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

Ontario

Tribunal File Number: **16-002858/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:

Pirashanthini Shanmuganathan

Applicant

and

State Farm Insurance Company

Respondent

DECISION

Adjudicator: **Sandeep Johal**

Counsel for the Applicant: **David Wilson**

Counsel for the Respondent: **Michael Taylor**

Heard in-writing: **March 9, 2017**

INTRODUCTION:

1. The applicant was injured in an automobile accident on January 10, 2009, and sought benefits from State Farm Insurance Company (the "respondent") pursuant to the older *Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996* (the "*Schedule*").[1]

2. The applicant and the respondent disagreed over the reasonableness or necessity of assessments or examinations related to a determination of catastrophic impairment and whether the fees charged are reasonable.

3. On September 23, 2016, the applicant submitted an application for dispute resolution services to the Licence Appeal Tribunal – Automobile Accident Benefits Service (AABS) (the "Tribunal").

4. The Tribunal held a case conference on December 19, 2016, and a resumption of the case conference on December 23, 2016. The parties did not resolve the issues in dispute and the Tribunal ordered a written hearing scheduled for March 9, 2017. Prior to the hearing, the respondent sent a letter dated February 16, 2017 to the Tribunal along with their written submissions, advising that they have agreed to approve some of the issues in dispute[2]

5. The remaining issues in dispute are as follows:

    a. Is the applicant entitled to the following cost of assessments (or examinations) recommended by Omega Medical Associates submitted to the respondent on April 4, 2016.

        - An Occupational Therapy Assessment (Situational) in the amount of $2,000?
        - An Occupational Therapy Assessment (Community) in the amount of $2,000?
        - A Triage Assessment in the amount of $2,000?

    b. Is the respondent liable to pay an award under *Regulation* 664 because it unreasonably withheld or delayed payments to the applicant?

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

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1 O Reg 403/96.

2 A Physiatry Assessment in the amount of $2,000, Psychology Assessment in the amount of $2,000, Occupational Therapy Assessment (In-home) in the amount of $2,000, Overall Assessment Summary-Summary, Analysis, Final Rating, in the amount of $2,000, the completion of the Treatment and Assessment Plan (OCF-18) dated April 4, 2016 for the sum of $200. The completion of the Treatment and Assessment Plan (OCF-19) for the sum of $200.

d. Is the applicant entitled to costs of the proceeding?

RESULT

6. Based on the totality of the evidence before me,

a. I find that the applicant is entitled to the cost of assessments as recommended by Omega Medical Associates for the situational and community occupational therapy assessments.

b. I find that the applicant is not entitled to the cost of the triage assessment.

c. I find that the applicant is not entitled to an award under *Regulation* 664.

d. I find that the applicant is entitled to interest for the situational and community cost of assessments if they have been incurred, and in accordance with the *Schedule*.

e. I find the applicant is not entitled to costs of the proceeding.

ANALYSIS

7. Although this accident took place in 2009, the applicable *Schedule* associated with the issues in dispute is the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[3] *(*the *"New Schedule")* because the *New Schedule* governs the amounts payable for assessments or examinations even for those accidents that occurred prior to the *New Schedule* taking effect. More specifically, the *New Schedule* governs the amounts payable by insurers on account of fees invoiced on or after September 1, 2010.[4]

8. Section 25(1)5 of the *New Schedule* requires the respondent to pay reasonable fees charged for preparing an application for a determination of whether the applicant has sustained a catastrophic impairment, including any assessment or examination necessary for that purpose. This section further states the amount the respondent would have to pay is limited to $2,000 for any one assessment, examination or report.[5]

9. The respondent denied the assessments, and in denying the assessments, the respondent is required to give medical and other reasons why it considers the

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[3] *Ontario Regulation 34/10.*

[4] Section 3(1)(1.5)(1.6) of *Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996,* O Reg 403/96.

[5] Section 25 5(a) of the *New Schedule.*

assessments or examinations (or the proposed cost) not to be reasonable and necessary. [6]

10. In order to adequately address and decide on the issues in dispute, I must first determine which section of the *New Schedule* and which test is applicable.

What is the applicable legal test for assessments or examinations?

11. The correct test is reasonable and necessary. The applicant applied for a catastrophic determination through one treatment plan provided by Dr. Becker of Omega Medical Associates. This plan was divided into different modalities. In my opinion, each modality is a request for a medical benefit on behalf of the applicant and the test for a medical benefit is the well-established test of 'reasonable and necessary'.

