**Citation: Anthony v. Aviva General Insurance, 2023 ONLAT 20-006549/AABS**

**Licence Appeal Tribunal File Number: 20-006549/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:

**Rayel Anthony**

**Applicant**

and

**Aviva General Insurance**

**Respondent**

# DECISION

**ADJUDICATOR:** **Stephanie Kepman**

**APPEARANCES:**

For the Applicant: Brennan Kahler, Counsel
Lane Foster, Counsel

For the Respondent: Jennifer Cosentino, Counsel

**HEARD:** **In writing**

## OVERVIEW

[1] Rayel Anthony (the "applicant") was involved in an automobile accident on July 12, 2018, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The applicant was denied benefits by Aviva General Insurance (the "respondent") and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for the resolution of the dispute.

## ISSUES

[2] The issue(s) in dispute is/are:

i. Is the applicant entitled to attendant care benefits in the amount of $1,897.16 per month from December 12, 2018, to date an ongoing?

ii. Is the applicant entitled to $4,589.12 for physiotherapy, proposed by Rehab First in a treatment plan ("plan") dated October 23, 2019?

iii. Is the applicant entitled to $4,268.00 for medication expenses proposed by Nadine Thomas in a plan dated April 18, 2019?

iv. Is the applicant entitled to $690.64 for medication expenses proposed by Cann Trust in a plan dated November 19, 2018?

v. Is the applicant entitled to $2,046.00 for medication expenses proposed by Cann Trust in a plan dated March 20, 2019?

vi. Is the applicant entitled to $6,358.50 for occupational therapy services proposed by Nadine Thomas in a plan dated April 25, 2019?

vii. Is the applicant entitled to $9,296.50 for home modifications proposed by Ashley MacDonald in a plan dated May 17, 2020?

viii. Is the applicant entitled to $10,735.00 ($28,085.00 less approved amount of $17,350.00) for catastrophic impairment assessments?

ix. 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?

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

## RESULT

[3] The applicant withdrew issue viii related to the catastrophic impairment assessments.

[4] The applicant is not entitled to the attendant care benefits in the amount of $1,897.16 per month from December 12, 2018, to date and ongoing, as they are found not to be reasonable and necessary.

[5] The applicant is not entitled to $4,589.12 for physiotherapy, as this treatment plan (“OCF-18”) is not reasonable and necessary.

[6] The applicant is not entitled to $4,268.00 for medical cannabis, as this OCF-18 is not reasonable and necessary.

[7] The applicant is entitled to $597.80 and not $690.64 for medical cannabis, as this Expense Claim Form (“OCF-6 “) is reasonable and necessary.

[8] The applicant is entitled to $340.88 for medical cannabis, as this OCF-6 is reasonable and necessary.

[9] The applicant is entitled to $1,541.32 for medical cannabis, as this OCF-6 is reasonable and necessary.

[10] The applicant is entitled to $6,358.50 for occupational therapy services, as this OCF-18 is reasonable and necessary.

[11] The applicant is not entitled to $9,296.50 for home modifications, as this OCF-18 is not reasonable and necessary.

[12] The applicant is entitled to interest on the outstanding issues in dispute, meaning the amounts of $597.80, $340.88 and 1,541.32 for medical cannabis, and to $6,358.50 for occupational therapy services.

[13] The applicant is not entitled to an award.

## ANALYSIS

### *The applicant is not entitled to attendant care benefits*

[14] Section 19 of the *Schedule* states that an insurer shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of an accident for attendant care benefits services (“ACB”s) provided by an aide or attendant. Section 42(1) of the *Schedule* provides that an application for ACBs

must be in the form of, and contain the information required to be provided in, the approved document entitled Assessment of Attendant Care Needs ("Form-1").

[15] The applicant submits that the ACBs are reasonable and necessary; therefore, she is entitled to ACBs. The respondent disagrees.

[16] The applicant relies on the Occupational Therapy Assessment Report and Form 1 of Joliane Jutras, occupational therapist, both dated December 5, 2018. Ms. Justras found that the applicant required attendant care to assist her with her grooming, meal preparation, assistance with driving at night, supervision when walking to school, assistance with laundry, cleaning, emotional support, and cueing for exercise. Ms. Justras recommended the applicant receive 1814 minutes of care per week.

