

**LICENCE APPEAL  
TRIBUNAL**

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



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

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

**Citation: D. M. A. M vs. Aviva Insurance Canada 2020 ONLAT 19-005566/AABS**

**Released Date: July 10, 2020  
File Number: 19-005566/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:

**D. M. A. M.**

**Applicant**

and

**Aviva Insurance Canada**

**Respondent**

**REASONS FOR DECISION AND ORDER**

**ADJUDICATOR:**

**Sandeep Johal**

**APPEARANCES:**

Counsel for the Applicant:

S. Iftekhar Yakub

Counsel for the Respondent:

Arijana B. Schrauwen

**Heard by way of written submissions**

## OVERVIEW

- [1] The applicant was injured in an automobile accident on **October 22, 2016** and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*<sup>1</sup> (the "Schedule").
- [2] The applicant was the driver in a vehicle on a highway when a third-party vehicle veered into her lane causing her to swerve and side swipe a post on the front passenger side.
- [3] The applicant was involved in two separate motor vehicle accidents prior to the subject accident, on May 19, 2015 and November 19, 2015. As a result of the accident, the applicant exacerbated her existing injuries and her on-going pain worsened.
- [4] At the time of the collision the applicant was receiving physiotherapy, chiropractic and massage therapy treatment with respect to the previous accidents.
- [5] Based on her injuries, the applicant was removed from the *Minor Injury Guideline* ("MIG") by the respondent on July 7, 2017.
- [6] The applicant applied for an attendant care benefit ("ACB") as well as medical benefits and costs of examinations that were denied by the respondent on the basis that they were not reasonable and necessary. The applicant disagreed with that decision and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

## ISSUES TO BE DECIDED

- [7] The following are the issues to be decided:
  - i. Is the applicant entitled to an attendant care benefit in the amount of \$1,202 per month from August 31, 2017 to date and ongoing?
  - ii. Is the applicant entitled to payments for the cost of examinations in the amount of \$2,520.00 for an orthopaedic assessment recommended by Princeton Hills Medical Assessments in a treatment plan (OCF-18) submitted on May 10, 2017 and denied on May 25, 2017?

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<sup>1</sup> O. Reg. 34/10.

- iii. Is the applicant entitled to payment of a medical benefit for the following treatment plans (OCF-18) for chiropractic treatment recommended by Mackenzie Medical Rehabilitation Centre in the following OCF-18's:
  - a. \$2,569.40 submitted March 20, 2019 and denied by the respondent on April 2, 2019;
  - b. \$1,977.05 submitted October 2, 2017 and denied by the respondent on October 17, 2017;
- iv. Is the applicant entitled to interest on any overdue payment of benefits?

[8] By way of a letter dated January 9, 2020 the respondent approved the chiropractic treatment plan in the amount of \$1,977.05 and by way of a letter dated January 20, 2020 the applicant agreed to withdraw both chiropractic treatment plans in dispute as well as the cost of examination.

[9] As a result, the only issue in dispute for this written hearing is whether the applicant is entitled to an ACB as well as interest.

## **RESULT**

[9] Based on the totality of the evidence before me, I find the applicant's claim for an ACB is not reasonable and necessary. As there are no payments outstanding, there is no interest that is owing.

## **ANALYSIS**

### **Is the applicant entitled to an attendant care benefit?**

[10] The applicant submits that her pre-existing injuries were exacerbated as a result of this subject accident and she was receiving physical treatment and prescribed pain medication from her family doctor to treat her collision-related pain.

[11] The applicant relies upon an in-home attendant care and activities of daily living assessment ("Form-1") that was submitted by Ibrahim Ismayilov, registered nurse, in a report dated August 31, 2017.

[12] In the Form-1, Mr. Ismayilov notes the applicant's subjective pain complaints in her cervical spine, lumbar, thoracic spine as well as shoulder, knee, right

foot/ankle, bilateral wrist/hand and right chest/rib pain with a pain intensity between 8-10 with 10 being intolerable pain.<sup>2</sup>

- [13] Mr. Ismayilov noted the applicant to have limited range of motion and that she required attendant care tasks with dressing and undressing, cutting and cleaning toe nails, preparing, serving and feeding meals. She required help with cleaning, laundry, exercising and coordinating her attendant care. Based on his assessment, he recommended attendant care in the amount of \$1,202 per month.<sup>3</sup>
- [14] The applicant further submits that the ACB services were provided by a qualified personal support worker who provided the attendant care services for the recommended tasks and that these expenses have been incurred.<sup>4</sup>
- [15] The respondent submits that the applicant's family doctor, Dr. Behiya diagnosed the applicant with a neck spasm and recommended rest and heat.<sup>5</sup> On February 18, 2017 Dr. Behiya found no swelling, bruising, tenderness or deformities. She was found to have full knee, hip and ankle range of motion and no recommendations were made.<sup>6</sup>
- [16] A note from Dr. Behiya dated October 14, 2017 notes the cause of the applicant's pain to be from the 2015 motor vehicle accident, (as opposed to the subject accident),<sup>7</sup> and X-rays of the applicant's lumbar and thoracic spine came back as unremarkable.<sup>8</sup>
- [17] On March 15, 2018, the applicant was noted to have normal range of the cervical spine and diagnosed with a muscle strain.<sup>9</sup>
- [18] The respondent further submits that the onus is on the applicant and she has not submitted evidence in support of any type of assistive help that she may require to maintain her daily living. According to the respondent, the biggest recommendation is for the applicant to apply heat, and there is no mention of the subject accident in her family doctor's clinical notes and records.

