

**LICENCE APPEAL
TRIBUNAL**

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

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

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



Date: 2018-10-10

Tribunal File Number: 17-006537/AABS

Case Name: 17-006537 v Aviva General Insurance

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:

Applicant

Appellant(s)

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR:

Christopher A. Ferguson

APPEARANCES:

For the Applicant:

Carla Barcelo, Counsel for the Applicant

For the Respondent:

Ramandeep Kaur Pandher, Counsel for the Respondent

Heard:

In Writing on September 4, 2018

OVERVIEW

- [1] The applicant [the applicant] was involved in an automobile accident on August 19, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the "*Schedule*").
- [2] The applicant applied to the Licence Appeal Tribunal (the "Tribunal") when the disputed benefits, income replacement benefits (IRBs) and medical benefits were denied by Aviva Insurance Canada ("Aviva").
- [3] Aviva asserts that [the applicant] failed to attend a scheduled insurer's examination (IE) with no reasonable explanation and is therefore barred from appealing the denial of specific medical benefits.
- [4] Aviva asserts that [the applicant] cannot proceed with her appeal on IRBs and a denied claim for dental treatment because she has failed to provide Aviva with information it requested under s.33 of the *Schedule*.

PRELIMINARY ISSUE

- [5] In a motion dated March 7, 2018, Aviva asked the Tribunal to determine the following issues:
 - I. Is [the applicant] barred from commencing an appeal with respect to a medical benefit set out as issue #5 below, because she failed to attend insurer's examinations (IEs) requested by the respondent under s.44 of the *Schedule*?
 - II. Is [the applicant] disentitled to claim IRBs and dental benefits set out in her appeal as issues #1 and #6 (see below) because she failed to provide Aviva with information it requested under s.33 of the *Schedule*?

SUBSTANTIVE ISSUES

- [6] The issues in dispute are as follows:
 - i. Is the applicant entitled to receive a weekly IRB in the amount of \$400 per week for the period from November 19, 2015 to date and ongoing?
 - ii. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$3,577.46 for chiropractic treatment recommended by

¹ O.Reg. 34/10

Medi Plus Physiotherapy in a treatment plan submitted on August 30, 2016, and denied on August 30, 2016?

- iii. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$440.16 for psychological services recommended by Medi Plus Physiotherapy in a treatment plan submitted on August 25, 2016, and denied on September 14, 2016?
- iv. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$229.10 for chiropractic treatment recommended by Medi Plus Physiotherapy and Rehabilitation in a treatment plan submitted on January 21, 2016, and denied on January 22, 2016?
- v. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$3,643.76 for other goods and services of a medical nature recommended by Medi Plus Physiotherapy and Rehab in a treatment plan submitted on March 21, 2016, and denied on March 21, 2016?
- vi. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$1,180.00 for dental work recommended by Dr. Henry Wong in a treatment plan submitted on February 3, 2016, and denied on February 9, 2016?
- vii. Is the applicant entitled to interest on any overdue payment of benefits?

FINDINGS

- [7] [The applicant]'s appeal on IRBs (issue #1 above) and her dental treatment claim (issue #6) are barred, without prejudice to [the applicant] bringing an application before the Tribunal once she has submitted the required information and Aviva has issued its determination.
- [8] [The applicant]'s appeal of the medical benefit set out as issues #5 respectively in paragraph 6 above is barred.
- [9] [The applicant]'s claim for chiropractic treatment set out as issue #2 in paragraph 6 above is denied.
- [10] [The applicant]'s claim for the balance of a psychological treatment plan set out as issue #3 in paragraph 6 above is denied.

- [11] [The applicant]'s claim for the balance of a chiropractic treatment plan set out as issue #4 in paragraph 6 above is allowed.
- [12] Aviva is required to pay interest on the \$229.10 owing for chiropractic treatment (issue #4) at the prescribed rate.

