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

2017 CanLII 93462 (ON LAT)

Date: 2017-12-13
Tribunal File Number: 17-001173/AABS
Case Name: 17-001173 v Aviva Insurance Canada

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

Between:

Applicant

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

Adjudicator: Catherine Bickley

Appearances:

For the Applicant: Lisa Morell Kelly, Counsel
Marilyn Snow, Paralegal

For the Respondent: Ramandeep Pandher, Counsel
Christine Mansbridge, Representative

Heard in writing and in person on: August 30, 2017

2017 CanLII 93462 (ON LAT)

OVERVIEW

[1] The applicant, [the applicant], was involved in an automobile accident on October 31, 2013. The respondent, Aviva Insurance Canada, funded physiotherapy and chiropractic treatment for [the applicant] pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*"). Aviva also paid [the applicant] income replacement benefits ("IRBs") from November 8, 2013 to October 2, 2015.

[2] Aviva stopped paying IRBs in October 2015 following several s.44 examinations ("IEs"). Aviva also denied payment[1] of six treatment plans for medical/rehabilitation benefits plus the cost of two examinations. [The applicant] appealed Aviva's decisions to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[3] At a May 2017 case conference, the parties agreed to an in-person hearing focused on [the applicant]'s entitlement to IRBs and a written hearing focused on the remaining issues. [The applicant] testified at the in-person hearing. Aviva called Dr. John Heitzner (physiatrist) and Dr. Georgio Ilacqua (psychologist). The parties submitted numerous medical reports and records for the in-person and written hearings.

[4] I find that [the applicant] has established entitlement to IRBs from October 3, 2015 to date and ongoing. I find that she has not established entitlement to any of the medical/rehabilitation benefits and costs of examinations in dispute.

ISSUES TO BE DECIDED

[5] The following are the issues to be decided:

1. Is [the applicant] entitled to IRBs of $323.89 per week from October 3, 2015 to date and ongoing?

2. Is [the applicant] entitled to payment for the following medical/rehabilitation benefits:

   Partially approved treatment plans

   a. The balance of $399.01 for occupational therapy services recommended by Neha Hasan (Rehab First Inc.) in a March 17, 2015 treatment plan;

---

[1] In some instances, it is the unpaid balance of a partially approved OCF-18 that is in issue.

b. The balance of $177.13 in a December 17, 2015 treatment plan by Tayenda Austin (Rehab First Inc.) recommending personal counselling; and,

c. The balance of $288.00 for physiotherapy services recommended by Stephanie Cherry (Manual Concepts Physiotherapy) in a June 7, 2016 treatment plan.

Denied treatment plans

d. $350.00 for chiropractic services recommended by Dr. Lawson in a September 23, 2015 treatment plan;

e. $1,335.00 for occupational therapy services recommended by Tayenda Austin (Rehab First Inc.) in a December 17, 2015 treatment plan; and,

f. $635.00 for physiotherapy services recommended by Stephanie Cherry (Manual Concepts Physiotherapy) in a January 15, 2016 treatment plan.

3. Is [the applicant] entitled to payment for the following examinations:

a. $2,219.26 for a multidisciplinary assessment by Michael DeGroote Clinic submitted March 2, 2015; and,

b. $2,400.00 for a psychological assessment by Dr. Sean Sharokhnia, (Psychology Health Solutions) submitted March 4, 2015.

RESULT

[6] Based on the totality of the evidence before me and the parties' submissions, I find that:

1. [The applicant] is entitled to IRBs of $323.89 per week from October 3, 2015 to date and ongoing.

2. [The applicant] is not entitled to payment for the balance of any of the three partially approved treatment plans dated March 17, 2015, December 17, 2015 and June 7, 2016. She is not entitled to payment for any of the denied treatment plans dated September 23, 2015, December 17, 2015[2] and January 15, 2016.

---

[2] Two distinct treatment plans were submitted on December 17, 2015.

2017 CanLII 93462 (ON LAT)

3. [The applicant] is not entitled to payment for the multidisciplinary assessment and the psychological assessment dated March 2, 2015 and March 4, 2015 respectively.

