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

Ontario

File Number: 19-002890/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:

R.A.

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: **Lindsay Lake**

APPEARANCES:

For the Applicant: Lisa Bishop, Counsel

For the Respondent: Jennifer Cosentino, Counsel

Heard by way of written submissions on January 13, 2020

OVERVIEW

[1] The applicant, R.A., was injured in an automobile accident on August 23, 2017 (the "accident") and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*")[1] from Aviva Insurance Company ("Aviva"), the respondent.

[2] Aviva denied R.A.'s claim for income replacement benefits, attendant care benefits and several treatment plans. As a result, R.A. submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[3] The matter proceeded to a case conference on July 24, 2019, but the parties were unable to resolve the issues in dispute. A combination hearing was scheduled with an in-person portion to be held on February 26-28, 2020 to address the issues of income replacement benefits and attendant care benefits. A written portion of the hearing was also scheduled for November 4, 2019 to address the remaining issues.

[4] On October 9, 2019, R.A. filed a Notice of Motion following settlement of the issue of income replacement benefits. On consent of Aviva, the Tribunal granted R.A.'s request to vacate the dates for the in-person portion of the hearing and ordered that the remaining issues would be heard in writing as previously scheduled. The written hearing date was later rescheduled on consent of the parties to January 13, 2020.

ISSUES IN DISPUTE

[5] The following are the issues to be decided:[2]

(i) Is R.A. entitled to attendant care benefits ("ACB") of $712.24 per month from October 23, 2017 to March 8, 2018?

(ii) Is R.A. entitled to $2,000.00 for a psychological assessment recommended by Downsview Healthcare Inc. in a treatment plan ("OCF-18") dated October 26, 2017, and denied by Aviva on January 5, 2018?

[1] O. Reg. 34/10.
[2] Several of the issues in dispute were not correctly identified in the Tribunal's July 24, 2019 Order. The issues have been amended in this decision to reflect the correct goods and services sought by each of the treatment plans in dispute.

(iii) Is R.A. entitled to $3,335.98 for psychological treatment recommended by Downsview Healthcare Inc. in an OCF-18 submitted on February 26, 2018, and denied by Aviva on March 5, 2018?

(iv) Is R.A. entitled to $1,981.70 for a driving re-integration assessment recommended by Downsview Healthcare Inc. in an OCF-18 dated May 24, 2018, and denied by Aviva on June 7, 2018?

(v) Is R.A. entitled to $1,300.80 for an exercise program, physical therapy, massage therapy and laser therapy recommended by Downsview in an OCF-18 dated December 6, 2018, and denied by Aviva on December 13, 2018?

(vi) Is R.A. entitled to $1,271.20 for an exercise program, physical therapy and massage therapy recommended by Downsview Healthcare Inc.in an OCF-18 dated January 10, 2019, and denied by Aviva on January 31, 2019?

(vii) Is R.A. entitled to chronic pain assessments recommended by Downsview Healthcare Inc. as follows:

(a) $2,000.00 in an OCF-18 dated January 16, 2018, and denied by Aviva on February 13, 2018?

(b) $2,000.00 in an OCF-18 dated December 13, 2018, and denied by Aviva on February 1, 2019?

(viii) Is the applicant to $12,293.41 for a multidisciplinary chronic pain treatment program in an OCF-18 dated February 14, 2019, and denied by Aviva on March 1, 2019?

(ix) Is R.A. entitled to $1,800.00 for shockwave therapy recommended by Downsview Healthcare Inc. in an OCF-18 dated February 28, 2019, and denied by Aviva on March 1, 2019?

(x) Is R.E. entitled to $190.00 for a psychological pre-screen interview which was denied by Aviva on October 26, 2017?

(xi) Is R.A. entitled to the cost of the completion of Disability Certificates (“OCF-3s”) as follows:

(a) $200.00 denied by Aviva on January 10, 2018?

(b) $200.00 denied by Aviva on June 24, 2018?

(xii) Is Aviva liable to pay an award under O. Reg. 664 because it unreasonably withheld or delayed payments to R.A.?

(xiii) Is R.A. entitled to interest on any overdue payment of benefits?

PROCEDURAL ISSUES

R.A.'s claim for ACBs from August 23, 2017 to August 23, 2019

[6] In her submissions, R.A. stated that she is seeking an Order for payment of ACBs at a rate of $712.24 per month from the date of loss to August 22, 2019, which is the two-year anniversary of the accident.[3]

[7] Aviva's position is that the period in dispute for ACBs is from October 23, 2017 to March 8, 2018, which is the period in dispute indicated on the Tribunals July 24, 2019 Order. Aviva argued that R.A was attempting to circumvent the July 24, 2019 Order which was prejudicial to Aviva because it did not receive notice of this change prior to receiving R.A.'s written hearing submissions.

[8] I find that any claim for ACBs beyond March 8, 2018 is not properly before me. The case conference in this matter was held on July 24, 2019. As such, R.A. had sufficient time before the hearing to bring a motion to allow Aviva a full opportunity to respond to her claim for ACBs outside of the time period set out in the Tribunal's July 24, 2019 Order. It is highly prejudicial to Aviva for R.A. to significantly change her claim for ACBs in her written hearing submissions. R.A. also failed to provide any explanation or rationale for the change as she did not file any reply hearing submissions.

[9] For all of these reasons, I decline to determine R.A.'s entitlement to ACBs outside of the period of October 23, 2017 to March 8, 2018.

Exclusion of Evidence: Clinical Notes and Records from Downsview HealthCare Inc.

[10] In its submissions, Aviva requested that the clinical notes and records ("CNRs") from Downsview HealthCare Inc. ("Downsview") that were included in R.A.'s Book of Exhibits be excluded from the hearing evidence. The basis for Aviva's request was that R.A. failed to produce the CNRs prior to the production

[3] Submissions of the Applicant, page 15.

deadline of September 6, 2019 as set out in the Tribunal's July 24, 2019 Order. Aviva argued that it was prejudiced by the late submissions of the CNRs.

[11] As mention in paragraph [8] above, R.A. filed no reply submissions and, as a result, failed to address Aviva's request to exclude the CNRs from Downsview as evidence for the hearing.

[12] Aviva's request is denied. While Aviva submitted that the CNRs were not received prior to the September 6, 2019 production deadline, Aviva did not particularize when they were received. This information is important because even though Aviva submitted that it was prejudiced by the late production of the CNRs, the exact time when the CNRs were provided to Aviva would be of assistance in determining what, if any, prejudice there was to Aviva. By the same token, Aviva did not provide any particulars of the prejudice it suffered as a result of the late production of the CNRs. I also find that the CNRs are relevant to the issues in dispute and a more appropriate remedy, rather than excluding evidence, would be an adjournment which was not requested by Aviva. For these reasons, the CNRs from Downsview are not excluded from the hearing evidence.

RESULT

[13] Based on the evidence before me, I find that R.A. is:

(i) not entitled to ACBs from October 23, 2017 to March 8, 2018;

(ii) entitled to the following OCF-18s plus interest in accordance with s. 51 of the *Schedule*:

(a) $2,000.00 for a psychological assessment;

(b) $1,300.80 for an exercise program, physical therapy, massage therapy and laser therapy;

(c) $2,000.00 for the second proposed chronic pain assessment dated December 13, 2018; and

(d) $1,800.00 for shockwave therapy;

(iii) not entitled to the following OCF-18s:

(a) $3,335.98 for psychological treatment;

(b) $1,981.70 for a driving re-integration assessment;

(c) $1,271.20 for an exercise program, physical therapy and massage therapy;

(d) $2,000.00 for the first proposed chronic pain assessment dated January 16, 2018; and

(e) $12,293.41 for a multidisciplinary chronic pain treatment program;

(iv) not entitled to $190.00 for a psychological pre-screen interview report;

(v) not entitled to $200.00 each for the completion of two OCF-3s; and

(vi) not entitled to an award.

