CITATION: Zheng, Cai v. Aviva Insurance Company of Canada, 2018 ONSC 5707
DIVISIONAL COURT FILE NOS.: 175/17 and 176/17
DATE: 20180926

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

CONWAY, MATHESON and SHEARD JJ.

BETWEEN:	
COURT FILE NO.: 175/17	
MIN FEI ZHENG	*Pavlos Achlioptas* and *Nick Hamilton*, for the Applicant (Respondent in Appeal)
Applicant (Respondent in Appeal)	
– and –	
AVIVA INSURANCE COMPANY OF CANADA	*Petros Yannakis*, for the Respondent (Appellant in Appeal)
Respondent (Appellant in Appeal)	
AND BETWEEN:	
COURT FILE NO.: 176/17	
JIN CHAI CAI	*Pavlos Achlioptas* and *Nick Hamilton*, for the Applicant (Respondent in Appeal)
Applicant (Respondent in Appeal)	
– and –	
AVIVA INSURANCE COMPANY OF CANADA	*Petros Yannakis*, for the Respondent (Appellant in Appeal)
Respondent (Appellant in Appeal)	**HEARD at Toronto:** September 26, 2018

CONWAY J. (Orally)

Introduction

[1] Aviva Insurance Company of Canada ("**Aviva**"), appeals the orders of Adjudicator Jeffery Shapiro dated March 10, 2017 and the reconsideration decision of the Executive Chair Linda P. Lamoureux dated September 22, 2017, both of the License Appeal Tribunal, Toronto (the "**Tribunal**"). Since the same question of law is raised in the two cases before us, we heard the cases together and are providing our decision in one set of reasons.

[2] Aviva challenges the Adjudicator's determination that Aviva's procedural non-compliance with s. 38(8) and (9) of the *Statutory Accident Benefits Schedule – effective after September 1, 2010,* O. Reg. 34/10 (the "**Schedule**") entitled each Respondent to medical and rehabilitation benefits in excess of the $3500 monetary cap on minor injuries contained in s. 18(1) of the Schedule.

Background

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[3] The Respondent was injured in a motor vehicle accident on January 30, 2015 and claimed Statutory Accident Benefits from Aviva. He was initially diagnosed with a minor injury and received treatment under the Minor Injury Guideline framework of the Schedule ("**MIG**"), which covers up to $2200 in treatment. He then submitted a treatment and assessment plan for approval of additional treatment under s. 38 of the Schedule (a "**Treatment Plan**") and received an additional $1300 in benefits. That took him up to the $3500 limit on medical and rehabilitation benefits for minor injuries contained in s. 18(1) of the Schedule.

[4] The Respondent submitted another Treatment Plan for additional benefits on August 31, 2015, which would have exceeded the $3500 limit. Aviva denied the benefit. The Adjudicator found that the notice of denial of benefits was not compliant with the requirements of s. 38(8) and (9) of the Schedule. He held that although the Respondent's impairment was a minor injury, the consequences of non-compliance under s. 38(11) of the Schedule (described below) applied and Aviva was prohibited from taking the position that the MIG applies to the Respondent's impairment. He held that the Respondent was entitled to receive additional medical benefits of $2569.08.

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[5] The Respondent was injured in the same motor vehicle accident on January 30, 2015. She was found to have minor injuries that came within the MIG and began receiving benefits under the MIG framework. The Respondent subsequently made a claim for chiropractic benefits from Aviva under s. 38 of the Schedule. On May 15, 2015, Aviva denied the request.

[6] The Adjudicator found that the denial notice was non-compliant with s. 38(8) and (9) and that the consequences of s. 38(11) were triggered. The Adjudicator held that the Respondent was

entitled to medical benefits in the amount of $69.44 for prescription expenses and $16.36 for chiropractic services.

Reconsideration Decision

[7] The Executive Chair dismissed both requests for reconsideration in her decision dated September 22, 2017. She stated that the Adjudicator had found that the defective notice prohibited Aviva from ever taking the position that the Respondents have a MIG impairment, with the effect that the Respondents could potentially receive benefits above the $3500 monetary limit for minor injuries. However, in the case of Mr. Zheng, she found that Aviva had subsequently cured the initial defective notice and that this reduced the quantum of benefits payable to Mr. Zheng.

[8] Aviva appeals. Its primary submission is that it was an error of law for the Tribunal to determine that Aviva's non-compliance with s. 38(8) and (9) of the Schedule had the effect of permanently removing the Respondents from the $3500 monetary limit on medical and rehabilitation benefits for minor injuries.

Jurisdiction and Standard of Review

[9] Under s. 11(6) of the *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sched. G, an appeal from the Tribunal relating to a matter under the *Insurance Act* lies to the Divisional Court on a question of law alone. The standard of review in this case, involving the interpretation by the Tribunal of one of its home statutes, is reasonableness: *Melo v. Northbridge Personal Insurance Corporation*, 2017 ONSC 5885 (Div Ct), at para. 7. See also *Scarlett v. Belair Insurance*, 2015 ONSC 3635 (Div Ct). In determining whether a decision is reasonable, the court is concerned with the justification, transparency and intelligibility of the reasons, as well as whether the decision falls within a range of possible, acceptable outcomes, given the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47.

Statutory Framework

[10] Sections 15 and 16 of the Schedule provide for the payment of medical and rehabilitation benefits as a result of an accident. Section 18(1) limits the amount of these benefits to $3500 for minor injuries. It states:

> The sum of the medical and rehabilitation benefits payable in respect of an insured person who sustains an impairment that is predominantly a minor injury shall not exceed $3,500 for any one accident, less the sum of all amounts paid in respect of the insured person in accordance with the Minor Injury Guideline.

