[Cite as *In re Howells*, 2024-Ohio-3271.]

IN THE COURT OF CLAIMS OF OHIO

IN RE: RIAN HOWELLS	Case No. 2023-00653VI
RIAN HOWELLS	Magistrate Holly True Shaver
Applicant	DECISION OF THE MAGISTRATE

{¶1} On March 6, 2024, a hearing was held on Rian Howells' ("applicant") appeal of the Attorney General's ("AG") September 28, 2023 final decision.[1]

{¶2} Applicant was a victim of criminally injurious conduct on November 27, 2019, when he was involved in an altercation outside of a bar where he was punched in the jaw. In decisions from previous applications, the AG determined that applicant is responsible for 20% of his expenses incurred because of this incident due to his contributory misconduct.

{¶3} In the September 28, 2023 final decision, the AG found that the expenses applicant incurred from Head and Neck Physical Therapy were not compensable because applicant is required to utilize a provider who accepts his insurance and is in-network pursuant to R.C. 2743.51(B) and R.C. 2743.60(D).

{¶4} Applicant did not attend the hearing but was represented by Attorney Michael Falleur. Assistant Attorney General Candice Suffren represented the state of Ohio. The attorneys presented oral arguments and applicant's wife, Annie Howells, testified.

{¶5} In opening argument, attorney for applicant asserted that the expenses incurred from Head and Neck Physical Therapy were reasonable and should be awarded because: 1) there was a "peer to peer" referral from applicant's treating Ear, Nose, and

[1] Although various parts of the claim file refer to a September 15, 2023 final decision, the correct date of the final decision is September 28, 2023. See page 122/704 of transmitted file.

Throat ("ENT") specialist to the specific physical therapist[2]; and 2) applicant's physical therapist has unique expertise that cannot be found elsewhere in the area.

{¶6} In contrast, the AG asserted that applicant failed to use a readily available collateral source. The AG contended that applicant did not attempt to see an in-network provider before going to the out-of-network provider to whom he was referred.

{¶7} Annie Howells testified that she is the primary person in her household who deals with insurance matters. Mrs. Howells stated that after the November 27, 2019 altercation, applicant started to see Dr. David Powell, an ENT specialist, to treat his injuries. Mrs. Howells stated that Dr. Powell has been supportive throughout her husband's recovery and that applicant's family trusts Dr. Powell for his expertise as an ENT. Mrs. Howells averred that applicant still experiences facial nerve pain, jaw pain, and headaches stemming from the altercation. Mrs. Howells testified that Dr. Powell referred applicant to Jenna Goar at Head and Neck Physical Therapy for treatment of his continued symptoms. Mrs. Howells stated that after she and applicant discovered that Jenna Goar was not in-network for their insurance, they asked Dr. Powell if there was anyone else in the area who provides the same care as Goar and Dr. Powell stated there was not. Further, Mrs. Howells testified that when she conducted a search for head and neck physical therapists on her insurance online search tool, it did not return any results. *See* Applicant's Exhibit A, p. 4. Mrs. Howells was not sure when she first conducted this search but stated that she most recently searched in December 2023. Mrs. Howells stated that Goar's office is on the opposite side of Columbus from where applicant lives and that if there were a closer option, applicant would use that.

{¶8} In closing, applicant's attorney argued that the note attached to applicant's brief dated December 6, 2023, from Jenna Goar stating that she would have no one to refer her patients to if she was unable to see them, is proof that there is not another readily available option in applicant's area, let alone in-network. Further, applicant's attorney argued that In re Elmo, Ct. of Cl. No. 2012-70025VI, 2017-Ohio-9451, and In re Shelly K., Ct. of Cl. No. V81-68166jud (Mar. 30, 1984), stand for the proposition that a referral from

[2] Because the case is resolved in applicant's favor on other grounds, the magistrate will not address applicant's "peer to peer" argument.

a trusted provider outweighs the collateral source rule. Applicant's attorney also argued that the standard of proof is a preponderance of the evidence, and this standard has been met.

