

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Tribunal File Number: 17-008789/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Z. A.

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: Brian Norris

APPEARANCES:

For the Applicant: Julia Abd Elseed, Counsel

For the Respondent: Alexander Hartwig, Counsel

HEARD: In Writing on June 25, 2018

OVERVIEW

- [1] The applicant was injured in an automobile accident on February 1, 2016 and sought benefits from the respondent pursuant to O. Reg. 34/10, known as the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “*Schedule*”). The respondent refused to pay for certain attendant care benefits and costs of examinations. As a result, the applicant has applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of this dispute.

ISSUES

- [2] The disputed issues in this hearing are:
- (1) Is the applicant entitled to payment for the costs of examination in the amount of \$366.10 for an in-home assessment conducted by Health Pro Wellness submitted May 9, 2016?
 - (2) Is the applicant entitled to attendant care benefits (ACBs) in the amount of \$147.02 per month for the period February 1, 2016 to February 1, 2018?
 - (3) Is the applicant entitled to an award under *Ontario Regulation 664* because the respondent unreasonable withheld or delayed the payment of benefits?
 - (4) Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] The applicant is unsuccessful on all issues.

BACKGROUND

- [4] The applicant was driving a vehicle which was struck on the driver’s side in a perpendicular fashion at an intersection. The applicant was treated by EMS at the scene but was not taken to a hospital. About a week later, the applicant sought the advice of Dr. T. Adenwala, family physician, and was advised to take Aleve for pain, and physiotherapy treatment to address the soft issue injuries.
- [5] The applicant later attended at Health-Pro Wellness and engaged in treatment under the *Minor Injury Guideline* (“MIG”), which the respondent funded. On May

9, 2016 the applicant provided the respondent with an Assessment of Attendant Care Needs ("Form-1") completed by Yana Granovsky, registered nurse, dated February 18, 2016.

IN-HOME ASSESSMENT

- [6] The applicant claims entitlement to \$366.10 for the cost of an in-home assessment on February 18, 2016, submitted to the respondent on an *Auto Insurance Standard Invoice* (otherwise known as an OCF-21) dated May 9, 2016. The applicant claims entitlement to payment for the in-home assessment on the basis that the applicant was removed from the MIG in August 2016. The respondent submits the cost of the in-home assessment is not a reasonable and necessary expense because the applicant is not entitled to ACBs.
- [7] I find the applicant is not entitled to this cost as it was incurred prior to submitting a treatment and assessment plan for it, contrary to section 38(2). Further, the expense was incurred during a period in which the applicant was engaging in treatment under the MIG and section 25(2) provides that the respondent is not required to pay for an in-home assessment in the event that the insured is being treated under the MIG.

ATTENDANT CARE

- [8] The applicant claims entitlement to an ACB in the amount of \$147.02 per month from the date of the accident, February 1, 2016, to February 1, 2018. The applicant did not incur the services of an attendant care provider and requests I deem the expenses incurred pursuant to section 3(8) of the *Schedule*.
- [9] The respondent disputes the applicant is entitled to any attendant care. The respondent relies on the Form1 dated June 24, 2016, completed as a result of an in-home assessment by Susanna Pui Shan Au, occupational therapist, which was commissioned by the respondent.

What is the Period of Entitlement?

- [10] On May 9, 2016, the applicant applied for ACBs by providing the respondent with a Form1 dated February 18, 2016, pursuant to section 42(1) of the *Schedule*. Fewer than 10 business days later, the respondent replied to the applicant's application by letter dated May 19, 2016. The letter denied the claim for ACBs on

the basis the respondent was unsure if the ACBs claimed are reasonable and necessary and requested an examination under section 44.