ANALYSIS

Attendant Care Benefits (ACBs)

[14] Pursuant to s. 14 of the *Schedule*, ACBs are not available to an insured person whose injuries are found to be within the Minor Injury Guideline ("MIG"). As such, R.A. was not entitled to ACBs until February 5, 2018 when she was released from the MIG.[4] Therefore, I find that R.A. is not entitled to ACBs from October 23, 2017 to February 5, 2018.

Is R.A. entitled to ACBs from February 5, 2018 to March 8, 2018?

[15] For the reasons that follow, I find that R.A. has failed to prove on a balance of probabilities that expenses for ACBs were incurred in accordance with s. 3(7) of the *Schedule* and I decline to deem any ACBs incurred under s. 3(8) of the *Schedule*. R.A. is, therefore, not entitled to any ACBs for the period of October 23, 2017 to March 8, 2018.

[16] Section 19 of the *Schedule* states that the insurer shall pay for all reasonable and necessary expenses that are incurred by or on behalf of the insured person as a result of the accident for services provided by an aide or attendant.

[17] Under s. 3(7)(e) of the *Schedule*, for an expense to be "incurred" it must meet the following three criteria:

(i) the insured person has received the goods and services to which the expense relates;

[4] Applicant's Book of Exhibits, tab 27.

(ii) the insured person has paid the expense, promised to pay the expense, or is otherwise legally obligated to pay the expense; and

(iii) the person who provided the goods or services:

(a) did so in the course of employment, occupation or profession in which he or she would have ordinarily been engaged but for the accident, or

(b) sustained an economic loss as a result of providing the goods or services to the insured person.

[18] R.A. submitted as evidence an Assessment of Attendant Care Needs ("Form 1") dated October 23, 2017 that was completed by Elizaveta Lianos, registered nurse. Ms. Lianos concluded that R.A. required assistance with the following tasks: hair care and styling; toenail care; assistance with preparing and feeding meats; hygiene consisting of cleaning the bathroom, changing bedding, preparing daily wearing apparel and laundry completion; and assistance with exercise program. Ms. Lianos determined that R.A. required $712.24 per month of ACBs.

[19] R.A. submitted no evidence that she incurred the services of an attendant care provider during the period in dispute. Instead, it was Aviva that submitted various monthly invoices from Attendants With Care Inc. for the period of December 18, 2017 to April 17, 2018 each in the same amount of $700.00, which totaled $2,800.00 for 25 hours of attendant care services for grooming, feeding, hygiene and exercise.[5] R.A. provided no reply submissions in response to these monthly attendant care invoices.

[20] I am unable to find on a balance of probabilities that the applicant received goods and services from Attendants With Care Inc. as I agree with Aviva that the invoices from Attendants With Care Inc. lack particulars of the services provided. Similar to *16-003776 v Pembridge Insurance Company*,[6] as relied upon by Aviva, there are no details on the invoices as to the exact dates worked per month or the number of hours worked per day. No time dockets, daily logs, job diaries or any information on the dates and times that the services were performed accompanied the invoices. Further, it is also unknown who allegedly performed services for R.A. as all of the invoices were signed by the company's Director. As a result, I find that R.A. does not meet the first criterion for a finding

[5] Written Submissions on Behalf of the Respondent, tab 8.
[6] 2017 CanLII 87158 (ON LAT) at para. 29.

that these expenses have been incurred in accordance with s. 3(7) of the *Schedule*.

[21] R.A.'s submissions regarding her claim for ACBs consisted of her request that I deem the expenses incurred pursuant to s. 3(8) of the *Schedule* on the basis that Aviva unreasonably withheld or delayed payment of a benefit. Specifically, R.A. argued that Aviva failed to advise her that she was entitled to ACBs when she was removed from the MIG.

[22] I agree with R.A. that Aviva did not advise her in its February 5, 2018 correspondence of her eligibility to receive ACBs when Aviva removed her from the MIG. However, I do not agree that this omitted information constitutes an unreasonable withholding or a delay of benefits as suggested by R.A. Moreover, the invoices from Attendants with Care Inc. were not provided to Aviva until July 24, 2019 which further leads me to find that there was no unreasonable withholding of ACBs within the period in dispute.

[23] R.A. also relied upon the decision of *17-001681 v Motor Vehicle Accident Claims Fund*[7] to support her position that ACBs are payable under s. 3(8) of the *Schedule* even if they were not incurred. I find that *17-001681* is distinguishable as in that decision, the adjudicator deemed ACBs incurred because the respondent relied upon flawed medical reports and also failed to consider other compelling medical documentation in making its decision to deny payment of ACBs which the adjudicator found to be unreasonable. Here, R.A. made no such arguments that Aviva failed to review all of the medical documentation available as was advanced in *17-001681*. The only argument made by R.A. in terms of s. 3(8) was that she was not notified that she was eligible to receive ACBs. Therefore, I find that *17-001681* is distinguishable from the facts in this matter.

[24] As R.A. advanced no other arguments or evidence that Aviva unreasonably withheld or delayed payment of ACBs, I find that Aviva did not unreasonably withhold or delay the payment of ACBs upon R.A. being eligible to receive this benefit after she was removed from the MIG. As such, I decline to deem any ACBs incurred under s. 3(8) of the *Schedule* and R.A. is, therefore, not entitled to any ACBs for the period of October 23, 2017 to March 8, 2018.

[7] 2018 CanLII 112134 (ON LAT) ("*17-001681*").

Treatment Plans

[25] Sections 14 and 15 of the *Schedule* provide that the insurer shall pay medical benefits to, or on behalf of, an applicant so long as the applicant sustains an impairment as a result of an accident and the medical benefit is a reasonable and necessary expense incurred by the applicant as a result of the accident.

[26] R.A. bears the onus of proving her entitlement to the claimed treatment and assessments by proving they are each reasonable and necessary on a balance of probabilities.[8]

[27] For the reasons that follow, I find that R.A. is entitled to the following OCF-18s:

(i) $2,000.00 for a psychological assessment;

(ii) $1,300.80 for an exercise program, physical therapy, massage therapy and laser therapy;

(iii) $2,000.00 for the second proposed chronic pain assessment dated December 13, 2018; and

(iv) $1,800.00 for shockwave therapy.

[28] R.A. is not entitled to any of the remaining treatment plans in dispute.

Psychological Assessment

[29] The OCF-18 in dispute for a psychological assessment was completed by Dr. Andrew Shaul, psychologist, on October 25, 2017 and sought funding in the amount of $2,000.00.

[30] R.A. submits that Aviva did not provide a proper denial to this OCF-18 as required by s. 38 of the *Schedule*. The relevant portions of Aviva's denial, dated November 13, 2017, is reproduced as follows:

> Based on the information we have available, your injuries appear to be treatable within the Minor Injury Guideline, (MIG) however the OCF 18 submitted by your provider is recommending goods and services outside of the MIG.

[8] *Scarlett v. Belair Insurance*, 2015 ONSC 3635 (CanLII) at paras. 20-24.

