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: **[A.L.] vs. Aviva Insurance Canada, 2019** ONLAT **18-008991/AABS**

Date: November 26, 2019
File Number: 18-008991/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:

[A.L.]

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR:	**Poeme Manigat**
APPEARANCES:	
For the Applicant:	Alysia Christiaen, Counsel
For the Respondent:	Geoffrey Keating, Counsel
HEARD:	**In Writing on: April 15, 2019**

OVERVIEW

[1] The applicant ("A.L") was injured in an automobile accident ("the accident") on June 3, 2015 and sought insurance benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] *(the "Schedule").* She applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service ("the Tribunal") when her claims for benefits were denied by the respondent, Aviva Insurance Canada ("Aviva").

[2] The respondent denied the applicant's claims because it determined that the treatment plans sought by the applicant were not reasonable and necessary.

[3] The applicant bears the onus of proving entitlement on the basis that the treatment plans are reasonable and necessary.

Preliminary issue raised in respondent's submissions

[4] In its written submissions, the respondent raised the preliminary issue of whether the applicant's affidavit should be excluded from the hearing.

[5] The respondent argued that Aviva was not provided with prior notice that the applicant would be relying on affidavit evidence at the hearing. The respondent argued that it would be highly prejudicial to Aviva to allow the applicant's affidavit to be included in the materials.

[6] In support of their position, Aviva relied on decision *18-000655 v Echelon General Insurance Company*, 2018 CanLII 115670 (ON LAT) ("*Echelon*").

[7] The applicant takes the position that at the case conference, she notified the respondent in her case conference summary of her intention to provide evidence at the hearing. The applicant's case conference summary states: "The Applicant will speak to her ongoing accident-related pain and limitations […]. The Applicant will also speak to her need for further medical/rehabilitation treatment […]." The applicant submits that given the fact that the hearing was to proceed in writing, the only way that she could provide her evidence would be by way of an affidavit.

[8] The fact that the applicant's case conference summary stated that she had intention to speak to her ongoing accident-related pain, limitations, and need for further medical/rehabilitation treatment is insufficient to conclude that the applicant gave notice of her intention to use affidavit evidence. Amongst other

[1] O. Reg. 34/10.

things, the case conference is meant to address procedural issues related to the hearing. The parties did not turn their minds to the possibility of using affidavit evidence during the case conference, which explains why the order is silent about it. The only way the applicant could provide evidence at a written hearing is by way of an affidavit, and there is no compelling reason to deprive her of this opportunity. The *Echelon* decision is distinguishable from the present case, where a clear prohibition formed part of the order stating that affidavit evidence was not to be relied upon at the hearing. In the present case, the order does not have any prohibitions against the use of affidavit evidence; therefore, one cannot assume that such evidence could not be included in the materials. The respondent has not established any prejudice is caused by allowing the applicant's affidavit evidence. The respondent received the applicant's materials (including the affidavit and submissions) in advance and had the opportunity to address them in its responding materials. The respondent had an opportunity to provide opposing evidence and respond to any concerns that it had in regard to the applicant's affidavit.

[9] Based on the above-noted reasons, I allow the applicant's affidavit to form part of the hearing materials.

ISSUES

[10] The issues to be decided are as follows:

(i) Is the applicant entitled to a rehabilitation benefit in the amount of $2,633.96 for occupational therapy services recommended by Amanda Smith, Novus Rehabilitation Limited in a treatment plan (OCF-18) submitted on February 15, 2018, and denied on June 13, 2018?

(ii) Is the applicant entitled to a rehabilitation benefit in the amount of $2,469.64 for physiotherapy services recommended by Brenda Enns, Neurophysio Rehabilitation in a treatment plan (OCF-18) submitted on March 9, 2018, and denied on June 13, 2018?

RESULT

[11] I find that the applicant is not entitled to the occupational therapy in the amount of $2,633.96.

[12] I find that the applicant is not entitled to the physiotherapy treatment in the amount of $2,469.64.

ANALYSIS

Occupational Therapy Treatment

[13] Ms. Amanda Smith authored a treatment plan dated February 13, 2018 for the purpose of assisting the applicant to return to her activities of normal living and providing her with a workplace/home assessment as needed.

