



**Citation: Francis v. Aviva Insurance Company of Canada, 2023 ONLAT 21-000714/AABS**

**Licence Appeal Tribunal File Number: 21-000714/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:

**Andy Francis**

**Applicant**

and

**Aviva Insurance Company of Canada**

**Respondent**

**DECISION**

**VICE-CHAIR:**

**Monica Ciriello**

**APPEARANCES:**

For the Applicant:

Maziar Mortezaei, Counsel

For the Respondent:

Jennifer Cosentino, Counsel

**HEARD:**

**By way of written Submissions**

## OVERVIEW

- [1] Andy Francis, the applicant, was involved in an automobile accident on February 5, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “Schedule”). The applicant was denied benefits by the respondent, Aviva Insurance Company of Canada, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

## PRELIMINARY ISSUE

- [2] The respondent submits that the applicant did not comply with the deadlines outlined in the August 5, 2021, Case Conference and Order (“Order”). The Order set a deadline of February 4, 2022, to exchange all documents that the parties intended to present as evidence at the hearing. The deadline was agreed to by both parties.
- [3] The respondent provides that the submissions in Tabs 5, 9, and 12 of the Applicant’s Book of Documents were submitted after the deadline and should be excluded from evidence. The respondent submits that the applicant had numerous years to produce evidence and to do so beyond the production deadline is prejudicial and procedurally unfair.
- [4] The applicant’s position was that he requested that the respondent provide a list of production requests to substantiate the claim before the Tribunal. The applicant submits that the respondent failed to request any additional documents, and therefore it was the applicant’s understanding that the respondent was in possession of all relevant documents.
- [5] I find that Tab 5 “Dr. Meglis” Updated CNRs, various dates,” Tab 9 “Health Pro Wellness (HPW) CNRs, various dates” and Tab 12 “Attendant Care Benefits Invoices and PSW Certificate, various dates” were disclosed after the production deadline and will be excluded from the evidentiary record pursuant to Rule 9.4 of the common *Rules of the Licence Appeal Tribunal, Animal Care Review Board and Fire Safety Commission (effective October 2, 2017)* (“Common Rules”).
- [6] The late disclosure is contrary to the deadlines outlined in the Order dated August 5, 2021. The parties were to exchange all documents they intended to rely upon at the hearing by February 4, 2022.
- [7] I am not persuaded by the applicant’s explanation for the delay in production, that it is the respondent’s responsibility to advise whether any further productions

are required to substantiate the applicants claim. But rather I find that it is the applicant's responsibility to comply with the Order.

- [8] By failing to comply with the production deadline, the applicant has failed to abide by the previous Order, which falls directly within the ambit of Rule 9.4, as the respondent would be prejudiced by the late disclosure of evidence. In my view, inclusion of the late disclosure would compromise the procedural fairness of the hearing pursuant to Rule 3.1(a). When I consider this potential unfairness, I am persuaded that Tabs 5, 9, and 12 of the Applicant's Book of Documents shall be excluded from the record.

## ISSUES

- [9] The issues in dispute are:
- i. the applicant entitled to attendant care benefits ("ACB") of \$1,099.69 per month from May 31, 2019, to date and ongoing?
  - ii. Is the applicant entitled to \$2,456.00 for physiotherapy treatment, proposed by Health Pro Wellness in a treatment plan ("OCF-18") dated June 11, 2019?
  - iii. Is the applicant entitled to \$2,197.29 for psychological services, proposed by Health Pro Wellness in OCF-18 dated June 9, 2019?
  - iv. Is the applicant entitled to \$3,543.48 for an assistive devices attendant care assessment, proposed by Health Pro Wellness in OCF-18 dated June 11, 2019?
  - v. Is the applicant entitled to \$3,130.76 for physiotherapy treatment, proposed by Health Pro Wellness in OCF-18 dated August 28, 2019?
  - vi. Is the applicant entitled to \$2,624.93 for physiotherapy treatment, proposed by Health Pro Wellness in OCF-18 dated on November 14, 2019?
  - vii. Is the applicant entitled to \$2,153.84 for physiotherapy treatment, proposed by Health Pro Wellness in OCF-18 dated on March 7, 2020?
  - viii. Is the respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?
  - ix. Is the applicant entitled to interest on any overdue payment of benefits?

## RESULT

[10] I find that:

- i. The applicant is not entitled to ACB.
- ii. The applicant is not entitled to OCF-18s for physical therapy.
- iii. The applicant is not entitled to OCF-18 for psychological services.
- iv. The applicant is entitled to OCF-18 for assistive devices.
- v. The applicant is not entitled to an award.
- vi. The applicant is entitled to interest on any overdue payment of benefits.