12. The 'reasonable and necessary' test is outlined in s. 15 of the *New Schedule* and falls under Part 3 of the *Schedule* which is for medical, rehabilitation and attendant care benefits. The applicant, in this case, is seeking the approval of the treatment plan for cost of examination for medical benefits. The test for a medical benefit, according to s. 15(1) of the *New Schedule* is reasonable and necessary.

13. The applicant submits that the appropriate legal test is outlined in s. 25(5)(a) of the *New Schedule*. I agree, but only in part. Section 25(5)(a) of the *New Schedule* sets out a maximum of $2,000 that the respondent will pay for fees and expenses for any one assessment or examination. However, each assessment for a medical benefit must still be reasonable and necessary in accordance with s. 15(1) of the *New Schedule*. Once each assessment is determined to be reasonable and necessary, s. 25 would apply to determine if the fees charged are reasonable. Section 25 falls under Part 4 of the *Schedule* entitled 'Payment of Other Expenses' and it is not the section or part that determines whether the assessments or examinations are reasonable or necessary.

Can the Tribunal decide if each assessment or examination listed in the treatment plan is reasonable and necessary?

14. I find the Tribunal may decide whether each modality of the treatment plan is reasonable and necessary because there are several treatment and assessment plans combined into one OCF-18 by the applicant, and each one must be determined to be reasonable and necessary.

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[6] Section 38(8) Within 10 business days after it receives the treatment and assessment plan, the insurer shall give the insured person a notice that identifies the goods, services, assessments and examinations described in the treatment and assessment plan that the insurer agrees to pay for, any the insurer does not agree to pay for and the medical reasons and all of the other reasons why the insurer considers any goods, services, assessments and examinations, or the proposed costs of them, not to be reasonable and necessary.

15. I do not agree with the applicant's submission that a treatment plan can only be looked at in its entirety and that only an "all or nothing" approach must be taken.

16. Part 12 of the treatment and assessment plan individually lists each assessment that is recommended by the applicant's doctor, Dr. Becker, and as a result, each assessment or examination listed must be determined to be reasonable and necessary. This is not a typical treatment or assessment plan, it is a catastrophic assessment that divides each of the modalities.

17. Each assessment or examination must be looked individually and in accordance with s. 15 that outlines the test for a medical benefit that the applicant is claiming.

Whether the triage assessment and the occupational therapy assessments are reasonable and necessary?

18. The onus is on the applicant to show on a balance of probabilities that they are entitled to a payment for medical benefits under the *Schedule*. It follows then, that the applicant will have to show that each and every assessment recommended by Dr. Becker, is reasonable and necessary and the fees charged are reasonable.

19. I find the applicant is entitled to the situational occupational assessment and the community occupational assessment, however, the applicant is not entitled to the triage assessment.

20. With respect to the triage assessment, I am not provided with any evidence or submissions by the applicant as to what the triage assessment would entail and why it is reasonable and necessary. With the onus on the applicant to prove her entitlement to the benefit, I find the onus has not been satisfied, and accordingly, I find the applicant is not entitled to the triage assessment.

Occupational Therapy Assessments

21. With respect to the occupational therapy assessments, the respondent submits that there are no differences between the three occupational therapy assessments and that they each evaluate the applicant's psychological condition and how it relates to her activities of daily living. I disagree with the respondent and I find that the applicant is entitled to the situational and community assessments because as stated by Dr. Becker's summary dated May 25, 2016, the community assessment needs to be done to determine the functional impact of the applicant's psychological condition on her function with respect to social function, concentration, persistence, pace, as well as adaption to stress like conditions in her local community. Dr. Becker further states the situational

assessment is needed to determine the functional impact of the applicant's psychological condition within an individualized structured setting in which the integration of her function within the four mental and behavioural domains can be observed in a more structured setting and applied to chapter 14 of the *American Medical Association Guides*. [7] (the "Guides") The Guides are the relevant method by which one can assess catastrophic impairments according to the *Schedule.*

22. The respondent further submits that the multiple occupational therapy assessments would entail some duplication. However I am not directed to any evidence of duplication the occupational therapy assessments would entail. The respondent has only provided submissions that more than one occupational therapy assessment provides no value added and that the applicant has not demonstrated these examinations are necessary. I disagree with the respondent's submissions for two reasons. First, the applicant has provided a summary by her assessor, Dr. Becker, who is recommending the assessments and the reasons why they are necessary. Second, submissions alone are not evidence and the respondent has not provided any medical evidence to show why they believe the assessments are not necessary. I am satisfied with the summary from Dr. Becker on what each occupational therapy assessment would entail and I find them both to be reasonable and necessary based on the testing that will be done to determine the applicant's functional impact on her psychological condition.

