

**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**



Citation: Afriat v. Aviva General Insurance, 2020 ONLAT 19-014196/AABS

**Released Date: 12/29/2020
File Number: 19-014196/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:

Tami Afriat

Applicant

and

Aviva General Insurance

Respondent

DECISION AND ORDER

ADJUDICATOR: Theresa McGee, Vice-Chair

APPEARANCES:

For the Applicant: Lisa Bishop, Counsel

For the Respondent: Melinda Baxter, Counsel

HEARD: By way of written submissions

REASONS FOR DECISION AND ORDER

OVERVIEW

- [1] The applicant, (“T.A.”) was involved in an automobile accident on September 17, 2016 when, while stopped at a red light, the vehicle she was operating was rear-ended, pushing it into the vehicle ahead of it. Air bags did not deploy. No part of T.A.’s body struck the interior of her vehicle. She did not lose consciousness. She exited her vehicle independently. Emergency services arrived at the scene, but T.A. declined transportation to the hospital. She drove herself home. After the accident, T.A. sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “Schedule”).¹
- [2] The respondent, (“Aviva”) denied T.A. certain benefits and she applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”) for a resolution of the dispute.

ISSUES IN DISPUTE

- [3] I am to decide the following issues:
- i. Is T.A. entitled to the following medical benefits recommended by Health Pro Wellness in the following treatment plans (OCF-18s):
 - a. \$3,793.04 for psychological services in a treatment plan dated October 13, 2018 and submitted to the insurer on October 16, 2019?
 - b. \$3,456.40 for chiropractic services in a treatment plan dated October 15, 2019 and submitted to the insurer on October 16, 2019?
 - c. \$2,198.80 for a Driver Anxiety Assessment in a treatment plan dated September 20, 2018 and submitted to the insurer on October 16, 2019?
 - ii. Is T.A. entitled to interest on any overdue payment of benefits?
 - iii. Is Aviva liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to T.A.?

¹ Ontario Regulation 34/10.

RESULT

- [4] T.A. has not established entitlement, on a balance of probabilities, to the medical benefits claimed in this application. Since no benefits are owing, no interest is payable. T.A. has not established that Aviva unreasonably withheld or delayed payments and Aviva is not liable to pay an award.

ANALYSIS

The disputed medical benefits

- [5] To be eligible for the medical benefits claimed in this application, T.A. must demonstrate, on a balance of probabilities, that the proposed treatments and assessment are reasonable and necessary expenses as a result of the accident, pursuant to s. 15(1) of the *Schedule*.
- [6] It is well-established that the onus of establishing entitlement to accident benefits pursued under the *Schedule* rests with the applicant.²
- [7] The disputed medical benefits are contained in three Treatment and Assessment Plans (OCF-18s) as follows:

Claim Amount	Treatment/Assessment Proposed	Prepared	Submitted	Denied
\$3,793.04	psychological services	October 13, 2018	October 16, 2019	October 30, 2019
\$3,456.40	chiropractic services	October 15, 2019	October 16, 2019	October 30, 2019
\$2,198.80	Driver Anxiety Assessment	September 20, 2018	October 16, 2019	October 30, 2019

- [8] T.A. submits that the treatments and assessment she seeks are reasonable and necessary as a result of the accident. She submits that the treatment goals identified in the plans are legitimate.
- [9] Aviva submits that T.A. has failed to establish the reasonableness and necessity of the disputed plans. It submits that T.A. waited over a year to submit the plans for psychological treatment and a Driver Anxiety Assessment, and that this delay calls into question the necessity of the treatment and the assessment. Aviva's

² *Scarlett v. Belair Insurance Company*, 2015 ONSC 3635; *Owusu v. TD Ins. Co.*, 2010 ONSC 6627.

position is that T.A.'s psychological condition pre-dates the accident; that other factors are the causes of her condition; and that there is no justification for ongoing treatment for her accident-related injuries and impairments.

Pre-existing and accident-related illness and injuries

- [10] T.A. was diagnosed with schizophrenia in 2006. She has suffered from anxiety for approximately 25 years. In 2015, Dr. Jared Risman, Psychiatrist, began treating T.A.'s schizophrenia and anxiety. T.A.'s family physician, Dr. Robin Shear, is also involved in her care. Periodically, T.A. attends a walk-in clinic for urgent medical attention.
- [11] In July of 2016, T.A. had a slip and fall injury that resulted in a broken ankle. She had metal plates implanted.
- [12] In August of 2016, about one month before the accident, T.A. visited Dr. Shear with complaints of paranoia surrounding her health. She cited concerns about a pelvic ultrasound and an endometrial polyp, as well as intermittent back pain. Dr. Shear noted that T.A. "look[ed] anxious" but noted that T.A. would be seeing her psychiatrist in two weeks.
- [13] Two days following the accident, T.A. attended a walk-in clinic where she was assessed by Dr. S. Davidson. The clinical notes from this visit state that T.A. had been "feeling depressed" since the day prior but was not observed to be in acute distress. She was diagnosed with cervical strain and reactive stress. Dr. Davison recommended that T.A. seek physical therapy for her neck and contact her mental health team for monitoring.
- [14] On September 22, 2016, Dr. Aliya Salayeva, Chiropractor, completed a Disability Certificate (OCF-3) on T.A.'s behalf. Dr. Salayeva identified T.A.'s injuries as whiplash associated disorder, strain and sprain injuries, pain, headaches and subluxation. T.A. began rehabilitation for these injuries shortly after the accident and continued with treatment until the summer of 2018.
- [15] In December 2016, T.A. reported to Dr. Shear that she had slipped and fallen on some stairs. Dr. Shear examined a bruise on T.A.'s left buttock and advised her to use Tylenol or Advil as needed for pain.
- [16] T.A. did not discuss the accident with Dr. Shear until approximately 10 months later, at his request. Dr. Shear noted that T.A. had not advised her of the accident or that she had visited a walk-in clinic. Dr. Shear assessed T.A. as

having sustained a cervical strain and recommended that she continue with her rehabilitation program.

