**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: J.T. vs. Aviva Insurance Canada, 2019 ONLAT 18-008354/AABS**

Tribunal File Number: **18-008354/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:

**J.T.**

**Applicant**

**and**

**Aviva Insurance Canada**

**Respondent**

# DECISION

**Adjudicator:** **Jesse A. Boyce**

**APPEARANCES:**

For the Applicant: Navneet Jaswal

For the Respondent: Geoffrey L. Keating

**Written Hearing:** **May 6, 2019**

## OVERVIEW

[1] The applicant, J.T., was injured in an accident on March 23, 2016 and sought benefits from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] *(Schedule).*

[2] Aviva denied J.T.'s claim for an income replacement benefit ("IRB") after J.T. returned to work and failed to provide supporting financial documentation. Aviva also denied her claims for medical and rehabilitation benefits on the basis that they were not reasonable and necessary. J.T. disagreed with Aviva's decision and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (Tribunal) for reinstatement of the IRB.

[3] The parties participated in a case conference but were unable to resolve their dispute and, thus, proceeded to this hearing.

## ISSUES TO BE DECIDED

[4] The following are the issues in dispute, as per the Case Conference Order dated January 15, 2019:

i. Is the applicant entitled to receive an income replacement benefit in the amount of $400.00 per week for the period from March 30, 2016 to June 6, 2016?

ii. Is the applicant entitled to receive a medical benefit in the amount of $1,902.29 for chiropractic services recommended by Myomedical in a treatment plan submitted on November 6, 2017 and denied by the respondent on March 12, 2018?

iii. Is the applicant entitled to receive a medical benefit in the amount of $1,260.28 for chiropractic services recommended by Myomedical in a treatment plan submitted on March 21, 2018 and denied by the respondent on March 30, 2018?

[1] O. Reg. 34/10.

iv. Is the applicant entitled to the cost of expenses in the amount of $812.82, consisting of $532.82 submitted on October 12, 2017 and $280.00 submitted on December 4, 2017, denied by the respondent on March 5, 2018?

v. Is the applicant entitled to interest on any overdue payment of benefits?

**RESULT**

[5] I find J.T. is not entitled to an IRB or any of the rehabilitation benefits or expenses in dispute.

**ANALYSIS**

***Is J.T. entitled to an income replacement benefit?***

[6] No. I find J.T. is not entitled to an income replacement benefit for the period in dispute, as she has not provided evidence that she suffered from a substantial inability to perform the essential tasks of her employment, that she did not provide the requested financial documentation and that she returned to work on a full-time basis.

[7] Entitlement to an IRB falls under s. 5(1)(1)(i) of the *Schedule*: an IRB is payable if the insured was working at the time of the accident and, within 104 weeks of the accident, suffers a substantial inability to perform the essential tasks of that employment. This inquiry is divided into two steps: 1) what are the essential tasks of employment; and, 2) is the insured substantially unable to perform the essential tasks of that employment? The onus to prove entitlement rests with the applicant.

[8] At the time of the accident, J.T. was employed at [a cosmetic company], performing duties as a Distribution Associate. In an OCF-2 completed in February 2019, her duties are described as picking, packing and shipping orders. Her work was full-time. J.T. submits that, as a result of the accident, she suffered from impairments—identified as headaches, sleep disturbances, dizziness, mood changes, balance issues, depression, anxiety, neurocognitive, psychological and

emotional issues—that prevented her from working and that she was off work, unpaid, for an undetermined period. In submissions, she states that she was subjected to re-apply for her position on a part-time basis on June 6, 2016 before becoming a full-time employee again in September 2017.

[9] In response, Aviva offers several arguments: that J.T. has not defined the time period of eligibility so her claim must fail, that J.T. failed to comply with Aviva's s. 33 requests for financial documentation to determine her eligibility for and calculate the amount of an IRB and that J.T. returned to full-time duties.

[10] I agree with Aviva. The onus to prove entitlement to an IRB rests with J.T. and I find that she has fallen well-short of meeting her burden. First, J.T. has provided no financial documentation to support her eligibility for an IRB or, if eligibility was pre-determined, how much her IRB quantum would be. Second, I find Aviva made a proper request for this information under s. 33 of the *Schedule* and that J.T. has failed to provide the Tribunal with evidence that she complied with Aviva's request to deliver any of the documentation it requested—including T4's, records of employment, pay stubs, *etc*.—save for an OCF-2 dated three years post-accident and an "employee file" from [the cosmetic company] consisting of an offer letter of employment and a position change form. Third, and perhaps most importantly, her submissions on entitlement consisted of three sentences, none of which reference any medical documentation, clinical notes, doctor referrals or really, anything objectively medical to indicate that she suffered from impairments that resulted in a substantial inability to perform the essential tasks of her employment. While I accept that J.T. may have missed time from work as a result of her impairments, the Tribunal was not provided with evidence to meet the legal test required for IRB entitlement under the *Schedule*.

[11] For these reasons, I find J.T. is not entitled to payment for an IRB as she has not demonstrated that she suffered from a substantial inability to perform the essential tasks of her employment during the alleged period of eligibility.

