**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

**Tribunal File Number: 17-006004/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

**Aviva Insurance Canada**

**Respondent**

**DECISION**

**ADJUDICATOR:** **Derek Grant**

**APPEARANCES:**

For the Applicant: Yu (Denise) Jiang

For the Respondent: David Koots

**Heard by way of Written Hearing: April 9, 2018**

## OVERVIEW

[1] The applicant ("Y.Y.") was injured in an automobile accident ("the accident") on April 17, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] *(the "Schedule").* Y.Y. applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") when his claims for benefits were denied by the respondent.

[2] The respondent ("Aviva") denied Y.Y.'s claims because it took the position that his injuries fit the definition of "minor injury" prescribed by s. 3(1) of the *Schedule*, and therefore, fell within the Minor Injury Guideline[2] ("the MIG"). Aviva states that the MIG applies to both the September 1, 2015 and September 12, 2016 treatment plans. Y.Y.'s position is exactly the opposite.

[3] The MIG sets a monetary limit of $3,500.00. Y.Y. argues that his injuries take him out of the limits set out by the MIG in regards to the September 1, 2015 treatment plan. In addition, Y.Y. argues the MIG limit does not apply to the September 12, 2016 treatment plan because of a number of failures on the part of Aviva to comply with its obligations under the *Schedule*. It is unclear if Y.Y. has consumed the full $3,500.00 MIG limit.

[4] Y.Y.'s position is that Aviva failed to do two things: give medical reasons and state that the MIG applies. He submits that, as a result, Aviva is prevented from taking the position that the MIG applies to the September 12, 2016 treatment plan and any subsequent treatment plans from October 21, 2016 ongoing.

[5] Aviva's position is that, even if it failed to comply with procedural steps, Y.Y. must still show that the treatment must be reasonable and necessary, even if it is determined that the MIG does not apply.

## ISSUES

[6] Did the applicant sustain predominantly minor injuries as defined by the *Schedule*? Is his entitlement to benefits limited by the MIG?

[7] If the applicant's injuries are not within the MIG, then I must determine the following issues:

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1 O. Reg. 34/10.

2 Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act*.

i. Is the applicant entitled to receive the medical benefit in the amount of $2,450.95 for chiropractic treatment pursuant to a Treatment and Assessment Plan (OCF18) completed by Perfect Physio, submitted on September 1, 2015 and denied on September 17, 2015?

ii. Is the applicant entitled to the cost of examination in the amount of $2,000.00 for psychological assessment pursuant to a Treatment and Assessment Plan (OCF18) completed by Perfect Choice Psychological Service, submitted on September 12, 2016 and denied on October 5, 2016?

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

**RESULT**

[8] I have considered all of the evidence submitted by each party and, for the reasons that follow, I have determined that:

i. Y.Y's injuries fall within the MIG in regards to the September 1, 2015 treatment plan. It is therefore unnecessary to consider the reasonableness of the September 1, 2015 treatment plan or the issue of interest in regards to same;

ii. I must still determine whether the September 12, 2016 treatment plan is payable;

iii. Aviva's denial letter did not meet the requirements of section 38(8) of the Schedule, as it did not provide the required medical reasons and notice to Y.Y. that the Minor Injury Guideline applies to his impairments;

iv. Thus, Aviva is prohibited from taking the position that Y.Y.'s injuries are predominantly minor to which the MIG applies. Y.Y. is no longer subject to the $3,500 limit set out in the Schedule; and

v. Aviva is therefore required to pay the disputed cost of examination expense in the September 12, 2016 treatment plan because it failed to give medical reasons in accordance with section 38 of the Schedule.

## DISCUSSION

### The Minor Injury Guideline

[9] 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 and includes any clinically associated sequelae to such an injury." The *Schedule* also defines what these terms for injuries mean.

[10] Section 18(1) limits the entitlement for medical and rehabilitation benefits for minor injuries to $3,500.

[11] The onus is on Y.Y. to show that his injuries fall outside of the MIG[3]

### *Issue 1: Did Y.Y. sustain predominantly minor physical injuries regarding the September 1, 2015 treatment plan?*

[12] I find that the evidence indicates that Y.Y. sustained physical injuries that are predominantly minor injuries and therefore not entitled to the September 1, 2015 treatment plan.

