

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Date: 2017-11-27

Tribunal File Number: 17-002814/AABS

Case Name: 17-002814 v Aviva Insurance Canada

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:

C.D.

Applicant

and

Aviva Insurance Canada

Respondent

AMENDED DECISION

ADJUDICATOR: Christopher A. Ferguson

APPEARANCES

For the Applicant: Michael Wentzel, Representative

For the Respondent: Suzanne Clarke, Counsel

HEARD in Writing on October 11, 2017

OVERVIEW

- [1] This is an Application to the Licence Appeal Tribunal (the “Tribunal”) to determine an insured person’s entitlement to statutory accident benefits.
- [2] CD, (“the applicant”) was involved in an automobile accident on January 8, 2016, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the “Schedule”).
- [3] The applicant is seeking payment for a psychological assessment and report. The respondent partially approved the assessment plan recommended but disputes the amount. The sole dispute is the plan’s cost.

ISSUES

- [4] The issues in dispute are:
1. Is the applicant entitled to a payment for the cost of examinations in the amount of \$677.93 for a psychological assessment recommended by Pilowsky Psychology Professional Corporation (“Pilowsky”) in an assessment dated April 20, 2016, denied by the respondent on May 13, 2017?²
 2. Is the respondent liable to pay an award under s.10 of *Regulation 664, Automobile Insurance*³ (“Regulation 664”) because it unreasonably withheld or delayed payments to the applicant?
 3. Is the applicant entitled to interest on overdue payments from the respondent?

FINDINGS

- [5] The applicant has not met the onus on her to prove that the amount of the claimed assessment plan is reasonable and necessary.
- [6] As a result of my finding on the substantive issue, the respondent is not liable to pay either an award or interest on the amount claimed by the applicant.

REASONS

Is the Respondent statute-barred from denying the Applicant’s claim?

¹ O.Reg. 34/10.

² The sole dispute is the plan’s cost. The applicant seeks the remainder of the \$2,000.00 assessed by Dr. Pilowsky, after the respondent approved \$1,322.07 for the assessment plan.

³ R.R.O. 1990, Reg. 664

- [7] The applicant argues that she is entitled to be paid for the full claimed cost of the psychological examination, which she incurred, because the respondent failed to comply with s.38 (8) of the *Schedule*.
- [8] Section 38(8) of the *Schedule* requires the insurer to give the insured person a detailed notice of what it agrees to pay for, refuses to pay for and the reasons for its decision within ten business days of receiving a treatment and assessment plan.
- [9] Section 38(11)2 of the *Schedule* sets out the consequence for failing to comply with s.38(8): the insurer must pay for all goods, services, assessments and examinations starting on the 11th business day after the insurer received the application and ending on the day the insurer gives the notice required by s.38(8).
- [10] The parties agree that the applicant submitted the disputed OCF-18 on April 22, 2016. The 11th business day after the insurer received the claim was May 9, 2016. The respondent denied the claim on May 13, 2016.
- [11] There is no dispute that the applicant proceeded to be examined and assessed by Dr. Judith Pilowsky under the disputed OCF-18 on May 17, 2016, four days after the insurer communicated its denial of benefits to her. That is, the applicant was examined and incurred the cost of the disputed OCF-18 four days after the insurer's liability to pay her claim under s.38(11)2 ended.
- [12] The applicant's submission simply fails to explain why she believes that she was entitled to proceed with the assessment by Dr. Pilowsky after the respondent notified her that her claim was denied.
- [13] I find that the applicant's entitlement to the cost of examination on the basis of s.38 of the *Schedule* ended on May 13, 2016 when the denial notice was communicated to her. Accordingly, the applicant cannot claim that she is entitled to the cost of examination under s.38 (11)2; she must prove that her claimed costs are reasonable and necessary.

Is the cost of disputed treatment plan reasonable and necessary?

- [14] On July 25, 2016 Dr. Pilowsky submitted a psychological assessment report on the examination/assessment that she conducted on May 17, 2016 with the help of a psychometrist. The report indicates extensive clinical interviewing and such standard tests as the Beck Depression Inventory II, Beck Anxiety Inventory and the Pain Catastrophizing Scale.