***Are the rehabilitation benefits reasonable and necessary?***

**$1,902.29 for chiropractic services**

**$1,260.28 for chiropractic services**

[12] Section 14 of the *Schedule* provides that an insurer is liable to pay for medical and rehabilitation benefits that are reasonable and necessary as a result of an accident. The applicant bears the onus of proving on a balance of probabilities that each treatment and assessment plan is reasonable and necessary. I find on the evidence that J.T. has not provided evidence to meet her burden that the treatment plans are reasonable and necessary.

[13] In submissions, J.T. groups these benefit claims together as they were submitted consecutively. She relies on the medical records from Tandem Health to prove her ongoing injuries, which state that she suffered from psychological symptoms, low back pain, knee pain, anxiety and ongoing chronic pain which were preventing her from successful recovery. J.T. argues she was denied treatment in 2017 and has not been able to recover. She argues that she continued to see her family physician on a regular basis for her injuries and physiotherapy was recommended. Finally, she directs the Tribunal to an ultrasound of her right knee from March 2019 indicating she has a bulging medial meniscus joint effusion.

[14] In response, Aviva relies on a s. 44 Insurer's Examination ("IE") and report dated August 1, 2018 which found that J.T. was not suffering from an impairment as a result of the accident, had reached maximal medical improvement and that the disputed benefits were not reasonable and necessary. Aviva denied treatment on the basis that the treatment did not appear consistent with J.T.'s diagnoses.

[15] I agree with Aviva. Again, J.T. has not provided the Tribunal with sufficient evidence to prove her claim that the treatment plans are reasonable and necessary. J.T. refers to the medical records from Tandem Health indicating ongoing difficulties, but she did not provide those records. Instead, she only provided the OCF-18 from Tandem Health, which indicates she has pain but that she continues to work despite the pain. The physical symptoms identified in the documentation appear to largely be sprain and strain type injuries, save for the

psychological impairments that are not covered by these plans. While the treatment goals seem reasonable, there is nothing in evidence to speak to the necessity of the treatment and there is no medical documentation or opinion to rebut the IE report from Aviva.

[16] Further, J.T.'s submission that she saw her family physician on a regular basis could be evidence of continuing and consistent impairment rendering treatment reasonable and necessary. However, J.T. provided only a single note from her doctor, dated January 2017 diagnosing a knee sprain, which followed the denial of the first OCF-18. In my view, a single note following a denial is not an indication of regular or continuous complaints necessitating ongoing treatment nor is it sufficient evidence that treatment will bring about further recovery or benefit. Finally, the ultrasound report of J.T.'s knee, which was not conducted until March 2019, indicates that there is no obvious tear or obvious meniscal or ligamentous injury.

[17] Accordingly, I find the lack of medical evidence, combined with J.T.'s limited submissions on same, fall short of meeting her burden to prove that the OCF-18's are reasonable and necessary.

***OCF-6 Expenses***

**$532.82 submitted on October 12, 2017**

**$280.00 submitted on December 4, 2017**

[18] I find J.T. is not entitled to payment for any of the expenses listed in either of the OCF-6's for the following reasons.

[19] The OCF-6 dated October 12, 2017 lists the following expenses: $281.41 for Massage Therapy; $30.50 for a Magic Bag; $109.58 for Athletic Footwear and shoe repair; $54.00 from North General Hospital and $57.33 for Rx Medication. In submissions, J.T. argues entitlement to all her expenses because she has incurred the massage treatment due to her placement in the Minor Injury Guideline and that she suffers from chronic pain. The OCF-6 dated December 4, 2017 lists the

following item: $280 for glasses from Hakim Optical. In submissions, J.T. argues that her glasses were damaged in the accident and that she should be reimbursed.

[20] In response, Aviva offered the following reasons for denying the expenses in its letter of March 5, 2018. First, Aviva stated it had no record of receiving or approving a treatment and assessment plan for massage therapy for the period of April 3, 2016 to June 12, 2016 and an insurer is not liable to pay for an expense that was incurred before a treatment and assessment plan is submitted. Second, Aviva was unable to consider the prescription medication, footwear or magic bag because it was not provided with medical documents to support that the items were prescribed to treat injuries directly related to the motor vehicle accident of March 23, 2016. Third, Aviva asked J.T. to provide an invoice or details relating to the $54 from North General Hospital explaining the nature of the expense. In response to the eyewear claim, Aviva stated that it was not clear whether J.T. was "replacing prescription eyewear damaged or broken as a result of the accident of March 23, 2016, considering the eyewear was purchased on October 13, 2017 at 1.7 years post-accident." Aviva asked that J.T. advise how the claim was directly related to the motor vehicle accident.

[21] I agree with Aviva's reasons for denial. First, it is well-settled that an insurer is not liable to pay for any expense that is incurred before a treatment and assessment plan is submitted. Second, absent a prescription or evidence linking certain items to the accident, Aviva is also not required to pay for expenses like medication, footwear or a magic bag. Third, J.T. did not provide evidence to identify or justify the $54 hospital expense. Finally, while J.T. did submit an invoice from Hakim Optical, she has not provided explanation for why she waited so long to procure new eyewear after it was allegedly damaged in the accident or proof that it was related to the accident. On the evidence before the Tribunal, I agree that none of these expenses are payable.

## CONCLUSION

[22] For these reasons, I find J.T. is not entitled to an IRB or any of the rehabilitation benefits or expenses in dispute.

**Released: November 7, 2019**

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**Jesse A. Boyce**
**Adjudicator**