Y.Y.`s evidence

[13] On September 1, 2015, Dr. Amil Oliwael, Chiropractor, submitted a treatment plan for chiropractic active therapy and acupuncture. Under Part 6 of the treatment plan, Dr. Oliwael diagnosed Y.Y.'s injuries as "rotator cuff syndrome; open wound of nose; injury of muscle and tendon of neck level; dislocation, sprain and strain of joints and ligaments of thorax, lumbar spine, pelvis, shoulder girdle, and hand; nonorganic sleep disorders; radiculopathy; among others". Under Part 9, barriers to recovery were identified as "severity of symptoms, multiple injury sites, and psychological complaints". Although in some cases psychological complaints can remove an insured from the MIG limits, at this time, the complaint was made to a chiropractor and not the result of an assessment. Therefore, I place little weight on the chiropractor's opinion regarding psychological complaints, as this is beyond Dr. Oliwael's area of expertise.

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3 *Scarlett v. Belair,* 2015 ONSC 3635 para.24

[14] I find that Dr. Oliwael's diagnosis of Y.Y. is consistent with injuries that would fall under the MIG. Y.Y. has no history of pre-existing injuries, as indicated in the treatment plan. Further, the accident-related sequelae do not indicate that Y.Y. has sustained anything more than muscle sprain/strain injuries, also noted in the treatment plan.

Aviva's evidence

[15] Aviva denied the September 1, 2015 treatment plan in a letter dated September 17, 2015. The September 17, 2015 denial letter details the medical and other reasons for the denial, including informing Y.Y. that the MIG applies. The letter states:

i. The injuries outlined on all of the documentation received to date are soft tissue in nature and appear to be consistent with the definition of a "minor injury", which is defined in the Statutory Accident Benefits Schedule as one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae.

ii. We have not received any compelling medical evidence to support otherwise, or to support that you have a pre-existing medical condition that will prevent you from achieving maximal recovery from your injuries if you are subject to the limitations of the Minor Injury Guideline.

[16] On October 8, 2015, Dr. Alisa Naisman, Physician, conducted an assessment of Y.Y. "in order to address the Medical and Rehabilitation benefit - Minor Injury Guideline and to offer an opinion on whether the proposed treatment plan dated September 1, 2015 by Dr. Owilael, is considered reasonable and necessary".

[17] Dr. Naisman reviewed the following materials in addition to conducting her own objective testing,

(1) OCF-18 by Dr. A. Owliael dated September 1, 2015 under review;

(2) Ontario Medical Imaging Chalmers Gate X Ray and Ultrasound dated June 20, 2015;

(3) OCF-24 by Georgia Palantzas dated July 23, 2015;

(4) OCF-1 dated April 28, 2015 by claimant;

(5) OCF-23 by Georgia Palantzas dated April 23, 2015;

(6) Motor Vehicle Damage Estimate; and

(7) Motor Vehicle Damage Pictures.

[18] Based on her findings, Dr. Naisman concluded that the examination did not reveal any functional limitations or impairments. Additionally, Y.Y. "displays evidence of myofascial tightness in his lumbar spine. He (Y.Y.) displays significant pain focused behaviour which makes his descriptions of limitations to be unreliable." Dr. Naisman concludes that Y.Y.'s injuries are predominantly minor and the injuries fall within the Minor Injury Guideline ("MIG").

[19] Y.Y. directed me to clinical notes and records of Dr. Xiao Li, Family Physician and Dr. Tom Chen, Physiatrist. Of note, is the report of Dr. Chen, from January 2016, in which Dr. Chen documented a clinical impression of myofascial strain. Dr. Chen's findings are similar to those of Dr. Naisman, in that they both agree Y.Y. suffered a myofascial injury, which falls under the definition of a minor injury. In addition, Dr. Chen recommended self-directed exercises, no regular pain medication, and follow-up, if needed.

[20] With respect to the reports of Drs. Naisman and Chen, I find that from a physical perspective, there is no recommendation for further facility-based treatment and I find that Y.Y.'s injuries are properly subject to the MIG.

[21] Because I have found Y.Y.'s injuries to fall within the MIG, it is unnecessary for me to assess whether the September 1, 2015 treatment plan is reasonable and necessary. Further, neither party directed me to any evidence that indicated whether or not the MIG limit was exhausted.

