

S/SC/430/2010

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN

REC'D
REGU

APR 12 2011

FILED
DEPOSE

BETWEEN:

Citation: 2011 NBQB 098

Date: 2011 04 12

COUR DU BANC DE LA REINE
GREPPIER / SAINT-JEAN

KELLY WEBB

Plaintiff

- and -

AVIVA INSURANCE COMPANY

Defendant

BEFORE: Justice William T Grant

TRIAL HELD: Saint John

DATES OF TRIAL: March 22 and 23, 2011

DATE OF DECISION: April 12, 2011

COUNSEL:

Timothy M. Collins, Esq. for the plaintiff

Donald V. Keenan, Esq. for the defendant

DECISION

GRANT, J

[1] In this action the plaintiff, Kelly Webb, claims against the defendant insurer, Aviva Insurance Company, pursuant to Section B of the New Brunswick Standard Automobile Policy for the cost of massage therapy treatments which she incurred after a car accident and for which Aviva refuses to pay.

BACKGROUND

[2] The plaintiff, Kelly Webb, was injured in a motor vehicle accident on August 30, 2008 ("the second accident"). At the time of that accident she was undergoing medical treatment for injuries she had suffered in a prior motor vehicle accident on December 22, 2006 ("the first accident").

[3] In the second accident she sustained repeat neck, shoulder and back injuries and developed severe headaches which have been described as "tension headaches" by one doctor and "headaches with migrainous features" by another.

[4] Ms. Webb's family doctor is Dr. Elizabeth Keyes. Dr. Keyes testified that she has been seeing Ms. Webb monthly for her injuries resulting from the motor vehicle accidents. She testified that following the second accident she prescribed physiotherapy and massage therapy but by January of 2009 there was no improvement in Ms. Webb's condition so she referred her to Dr. Patricia Forgeron, a specialist in physical medicine and rehabilitation.

[5] At that time her chief complaint was of low back pain and Dr. Forgeron noted that she had not significantly improved from a functional standpoint despite going to both physiotherapy and massage therapy twice a week. Dr. Forgeron recommended that she move into a more active treatment program and suggested that she start a regular exercise regime with a personal trainer which seemed to have helped her after the first accident. She started working with a personal trainer, lost weight and there was some improvement with her lower back pain but her headaches persisted.

[6] In February, 2010 Dr. Keyes referred Ms. Webb to Dr. Gregg MacLean, a neurologist, to investigate her headaches. He noted that she had no history of headaches prior to the second accident and that while she obtained some relief with drugs, she did not have the coverage to allow her to purchase the drugs that gave her relief. He noted that her headaches had migrainous features that respond to anti-migraine therapy and recommended a different drug.

[7] Dr. MacLean also saw Ms. Webb in January of 2011 and noted that the drug he had recommended, though initially helpful, was not helping any longer. On January 26, 2011 he wrote to Dr. Keyes:

This is a lady who unfortunately has ongoing chronic pain problems. Her migraine syndrome is out of control despite anti-migraine therapy. Her use of Maxalt and Relpax might suggest there could be an element of medicine-induced headache. She takes Talwin 50 and may take 4 per day.

Normally, one would try injecting the greater occipital tender points and then perhaps even considering Botox treatment. However, she is completely needle-phobic and this would be out of the question.

She seemed to do better with physical therapies and certainly physio to try some acupuncture and resumption of massage would give her some relief. ...

[8] Dr. MacLean then wrote a prescription for "physiotherapy, acupuncture, etc.". The prescription was dated the same day as his letter to Dr. Keyes from which I infer that by "etc." he meant massage therapy.

[9] In April, 2010 Dr. Edwin Koshi, an expert in physiatry, conducted an independent medical examination at the request of Aviva. He recommended that Ms. Webb be further educated about her condition and stated, "... at this stage of the recovery, in my opinion, further massage therapy and physiotherapy is not recommended." (underlining in the original).

[10] At or about the time that Ms. Webb attended the IME with Dr. Koshi and throughout the summer of 2010 Dr. Keyes wrote prescriptions for her to continue massage therapy, the latest being on August 29, 2010. Ms. Webb found that the massage therapy was giving her some relief from her headaches so she continued with it and paid the costs herself until she could no longer afford it.

[11] It continued until early November 2010 although the defendant refused to pay for it under Section B of her policy. She now brings this action against Aviva to recover those costs, the total of which is agreed to be \$4,605.00. There is no issue with the reasonableness of those charges.

ANALYSIS AND DECISION

[12] The portion of Section B of the policy that is in issue reads as follows:

Section B – Accident Benefits
Subsection 1 – Medical, Rehabilitation and Funeral Expenses

- (1) The insurer will pay with respect to each insured person who sustains bodily injury as a result of an accident reasonable expenses resulting from the accident within the benefit period set out in clause (2) for,**
- (a) necessary medical, surgical, dental, chiropractic, ambulance, hospital, or professional nursing services;**
 - (b) any other necessary service within the meaning of entitled services in the Hospital Services Act or the Medical Services Payment Act; and**
 - (c) other goods and services, which, in the opinion of the insured person's attending physician and in the opinion of the insurer's medical advisor, are essential for the treatment, occupational retraining or rehabilitation of the insured person.**

LAW

[13] In the case of *Rolfe v. Axa Insurance Co.* (2004), 269 N.B.R. (2d) 16 (C.A.), Ms. Rolfe suffered soft tissues injuries to her back in a motor vehicle accident and her treating physician recommended that she undergo massage therapy to treat those injuries. After about a year of massage therapy treatments the insurer's medical advisor observed that if she "...has had 61 massage therapy treatments and continues to have the problems she reports I don't think much will be achieved by additional treatments". Axa then refused to honour future claims for massage therapy on the ground that it was not "essential for ... (her) ... treatment, occupational retraining or rehabilitation...". Her treating physician disagreed and expressed the opinion that she would benefit from massage treatments and prescribed more for her. She took seven treatments, sent the bill to Axa, which denied payment, and then she sued them.