[11] Section 18(2) contains an exception to the $3500 limit for an insured with a pre-existing medical condition. Section 18(3) provides that the amount of benefits paid in respect of a person who is not subject to the financial limit in s. 18(1) is $50,000 or, in the case of a catastrophic impairment, $1,000,000.

[12] The MIG is a guideline issued under the Schedule that establishes a treatment framework for an insured who has sustained a minor injury. It permits an insured immediate access to medical treatment without insurer approval and is intended to provide speedy access to rehabilitation for persons with minor injuries. The MIG framework has a defined monetary limit that adds up to $2200. Treatment under the MIG is intended to be completed within 12 weeks.

[13] Section 38 of the Schedule establishes a procedure for an insured to apply for medical and rehabilitation benefits other than those payable under the MIG. The insured must present a Treatment Plan and comply with the conditions in s. 38. The insurer may refuse to accept the Treatment Plan if it describes goods or services to be received in respect of any period during which the insured is entitled to receive them under the MIG.

[14] Within 10 business days of receiving the Treatment Plan, the insurer must give the insured notice identifying what goods, services, assessments and examinations it does or does not agree to pay for and the medical and other reasons why the insurer considers them not to be reasonable and necessary (s. 38(8)). If the insurer believes that the MIG applies to the insured's impairment, the notice under s. 38(8) must so advise the insured (s. 38(9)).

[15] If the insurer fails to give a notice that complies with these requirements in connection with a Treatment Plan, s. 38(11) imposes the following consequences on the insurer:

> (1) The insurer is prohibited from taking the position that the insured person has an impairment to which the Minor Injury Guideline applies.
>
> (2) The insurer shall pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period 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).

Consequences of Non-Compliance with s. 38(8) and (9)

[16] The Adjudicator held that because Aviva's denial notices did not comply with the provisions of s. 38(8) and (9), the consequences in s. 38(11) applied. The Adjudicator recognized that the onus is on the insured to prove that he is out of the MIG, rather than on the insurer to prove that the insured is in it, citing *Scarlett v. Belair Insurance*, 2015 ONSC 3635 (Div Ct). However, the Adjudicator concluded that the statutory consequences of non-compliance prohibited Aviva from taking the position that the Respondents had an impairment to which the MIG applied. He further ordered payment of benefits to the Respondents pursuant to the Treatment Plans submitted by them, in excess of the $3500 limit.

[17] In our view, the Adjudicator's conclusion was reasonable. The wording of s. 38(11) specifically states that an insurer that delivers a non-compliant notice is precluded from taking the position that the insured person has an impairment to which the MIG applies, and is required to pay for the goods and services set out in the Treatment Plan until a proper notice is given. These consequences are explicitly set forth in the Schedule itself. The section imposes no monetary limit on the amount that the insurer must pay until it delivers a compliant notice, nor does it refer to or incorporate the $3500 limit on benefits set out in s. 18(1).

[18] Reading those words in the context of s. 38 as a whole, it is clear that an insurer must respond to an insured's Treatment Plan within a specified time. The insurer must provide the insured with the specific information set out in s. 38(8). The insurer must further notify the insured if the MIG applies to the insured's impairment. These are matters that are exclusively within the control of the insurer.

[19] The consequences in s. 38(11) relate directly to the insurer's failure to fulfill those statutory requirements. The insurer is no longer able to take the position that the impairment falls within the MIG and must pay for costs under the Treatment Plan in question until a compliant notice is given. This ensures that the insured who receives a non-compliant notice can proceed to obtain treatment with the assurance that his costs will be covered.

[20] The requirement for an insurer to comply with the provisions of s. 38 are strict and the consequences of s. 38(11) are mandatory: *Ferawana v. State Farm Mutual Automobile Insurance Co.*, [2016] O.F.S.C.D. No. 247, pp. 4-6. The Adjudicator's interpretation of these statutory consequences aligns with the consumer protection focus of the legislation: *Smith v. Co-operators General Insurance Co.*, [2002] SCC 39.

[21] The Adjudicator's actual orders do not go beyond the Treatment Plans at issue. Further, the language used in s. 38 refers to the specific Treatment Plan in question. We therefore do not accept the submission, in these cases, that s. 38(11) imposes a permanent prohibition on Aviva with respect to whether the impairment of the Respondents is covered by the MIG or is subject to the $3500 limit in s. 18(1). As well, we should not be taken as agreeing with the Executive Chair's reasoning in her denial of reconsideration.

Decision

[22] We therefore dismiss the appeal from the orders of the Adjudicator and from the order of the Executive Chair denying the request for reconsideration.

[23] I have endorsed the Appeal Book and Compendium, in the Zheng case, Court File No.175/17, as follows: "For oral reasons delivered in court today, the appeal is dismissed. In accordance with the agreement of counsel, costs of this appeal and the appeal in the companion case Cai v. Aviva are payable by Aviva to the Respondents in the amount of $7,000 total for both cases, all inclusive."

[24] I have endorsed the Appeal Book and Compendium, in the Cai case, Court File No. 176/17, as follows: "For oral reasons delivered in court today, the appeal is dismissed. Costs payable by Aviva as set out in the endorsement on the companion case of Zheng v. Aviva."

Conway J.
CONWAY J.

I agree
MATHESON J.

I agree
Sheard J.
SHEARD J.

Date of Reasons for Judgment: September 26, 2018

Date of Release: SEP 27 2018

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ORAL REASONS FOR JUDGMENT

CONWAY J.

Date of Reasons for Judgment: September 26, 2018

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