2017 CanLII 93462 (ON LAT)

EVIDENCE

[The applicant]'s testimony

[7] [The applicant] testified that immediately after the accident she felt a stinging or burning sensation in her right hip and the right side of her neck as well as pain in one of her wrists and her right ankle.

[8] [The applicant] recalled that with treatment her physical issues gradually improved. She received physiotherapy until May 2014. Then, when Aviva denied funding for further treatment, her condition worsened. She was unable to sit in a chair long enough to watch an entire movie. She stopped her singing lessons because "I couldn't stand up at all" [3]. By the fall of 2014, her co-workers were noticing that she was "holding [her] backside" when walking. She sought help from her family doctor in September 2014 "when [she] couldn't stand it anymore". By late 2014, the pain in her lower back and right leg had increased to the point that she was no longer able to work. She was also having difficulty driving. Her last day of work was December 19, 2014.

[9] [The applicant] then went to her parents' home for a Christmas visit. She testified that she was hopeful that she would be able to return to her two part-time jobs after the Christmas break. However, she remained at her parent's home until March 2014.

[10] [The applicant] testified that at her parents' home she spent most of her time on the couch. She recalled that she experienced pain and muscle spasms in her back, leg, ankle and calf when she was even minimally physically active. She could not stand independently for "even a whole minute" and sitting was also painful. At times the pain was "way over 10/10". She ate her meals lying down on the couch. She began to use a cane and a walker. She also had difficulties with basic personal care to the extent that her mother "had to wipe [her] backside, help [her] with [her] showers."

[11] [The applicant] stated that she continued to use the walker and cane until the summer of 2016. [The applicant] testified that she can now (at the time of the hearing) sit for "maybe half an hour or 40 minutes" if reclining (as in a car). She can walk slowly for about an hour. She stated that she still takes two medications -- Cymbalta and Gabapentin -- to control pain. She stated that she continues to experience almost constant pain. She says she is unable to focus or think clearly

---

[3] The quotes in paras 8, 10 and 11 are from [The applicant]'s testimony on August 30, 2017.

because of the medication and her pain. She is currently getting disability benefits from the Canada Pension Plan ("CPP"). She is receiving some physiotherapy and acupuncture paid for with her own funds and with money from friends.

2017 CanLII 93462 (ON LAT)

Dr. Bauman (Family Doctor): clinical notes and records and narrative reports[4]

[12] When [the applicant] saw Dr. Bauman, on November 3, 2013 (three days after the accident) he noted soreness in her left wrist and hand, both shoulders, between her shoulder blades, her right ankle and her right buttock. He referred her for physiotherapy.

[13] Although Dr. Bauman saw [the applicant] for other health issues thereafter, he next recorded accident-related injuries on September 8, 2014. He noted that she had pain in her right buttock and hip that radiated to her right calf and foot with tingling of her right toes. When he saw her again on November 26, 2014, her right buttock pain had worsened and she had a positive straight leg test at 45 degrees[5]. He concluded that she had radicular pain from compression of her sciatic nerve. D.L visited him five more times over the next two months. Each time her "right-sided sciatica" had worsened. He prescribed Neurontin, Cymbalta, Vimovo and Tylenol #3 for her pain.[6]

[14] Dr. Bauman referred [the applicant] for a CT scan of her lumbar spine. The December 22, 2014 scan showed the following:

> Broad-based disc bulge with degenerative change of the facet joints. Focal protrusion/extrusion at the right neural foramen partical calcification of the protruded/extruded disc material. Moderate to severe central canal and moderate to severe right neural foraminal stenosis without significant left neural foraminal stenosis.[7]

[15] In a Disability Certificate (OCF-3) dated February 24, 2015[8] Dr. Bauman listed "L4- L5 Disc herniation with Right L-5 Radiculopathy" as an unresolved injury. He noted that [the applicant] "still has severe pain radiating down her right leg".