{¶9} The AG argued that because applicant knew that Goar was not covered by applicant's insurance and there was no evidence that applicant contacted the insurance company to see if there was a comparable, in-network provider prior to applicant's first appointment with Goar, applicant has failed to use a readily available collateral source and this claim should be denied. In support of its argument the AG cited In re Wilke, Ct. of Cl. No. 2019-00503VI, 2019-Ohio-5074, for the proposition that a denial of compensation for out-of-network expenses is appropriate when a victim fails to exhaust all possible in-network providers. The AG also stated that In re Cardinal, V94-45526 (Sept. 29, 1995)—which held that a victim may be compensated for out-of-network expenses when no in-network providers possess the necessary expertise to treat the victim,—and In re Hanratty, 61 Ohio Misc. 2d 355, 579 N.E.2d 306 (Ct. of Cl. 1989)—which held that in emergency situations, a victim can be treated by and compensated for expenses incurred with an out-of-network provider—do not apply in this case.

{¶10} R.C. 2743.61(B) states, in pertinent part:

> If upon hearing and consideration of the record and evidence, the court decides that the decision of the attorney general appealed from is reasonable and lawful, it shall affirm the same. If the court decides that the decision of the attorney general is not supported by a preponderance of the evidence or is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter judgment thereon.

{¶11} R.C. 2743.60(D) states,

> The attorney general or the court of claims shall reduce an award of reparations or deny a claim for an award of reparations that is otherwise payable to a claimant to the extent that the economic loss upon which the claim is based is recouped from other persons, including collateral sources. If an award is reduced or a claim is denied because of the expected recoupment of all or part of the economic loss of the claimant from a collateral source, the amount of the award or the denial of the claim shall

> be conditioned upon the claimant's economic loss being recouped by the collateral source. If the award or denial is conditioned upon the recoupment of the claimant's economic loss from a collateral source and it is determined that the claimant did not unreasonably fail to present a timely claim to the collateral source and will not receive all or part of the expected recoupment, the claim may be reopened and an award may be made in an amount equal to the amount of expected recoupment that it is determined the claimant will not receive from the collateral source.

{¶12} R.C. 2743.52(A) places the burden of proof on an applicant to satisfy the court of claims that the requirements for an award have been met by a preponderance of the evidence. *In re* Rios, 8 Ohio Misc.2d 4, 455 N.E.2d 1374 (Ct. of Cl. 1983). However, "[w]ith respect to the exclusionary criteria of R.C. 2743.60, the Attorney General bears the burden of proof by a preponderance of the evidence. *In re Williams,* V77-0739jud (3-26-79); and *In re Brown,* V78-3638jud (12-13-79)." *In re Sammons*, Ct. of Cl. No. V2006-20429, 2006-Ohio-6321, ¶ 7.

{¶13} Applicant does not contend that this was an emergency, so the decision in *Hanratty*, supra, does not apply. Thus, the question is whether the AG has proven by a preponderance of the evidence that applicant unreasonably failed to present a timely claim to the collateral source, namely, applicant's health insurance company, for Goar's treatment of him. For the foregoing reasons, the magistrate finds that the AG is unable to meet this burden.

{¶14} The December 6, 2023 letter from Goar attached to applicant's brief states, "I know of no other professional office in central Ohio with focus on head and neck maladies that could provide the same or similar services and obtain the same benefits as I do for my patients." Further, Mrs. Howells testified that when she searched for head and neck physical therapists on her insurance provider search tool, none were found. Mrs. Howells also testified that Dr. Powell did not know of any other providers in the central Ohio area that provide the same services as Goar. The AG did not present evidence refuting these facts or provide the court with a reasonable alternative to Goar within applicant's insurance network.

{¶15} Upon review of the evidence in the case file and in consideration of the arguments and testimony presented at the hearing, the magistrate finds that the AG did not prove, by a preponderance of the evidence, that applicant unreasonably failed to present a timely claim to his insurance company for services provided by Jenna Goar. Moreover, the magistrate finds that applicant has provided evidence that, like in *In re Cardinal*, *supra*, no in-network providers possessed the necessary expertise to treat applicant. Indeed, applicant has shown that applicant's insurance company does not offer coverage for Goar's unique services, or similar services from a different provider. Therefore, the magistrate finds that applicant has proven, by a preponderance of the evidence, that he incurred expenses not covered by a collateral source as a result of the criminally injurious conduct that occurred on November 27, 2019.

{¶16} Accordingly, the magistrate concludes that the final decision of the AG is not supported by a preponderance of the evidence. The magistrate recommends that the final decision of the AG be reversed and that the claim be remanded to the AG for economic loss calculations consistent with this decision.

{¶17} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party* shall *not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

HOLLY TRUE SHAVER
Magistrate

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