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Ontario

October 23, 2018

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Mr. James Brown
Lawyer
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Dear Mr. Clausi and Mr. Brown:

RE: Aviva Canada Inc. and Yeshitla Dadi
Commission Appeal File №: P17-00074
Claim №: 0500219557

Enclosed please find a copy of the decision of the Director's Delegate, Maggy Murray, in the above matter.

Yours truly,

Melanie Fischer
Case Administrator

Encl.

Copies to:

Mr. Yeshitla Dadi
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Ottawa ON K4A 0T9

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Appeal P17-00074

OFFICE OF THE DIRECTOR OF ARBITRATIONS

AVIVA CANADA INC.

Appellant

and

YESHITLA DADI

Respondent

BEFORE: Maggy Murray

REPRESENTATIVES: James Brown for Aviva Canada Inc.
Alan Clausi for Mr. Dadi

HEARING DATE: September 19, 2018

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The Arbitrator's Order of September 20, 2017 is confirmed and this appeal is dismissed.

2. At the commencement of the appeal hearing, the parties agreed that the successful party to the appeal would be entitled to $7,500.00 inclusive of disbursements and HST. Therefore,

Aviva shall pay Mr. Dadi his legal expenses of the appeal proceedings herein, in the amount of $7,500.00, inclusive of disbursements and HST.

Maggy Murray
Director's Delegate

October 23, 2018
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Aviva appeals the order of Arbitrator Matheson dated September 20, 2017 wherein he found that Mr. Dadi is entitled to receive a medical benefit of $1,822.04 for a treatment plan dated October 23, 2015. Aviva claims that the Arbitrator erred in law by:

(i) Misinterpreting the *Schedule*;
(ii) Failing to provide adequate reasons;
(iii) Refusing to qualify Dr. Aiello as an expert witness; and
(iv) Making findings of fact in the complete absence of any evidence.

II. BACKGROUND

Mr. Dadi was injured in a motor vehicle accident on June 10, 2015. As a result, he sought statutory accident benefits under the *2010 Schedule*[1] from his first-party automobile insurer, Aviva Canada

[1] *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended (*Schedule*).

Inc. (Aviva). Aviva initially classified Mr. Dadi's injuries as falling within the Minor Injury Guideline (MIG).[2] Aviva later removed Mr. Dadi from the MIG[3] in April 2017.

On July 3, 2015, Wendy Ruthven, a road adjuster with Aviva, met with Mr. Dadi in his home and took a statement from him regarding the accident. According to Mr. Dadi's testimony at the hearing, which the Arbitrator accepted, he did not read the statement which Ms. Ruthven took before he signed it.

Mr. Dadi submitted a treatment plan to Aviva in the amount of $1,822.04 dated October 23, 2015. The treatment plan was for an:

> OT in home assessment to evaluate client's physical, psychosocial, functional and safety requirements in order to initiate an OT program to address goals and increase client's participation in the community, as well as completion of Form 1.[4]

At Aviva's request, Dr. Aiello conducted an Insurer's Examination regarding this treatment plan. In his first report, Dr. Aiello concluded that Mr. Dadi "has not sustained an impairment as a direct result of the motor vehicle accident." Then Dr. Aiello stated, somewhat in contradiction: "(Mr. Dadi) is currently suffering from a mild cervical and lumbar muscle strain that is a direct result of the accident in question. His cervical muscle strain is causing him to have constant headaches."[5] In an addendum report,[6] Dr. Aiello again confirmed the aforementioned.

Aviva relied on the Insurer's Examination reports by Dr. Aiello and refused to pay for the treatment plan.

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[2] *Schedule*, s. 18(1), a minor injury limits an insured's medical and rehabilitation treatment to $3,500

[3] *Schedule*, s. 18(3)(a), removal from the MIG increases an insured's medical and rehabilitation treatment to up to $50,000

[4] Compendium of the Respondent, Volume II, tab 25

[5] Compendium of the Respondent, Volume II, tab 27, report by Dr. Aiello, at pp.'s 5-6

[6] Compendium of the Respondent, Volume II, tab 30, report by Dr. Aiello, at p. 2

The Arbitrator found that the evidence showed that as a result of this accident, Mr. Dadi hit his head, had significant bruising, and complained constantly of issues of pain in the neck and shoulders and back and was diagnosed with a concussion. According to the Arbitrator, Aviva ignored information that the treatment plan was reasonable and necessary for Mr. Dadi's treatment. The Arbitrator found that this treatment plan was reasonable and necessary.