Reasonableness of Fees

23. Having found that that both occupational therapy assessments (situational and community) and examinations are reasonable and necessary, I must consider whether the fees charged for the assessments and examinations are also reasonable[8] because s. 25(5)(a) of the *New Schedule* states the respondent shall not pay more than a total of $2,000 in respect of fees and expenses for any one assessment.

24. I find the fees charged for these assessments to be reasonable and in accordance with the *New Schedule*. The assessors for each examination are charging $2,000 for the preparation and conducting of each report.

25. The respondent submits that to determine whether the fee is reasonable, it requires a consideration of hours and hourly rates and that the applicant has not provided any evidence with respect to hours and hourly rates for the proposed assessments. I disagree with the respondent on this point. Section 25(5)(a) of the *New Schedule* states the respondent shall not pay more than a total of

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7 America Medical Association Guides to the Evaluation of Permanent Impairment 4th Edition, 1993.

8 Section 25 (1) 5 of the *Schedule*

$2,000 in respect of fees and expenses for any one assessment. It does not state a maximum number of hours or a maximum hourly rate that cannot be exceeded in arriving at the $2,000 fee and the respondent has not directed me to any evidence of a fee or guideline or any part of the *New Schedule* that requires the hours and hourly rates to be considered for the purposes of s. 25(5)(a).

26. I find the fee of $2,000 for the situational occupational assessment and $2,000 for the community occupational therapy assessment as reasonable and in accordance with the *New Schedule*.

INTEREST

27. Interest is payable by the respondent if the cost of the occupational therapy assessments were incurred. I am not provided with any evidence on whether the cost of the assessments or examinations were incurred. If they were, the applicant would be entitled to interest as set out in the *New Schedule*.

AWARD FOR UNREASONABLY WITHHELD OR DELAYED PAYMENTS

28. The applicant, seeks an award under Section 10 of Ontario Regulation 664 (the "Regulation") under the *Insurance Act,* RSO 1990, c I.8 (the "Act") which allows the Tribunal to award a lump sum of up to 50 per cent of the amount to which the applicant was entitled if it finds that the respondent unreasonably withheld or delayed payments to the applicant.[9]

29. The respondent submits that the Tribunal does not have jurisdiction to provide an award on the basis of the *Regulation* because the underlying statutory power to do so that existed previously in s. 282(10) of the Act has been repealed. I disagree.

30. The relevant portions in the *Insurance Act* that deals with the Tribunal's jurisdiction over statutory accident benefits disputes are outlined in sections 279 and 280. Section 280(5) of the Act states:

> The regulations may provide for and govern the orders and interim orders that the Licence Appeal Tribunal may make and may provide for and govern the powers and duties that the Licence Appeal Tribunal shall have for the purposes of conducting the proceeding.

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[9] If the Licence Appeal Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Licence Appeal Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, may award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

In my opinion, the ***Regulations*** govern the powers and duties the Tribunal shall have for the purpose of conducting a proceeding. According to the wording in s. 280(5), I find the Tribunal does have jurisdiction to consider an award under the legislation as per s. 10 of the *Regulation* mentioned above.

31. I find that the applicant is not entitled to an award under the *Regulation* as I am not presented with evidence of unreasonably withheld or delayed payments to warrant such an award. Based on the evidence before me, I find the respondent to have acted in accordance with the requirements outlined in the *Schedule* in adjusting the applicant's file.

32. Approval of assessments falls under Part 8 and s. 38 of the *Schedule* which is titled 'Procedures for Claiming Benefits'. Part 8 of the *Schedule* is the claim adjusting section for the respondent to follow. Section 38(8) requires the respondent to provide medical and other reasons why the respondent considered any assessments and examinations not to be reasonable and necessary. I find the respondent has done so.

33. The applicant submits they are entitled to an award under the *Regulation* because of four reasons. One, the respondent's refusal to follow the correct test under the *New Schedule*. Two, the respondent's persistence to accept the conclusions of assessors whose opinions were specifically rejected by a FSCO Arbitrator in an arbitration involving the same accident. Three, for the respondent's reliance on Dr. Muhlstock and Dr. Jeffries' insurer examination reports and four, because in the applicant's opinion, there is arguably overwhelming evidence of impairment and the respondent's theory of the applicant's status was rejected by the FSCO Arbitrator. I will address each in turn.