[17] The applicant also relies on the Future Cost of Care Report dated September 13, 2020, and Form 1 dated July 20, 2020, of Marla Tennen, rehabilitation registered nurse. Ms. Tennen recommended that the applicant receive attendant care to assist her with dressing/undressing, grooming and hygiene, exercise, administration/maintenance of medications, meal preparation, mobility, bathing, and maintenance of supplies and equipment. Ms. Tennen recommended the applicant receive 3064 minutes of attendant care per week.

[18] The respondent relies on its Occupational Therapy In-Home Insurer's Examination ("IE") of Joseph Morgan, occupational therapist, dated September 30, 2019, which found that the applicant was recovering from her injuries, independent with her tasks and activities of daily living ("ADL"s), and did not require ACBs. The applicant did report taking longer with her tasks.

[19] The respondent also relied on its IE of Dr. Joel Maser, Internal Medicine specialist, which found that the applicant did not suffer from an objective, physical impairment as a result of the accident.

[20] The respondent was also critical of Ms. Jutra's findings, as she relied on "non-standardized testing methods" such as the Headache Impact Test ("HIT6"), the Brain Injury Vision Symptom Survey ("BIVSS") and Generalised Anxiety Disorder Assessment ("GAD-7") and submits these findings are subjective and not an objective way of determining injuries or impairments. The respondent submits the report of Mr. Morgan should be preferred, as it relied on objective metrics.

[21] The respondent also notes that the applicant's contemporaneous evidence from her family doctor, Dr. David Barr, physician, did not note Ms. Jutras's findings nor provide evidence that supports the applicant's need for ACBs.

[22] Finally, the respondent concludes that ACBs are not payable during the applicant's period of non-compliance with sections 42 and 44 of the *Schedule*. The respondent submits the applicant failed to attend a properly scheduled IE of April 1, 2019, and therefore, it suspended her ACBs effective April 1, 2019. The applicant did eventually attend the required IE on July 4, 2019, with Mr. Morgan.

[23] The applicant was critical of the respondent's position regarding Dr. Maser's IE and noted that his specialty was not relevant to the issue in dispute, as his specialty addresses diseases of the organ systems and chronic illnesses.

[24] I find that the applicant is not entitled to ACBs from the period of December 12, 2018, until April 1, 2019. I was not persuaded by the evidence of Ms. Jutras, which noted the applicant's struggles with completing tasks due to her neck pain, headaches and concussion symptoms. I would have expected this evidence to be supported by Dr. Barr, the applicant's primary care provider, but it was not.

[25] Moreover, the applicant, who carries the burden of proof, offered little objective evidence to support her position. I also put less weight on Ms. Jutras' findings that were made based on non-standardized testing. I agree with the respondent that these findings are based on subjective-self reporting and not objective data. I made this conclusion based on reviewing the report and finding that the data related to these tests was titled "non-standardized testing."

[26] I agree with the respondent and find that the applicant is not entitled to ACBs for the period of non-compliance, from April 1, 2019, until July 4, 2019. As noted by the respondent, the applicant had previously rescheduled this IE and did not provide submissions to explain her failure to comply with the *Schedule.*

[27] I put little weight on Dr. Maser's findings regarding the applicant's ACBs, as they did not specifically comment on the issue in dispute.

[28] I also find that the applicant is not entitled to the ACBs from July 4, 2019, to date and ongoing. I found Mr. Morgan's findings persuasive, as they relied on objective testing and data and were obtained in person. By contrast, I found Ms. Tennen's findings appear to be based solely on a telephone call with the applicant and relied on the applicant's subjective reports on her issues; there was no evidence of objective testing by Ms. Tennen. Moreover, Ms. Tennen's Form 1 and Report provided little explanation for her findings, while Mr. Morgan's IE did. Therefore, I preferred Mr. Morgan's findings and agree that the ACBs are not reasonable and necessary.

[29] I also agree with the respondent concerning the fact that the applicant has provided no evidence that the ACBs in dispute were incurred; therefore, she is also not entitled to them on this basis.

***The applicant is not entitled to $4,589.12 for physiotherapy***

[30] The applicant submits that the OCF-18 for physiotherapy is reasonable and necessary. The respondent disagrees.