> We're unable to determine whether the recommendations on your OCF 18 are reasonable and necessary for the injuries you sustained and we're not able to pay your benefits at this time.

[31] Aviva also provided notice of an insurer's examination ("IE") for a psychological assessment at this time and provided the following medical reasons, "upon review of the minor injury guideline and the treating practitioners medical opinion, we have concluded the health practitioner has not provided compelling evidence the impairment sustained is not predominantly a minor injury." No other reasons for the IE were provided.

[32] R.A. argues that Aviva's denial failed to adhere to the requirements in s. 38 of the *Schedule* as Aviva provided no medical reason for its denial of the proposed psychological assessment while at the same time requiring R.A. to attend a psychological assessment. R.A. also argued that the denial was vague and provided no explanation of how psychological conditions would be "minor."

[33] In response, Aviva reiterated the contents of its November 13, 2017 correspondence and argued that the *Schedule* bestows a right to Aviva to conduct an IE and that no inference should be drawn, as suggested by R.A., as to the reasonableness and necessity of the proposed treatment plan as a result of the scheduling of the assessment to which Aviva is entitled.

[34] Sections 38(8) and 38(11) of the *Schedule* set out strict notice requirements for insurers responding to treatment plans and specific consequences if they fail to comply. Section 38(8) requires an insurer to inform an insured person of the medical and other reasons why it considered the goods and services not to be reasonable and necessary if it denies a treatment plan. The requirement of medical reasons was explained in the reconsideration decision of *T.F. v. Peel Mutual Insurance Company*,[9] in which Executive Chair Lamoureux stated:

> an insurer's "medical and any other reasons" should, at the very least, include specific details about the insured's condition forming the basis for the insurer's decision or, alternatively, identify information about the insured's condition that the insurer does not have but requires. Additionally, an insurer should also refer to the specific benefit or determination at issue, along with any section of the *Schedule* upon which it relies. Ultimately, an insurer's "medical and any other reasons" should be clear and sufficient enough to allow an unsophisticated person to make an informed decision to

[9] 2018 CanLII 39373 (ON LAT) ("*T.F. v. Peel Mutual*").

> either accept or dispute the decision at issue. Only then will the explanation serve the *Schedule*'s consumer protection goal.[10]

[35] Pursuant to s. 38(11), if an insurer fails to comply with its obligations under s. 38(8), it must pay for all goods, services, assessments and examinations described in the treatment plan starting on the 11th business day after the day that the insurer received the treatment plan until such time that it gives notice that complies with s. 38(8) of the *Schedule*. As such, the insurer is given a window to "cure" a defective notice but without such a cure, any goods, services, assessment and examinations set out in the treatment plan are payable as an analysis as to the reasonableness and necessity of the proposed treatment under s. 15 of the *Schedule* is no longer required.[11]

[36] I find that Aviva's November 13, 2017 correspondence was deficient because it did not include any specific details about R.A.'s condition forming the basis of Aviva's decision and only generally referred to R.A.'s injuries without any details or explanation. The reasons provided for the IE also do not assist in discharging Aviva's onus under s. 38(8) because the notice simply states, in very generic terms, that the MIG was reviewed, the treating practitioner's (with no indication who this was) medical opinion was reviewed and Aviva's conclusion that the health practitioner (with no specifics as to who this was) has not provided compelling medical evidence that the impairment sustained is not predominantly a minor injury. I find Aviva's November 13, 2017 correspondence was boilerplate and did not even mention the two-page Psychological Pre-screen Interview Report that was included in the additional comments portion of the denied OCF-18.

[37] As a result, the consequences in s. 38(11) of the *Schedule* are triggered and Aviva is required to pay for all goods, services, assessments and examinations described in the treatment plan for the psychological assessment starting on the 11th business day after receiving the OCF-18 and ending when Aviva gives notice that complies with the requirements of the *Schedule*.

[38] On November 15, 2019, approximately two years after its first denial, Aviva sent correspondence to R.A. indicating that it was maintaining its denial of the proposed psychological assessment. At this time, Aviva relied upon a November 8, 2019 Insurer's Psychology Examination Report by Dr. Shahriar Moshiri, psychologist.[12] In his report, Dr. Moshiri found that from a psychological perspective, R.A. did not sustain an impairment as a direct result

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[10] *Ibid*. at para. 19.
[11] See *M.F.Z. v Aviva Insurance Canada*, 2017 CanLII 63632 (ON LAT) at paras. 50-52, 59 and 64.
[12] Written Submissions on Behalf of the Respondent, tab 11.

of the accident and that R.A. did not have a diagnosis for a formal psychological condition.[13] I find that this denial was sufficient to discharge Aviva's obligations under s. 38(8) of the *Schedule* as Aviva provided medical reasons for its denial that included specific information about R.A.'s condition in reference to Dr. Moshiri's report that formed the basis of Aviva's denial. Therefore, the consequences in s. 38(11) ended on November 15, 2019 and, after this time, Aviva was no longer required to pay for the proposed psychological assessment without a determination of its reasonableness and necessity.

[39] Prior to November 15, 2019, R.A. was assessed on December 4, 2017 which resulted in a Psychological Report dated January 3, 2018. The report stated that R.A. was interviewed by Ms. Helen Illios, registered psychotherapist, who was supervised by Dr. Shaul.[14]

[40] Aviva challenged the authenticity of the January 3, 2018 report suggesting that the assessment of R.A. never occurred. Aviva relied upon a December 22, 2017 IE Psychology Assessment Report by Dr. Janet Clewes, psychologist,[15] in which Dr. Clewes reported that R.A. did not recall meeting Dr. Shaul and that R.A. denied ever consulting with a mental health professional before in her life.[16] Aviva suggested that it would be reasonable for R.A. to recall the assessment supposedly involving a clinical interview and multiple lengthy questionnaires that occurred only five days before Dr. Clewes' assessment of R.A.

[41] I do not agree with Aviva that R.A. did not participate in a psychological assessment on December 4, 2017. Dr. Clewes reported that R.A. did not recall *meeting* with Dr. Shaul which could very well have been true. Dr. Shaul's report indicates that R.A. was interviewed by Ms. Illios and not by Dr. Shaul. As such, R.A.'s failure to recall meeting Dr. Shaul is reasonable given the evidence before me. Further, I place little weight on Dr. Clewes' notation that R.A. denied ever consulting with a mental health professional. This statement is vague and lack particulars as, for example, it is not known from this comment if R.A. considered Ms. Illios a "mental health professional" or if R.A. considered "consult" to mean "treated by" or simply attended at an appointment with such a person.

[42] As a result of my findings of Aviva's non-compliance with s. 38(8) of the *Schedule* until November 15, 2019, the consequences set out in s. 38(11) were triggered following Aviva's first denial on November 13, 2017. As I do not agree

[13] *Ibid*. at page 15.
[14] Applicant's Book of Exhibits, tab 8.
[15] Written Submissions on Behalf of the Respondent, tab 9.
[16] *Ibid*. at page 4.

with Aviva's suggestion that the December 4, 2017 psychological assessment of R.A. did not take place, I find that the treatment plan for the psychological assessment is payable as it was incurred prior to November 15, 2019.

Psychological Treatment

[43] This OCF-18 in dispute was submitted to Aviva on February 26, 2018 and sought funding in the total amount of $3,335.98. In the additional comments portion of this OCF-18, it was noted that the proposed 14 counselling sessions, a psychotherapy progress report and psycho-educational material consisting of a psychoeducational CDs set out in the treatment plan were based on Dr. Shaul's recommendations from the January 3, 2018 Psychological Report.

