

**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**



**Citation: Marcia Emiliani Rivera vs. Aviva General Insurance Company, 2020  
ONLAT 17-008924/AABS**

**Released Date: 09/23/2020  
File Number: 17-008924/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:

**Marcia Emiliani Rivera**

**Applicant**

and

**Aviva General Insurance Company**

**Respondent**

**DECISION [AND ORDER]**

**ADJUDICATOR:**

**Paul Gosio**

**APPEARANCES:**

For the Applicant:

Marcia Emiliani Rivera, Applicant  
Antonio Trombacco, Representative

For the Respondent:

Jennifer Cosentino, Counsel

Interpreter

Ms. Sandra Flores, Spanish Interpreter

**HEARD: by Teleconference: June 25, September 16, 23 and October 10, 2019**

## OVERVIEW

- [1] The applicant seeks entitlement to an attendant care benefit and a treatment plan for psychological services.
- [2] The applicant was involved in a motor vehicle accident on August 15, 2015. She applied for and received benefits pursuant to the *Statutory Accident Benefit Schedule – Effective September 1, 2010*<sup>1</sup> (“*Schedule*”). The applicant then applied for an attendant care benefit and a treatment plan for psychological services which were denied by the respondent based on the strength of various s. 44 insurer’s examinations.
- [3] The applicant disagreed with the respondent’s decisions and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) for dispute resolution. The parties could not resolve the issues in dispute, so the matter proceeded to a hearing.

## ISSUES IN DISPUTE

- [4] The following issues are in dispute:
- I. Is the applicant entitled to receive an attendant care benefit in the amount of \$2,479.00 per month for the time period from August 15, 2015 to date?
  - II. Is the applicant entitled to receive a medical benefit in the amount of \$2,134.11 for psychological services recommended in a treatment plan dated January 25, 2016, and denied by the respondent on April 28, 2016?
  - III. Is the applicant entitled to receive a medical benefit in the amount of \$1,197.79 for a mattress recommended in a treatment plan submitted on January 29, 2016 and denied by the respondent on February 9, 2016?

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<sup>1</sup> O. Reg. 34/10.

- IV. Is the applicant entitled to a medical benefit in the amount of \$2,136.67 for chiropractic services recommended in a Treatment and Assessment Plan submitted on January 25, 2016 and denied by the respondent on April 28, 2016?
- V. Is the applicant entitled to a medical benefit in the amount of \$714.05 for chiropractic services recommended in a Treatment and Assessment Plan submitted on January 6, 2016 and denied by the respondent on January 14, 2016?
- VI. Is the applicant entitled to a medical benefit in the amount of \$1,449.33 for physiotherapy services recommended in a Treatment and Assessment Plan submitted on March 4, 2016 and denied by the respondent on June 13, 2016?
- VII. Is the applicant entitled to a medical benefit in the amount of \$2,632.07 for transportation expenses submitted to and denied by the respondent?
- VIII. Is the applicant entitled to a medical benefit in the amount of \$2,286.99 for physiotherapy services recommended in a Treatment and Assessment Plan submitted on March 4, 2016 and denied by the respondent on June 13, 2016?
- IX. Is the applicant entitled to a medical benefit in the amount of \$4,190.35 for occupational therapy services recommended in a Treatment and Assessment Plan submitted to and denied by the respondent?
- X. Is the applicant entitled to interest on any overdue payment of benefits?

## **RESULT**

[5] Based on the evidence before me I find that the applicant is entitled to receive an attendant care benefit in the amount of \$297.76 per month from August 15, 2015 to June 14, 2016. The applicant is not entitled to an attendant care benefit from June 15, 2016 to date.

[6] With respect to the disputed treatment plans, I find that the treatment plans seeking additional chiropractic and physiotherapy treatment are reasonable and necessary. I also find that the unapproved portion of the treatment plan for psychological services, the orthopaedic mattress and the requested occupational therapy services are not reasonable and necessary. The disputed expenses are not payable.

