Another Stark Reminder

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THE MATTER OF APPLICANT AND AVIVA [1] is another reminder that to be effective, *"all notices governed by the Schedule must be clear and readily understandable to the unsophisticated person."* [2]

In a dispute over a number of Treatment and Assessment Plans (OCF-18) relating to physiotherapy treatment, the Applicant in this case sustained soft-tissue injuries in the accident which were not the point of contention in this claim. The Applicant had a pre-existing psychological condition ultimately removing the Applicant from the MIG. The insurer disputed whether or not the Applicant's left-knee impairment, which was ultimately treated with arthroscopic surgery, arose from the accident. The left-knee injury was noted in the disputed Treatment and Assessment Plans (OCF-18). Naturally, the insurer disputed causation arguing that the left knee impairment was a pre-existing condition.

The Applicant claimed that her left knee impairment was aggravated by the accident. The Applicant's treating Orthopedic surgeon provided a report indicating that the Applicant sustained myofascial strain to the left knee, characterized as exacerbating pre-existing left knee pain.

The Adjudicator agreed that the Applicant's left knee problems arose and were being treated two years before the accident. The Applicant contended that the insurer was negligent in not requiring an amendment to its IE reports after she was removed from the MIG. The Adjudicator found this argument to be "meritless" because the insurer's section 44 assessments supported denials based on the "reasonable and necessary" standard, the MIG removal was based on psychological issues, not physical ones. As a result, all three OCF-18's were found to be not reasonable and necessary by the Adjudicator.

However, as a further argument in relation to one of the three OCF-18's, the Applicant claimed that the denial did not meet the requirements of section 38 of the Schedule. Most notably, the Adjudicator agreed that the insurer's notice of denial was insufficient, in that the insurer failed to provide a medical reason for its refusal. The Adjudicator went on to state that the insurer linked its determination that the proposed OCF-18 was not reasonable and necessary to the Applicant's failure to attend a previously scheduled IE in relation to different earlier claims and further found that the insurer:

> *"gave an invalid reason that was misleading to the applicant and frustrated the purpose of the notice to provide the applicant with accurate information on which to base her decisions...No medical reason for refusal was given...The respondent effectively stated to the applicant that it would refuse to even consider the August 15th claim because of her failure to attend an IE scheduled in June 2015 to assess another, different and earlier claim. No such right exists: it could have and should have issued a new, proper notice of examination."* The Notice was confusing, and had *"imprecise and unexplained references to sections of the Schedule [that] would confuse or at least fail to help the typical reader."* [3]

As a result of the insurer's insufficient explanation of benefits, the insurer was found liable to pay the cost of the OCF-18 plus interest, as prescribed by s.38 of the *Schedule*. ■

[1] *Applicant and Aviva* (2018 CanLII 81888)

[2] *Ibid* at para 24(ii)

[3] *Ibid* at para 24