



Citation: Gill v. Aviva General Insurance, 2022 ONLAT 20-008499/AABS

Licence Appeal Tribunal File Number: 20-008499/AABS

In the matter of an application made pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

Gurminder Kaur Gill

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR: Taivi Lobu

APPEARANCES:

For the Applicant: Seema Passi, Paralegal

For the Respondent: Jennifer Cosentino, Counsel

HEARD: By Way of Written Submissions

BACKGROUND

- [1] The applicant was injured in a motor vehicle accident (“MVA”) on July 29, 2019 and sought benefits from the respondent pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, [O. Reg. 34/10](#) (the “[Schedule](#)”). The respondent refused to pay the amount claimed for certain benefits and, in response, the applicant applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”) for resolution of this dispute.
- [2] The applicant is outside of the Minor Injury Guideline as a result of a diagnosis of psychological impairment resulting from the accident.

ISSUES IN DISPUTE

- [3] A case conference was conducted by the Tribunal on February 25, 2021, and the following issues in dispute were ordered to a written hearing:
- a. Is the applicant entitled to receive benefits recommended as follows;
 - i. \$1,999.91 for a chronic pain assessment plan recommended in an OCF-18 by Unison Medical Assessments dated May 19, 2020?
 - ii. \$2,000.01 for a physiatry assessment plan recommended in an OCF-18 by Unison Medical Assessments dated May 8, 2020?
 - iii. \$1,988.75 for a physiotherapy treatment plan recommended in an OCF-18 by Charolais Physio & Rehab dated December 8, 2020?
 - iv. \$1,595.49 for an in-home assessment plan recommended in an OCF-18 by Unison Medical Assessments dated May 25, 2020? and
 - v. \$3,866.40, less \$2,178.31 approved by the respondent, for a psychological treatment plan recommended in an OCF-18 by Unison Medical Assessments dated November 12, 2020?
 - b. Is the applicant entitled to interest on any overdue payment of benefits?
- [4] In her submissions for the written hearing, the applicant raised the additional two issues:
- a. Is the respondent liable to pay an award pursuant to Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

- b. Is the applicant entitled to costs pursuant to Rule 19 of *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)* as amended (“*Rules*”)?

RESULT

- [5] The applicant is not entitled to the treatment plans proposed for a chronic pain assessment; a psychiatry assessment; physiotherapy treatment.
- [6] Having been removed from the Minor Injury Guideline, the applicant is now entitled under section 25 of the *Schedule* to an in-home assessment.
- [7] The applicant is entitled to the treatment identified in the psychological treatment plan, but not at the monetary rate claimed for one of the identified treatment providers.
- [8] The applicant is not entitled to an award.
- [9] The applicant is not entitled to costs.

ANALYSIS

- [10] Pursuant to sections 14, 15, 16 and 19 of the *Schedule*, the insurer is required to pay benefits to an insured person who sustains an impairment as a result of a motor vehicle accident.
- [11] The applicant has the onus to prove on a balance of probabilities the entitlement to benefits claimed and that the benefits are reasonable and necessary.¹

Causation

- [12] Medical, rehabilitation and attendant care benefits payable under the *Schedule*, are for expenses incurred as a result of the accident. There must be a direct link to the accident at issue.
- [13] The applicable test in making a causation determination is the “but for” test: whether the applicant would have suffered left shoulder and neck pain but for the accident.² The accident is not required to have been “the cause” – that is, the accident need not be the sole cause or have been sufficient in itself to have

¹ *Scarlett v Belair Insurance*, 2015 ONSC 3635 (CanLII).