### **ATTENDANT CARE BENEFIT**

[7] As per section 19 of the *Schedule*, the applicant would be entitled to attendant care benefits up to a maximum of \$3,000.00 per month for the first 104 weeks after the accident if she can establish on a balance of probabilities that the attendant care services are reasonable and necessary.

[8] The applicant submits that she is entitled to attendant care benefits in the amount of \$2,479.00 per month and relies on the strength of Mr. De Feo's Occupational Therapy Assessment of Attendant Care Needs Report and the corresponding Form 1 dated April 13, 2016.

[9] The respondent disagrees with the applicant's position and relies on the strength of Ms. Lookmanjee's Occupational Therapy In-Home Assessment Reports and corresponding Form 1's dated January 29 and June 15, 2016.

#### *Are the Claimed Attendant Care Benefits Reasonable and Necessary?*

[10] On August 15, 2015, the applicant was walking in a parking lot when she was struck by a vehicle that was backing out of a parking space. The applicant was struck on the left side and she fell to the ground complaining of left hip and wrist pain. She was assessed by paramedics and was taken to Humber River Hospital where an X-ray revealed a left wrist fracture. The applicant was subsequently seen at a fracture clinic and provided with a fiberglass cast which was removed on October 7, 2015. The Disability Certificate ("OCF-3") dated September 25, 2015 and completed by Dr. Cipolla, chiropractor, indicated that the applicant also suffered from the following accident related injuries: whiplash associated disorder

II; sprain and strain of the lumbar spine; and a contusion of the hip, shoulder and upper arm.

- [11] Mr. De Feo assessed the applicant on April 13, 2016. His report noted that the applicant continued to complain of pain in her left upper extremity including her shoulder, wrist and hand. He also noted that the applicant demonstrated a reduced range of motion in her shoulder with an inability to raise her arm over her head. She also demonstrated a lack of dexterity and coordination with her fingers making it difficult for her to use her left hand in functional activity.
- [12] Mr. De Feo concluded that the applicant's lack of functional use of her left upper extremity makes it difficult for her to complete many of her required day to day tasks. He opined that the applicant required assistance with dressing, grooming, feeding, hygiene, exercise, taking medication and bathing. He assessed the applicant's attendant care needs to amount to 44.4 hours a week totaling \$2,479.46 per month. Mr. De Feo also indicated that the applicant would benefit from an attendant care re-assessment approximately 6 weeks after his recommendations (for assistive devices, occupational therapy services and rehabilitation modalities) have been implemented.
- [13] The applicant reports receiving assistance from Ms. Martha Molina of Modern Angel at a rate of approximately 65 hours per month with respect to the following self care tasks: hygiene tasks, washing hair, bathing, combing and styling hair, preparing and serving meals and going for walks.
- [14] Ms. Lookmanjee assessed the applicant on January 20, 2016. Her report dated January 29, 2016 noted that the applicant can perform most of her self care activities independently except for meal preparation tasks due to an inability to perform bilateral grip. The applicant was observed to have swelling in her left hand that prevented her from gripping and flexing her fingers completely. She demonstrated sufficient range of motion mobility and strength in her right dominant arm for most self care tasks. The applicant was observed to limit her left arm use due to reports of pain. Ms. Lookmanjee opined that the applicant required

assistance with meal preparation tasks and as such, her Form 1 recommended 5.25 hours per week of assistance for this purpose in the amount of \$297.76 per month.

[15] Ms. Lookmanjee assessed the applicant again on June 7, 2016. Her report dated June 15, 2016 noted that the applicant was able to perform her self care activities independently as she demonstrated sufficient range of motion mobility and strength in her right dominant arm for needed self care tasks. The applicant was observed to limit left arm use due to reports and anticipation of pain.