***Issue 2: Did Aviva comply with the notice requirement in section 38(8) of the Schedule regarding the September 12, 2016 treatment plan?***

**Law:**

[22] Sections 38 (8), (9) and (11) of the Schedule set out strict notice requirements for insurers responding to treatment plans, with specific consequences if they fail to comply. Under section 38 (8), the insurer must notify the insured person within 10 business days whether it will pay for the goods and services requested. If it refuses to pay for them, it must state the medical and other reasons why it considers the goods and services not to be reasonable and necessary. Section 38(9) further requires that if the insurer takes the position that the MIG applies, it must include that information in the notice. As per

section 38 (11), if an insurer fails to comply with any of these requirements, it is prohibited from taking the position that the MIG applies and must pay for any incurred treatment expenses until such time that it gives proper notice.

Y.Y.`s Submission

[23] Despite my finding that the MIG applies to the September 1, 2015 treatment plan, I must still make a determination regarding the September 12, 2016 treatment plan. I am asked to decide whether or not Aviva complied with the requirements in accordance with section 38 of the *Schedule* for providing notice to Y.Y. I find Aviva did not comply with section 38 of the *Schedule* for the reasons below.

[24] On September 12, 2016, Dr. Ming Che Yeh, Psychologist, proposed a psychological assessment.

[25] Y.Y. submits that Aviva has not complied with section 38 (8) and (9) in their response to the September 12, 2016 treatment plan because it did not set out medical reasons for the denial or indicate that the MIG applied. Aviva's denial letter is as follows:

> "We have not received any compelling medical evidence to support that you require an assessment or treatment of a psychological nature and therefore may not warrant the treatment/assessment proposed in the OCF-18 outlined above. Therefore, we have determined that the above noted treatment plan is not reasonable and necessary for the injuries you sustained in the accident. Please accept this letter as our formal response and denial of this treatment and assessment plan and any associated invoices".

[26] With respect to the September 2016 treatment plan, Y.Y. submits that having "not received any compelling medical evidence" is not a medical reason; it is an "other reason and a status of the case" and Aviva also did not comply with section 38(9), as the letter failed to advise Y.Y. that the MIG applies.

[27] In a further letter dated December 9, 2016, Aviva states:

> "Based on this report[4], we maintain our denial of the Treatment and Assessment Plan (OCF-18) dated September 12, 2016. Please accept this letter as our formal response and denial of this Treatment and Assessment Plan and any associated invoices".

[28] Again, Y.Y. submits Aviva failed to advise that the MIG applies to Y.Y's case.

Aviva's Submission

[29] Regarding the September 12, 2016 treatment plan, Aviva submits that its October 5, 2016 denial letter was proper and in compliance with section 38(8). Aviva specifically refers to the following excerpt from the October 2016 letter:

> "Based on a review of your complete file and the documentation we have received to date, we do not agree to fund the goods and services proposed in this (September 12, 2016) treatment plan…"

[30] Aviva argues this specifically worded response is sufficient in regards to the "medical and other reasons" provision of section 38(8). Aviva takes the position that the medical reason was that "no documentation had been submitted to support the requirement for the proposed assessment". Aviva submits that "by October 5, 2016, Y.Y. was aware of the reason why Aviva denied entitlement to the [treatment] plan".

[31] Aviva further submits that in the subject proceeding, the psychological assessment has not been attended or incurred. Even if the Tribunal finds the original October 5, 2016 notice is defective, Aviva argues "the Applicant has no entitlement to the plan unless he has proven it is reasonable and necessary as there was a valid denial on December 9, 2016, before the assessment was undertaken". For the reasons that follow, I disagree with Aviva's argument that the psychological assessment is not payable because it was not incurred or proven to be reasonable and necessary.

[32] The term "reasonable and necessary" laid out in section 15 of the *Schedule* is not included in section 38(11)2. Section 15 requires that an insurer "shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident". Section 38(11)2 does not include the

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4 Dr. Neil Weinberg, Psychologist – report dated December 5, 2016.

"reasonable and necessary" and "expenses incurred" wording. Instead, section 38(11)2 states that the "Insurer **shall pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period** (my emphasis) starting on the 11th business day after the day the insurer received the application and ending on the day the insurer gives a notice described in subsection (8)". In my opinion, the language in section 38(11)2 supports Y.Y's entitlement to the disputed psychological assessment. In the subject proceeding, it is unnecessary for me to make any determination under section 15.