[31] The applicant relies on disputed OCF-18 for physiotherapy of Ashley MacDonald, physiotherapist, dated October 23, 2019, which states that the goals of this treatment are to reduce the applicant's pain, increase her strength, her range of motion, manage her headache symptoms, improve her educational participation, improve her muscle endurance and assist her in returning to her active lifestyle. Ms. MacDonald opined that the applicant's symptoms were being aggravated by her return to school and prolonged sitting.

[32] The OCF-18 states that it will provide the applicant with provide the following services and their cost:

a) Completion of the OCF-18 - $200.00;

b) Physiotherapy Services- inclusive of 2 sessions weekly for a total of 24 sessions, consultation with rehabilitation team including family physician, prep and planning, documentation, etc. - $2,992.50;

c) Provider Travel Time - $1,197.12, and;

d) Progress Report - $199.50.

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Total $4,589.12

[33] The applicant also relies on the Neurological Medical Assessment Report of Dr. Vincenzo Basile, neurologist, dated May 21, 2020. Dr. Basile found that the applicant required physiotherapy services to maximize her chances of fully improving. Dr. Basile also comments that the applicant's soft-tissue injuries have likely developed into chronic pain syndrome, which could be a barrier to her recovery.

[34] The applicant also relies on the Future Cost of Care Report dated September 13, 2020, of Ms. Tennen, which recommends that the applicant receive consistent physiotherapy for her headaches and pain to help the applicant function.

[35] The applicant also noted that she was diagnosed with chronic pain by Dr. Jack Ferrari, psychologist, in his Psychological Assessment dated February 4, 2019, and recommended that the applicant requires ongoing occupational and physiotherapy.

[36] The applicant echoed her concerns regarding Dr. Maser and his specialty and submits little to no weight should be placed on his findings. Instead, the applicant submits that the findings of Dr. Jihad Abouali, neurosurgeon, which was undated, and formed part of the Catastrophic Impairment Calculation/ Determination, should be preferred. Dr. Abouali diagnosed the applicant with a whiplash-associated disorder II ("WAD-II"), a lumbar strain with L5 radiculopathy, a right knee strain with possible meniscal injury and a left forearm strain/contusion that has resolved. The applicant submits these diagnoses show that the applicant has suffered an impairment as a result of the accident.

[37] The applicant also relies on the Orthopaedic Medical Assessment Report of Dr. Ken Fern, orthopaedic surgeon, dated September 16, 2020. Dr. Fern found that the applicant had developed chronic pain as a result of the accident, which has impacted her physical functioning with impairments that will be permanent. Dr. Fern found that the applicant was impaired with respect to standing, bending, lifting and twisting and other physical manoeuvring.

[38] The applicant also relied on the Chronic Pain Medical Assessment Report of Dr. Mark Friedlander, anesthesiologist, conducted on July 12, 2020. Dr. Friedlander found that the applicant suffers from chronic pain syndrome and chronic pain based on the American Medical Association Guides to the Evaluation of a Permanent Impairment, 4th edition ("AMA Guides"). Dr. Friedlander found that the applicant found the applicant met the criteria for chronic pain syndrome because of the:

"•Duration (Chronicity)
• Verbal or non-verbal behavioural changes
• Need for medication
• Psychological impairment
• Dysfunction and impairment
• Immobilisation and avoidance of activity
• Multiple consultations and investigations
• Dependence on others and/or on passive physical therapy."

[39] Dr. Friedlander also notes that passive therapies may be helpful, but active modalities were encouraged.

[40] The respondent relies on the IE of Dr. Maser, which opined that given that the applicant had participated in eleven months of passive therapy and presented

with no anatomical or musculoskeletal abnormalities, the applicant had achieved maximum medical recovery and the OCF-18 was not reasonable and necessary. The respondent also argued that Dr. Maser considered an OCF-18 of June 5, 2019, which contained a nearly identical set of treatments, that was also denied by the respondent and not appealed to the Tribunal.

[41] The respondent also relies on the CNRs of Dr. Barr dated September 18, 2018, which noted that the applicant had returned to her educational studies as of September 4, 2018. Based on this, the respondent submits that the applicant has not shown that her physical impairments impacted the applicant's school attendance and that she requires the requested OCF-18.

[42] The respondent also relies on the IE of Mr. Morgan, where it was noted that the applicant attends the gym weekly, is enrolled in school, is independent with her personal care, cares for 2 dogs and engaged in family and social interactions.

