



**Citation: Ali v. Motor Vehicle Accident Claims Fund (MVACF), 2023 ONLAT
21-006751/AABS**

Licence Appeal Tribunal File Number: 21-006751/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:

Emmun Sayed Ali

Applicant

and

Motor Vehicle Accident Claims Fund (MVACF)

Respondent

DECISION

VICE-CHAIR: Brett Todd

APPEARANCES:

For the Applicant: Andrew Franzke, Counsel

For the Respondent: Drew T. Higginbotham, Counsel

HEARD BY WAY OF WRITTEN SUBMISSIONS

OVERVIEW

- [1] Emmun Sayed Ali (the “applicant”) was involved in a motor vehicle accident on July 19, 2019 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”). The Motor Vehicle Accident Claims Fund (“MVACF” or the “respondent”) denied partial amounts of two treatment plans. The applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES IN DISPUTE

- [2] The following issues are in dispute:
1. Is the applicant entitled to \$146.90 (\$3,243.10 less \$3,096.20 approved) for psychological services, recommended by Meditech Medical Examinations in a treatment plan/OCF-18 denied on January 25, 2021?
 2. Is the applicant entitled to \$2,245.80 (\$2,645.80 less \$400.00 approved) for assistive devices, recommended by Meditech Medical Examinations in a treatment plan/OCF-18 denied on May 26, 2021?
 3. 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?
 4. Is the applicant entitled to interest on any overdue payment of benefits pursuant to s. 51 of the *Schedule*?

RESULT

- [3] I find that:
- i. The applicant is not entitled to the unapproved portion of the treatment plan for psychological services, as she has not demonstrated that the interpretation and transportation items in dispute are reasonable and necessary. It follows that she is also not entitled to interest.
 - ii. The applicant is partially entitled to the remainder of the treatment plan for assistive devices. She is entitled to item #2 on the list of proposed goods or services in the treatment plan (a neck massager), valued at \$250.00 plus HST, along with interest on any incurred amount. She is not entitled to the remainder of the assistive devices in dispute, or interest, as they have not been demonstrated to be reasonable and necessary.

- iii. The respondent is not liable to pay an award.

ANALYSIS

The Treatment Plans

- [4] To be entitled to a treatment plan under s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. The applicant should identify treatment goals, how these goals would be met to a reasonable degree, and that the overall costs of achieving them are reasonable.
- [5] In dispute are two treatment plans that have been partially approved by the respondent. The first is a plan for psychological services dated October 27, 2020, where the respondent has denied interpretation and transportation expenses line items due to a disagreement on the rates and payment requirements of these services. The second plan dated May 16, 2021 involves assistive devices. Here, the respondent has denied a majority of the recommended items as they have not been demonstrated to be reasonable and necessary and because they do not serve a medical purpose as required by the *Schedule*.

Is the applicant entitled to \$146.90 for psychological services?

- [6] I find that the applicant is not entitled to the remainder of this treatment plan, as she has failed to demonstrate that the interpretation and transportation expenses in dispute are reasonable and necessary.
- [7] The applicant submits that the line items of \$320.00 for interpretation (\$80.00 per hour for four hours) and \$350.00 for transportation (apparently a flat rate, as there is no explanation provided regarding how this amount was calculated) in this treatment plan for a psychological assessment are reasonable and necessary. Further, the applicant argues that these two items have been “unlawfully denied” by the respondent on the basis that they were not incurred, citing paragraph 31 in the Divisional Court decision *Aviva Insurance Company of Canada v. Danay Suarez*, 2021 ONSC 6200 as support.
- [8] Although the respondent approved the majority of this treatment plan in correspondence dated January 25, 2021, and even found that the interpretation and translation line items to be reasonable and necessary, it approved both of these expenses on a conditional basis. The interpretation services were approved at the rate of \$60.00 per hour for four hours, for a maximum total of

\$240.00. Transportation was approved at the rate of \$2.00 per KM, with the total amount not to exceed \$300.00.

