

**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**

Citation: M.G. v. Aviva General Insurance Company, 2020 ONLAT 19-003062/AABS

**Released Date: 11/10/2020
File Number: 19-003062/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:

M. G.

Applicant

and

Aviva General Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: Avril A. Farlam

APPEARANCES:

For the Applicant: David Carranza, Paralegal

For the Respondent: M. Jennifer Cosentino, Counsel

HEARD By Way of Written Submissions

REASONS FOR DECISION AND ORDER

OVERVIEW

- [1] M.G. (the “applicant”) was involved in a motor vehicle accident on February 10, 2017 (the “accident”). The applicant was 69 years of age at the time of the accident. The applicant sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “Schedule”).¹
- [2] The applicant was denied certain benefits by Aviva General Insurance Company (the “respondent”) and submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service (the “Tribunal”).

ISSUES

- [3] The issues to be decided in this hearing are²:
- i. Is the applicant entitled to payments for housekeeping and home maintenance services in the amount of \$100.00 per week for the period March 16, 2018 to February 5, 2019 in the total amount of \$904.00 for the entire period?
 - ii. Is the applicant entitled to payments for the cost of examinations in the amount of \$2,578.65 for a chronic pain assessment, recommended by Excel Medical Diagnostics in a treatment plan submitted December 17, 2018, and denied by the respondent on January 2, 2019?
 - iii. Is the applicant entitled to receive a payment in the amount of \$200.00 for a disability certificate, submitted March 7, 2017?
 - iv. Is the applicant entitled to receive a payment in the amount of \$200.00 for a disability certificate, submitted August 24, 2017?
 - v. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [4] The applicant is not entitled to \$904.00 for housekeeping and home maintenance services for the period in dispute. The applicant is not entitled to \$2,578.65 for

¹ O. Reg. 34/10.

² The Tribunal’s Direction made July 31, 2019 set out the issues for the hearing which were amended by the Tribunal’s Order made February 28, 2020.

the cost of a chronic pain assessment. The applicant is not entitled to \$200.00 each for the two disability certificates. The applicant's claim is dismissed.

LAW

- [5] Section 23 of the *Schedule* provides that an insurer shall pay up to \$100.00 per week for reasonable and necessary additional expenses incurred by or on behalf of an insured person as a result of an accident for housekeeping and home maintenance services if, as a result of the accident, the insured person sustains a catastrophic impairment that results in a substantial inability to perform the housekeeping and home maintenance services that he or she normally performed before the accident.
- [6] Section 3(7)(e) of the *Schedule* defines "incurred" as the insured has received the goods or services to which the expense relates, has paid, promised to pay or is otherwise legally obligated to pay the expense, and the person who provided the goods or services did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged but for the accident, or sustained an economic loss as a result of providing the goods or services to the insured person.
- [7] Sections 14, 15 and 16 of the *Schedule* provide that an insurer is only liable to pay for medical and rehabilitation expenses that are reasonable and necessary as a result of an accident. The applicant bears the onus of proving on a balance of probabilities that any proposed treatment plan he or she seeks is reasonable and necessary.³

ANALYSIS

Is the Applicant Entitled to Housekeeping and Home Maintenance Service? Totalling \$904.00 for the Period of March 16, 2018 to February 5, 2019?

- [8] The test under s. 23 of the *Schedule* requires a consideration of a) the housekeeping and home maintenance services that the applicant normally performed before the accident, and b) whether the applicant suffers a substantial inability to perform those services as a result of an impairment suffered in the motor vehicle accident, and c) if a substantial inability is found, whether the expenses incurred as a result of that substantial inability are reasonable and necessary.

³ *Scarlett v. Belair*, 2015 ONSC 3635 (Div. Ct).

- [9] The applicant seeks reimbursement for expenses incurred between March 16, 2018 to February 5, 2019 in the total amount of \$904.00 under optional benefits coverage purchased which included housekeeping benefits. Based on the totality of the evidence, I find that the applicant is not entitled to \$904.00 for house keeping and home maintenance services for the period in dispute for the following reasons.
- [10] The respondent paid for housekeeping expenses for February 11, 2017 to April 12, 2017. There is no evidence that expense forms were submitted by the applicant for April 13, 2017 to March 16, 2018. In this hearing the applicant claims housekeeping expenses of \$904.00 for March 16, 2018 to February 5, 2019, a period some 13 to 24 months post-accident.
- [11] The applicant submits that she has required housekeeping services post-accident because of her neck, upper back, lower back and psychological injuries sustained in the accident. The applicant relies on various records including the August 2017 report of Dr. Mrahar, the applicant's psychologist, the records of her family physician Dr. Vadasz and the December 2019 chronic pain assessment report of Dr. Brown, the applicant's anesthesiologist.
- [12] Dr. Mrahar's August 2017 report includes self-reporting by the applicant not made to other assessors, including the report of a subsequent minor motor vehicle accident on June 27, 2017 which she says exacerbated her emotional difficulties. With respect to housekeeping chores, the applicant told Dr. Mrahar that until the end of May 2017 she had a housekeeper who did all housekeeping chores but since then she continues to struggle with all housekeeping chores due to pain and physical restrictions. However, she takes breaks and paces herself when engaging in the above-mentioned tasks and engages in all chores less often. Dr. Mrahar's report does not establish a substantial inability to perform pre-accident housekeeping tasks but tends to indicate the opposite – that the applicant is able to substantially perform pre-accident housekeeping tasks, albeit with more difficulty than pre-accident.
- [13] Dr. Vadasz's disability certificates and notes are insufficient to establish the applicant's position. The August 3, 2017 disability certificate by Dr. Vadasz indicates that the applicant has a substantial inability to perform the housekeeping and home maintenance services that she normally performed before the accident for an anticipated duration of more than 9-12 weeks, but he gives no detail as to those tasks. The records of Dr. Vadasz from February 22, 2018 to March 12, 2019, approximately the period of time in question, do not contain any record of the applicant's inability to perform pre-accident