[43] The respondent also notes that based on Ms. Tennen's note of October 15, 2019, she supported that the applicant's return to her community gym.

[44] Finally, in terms of the applicant's submissions regarding chronic pain, the respondent submits that chronic pain does not equate an impairment under the *Schedule.* The respondent submits that the applicant's contemporaneous CNRs show that she does not suffer an impairment which requires ongoing physiotherapy.

[45] I find that the applicant is not entitled to the physiotherapy services. I did not find the disputed OCF-18 itself persuasive that the physiotherapy was reasonable and necessary. Instead, I find that it supported that the applicant had subjective physical symptoms of pain.

[46] I agree with the applicant that as a result of the accident, she has been diagnosed with chronic pain syndrome. Although not binding on this Tribunal, the AMA Guides' criteria on chronic pain are a useful tool for determining whether a person has a chronic pain condition. I found Dr. Friedlander's findings persuasive, as they addressed the AMA Guides. Moreover, this position was supported by Dr. Fern, Dr. Ferrari and Dr. Basile.

[47] I put little weight on Dr. Ferrari's recommendations regarding physical treatment, given that this falls outside his scope of practice as a psychologist.

[48] I find that Dr. Basile and Ms. Tennen supported that the applicant required further physiotherapy to fully improve. However, I preferred the evidence of Dr.

Friedlander when considering the applicant's required ongoing treatment, given that Dr. Friedlander's specialty is diagnosing and treating chronic pain.

[49] I note that Dr. Friedlander did not specifically find passive therapy or physiotherapy necessary among his many recommendations for the applicant. This position was supported by Dr. Fern, who recommended several treatments to address the applicant's chronic pain but none of which include physiotherapy. This position was also supported by Dr. Maser.

[50] In terms of the applicant's submissions regarding Dr. Maser, though I note that the doctor's specialty is internal medicine, the doctor is still able to provide expert evidence as a physician. Therefore, I considered this when assigning weight to the doctor's evidence and assigned it some when considering the applicant's physical injuries, but less with respect to her impairments and chronic pain.

[51] I preferred the findings of Dr. Friedlander, who again, was the only chronic pain expert who specifically commented on the applicant's injuries, impairments and treatments in light of the AMA. Dr. Friedlander wrote, under the heading "physical rehabilitation techniques", that the applicant should be engaging in active modalities of muscle strengthening, and home exercises.

[52] When considering that the doctor found that physiotherapy may be helpful, I agree that this service would be reasonable. However, I do not agree that the doctor found that physiotherapy therapy was necessary. Therefore, I was not persuaded that the disputed OCF-18 is reasonable and necessary, and the applicant is not entitled to the OCF-18 in dispute.

***The applicant is entitled to the disputed Expense Claim Forms in the amounts of $597.80, $340.88 and $1,541.32, but not the Treatment Plan for medical cannabis in the amount of $4,268.00***

[53] The parties agree that the issues in dispute regarding OCF-6 expense claims are not accurately listed in the case conference and report (which was the source of my recital of the issues above at paragraph 2). The parties agree that the issues relate to the following three OCF-6s:

i. An OCF-6 dated October 31, 2018, for $690.64. This OCF-6 contained expenses totalling $597.80 for medical cannabis, which remains in dispute;

ii. A second OCF-6 for $340.88 for medical cannabis dated November 19, 2018, which is also in dispute; and

iii. A third OCF-6 dated March 20, 2019, for expenses from September 25, 2018, until March 20, 2019. The respondent submits the correct quantum in dispute is $1,541.32, and that expense submitted on the third OCF-6 relates to previously submitted expenses, namely those of September 25, October 26, 2019, of the first OCF-6 and November 9 and November 12, 2018, of the second OCF-6. The applicant did not address the issue of quantum.

[54] In addition, the parties agree that the applicant submitted an OCF-18 dated April 18, 2019, in the amount of $4,268 authored by Nadine Thomas, Occupational Therapist, who recommended that the applicant receive 6 months of medical cannabis. This OCF-18 is properly in dispute.

[55] The applicant relies on the disputed OCF-18 of Ms. Thomas, which states that the OCF-18 relates to the applicant's prescription from Dr. Barr for 3 grams of medical cannabis to manage her pain.