- [17] There are no clinical notes and records from Dr. Shear beyond July of 2018.
- [18] T.A. has presented the clinical notes and records of her psychiatrist, but those records only begin in May 2018, despite T.A. being in his care since 2015. Dr. Risman's clinical notes chronicle T.A.'s ongoing struggles with anxiety, hypochondriasis, and interpersonal conflict with her in-laws. Dr. Risman consistently notes that T.A.'s mood is stable. His notes contain no reference to fear or anxiety related to driving. He makes no mention of the accident.

Causation of impairment

- [19] The objective medical evidence before me, as set out above, does not support T.A.'s claim for psychological treatment, chiropractic treatment, or a Driver Anxiety Assessment.
- [20] While the evidence clearly shows that T.A. presents with significant mental health concerns, I am not satisfied on a balance of probabilities that these concerns, as documented at the time the disputed plans were prepared, are as a result of the accident. I find that T.A.'s psychiatric conditions are being managed by her family physician and treating psychiatrist. These health practitioners have long-standing relationships with T.A. and I place significant weight on their opinions and recommendations. I note that references to the accident are scarce in the objective medical evidence before me. Other causes of T.A.'s anxiety and concern are well-documented. The clinical notes and records of Drs. Shear and Risman highlight T.A.'s relational stress, worries about her physical health, and concerns relating to the side effects of her medications.
- [21] T.A. relies upon the Psychological Pre-Screen Interview Report and Psychological Assessment Report of Dr. F. Aghamohseni, dated March 2, 2017 and October 19, 2018 to establish her entitlement to the disputed psychological treatment and assessment. While these reports detail T.A.'s psychological symptoms including anxiety, depression, increased appetite, weight gain, and a decreased sense of self-worth, they do not persuasively establish the accident as a direct cause of those symptoms.
- [22] Both parties refer me to the Section 44 Insurer's Examinations (IEs) of Dr. V. Sivasubramanian. T.A. cites his initial report, dated August 16, 2018 (prepared in relation to a prior dispute), for his opinion that T.A. suffered an exacerbation of her pre-existing anxiety due to the accident and meets the criteria for Specific

Phobia (driver and passenger anxiety) and an anxiety disorder. Aviva refers me to Dr. Sivasubramanian's December 6, 2019 and May 1, 2020 reports, which evaluate the reasonableness and necessity of the psychological treatment and assessment currently in dispute. In these reports, Dr. Sivasubramanian opines that while there was exacerbation of T.A.'s anxiety symptoms after the accident, minimal impairment resulted and there was no significant avoidance of driving. After the accident, T.A. began employment as a driver, at various times working for Uber, Uber Eats, and Skip The Dishes. Dr. Sivasubramanian notes that although in his initial report he indicated that the onset of T.A.'s hypochondriasis occurred after the accident, T.A. indicated during this subsequent assessment, T.A. indicated she had been suffering from worries about her health for several years prior. This is consistent with the clinical notes and records of T.A.'s family doctor.

- [23] The only recommendations for physical therapy in the clinical notes and records of T.A.'s treating practitioners were made:
- i. two days after the accident, when a walk-in clinic physician recommended that T.A. seek physical therapy for her neck; and
 - ii. 10 months after the accident, when T.A.'s family physician recommended that she continue with her rehabilitation program to address her cervical strain injury.
- [24] These recommendations do not support the need for physical therapy more than three years after the accident. There is no evidence in the record before me that establishes the reasonableness and necessity of the disputed chiropractic treatment for the soft tissue injuries T.A. sustained as a result of the accident.

Conclusion

- [25] The evidence T.A. has presented in support of her claims is insufficient to establish that the disputed treatments and assessment are reasonable and necessary as a result of the accident. Given the lack of evidence to support causation, on a balance of probabilities, I cannot conclude that T.A.'s psychological symptoms and impairments are a direct result of the accident. The evidence also fails to show a need for chiropractic treatment three years after the accident.

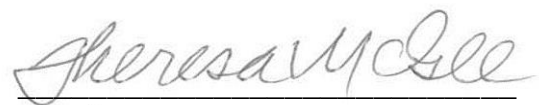
Award under Regulation 664

- [26] T.A. has not made persuasive submissions as to why an award against Aviva is justified. She submits that Aviva acted unreasonably in denying her a psychological assessment by her own assessor, only to request that same assessment by an Insurer's Examiner. There is nothing in the *Schedule* prohibiting this conduct. Section 44 of the *Schedule* expressly grants insurers the right to request an IE for the purpose of determining entitlement to a benefit.
- [27] T.A. further submits that Aviva denied the disputed psychological assessment without valid medical reasons. Again, I find no support for this position in law or in the evidence before me. Aviva's October 30, 2019 denial of the disputed assessment was accompanied by detailed medical and other reasons as required by s. 38(8) of the *Schedule*, including the opinion of its IE assessor and the absence of updated medical records to support the need for a psychological assessment in relation to the accident.
- [28] T.A. has presented no evidence and made no submissions to support a finding that Aviva conducted itself in a manner deserving of an award.

CONCLUSION

- [29] T.A. has failed to establish entitlement to the medical benefits in dispute. No payments are owing, and no interest is payable. There is no award. The application is dismissed.

Released: December 29, 2020



**Theresa McGee
Vice-Chair**