housekeeping and home maintenance services except the note of September 27, 2018 which records “difficulty completing all heavier chores of homemaking” without noting whether the applicant was doing these chores pre-accident or what chores they might be.

- [14] Dr. Brown’s December 2019 report is also insufficient to establish the applicant’s position. This report is more than two- and one-half years post-accident and some ten months after the time period for which the applicant claims housekeeping and maintenance services. The focus of this report was chronic pain, not housekeeping and maintenance services, mentions housekeeping tasks in a cursory way and Dr. Brown does not engage in any significant pre-accident and post-accident comparison of the applicant’s abilities to perform housekeeping tasks. Although Dr. Brown opines that the applicant is “...continuously prevented from engaging in substantially all of the activities in which she normally engaged before the accident”, Dr. Brown also opines that the applicant’s neck and back pain “limit her ability to perform certain household duties such as cleaning, laundry, food preparation and vacuuming. She reports restrictions when doing anything that involves bending or heavy lifting” which indicates limitations on her ability and not substantial inability to perform tasks.
- [15] I prefer the evidence of the respondent’s occupational therapist, Marlene Levy who is the only assessor to observe the applicant in her home and who assessed the applicant several months after the accident. The applicant told Ms. Levy in April 2017 that she lives alone in a one-bedroom apartment, was independent with self-care prior to the accident and reported independence with her self-care tasks, albeit slowly with back pain after the accident. The applicant also told Ms. Levy that for approximately five weeks post-accident she received assistance with cooking, cleaning, shopping and laundry but as of the April, 2017 assessment, she can cook slowly, can bend albeit with pain, can vacuum and clean the bathroom slowly with pain and pacing, has the ability to dust, carry small bags of garbage to the chute, make the bed, change the linen, and clean the bathroom sink and toilet. She also reported that she drives to the store and purchases light items, transports items to her apartment with a grocery cart with difficulty if it has heavy items or is too full. She uses a laundromat with a friend’s assistance to lift and carry and access the machines as she reports difficulty bending. The applicant also told Ms. Levy that she resumed driving approximately four weeks following the accident but is nervous while driving. The applicant told Ms. Levy that pre-accident she visited family, volunteered and visited with friends. Post-accident she visits family less often, has resumed volunteering and visits with friends. Based on the applicant’s self-reporting and physical evaluations and observations of the applicant doing tasks in her home,

Ms. Levy concludes that the applicant does not suffer a substantial inability to perform her housekeeping tasks.

- [16] Ms. Levy's report is consistent with the May 2017 report of Dr. Tucker, the respondent's psychiatrist who diagnosed the applicant with adjustment disorder with anxious mood likely precipitated by the accident but opines that, from a psychological perspective, the applicant does not suffer a substantial inability to perform her pre-accident housekeeping tasks as a direct result of the accident. Ms. Levy's assessment is also consistent with the September 2019 report of Dr. Dessouki, the respondent's psychiatrist and the updates to the reports of the respondent's assessors.
- [17] Further, I prefer the evidence of Dr. Dessouki who reviewed the applicant's pre and post-accident housekeeping and home maintenance with her in some detail. The applicant self-reported that pre-accident she was independent in these tasks and post-accident she has difficulty completing these tasks such as grocery shopping, cooking, vacuuming and cleaning due to pain and that her daughters will help with these tasks. After a thorough physical examination, Dr. Dessouki diagnosed musculo-ligamentous injuries of the cervical spine and right shoulder sprain/strain and opined that the applicant does not suffer a substantial inability to perform her pre-accident housekeeping and home maintenance tasks as a direct result of the accident.
- [18] I find that the applicant's medical evidence is insufficient to establish a substantial inability to perform the housekeeping and home maintenance services that she normally performed before the accident. This is the applicant's onus and she has not met it. As a result, the applicant's claim for housekeeping and home maintenance services for the period in dispute is dismissed.