[56] The applicant relies on the CNR of Dr. Barr dated March 18, 2019, which prescribed the applicant cannabis to manage her "pain syndrome" as a result of the accident. The applicant also relies on the Occupational Therapy Assessment Report of Ms. Jutras, dated December 5, 2018. Ms. Jutras states that medical cannabis's purpose was to assist the applicant with her physical and emotional symptoms. Ms. Jutras also notes that the applicant reports medical cannabis assists her symptoms. The applicant notes that she has incurred all the disputed OCF-6s. The applicant also notes that medical cannabis assists her with her chronic pain.

[57] The applicant also relies on the CNR of Samantha Richardson, Occupational Therapist, dated February 7, 2020. The applicant noted that she had not consumed medical cannabis for a period of 2 weeks and felt an increase in symptoms including headaches, and increased pain and anxiety.

[58] The respondent submits that the applicant has not met her evidentiary burden with respect to the disputed OCF-6s. The respondent submits that the applicant was consuming medical cannabis before it was recommended to her. It relies on the CNR of Dr. Barr dated October 29, 2018, where the doctor recommended that the stop smoking cannabis because of her asthma.

[59] The respondent submits that the disputed OCF-18 does not provide sufficient detail about the recommended medical cannabis having already been submitted via the disputed OCF-6s or if the OCF-18 proposes to cover future cannabis. The respondent submits that without this information, the applicant cannot proceed based on section 38(2)(c) of the *Schedule,* as an insurer is not liable to pay for medical benefits before the insured person submits an OCF-18 unless the expense is reasonable and necessary for drugs prescribed by a regulated health professional.

[60] The respondent also relies on the IE of Dr. Maser, where the applicant reported using medical cannabis with no significant improvements. Dr. Maser opined that the disputed OCF-6s and OCF-8 were not reasonable and necessary from a physical perspective.

[61] The respondent also relies on the Paper Review IE of Dr. Alex Luczak, psychiatrist, dated October 18, 2019. Though Dr. Luczak was not specifically asked to comment on the disputed expenses and treatment, the doctor noted that the applicant reported consuming medical cannabis to assist with her sleep. The doctor opined that medical cannabis could increase anxiety and is not indicated to treat anxiety. Instead, the doctor proposed that the applicant would benefit from psychological counselling and medication to address her psychological issues. The respondent submits that the disputed expenses and treatment are not reasonable and necessary based on the doctor's findings.

[62] The respondent also noted that Dr. Luczak has been involved in assessing chronic pain and co-morbid psychiatric conditions. The respondent submits the doctor's opinion should be given more weight regarding the disputed issues than those of Ms. Jutras, Dr. Barr and Ms. Thomas.

[63] I find that the applicant is entitled to the disputed OCF-6s in the amounts of $597.80, $340.88 and $1,541.32. I find that the applicant is not entitled to the OCF-18 in the amount of $4,268.

[64] In terms of the quantum of the third OCF-6, after reviewing each receipt associated with the OCF-6, I agree with the respondent and am persuaded that the correct amount in dispute is $1,541.32. I am unaware why the applicant resubmitted expenses that were already addressed in the first and second OCF-6, and therefore will only address the quantum in dispute.

[65] I was persuaded that the OCF-6s for medical cannabis were reasonable and necessary. I found the opinion of the prescribing doctor, Dr. Barr, persuasive, that the medical cannabis was reasonable and necessary to address the applicant's accident-related pain. Ms. Jutras was able to capture the subjective, physical relief medical cannabis provided to the applicant, and given my findings regarding the applicant's chronic pain, it is clear to me that the applicant uses medical cannabis to address her physical pain. This position is also supported by the applicant's subjective reporting to Ms. Thomas.

[66] I did consider the respondent's argument regarding the applicant consuming cannabis before her accident as noted by Dr. Barr. However, upon a contextual analysis of Dr. Barr's CNRs, I also noted that the applicant was using cannabis before her accident to manage her anxiety and did not report pain or the need to manage pain before her accident.

[67] In terms of Dr. Maser's findings, as discussed above, though the doctor noted that the applicant did not suffer from any major physical injuries because of the accident, Dr. Maser did not take into account the applicant's chronic pain syndrome. Therefore, I found his evidence less persuasive with respect to the disputed OCF-6s.

[68] As for Dr. Luczak's findings, though I agree that the doctor did not recommend that the applicant use medical cannabis to treat her anxiety, the doctor did not comment on this expense concerning treating the applicant's chronic pain syndrome.

