Financial Services Commission of Ontario

Ontario

Commission des services financiers de l'Ontario

Appeal P13-00026

OFFICE OF THE DIRECTOR OF ARBITRATIONS

PERTH INSURANCE COMPANY

Appellant

and

CHANNOCH SHMUEL

Respondent

BEFORE:	David Evans
REPRESENTATIVES:	Nicholaus de Koning for Perth Insurance Company Alon Rooz for Mr. Shmuel
HEARING DATE:	June 12, 2014

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 of the Arbitrator's order dated August 12, 2013 is allowed. Paragraph 1 of the Arbitrator's order is revoked, and the following substituted:

    1. Mr. Shmuel is not entitled to receive payment for any medical and rehabilitation benefits.

2. If the parties are unable to agree on the legal expenses of this appeal, an expense hearing shall be requested pursuant to the *Dispute Resolution Practice Code* (Fourth Edition, Updated – January 2014).

David Evans
Director's Delegate

July 22, 2014
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Perth Insurance Company appeals Arbitrator Lee's order that, under the *SABS–1996,*[1] Mr. Shmuel is entitled to receive a medical benefit for six treatment plans, deemed approved, totaling $6,398.23.

II. BACKGROUND

Mr. Shmuel was in a motor vehicle accident on November 12, 2009. He applied for statutory accident benefits from Perth Insurance Company. The dispute about the claimed benefits came before the Arbitrator. He dismissed almost all of the claims.

In particular, Mr. Shmuel claimed he was entitled to receive a medical benefit for twenty-nine treatment plans from Universal Rehab Clinic, totaling $29,299.27.

The Arbitrator noted that the plans included a number of modalities, but none of the alleged treating professionals testified. The only witness from Universal Rehab was the office administrator, who described the process to "unleash ... the torrent of treatment plans." Mr. Shmuel attended as he wished, and although, as the Arbitrator noted, Mr. Shmuel attended on over a hundred occasions, "an examination of the clinical notes and records of Universal Rehab Clinic reveals little more than sheets of illegible and indecipherable entries with some records of Mr. Shmuel's massage." [Footnote omitted]

The Arbitrator found that there was no medical evidence to show "the treatment goals were identified or reasonable or being met", "the overall costs were reasonable" or "the treatment was timely, medically appropriate or medically suited to Mr. Shmuel." Most significantly for this appeal, the Arbitrator found that "It was not even possible to determine what 'treatment' had

[1] *The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996,* Ontario Regulation 403/96, as amended.

been administered to Mr. Shmuel in the course of his over one hundred visits to Universal Rehab during the ten-month period in question."

However, the Arbitrator agreed with Mr. Shmuel that six treatment plans, totaling $6,398.23, had been deemed approved through operation of the *SABS*, namely s. 38(8.2)(2), which describes the consequences when an insurer fails to respond to a treatment plan.

The Arbitrator found that there had been no responses to those six treatment plans, and that "no jurisprudence was tendered to support the contention that a treatment plan, deemed approved, had to be incurred before it became payable." Therefore, those six plans were payable.

III. ANALYSIS

Section 38 applies to medical and rehabilitation benefits. There was no suggestion that Mr. Shmuel was subject to a *Pre-approved Framework Guideline*, so in the following I will ignore those portions of s. 38 dealing with PAFs.

Insureds have to submit an application for s. 38 benefits by means of a treatment plan. Subsection 38(7) provides that "On receiving the application, the insurer shall promptly determine whether the insurer is required to pay for the goods and services contemplated by the treatment plan." If there had been no earlier notice of a conflict of interest, the insurer then has to give a notice under para. 1 of s. 38(8) within 10 business days of receipt of the application, pursuant to s. 38(8.1). Subsection 38(8.2) then sets out the consequences of failing to respond to a non-PAF claim:

> **38.** (8.2) If the insurer fails to give a notice under subsection (8) in accordance with subsection (8.1), the following rules apply:
> ...
> 2. In the case of a notice under paragraph 1 of subsection (8), the insurer shall pay for all goods and services provided under the treatment 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 the notice described in paragraph 1 of subsection (8).

Subsection 38(8.2) does not deem the treatment plan approved, does not require the insurer to pay the entirety of the treatment plan, and does not speak of a treatment plan being "incurred." Rather, the insurer must only pay for those goods and services *provided* under the treatment plan that *relate to the period starting on the 11th business day after the day the insurer received the application.*

However, the Arbitrator specifically found that it was impossible to determine what treatment had been administered to Mr. Shmuel in the course of his attendances at Universal Rehab. Although the Arbitrator used the term "administered," this is the same as saying "provided." Thus, according to the Arbitrator's own findings, it is impossible to say what goods and services under the treatment plans were provided to Mr. Shmuel, or when.

In those circumstances, s. 38(8.2) cannot apply. The Arbitrator therefore erred in finding that Perth Insurance Company was required to pay for those six treatment plans. The appeal is allowed. Paragraph 1 of the Arbitrator's order is rescinded and replaced with one denying Mr. Shmuel any medical and rehabilitation benefits.

At the end of his decision, the Arbitrator stated "The parties did not make submissions on special award or expenses, and if necessary, they may make written submissions in regard to these two items..." However, pursuant to s. 282(10) of the *Insurance Act*, a special award is only payable where "an insurer has unreasonably withheld or delayed payments." Since no payments were due to Mr. Shmuel, the only remaining issue at arbitration is arbitration expenses.

IV. APPEAL EXPENSES

If the parties are unable to agree on the legal expenses of this appeal, an expense hearing shall be requested pursuant to the *Dispute Resolution Practice Code* (Fourth Edition, Updated – January 2014).

David Evans Director's Delegate	July 22, 2014 Date