- [9] In submissions, the respondent noted that it calculated the round-trip length of travel from the applicant's home to the assessment facility to be between 134 KM and 154 KM, waived the 50 KM deductible provision in s. 3(1) of the *Schedule*, and increased the per-KM expense rate from the \$0.40 per KM listed in the *Superintendent's Guideline No.04/16: Transportation Expense Guideline* to \$2.00 per KM. The respondent also requested that invoices from the providers of both services be submitted before payment would be made to the applicant. It defended this request in submissions with reference to s. 15(1) of the *Schedule*, which holds that expenses must be incurred to be payable.
- [10] I agree with the respondent. The reasoning applied by MVACF in its denial letter and in submissions seems eminently fair and reasonable, especially given its concession regarding the per-KM rate and its waiving the 50 KM deductible that the *Schedule* permits. I do not find *Suarez* to be relevant here. That decision involves Tribunal authority regarding the approval of disputed treatment plans that have not yet been incurred, a different subject to that which is before me. Moreover, *Suarez* reaffirmed at paragraph 38 that benefits must still be incurred before they become payable, rendering moot the applicant's argument that this decision requires MVACF to pay the interpretation and transportation expenses whether incurred or not.
- [11] For the above reasons, I find that the applicant is not entitled to the remaining unapproved portion of this treatment plan for psychological services.

Is the applicant entitled to \$2,245.80 for assistive devices?

- [12] I find that the applicant is partially entitled to the remainder of this treatment plan. She is entitled to item #2 (listed incorrectly on the OCF-18 as an electronic device such as a tablet or smart phone, but actually a neck massager) on the list of proposed goods or services in the treatment plan, valued at \$250.00 plus HST, along with interest on any incurred amount. She is not entitled to the remainder of the assistive devices in dispute, as they have not been demonstrated to be reasonable and necessary.
- [13] This treatment plan is for assistive devices that the applicant submits are all reasonable and necessary. She relies on the treatment plan itself, which was the result of an in-home assessment conducted on May 13, 2021, by Julian Amchislavsky, occupational therapist. This plan listed documentation support (\$200.00) along with a neck massager (\$250.00), crock pot (\$300.00), Ninja

kitchen system (\$500.00), anti-slip shower mat (\$80.00), hand-held shower head (\$150.00), electrical heating pad (\$180.00), robotic vacuum (\$700.00), cervical pillow (\$150.00), and ice/heat pack (\$50.00).

- [14] The respondent initially denied the entire plan in correspondence dated May 26, 2021, citing earlier s. 44 insurer's examination ("IE") reports that held the applicant's physical injuries to be predominantly minor in nature and that she did not require any assistive devices. However, in this letter MVACF also offered the option of attending new IEs to the applicant. She accepted, and was assessed by Andrew Phillips, occupational therapist, and Dr. Yong-Kyong Michael Ko, physiatrist. As a result of their IE reports dated December 17, 2021, the respondent sent a letter on December 30, 2021 that the treatment plan was being partially approved.
- [15] This decision was made mainly due to the report of Mr. Phillips. He found the documentation, cervical pillow, ice/heat pack, and neck massager items in the treatment plan to be reasonable and necessary, but denied the crock pot, Ninja cooking system, anti-slip shower mat, handheld shower head, and robotic vacuum as he found the applicant to not require such assistive devices given her observed level of functionality around the home. Mr. Phillips also denied the electric heating pad as he approved the ice/heat pack instead. Oddly, the respondent approved the first three items but not the neck massager, despite Mr. Phillips specifically finding it to be reasonable and necessary in his report (with the clarification that the original OCF-18 was incorrect in that it described this item as an electronic device for rehabilitation purposes such as a tablet or smart phone).
- [16] In addition, the respondent submits that the applicant is not entitled to many items in this plan because they are not medical in nature and are not referenced in the list of approved assistive devices found in s. 15(1) of the *Schedule*.
- [17] I agree with the applicant and find that she is entitled to the neck massager. Mr. Phillips noted in his report that he found this device to be reasonable and necessary for the purposes of assisting the applicant with pain management. As the respondent accepted Mr. Phillips' opinions on the other assistive devices in dispute, I see no reason to challenge his opinion here. Further, the respondent does not explain why it denied this item in either the letter dated December 30, 2021 or its written submissions, leaving me to conclude that the massager may have been omitted in error due to the incorrect description in the OCF-18 as well as Mr. Phillips not including the dollar amount of this one item in his report.

