Financial Services Commission

Commission des services financiers de l'Ontario

Appeal P99-00047

OFFICE OF THE DIRECTOR OF ARBITRATIONS

GENERAL ACCIDENT ASSURANCE CO. OF CANADA

Appellant

and

DOMINIC VIOLI

Respondent

BEFORE: David R. Draper, Director's Delegate

COUNSEL: Robert H. Rogers (for General Accident)
Allen Wynperle (for Dominic Violi)

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that:**

1. The appeal is dismissed and the arbitration order dated August 20, 1999 is confirmed.

2. General Accident Assurance Co. of Canada is required to pay Dominic Violi's reasonable appeal expenses.

David R. Draper
Director's Delegate

September 27, 2000

REASONS FOR DECISION

I. NATURE OF THE APPEAL

General Accident Assurance Co. of Canada ("General Accident") appeals from an arbitration order dated August 20, 1999. It contends that the arbitrator erred in law in ordering payment of the following expenses:

- chiropractic expenses between July 31, 1995 and April 1, 1999, in the amount of $7,002.70;
- chiropractic expenses between April 2, 1999 and July 31, 1999, to a maximum of two treatments per week;
- massage expenses between May 1996 and March 31, 1999;
- massage expenses between April 1, 1999 and July 31, 1999, at a frequency of one treatment per month.

General Accident's central argument is that this treatment was not reasonable or necessary because, at most, it provided temporary pain relief, with no measurable or permanent improvement in Mr. Violi's functional abilities.

II. ANALYSIS

Mr. Violi was involved in three automobile accidents — July 11, 1994, July 20, 1995 and January 26, 1996. General Accident is the insurer responsible for paying his accident benefits for all three accidents.

The arbitrator found that as a result of these accidents, Mr. Violi sustained injuries to his neck, low back and shoulder. Although later X-rays showed early degenerative disc disease, the

arbitrator was unable to determine whether this condition contributed to Mr. Violi's pain symptoms. The decision makes it clear, however, that she accepted that Mr. Violi suffered from neck and back pain as a result of the accidents. The question was whether ongoing massage and chiropractic treatment was an appropriate response.

The arbitrator dealt with Mr. Violi's claims as supplementary medical benefits under s.36 of the *SABS-1994*.[1] This section provides that "if an insured person sustains an impairment as a result of an accident," the insurer is obliged to pay for "all reasonable expenses incurred by or on behalf of the insured person as a result of the accident," including medical services, chiropractic services and "other goods and services of a medical nature that the insured person requires."

The wording used in other related sections is slightly different. According to s.37(1), the insurer can require the insured person to provide a certificate from his or her health practitioner stating that the expense is "reasonable and necessary for the person's treatment." This is the same test the Designated Assessment Centres ("DACs") apply. The legislation directs them to provide a report stating whether the expense claimed is "reasonable and is necessary for the insured person's treatment."[2]

At the arbitration hearing, Mr. Violi claimed that the massage and chiropractic treatments provided relief from pain, albeit temporarily, and helped him maintain his level of functioning. In support of his claim, he relied on his family doctor, chiropractor, massage therapist and orthopaedic surgeon, all of whom supported an approach that included massage and chiropractic treatment.

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[1] Ontario Regulation 776/93, as amended, the *Statutory Accident Benefits Schedule—Accidents after December 31, 1993 and before November 1, 1996*. After concluding that the benefits were payable under s.36, the arbitrator did not go on to deal with Mr. Violi's claim that they were also payable as rehabilitation benefits under s.40.

[2] *SABS-1994*, s.39(10)(a).

General Accident relied on two reports prepared by The Hamilton Hospitals Assessment Centre, acting as a DAC. In June 1996, the DAC was asked to assess whether the massage and chiropractic treatments were reasonable and necessary. The assessment was done by Dr. D. Kumbhare ("evaluating physician") and Dr. E.R. Crowther (chiropractor). They recommended that chiropractic treatment be tapered and discontinued over an eight-week period. With respect to massage, they felt that it provided only temporary relief from symptoms. In their view, Mr. Violi would be best served by participating in a self-directed, structured exercise program.

Two and a half years later, after the arbitration process was already underway, General Accident arranged for another DAC assessment at The Hamilton Hospitals Assessment Centre. The questions were expanded to some extent, but still focussed on the reasonableness of massage and chiropractic treatment. This assessment was done in November 1998 by Dr. A.M. Porte (orthopaedic surgeon), S. Lowe (physiotherapist) and Dr. E.R. Crowther, the same chiropractor involved in the first DAC assessment. The DAC concluded as follows:

> At the current time, passive interventions are palliative in nature and are likely to have no significant impact in Mr. Violi's ongoing recovery. We do not feel at the current time that ongoing chiropractic treatment and massage therapy is medically reasonable or necessary to address the injuries sustained in his previous three motor vehicle accidents . . .
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> Unfortunately, it is the consensus of the examining practitioners that there are no other future medical treatments or rehabilitation services required that would be considered to be medically reasonable or necessary to address the injuries sustained in his previous three motor vehicle accidents. It is the opinion of the evaluating practitioners that Mr. Violi continue to focus on his self-directed home exercise program to maintain his current level of flexibility and endurance.