[16] Dr. Desai assessed the applicant on behalf of the insurer on April 14, 2016. His Orthopaedic Surgery Assessment Report dated May 3, 2016 noted that there were no objective signs of impairment that would prolong the applicant's symptoms in her left shoulder, arm, elbow or forearm. He reported that the applicant was very pain focused and noted that she would be palpably tender when directly pressing over areas of her left arm however, when distracted, she was not tender.

[17] Ms. Lookmanjee, taking Dr. Desai's opinion into account, concluded that no attendant care support was required at this time. She noted that active resumption of activities of daily living is considered a reasonable and necessary component of the applicant's rehabilitation process in order to assist in full resumption of all her pre-accident activities of daily living. She opined that the provision of unnecessary support for self care tasks would promote unnecessary dependency on external supports which is not required in the course of the applicant's rehabilitation. Consequently, Ms. Lookmanjee's updated Form 1 recommended no attendant care support for the applicant.

[18] Based on the evidence before me, I find that the amount care, as outlined by Ms. Lookmanjee's Form 1's to be reasonable and necessary. Ms. Lookmanjee's assessments were thorough and her rationale was compelling. The applicant is right hand dominant. Ms. Lookmanjee's assessment took this into account when she assessed the applicant's overall functioning; whereas I find Mr. De Feo's assessment to focus on the applicant's abilities with her left only. I find this to be

problematic and conclude that Mr. De Feo's assessment failed to convey the applicant's actual capabilities through the use of her dominant right hand and arm. In addition to this, Ms. Lookmanjee's functional testing of the applicant demonstrated that she was capable of dressing, grooming and bathing through the use of her right hand while employing some pacing techniques when necessary.

[19] I also note that there is no objective evidence before me that would explain the cause of the applicant's ongoing physical impairments in her left upper extremities. The evidence before me, including Dr. Desai's opinion, suggests that the applicant suffered from an uncomplicated sprain/strain of her left shoulder, arm, elbow and forearm. Dr. Desai opined that this type of injury typically resolves in a period of six to 12 weeks. During the examination, Dr. Desai noted that passively, the applicant demonstrated full range of motion in her left shoulder, hand and wrist and was able to extend and flex her left elbow fully. Dr. Desai's examination identified no objective signs of impairment that would prolong the applicant's symptoms in her left shoulder, arm, elbow or forearm.

[20] Given the above, I find Ms. Lookmanjee's Form 1 recommending 5.25 hours per week of assistance in the amount of \$297.76 per month to be reasonable and necessary up to June 15, 2016. From June 15, 2016 to date, I agree with Ms. Lookmanjee's updated Form 1 and find that attendant care services during this period are not reasonable and necessary.

## **DISPUTED TREATMENT PLAN**

[21] The applicant's entitlement to the treatment plan in dispute turns on whether the particular treatment plan is reasonable and necessary in accordance with sections 14 and 15 of the *Schedule*. The applicant bears the onus of establishing on a balance of probabilities that the treatment plan in dispute is reasonable and necessary.

*Treatment and Assessment Plan in the Amount of \$2,134.11 for Psychological Services*