REASONS

Preliminary Issues

[The applicant]'s Duty to Participate in the IE

- [13] Section 44(1) of the *Schedule* governs IEs, and it prescribes as follows:
- i. S. 44(1) permits an insurer to require an insured person to be examined by one or more regulated health professionals determine whether the insured continues to be entitled to a specific benefit, as in this case.
 - ii. S.44(9)2.ii. requires the insurer to make reasonable efforts to schedule the IE for a day, time and location that are convenient for the insured person.
 - iii. S.44(9)2.iii. requires the insured person to attend the examination and to submit to all reasonable examinations requested by the examiner(s).
- [14] The onus is on the insured person, in this case [the applicant], to establish a reasonable explanation for not attending an IE.²
- [15] Section 55(1)2. of the *Schedule* provides that an insured person shall not apply to the Tribunal if the insurer has notified him or her that it requires an examination under s.44, but the insured person has not complied with that section.
- [16] Aviva submits that [the applicant] failed to attend an IE scheduled to assess her entitlement to the medical benefit set out as substantive issue #5 in paragraph 6 above. It states that [the applicant] called on April 20, 2016 to advise that she would not attend the IE scheduled for April 21, 2016, said that she would call back to reschedule, and then never called back.
- [17] [The applicant] does not dispute Aviva's version of events. Without referring to the specific IE or its date, [the applicant] indicates that her psychological

² *Horvath v. Allstate Insurance Co. of Canada*, 2003 OFSCID No. 92, affirmed in *State Farm Mutual Automobile Insurance Company v S.R.* [2013] ONSC 2086

and pain-related impairments “got so bad that she didn’t want to leave her house”. She does not point me to any evidence to corroborate the implied claim that she was unable to attend the IE, and does not claim to have communicated this to Aviva.

- [18] Aviva submitted a surveillance video and report from Xpera Investigators dated June 5, 2016, which it submits shows that [the applicant] was well enough to attend an IE. [The applicant] was shown to be able to drive, shop for groceries, walk her dog and work out, all without apparent difficulty or limitation. I accept this evidence, which was not explained or contested by the applicant.
- [19] I find that [the applicant]’s claim for the medical benefits set out as issue #5 in paragraph 6 above is barred from appeal. In my view, [the applicant] cannot simply cancel an IE and effectively refuse to attend without explanation. Her submission provides me with no reason to lift the bar on this claim.

[The applicant]’s Duty to Provide Information: s.33 Requests

- [20] Under section 33.(1)1. of the *Schedule*, an insured person must provide on request any information reasonably required to assist the insurer in determining the applicant’s entitlement to a benefit. The time period for complying is 10 business days.
- [21] The insurer is not liable to pay a benefit during any period in which the applicant fails to provide the insurer with the requested information under s.33(6). If the applicant eventually complies with the insurer’s request, with a reasonable explanation for the delay, the insurer must pay the withheld benefit under s.33(8).
- [22] Aviva states that it has requested and failed to receive:
- i. A signed invoice and dental records in relation to the claim for dental treatment set out as issue #6, paragraph 6 above. The dental records, from two years prior to the accident to the date of accident, were needed by Aviva to establish the accident as the cause of dental injury.
 - ii. In relation to claimed IRBs:
 - a. Election of Income Replacement, Non-Earner or Caregiver Benefit form (“OCF-10”).
 - b. Income tax returns from 2013 and onwards.

c. Post-accident income information (if any).

[23] [The applicant] does not deny that Aviva's requests were properly made. She offers no explanation for the failure to meet Aviva's requests. I see none of the requested information appended to her submissions.

[24] [The applicant] did submit a Disability Certificate ("OCF-3") and Employer's Confirmation Form ("OCF-2") – from herself as a self-employed person -- in support of her claim. The OCF-2 is dated April 3, 2017.

[25] [The applicant]'s case is, *verbatim* and in its entirety:

"We have made best efforts to comply with all requests and as long as best efforts are made under Section 33 the claim moves forward, all records to date have been provided the onus is on the Applicant to prove her claim and to date this has been satisfactorily been done; therefore we do not feel that the claimant should be disentitled to benefits that are rightfully available to her under her policy due to this."

[26] [The applicant]'s appeal for dental treatment and for IRBs is barred, until and unless she provides Aviva with the information it requires under s.33 with a reasonable explanation for the delay. My reasons are:

- i. The facts of [the applicant]'s non-compliance with s.33 of the *Schedule* are uncontested.
- ii. [The applicant] provides me with no argument that she met – or even attempted to meet – the "reasonable explanation exception" to s.33. There is no legal basis that I am aware of for her assertion that "as long as best efforts are made under s.33 the claim moves forward", and in any event she provides no evidence of her efforts to comply. I reject [the applicant]'s implied position, unsupported by precedent, that s.33 should be waived for her simply because of her alleged serious injuries.
- iii. I fail to see how [the applicant]'s OCF-3 and OCF-2 can be considered sufficient information for Aviva to determine her IRB claim, especially as the OCF-2 is from [the applicant] herself and is uncorroborated by any documentation of earnings.

