Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A12-005538

BETWEEN:

JULIA LO-PAPA

Applicant

and

CERTAS DIRECT INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Arbitrator Barry S. Arbus, Q.C.

Heard: January 29, 2014 at the offices of ADR Chambers in Toronto, Ontario and by Written Submissions received on March 15, 2014

Appearances: Ms. Merai Daoud for Ms. Julia Lo-Papa
Mr. Robert H. Rogers and Ms. Kimberley Tye (Co-Counsel) for Certas Direct Insurance Company

Issues:

The Applicant, Ms. Julia Lo-Papa, was injured in a motor vehicle accident on October 10, 2010. She applied for and received statutory accident benefits from Certas Direct Insurance Company ("Certas"), payable under the *Schedule*.[1] The Insurer paid benefits up to the limits of the Minor Injury Guideline (MIG) Cap of $3,500, as provided for under the *Schedule,* and then refused additional funding for treatment plans and assessments beyond the $3,500. The Applicant claims that her injuries entitle her to funding for the treatment plans and assessments because her injuries fall outside the Minor Injury Guideline Cap of $3,500. The parties were unable to resolve their disputes through mediation, and the Applicant applied for arbitration at the

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

Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this Hearing are:

1. Is the Applicant subject to the Minor Injury Guideline Cap of $3,500?

2. If the answer to the first question is in the negative, is the Applicant entitled to funding for the treatment plans and assessments in dispute?

Result:

1. The Applicant, Julia Lo-Papa, is subject to the Minor Injury Guideline Cap of $3,500, as defined by the *Schedule.*

2. The Applicant is not entitled to funding for the treatment plans and assessments in dispute.

Evidence and Analysis

History:

Ms. Julia Lo-Papa was involved in a motor vehicle accident on October 20, 2010. She was a belted passenger in her grandmother's vehicle. Ms. Julia Lo-Papa and her sister, Jessica Lo-Papa, testified at the Arbitration Hearing and outlined the nature of her injuries and the treatment that she had received since the accident. The Applicant stated that at the time of the accident she suffered pain to her spine and her head. She stated that she currently suffers from headaches, lower back pain, leg pain, and is moody, anxious, and depressed.

Analysis

The parties delivered an Agreed Statement of Facts and a Joint Document Brief, both of which were introduced as exhibits during the Arbitration Hearing. The Applicant relied on the report of

Dr. Howard Jacobs, a chronic pain specialist, dated October 24, 2011 (Joint Document Brief, Tab 16) who stated that the Applicant suffered anxiety and depression since the accident. The Respondent relies on the evidence of Dr. Derek Lefebvre dated May 9, 2011 (Joint Document Brief, Tab 17) and Dr. Lam in his report dated February 6, 2012 (Joint Document Brief, Tab 18).

Onus of Proof

It is clear that the onus of proof is with the Applicant to establish that the injury falls outside the Minor Injury Guideline (and therefore is not subject to the Minor Injury Guideline Cap of $3,500). In the Appeal decision of *Scarlett v. Belair*, Director's Delegate Evans stated clearly that, "the burden of proof always rests on the insured of proving that he or she fits within the scope of the coverage."[2]

Director's Delegate Evans stated:

> "The law, briefly, provides that
>
> - a minor injury means 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 [*Schedule*, s. 3(1)]
> - an insured who sustains an impairment that is predominantly a minor injury can receive no more than $3,500 towards medical and rehabilitation expenses (including assessments) [*Schedule*, s. 18(1)]
> - an exception for pre-existing conditions may apply based on "compelling evidence" [*Schedule*, s. 18(2)]"

Dr. Lefebvre's assessment offered the following opinions specific to the issue under consideration as follows:

(a) The Applicant suffers from a predominantly minor injury as a result of the motor vehicle accident;

(b) The Applicant does not have a pre-existing medical condition that would prevent her from achieving maximum recovery from her minor injuries if she was subject to the $3,500 limit;

[2] *Scarlett v. Belair*, Page 2.

(c) The disputed treatment plans are neither reasonable nor necessary because the Applicant's intervention can be adequately delivered within the Minor Injury Guideline.

Dr. Jacobs' report of October 24, 2011 does opine that the Applicant suffers from lots of anxiety and depression, but at no time does he address whether the anxiety and depression are sufficient to remove the injuries suffered from the Minor Injury Guideline. He also offers no opinion as to whether there is any pre-existing medical condition that might be impeding recovery. Dr. Jacobs does not address the question of whether the impairment is other than predominantly a minor injury, or that the Applicant's symptoms are separate and distinct from her soft tissue injury (and not clinically associated sequelae).

Dr. Lam's subsequent examination and report dated February 6, 2012 and his follow-up report dated March 8, 2013 (Joint Document Brief, Tab 19) substantially reiterated the position of Dr. Lefebvre in his report.

Section 38 of the *Schedule* states that in order to show that the MIG does not apply, the Insured must provide a treatment and assessment plan completed and signed by a regulated health professional stating that the Insured Person's impairment is not predominantly a minor injury.

Section 38(3)(c)(i) provides that a treatment and assessment plan must provide:

A. that the insured person's impairment is not predominantly a minor injury,

OR

B. that the insured person's impairment is predominantly a minor injury but, based on compelling evidence provided by the health practitioner, the insured person does not come within the Minor Injury Guideline because the insured person has a pre-existing medical condition.

Conclusion

Clearly, the burden of proof rests on the Applicant and there is nothing provided by the Applicant which satisfies the test of removing the injuries from being predominantly a minor injury. I am satisfied that the Applicant has not satisfied the tests required to meet the burden of

proof required, and accordingly the Applicant is subject to the Minor Injury Guideline Cap of $3,500. Because of the answer to the first issue, I do not need to deal with the second issue.

Expenses

The parties made no submissions on expenses. They are encouraged to resolve this issue. If they are unable to do so, they may schedule an expense hearing before me, according to the provisions of Rule 79 of the *Dispute Resolution Practice Code.*

Barry S. Arbus, Q.C. Arbitrator	May 14, 2014 Date

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ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The Applicant, Julia Lo-Papa, is subject to the Minor Injury Guideline Cap of $3,500, as defined by the *Schedule.*

2. The Applicant is not entitled to funding for the treatment plans and assessments in dispute.

Barry S. Arbus, Q.C.
Arbitrator

May 14, 2014
Date