² *Sabadash v. State Farm et al.*, 2019 ONSC 1121 (CanLII).

caused the impairments at issue. Rather, the accident need only to have been a “necessary cause.”³

- [14] I note that all of the proposed treatment plans and assessments include addressing the applicant’s left shoulder and neck pain.
- [15] By Case Conference Report and Order dated February 25, 2021, the applicant was ordered to produce by June 25, 2021 her family physician’s clinical notes and records from three years pre-accident to date; the applicant’s decoded OHIP summary for the period from three years pre-accident to date; the accident benefit file from a 2017 motor vehicle accident; and the files of any extended health carrier to which the applicant had access from three years pre-accident to date.
- [16] Prior to the case conference, the applicant had produced clinical notes and records covering family physician visits from September 24, 2018 – close to one year pre-accident. However, the respondent submitted that the applicant did not comply with the Tribunal’s Case Conference Order requiring the applicant produce pre-accident records.
- [17] In her reply, the applicant stated that she “had submitted documents requested.” The applicant did not identify the documents so submitted or the date of submission. The applicant stated that she had “submitted a copy of OHIP record requested” but added that it “was not received at time of request.” The applicant did not indicate the reason for non-receipt or provide other details. The pre-accident records in issue do not appear in the evidence submitted to the Tribunal. There was no evidence of their submission included in support of the applicant’s reply.
- [18] I find that the applicant did not comply with the Tribunal’s order to produce the requested pre-accident records pertaining to the applicant’s medical and accident history. Such records are relevant to whether injuries which are the focus of the treatment plans were pre-existing or caused and/or aggravated by the 2019 MVA.
- [19] The chronic pain assessment, the physiatry assessment and the physiotherapy treatments sought by the applicant significantly focus on the applicant’s neck and shoulder pain. The evidence before the Tribunal shows that the applicant’s neck and shoulder pain pre-date the accident at issue by some two years. For

³ *Ibid.* at para. 39.

example, on February 19, 2021, one of the applicant's family physicians, Dr. Vijn, charted an applicant report of "persistent neck shoulder pain x 4 years."⁴

- [20] In section examinations ordered by the respondent under section 44 of the *Schedule* (insurer examinations) in 2020 and 2021, the applicant reported to Dr. E. Silver that she had pain in her neck and left shoulder area from a 2017 MVA when the July 2019 accident occurred. While the applicant reported to Dr. Silver that the pain had worsened after the 2019 accident, Dr. Silver did not have records related to her injury from the previous MVA.
- [21] The records ordered by are relevant to establishing whether the applicant's neck and shoulder pain for which the applicant seeks treatment was aggravated by the 2019 accident. Given the applicant's failure to produce the ordered records, I draw a negative inference about whether the 2019 accident contributed to the neck and shoulder pain.
- [22] Even apart from this however, for the reasons that follow I find that the applicant has not demonstrated on a balance of probabilities that the chronic pain and physiatry assessments and physiotherapy treatment sought by the applicant are reasonable and necessary.
- [23] I do note that it has been established that the applicant has experienced psychological impairment as a direct result of the 2019 accident,⁵ and as a result the applicant is no longer within the limits of the Minor Injury Guideline.

Chronic Pain Assessment

- [24] I find that the May 19, 2020 assessment plan in the amount of \$1,999.91 for a chronic pain assessment as recommended by D. Rozen, medical doctor, and Larysa Mikhailava, chiropractor, of Unison Medical Assessments, is not reasonable or necessary.
- [25] Assessments, by their nature, are speculative. The purpose of an assessment is to determine if a condition exists. Nonetheless, the applicant still bears the onus of establishing on a balance of probabilities that an assessment is reasonable and necessary. To do so, applicants must point to objective evidence that there are grounds to suspect they have the condition for which the assessment is sought.

⁴ Applicant Submissions, Exhibit B-9.

⁵ See the report from the psychology insurer's examination, authored by Dr. J. Goldberg - August 12, 2020, Respondent Submissions, TAB 7.