[44] As discussed in paragraph [39] above, a January 3, 2018 Psychological Report was produced following R.A.'s assessment on December 4, 2017.

[45] I place little weight on the January 3, 2018 Psychological Report and the diagnoses and recommendations contained therein for two reasons. First, R.A.'s psychological test scores were disregarded in favour of R.A.'s self-reporting during her interview.

[46] The report notes that R.A.'s testing scores were within the minimal range for both the Beck Depression Inventory-II questionnaire and the Beck Anxiety Inventory (BAI) questionnaire. R.A. also endorsed the majority of her reported psychological and physical symptoms on the Symptom Checklist-90-Revised questionnaire as "a little bit distressing." In summary, the report stated that R.A.'s test result scores indicated that she was experiencing minimal levels of emotional distress.

[47] Nonetheless, the report then stated, "although her scores on the BDI and BAI appeared to reveal that [R.A.] is only experiencing relatively low levels of symptoms of depression and anxiety, her report during the clinical interview suggested that her current psychological and emotional distress is more significant than what was represented in her test responses."[17] Further, "it is our opinion that [R.A.'s] current presentation is consistent with the following DSM-5 diagnostic criteria: 1. Adjustment Disorder with Mixed Anxiety and Depressed Mood; and 2. Specific Phobia (travelling in and around a vehicle)."[18]

[48] The favouring of R.A.'s interview over that of her testing results, which ultimately led to certain diagnoses, is highly problematic because Dr. Shaul does not

[17] *Ibid*. at page 10.
[18] *Ibid*. at page 11.

appear to have ever met R.A. The assessment was comprised only of a clinic interview and the administration of three psychological self-report questionnaires that were conducted by Ms. Illios.[19] Therefore, I find that there is no justifiable explanation or rationale for preferring R.A.'s interview responses that were obtained by unknown questions asked by Ms. Illios, who is not legally qualified to diagnose psychological disorders as a psychotherapist, and not by Dr. Shaul over that of R.A.'s standardized psychological testing scores.

[49] Second, I find the January 3, 2018 Psychological Report to be unclear as to whose opinions and recommendations it contains. For example, the report changes between referring to the speaker as "I" and "my" to "our" throughout without explanation and is signed by both Dr. Shaul and Ms. Illios.[20]

[50] I was also not directed to any other evidence that supports a finding that the proposed psychological treatment in the February 26, 2018 OCF-18 was reasonable and necessary.

[51] R.A. referred to a September 7, 2017 OCF-3 that was completed by Dr. Oleksandr Pivtoran, chiropractor. This OCF-3 included as part of the injury and sequelae information portion behaviours – acute stress reaction and behaviour – symptoms and signs involving emotional state. These psychological conditions, however, are beyond the scope of Dr. Pivtoran's practice to comment on, or to provide a diagnosis of, as a chiropractor.

[52] R.A. also stated in her submissions that one of her family doctors, Dr. Sushila Treasurer, made note of R.A.'s anxiety and diagnosed her with post-traumatic stress. R.A., however, failed to direct me to any specific CNR entry by Dr. Treasurer to support this position. Dr. Treasurer did note that on August 24, 2017, the day after the accident, that R.A. "feels anxiety" and on August 28, 2017 there is the note of "PTS." There are no other entries contained in Dr. Treasurer's CNRs that speak to any anxiety or other psychological complaints in or about the time that the psychological treatment was proposed. There is also no evidence that R.A. ever received any referrals from Dr. Treasurer for any psychological treatment or was prescribed any medication for any psychological conditions.

[53] On March 5, 2018, Aviva denied the February 26, 2018 OCF-18 by relying upon the December 22, 2017 Insurer's Examination Psychology Assessment report by Dr. Janet Clewes, psychologist, in which Dr. Clewes opined that from a

[19] *Ibid.* at page 1.
[20] *Ibid*. at pages 9, 11, 12 and 14.

psychological perspective, R.A. did not suffer from any accident related DSM-IV diagnostic condition and that R.A. had no psychological symptoms that would warrant clinical intervention. While R.A. criticized Dr. Clewes' report, the onus remains on R.A. to prove on a balance of probabilities that the proposed treatment is reasonable and necessary and not on Aviva to disprove entitlement.

[54] For all of the reasons set out above, I find that R.A. has failed to prove on a balance of probabilities that the February 26, 2018 OCF-18 for psychological treatment, progress report and psychoeducational material is reasonable and necessary. As a result, R.A. is not entitled to this treatment plan.

Driving Re-Integration Assessment

[55] An OCF-18 dated May 24, 2018 was submitted to Aviva and sought funding for a driving re-integration assessment in the amount of $1,981.70.

[56] I find that R.A. has failed to prove on a balance of probabilities that this OCF-18 for a driving re-integration assessment is reasonable and necessary as the sole evidence submitted to support this assessment was the January 3, 2018 Psychological Report which I have afforded little weight to as discussed in paragraphs [45] to [49] above. There is no other evidence before me, and I was not directed to any other reports or CNRs by R.A. in her submissions, that support the reasonableness and necessity of a driving re-integration assessment. As a result, R.A. is not entitled to this OCF-18.

Exercise Program, Physical Therapy, Massage Therapy and Laser Therapy

[57] The December 6, 2018 OCF-18 was completed by Dr. Pivtoran and sought funding for 6 sessions of a functional exercise program, 4 sessions of passive physical therapy, 4 sessions of massage therapy, 6 sessions of laser therapy and completion of the OCF-18 in the total amount of $1,300.80.

[58] R.A. submits that Aviva did not provide a proper denial to this OCF-18 as required by the *Schedule*. The relevant portions of Aviva's denial, dated December 13, 2018, is reproduced as follows:

> We're unable to determine whether the recommendations on your OCF 18 are reasonable and necessary for the injuries you sustained and we're not able to pay your benefits at this time.

[59] Aviva also provided notice of an IE for a physiatry assessment at that time and provided the following medical reasons, "the frequency of care does not generally diminish over time." No other reasons for the IE were provided.

[60] Based on the principals set out in *T.F. v. Peel Mutual* as discussed above in paragraph [34], I find that Aviva's December 13, 2018 did not adhere to the requirements of s. 38(8) of the *Schedule* as it did not include any specific details about R.A.'s condition forming the basis of Aviva's decision and only referred to R.A.'s injuries without any details or explanation. Further, the reasons provided for the IE also do not assist in discharging Aviva's onus under s. 38(8) because I agree with R.A. that the statement, "the frequency of care does not generally diminish over time" is nonsensical and unclear.

[61] As a result, the consequences of s. 38(11) of the *Schedule* are triggered and Aviva is required to pay for all goods, services, assessments and examinations described in the December 6, 2018 treatment plan starting on the 11th business day after receiving the OCF-18 and ending when Aviva gives notice that complies with the requirements of the *Schedule*.