## ANALYSIS

### ***The Applicant is not entitled to an ACB***

- [11] The applicant is not entitled to an ACB in the amount of \$1,099.69 per month from May 31, 2019, to date and ongoing.
- [12] Under section 19(1) of the *Schedule*, an insurer must pay for reasonable and necessary ACBs incurred by or on behalf of the insured person as a result of the accident.
- [13] Section 42(1) of the *Schedule* provides that an applicant for an ACB must be in a form of, and contain the information required to be provided in, the version of the document entitled Assessment of Attendant Care Needs (“Form 1”).
- [14] Section 3(7)(e) of the *Schedule* provides that a person has “incurred” an expense if they have received the goods or services to which the expense relates; paid the expense, promised to pay the expense, or otherwise legally obligated to pay the expense.
- [15] The applicant submits that he is entitled to ACB because his accident-related injuries were serious and chronic, preventing him from conducting daily activities. To establish the applicant sustained serious and chronic injuries the applicant relies on various medical records and the Disability Certificate (“OCF-3”). To establish the need for an ACB the applicant relies on OCF-6s, Attendant Care Report and Form 1. The Form 1 dated June 25, 2019, prepared by Mr. Julian Amchislavsky, occupational therapist opined that the applicant required attendant care needs for 14.83 hours/week at a cost of \$1,099.69 per month due.

- [16] I am persuaded by the myriad of the respondent's submissions.
- [17] The respondent relies on the section 44 report by Ms. Margaret Ramsay, occupational therapist dated November 12, 2019, which is supported by the diagnoses of Dr. Gilbert Yu Ming Yee, orthopaedic surgeon, who diagnosed the applicant with soft tissue injuries and Dr. Rod Day, psychologist, who did not diagnose a psychological impairment. The report provides that post-accident the applicant continues to work full-time hours as a parts driver, working the same hours as pre-accident. As well as the applicant demonstrated adequate functional abilities to perform basic self-care tasks. Ms. Ramsay opined a zero quantum for the monthly ACB.
- [18] The respondent also relies on section 42(5) of the *Schedule*, that an insurer may pay but is not required to pay an expense incurred before an assessment of attendant care needs submitted to the insurer, submitting that the applicant submitted expenses supposedly incurred prior to the submission of the section 25 report. I find that without a reasonable explanation, pursuant to section 34, the applicant is not entitled to any potential retroactive benefits.
- [19] Furthermore, the I find that the evidence for ACB before me is incomplete. The OCF-6s submitted by the applicant indicated the service period, hours, rate of pay and activities performed. I find that the OCF-6s lack specificity and detail, it does not provide the specific dates of care, the specific hours per day or per week, the specific time per activity or a signature of the personal support worked. Insufficient information on the level of care provided, raises a doubt about whether this benefit was incurred pursuant to section 3(7)(e). Given the above, I agree with the respondent, and find that the evidence before me does not support a finding that the services were incurred.
- [20] Given the totality of the evidence, I cannot conclude that the applicant has met his onus in relation to the ACB. Therefore, the applicant's ACB claim is denied.

### ***Treatment Plans***

- [21] Section 14 and 15 of the *Schedule* provides 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.
- [22] The applicant bears the onus of proving his entitlement to the claimed treatment and assessments by proving they are each reasonable and necessary on a balance of probabilities.

***OCF-18s, dated June 11, 2019, November 14, 2019, August 28, 2019, and March 7, 2020, for physical therapy***

- [23] I find that the applicant has not met his burden for the four physical therapy OCF-18s.
- [24] The applicant made joint submissions for all four physical therapy OCF-18s covering treatment for physiotherapy, massage, and chiropractor treatments submitting that all are reasonable and necessary. It is the applicants position that the OCF-18s have goals of pain reduction, increase range of motion, increase strength, and help return the applicant to his pre-accident activities of life. The applicant also relies on the clinical notes and records (“CNRs”) of Dr. Gus Meglis, family physician, who advised the applicant eight days after the accident to continue with physiotherapy.
- [25] The OCF-18 dated June 11, 2019, in the amount of \$2,456.00 recommended 20 chiropractic sessions over the course of 10 weeks. The respondent relies on the section 44 report of Dr. Yee to partially approve the OCF-18. Dr. Yee’s ultrasound findings of the right shoulder, other than some tenderness on the palpation, the applicant had full range of motion. Dr. Yee recommended four sessions to assist the applicant from facility-based treatment to a home exercise program, and the respondent partially approved \$651.20 of the \$2,456.00 total.
- [26] The OCF-18 dated March 7, 2020, in the amount of \$2,153.84 recommended 12 sessions of manipulation, 12 sessions of exercise, and 12 sessions of therapy. The respondent denied the OCF-18 as per the opinion of Dr. Yee.
- [27] The OCF-18 dated November 14, 2019, in the amount of \$2,624.93 recommended 14 sessions of manipulation, 14 sessions of exercise therapy, 14 sessions of therapy, and 5 sessions of massage therapy with a massage therapist. The respondent denied the OCF-18 as per the opinion of Dr. Yee.
- [28] The OCF-18 dated August 28, 2019, in the amount of \$3,130.76 recommended 18 sessions of chiropractic treatment, exercises and therapy with three different chiropractors. The respondent denied the OCF-18 as per the opinion of Dr. Yee.
- [29] Previous Tribunal decisions have consistently held that an OCF-18 by itself does not amount to evidence sufficient to discharge the applicant’s burden of proving that the disputed treatment is reasonable and necessary, as that would be tautological. I agree with this reasoning and apply it here. I am satisfied that the respondent provided four additional sessions to assist the applicant transition to a home exercise program, and the evidence before me is not persuasive that

the applicant would benefit from additional physical therapy. Furthermore, I remain unclear as to why there are various chiropractors required to provide various sessions on the applicant.