[16] In a medical report filed with Service Canada in May 2015[9], Dr. Bauman stated that [the applicant]'s pain had been severe since September 2014. He gave the following diagnosis:

---

[4] Joint Document Brief, Tabs 14, 16 and 32.
[5] An indication of a herniated disc.
[6] In January 2015, the Tylenol #3 was replaced with Dilaudid. In February 2015, D.L began taking Gabapentin, Hydromorph Contin. She stopped the Hydromorph Contin in December 2015 (January 25, 2015 and June 18, 2017 narrative reports by Dr. Bauman, Joint Document Brief, Tabs 16 and 32).
[7] Joint Document Brief, Tab 7.
[8] Joint Document Brief, Tab 12.
[9] Joint Document Brief, Tab 27.

> MVA Oct 31/13 resulting in L4-5 disc herniation with moderate to severe central canal stenosis and moderate to severe right foramenal stenosis causing right sciatica.

2017 CanLII 93462 (ON LAT)

[17] A June 2015 lumbar spine MRI found degenerative lumbosacral spondylosis with multilevel canal stenosis, L4-5 impingement of the right exiting nerve root and L3-4 diffuse disc/osteophyte bulge with relative canal stenosis.[10]

[18] In a June 23, 2015 report, Dr. Gordon Ko (physiatrist) and Dr. Gordon Lawson (chiropractor) reviewed a series of diagnostic facet joint blocks and concluded that had facet joint mediated pain as a direct result of the accident. The report noted that the available treatment options "are palliative and Ms. [L] will continue to have dysfunction and disability on a permanent basis".[11]

[19] Other medical testing summarized in Dr. Bauman's narrative reports and clinical notes and records included:

- January 6, 2015 EMGs showing evidence of active and chronic right L5 radiculopathy;
- June 22, 2015 diagnosis by Dr. Brett Dunlop (orthopaedic surgeon) of L4-L5 disc herniation with L-5 radiculopathy; and,
- April 18, 2016 diagnosis by Dr. Gemah Moammer (spinal surgeon) of L4-L5 disc herniation.

[20] In June 2017, after summarizing [the applicant]'s symptoms and the medical testing since 2015, Dr. Bauman concluded that [the applicant]'s symptoms are caused by "L4-L5 right paracentral disc protrusion impinging on the right exiting L-5 nerve root" and that the impingement is caused by the accident.[12]

<u>IE reports</u>

[21] A multidisciplinary assessment report summary dated August 25, 2015[13] concluded that [the applicant] had no psychological impairment or diagnosis related to the accident. Dr. John Heitzner (physiatrist) found that [the applicant] had physical injuries to her cervical spine, lumbar spine, right hip and both shoulders that were attributable to the accident but, in his opinion, these were soft tissue injuries.

---

[10] Joint Document Brief, Tab 32.
[11] Joint Document Brief, Tab 23.
[12] Joint Document Brief, Tab 32.
[13] The report summary covers assessments between May 27 and August 18, 2015. Joint Document Brief, Tab 6.

[22] Dr. Shawn Henderson (chiropractor) assessed [the applicant] in November 2015 and March 2016[14]. He opined that [the applicant] "presents with impairment in the lumbar spine with related objective neurological deficit identified in the right lower extremity"[15]. He offered the following diagnosis:

> ... a right S1 radiculopathy with likely compromise of the other exiting nerve roots (with MRI documented multilevel DDD) in the lumbar spine as well as having sustained sprain/strain injuries involving the supportive muscles and ligaments of the cervical spine and upper shoulder regions.[16]

[23] Dr. Henderson did not, however, consider [the applicant]'s injuries and impairments to be directly related to the accident because he did not see "any prior clinical notation of an absent right S1 reflex. [17]"

[24] Dr. Gilbert Yee (orthopaedic surgeon) assessed [the applicant] in June 2016[18]. He found that she had residual symptomology related to myofascial strain of her cervical spine, right shoulder, lumbar spine and right lumbar L5 radiculopathy.

Dr. Heitzner's testimony

[25] Dr. Heitzner was qualified as an expert in physiatry.

[26] In his August 2015 IE report, as noted above, Dr. Heitzner concluded that [the applicant] had only soft tissue injuries. At the hearing, Dr. Heitzner opined that [the applicant] had no objective restrictions that would prevent her from working as a receptionist, travel agent or crossing guard.