[62] On February 5, 2019, Aviva sent an explanation of benefits to R.A. regarding the December 6, 2018 treatment plan. The relevant portions of this correspondence include:

> Please review the enclosed insurer's examination completed by CanAssess under section 44 of the Statutory Accident Benefits Schedule. The examination was completed by Dr. Yuri Marchuk and dated February 4, 2019. The assessor reviewed the above noted treatment plan and has determined the treatment recommended is not reasonable and necessary from the injuries sustained in the motor vehicle accident. Therefore, Aviva will not fund any treatment incurred relating to this treatment plan.
>
> The assessor, on Page 19 stated the following, *"From a Physical Medicine perspective, the proposed OCF-18 Treatment and Assessment Plan is not considered reasonable or necessary as related to the impairments sustained in the motor vehicle accident. Given the length of time since the index accident and the minimal noted improvement noted by the claimant despite having received similar treatment in the past with no noted benefit, it is unlikely further facility-based treatment will assist with healing. The claimant's condition has plateaued."*[21]

[63] I also find Aviva's February 5, 2019 correspondence is not clear and again fails to adhere to the requirements of s. 38(8) of the *Schedule*. This correspondence

[21] Written Submissions on Behalf of the Respondent, tab 17.

contains no specific details about R.A.'s condition forming the basis of Aviva's decision and does not, even at a minimum, set out what R.A.'s injuries are.

[64] No other correspondence from Aviva was submitted as evidence for this hearing regarding the December 6, 2018 treatment plan. As a result of my findings of Aviva's non-compliance with s. 38(8) of the *Schedule* regarding its December 13, 2018 and February 5, 2019 correspondence, I find that the December 6, 2018 treatment plan is payable as Aviva no longer has the opportunity to issue a proper denial notice as a decision has been rendered regarding this benefit.

Exercise Program, Physical Therapy and Massage Therapy

[65] Approximately one month after the December 6, 2018 treatment plan was submitted, an OCF-18 dated January 10, 2019 was submitted to Aviva that was again completed by Dr. Pivtoran. This OCF-18 sought funding for 8 sessions of a functional exercise program, 6 sessions of passive physical therapy modality, 6 sessions of massage therapy and completion of the OCF-18. The goals of this treatment plan were the exact same as the December 6, 2018 treatment plan of pain reduction, increase in strength, increased range of motion, restore core stability and full spine flexibility, return to activities of normal living and return to pre-accident work activities.

[66] I find that R.A. has failed to prove on a balance of probabilities that the January 10, 2019 OCF-18 was reasonable and necessary for the following reasons:

(a) This OCF-18 was submitted approximately one month after the December 6, 2018 treatment plan which had an estimated duration of 8 weeks and, therefore, is a duplication of services but for the laser therapy which was not included in this OCF-18;

(b) The only submission made by R.A. regarding this treatment plan was that this OCF-18, along with others in dispute, is reasonable and necessary based on the goals of providing pain relief and functional restoration;[22]

(c) R.A. received various forms of therapy at Downsview that included laser therapy, massage therapy and physical therapy/passive modalities from September 12, 2017 to March 7, 2019 with a gap in treatment between July 2018 and November 2018. The CNRs from Downsview provide no comments on whether or not R.A. was reporting improvement in her pain

[22] Submissions of the Applicant, page 8.

symptoms and, instead, only noted R.A.'s pain locations. Further, under the section on the pre-printed CNRs entry forms entitled "Objective," there is no information from any of R.A.'s visits that reported any increase or decrease of R.A.'s range of motion even though there is clearly a portion preprinted for such information. As a result, it is unclear from these CNRs if further treatment that was substantially the same as R.A. had been receiving from September 2017 would assist in achieving the stated goals of the OCF-18 of decreasing pain and increased pain-free range of motion;

(d) R.A. also submitted as evidence the CNRs of one of her family doctors, Dr. Treasurer. The CNRs, however, reflect that R.A.'s last accident-related visit to Dr. Treasurer was in February 2018, some 10 months prior to the submissions of this treatment plan; and

(e) R.A. began seeing Dr. Trinchuk in January 2019 as Dr. Treasurer retired. R.A. reported the accident to Dr. Trinchuk on January 29, 2019 as well as her attendance at physiotherapy once per week and at massage and laser therapy. Dr. Trinchuk, however, did not make any recommendations for further similar treatment at this visit. Instead, Dr. Trinchuk diagnosed R.A. with back and left hip pain and advised R.A. to rest and referred R.A. for x-rays. There is no other mention of the accident or any recommendations for therapy in the remainder of Dr. Trinchuk's CNRs.

[67] For all of these reasons, R.A. is not entitled to the January 10, 2019 OCF-18.

Chronic Pain Assessments

[68] There are two treatment plans in dispute, both completed by Dr. Pivtoran, that seek funding for a chronic pain assessment in the amount of $2,000.00 each.

[69] The first was an OCF-18 dated January 16, 2018. The goals of this OCF-18 was for R.A. to return to activities of normal living and to evaluate the extent of R.A.'s chronic injuries and psychological complaints and to provide a prognosis and recommendations for recovery. This OCF-18 noted that R.A. reported difficulty with activities involving bending, lifting, carrying, stooping and overhead activities and that prolonged sitting, standing and walking were reported as provocative. The injury and sequelae information portion listed the following conditions: thorax – fracture of Rib(s), Sternum and Thoracic Spine; chronic cervical joint dysfunction with myofascial symptoms; head – concussion; head – post concussion syndrome (left); thorax – costovertebral joint dysfunction (left);

behavioural – symptoms and signs involving emotional state; pain – multiple sites; and pain – chronic pain. In the additional comments portion, the OCF-18 stated that it has been over 4 months since R.A. was involved in the accident and that clinical guidelines report that the injuries sustained by R.A. should have resolved but that it was clear that maximum medical improvement had not yet been achieved.

[70] The second treatment plan dated December 13, 2018 is the exact same as the January 16, 2018 OCF-18 and, despite a second denial from Aviva, R.A. underwent a chronic pain assessment by Dr. Grigory Karmy, general practitioner on January 11, 2019.

[71] One of the purposes of a chronic pain assessment, in my opinion, is to diagnose chronic pain syndrome. Therefore, in determining the reasonableness and necessity of a treatment plan proposing a chronic pain assessment, I must consider whether or not it is reasonably *possible* that R.A. may have chronic pain syndrome.[23]

[72] R.A. made no submissions on the issue of whether or not she may have chronic pain at the time that the treatment plans were submitted. Instead, R.A. relied upon Dr. Karmy's January 16, 2019 Chronic Pain Assessment Report[24] which diagnosed R.A. with, among other conditions, chronic pain syndrome.

[73] On the other hand, Aviva argued that whether or not it was possible that R.A. had chronic pain should be assessed against the six criteria described in the *American Medical Association ("AMA") Guides*,[25] which require at least three of the following criteria to be met for a diagnosis of chronic pain:

(i) Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances;

(ii) Excessive dependence on health care providers, spouse, or family;

(iii) Secondary physical deconditioning due to disuse and or fear-avoidance of physical activity due to pain;

(iv) Withdrawal from social milieu, including work, recreation, or other social contacts;

[23] See *16-001934 v Aviva Insurance Canada*, 2017 CanLII 19197 (ON LAT) ("*16-001934*").
[24] Applicant's Book of Exhibits, tab 19.
[25] American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 6th Edition, 2008, pages 23-24.

(v) Failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family or recreational needs; and

(vi) Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviors.

[74] Aviva argued that while R.A. was not working at the time the first treatment plan was submitted, R.A. had returned to work by the date that the second treatment plan was submitted. Aviva maintained that there was no evidence to support the other five criteria when R.A. submitted the first and the second OCF-18 and, as a result, it was not likely that R.A. had chronic pain which rendered both of the proposed chronic pain assessments not reasonable and necessary.