Further to these reports, Dr. Crowther testified at the arbitration hearing. The only other witness was Mr. Violi. Relying heavily on Dr. Crowther's evidence, General Accident argued that Mr. Violi could maintain his level of functioning through independent exercise, making chiropractic and massage treatments unnecessary.

The arbitrator concluded that the expenses claimed were reasonable and necessary. As a result, she ordered General Accident to pay the outstanding chiropractic and massage expenses, as well as certain ongoing expenses. General Accident challenges this order, arguing that she erred in law in interpreting and applying the test in s.36 of the *SABS-1994*.

On appeal, General Accident submits that to qualify for prolonged treatment, the insured person must establish, at a minimum, that:

> (a) the treatment goals, as identified, are reasonable;
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> (b) these goals are being met to a reasonable degree; and
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> (c) the overall costs [not just financial, but also investment of time, etc.] of achieving these goals is reasonable taking into consideration both the degree of success and the availability of other treatment alternatives.

These tests have considerable merit. However, for reasons that follow, I am satisfied that the arbitrator considered these factors, although perhaps not as explicitly as General Accident might have wanted.

Dealing with the first test, the goal of Mr. Violi's chiropractic and massage treatments was to relieve his pain and help maintain his level of functioning. One question is whether pain relief is a legitimate goal. I agree with the arbitrator that it can be, a position consistently adopted in previous arbitration decisions.[3] As Eberhard J. recently said in *Cubello v. Guidolin*, [2000] O.J. No. 1468, "[t]he relief of pain is, at many levels from aspirin to palliative care of terminal patients, a valid and recognized mandate of the health care professions."

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[3] See also *Amoa-Williams and Allstate Insurance Company of Canada*, (FSCO A97-001864, June 5, 2000); *Ms. Z and Dominion of Canada General Insurance Company*, (FSCO A98-000124, March 7, 2000), under appeal; *Kennelly and Wawanesa Mutual Insurance Company*, (FSCO A99-000139, January 21, 2000); and *Walker and State Farm Mutual Automobile Insurance Company*, (OIC P96-000036, December 9, 1996).

In some extreme cases, pain relief might be the only goal. More typically, as here, it will be part of a broader treatment or rehabilitation strategy. Mr. Violi's treatment team felt that the chiropractic and massage treatment were needed to reduce his pain and help him maintain his level of functioning. Dr. Crowther accepted the importance of "supportive care," but not without some kind of testing to ensure its effectiveness. In other words, the effectiveness of ongoing, repetitive treatment cannot simply be assumed. The best approach, he suggested, was to withdraw the treatments periodically and monitor the consequences.

Dr. Crowther's approach has received some acceptance. In *Alves and Commercial Union Assurance Company*, (FSCO A96-000247, May 13, 1999), the arbitrator held that to justify the extensive chiropractic treatment the insured person was receiving, particularly given his lack of improvement, he had to provide some type of compelling evidence that the treatments were effective. On the particular facts, the arbitrator concluded that the expenses were not reasonable.

On appeal, Mr. Alves argued that the arbitrator erred in imposing an unreasonably high standard of proof not authorised by the legislation. Director's Delegate Naylor rejected this argument as follows:[4]

> I do not view the arbitrator's reasons as imposing set requirements of proof. Rather, he was assessing the strength of the evidence before him. He acknowledged that an applicant could recover expenses for palliative therapy affording pain relief. However, he was not satisfied in this case, given the amount of treatment Mr. Alves had received and the outcome of the DAC review, that generalised assertions on the part of Mr. Alves and his treating practitioner that the therapy was of benefit were sufficient to justify continued payment. I do not find any basis to interfere in his assessment. (p.11)

I agree with this approach. Evaluating the effectiveness of any treatment is important, especially in determining whether it should continue over a lengthy period. One concern is dependence. As Arbitrator Sapin recently said in *Amoa-Williams*, cited previously, "pain relief measures should

[4] *Alves and Commercial Union Assurance Company*, (FSCO P99-00028, August 25, 2000).

not encourage an inappropriate or indefinite dependency, or interfere with other aspects of rehabilitation."

While the arbitrator accepted that the withdrawal of treatment is a recommended procedure, she was not persuaded it was required in every case. In dealing with the facts of this case, she was influenced, appropriately in my view, by the fact that this issue was not raised until Dr. Crowther testified at the hearing. The situation might have been different if Mr. Violi and his treatment team had been given more time to respond and failed to provide a reasonable explanation. More importantly, this case had strengths that distinguished it from some of the other decisions. For example:

- Mr. Violi was credible and sincerely motivated to return to his pre-accident activities, including work;
- his treatment team took a consistent approach, recommending a reasonable progression of treatment;
- he and his medical team did not insist on one treatment modality, but adjusted the type and frequency of the treatments based on his current needs; and
- he did not simply rely on passive modalities, but combined chiropractic and massage with active exercise and work.

In my opinion, these are appropriate considerations sufficient to support the decision. While insurers should not be expected to fund ineffective treatment, effectiveness need not be proven to a level of scientific certainty. The arbitrator was entitled to rely on the evidence of Mr. Violi and his treatment team and, therefore, I am not prepared to interfere.

IV. APPEAL EXPENSES

Given the outcome and the issues involved, Mr. Violi should recover his appeal expenses. If the parties are unable to agree on the amount, they should follow the procedures set out in the *Dispute Resolution Practice Code.*

David R. Draper
Director's Delegate

September 27, 2000