34. One, I find the respondent to have followed the correct procedure under the *New Schedule* by providing a denial of the assessments based on medical reasons from the s. 44 insurer examinations and the reports of Dr. Goodman, Dr. Kavanaugh and Dr. Caterer. The denial appears to be adequate and I do not see any basis for the applicant's 'unreasonably withheld or delayed payments' argument. As discussed above, the correct test is reasonable and necessary. According to the *Melchoirre*[10] case before FSCO, a special award would not be granted merely because the insurer incorrectly interpreted or failed to comply with a provision of the *Schedule*, if that were the case, then an award would be granted to every successful applicant.

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[10] *Melchiorre v. Wawanesa Mutual Insurance Company* (FSCO A05-000491 and A05-000492, December 22, 2006), at p. 23.

35. Two, I do not find a determination by an Arbitrator from a different Tribunal on different issues altogether to be determinative for an award.

36. Third, the applicant submits the respondent's reliance on Dr. Muhlstock's and Dr. Jeffries' reports were unreasonable because those reports were superficial, lacked objectivity and were inherently insurer biased. Even if I were to agree with the applicant's submission on this point, that alone would be not sufficient for an award. As mentioned above in the *Melchiorre* case, an insurer can come to the wrong conclusion without having acted unreasonably[11]. The discretion has to be left to the respondent to make a decision based on information and evidence that is available to them. The appeal process to the Tribunal would be the mechanism to dispute it, but for the purposes of an award, it has to amount to much more than just the respondent making the wrong conclusion with respect to a benefit. There must be unreasonable conduct by the respondent. I find the respondent complied with the *New Schedule* in assessing and responding to the applicant's requests for benefits in a timely and reasonable manner.

37. The respondent conducted an insurer examination under s. 44 of the *Schedule* upon receipt of the application to determine whether the applicant sustained a catastrophic impairment. The insurer examination was done by way of a file paper review.

38. The applicant submits it was inappropriate to request a file paper review from Dr. Muhlstock and Dr. Jeffries for the purpose of determining catastrophic injuries and that this is a basis for a finding of an award. I disagree, s. 44(4) of the *New Schedule* allows the respondent to conduct an examination of material rather than requiring an in person examination. The applicant has not directed me to any statutory authority that requires or obligates a respondent to demand an in person examination for certain types of injuries.

39. Fourthly, the applicant submits there is overwhelming evidence related to the applicant's impairments and as a result of the FSCO Arbitrator's finding, an award is more than justified. I disagree, unreasonable behaviour or conduct for the purposes of an award does not mean arriving at a decision that the applicant does not agree with. I am not satisfied that the respondent unreasonably withheld or delayed payments. The standard is not one of perfection.[12]

COSTS

40. The applicant's request for costs pursuant to Rule 19.1 of the *Licence Appeal Tribunal Rules of Practice and Procedure* (the "*Rules*") is denied.

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[11] Ibid, at p. 23.

[12] *Cripps v AXA Insurance (Canada)*, 1997 Carswell Ont 1190, at p. 12.

41. Rule 19.1 provides that a party may make a request to the Tribunal for its costs where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith.

42. The applicant submits the respondent acted in a manner that preferred its own interest to that of the insured and placed an unreasonable roadblock with respect to the applicant's request to be assessed and the respondent's conduct cannot be justified on any reasonable or appropriate ground. The applicant relies on her submissions with respect to a claim for an award under s.10 of *Regulation* 664 for her claim for costs. But this remedy addresses conduct that is related to the proceeding before LAT. I am not convinced that costs relate to conduct that took place prior this proceeding, I am also not persuaded that there was any conduct that meets the threshold of unreasonable, vexatious, frivolous or bad faith behaviour in the proceeding.

43. The applicant's claim for costs is dismissed.

ORDER

44. The applicant is entitled to payment of the following cost of assessments:

    i. $2,000 plus HST for the situational occupational therapy assessment;
    ii. $2,000 plus HST for the community occupational therapy assessments; and,
    iii. interest in accordance with the *New Schedule*.

45. The applicant is not entitled to the following:

    i. the cost of examination for the triage assessment;
    ii. an award under s. 10 of *Regulation* 664; and,
    iii. costs of this proceeding.

Released: November 7, 2017

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Sandeep Johal
Adjudicator