- [30] The applicant's evidence is insufficient to demonstrate that the physical therapy OCF-18s are reasonable and necessary.

***OCF-18 dated June 9, 2019 in the amount of \$2,197.29 for Psychological Services***

- [31] I find that the applicant has not met his burden and is not entitled to the OCF-18 for psychological services.
- [32] The applicant submits that the OCF-18 completed by Dr. Fahimeh Aghamohseni, psychologist for a psychological assessment is both reasonable and necessary. The OCF-18's goal is to determine the extent of his psychological impairments and recommend appropriate treatments with the goal of restoring the applicant's pre-accident psychological functioning. The applicant relies on the pre-screen psychological interview by Dr. Aghamohseni, psychologist who opined that he is an individual in need of psychological assistance. The applicant also references CNRs of Dr. Okhravi, family physician, that provides reference to psychological issues, however the applicant's book of documents index is absent of CNRs of Dr. Okhravi.
- [33] I am persuaded by the submissions of the respondent, that relies on the section 44 report of Dr. Day, who opined that there is no current accident-related psychological impairment and found that the OCF-18 was not reasonable and necessary. In the report, Dr. Day did note mild symptoms of low mood, which the applicant attributed to the loss of his close family members, including his brother.
- [34] I find that there is no compelling evidence before me that the applicant had made accident-related psychological complaints warranting a pre-screening psychological interview of Dr. Agamohseni, who also completed the OCF-18. Furthermore, a review of the CNRs of Dr. Meglis did not reveal vehicular anxiety issues or other psychological complaints and the OCF-3 submitted by the applicant did not list psychological injuries.
- [35] I do not find that the OCF-18 is reasonable and necessary as the accident-related psychological symptoms do not warrant further assessment or psychological intervention.

***OCF-18 dated, June 11, 2019, in the amount of \$3,543.48 for Assistive Devices***

- [36] I find that the applicant has met his burden and is entitled to the remainder of the \$3,543.48 for assistive devices. The OCF-18 was partially approved in the amount of \$239.54 (\$3,303.94 outstanding).
- [37] The OCF-18 recommends assistive devices such as a massager, cervical collar, cervical pillow, back support, vacuum cleaner, hot/cold gel packs, heating pads, long shoehorn, TENS unit, shower hose/head and an education session. The goal of the OCF-18 is to reduce pain, increase strength and range of motion to allow the applicant to return to activities of normal living.
- [38] I am persuaded by the applicant's submissions that the assistive devices are reasonable and necessary as opined by Mr. Amchislavsky, occupational therapist. Dr. Yee's section 44 report also found that that the OCF-18 to be partially reasonable and necessary. I place weight on the evidence before me, including the opinion of Mr. Amchislavsky, the section 44 report by Ms. Ramsay and Dr. Yee, that the assistive devices would assist with pacing or task modification providing the applicant pain relief. The cumulative evidence before me demonstrates that the assistive devices are reasonable and necessary.
- [39] Furthermore, the applicant submits that the respondent did not meet its obligations under s. 38(8) of the *Schedule*, when it failed to provide sufficient explanations when it denied OCF-18. I agree with the applicant, s. 38(8) is to achieve its purpose, it must require the respondent to accompany any denial of benefits with meaningful and accurate reasons.
- [40] I find that the OCF-18 is reasonable and necessary, and the applicant is entitled to it in the remaining amount of \$3,303.94.

***Award***

- [41] Section 10 of Regulation 664 provides that an award may be granted if the respondent unreasonably withheld or delayed payments.
- [42] While the respondent denied the claim, I cannot conclude that it did so unreasonably. There applicant is not entitled to an award.

***Interest***

- [43] Section 51 of the Schedule states that interest is due on a benefit that is overdue if the insurer does not pay the benefit within the time stated by the *Schedule*.




[44] As I have found benefits payable, it follows that interest applies on any overdue payments of benefits.

**ORDER**

[45] I make the following order:

- i. The applicant is not entitled to ACB.
- ii. The applicant is not entitled to OCF-18s for physical therapy.
- iii. The applicant is not entitled to OCF-18 for psychological services.
- iv. The applicant is entitled to OCF-18 for assistive devices.
- v. The applicant is not entitled to an award.
- vi. The applicant is entitled to interest on any overdue payment of benefits.

**Released: May 9, 2023**

  
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**Monica Ciriello**  
**Vice-Chair**