III. ANALYSIS

A party to an arbitration may appeal an order of an arbitrator to the Director, or his delegate, only on a question of law.[7] This was a fact-based decision. In that regard, the Divisional Court stated in *Kanareitsev v. TTC Insurance Company Limited*, [8] that "when results involve a fact-driven analysis, appellate review must take 'proper account of the distinct advantage' of the first-instance decision maker's assessments. The appeal judge must not try the case *de novo* or simply substitute his or her views for those of the trial judge." Moreover, the Arbitrator's reasons simply need refer to the principal evidence relied upon by the Arbitrator and provide a justification for the conclusions.[9]

i. Misinterpreting the *Schedule*

The burden of proof in an accident benefits case is on a claimant.[10] In claims for medical benefits, a claimant has to prove, on a balance of probabilities, that the medical benefit is reasonable and necessary.[11]

The Arbitrator stated:

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[7] Rule 50.1 of the *Dispute Resolution Practice Code – Fourth Edition* and s. 283(1) of the *Insurance Act*, R.S.O. 1990, c. I.8

[8] (2008), 66 C.C.L.I. (4th) 46, 297 D.L.R. (4th) 373, QL at para. 29 (Ont. Div. Ct.)

[9] *Kanareitsev,* QL at para. 32

[10] *Scarlett v. Belair Insurance Co.* (2015), 127 O.R. (3d) 64, 50 C.C.L.I. (5th) 230, QL at para. 24 (Ont. Div. Ct.)

[11] *Schedule*, s. 15(1)

> The Insurer argues that regardless of the question on the applicability of the MIG, the Applicant still bears the additional burden of proving that the treatment plan was reasonable and necessary. **The Insurer argues that** in this case, the Applicant has failed to prove on a balance of probabilities that the treatment plan is reasonable and necessary - that **there is no cogent evidence justifying that the Applicant requires attendant care or occupational therapy, or an assessment of the need for same. I disagree**.
>
> **The evidence shows that** the Applicant hit his head, had significant bruising as a result, and complained constantly of issues of pain in the neck and shoulders and back. The adjusters log notes clearly show that the Applicant hit his head and was diagnosed with a concussion. **Clearly, in my view, the Insurer chose to ignore the information in its possession and control along with two recommendations from two different competing treatment facilities who requested an assessment or deeper screening of the Applicant.**
>
> ...
>
> **As such** the Applicant was entitled to treatment outside the MIG and **by extension** is entitled to the treatment plan of October 23, 2015 at (*sic*) **it was reasonable and necessary** (emphasis added).[12]

The Arbitrator used the words "I disagree" and "by extension." According to Aviva, this meant that the Arbitrator rejected the legal requirement that Mr. Dadi had to establish that the treatment plan was reasonable and necessary.

Contrary to Aviva's submissions, I find that:

i. The Arbitrator's use of the words "I disagree" refer to the Arbitrator's rejection of Aviva's submission that "there is no cogent evidence justifying that the Applicant requires attendant care or occupational therapy, or an assessment of the need for same," not a rejection of the legal requirement that the treatment plan be reasonable and necessary;

ii. The Arbitrator's use of the words "by extension" refer to the Arbitrator's earlier explanation that the medical evidence supported both Mr. Dadi's removal from the MIG and approval of the treatment plan;

[12] *Dadi and Aviva Canada Inc.*, QL at para.'s 29, 30 and 32 (FSCO A16-004703, September 20, 2018)

iii. The Arbitrator understood that the treatment plan had to be "reasonable and necessary" and concluded that Mr. Dadi "is entitled to the treatment plan of October 23, 2015 **(as) it was reasonable and necessary** (emphasis added)."

ii. Failing To Provide Adequate Reasons

According to Aviva, the Arbitrator did not refer to the evidence of Ms. Van Gendt, the author of the treatment plan, who testified at the arbitration hearing.

As stated in *Kanareitsev v. TTC Insurance Co.*,[13] the factors to be considered in determining the adequacy of an adjudicator's reasons include:

> The decision-maker setting out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue; it is insufficient for the decision-maker to summarize the parties' positions and "baldly state its conclusions"; and the reasoning process followed must be set out and reflect consideration of the main relevant factors.

Not reciting all the evidence does not mean an Arbitrator failed to consider it.[14] I find that the Arbitrator's reasons referred to the principal evidence upon which he relied, such as Mr. Dadi hitting his head on the steering wheel and losing consciousness when the accident happened, headaches, neck and shoulder pain that interrupts his sleep, anxiety attacks, tingling in his arms when the pain is severe,[15] and provided an explanation for his conclusion that the treatment plan is reasonable and necessary.

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[13] (2008), 66 C.C.L.I. (4th) 46, 297 D.L.R. (4th) 373, QL at para. 28 (Ont. Div. Ct.)

[14] *State Farm Mutual Automobile Insurance Co. v. Movahedi*, [2001] O.J. No. 5099, QL at para. 3 (Ont. Div. Ct.)

[15] *Dadi*, QL at para.'s 22, 26, 29, 30 and 32

iii. Refusing To Qualify Dr. Aiello As An Expert Witness

Although Dr. Aiello testified at the arbitration hearing, Aviva submits on appeal that the Arbitrator erred in refusing to qualify Dr. Aiello as an expert. However, I find it was within the Arbitrator's discretion to refuse to qualify Mr. Aiello as an expert, and the Arbitrator explained his reasons for doing so, namely, that Dr. Aiello:

(i) Lacked any specific area of specialty;
(ii) Did not have enough experience as a health care practitioner to be deemed an expert;
(iii) Did not have standing in any secondary professional organizations; and
(iv) Was not published on any noted area of practice.