- [22] Dr. Shaul, psychologist, assessed the applicant on November 27, 2015. He diagnosed the applicant with adjustment disorder with mixed anxiety and depressed mood, specific phobia (passenger), and somatic symptom disorder with predominant pain, persistent. Dr. Shaul opined that the applicant's symptoms of fear, anxiety, and nervousness when travelling in a vehicle or crossing the street, sleep difficulties, limitations in previously enjoyed activities, her changed mood, sadness, irritability, physical discomfort, difficulty coping with pain and difficulty with memory and concentration support these diagnoses.
- [23] Dr. Shaul then submitted the disputed treatment plan dated January 25, 2016. The treatment plan proposes funding for 12 90-minute psychotherapy sessions (\$2,693.04), a clinical re-evaluation (\$149.61), report generation (\$299.22), completion of claims forms (\$200.00), and interpretation services (\$1,386.00) for a total proposed cost of \$4,727.87. Dr. Shaul recommended the psychotherapy sessions in order to provide cognitive behavioral therapy, relaxation techniques and possibly systematic desensitization. The goal of the treatment plan was to help return the applicant to her pre-accident level of psychological functioning.
- [24] Dr. Day, psychologist, conducted an insurer's psychological assessment on March 8, 2016. Dr. Day diagnosed the applicant with major depressive disorder, single episode, moderate. Dr. Day opined that the proposed psychological treatment was partially reasonable and necessary in order to reduce the applicant's accident-related psychological symptoms. Dr. Day opined that 12 60-minute sessions of psychotherapy, with the assistance of an interpreter were warranted. Dr. Day also opined that four hours for completion of a progress/discharge report and the amount for the completion of the claims forms were reasonable and necessary.
- [25] The discrepancy between the parties focuses on the length of the 12 psychotherapy sessions. The applicant bears the onus of establishing on a balance of probabilities that the proposed treatment is reasonable and necessary. In this case, I find it difficult to assess whether the proposed 90-minute sessions are reasonable and necessary given that Dr. Shaul failed to explain why the

proposed 90-minute sessions were warranted under the circumstances. This explanation would have been helpful given the discrepancy between the opinions of Dr. Shaul and Dr. Day. Given the above, I find that the applicant failed to establish on a balance of probabilities that the unapproved portion of this treatment plan is reasonable and necessary.

*Treatment and Assessment Plan in the Amount of \$1,197.79 for an Orthopaedic Mattress*

[26] The disputed treatment plan proposes funding for an orthopaedic mattress. The respondent notified the applicant that it had denied the treatment plan and issued a Notice of Examination for an orthopaedic assessment pursuant to s. 44 of the *Schedule* in order to assess the applicant's entitlement to the treatment plan.

[27] The applicant failed to attend the orthopaedic assessment which was scheduled for February 8, 2016. Given that the applicant failed to attend the insurer's examination wherein a valid s. 44 Notice was provided, pursuant to s. 55 of the *Schedule*, she is barred from proceeding with this issue in dispute.

*Treatment and Assessment Plan in the Amount of \$2,136.67 and \$714.05 for chiropractic services*

[28] The disputed treatment plans were submitted by Dr. Thambirajah, chiropractor, and proposes funding for sessions of chiropractic treatment in order to increase the applicant's strength and range of motion so that she could return to her activities of normal living. Dr. Thambirajah noted that the applicant had suffered pain in her joint, a sprain and strain of her cervical, thoracic and lumbar spine, and an injury to the muscle and tendons of the rotator cuff of the shoulder.

[29] Dr. Thambirajah also noted that the applicant indicated that her wrist and hand were in constant pain. Dr. Thambirajah noted visible swelling in the applicant's left wrist and exhibited difficulty with her left-hand grip and was unable to perform activities which require the grasp of the left hand. The applicant also stated that her left shoulder and arm were fatigued and that over head lifting with the left arm

and repeated movement of the shoulder were difficult. Dr. Thambirajah noted that the applicants progress would be evaluated based on VAS, grip strength, ability to close her left hand and functional testing.

[30] I find these treatment plans to be reasonable and necessary. I acknowledge that the applicant stopped attending Caring Rehabilitation LTD where she was receiving chiropractic treatment in February of 2016 and that her last visit with her family doctor, Dr. Dubis, was on February 26, 2016. Although the applicant did not provide a reason for this, she testified that the treatment she did receive was helpful with respect to the pain and difficulties caused by her left hand and wrist injury. Under the circumstances, I find continued treatment as proposed to be reasonable and necessary.

*Treatment and Assessment Plan in the Amount of \$1,449.33 and \$2,286.99 for physiotherapy services*

[31] The submitted treatment plans were submitted by Dr. Lee, chiropractor, and proposed funding for additional physiotherapy treatment sessions. The treatment plans were denied by the respondent based on the strength of Dr. Desai's orthopaedic IE assessment which took place on April 14, 2016.