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<sup>2</sup> Written Submissions of the Applicant at Tab 1.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid at Tab 9.

<sup>5</sup> Written Submissions of the Respondent at Tab F, Clinical Note and Records dated November 3, 2016.

<sup>6</sup> Ibid at Tab H, dated February 18, 2017.

<sup>7</sup> Ibid at Tab J, dated October 14, 2017.

<sup>8</sup> Ibid at Tab K, X-Ray Report dated November 8, 2017.

<sup>9</sup> Ibid at Tab M, Clinical Notes and Records dated Mar 5, 2018.

- [19] The respondent relies upon its insurer examination (“IE”) assessments of the applicant in support of its position. Andrew Phillips, Occupational Therapist, conducted an orthopaedic assessment of the applicant and found that she was independent with her personal tasks and had the necessary range of motion, strength and physical mobility.<sup>10</sup> The report also summarizes that the applicant reported that she is able to independently manage her personal care tasks, perform light housekeeping tasks and perform some cooking, she continues to work full-time as a personal support worker and continues to care for her children.<sup>11</sup> The report goes on to note that the applicant was able to perform upper and lower reaching in the kitchen, to stoop lower for reaching in the refrigerator drawers and to reach the upper kitchen cupboards bilaterally. She was able to demonstrate transferring in and out of her bed (the couch where she sleeps) and independently without support. She was independent with the bathtub and toilet and was able to put on and remove her jacket independently, showing full functional upper extremity mobility.<sup>12</sup>
- [20] The respondent further relies upon the physiatry IE of Dr. Zabieliauskas and his report dated April 13, 2018 who opined that the applicant has uncomplicated soft tissue injuries which had resolved,<sup>13</sup> as well as the physiatry IE of Dr. Gwardjan and his report dated December 6, 2018 in which he opined that, while the applicant had subjective complaints, he found no signs of ongoing musculoskeletal impairments.<sup>14</sup>
- [21] In my view, I agree with the respondent that the onus is on the applicant to prove her case rather than the respondent having to disprove it. I find that the applicant has not met her burden to prove on a balance of probabilities that she requires an attendant care benefit.
- [22] The applicant is relying on the Form-1 and OCF-18’s that list the applicant’s injuries; however, in my view, the Form-1 on its own is not compelling evidence in support of an attendant care benefit. There is no contemporaneous evidence that shows the applicant to have limitations and restrictions that would suggest she requires assistance with her activities of daily living. I am not directed to any clinical notes and records of any treating practitioner such as her family

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<sup>10</sup> Written Submissions of the Respondent at Tab R, Occupational Therapist Report dated November 7, 2017.

<sup>11</sup> Ibid at page 5.

<sup>12</sup> Ibid at pgs. 5-6.

<sup>13</sup> Ibid at Tab T.

<sup>14</sup> Ibid at Tab U.

doctor in support of functional limitations that would warrant the need for an ACB.

- [23] The applicant directs me to the notations in the Occupational Therapy IE report that she continues to experience pain symptoms and IE assessor notes that she should liaise with her treating medical practitioner to help manage her ongoing symptoms.<sup>15</sup> As a result, the applicant submits she should be entitled to attendant care assistance and that the IE report is undermined as a result of those findings.
- [24] After a review of the report, the IE assessor did not opine that the applicant experienced pain symptoms. In fact, the report points out that the applicant self-reported pain complaints to the assessor however Mr. Andrews observed the applicant and reported that she resumed independent performance of personal care tasks and demonstrated the necessary range of motion, physical mobility and strength to independently complete all associated tasks. As a result, he opined that the applicant did not require attendant care assistance.
- [25] Based on the above, I find that the applicant has not persuaded me on a balance of probabilities that she has functional limitations that would warrant an ACB. As a result, I find that the applicant's claim for an ACB is not reasonable and necessary.

## **ORDER**

- [26] Based on the totality of the evidence before me, I find the applicant's claim for an ACB is not reasonable and necessary. As there are no payments outstanding, there is no interest that is owing.

**Released: July 10, 2020**



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**Sandeep Johal**  
**Adjudicator**

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<sup>15</sup> Written Submissions of the Respondent at Tab R, pg. 6. Occupational Therapy Report dated November 7, 2017.