- [11] The respondent did not reference the MIG in the May 19, 2016 letter and as a result is unable to rely on the MIG as a reason for denying ACBs. Regardless, the respondent formally removed the applicant from the MIG by August 18, 2016.
- [12] The section 44 examination occurred on June 24, 2016 with a report dated June 24, 2016. The section 44 examination report concluded the applicant was not entitled to any ACBs. The report was provided to the applicant on August 18, 2016 – this is beyond the 10 days required under the Schedule and pursuant to section 42(13).
- [13] The applicant claims entitlement to ACBs for the first 104 weeks after the accident. The applicant submits that, at the very least and on a technical basis, the applicant is entitled to ACBs up to August 18, 2016, when the respondent provided a copy of the insurer's examination report denying the benefit.
- [14] The respondent submits that the applicant has not met the burden to prove, on a balance of probabilities, the applicant requires and is entitled to ACBs. The respondent concedes there may be entitlement to ACBs for the period from July 11, 2016 to August 18, 2016 when it provided a copy of the insurer's examination report; however, the respondent submits that the applicant is not eligible for reimbursement of the expense because the applicant did not use any services during this time.
- [15] Based on the information before me, I find the applicant is entitled to ACBs from May 19, 2016 to August 18, 2016. There is no evidence before me to counter the recommendation in the applicant's Form 1 until the Form 1 from the respondent is produced on August 18, 2016.
- [16] For the period beyond August 18, 2016, the applicant submits that the respondent's Form 1 be given less weight because the assessor did not review the applicant's clinical notes and records in advance. However, I accept the Form 1 produced by the respondent to be a valid assessment of the applicant's attendant care needs. The Form 1 produced by the respondent was conducted by a qualified professional, is the most current Form 1, and is consistent with the applicant's medical record. As such, I find there is no entitlement to ACBs after August 18, 2016.

Should ACBs be deemed incurred?

- [17] Section 3(8) of the *Schedule* allows me to deem an expense incurred when an insurer has unreasonably withheld or delayed payment of a benefit. The applicant requests ACBs be deemed incurred due to the respondent's failure to properly adjust the claim. The respondent submits it did not unreasonably withhold or delay payment of ACBs so nothing should be deemed incurred.
- [18] I find the respondent did not unreasonably delay or withhold payment of ACBs for the following reasons:
- i. First, the applicant's behaviour prior to submitting the Form 1 indicates a lack of urgency with respect to the applicant's attendant care needs. The applicant had a Form 1 completed on February 18, 2016 but did not submit the document to the respondent until nearly 3 months later on May 9, 2016. It is likely the applicant would have incurred those services during the period had the applicant required them or, at the very least, would have provided the respondent with the Form 1 at a time closer to the completion of the document.
 - ii. Second, the applicant provided no basis to explain why the services were not incurred.
 - iii. Third, pursuant to section 42(6), ACBs incurred are payable during the period between the receipt of the applicant's Form 1 by the respondent and receipt of the respondent's Form 1 by the applicant. The applicant submitted the Form 1 but never incurred any expenses after providing the Form 1 to the respondent, despite having entitlement to the benefit.

AWARD

- [19] The applicant claims entitlement to an award pursuant to section 10 of Regulation 664. The applicant submits the respondent unreasonably withheld payment of ACBs by delaying the delivery of the insurer's examination report to the applicant. The respondent submits that the delay in the delivery of the insurer's examination report was a slight technical breach which did not prejudice the applicant.
- [20] I find the applicant is not entitled to an award pursuant to section 10 of Regulation 664. I recognize the respondent did not deliver the insurer's examination report within 10 business days of receipt and contrary to section

42(13) however, the respondent did not delay or withhold payment of ACBs because the applicant did not incur any attendant care expenses.

COSTS

- [21] Pursuant to Rule 19.1 of the *Licence Appeal Tribunal Rules of Practice and Procedure, Version 1*, costs may be awarded in the event that a party during a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith.
- [22] The applicant requests a cost award against the respondent. The applicant submits the respondent failed to adjust the applicant's claim in good faith or in a fair and responsible manner, and failed to re-evaluate and reconsider medical evidence, which led to an unnecessary hearing on the issues. The respondent made a counter-claim for a cost award against the applicant because the applicant was unable to prove entitlement to the disputed benefits.
- [23] I find that neither party is entitled to a cost award because neither party, during the proceeding, displayed behaviour which could be characterized as unreasonable, frivolous, vexatious or of bad faith.

CONCLUSION

- [24] The applicant's appeal on all issues has failed. The application is dismissed without costs.

Released: August 28, 2018



Brian Norris, Adjudicator