[14] At the time of the *Rolfe* case the wording of subsection of 1(1) of Section B of the policy was slightly different in that the three categories that are now set

out in separate sub-paragraphs were all contained in a single paragraph. However, the courts, including the Court of Appeal, all agreed that the single paragraph established three categories of insured services which are, with minor variations, the same as those in the current policy.

[15] The main issue dealt with by the Court of Appeal was whether or not massage therapy was a "medical" service within the meaning of Section B coverage and Section 256(1) of the *Insurance Act* R.S.N.B. 1973, c. I-12. The Court of Appeal found that it was, and that is not contested in this case. The issue raised by Aviva in this case is whether, in light of the evidence, massage therapy was "necessary" after April of 2010 when Dr. Koshi, advised Aviva that it was not.

[16] In *Rolfe v. Axa, supra*, the trial judge found that the services in question were necessary and that finding was not contested on appeal. The Court of Appeal therefore did not deal with the issue of whether or not the services were "necessary" or how that should be determined.

THE POLICY

[17] Aviva submits that for treatments to be "necessary" under the policy they must be more than merely helpful or useful. It submits they must be essential or required and that the evidence when viewed as a whole only establishes that they are helpful to Ms. Webb for very short periods, not that they are essential for her rehabilitation.

[18] Sub-paragraph (c) of the policy states that the services therein provided for are covered only if they are deemed "essential" for the treatment, occupational retraining or rehabilitation of the insured. In my view there is no significant difference between the terms "essential" as found in sub-paragraph

(c) and "necessary" as found in sub-paragraph (a). In fact, in the Merriam-Webster online dictionary "necessary" is listed as a synonym for "essential" and the word "required" is a synonym for both. However, where there is a difference between the two sub-paragraphs of the policy is in the test for determining if the services are required.

[19] Under sub-paragraph (c) the policy provides that the services set out therein are essential if that is the conclusion of both the insured's attending physician and the insurer's medical advisor. Moreover, they must be essential in the opinion of both doctors "... for the treatment, occupational retraining or rehabilitation of the insured person." It is a stringent test in that both physicians must agree and it has clearly enunciated parameters.

[20] Sub-paragraph (a), on the other hand, under which this medical service falls, does not set out the test for determining whether a medical service is "necessary" nor does it say what the medical service must accomplish. In my view, then, the insured is required to meet a lower threshold under sub-paragraph (a) than under sub-paragraph (c).

[21] The next threshold lower than the concurrence of two doctors is the opinion of one doctor. In my view the doctor who would be in the best position to provide that opinion would be the attending physician. I therefore find that the test under sub-paragraph (a) for determining if a medical service is "necessary" is that it be deemed to be so in the opinion of the insured's attending physician. Moreover, considering that the policy contains no parameters stating what the medical service must accomplish, I find that it need only provide some benefit to the insured in the attending physician's opinion.

[22] It follows then, and I find, that when a medical service has been recommended by the insured's attending physician, as it has been in this case, it

matters not what the insurer's medical advisor says. The service is "necessary" as that term is used in sub-paragraph 1(a) of Section B of the policy and the insurer is liable to pay for it.

MEDICAL EVIDENCE

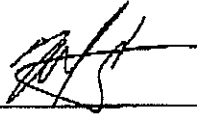
[23] In this case Dr. Keyes testified that in her opinion the massage therapy is necessary for Ms. Webb. She continued to prescribe it long after Aviva made it known that it would no longer provide coverage for massage therapy. She believes it provided relief to Ms. Webb from her neck pain and her headaches during the summer of 2010 and made it easier for her to be productive in her work. When it was discontinued she noted a deterioration in her condition including increasing neck pain, tenderness in her neck muscles and worsening headaches resulting in sleep disruption and decreased productivity in her work. Because of these symptoms and effects she referred Ms. Webb to Dr. MacLean again.

[24] Dr. Keyes is Ms. Webb's attending/treating physician; she has seen her on a monthly basis since her first accident. Moreover, Dr. Keyes has continued to follow Ms. Webb's progress up until the time of trial and is still of the opinion that massage therapy is necessary for her treatment.

[25] In light of this evidence, which I accept, and my interpretation of the policy as set out above I find that the massage therapy treatments Ms. Webb had after April, 2010 were "necessary medical services" as that term is used in the policy. It follows, and I find, that Aviva is liable to Ms. Webb for the cost of those treatments for which she has paid.

DISPOSITION

[26] There will be judgment in favour of the plaintiff, Kelly Webb, in the amount of \$4,605.00 plus interest at five percent from September 1st, 2010 until the date of payment. Ms. Webb is also entitled to costs on Scale 1 based on an amount involved of \$5,000.00 plus all taxable disbursements.



William T Grant
Judge of the Court of Queen's Bench
of New Brunswick