[27] Dr. Heitzner testified that, in his opinion, [the applicant]'s "active radiculopathy" was not caused by the accident. He said it would have shown up within three or four months of the accident or maybe a little more; not, however, a year and a half later. He also noted some inconsistencies in his physical examination of [the applicant] although he stated those inconsistencies did not necessarily mean malingering or embellishment. He agreed that how [the applicant] perceives her pain may be a factor in how she functions.

[28] Dr. Heitzner testified that he did not have Dr. Ko's June 2015 report at the time of his August 2015 IE assessment. Dr. Heitzner acknowledged that he had also not reviewed the January 2015 EMG test or the December 22, 2014 MRI of [the applicant]'s lumbar spine. When shown the MRI during cross-examination, he agreed that it indicated nerve impingement, especially on the right side, and

[14] Reports dated December 7, 2015 and March 30, 2016 at Tabs 9 and 16 of Aviva's written submissions.
[15] Aviva's Written Submissions, Tab 16.
[16] Aviva's Written Submissions, Tab 16.
[17] Aviva's Written Submissions, Tab 16.
[18] July 12, 2016 report, Aviva's Written Submissions, Tab 11.

2017 CanLII 93462 (ON LAT)

that nerve root impingement can cause signficant pain. He also acknowledged that [the applicant]'s reported injuries were consistent with the mechanics of the accident.

2017 CanLII 93462 (ON LAT)

Dr. Ilacqua's testimony

[29] Dr. Ilacqua was qualified as an expert in psychology.

[30] Dr. Ilacqua assessed [the applicant] in May 2015 and conducted a psychology paper review in August 2015. In his assessment, as noted above, he concluded that [the applicant] had no psychological impairment or diagnosis related to the accident. He testified that while [the applicant] reported some psychological issues, they were not significant enough to arrive at a diagnosis. Further, she told him that she did not want psychological treatment as she felt her pain was physical rather than mental.

[31] According to Dr. Ilacqua, [the applicant]'s results on the Beck Depression Inventory and the Beck Anxiety Inventory showed moderate depression and mild anxiety. With respect to validity testing[19], [the applicant]'s scores were all within accepted norms. Therefore, "you can rely on her self-reports" and "can bank on her answers". Her results on the Pain Patient Profile (P3) test were in the low range for depression and anxiety and above average for somatic physical problems. Dr. Ilacqua explained that this is the picture of a person who perceives her problems to be physical rather than psychological. Dr. Ilacqua stated that [the applicant]'s results on the Personal Assessment Inventory (PAI) test did not reach a level of clinical significance. In conclusion, he stated that [the applicant] does not have any psychological diagnosis that would hamper her ability to work.

ANALYSIS AND DECISION

[The applicant]'s Injuries are a result of the October 2013 accident

[32] Aviva argues that "by failing to establish a close temporal connection, the Applicant has failed to prove that the accident caused her alleged impairments."[20] Instead, an intervening event "such as an improper lifting of a box or a slip and fall while on crossing guard duty"[21] could have caused [the applicant]'s impairments.

[33] The only possible intervening event put to [the applicant] on cross-examination

[19] Dr. Ilacqua administered the Structured Inventory of Malingered Symptomatology (SIMS) test. He testified that both the Pain Patient Profile (P3) test and the Personality Assessment test (PAI) have built-in validity scales.
[20] Aviva's Written Submissions, para 7.
[21] Aviva's Written Submissions, para 29

was a March 2014 slip and fall noted in physiotherapy records.[22] Aviva submits that [the applicant]'s failure to tell her family doctor and other doctors about this fall undermines her credibility. [The applicant] testified that the fall was insignificant; she fell on her left side and did not experience increased pain. She only mentioned it to the physiotherapist because they met a few days after the fall. [The applicant] submits that I should rely on Dr. Ilacqua's conclusions about her credibility, i.e., that one can "bank on her answers". I found [the applicant] to be a credible witness whose testimony was consistent with the preponderance of the medical evidence. I accept [the applicant]'s description of the March 2014 slip and fall and her explanation for not reporting it to various medical professionals.