[32] Dr. Desai took the position that from a musculoskeletal point of view, there were no further treatments or investigations necessary. Dr. Desai noted that the examination identified no objective signs of impairment that would prolong the applicant's symptoms despite the applicant's continuing complaints related to her left wrist and the findings on physical examination of decreased range of motion of her fingers. Dr. Desai then noted that there was no compelling clinical evidence that causally links the applicant's subjective complaints to the initial motor vehicle accident and that at this point, it was expected that the applicant would have recovered fully with no symptoms.

[33] I find these treatment plans to be reasonable and necessary. The applicant testified that the physiotherapy treatment she had received was helpful with

respect to the pain and difficulties caused by her left hand and wrist injury. Given that the treatment was providing the applicant with pain relief and some help with respect to her range of motion, I find continued treatment as proposed to be reasonable and necessary.

*Treatment and Assessment Plan in the Amount of \$1,248.01 for Various Expenses*

[34] The applicant is seeking payment for four OCF-6's submitted on August 25 and 26, 2016 for travel and clothing/personal expenses. There is no provision in the *Schedule* which compels the respondent to reimburse the applicant for the clothing and personal expenses she submitted. As a result, they are not payable.

[35] With respect to the travel expenses claimed by the applicant, I note that section 3 of the *Schedule* defines "authorized transportation expense" as follows:

"authorized transportation expense" means, in respect of an insured person, expenses related to transportation,

(a) that are authorized by, and calculated by applying the rates set out in, the Transportation Expense Guidelines published in The Ontario Gazette by the Financial Services Commission of Ontario, as they may be amended from time to time, and

(b) that, unless the insured person sustained a catastrophic impairment as a result of the accident, relate to transportation expenses incurred only after the first 50 kilometres of a trip.

[36] The evidence before me establishes that none of the transportation expenses in dispute are over 50 km in distance and are therefore not payable as the applicant has not been found to have sustained a catastrophic impairment.

*Treatment and Assessment Plan in the Amount of \$4,190.35 for Occupational Therapy Services*

[37] The submitted treatment plan requested funding for additional occupational therapy services. The applicant received occupational therapy services in May, June, July and August of 2016. An Occupational Therapy Progress Report was authored by Ms. Nunes on behalf of the applicant. Ms. Nunes noted that the applicant made steady gains through her occupational treatment. Ms. Nunes noted improved range of motion and strength in her left hand and fingers despite dealing with some pain. Ms. Nunes recommended some additional physiotherapy services but noted that there were no additional OT goals for the applicant. As such, I find that the treatment and assessment plan is not reasonable and necessary.

## **CONCLUSION**

[38] For the reasons outlined above, I find that:

- I. The applicant is entitled to receive an attendant care benefit in the amount of \$297.76 per month for the time period from August 15, 2015 to June 14, 2016;
- II. The applicant is not entitled to an attendant care benefit from June 15, 2016 to date;
- III. The unapproved portion of the medical benefit in the amount of \$2,134.11 for psychological services is not reasonable and necessary;
- IV. The medical benefit in the amount of \$1,197.79 for an orthopaedic mattress is not reasonable and necessary;
- V. The medical benefit in the amount of \$2,136.67 for chiropractic services is reasonable and necessary;
- VI. The medical benefit in the amount of \$714.05 for chiropractic services is reasonable and necessary;

- VII. The medical benefit in the amount of \$1,449.33 for physiotherapy services is reasonable and necessary;
- VIII. The various expenses in the amount of \$2,632.07 are not payable;
- IX. The medical benefit in the amount of \$2,286.99 for physiotherapy services is reasonable and necessary;
- X. The medical benefit in the amount of \$4,190.35 for occupational therapy services is not reasonable and necessary; and
- XI. The applicant is entitled to interest pursuant to the *Schedule*.

**Released: September 23, 2020**



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**Paul Gosio  
Adjudicator**