[69] In terms of affording Dr. Luczak's findings more weight, I see little nexus between the doctor's assessment of the applicant and her chronic pain syndrome. The doctor was not asked, nor did he provide commentary on this subject matter. Therefore, I reject this argument.

[70] In terms of the dispute OCF-18 of Ms. Thomas, I agree with the respondent in that this treatment plan was unclear about what it was recommending and was left with questions about what the OCF-18 recommended and if it related to future or past medication. As such, section 38(2)(c) of the *Schedule* may apply. Without this information as the burden is on the applicant to prove her entitlement to the OCF-18, I do not find the disputed OCF-18 reasonable and necessary.

***The Applicant is entitled to $6,358.50 for occupational therapy services***

[71] The applicant argues that the disputed OCF-18 is reasonable and necessary. The respondent disagrees.

[72] The applicant submits that the OCF-18 in dispute is for an emotional support dog, a service dog kit which includes a vest, registration card, and documentation, and pet insurance for twelve months. The applicant relies on the disputed OCF-18, authored by Ms. Thomas, which notes that the goals of the plan are to reduce the applicant's anxiety, social isolation, and sadness, and improve the applicant's sleep and engagement with her activities.

[73] The applicant relies on the CNRs of Ms. Thomas, to whom the applicant reported that after obtaining an emotional support dog, she found she was able to get 4 hours of sleep per night and assist with her anxiety. The applicant also reported to Karyne Lapensee, Occupational Therapist, during the Catastrophic Assessments conducted September 1 and 2, 2020, that the emotional support dog slept on the applicant's chest during her episode of extreme anxiety and helped her mood overall.

[74] The applicant also relies on the note of Dr. Barr dated March 18, 2019, where the doctor submits that the applicant requires an emotional support service animal to manage her mental health disorder.

[75] The respondent argues that the OCF-18 is not reasonable and necessary, and that the applicant has not met her evidentiary burden. It relies on the Paper Review IE of Dr. Luczak dated October 18, 2019, that found that the disputed OCF-18 was not reasonable and necessary. Dr. Luczak noted that there is some scientific evidence to support an emotional support animal as a treatment for psychiatric conditions.

[76] However, the doctor also noted that the applicant has not participated in psychological counselling or fully explored medication as treatment for her trauma disorders, anxiety and depression. Dr. Luczak noted that the applicant is still symptomatic and impaired as a result of the accident and that the animal may provide some symptomatic relief but is not improving her overall condition or level of impairment. Based on this, the doctor opined that the OCF-18 was not reasonable and necessary.

[77] The respondent also relies on its surveillance of the applicant based on the investigation report of Sharon Butler dated October 19, 2020. In the report, the applicant was observed in the community without her emotional support dog.

[78] The applicant submits that Dr. Luczak did not correctly apply the legal test, as the emotional support animal does not need to significantly improve the applicant's condition to be considered reasonable and necessary. Instead, she proposes that since the applicant has experienced a significant reduction in her symptoms, the OCF-18 is reasonable and necessary.

[79] In terms of Dr. Luczak's recommendation that the applicant attempt counselling and medication before the disputed OCF-18 is reasonable and necessary, the applicant argues that it is illogical. She submits that based on this train of thought, counselling would not be considered reasonable and necessary until after medications were tried first. The applicant submits that there is no legal or medical basis of force her to have drug-based treatments before the disputed OCF-18.

[80] The applicant also submits that she has attempted the recommended treatment based on the CNRs of Dr. Barr, Dr. Nicole Reist, Psychologist, and the CNRs and Psychological Assessment of Dr. Ferrari. Dr. Reist's CNRs noted that the applicant has been engaging in treatment with her since 2020.

[81] The applicant submits that Dr. Barr had prescribed the applicant medication for her psychological issues, and that Dr. Luczak did not have the applicant's medication dosage, which is not a basis to deny treatment. The applicant also submits that Dr. Farrari noted that the applicant reported participating in therapy.

[82] I find that the applicant is entitled to the OCF-18 in dispute. The applicant provided persuasive medical evidence that both Ms. Thomas and Dr. Barr specifically recommended that the applicant receive an emotional support animal

to address her accident-related anxiety. Dr. Barr's evidence provides objective support for this treatment. This position is also supported by the applicant's subjective reporting to Ms. Lapensee.