[34] Aviva also relies on Dr. Henderson's opinion that, because in November 2015 he was the first doctor to note an absent S1 reflex, [the applicant]'s radiculopathy was not related to the accident. As Dr. Henderson did not testify at the in-person hearing, there was no opportunity for him to explain why his opinion on causation differed not only from the opinions of Dr. Bauman, Dr. Ko and Dr. Lawson, but also from the opinions of his fellow IE assessors. Notably, Dr. Henderson did not address in either of his reports the fact that Dr. Bauman had noted in November 2014 that [the applicant]'s straight leg raising test was positive at 45 degrees, an indication of disc herniation.

[35] After Dr. Henderson's November 2015 and March 2016 reports, Aviva continued to approve some treatment plans without raising any causation issue. For example, based on Dr. Yee's July 2016 IE report, summarized above, Aviva approved fifteen sessions of physiotherapy.

[36] The British Columbia decisions[23] relied upon by Aviva do not bind an Ontario tribunal. Nor do I find them persuasive. In *Deo v. Wong*[24], there was no evidence that Mr. Deo's knee experienced any trauma in the accident and his family doctor was sceptical that the knee problems were causally connected to the accident. Aviva's witness, Dr. Heitzner, acknowledged that [the applicant]'s injuries were consistent with the mechanics of the accident. Further, her family doctor, Dr. Bauman has opined repeatedly and consistently that [the applicant]'s injuries were caused by the accident. In *Nickerson v. Allen*[25], the plaintiff's symptoms did not start until a year and four months after the accident in question. [The applicant] has complained of problems with her right buttock and right leg and ankle since the time of the accident. The severity of her symptoms have varied over time but the symptoms have consistently been present.

[37] Aviva argues that the gap between [the applicant]'s accident-related appointments with her family doctor is comparable to the gap in *K.L. v. Aviva*

---

[22] Joint Document Brief, Tab 45.
[23] *Nickerson v. Allen*, 2006 BCSC 562 [*Nickerson*] and *Deo v. Wong*, 2008 BCCA 110 [*Deo*].
[24] *Deo,* note 23.
[25] *Nickerson*, note 23.

2017 CanLII 93462 (ON LAT)

Insurance Company of Canada[26], a case where the Tribunal found that an applicant had not established that a compression fracture was related to an accident. While the period without medical treatment was a factor in the Tribunal's decision in *K.L.*, the adjudicator also relied on other factors. Significantly, K.L.'s family doctor did not opine that the fracture was connected to the accident. K.L. worked in a physically demanding job and he first complained of pain "while lifting". As noted above, Dr. Bauman – and other medical professionals – have opined that [the applicant]'s injuries are caused by the accident. Further, she did not do physically demanding work and has consistently complained of pain in her right buttock, leg and ankle.

2017 CanLII 93462 (ON LAT)

[38] Having rejected Aviva's argument on causation, I am left with substantial medical evidence establishing that [the applicant] has significant injuries, that those injuries are as a result of the accident and that [the applicant] is significantly impaired as a result. The preponderance of the medical evidence indicates that [the applicant] has had symptoms of pain in her right buttock, leg and ankle from the time of the accident. Objective medical imaging confirms that she has L4-L5 disc herniation, nerve impingement and radiculopathy. Dr. Heitzner testified that these injuries were consistent with the mechanics of the accident. I find that [the applicant] has established that her injuries and impairment are a result of the accident. I turn now to a consideration of what impact her impairment has on her entitlement to IRBs.

[The applicant] is entitled to IRBs from October 3, 2015 to date and ongoing

[39] [The applicant] seeks IRBs of $323.89[27] per week from October 3, 2015 to date and ongoing. I must determine whether during the first 104 weeks after the accident and as a result of the accident she suffered a substantial inability to perform the essential tasks of her pre-accident employment. I must also determine whether following the first 104 weeks post-accident she suffered a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience.