Medical Benefits

[27] Sections 14 and 15 of the *Schedule* provide that an insurer is only liable to pay for medical expenses that are reasonable and necessary as a result of the

accident. The applicant bears the onus of proving on a balance of probabilities that any proposed treatment or assessment plan is reasonable and necessary.³

Substantive Issue #2: Chiropractic Treatment

[28] [The applicant]’s case is, *verbatim* and in its entirety:

“In the enclosed clinical notes and records by Dr. Wang specifically in the entry of August 27, 2015 he continues to support the need for aggressive therapy this is a treatment plan that has been incurred solely as a result of the motor vehicle accident and to help [[the applicant]] reach maximum recovery; therefore we feel that the cost of the treatment plan is dispute should be paid.”

[29] Aviva disputes [the applicant]’s claim by arguing that she has provided no medical evidence to establish her entitlement to the benefits sought:

- i. [The applicant]’s medical records for the six months preceding the disputed OCF-18 reveal no need for ongoing treatment.
- ii. The medical entry by Dr. Jeffrey Wang dated August 27, 2015 precedes the OCF-18 by a year and is therefore unreliable as an indicator of need. It should be given little weight.

[30] I find that [the applicant] has failed to prove her entitlement to the claimed medical benefit, her submission refers overwhelmingly to self-reporting statements without medical or any other documentation to support her complaints. The entry from Dr. Wang that she relies on is not contemporaneous enough with the disputed OCF-18 to be persuasive.

Substantive Issue #3: Psychological Services

[31] Aviva partially approved the claimed treatment plan and paid \$3,550.18.

[32] Aviva denies the remaining \$440.16 because:

- i. \$240.16 is for “planning”, which is not covered as a payable expense under the *Schedule*, and
- ii. \$200.00 is for a book entitled *Recovering from the Trauma of Your Car Accident* by Dr. Ilia Gladshsteyn, who also authored the OCF-18 – and a similar book is available online for \$51.95 online, making the cost unreasonable.

³ *Scarlett v. Belair*, 2015 ONSC 3635

- [33] [The applicant] offers no rebuttal whatsoever to Aviva’s argument, she reiterates that she has sustained psychological injury, and that therefore her claim ought to be paid.
- [34] I find that Aviva is not liable to pay the \$240.16 for planning, because I can find no reference to planning as a payable medical expense under s.15 of the Schedule, or in the Guidelines⁴, which govern medical expense coverage.
- [35] I find that Aviva is not liable to pay \$200.00 for the book included in the plan, because [the applicant] has failed to show why the expense is reasonable and necessary, or to reply to Aviva’s argument that a cheaper version is available. The onus is on her to do so.

Substantive Issue #4: Chiropractic Treatment

- [36] Aviva partially approved the claimed treatment plan and paid \$1,073.58.
- [37] Aviva denied the remaining \$229.10 because it considered [the applicant]’s injuries to be “minor” as defined by s.3 of the Schedule, and therefore subject to a \$3,500.00 cap on medical benefits imposed under the Minor Injury Guideline (MIG). The amount paid by Aviva was the remaining amount available to [the applicant] under the MIG when it was paid.
- [38] I find that Aviva is liable to pay the remaining \$229.00 of this treatment plan because:
- i. It has effectively removed [the applicant] from the MIG by acknowledging her psychological injury and covering treatment for it.
 - ii. Aviva has not argued that the treatment plan is unreasonable or unnecessary. It cannot rely on its initial position on “minor injury” to deny this claim.

CONCLUSIONS

- [39] [The applicant]’s appeal on IRBs and dental benefits is barred, without prejudice to [the applicant] bringing an application before the Tribunal once she has submitted information requested by Aviva under s.33 and Aviva has issued its final determination.
- [40] [The applicant]’s appeal of the denied medical benefit set out as issues #6 in paragraph 6 above is barred.

⁴ i.e. Superintendent’s Guideline No. 2/18 – *Health Claims for Auto Insurance*

- [41] [The applicant]'s claim for chiropractic treatment set out as issue #2 in paragraph 6 above is denied.
- [42] [The applicant]'s claim for the balance of a psychological treatment plan set out as issue #3 in paragraph 6 above is denied.
- [43] [The applicant]'s claim for the balance of a chiropractic treatment plan set out as issue #4 in paragraph 6 above is allowed.
- [44] Aviva is required to pay interest on the \$229.10 owing for chiropractic treatment at the prescribed rate.

Released: October 10, 2018

**Christopher A. Ferguson,
Adjudicator**