These are sufficient reasons not to qualify the doctor as a witness.

The Arbitrator nonetheless assessed Dr. Aiello's evidence and determined that he is:

> unable to place any weight on Dr. Aiello's reports as he continued to rely heavily on the facts that the Applicant was working and had gone on a vacation in order to support his findings. Further, the doctor testified he did not believe that he should give any relevance or weight to any pre-existing medical conditions, nor did he appreciate or give emphasis to any other medical documentation when conducting his assessments or writing his reports.
>
> The doctor simply wrote his reports based on his interview. I am unable to give any credence or weight to this doctor's report.[16]

Despite the fact that Dr. Aiello was not qualified as an expert, the Arbitrator still assessed his evidence and concluded that he is unable to place any weight on Dr. Aiello's reports. The Arbitrator was best placed to assess the potential value of Dr. Aiello's evidence. His conclusion is entitled to deference.

iv. Findings Of Fact In The Absence Of Evidence

[16] *Dadi*, QL at para.'s 26 – 27

A finding made in the absence of evidence is an error of law.[17] According to Aviva, when the Arbitrator weighed the written statement signed by Mr. Dadi against other evidence, the Arbitrator decided to give the written statement "no weight" based on findings of fact made in the complete absence of any evidence, and thereby made an error of law.

Essentially, Aviva has two issues concerning the way in which the Arbitrator dealt with the written statement taken by Wendy Ruthven, the road adjuster: (i) The Arbitrator used the wrong name in reference to the road adjuster; and (ii) there was no evidence that the road adjuster had difficulty understanding Mr. Dadi. The Arbitrator's analysis of the written statement states:

> I give no weight to the hand written statement prepared by **Ms. Allard, who acknowledged that the Applicant had difficulties understanding her questions and directions.** In my view, the letter was self-serving for the Insurer and its credibility was reasonably challenged by the Applicant's testimony that he did not read the documents, he just signed what he was told to sign. In my view, a breach of trust by a person in authority may have occurred (emphasis added).[18]

Neither Ms. Allard or Ms. Ruthven testified at the hearing. Clearly, the reference to Ms. Allard is incorrect and should be to Ms. Ruthven since it is not contested that Ms. Ruthven conducted the assessment. However, I find that this error is more in the nature of a typographical error. Earlier in his decision, the Arbitrator states "On July 3, 2015, the road adjuster, Ms. Wendy Ruthven, met the Applicant in his home and helped him fill out the OCF-1 and statement."[19] The Arbitrator further states "Ms. Allard is a physiotherapist."[20] This demonstrates that the Arbitrator knew the difference between Ms. Ruthven and Ms. Allard.

A typographical error is not an error of law. Rule 65.5 of the *Code* allows an arbitrator at any time to correct a typographical error. However, it does not appear that either party asked the Arbitrator to correct Ms. Allard's name in the paragraph quoted above.

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[17] *Lombardi and State Farm Mutual Automobile Insurance Company*, QL at para. 28 (FSCO P01-00022, February 26, 2003)

[18] *Dadi*, QL at para. 31

[19] *Dadi*, QL at para. 22

[20] *Dadi*, QL at para. 24

The Arbitrator's statement "Ms. Allard,[21] who acknowledged that the Applicant had difficulties understanding her questions and directions" was also an error. However, the Arbitrator dealt with the weight of the written statement fully in his analysis when he found that "the letter was self-serving for the Insurer and its credibility was reasonably challenged by the Applicant's testimony that he did not read the documents, he just signed what he was told to sign." The crux of that paragraph is that the Arbitrator found Mr. Dadi's evidence that 'he just signed what he was told to sign' credible. I am not persuaded that the Arbitrator's decision turned on the comment "who acknowledged that the Applicant had difficulties understanding her questions and direction." The weighing of evidence was the Arbitrator's role, and he had evidence before him to reach his decision.

III. CONCLUSION

The Arbitrator correctly applied the law and made factual findings that are not subject to review on appeal. Accordingly, the appeal is dismissed and the Arbitrator's decision is affirmed.

IV. EXPENSES

At the commencement of the appeal hearing, the parties agreed that the successful party to the appeal would be entitled to $7,500.00 inclusive of disbursements and HST. Therefore, Aviva shall pay Mr. Dadi his legal expenses of the appeal proceedings herein, in the amount of $7,500.00, inclusive of disbursements and HST.

Maggy Murray
Director's Delegate

October 23, 2018
Date

[21] It was Tanya Cullen Michaud, Aviva's Health Care Advisor, who noted there "may be a language barrier", Volume III, Compendium of the Respondent, Tab 1, at 12