[75] I find that assessing R.A.'s entitlement to a chronic pain assessment against the six criteria set out in the *AMA Guides* is a far too stringent test to determine entitlement to a chronic pain assessment. The *AMA Guides* are clear that three of the six criteria are required for a *diagnosis* of chronic pain, which is not required to be proven to be entitled to a chronic pain assessment.

[76] Aviva also relied upon a Physiatry IE Paper Review Assessment dated February 12, 2019 by Dr. Yuri Marchuk, physiatrist,[26] in denying the second OCF-18 for the chronic pain assessment. In his report, Dr. Marchuk opines that the second OCF-18 is not reasonable and necessary from a physical medicine perspective as, "the claimant does not meet all of the criteria to be considered to suffer from chronic pain syndrome"[27] without any discussion or identification of which criteria he is referring to. Moreover, if Dr. Marchuk was referring to the *AMA Guides* criteria, R.A. would not need to meet *all* of the criteria listed for a diagnosis of chronic pain but would rather only need to meet three criteria. Finally, Dr. Marchuk recommends in this report cortisone injections to R.A.'s left trochanter bursa, left hip, left sacroiliac joint and iliotibial band area and a lumbar support brace to be worn during physical activity to help with R.A.'s symptom management.

[77] Dr. Marchuk's recommendations in his February 12, 2019 paper review report appear to stem from his recommendations in his February 4, 2019 Physiatry IE Assessment Report.[28] Dr. Marchuk noted in this report that R.A.'s current complaints were low back pain, left hip pain, left leg pain (all of which R.A. rated on the date of the assessment as 6/10 in severity) and other psychological

[26] Written Submissions on Behalf of the Respondent, tab 23.
[27] *Ibid*. at page 7.
[28] Written Submissions on Behalf of the Respondent, tab 14.

complaints.[29] Dr. Marchuk noted that while R.A. had returned to work as of February 2018, working aggravated her back and hip pain. R.A. also reported to Dr. Marchuk that she had not been able to participate in her pre-accident social activities and that she continued to experience pain with the completion of some personal care tasks and required assistance with other heavier tasks. Upon Dr. Marchuk's physical examination, he noted that R.A. had tenderness to palpation over her cervical musculatures, her lumbar musculatures, her paravertebral musculatures, her left trochanter bursa, her iliotibial band, her sacroiliac joint musculatures and her bilateral shoulder blade musculatures. Dr. Marchuk also reported that R.A.'s cervical spine active range of motion was reduced by 5% and R.A.'s lumbar spine active range of motion was reduced by 20%. Based on his assessment, Dr. Marchuk diagnosed R.A. with the following conditions as a result of the accident: lumbar musculoligamentous dysfunction; left iliotibial band dysfunction; and left trochanter bursitis. Dr. Marchuk also recommended in this earlier report, despite his opinion that R.A.'s condition had plateaued, cortisone injections to R.A.'s left trochanter bursa, left hip, left sacroiliac joint and iliotibial band area and a lumbar support brace to help with R.A.'s symptom management.

[78] Even without considering Dr. Karmy's January 16, 2019 Chronic Pain Assessment Report, I find that Dr. Marchuk's report demonstrates that R.A.'s pain complaints, specifically in her low back, left hip and left leg, persisted well beyond the three to six-month period after the accident and that these pain complaints were accompanied by R.A.'s self-reports of functional limitations. R.A.'s pain complaints to Dr. Marchuk were also consistent with her reports to her family doctor in or about the same time as Dr. Marchuk's assessment. For example, R.A. reported back and hip pain to Dr. Trinchuk on January 29, 2019 for which R.A. was referred for x-rays. Moreover, Dr. Marchuk's recommendations for symptom management further supports the reasonableness and necessity for R.A. to have a chronic pain assessment to achieve the stated goals of the OCF-18s of providing a prognosis and recommendations for recovery.

[79] As the Tribunal has accepted that chronic pain is a condition that persists for three to six months after an initial trigger or injury,[30] I find that it is reasonably possible that R.A. suffered from chronic pain or chronic pain syndrome at least at the time that she submitted the second OCF-18 for a chronic pain

[29] *Ibid*. at pages 13-14.
[30] See the reconsideration decision of *17-000835 v. Aviva General Insurance Canada*, 2018 CanLII 83520 (ON LAT) at para. 19 which, while not binding upon me, has been followed on numerous occasions by the Tribunal.

assessment to Aviva. Therefore, I find that R.A has proven on a balance of probabilities that the second treatment plan for the chronic pain assessment dated December 13, 2018 is both reasonable and necessary.

[80] I find that R.A. is not entitled to the first OCF-18 for a chronic pain assessment dated January 16, 2018 as it would be a duplication of services.

Multidisciplinary Chronic Pain Treatment Program

[81] Dr. Pivtoran completed the disputed treatment plan dated February 14, 2019 that sought funding for a multidisciplinary chronic pain treatment program in the total amount of $12,293.41, comprised of the following:

(i) review of file materials (psychological) by Dr. Shaul ($141.55);

(ii) consultation with treatment providers (psychological) by Dr. Shaul ($141.55);

(iii) 12 sessions of psychological treatment by Dr. Shaul ($2,547.98);

(iv) 20 sessions of chiropractic rehabilitation ($2,256.20);

(v) 20 sessions of a functional exercise program ($1,100.00);

(vi) 10 sessions of spinal decompression therapy ($1,500.00);

(vii) 20 sessions of laser therapy ($800.00);

(viii) 15 sessions of massage therapy ($675.00);

(ix) medical follow-up assessment by Dr. Karmy ($350.00);

(x) chronic pain progress report by Dr. Karmy ($250.00);

(xi) 6 sessions of shockwave therapy – MSK/Back location #1 ($900.00);

(xii) OCF-18 completion ($200.00);

(xiii) 15 sessions of mobilization (RMT) ($180.00);

(xiv) 4 educational sessions ($240.00); and

(xv) 6 sessions of shockwave therapy – MSK/Back location #2 ($900.00).

[82] The goals of the treatment plan are pain reduction, increased range of motion, increased strength, improve participation in all activities of daily living and return to activities of normal living.

[83] The proposed goods and services contained in the February 14, 2019 OCF-18 are based on recommendations made in Dr. Karmy's January 16, 2019 Chronic Pain Assessment report. In his report, Dr. Karmy states that chronic pain, "has been recognized as pain that persists beyond the normal healing time after a tissue injury and it adversely affects the function and well-being of an individual."[31] Further, chronic pain, "*substantially interferes* with *all daily activities* of the individual (my emphasis added)."[32] Following an assessment of R.A. that relied heavily upon her self-reporting, Dr. Karmy diagnosed R.A. with the following conditions:

(i) status post fracture of the 4th and 7th left ribs, caused by the subject accident;

(ii) chronic mechanical lower back pain, radiating to the left lower limb, likely originating from the lumbar discs and facet joints, caused by the subject accident;

(iii) chronic mechanical left hip pain, likely of myofascial origin, caused by the subject accident;

(iv) myofascial pain syndrome, caused by the subject accident;

(v) chronic pain syndrome, caused by the subject accident;

(vi) sleep disorder, related to the subject accident; and

(vii) adjuster disorder with mixed anxiety and depressed mood and specific phobia (travelling in and around a vehicle) [Driving and Passenger anxiety] (as per Psychological Report) and post-traumatic symptoms caused by the subject accident.[33]

[84] As a result of his diagnoses, Dr. Karmy made several recommendations for treatment, despite what he describes as the "permanent character" of R.A.'s impairments, including physiotherapy, laser therapy, an active exercise program, acupuncture, massage therapy, chiropractic adjustments and spinal

[31] *Supra* note 24 at page 2.
[32] *Ibid*.
[33] *Ibid*. at page 8.

decompression therapy. Dr. Karmy also opined that R.A.'s psychological condition required psychological treatment for the management of both of her chronic pain and her mental impairments. Dr. Karmy noted that the goal of his recommendations is to improve R.A.'s quality of life by reducing her chronic pain and optimizing her overall functioning.[34]

[85] Even I were to accept Dr. Karmy's diagnoses and recommendations, I find that R.A. is not entitled to any of the proposed treatment modalities that are set out on the February 14, 2019 treatment plan as she has failed to prove on a balance of probabilities that they are each reasonable and necessary.