"Medical reason and any other reason"

[33] I have addressed the "reasonable and necessary" and expenses incurred" provisions, I now turn to the "medical reason and any other reason" provision under section 38(8). The intention of the section 38(8) of the *Schedule* was to provide a detailed explanation to an insured as to what the insurer's determination of entitlement to a benefit is based on. The "medical reasons" were intended to provide the objective clinical explanation of the injuries that were determined to have been sustained, while the purpose of "other reasons" are to provide a non-medical explanation in circumstances where there may have been other factors in support of or in addition to the "medical reasons", which explain an insurer's reasons for denial of treatment or entitlement to a benefit.

[34] In addition, the *Schedule* requires both the medical and other reasons to provide fulsome explanations to an insured of what steps an insurer has taken to come to a conclusion regarding the insured's request and entitlement for treatment. Those steps need to be clearly laid out in a denial letter and where there is any ambiguity or lack of clarity on the part of the insurer; the intention of the *Schedule* is to protect the consumer, hence the section 38(11) provision.

[35] Aviva relies on the wording "based on a review of your complete file and….documentation" as the "medical reason." Aviva failed to note any specific medical reasons for the denial, and any other reasons. This is not in compliance with section 38(8). The requirement for "medical reasons" is outlined in the reconsideration decision in which the Executive Chair of the Tribunal stated,

> "an insurer's "medical and any other reasons" should, at the very least, include specific details about the insured's condition forming the basis for the insurer's decision or, alternatively, identify information about the insured's condition that the insurer does not have but requires.

> Additionally, an insurer should also refer to the specific benefit or determination at issue, along with any section of the *Schedule* upon which it relies. Ultimately, an insurer's "medical and any other reasons" should be clear and sufficient enough to allow an unsophisticated person to make an informed decision to either accept or dispute the decision at issue. Only then will the explanation serve the *Schedule*'s consumer protection goal".[5]

[36] Aviva provided correspondence to Y.Y. indicating it was denying the September 12, 2016 treatment plan, however, those letters failed to meet the following provisions of section 38:

<u>October 5, 2016 denial letter</u>

a. No medical reasons;

b. No indication that the MIG applies to Y.Y.'s injuries; and

<u>December 9, 2016 denial letter</u>

a. No indication that the MIG applies to Y.Y.'s injuries.

[37] Neither Aviva's October 2016 letter nor the December 2016 letter properly complied with providing medical reasons or indicated that the MIG applies to Y.Y.'s injuries. As a result, I find that the October 2016 letter was not in compliance with requirements of section 38(8). Aviva is therefore prohibited from taking the position that Y.Y. sustained injuries to which the MIG applies from October 21, 2016 onwards.

[38] As a result of my finding of Aviva's non-compliance under section 38(8), and for the reasons stated above, I find that Aviva has failed to properly interpret its resulting duty under section 38(11) of the *Schedule*. Thus, in accordance with subsection (2), under section 38(11) states, "the insurer shall pay".

[39] Since a decision is now rendered on the September 12, 2016 cost of examination expense, Aviva no longer has the opportunity to issue a proper notice of denial. The time to properly deny a benefit ends once a decision has been rendered regarding that benefit.

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5. 16-003316/AABS v. Peel Mutual Insurance Company, 2018 CanLII 39373 (ON LAT) par. 19

**Award under regulation 664**

[40] Y.Y. did not raise the issue of award in the Tribunal Application. There was no formal request to add this issue. Instead, counsel raised the argument in the written submissions. Y.Y. provides no evidence for an award pursuant to s.10 of Regulation 664 of the *Insurance Act*.

[41] In the absence of evidence of specific behaviour, I find that Aviva did not unreasonably withhold payment. Although I found that Aviva was in non-compliance with the notice provisions in regards to the September 12, 2016 treatment plan, I do not find that Aviva unreasonably withheld payment, as the denials were based on reasonable, objective assessments of Y.Y. As a result, an award is not warranted in the circumstances of this case.

## CONCLUSION

[42] For the reasons outlined above, I find that:

i. With respect to the September 1, 2015 treatment plan, Y.Y. sustained predominantly minor injuries that fall within the MIG. As a result, he is not entitled to the September 1, 2015 treatment plan claimed in this application;

ii. Secondly, regarding the September 12, 2016 treatment plan, Aviva did not comply with the provisions of section 38(8) of the *Schedule*, and is thus prohibited from taking the position that the MIG applies to the September 12, 2016 cost of examination expense;

iii. As a result of the non-compliance, Aviva shall pay for the September 12, 2016 cost of examination expense and any applicable interest.

**Released: August 15, 2018**

**Derek Grant, Adjudicator**