- [26] In submissions regarding the chronic pain assessment, the respondent referenced *AMA Guidelines, 6th Edition* and stated that the applicant “does not satisfy 3 of the 6 criteria.” However, the respondent did not articulate the *AMA Guidelines* or criteria relied upon, speak to the relationship of the evidence to the *Guidelines*, or reference caselaw or statutory authority supporting use of the *AMA Guidelines*. Accordingly, I have not relied on the *AMA Guidelines* in assessing the reasonableness or necessity of the chronic pain assessment.
- [27] Both Dr. R. Badwal and Dr. Vijh have served as family physicians for the applicant. The day after the July 29, 2019 accident, the applicant saw Dr. Badwal for accident-related issues, and again within a two-week period for a follow-up appointment on August 8, 2019. On August 8, 2019 Dr. Badwal charted “check the cervical spine and left shoulder x-ray and U/S”⁶ however the medical records submitted by the parties do not include evidence of radiology reports or investigations following up from August 8, 2019.
- [28] The next charting reference to physical issues arising from the 2019 MVA was nearly one-year post-accident, on June 29, 2020. It is noteworthy that after August 8, 2019 and before November 19, 2020, the applicant had over 20 family physician visits (with either Dr. Badwal or Dr. Vijh) but only one of these visits (June 29, 2020) spoke to pain concerns arising from the MVA.
- [29] Some 15 months post-accident, from November 19, 2020 to February 19, 2021, the applicant spoke with her family physicians about pain issues at four monthly appointments:
- [1] November 19, 2020 – “localised low back pain x few months, not resolving, going for therapy, not resolving, no radiation, no gi/gu, prev. h/ mva”
 - [2] December 16, 2020 – “back and neck problems; chronic since MVA; difficulty due to prolonged sitting for hours; gets spasms”
 - [3] January 9, 2021 – “c/o neck, low back pain, aggravated by repetitive bending, twisting movements; aggravated by sitting long periods; needs to get up frequently and stretch/even lie down at times; going for physio”
 - [4] February 19, 2021 – “persistent neck shoulder pain x 4 years; no relief with physiotherapy.”

⁶ Respondent Submissions, TAB 11.

These consecutive pain-related reports could support the need for a chronic pain assessment if consistent with the overall post-accident charting. However, as indicated, these four chart entries were preceded by well over a year where only one of more than 20 family physician visits referenced accident-related pain.

- [30] With regard to pain management, during the July 30 and August 8, 2019 post MVA appointments, Dr. Badwal proposed Tylenol or Advil for pain, and the applicant reported taking Tylenol in subsequent examinations but no other pain medications⁷. There was also a notation by Dr. Vijh on June 29, 2020 that the applicant was “not keen on taking PO NSAIDs etc.”⁸ Beyond this, the medical records do not speak to pharmaceutical pain management or identify other relevant action from the applicant’s family physicians, such as referral to OHIP specialists for pain-management.
- [31] With regard to pain related investigations, on November 19, 2020 the applicant was referred for lumbar spine x-rays in response to her reports of low back pain, but there is no radiology report or other evidence of follow-up in relation to such investigations in the medical chart provided.
- [32] The respondent required the applicant to attend for two insurer examinations in July 2020 and June 2021 with Dr. Silver, a family physician who practices at the Silver Integrative Medical Centre and the Chronic Pain Management Clinic and is certified in Impairment and Disability Rating by the American Board of Forensic Professionals.
- [33] For the July 2020 insurer’s examination report,⁹ Dr. Silver conducted a document review and a 40 minute in-person examination of the applicant, expressly for the purposes of addressing the proposals for the chronic pain assessment (OCF-18, dated May 19, 2020) and the psychiatry assessment (OCF-18, dated May 8 2020). The latter will be discussed later in this decision.
- [34] During the examination, the applicant reported to Dr. Silver that she was fully independent in her personal tasks, that she had returned to driving without difficulty and could engage in light cooking and housekeeping.
- [35] This information about the applicant’s functional abilities is consistent with the medical chart of her family physicians. For example on September 3, 2020, Dr. Vijh’s charts show that she encouraged the applicant to cope with other issues through continuing with her work, being involved in chores at home and engaging

⁷ Ibid., TAB 14 and TAB 26.

⁸ Applicant Submissions, Exhibit B-1.