- [15] The applicant bears the onus of proving on a balance of probabilities that the cost of examination she claims for psychological assessment is reasonable and necessary.
- [16] The costs of examinations are capped at \$2000.00 by s.25 (5) of the *Schedule*.
- [17] The respondent has acknowledged the applicant's need for a psychological assessment by partially approving the assessment plan recommended by Dr. Pilowsky.
- [18] The sole dispute is the plan's cost. The applicant seeks the difference between the \$2,000.00 assessed by Dr. Pilowsky, and the \$1,322.07 approved by the respondent for Dr. Pilowsky's assessment plan.
- [19] In denying the applicant's claim, the respondent submits in evidence the insurer's examination (IE) report of Dr. Shariar Moshiri, psychologist, dated June 24, 2016⁴ in which the doctor:
- i. administered several psychological tests, including validity testing, and reviewing the applicant's medical records;
 - ii. diagnosed the applicant with adjustment disorder with mixed anxiety and depressed mood, insomnia and sleep disorders all arising from the accident;
 - iii. assessed the time required, in his opinion, to carry out clinical interviews, tests, evaluation/interpretation of results, report preparation and feedback interview;
 - iv. recommended that the applicant undergo a psychological assessment which he costed at \$1,3229.07, a factor of time required at the hourly rate of \$149.61 set out by the *Professional Services Guideline*⁵.
 - v. recommended a plan that would give the applicant at least 4 hours of assessment time – significantly more than the 2.5 hours he required to conduct his IE psychological assessment.
- [20] The respondent contends that Dr. Pilowsky arbitrarily recommended \$2,200.00 as the cost of her plan because it is the maximum allowable cost. To support its contention, it states that:
- i. The Pilowsky plan includes no information on the amount of time it would take a psychologist or psychometrist to conduct the proposed assessment.

⁴ With an addendum report dated July 11, 2017.

⁵ Superintendent's Guideline No. 03/14, page 5, issued pursuant to s.268.3(1) of the *Insurance Act*, RSO 1990, c.I.8

- ii The 13 hours of assessment implied by the cost of the disputed plan is far greater than the time it took the IE assessor to complete his examination or the time recommended by the IE report for assessment – the difference is enough to call into question the reasonableness of the cost proposed.
- iii Dr. Pilowsky's recommendations were based on weak analysis, consisting of a review of the applicant's disability certificate, four "miscellaneous forms" and reliance on the applicant's "subjective reports".

[21] The applicant denies that the cost of Dr. Pilowsky's plan is arbitrary and refutes the respondent's claim that it is based on a weak analysis. Part 12 of the disputed OCF-18 sets out the included components of a psychological assessment, including review of external/medical file, clinical diagnostic interview, assessment testing, data analysis interpretation, report writing and feedback interview.

[22] The applicant challenges Dr. Moshiri's conclusions on the cost of examination by:

- i. noting that Dr. Moshiri failed to seek clarification of Dr. Pilowsky's cost breakdown or details of her proposed assessment.
- ii. asserting that Dr. Moshiri simply states that the proposed costs were unreasonable without explaining why this is so.

[23] I find Dr. Moshiri's report credible and I give it more weight than the OCF-18 by Dr. Pilowsky.

[24] I find that Dr. Moshiri's assessment of the hours required to conduct interviews and tests to be credible given his expertise and because he himself carried out the interviews and several of the same tests proposed and later used by Dr. Pilowsky in far less time. Furthermore, the amount of time he budgets in recommending cost is significantly greater than he himself used: he has exercised discretion in allowing for more in-depth assessment than he used in the IE.

[25] Because Part 12 of the OCF-18 did not lay out the specific tests and other diagnostic processes being proposed, I find that Dr. Moshiri was credible and reliable in developing an alternative plan outline and time-budget based on his own medical opinion of the applicant's needs. This is especially true given that he administered most of the very same tests eventually used by Dr. Pilowsky.

[26] On a balance, I find that the applicant has not met the onus on her to show that the claimed cost of examination is reasonable and necessary.

Request for Interest

- [27] Section 51 of the *Schedule* sets out the criteria for assessing and awarding interest on overdue payments.
- [28] The applicant is not entitled to interest on denied claims, because I have concluded that no payment is due from the insurer.

Award

- [29] Section 10 of the Regulation permits the Tribunal to award a lump sum of up to 50% of the amount to which the insured person (i.e. the applicant) is entitled at the time of the award together with interest on all amounts then owing (including unpaid interest) if it finds that an insurer (i.e. the respondent) has “unreasonably” withheld or delayed payments.
- [30] My finding that the applicant failed to furnish sufficient proof that the disputed OCF-18 is reasonable and necessary means that no award is warranted.
- [31] My review of the facts of the case provide me with no evidence that, even if I had found for the applicant, that the respondent acted unreasonably in any way in handling this claim.

CONCLUSIONS

- [32] The respondent is not liable to pay the disputed OCF-18 by operation of s.38 (11)2 of the *Schedule*.
- [33] The applicant has not proven that the disputed OCF-18 is reasonable and necessary beyond the amount already approved by the respondent
- [34] The application is denied.
- [35] Accordingly:
- i. No award under s.10 of the Regulation is warranted.
 - ii. There is no interest due on overdue payments.

Released: November 27, 2017

Christopher A. Ferguson, Adjudicator