Is the Chronic Pain Assessment Reasonable and Necessary?

- [19] The applicant submits that the disputed treatment plan for chronic pain assessment is reasonable and necessary because she was diagnosed with chronic pain syndrome by Dr. Vadasz and Dr. Brown and because the respondent failed to properly deny the proposed treatment plan.
- [20] I find that the applicant is not entitled to the disputed treatment plan for chronic pain assessment for the following reasons.

- [21] Although Dr. Vadasz made several references in his records to the applicant's chronic pain, he never made a referral to a specialist for chronic pain tending to indicate that in Dr. Vadasz's opinion, the medical expertise of a pain specialist was not required. This view is consistent with the respondent's 2019 surveillance which shows the applicant is able to drive in inclement weather, brush snow off her car, walk through a parking lot, enter a mall, visit an office and retrieve bags from her car trunk. As Dr. Tucker noted in her report after reviewing surveillance material from November 2019, the applicant demonstrates full activities of daily living.
- [22] Dr. Brown's report which diagnoses chronic pain and sleep disorder is more than two- and one-half years post-accident. Further, the methodology of Dr. Brown's report is not persuasive as it also fails to enumerate and address the application of the criteria for chronic pain in the AMA Guides which has been often accepted in past Tribunal decisions as a guiding principle for chronic pain cases.⁴ I find this line of Tribunal cases to be persuasive. Dr. Brown's report is inconsistent with the respondent's surveillance.
- [23] The applicant's submission that the respondent failed to properly deny the proposed treatment plan under s. 38 of the *Schedule* is not persuasive. As set out in the Tribunal's Case Conference Order, the treatment plan was submitted December 17, 2018 and denied by the respondent on January 2, 2019. There is no evidence before me that the applicant incurred any treatment between December 28, 2018 and January 2, 2019. In addition, having reviewed the denial, I am satisfied that it complied with the notice requirements of s. 38(8) to provide medical and other reasons for the denial.
- [24] Further, the respondent's correspondence establishes that the applicant failed to attend a properly schedule s. 44 examination and had been notified on May 16, 2017 that the housekeeping benefit was terminated. This was followed up by two further notifications to the applicant in July and August 2017.
- [25] The applicant has failed to establish with persuasive medical evidence that the treatment plan for chronic pain assessment was reasonable and necessary. This is the applicant's burden and she has failed to meet it. As a result, the claim for payment of the chronic pain assessment is dismissed.

⁴ See for example: *17-007825 v. Aviva Insurance Canada*, 2018 CanLII 98282 (ON LAT).

Is the Applicant Entitled to \$200.00 for the Cost of Completing Each of Two Disability Certificates dated February 15, 2017 and August 3, 2017?

- [26] The applicant submits that \$200.00 should be paid by the respondent for the February disability certificate. The respondent submits that it paid \$200.00 for the February disability certificate on March 24, 2017 and the cheque was cashed on April 14, 2017. In reply, the applicant submits that she “believes” the amount that the respondent paid was to cover the cost of producing the clinical notes and records of Dr. Vadasz, as her records do not confirm receipt of payment for the disability certificate.
- [27] I find that the respondent has paid \$200.00 for the February disability certificate. This \$200.00 claim is dismissed. The log notes of the respondent’s adjuster for March 24, 2017 record that the doctors fee of \$200.00 for the disability certificate, being invoice number 2718, was paid to Dr. Vadasz directly and the cheque details record filed by the respondent establishes that the \$200.00 cheque for invoice number 2718 was cashed. There is no evidence from Dr. Vadasz to the contrary. This is the applicant’s burden to prove and I find that she has not met it.
- [28] The applicant submits that \$200.00 should be paid by the respondent for the August disability certificate. The respondent submits that it did not receive records from Dr. Vadasz to substantiate the content of this disability certificate, and it did not request the second disability certificate and it is not obligated to pay this fee under s. 25 of the *Schedule*. In reply the applicant submits that was important and provided an update on the applicant’s condition. The applicant also submits that being in possession of the records of the applicant’s family doctor should not be a pre-requisite for the respondent to pay for the disability certificate.
- [29] I find that the respondent is not liable to pay for the August disability certificate. This \$200.00 claim is dismissed. There is no evidence that the respondent requested any additional disability certificate or that it was required. After reviewing these two disability certificates I am of the view that the August disability certificate did not add in any material way to the existing information already on file regarding the applicant’s injuries.

Interest

- [30] As no benefits are payable, no interest is payable.

ORDER

[31] For the reasons outlined above, the applicant is not entitled to \$904.00 for housekeeping and home maintenance services for the period in dispute. The applicant is not entitled to \$2,578.65 for the cost of a chronic pain assessment. The applicant is not entitled to \$200.00 each for the two disability certificates. The applicant's claim is dismissed.

Released: November 10, 2020



**Avril A. Farlam
Vice Chair**