⁹ Respondent Submission, TAB 14 (in-person examination on July 14, 2020; report dated July 27, 2020).

in recreational activities.¹⁰ Other than noting that the applicant had a full ergonomic set-up at home, pain-related restriction in functional ability and daily activity was not a focus in the applicant's numerous family physician visits since the 2019 MVA.¹¹

- [36] With regard to the low back pain which the applicant has reported with her family physicians, in his reports of in-person assessment of the applicant on July 2020 and a subsequent assessment of June 2021, Dr. Silver stated that the applicant advised that her lower back pain had resolved within six to seven months of the accident.¹² In addition, in his 2021 examination, Dr. Silver noted that the applicant showed some low back soreness with lumbar extension reduced approximately 25% whereas the extension was full and pain free during the July 2020 assessment.¹³
- [37] Dr. Silver concluded in his July 27, 2020 insurer's examination report that he "did not find objective evidence of ongoing accident-related musculoskeletal injury or impairment and Ms. Gill did not describe symptomatology that in my opinion would warrant a chronic pain assessment."¹⁴
- [38] Dr. Silver also prepared a April 13, 2021 addendum to his July 27, 2020 insurer's examination report in which he reviewed additional documentation made available by the applicant.¹⁵ In his addendum, he confirmed his earlier conclusion. A second in-person assessment and document review by Dr. Silver in June 2021 (which was requested by the respondent to address an OCF-18 for physiotherapy treatment), lead to in conclusions similar to those in his July 2020 report.¹⁶
- [39] Dr. Silver is experienced with chronic pain treatment and assessed the medical documentation made available by the applicant. He conducted a 40 minute in-person examination of the applicant including an interview and musculoskeletal examination. I am satisfied that his assessment of the applicant's symptomatology and the requirement for a chronic pain assessment is suitably based on the applicant's reports, the documentation provided, and the findings of his examination. I am also satisfied that Dr. Silver's findings and conclusions are

¹⁰ Applicant Submissions, Exhibit B-1.

¹¹ Ibid., Exhibit B-9.

¹² Respondent Submissions, TAB 14 and 26.

¹³ Ibid., TAB 26.

¹⁴ Respondent Submissions, TAB 14.

¹⁵ Ibid., TAB 16.

¹⁶ Ibid., TAB 26.

supportable by the family physician charts. There is no other medical evidence to support the OCF-18.

[40] Accordingly, I prefer Dr. Silver's assessment of the reasonableness and necessity of a chronic pain assessment to the proposal in the OCF-18.

[41] I find that the applicant has not demonstrated on the balance of probabilities that the proposed OCF-18 for a chronic pain assessment is reasonable and necessary pursuant to the *Schedule*.

Physiatry Assessment

[42] I find that the May 8, 2020 OCF-18 proposal for a physiatry assessment in the amount of \$2,000.01 by Larysa Mikhailava, chiropractor, and Ali Ghouse, physiatrist, of Unison Medical Assessments, is not reasonable or necessary.

[43] The respondent had initially denied this plan as the respondent had not received any medical records from the applicant in support of it. The respondent then sought the aforementioned July 2020 insurer's examination under section 44 of the *Schedule* with Dr. Silver. It addressed the May 8, 2020 OCF-18 physiatry assessment as well as the chronic pain assessment.

[44] In his July 27, 2020 report, Dr. Silver observed that the May 8, 2020 OCF-18, included a self-report from the applicant of musculoskeletal injuries and symptoms at her neck, left shoulder and lower back "with complaint of neurological symptoms, such as pain radiation in left arm and daily headaches."¹⁷ Dr. Silver commented that during his July 14, 2020 examination of the applicant, she had "denied left upper extremity referral and indicated having headaches approximately twice per week that lasted for one hour per headache. She denied ongoing lower back pain related to the subject accident."¹⁸

[45] Dr. Silver confirmed his conclusions in an April 13, 2021 addendum upon being provided additional medical documentation to review. Dr. Silver concluded that the proposed physiatry assessment was not reasonable and necessary on the basis of his finding that the applicant sustained uncomplicated soft tissue injuries in the 2019 accident and that there was no objective evidence of ongoing accident-related impairment.¹⁹

¹⁷ Respondent's Submissions, Tab 14.