[83] The respondent did not make submissions regarding the costs associated with the disputed OCF-18, and therefore, I accepted that they were reasonable and necessary.

[84] I also note that the respondent did not make arguments that the applicant incurred the OCF-18 prior to its submission, and therefore, I accepted that there were no issues with section 38(2) of the *Schedule*.

[85] In terms of Dr. Luczak's findings, I agree with the doctor's position, namely that the applicant ought to attempt medication and counselling to address her psychological injuries before a support animal could be considered reasonable and necessary. However, I also agree with the applicant's argument that she has tried these therapies, as demonstrated by Dr. Barr's and Dr. Reist's CNRs. Though I understand Dr. Luczak's concerns regarding the applicant's continued symptomology, given she has already attempted "frontline" treatments, I find the proposed OCF-18 reasonable and necessary.

[86] Moreover, Dr. Luczak's findings are anchored on the fact that the doctor did not have the applicant's medication dosage. This information should not be a barrier to the applicant receiving the treatment that is reasonable and necessary. Therefore, I agree that the applicant has shown that the disputed OCF-18 is reasonable and necessary.

***The applicant is not entitled to the home modifications***

[87] The applicant submits that the OCF-18 in dispute for a home modification assessment is reasonable and necessary. The respondent disagrees.

[88] Section 16(1) of the *Schedule* states that rehabilitation benefits shall pay for all reasonable and necessary expenses incurred by on or on behalf of an insured person that are reasonable and necessary to reduce to eliminate the effects of any disability resulting from the impairment or to help the person reintegrate into their family, society and the labour market. Section 16(3)(i) of the *Schedule* states that these activities include home modifications and home devices that accommodate the needs of the insured person.

[89] The applicant submits that the OCF-18 for a home modification assessment consists of a document review, interviews, assessment of the applicant's home, site evaluation, analysis of the home and recommendations, budgeting, disbursements, and travel expenses to ensure that the applicant's home is safe and accessible. The applicant submits that despite the respondent's denial of this benefit, it has been incurred.

[90] The applicant relies on the OCF-18 in dispute, dated May 17, 2020, and authored by Ashley McDonald, physiotherapist. Ms. McDonald submits that the applicant requires the requested treatment to address the applicant's injuries, including concussion; cervical, thoracic and lumbar myofascial pain, dizziness, mixed headaches/post-accident migraine headaches, nausea, neck pain, upper and lower back pain, left shoulder strain, left forearm contusion/abrasion, blurred vision, balance problems, sensitivity to light and noise, concentration difficulties, memory difficulties, irritability, sleep disturbances/fatigue, emotional difficulties including anxiety and depressive symptoms, bilateral SI joint pain, difficulty reading, bodily temperature deregulations (hot and cold sweats) and diminished appetite.

[91] As such, the applicant submits that the disputed OCF-18 is reasonable and necessary to address the applicant's accident-related impairments.

[92] The respondent objects to the report of Mr. Baum being admitted into evidence. The respondent relies on the Case Conference Report and Order of Adjudicator Gosio dated April 1, 2021, which set a production deadline of December 31, 2021, and scheduled the matter to be heard by videoconference. A motion was heard by Adjudicator Makhamra on September 26, 2022, the first day of the video hearing, and adjourned the video hearing. This motion also stated that "all previous orders made by the Tribunal remain in full force".

[93] The respondent filed a Notice of Motion on September 23, 2022, requesting that the matter be heard by way of a written hearing and a subsequent Case Conference was scheduled for September 26, 2022. At the second case conference, Vice Chair Johal converted the matter to a written hearing, with the caveat that the parties had already exchanged their productions and no additional productions were required.

[94] The respondent relies on the applicant's Brief of documents filed on September 13, 2022, which did not include Mr. Baum's report. Instead, the respondent noted that this document was only provided to it on February 3, 2023, when it received the applicant's submissions for this written hearing.

[95] The respondent submits that as a result of this "trial by ambush", it was not able to respond to this evidence or have the applicant assessed via IE. Therefore, the respondent submits that this evidence should not be considered, as the applicant failed to comply with the Tribunal's Order.