[86] I find that R.A. has failed to prove on a balance of probabilities that the amounts sought for a file review, consultation with treatment providers and 12 sessions of psychological treatment by Dr. Shaul are reasonable and necessary. In making these recommendations for treatment, Dr. Karmy solely relied upon the January 3, 2018 Psychological Report and did not complete any of his own analysis or psychological testing. As I have given no weight to the January 3, 2018 Psychological Report as discussed above in paragraphs [45] to [49], I find that R.A. is not entitled to this portion of the treatment plan.

[87] I also find Dr. Karmy's recommendations for physiotherapy, laser therapy, an active exercise program, acupuncture, massage therapy and chiropractic adjustments to be inexplicable and contrary to other comments made in his report. For example, Dr. Karmy noted that R.A. has been receiving passive physical therapy, massage therapy, laser therapy, acupuncture and chiropractic treatment and participated in an exercise program but then states, "however the benefits from those modalities have been short-lasting. Overall, the claimant has not achieved long-term improvements in her symptoms and functionality."[35] Dr. Karmy fails to explain why he recommended further treatment of the same modalities that R.A. has been undergoing since September 2017 to treat R.A.'s conditions and how these treatments would assist in meeting the goals of the treatment plan of reducing R.A.'s pain, increasing her strength and range of motion, improving R.A's participation in activities of daily living and returning her to activities of normal living. Therefore, I find that R.A. has failed to prove the reasonableness and necessity of the portion of this treatment plan which sought funding for chiropractic rehabilitation, a functional exercise program, laser therapy and massage therapy and, as a result, she is not entitled to these portions of the OCF-18.

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[34] *Ibid*. at page 9.
[35] *Ibid*. at page 5.

[88] From the evidence before me, it appears as though R.A. has not received any spinal decompression therapy prior to the submissions of this treatment plan. While it may be reasonable for R.A. to explore different treatment modalities than those she has undergone since September 2017, there is no discussion or rational provided in Dr. Karmy's report for spinal decompression therapy aside from that it "should be provided."[36] Consequently, it is unclear how spinal decompression therapy would achieve the stated goals of this treatment plan or how it differs from the other forms of physical therapies that R.A. has previously received.

[89] I also find that R.A. has failed to prove on a balance of probabilities that the 15 sessions of mobilization (RMT) are reasonable and necessary as there is no explanation as to how this treatment differs from massage therapy as both this treatment and the proposed massage therapy were to be provided by registered massage therapists. As such, R.A. is not entitled to this portion of the treatment plan.

[90] I also find that Dr. Karmy did not recommend shockwave therapy in his report and there is no discussion of what shockwave therapy entails in this OCF-18. R.A. submitted a print out from a website (www.shockwavetherapy.eu) which was not endorsed, or referred to, by any of the medical experts or R.A.'s treatment providers. The inclusion of this website printout, in my opinion, is an acknowledgement by R.A. that there was no explanation whatsoever provided for the shockwave treatment in this treatment plan or in Dr. Karmy's report. There is also no explanation in the OCF-18 of what location #1 and location #2 were. For all of these reasons, I find that R.A. is not entitled to the portions of the treatment plan for shockwave therapy.

[91] Similarly, there is no explanation or information provided for the amount sought for education sessions. As a result, I find that R.A. is not entitled to this amount as she has failed to prove on a balance of probabilities the reasonableness and necessity of this portion of the OCF-18.

[92] As I have found that R.A. is not entitled to any of the treatment modalities set out on the February 14, 2019 OCF-18, it follows that R.A. is also not entitled to the proposed medical follow-up assessment and chronic pain progress report as they are not necessary based on my finding that none of the proposed treatment on the OCF-18 is reasonable and necessary. Further, R.A. is not entitled to the

[36] *Ibid*. at page 8.

$200.00 for completion of the OCF-18 as I have not found her entitled to any amounts proposed on this treatment plan.

Shockwave Therapy

[93] An OCF-18 dated February 28, 2019 was completed by Dr. Pivtoran that sought funding in the total amount of $1,800.00 for 12 sessions of shockwave therapy for R.A.'s neck and back. The goals of this treatment plan were pain reduction, increased range of motion, a return to activities of normal living, restore mobility and to improve R.A.'s quality of life.

[94] Unlike the February 14, 2019 OCF-18 for the multidisciplinary chronic pain treatment program which provided no details for seeking funding for shockwave therapy, this OCF-18 did provide information about this treatment. For example, in the additional comments portion, the OCF-18 stated that R.A. would benefit from a course of shockwave therapy to reduce pain and improve function by repairing and regenerating damaged tissue to improve the healing process. The OCF-18 explains that shockwave therapy is a highly effective and non-invasive therapy that uses state-of-the-art engineering that applies strong pulses to affected areas. These pulses create micro-cavitation bubbles that expand and burst, and the force of these burst stimulates cells in the body that are responsible for bone and connective tissue healing. In many ways, the OCF-18 explains, shockwave therapy is most effective in cases where the human body has not been able to heal itself on its own and this therapy that is widely accepted and used as a surgical alternative for treatment of soft tissue conditions. Shockwave therapy, according to the OCF-18, reduces pain and increases range of motion.

[95] On March 1, 2019, Aviva denied this OCF-18 in the same correspondence in which it denied the OCF-18 for the multidisciplinary chronic pain treatment program. Aviva informed R.A. that its denial was based on Dr. Marchuk's February 12, 2019 report which maintained that R.A. did not meet all of the criteria to be considered to suffer from chronic pain syndrome. Aviva also relied upon Dr. Marchuk's report and stated that further facility treatment would be unlikely to assist with healing given that R.A.'s condition had plateaued and, that from a physical medicine perspective, R.A. had achieved maximum medical improvement. Aviva's letter then reiterated the recommendations Dr. Marchuk had made for treatment previously outlined in paragraph [76] above.

[96] Aviva also referred to a November 8, 2019 Physiatry IE Assessment report authored by Dr. Marchuk which again addressed the reasonableness and necessity of the OCF-18 for shockwave therapy along with several other OCF-

18s. Aviva maintained that Dr. Marchuk's opinion that R.A. had achieved maximum medical recovery remained unchanged in this report. Dr. Marchuk's November 2019 opinion was reported to R.A. by correspondence dated November 15, 2019 in which Aviva maintained its denial of this OCF-18.