¹⁸ Ibid.

¹⁹ Ibid., TABs 16 and 14.

- [46] As indicated earlier, only a small fraction of the applicant's post-accident family physician appointments speak to applicant post-accident physical symptomatology. There is no apparent concerns from investigations, even though the applicant's family physicians appeared alert to physical investigations. For example just over one week after the 2019 accident, Dr. Badwal charted "check cervical spine x-rays, left shoulder xray+U/S"²⁰ and in response to applicant complaints of low back pain at a November 19, 2020 appointment, Dr. Vijh noted under Plan, "L/S XRAY".²¹ The medical evidence submitted does not include radiology reports or notation of any concerns from such physical investigations by the applicant's treating physicians.
- [47] I am satisfied that Dr. Silver examined the applicant with the expertise required to assess her musculoskeletal condition. He concluded that applicant had sustained uncomplicated soft tissue injuries in the 2019 accident.
- [48] The OCF-18 does not point to additional or other evidence not considered by Dr. Silver, nor has the applicant provided such evidence. I find no reasonable basis for directing further investigations on this issue.
- [49] I accept Dr. Silver's assessment of the OCF-18 proposal and find that the applicant has not demonstrated on the balance of probabilities that the OCF-18 plan for a physiatry assessment is reasonable or necessary.

Physiotherapy Treatment Plan

- [50] I find that the December 8, 2020 physiotherapy treatment plan for \$1,988.79 by Anjan Acharaya, physiotherapist and Susobhini Korakode, massage therapist, Charolais Physio & Rehab, dated December 8, 2020 is not reasonable or necessary.
- [51] In order to address the physiotherapy OCF-18, the respondent required that the applicant attend a further in-person insurer's examination by Dr. Silver. On June 1, 2021, he conducted his second in-person assessment of the applicant (45 minutes in length) and carried out a review of available documents for a report issued June 25, 2021.
- [52] One of the goals of the December 8, 2020 OCF-18 was to return the applicant to her pre-accident work activities. Dr. Silver's report of June 25, 2021, and psychologist Dr. Joel Goldberg's report of August 12, 2020²² both document

²⁰ Dr. Badwal's chart, applicant appointment of August 8, 2019. Respondent's Submissions, Tab 11.

²¹ Dr. Vijh's chart, applicant appointment of November 19, 2020, Applicant's Submissions, Exhibit B-9.

²² Respondent Submissions, TAB 7.

applicant reports of having worked prior to the accident as a supply teacher (occasional contract work). This contract ended in June 2019 and the applicant was not working at the time of the July 2019 accident. She remained unemployed until December 2019 when she started a part-time teaching contract, and then, as reported to Dr. Silver, began a full-time contract in September 2020. It appears that the applicant's work activity increased rather than decreased, since the 2019 accident.

- [53] Another of the goals identified for the physiotherapy treatment plan was to return the applicant to pre-accident functional status. However, the evidence before the Tribunal does not include any medical documentation of the applicant's pre-accident status. As noted earlier, it does not appear that the applicant complied with a production order for records pertaining to her pre-accident health (apart from providing the respondent with one year, rather than three years of records from her family physician) and no pre-accident records are before the Tribunal.
- [54] In neither of his insurer examination reports (July 27, 2020 and June 25, 2021) did Dr. Silver find objective evidence of ongoing accident-related musculoskeletal injury or impairment. He was of the opinion that the applicant had reached maximum medical improvement from her July 29, 2019 injury.
- [55] In addition, with regard to the efficacy of additional physiotherapy treatment, family physician charting of February 19, 2021 included an applicant report that physiotherapy treatment did not provide relief for the neck and shoulder pain which she had for four years.²³
- [56] I find that the applicant has not demonstrated on the balance of probabilities that the proposed the physiotherapy treatment plan is reasonable and necessary.