[40] A review of the evidence persuades me that [the applicant] has met her onus to establish that she meets both the pre and post-104 week tests. Thus, she is entitled to IRBs from October 3, 2015 to date and ongoing

[The applicant]'s employment before the accident

[41] Until four months[28] before the accident, [the applicant] worked as a receptionist/travel co-ordinator at a travel agency. In June 2013, after five and a

[26] K.L. v. Aviva Insurance Company of Canada, 2017 CanLII 43974 (ON LAT).
[27] The parties agree that this is the correct weekly amount.
[28] Record of Employment, Joint Document Brief, Tab 18.

half years in this job, she was laid off due to shortage of work. At the time of the accident, [the applicant] was receiving Employment Insurance payments and working on a very part-time[29] basis selling insurance for Primerica Insurance.

[The applicant]'s employment after the accident

[42] In January 2014, [the applicant] started part-time work (about 20 hours per week) as a receptionist at a non-profit organization. She testified that there was a fair amount of flexibility so she was able to stand up and move around when sitting became uncomfortable. Nevertheless, by the fall of 2014, she was experiencing significant pain. She was limping and "holding [her] backside". Nonetheless, in early November 2014, she started a 19.5 hour per week job as a school crossing guard. She testified that she thought that maybe she could do the crossing guard job because it involved walking rather than sitting.

[43] [The applicant]'s last Primerica work was in early December 2014. She stopped working as a receptionist on December 18, 2014 and as a crossing guard on December 19, 2014. She has not worked since.

October 3, 2015 to October 31, 2015 (pre 104 weeks)

[44] The test, pursuant to s. 5(1) of the *Schedule*, is whether during the first 104 weeks after the accident and as a result of the accident [the applicant] suffered a substantial inability to perform the essential tasks of her pre-accident employment. At the time of the accident, [the applicant] was unemployed except for selling insurance part-time. She had previously worked for five and a half years as a travel agent.

[45] In arguing that [the applicant] is not entitled to any IRBs between October 5, 2015 and October 31, 2015, Aviva relies on Dr. Heitzner's opinion that [the applicant] experienced only soft tissue injuries none of which would prevent her from engaging in her pre- accident activities. Aviva submits that [the applicant] could have returned to a job as a travel agent. The difficulty with this argument is that I have found, based on the evidence, that [the applicant]'s injuries are far beyond soft tissue injuries. The resulting impairments make it difficult for her to stay in a sustained sitting position. Further, due to ongoing pain, she has difficulty concentrating and is not able to consistently keep to a schedule. I find that from October 3, 2015 to October 31, 2015, [the applicant] was substantially unable to perform the essential tasks of her pre-accident employment.

---

[29] [The applicant]'s 2013 income tax return indicates that her gross commissions for the year were $384.00. Joint Document Brief, Tab 33.

2017 CanLII 93462 (ON LAT)

2017 CanLII 93462 (ON LAT)

November 1, 2015 to date and ongoing (post 104 weeks)

[46] As of November 2015, [the applicant] is required to meet the more stringent post-104 week eligibility test for IRBs, pursuant to s. 6(2) of the *Schedule*. That test requires that an individual suffer a *complete* inability to engage in any employment or self- employment for which she is reasonably suited by education, training or experience.

[47] In May 2016, Service Canada determined that [the applicant] was eligible for a CPP disability benefit retroactive to December 2014.[30] [The applicant] submits that while not determinative of this application, the CPP ruling is significant. I agree that the finding of eligibility for CPP should be given some weight. To qualify for a CPP disability benefit, an individual must establish that she suffers from a severe and prolonged disability that renders her incapable regularly of pursuing any substantially gainful occupation. The CPP ruling is consistent with my findings on the medical evidence before me. I find, however, that even if I give the CPP ruling little or no weight, the other evidence before me establishes that [the applicant] has met the post-104 test.

[48] The *Schedule* directs that an individual's education, training and experience be considered when determining whether they are reasonably suited for particular employment. [The applicant]'s education includes diplomas in Biblical Studies and Travel and Tourism.[31] There was no evidence before me of any particular job training. [The applicant]'s most significant work experience was five and a half years as a travel agent.

[49] [The applicant] agreed during cross-examination that she could possibly do the crossing guard job and might be able to work as a receptionist for a "couple or few"[32] hours. This optimism is not supported by the medical evidence or the criteria set out in the *Schedule*.