[14] Based on the evidence provided, I find that the applicant has not met the onus of proving that the treatment plan is reasonable and necessary.

[15] I accept that the objective of a treatment plan is not simply to achieve full recovery, and that it may be approved if the evidence indicates that the treatment plan provides temporary relief of the applicant's symptoms. However, when it is established that an applicant has achieved maximal medical recovery, there must be a careful review of the evidence confirming that ongoing treatment will provide relief to the applicant. The evidence must clearly support the proposition that ongoing treatment will provide relief to the applicant and be of benefit.

[16] In the present case, I accept Dr. Khumbare[2]'s conclusion that the applicant has reached a point of maximum medical recovery due to the length of time (more than two years) that has passed since the injury. Therefore, in order to approve the treatment plan, adequate evidence confirming that the ongoing treatment sought will provide relief and benefit to the applicant must exist. The majority of the evidence supporting the applicant's position in the present case is based on the applicant's own assessment of the treatment. Without undermining the importance of an applicant's own assessment, it is critical that the totality of the evidence be considered, including medical opinion, before approving the treatment plan.

[17] I have not been persuaded of the treatment plan's reasonableness, nor of its necessity, as Dr. Khumbare's report[3] does not provide adequate details about the relief derived from ongoing treatment. When confirming that the applicant has reached maximum medical recovery, Dr. Khumbare cautiously stated that further investigation is needed to adequately assess the applicant's condition, and that it is possible that further treatment may be beneficial in relieving some of the applicant's symptoms. A mere possibility of ongoing treatment being beneficial is insufficient to warrant the approval of a treatment plan.

[2] Section 25 Assessor – Dr. Kumbhare
[3] Dr. Kumbhare Medical Report dated November 22, 2017

[18] Dr. Khumbare's report[4] stated that the applicant's ability to participate and enjoy recreational activities has been affected by the accident. The report also stated that the applicant now uses pacing strategies when producing art, otherwise her symptoms are aggravated. Dr. Khumbare notes that an ergonomic work space would assist the applicant with her ability to tolerate discomfort associated with tasks essential to her employment.

[19] Reports by Dr. Khumbare[5] and Mr. Sutherland[6] (Occupational Therapist – IE Assessor) confirmed that the applicant did not require a leave from teaching following the subject accident. In fact, the applicant has been working full-time as a high school supply teacher. However, the applicant relies upon pacing strategies to complete essential duties associated with her employment.

[20] There is no evidence that the applicant cannot safely perform her work-related tasks without seeking medical treatment.

[21] Mr. Suttherland performed a series of strengthening tests on the applicant's left shoulder; the results were very positive. For her left shoulder, the test results of the applicant's manual muscle testing revealed that she has full available range of motion. For the applicant's left shoulder and elbow, the cervical and upper extremity range of motion tests yielded results all within normal limits. These test results indicate that the applicant has recovered from her injuries and suggest that no additional treatment is needed.

[22] Mr. Sutherland opined that the applicant was provided with adequate occupational therapy intervention addressing her pain and function. He further stated that the applicant has the ability to incorporate the education, as well as the equipment provided, into her daily routine. Mr. Sutherland stated that the applicant does not require any additional occupational therapy treatment. I accept Mr. Sutherland's conclusion. The applicant has not reported having any difficulty using the equipment provided to her while resuming her daily activities, including her employment duties.

[23] Additionally, Mr. Sutherland's assessment of the applicant indicates that the applicant was able to complete all her pre-accident tasks – including personal care, housekeeping, employment and leisure – without any assistance. There was no subsequent report provided to refute the findings of Mr. Sutherland.

[4] Ibid
[5] Ibid
[6] Mr. Matt Sutherland Medical Report, Occupational Therapist, dated May 22, 2018

[24] I find Mr. Sutherland's report and conclusion persuasive and consistent with the fact that the applicant has been able to teach full time after the subject accident. As well, since the said accident, the applicant has moved to a new residence on her own and is able to function and care for herself without any reported help.