In-Home Assessment

- [57] At issue is an OCF-18 for an in-home assessment for \$1,595.49 by Pawan Chopra, occupational therapist, and Larysa Mihailava, chiropractor, of Unison Medical Assessments, dated May 8, 2020 and denied by the respondent on May 25, 2020.
- [58] While the applicant submits that the proposed treatment plan be approved because of impairments in the applicant's activities of daily living, the respondent submits that the evidence does not support the reasonableness and necessity of

²³ Applicant Submissions, Exhibit B-9.

the home assessment. Given that the applicant is no longer under the Minor Injury Guideline, I find it unnecessary to address these submissions.

- [59] In denying the OCF-18 for an in-home assessment, the respondent relied on section 25(2) of the *Schedule*, which provides that an insurer is not required to pay for an examination conducted in a person's home unless they have sustained an impairment that is not a minor injury. This decision was made by the respondent on May 25, 2020. At that time the applicant was still within the Minor Injury Guideline.
- [60] Subsequently, in August 2020, the respondent accepted that that the applicant's psychological impairment removed her from the Minor Injury Guideline.
- [61] Section 25(1) of the *Schedule* states that an insurer shall pay for "reasonable fees charged by an occupational therapist or a registered nurse for preparing an assessment of attendant care needs under section 42, including any assessment or examination necessary for that purpose." The minor injury exception to this requirement under section 25(2) no longer applies because the applicant has been removed from the Minor Injury Guideline.
- [62] Being outside of the Minor Injury Guideline, the applicant is statutorily entitled to the in-home assessment: whether the assessment proposed is reasonable and necessary is not a relevant screen for determining entitlement in these circumstances.
- [63] While the applicant did not request that the OCF-18 for an in-home assessment be reconsidered by the respondent upon her removal from the Minor Injury Guideline, the respondent has an ongoing duty to adjust the file.
- [64] As the applicant is no longer within the Minor Injury Guideline and as the requirement for a home-assessment is non-discretionary under section 25 when a person is not within the Minor Injury Guideline, the applicant is entitled to an in-home assessment.

Psychological Treatment Plan

- [65] The psychological treatment plan in the OCF-18, in the amount of \$3,866.00 was partially approved by the respondent for \$2,178.31. The applicant is contesting the difference of \$1,687.69.
- [66] The OCF-18 proposed that a registered psychotherapist, rather than a registered psychologist deliver the bulk of the proposed treatment plan. The respondent has different hourly rates for the two regulated professions. The respondent's

decision not to fund the entire amount identified in the OCF-18 was not based on entitlement to treatment but due to the service provider rate assigned by the respondent for registered psychotherapist identified in the treatment plan.

- [67] On August 17, 2020, the respondent notified the applicant that its hourly rate for psychologists was \$149.61 while its hourly rate for psychotherapists was \$58.19, with the proviso that a “provider can call to discuss rate.” The hourly rate proposed for the psychotherapist was the same as the guideline for “Counsellor/Therapist/Unregulated provider.”²⁴
- [68] While psychotherapists are now a regulated health profession, the qualifications for registration as a psychotherapist are substantially different than the qualifications for registration as a psychologist.²⁵ Therefore, it cannot be assumed that an individual who is registered as a psychotherapist has demonstrated education, training and/or experience at a level equivalent to that of an individual who has been registered as a psychologist.
- [69] There is no indication of guidelines for the calculation of hourly rates of registered psychotherapists beyond the basic service provider rate in the FSCO Professional Services Guideline.²⁶ While it would be preferable to have such guidelines, it is not unreasonable for the respondent to address the hourly rates for psychotherapists on a case-by-case basis.
- [70] The applicant has not suggested that the respondent has been provided with educational and/or experiential qualifications of M. Motamedlangroudi, the registered psychotherapist identified in the treatment plan, warranting payment beyond the basic service provider rate.
- [71] As the evidence does not demonstrate that Ms. Motamedlangroudi is entitled to be paid at the same service provider rate as a registered psychologist, I find that the applicant is not entitled to the balance of \$1,688.09 (\$3,866.40, less \$2,178.31 approved) for the treatment plan for psychological services.