[50] Aviva relies on [the applicant]'s testimony that she can walk up to one hour in support of its submission that she can work as a crossing guard. Aviva submits that this negates [the applicant]'s post-104 claim. I disagree. When one looks at [the applicant]'s education, training and experience, it is clear that the crossing guard position is not one for which she is reasonably suited. Work as a crossing guard is not consistent with her education. [The applicant] worked only briefly as a crossing guard in 2014. She testified that she tried the job because she thought the ability to move around would make the job easier, i.e., less painful than sitting at a desk. She found herself, however, soon unable to continue. In addition, the impact of medication and pain on [the applicant]'s focus and concentration also render her unsuitable for a crossing guard job. Finally, this job requires consistent attendance for multiple time periods on five

[30] May 26, 2016 ruling, Joint Document Brief, Tab 28.
[31] Dr. Heitzner, June 4, 2015 report.
[32] [The applicant]'s testimony, August 30, 2017.

consecutive days. [The applicant] testified that she cancels appointments or other plans because "[She's] just too hurting"[33].

[51] While Aviva focused primarily on the crossing guard job with respect to the post-104 period, I will deal briefly with the jobs of travel agent and receptionist. The evidence establishes that [the applicant] can not sit for any sustained period. She is unable to commit to consistent attendance at a regularly scheduled job. Further, her focus and concentration are affected by her medication and pain.

[52] For all of these reasons, I find that [the applicant] suffers a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience. I turn now to consideration of whether [the applicant] is entitled to any of the denied medical/rehabilitation benefits and costs of examination.

2017 CanLII 93462 (ON LAT)

TREATMENT PLANS

Partially approved treatment plans

[53] Three partially approved treatment plans are in dispute. For the following reasons, I find that [the applicant] has not established entitlement to the balance of any of these treatment plans.

March 17, 2015: occupational therapy ($399.01 balance)

[54] Neha Hasan (Rehab First Inc.) recommended occupational therapy at a cost of $2,169.57. Aviva approved $1,770.56, leaving a balance of $399.01. Aviva submits that the unpaid balance is not reasonable and necessary as it is attributable to duplicate entries within the OCF-18. [The applicant]'s submissions do not address this issue. Thus, she has not met her onus and is not entitled to the $399.01 balance of this treatment plan.

December 17, 2015: occupational therapy ($177.13 balance)

[55] Tayenda Austin (Rehab First Inc.) recommended occupational therapy at a cost of $1,523.76. Aviva approved payment of $1,346.64. It rejected the balance of $177.13 which was for mileage. Aviva relies on a Financial Services of Ontario bulletin[34] and a decision of the Tribunal[35] for the proposition that mileage is not payable. [The applicant]'s submissions do not address this issue. I agree that the *Schedule* does not provide for the payment of mileage in the circumstances before me. Accordingly, [the applicant] is not entitled to the $177.13 balance of this treatment plan.

---

[33] [The applicant]'s testimony, August 30, 2017.
[34] FSCO Bulletin, No A-14/14 (December 1, 2014), Joint Document Brief, Tab 21.
[35] *D.V. v. Optimum Insurance Company*, 2017 CanLII 22304 (ON LAT).

June 7, 2016: physiotherapy ($288.00 balance)

[56] Stephanie Cherry (Manual Concepts Physiotherapy) recommended eighteen physiotherapy sessions at a cost of $1,798.00. In a July 12, 2016 IE report, Dr. Yee (orthopaedic surgeon) opined that fifteen sessions were reasonable and necessary. Aviva approved fifteen sessions and associated documentation at a cost of $1,510.00. [The applicant]'s submissions do not address why an additional three sessions are reasonable and necessary. Thus, she has not met her onus and is not entitled to the $288.00 balance of this treatment plan.

