to the applicant which was done in good faith and in a timely manner.

INTEREST

Is the respondent liable to pay interest on overdue payments?

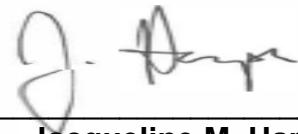
[23] As a result of the above-noted findings, interest with respect to a benefit is due pursuant to s. 51 of the *Schedule* in connection with the chiropractic treatment and the balance of the psychological treatment.

ORDER

[24] For the reasons provided above, I order the following:

- a. that the applicant is entitled to payment for the following:
 - i. \$3,157.52 and \$4,063.90 for the sum total of \$7,221.42 for chiropractic treatment proposed by Total Recovery Rehab;
 - ii. \$1,745.31 for psychological treatment by Somatic Assessments; and
- b. that the respondent pay to the applicant interest on overdue payments in accordance with s. 51 of the *Schedule*.

Released: October 10, 2023



Jacqueline M. Harper
Adjudicator