[25] I accept that the applicant had to make certain adjustments to cope with some pain and use strategies, such as pacing, to resume her pre-accident activities; however, I do not have sufficient evidence to conclude that the treatment plan sought is reasonable and necessary. The simple fact that the applicant may be experiencing some pain is not enough to approve the treatment plan. The applicant's ability to function at home and at work is slightly affected, which she has managed to remedy using coping strategies.

[26] I find that the applicant has not met the burden of proving that the occupational therapy treatment plan is reasonable and necessary.

Physiotherapy Treatment

[27] The IE report completed by Ms. Rodie[7] states that the applicant reached maximum medical recovery and maximum therapeutic benefit.

[28] The respondent approved $823.50 for physiotherapy treatment in response to a treatment plan submitted by the applicant in June 2016. However, the respondent was only invoiced for $498.75. The applicant submits that physiotherapy treatment is necessary to assist her in completing her daily activities, though it appears that $324.75 worth of approved physiotherapy has not been used.

[29] The applicant submits in her reply submissions that Ms. Enns, the applicant's physiotherapist, stated that the unbilled portion of the approved treatment plan is likely due to the applicant's extended healthcare benefits becoming available, and therefore the remaining treatment session did not need to be utilized. No documentation or additional evidence was submitted to substantiate this explanation. I find this concerning given the fact that the treatment plan in dispute is for physiotherapy. If claiming physiotherapy treatment, the applicant should exhaust all the treatment amounts allocated to physiotherapy. If, for whatever reason, the approved treatment amounts are not exhausted, the applicant should have complete and thorough evidence explaining the situation – this should be done before seeking an additional amount for the same treatment. The applicant is not prevented from submitting additional treatment

[7] Ms. Dawn Rodie Report, Physiotherapist, dated May 2, 2018

plans for previously-approved similar treatment(s); however, requesting additional monies without first using the approved amount(s) is inconsistent with the applicant's claim that treatment is essential to performing daily activities.

[30] I am not persuaded nor satisfied with the explanation provided by the applicant regarding the unused portion of the approved physiotherapy treatment plan.

[31] The applicant has not submitted any requests for physiotherapy treatment in the June 2016 to March 2018 period. There is no evidence suggesting that the applicant was undergoing physiotherapy treatment during this period. The applicant alleged in her affidavit that physiotherapy assisted her with performing work-related tasks; however, she has worked without physiotherapy treatment for an extended period (June 2016 to March 2018). The fact that the applicant was able to work for an extended period without physiotherapy treatment weakens her claim that such treatment is essential to performing daily activities, including her work-related duties.

[32] I am not persuaded that the physiotherapy treatment is reasonable and necessary. There is no evidence before me, other than the applicant's self-reporting, to substantiate the proposition that further physiotherapy treatment is reasonable and necessary. As stated above, it is critical that the totality of the evidence be considered when determining the reasonableness and necessity of a treatment plan. Additionally, while I have reviewed the applicant's affidavit, along with the medical evidence, I am not persuaded that the physiotherapy treatment plan is reasonable and necessary.

[33] Despite Dr. Khumbare's recommendation that the applicant could benefit from 20-40 sessions of physiotherapy treatment, the applicant *has* been able to function well and complete her pre-accident daily activities without formal work accommodation(s) or assistance at home.

[34] The applicant is functioning despite experiencing some pain; however, there is insufficient evidence to confirm that further treatment would result in additional benefit(s) for the applicant. The applicant can perform all the duties related to her full-time employment. The only assistance the applicant stated needing during the IE assessment performed by Ms. Rodie, was for when she hangs overhead art. There is no evidence to support that additional physiotherapy treatment would remedy the discomfort of overhead movements.

[35] I find that the applicant has not met the burden of proving that the physiotherapy treatment plan is reasonable and necessary.

CONCLUSION

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

i. The applicant is not entitled to occupational therapy in the amount of $2,633.96, nor to physiotherapy treatment in the amount of $2,469.64.

ii. The application is therefore dismissed.

Released: **November 26, 2019**

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Poeme Manigat
Adjudicator