[97] I find that R.A. has proven the reasonableness and necessity of this treatment plan on a balance of probabilities. I accepted above that Dr. Marchuk's February 4, 2019 and February 12, 2019 reports reflected ongoing pain complaints by R.A. in her low back, left hip and left leg in or about the same time that this treatment plan was submitted to Aviva for consideration. Further, Dr. Marchuk's recommendation for further goods and services for R.A.'s symptom management leads me to conclude that it is reasonable for R.A. to explore other modalities aside from those that R.A. had been receiving since September 2017 from Downsview for her pain. Dr. Marchuk did not dispute the comments contained in the OCF-18 which state that shockwave therapy was effective in cases where the human body has not been able to heal itself on its own and this therapy was used as a surgical alternative for treatment of soft tissue conditions. In fact, Dr. Marchuk's opinion that R.A.'s condition had plateaued and that she had reached maximum medical recovery would lead me to conclude that shockwave therapy was a very appropriate therapy for R.A. as her body clearly had not healed itself. For all of these reasons, I find that R.A. is entitled to the February 28, 2019 OCF-18 for shockwave therapy.

Psychological Pre-Screen Interview

[98] I find that R.A. is not entitled to the $190.00 sought for the psychological pre-screen interview.

[99] The only documentation before me regarding the psychological pre-screen interview, or its cost, is found in the outstanding account summary from Downsview. Under the heading of "goods/services (treatment plan not required)" on this document is an entry dated October 26, 2017 which appears to show that Downsview submitted an invoice to Aviva for $200.00 and that $10.00 was paid. No invoice was filed as evidence or the partial denial letter from Aviva.

[100] R.A. made no submissions about entitlement to payment for the psychological pre-screen interview. The only reference to the pre-screen interview by R.A. was that it was included on the October 26, 2017 OCF-18 that sought funding for a psychological assessment. R.A. highlighted certain excerpts from the pre-screen interview in support of her claim for the psychological assessment but, ultimately, I found that R.A. was entitled to the psychological assessment as a

result of Aviva's non-compliance with s. 38(8) of the *Schedule* and not based upon any portion of the psychological pre-screen interview.

[101] I also find that invoicing $200.00 for a psychological pre-screen interview, which is included on an OCF-18 and not in a separate report, over and above the $200.00 charged for completion of an OCF-18 violates the maximum amount payable for completion of an OCF-18 of $200.00 as set out in the Financial Services Commission of Ontario ("FSCO") Professional Services Guideline.[37] In my opinion, the $190.00 sought by R.A. is an attempt to garner two payments for the completion of one OCF-18 as no reasons were provided as to why the psychological pre-screen interview report could not be completed within the $200.00 maximum amount payable for completion of the OCF-18. I find the additional $200.00 fee charged for the completion of the psychological pre-screen report is a strategic decision driven by the treating clinic and not by any provision of the *Schedule* or any jurisprudence. For all of these reasons, R.A. is not entitled to any amounts for the psychological pre-screen interview.

Completion of Disability Certificates

[102] Payment for the completion of two OCF-3s denied by Aviva on January 10, 2018 and June 24, 2018 in the amount of $200.00 each are also in dispute. R.A. made no submissions regarding payment for the completion of the OCF-3s.

[103] On December 11, 2017, Aviva wrote to R.A. advising that it received two fax cover pages from Downsview indicating that an OCF-3 was attached but that the faxes were incomplete and no OCF-3 was attached to either correspondence. Aviva clearly stated in its December 11, 2017 letter, "please also note we will only issue payment for the completion of one OCF-3."[38]

[104] On July 25, 2019, R.A. provided Aviva with four OCF-3s dated September 7, 2017, December 4, 2017, March 8, 2018 and June 14, 2018 all of which were completed by Dr. Pivtoran.

[105] I find that R.A. has failed to prove on a balance of probabilities the reasonableness and necessity for the payment for the completion of the two OCF-3s. First, R.A. only submitted one OCF-3 dated September 7, 2017 as evidence for the hearing which leads me to conclude that the remaining three OCF-3s were not necessary. Second, R.A. advanced no evidence that Aviva requested a completed OCF-3 and, therefore, Aviva is not liable to pay for the

[37] Superintendent's Guideline No. 03/14, September 2014.
[38] Written Submissions on Behalf of the Respondent, tab 28.

completion of the two disputed OCF-3s pursuant to s. 21(3) of the *Schedule*. Third, R.A. failed to advance any evidence that the two disputed OCF-3s were required under s. 36 or s. 37 of the *Schedule* as part of R.A.'s application for a specified benefit. For all of these reasons, Aviva is not liable to pay for the completion of two OCF-3s that were denied on January 10, 2018 and June 24, 2018 pursuant to s. 25(1)1 of the *Schedule*.

Award

[106] Section 10 of O. Reg. 664 provides that, if the Tribunal finds that an insurer has unreasonably withheld or delayed payment of benefits, the Tribunal may award a lump sum of up to 50 per cent of the amount in which the person was entitled.

[107] It is well settled that an award should not be ordered simply because an adjudicator determined that an insurer made an incorrect decision. Rather, in order to attract a s. 10 award, the insurer's conduct must be excessive, imprudent, stubborn, inflexible, unyielding or immoderate.

[108] R.A. specifically addressed Aviva's actions in terms of an award regarding only one of the four treatment plans that I have found R.A. to be entitled to. R.A. argued that because Dr. Marchuk recommended further treatment in response to the second OCF-18 submitted for a chronic pain assessment that this was evidence that Aviva withheld access to a reasonable assessment that may have facilitated R.A.'s recovery. I disagree. There is no evidence before me of any pattern of bad faith decision making or that Aviva ignored an opinion of an assessor. In contrast, Aviva followed Dr. Marchuk's opinion in denying the December 13, 2018 OCF-18 for a chronic pain assessment.

[109] R.A. made other generalized and sweeping submissions in support of her claim for an award. I find, however, that there is simply no evidence before me of any actions of Aviva's that rise to the level of excessive, imprudent, stubborn, inflexible, unyielding or immoderate. Therefore, I find that R.A. is not entitled to an award under O. Reg. 664.

Interest

[110] R.A. is entitled to interest in accordance with s. 51 of the *Schedule* on the following amounts: the OCF-18 for the psychological assessment ($2,000.00); the December 6, 2018 OCF-18 for an exercise program, physical therapy, massage therapy and laser therapy ($1,300.80); the second OCF-18 for a chronic pain assessment dated December 13, 2018 (2,000.00); and the February 28, 2019 OCF-18 for shockwave therapy ($1,800.00).

CONCLUSION

[111] For the reasons outlined above, I find that R.A. is:

(i) not entitled to ACBs from October 23, 2017 to March 8, 2018;

(ii) entitled to the following OCF-18s plus interest in accordance with s. 51 of the *Schedule*:

(a) $2,000.00 for a psychological assessment;

(b) $1,300.80 for an exercise program, physical therapy, massage therapy and laser therapy;

(c) $2,000.00 for the second proposed chronic pain assessment dated December 13, 2018; and

(d) $1,800.00 for shockwave therapy;

(iii) not entitled to the following OCF-18s:

(a) $3,335.98 for psychological treatment;

(b) $1,981.70 for a driving re-integration assessment;

(c) $1,271.20 for an exercise program, physical therapy and massage therapy;

(d) $2,000.00 for the first proposed chronic pain assessment dated January 16, 2018; and

(e) $12,293.41 for a multidisciplinary chronic pain treatment program;

(iv) not entitled to $190.00 for a psychological pre-screen interview report;

(v) not entitled to $200.00 each for the completion of two OCF-3s; and

(vi) not entitled to an award.

Released: July 24, 2020

Lindsay Lake
Adjudicator