- [18] However, I do not agree with the applicant with regard to the other assistive devices. There is minimal objective evidence to support a need for them outside of the treatment plan, which is insufficient on its own to prove that they are reasonable and necessary. I prefer the report and recommendations of Mr. Phillips, who fully examined the applicant in her home, assessed her in all primary household tasks, and then reviewed each of the devices in turn in his report. I see no reason to doubt his conclusions that the applicant did not require these additional devices due to her mobility and range of motion, independence with household tasks such as cooking, and her demonstrated ability to complete bathtub transfers.
- [19] With that said, I do not concur with the respondent's views of s. 15(1) of the *Schedule*. Although such items as the robotic vacuum, crock pot, and Ninja kitchen system do not serve a medical purpose, the *Schedule* provides an allocation for such equipment at s. 15(1)(h), which refers to "other goods and services of a medical nature that the insurer agrees are essential for the treatment of the insured person." In this case, the insurer obviously does not agree that a robot vacuum and kitchen appliances are medical in nature or essential to the applicant's treatment. But to me this definition is sufficiently open-ended that it could include these apparatuses if supported by a medical practitioner who believed that such devices were essential with pain relief, medical rehabilitation, or other treatment needs.
- [20] Correspondingly, I find the applicant is entitled to item #2 (neck massager) on the list of proposed goods and services in the treatment plan, valued at \$250.00 plus HST, along with interest on any incurred amount. I further find that the applicant is not entitled to the assistive devices that comprise the remainder of this treatment plan, as she has not demonstrated them to be reasonable and necessary.

AWARD

- [21] I find that the respondent is not liable to pay an award.
- [22] Section 10 of O. Reg. 664 allows the Tribunal to award a lump sum of up to 50 per cent of the amount to which an insured person is entitled plus interest as applicable if it is found that the insurer behaved in a manner that was excessive, imprudent, stubborn, inflexible, unyielding, or immoderate, and as a result unreasonably withheld benefits.
- [23] The applicant requests an award of 50 per cent of all disputed amounts of the treatment plans, arguing that the respondent failed to adjust this file reasonably.

She submits that the respondent implicitly conceded this fact by belatedly reversing its initial denial of the assistive devices treatment plan.

- [24] The respondent denies the applicant's claims that it delayed benefits or reversed its opinion. In submissions, the MVACF notes that the applicant's inability to attend an arranged s. 44 IE psychology assessment until December 2, 2021 was the primary reason for the delay between the denial of the assistive devices treatment plan on May 26, 2021 and the partial approval on December 30, 2021. It submitted correspondence from ClaimsPro, Cira Health Solutions, and the applicant's legal representation dated June-October 2021 in support.
- [25] I agree with the respondent. The submitted correspondence shows that the applicant delayed the IE process, resulting in the seven-month gap between the denial of the treatment plan and its partial acceptance. Further, all the evidence before me indicates that MVACF fulfilled its obligations to the applicant in this matter. It seems to have responded to all claims promptly, it thoroughly assessed treatment plans with medical examinations, and it changed course with the assistive devices denial based on the opinions of its examiner. I can find no conduct here that rises to the level of warranting an award.
- [26] Accordingly, the respondent is not liable to pay an award.

ORDER

- [27] I find that the applicant is entitled to item #2 on the list of proposed goods or services in the treatment plan (a neck massager), valued at \$250.00 plus HST, along with interest on any incurred amount. She is not entitled to the remaining claims as they have not been demonstrated to be reasonable and necessary.
- [28] The respondent is not liable to pay an award.

Released: June 16, 2023

**Brett Todd
Vice-Chair**