[96] As a starting point, Rule 9.2 of the Tribunal's Rules requires a party to disclose all evidence that they intend to rely upon, in accordance with the Rules or as modified by a Tribunal Order. Rule 9.4 prohibits a party from relying on any such late evidence, subject to the Tribunal granting consent. Section 15(1) of the *Statutory Powers Procedure Act* allows this Tribunal to admit and consider any evidence that is relevant to the subject-matter to the proceeding. All this being

said, where late evidence is an issue, the Tribunal must consider the probative value of the evidence against the prejudicial effect its admission will have to the hearing process.

[97] After carefully reviewing the submissions and evidence of the parties, I agree with the respondent. The applicant failed to comply with the Tribunal's Order or explain why this failure occurred. Moreover, given the applicant's continuous contact with the Tribunal in Motion hearings and the second Case Conference, the applicant had ample opportunity to seek an order regarding Mr. Baum's report. Had the applicant known she would rely on Mr. Baum's report, she engaged in a positive duty to inform the respondent of this and allow it to conduct its own assessments.

[98] Moreover, given that the report was completed on March 18, 2022, I would have expected the applicant to raise this issue at the Motion Hearing of March 9, 2022, or the Case Conference of September 26, 2022. However, since the applicant failed to address this issue, I will exclude Mr. Baum's report.

[99] The respondent also submits that the applicant has not met her evidentiary burden, as she has failed to provide contemporaneous medical evidence supporting her position. The respondent relies on the CNRs of Dr. Barr, which failed to note that the applicant had issues navigating her home after her accident.

[100] The respondent also relies on the Occupational Therapy In-home IE of Joseph Morgan, occupational therapist, dated September 30, 2019. During this IE, the applicant reported headaches with visual and auditory sensitives, dizziness, and challenges swallowing, which were improving and that she was independent with most of her ADLs. Mr. Morgan conducted a second Occupational Therapy In-home IE, with the report authored on February 17, 2021. Mr. Morgan noted during his second assessment that the applicant had made huge improvements since the first assessment and was able to engage in her ADLs involving housekeeping, meal preparation, shopping, driving, and carrying purchases.

[101] These findings were supported by the applicant's third Occupational Therapy In-home assessment conducted by Danny Horban, occupational therapist, dated October 28, 2021. Mr. Hobran agreed with Mr. Morgan's second assessment findings.

[102] I find that the applicant is not entitled to the disputed OCF-18. I agree with the respondent and find that the applicant has not provided persuasive evidence that the home modification assessment is reasonable and necessary. I would have expected Dr. Barr's CNRs to reflect the position of the application regarding her accessibility needs. Moreover, I was persuaded by Mr. Morgan and Mr. Hobran's findings, which were not addressed by the applicant. Therefore, she is not entitled to the disputed OCF-18.

### *Interest*

[103] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule.* Given that I have found that the applicant is entitled to the amounts of $597.80, $340.88 and $1,541.32 for medical cannabis and occupational therapy services, interest is applicable.

### *Award*

[104] The applicant sought an award under s. 10 of *Reg. 664.* Under s. 10, the Tribunal may grant an award of up to 50 percent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits.

[105] The applicant submits that the respondent has unreasonably withheld the payments of the disputed benefits, and an award is warranted. The respondent submits that the applicant has failed to provide persuasive evidence that the denied benefits were unreasonably withheld and delayed, and that said denials were improper and not in compliance with the *Schedule*.

[106] I find that no award is warranted in this matter. I agree with the respondent, and that the applicant has failed to direct my attention to any particular instance or occasion where the respondent's adjustment of her file and its actions amounts to unreasonable behaviour. Therefore, no award is warranted.

## ORDER

[107] The applicant is not entitled to the attendant care benefits, as they are found not to be reasonable and necessary.

[108] The applicant is not entitled to the disputed physiotherapy plan, as this is not reasonable and necessary.

[109] The applicant is entitled to $597.80, $340.88 and to $1,541.32 for medical cannabis, but not the OCF-18 for $4,268.00 for medical cannabis, as the applicant has shown that some of these costs are reasonable and necessary. Interest is applicable on outstanding expenses.

[110] The applicant is entitled to occupational therapy services, as this is reasonable and necessary. Interest is applicable.

[111] The applicant is not entitled to home modifications, as this OCF-18 is not reasonable and necessary.

[112] The applicant is not entitled to an award.

**Released:** September 13, 2023

**Stephanie Kepman**
Adjudicator