Interest

²⁴ Respondent Submissions, TAB 28.

²⁵ See registration requirements for the respective professions: Regulation 67/15 made pursuant to the *Psychotherapy Act, 2007*, Statutes of Ontario, 2007 c 10, Sch R, and Regulation 74/15 made pursuant to the *Psychology Act, 1991*, Statutes of Ontario, 1991, c. 38

²⁶ Financial Services Commission of Ontario, Superintendent’s Guideline No. 03/14, September 2014.

[72] Section 51(1) of the *Schedule* states that “an amount payable in respect of a benefit is overdue if the insurer fails to pay a benefit within the time required under this regulation”.

[73] In this case, the only benefit payable is for an OCF-18 for an in-home assessment. This became retroactively payable as a result of the change of the applicant’s status with regard to the Minor Injury Guideline. Given the respondent’s continuing responsibility to adjust the file, I have found that the applicant became entitled to the in-home assessment upon being removed from the Minor Injury Guideline and interest accrues from that date forward.

Award

[74] The applicant is seeking an award under section 10 of Regulation 664 for unreasonably withheld or delayed payments to the applicant.

[75] The respondent has pointed out that the applicant’s submissions for an award identify Intact Insurance Company as the insurer, not the respondent, Aviva; that an award was not identified as an issue in dispute at the Case Conference and raised for the first time in the applicant’s hearing submissions; and the applicant has not provided particulars in support of her bald accusation of noncompliance with section 38(8) thus disabling the respondent from providing a meaningful response.

[76] While a request for an award can conceivably be raised at any stage in the adjudicative process, the request must still comply with standards for procedural fairness. Even overlooking the applicant’s error in referencing the wrong insurance company, the applicant has not explained why she did not seek to add the issue of the award until her hearing submissions and no factual particulars in support of the award were provided by the applicant.

[77] The claim for the award must fail as the respondent has not been provided with an opportunity to provide a meaningful response.

[78] The award claim is dismissed.

Costs

[79] The applicant submits that she is entitled to costs because she alleges that the respondent has acted unreasonably, frivolously, vexatiously, or in bad faith as per Rule 19.1 of the Tribunal’s *Rules*. The respondent submits that the insurer has acted in good faith at all material times and submits that the applicant has failed to produce evidence in support of this allegation.

[80] Rule 19.2 requires that “A submission on costs shall set out the reasons to the request and the particulars of the other party’s conduct that are alleged to be unreasonable, frivolous, vexatious, or in bad faith.” The applicant has not done so.

[81] The request for a costs order is dismissed.

ORDER

[82] I find that:

- a. The applicant is not entitled to \$1,999.91 for chronic pain assessment plan as it is not reasonable and necessary;
- b. The applicant is not entitled to \$2,000.01 for a physiatry assessment plan as it is not reasonable and necessary;
- c. The applicant is not entitled to \$1,988.75 for a physiotherapy treatment plan as it is not reasonable and necessary;
- d. The applicant is statutorily entitled to \$1,595.49 for an in-home assessment plan from the date of her removal from the Minor Injury Guideline;
- e. The applicant is not entitled to \$3,866.40, less \$2,178.31 approved by the respondent, for a psychological treatment plan as the treatment plan is not in compliance with the respondent’s service rates;
- f. The applicant is entitled to interest for the in-home assessment, from the date that she was removed from the Minor Injury Guideline;
- g. The applicant’s request for an award under Regulation 664 is dismissed; and,
- h. The applicant’s request for costs is dismissed.

Released: August 10, 2022



Taivi Lobu
Adjudicator