Denied treatment plans

[57] [The applicant] seeks payment of three denied treatment plans. [The applicant] did not address the proposed treatment specifically in her submissions. That is, she did not explain why each disputed treatment plan was reasonable and necessary. Instead, her submissions simply state that [the applicant]'s treatment providers are of the opinion that she requires treatment. She also relies on Dr. Bauman's June 18, 2017 letter[36] in which he states:

> I feel that the below proposed treatments would be reasonable and beneficial and necessary in her rehabilitation.
>
> a) Chiropractic Treatment
> b) Physiotherapy
> c) Occupational Therapy Services
> d) Personal Counselling
> e) Psychological and Participation at the Michael DeGrate [sic] Chronic Pain Clinic.

[58] This is insufficient.

[59] I have rejected Aviva's causation argument. Nonetheless, [the applicant] bears the onus of establishing that each of these treatment plans are reasonable and necessary. Aviva has made specific arguments as to why each treatment plan is not reasonable and necessary. [The applicant] has not responded in any persuasive way. As a result, I find that she has not established entitlement to the following treatment plans:

- $350.00 for chiropractic services recommended by Dr. Lawson in a September 23, 2015 treatment plan;

[36] Joint Document Brief, Tab 32.

2017 CanLII 93462 (ON LAT)

- $1,335.00 for occupational therapy services recommended by Tayenda Austin (Rehab First Inc.) in a December 17, 2015 treatment plan; and,
- $635.00 for physiotherapy services recommended by Stephanie Cherry (Manual Concepts Physiotherapy) in a January 15, 2016 treatment plan.

2017 CanLII 93462 (ON LAT)

COSTS OF EXAMINATION

[60] [The applicant] seeks approval for two assessments proposed in March 2015. I find that she has not established entitlement to either assessment.

Multi-disciplinary assessment, March 2, 2015

[61] Aviva denied this assessment based on an IE report by Dr. Heitzner and Dr. Ilacqua opining that the assessment was not reasonable and necessary from either a physiatry or psychology perspective. In particular, the IE report stated that the proposed assessment was unlikely to change [the applicant]'s diagnosis, change her overall level of functioning or provide symptom relief.[37][The applicant] has not explained why this asessment is reasonable and necessary other than through submission of Dr. Bauman's letter, referenced in paragraph 57 above. I find that she has not met her onus of establishing that this assessment is reasonable and necessary

Psychology assessment, March 4, 2015

[62] In an IE report dated May 26, 2015, Dr. Ilacqua opined that [the applicant] did not present with a psychological diagnosis and had not sustained psychological impairment as a result of the accident. Dr. Ilacqua repeated and explained this opinion at the in- person hearing. [The applicant] has produced no contrary evidence with respect to psychological issues other than a copy of a September 2015 note from Dr. Bauman that states simply "Ms. [L] requires counselling."[38] [The applicant] acknowledges that at the time of her assessment by Dr. Ilacqua, she was resistant to the idea of psychological treatment. I find that she has not met her onus of establishing that this assessment is reasonable and necessary.

---

[37] June 24, 2015 IE report, Aviva's Written Submissions, Tab 19.
[38] [The applicant]'s Written Submissions, Tab 4.

CONCLUSION

[63] For all the reasons set out above, I find that:

1. [The applicant] is entitled to IRBs of $323.89 per week from October 3, 2015 to date and ongoing, subject to any applicable deductions of income support from other sources.

2. [The applicant] is not entitled to the balance of three partially approved treatment plans dated March 17, 2015, December 17, 2015 and June 7, 2016. [The applicant] is not entitled to the denied treatment plans dated September 23, 2015, December 17, 2015[39] and January 15, 2016.

3. [The applicant] is not entitled to the costs of examination for the assessments proposed in treatment plans dated March 2, 2015 and March 4, 2015.

ORDER

[64] The Tribunal orders:

1. Aviva shall pay [the applicant] IRBs of $323.89 per week from October 3, 2015 to date and ongoing, subject to any applicable deductions of income support from other sources.

2. Aviva shall pay [the applicant] interest on the outstanding IRBs.[40]

3. The remainder of [the applicant]'s appeal is dismissed.

Released: December 13, 2017

Catherine Bickley, Adjudicator

2017 CanLII 93462 (ON LAT)

[39] Two distinct treatment plans were submitted on December 17, 2015.
[40] Pursuant to s.51 (4) of the *Schedule*.