



Citation: Diflorio vs. Aviva Insurance Company, 2021 ONLAT 19-010919/AABS

**Released Date: 03/24/2021
File Number: 19-010919/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:

Catherine Diflorio

Applicant

and

Aviva Insurance Company

Respondent

DECISION

VICE CHAIR:

Eleanor White

APPEARANCES:

For the Applicant:

Brendan Sullivan, Counsel

For the Respondent:

Evan Argentino, Counsel

Witness:

Jason Brumwell, Litigation Specialist for Aviva Insurance, oral testimony

HEARD:

By way of both written and subsequent oral submissions (November 18, 2020, by telephone)

OVERVIEW

- [1] The applicant, Ms. Catherine Diflorio, was injured as a pedestrian who was hit by an automobile on April 9, 2015. Ms. Diflorio was leaving her hospital job at the end of a workday and crossing the street outside of the building, within the crosswalk, when she was hit by a car making a left hand turn in front of her. She was struck by the vehicle on the left thigh and was knocked to the ground, hitting her head on the pavement. Ms. Diflorio was transported back to the hospital's emergency department and examined. Subsequently she sought benefits from the respondent, Aviva Insurance Company (Aviva), pursuant to the Statutory Accident Benefits Schedule – effective September 1, 2010 (*Schedule*)¹.
- [2] The insurer has, according to both parties, supported treatment plans submitted for physical and psychological treatment to assist in Ms. Diflorio's recovery, however, upon submission of the plans currently in dispute, the insurer either totally or partially denied the treatment and advised Ms. Diflorio and her counsel of their decision. As set out in the *Schedule*, Aviva's denials were based directly or indirectly, on reports arising from section 44 Insurer's Examinations (s. 44 IEs) attended by Ms. Diflorio. She disagreed with Aviva's decisions regarding the denial of the treatment plans and submitted an Application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (Tribunal) for resolution of the dispute.
- [3] A case conference held on April 17, 2020 resulted in an order for the matter to be heard in a combination-type hearing with written submissions scheduled to be followed by an oral component on November 18 and 19, 2020. Four treatment plans were listed as disputed in the application to the Tribunal, however, in the interval between the applicant's submissions and those of the respondent, Aviva approved two of the four disputed issues in their totality, 'without prejudice'. A Motion was brought by the applicant regarding the late approvals and the resulting Motion Order allowed the applicant to address the approvals in their reply submissions and the respondent was granted the right of sur-reply if needed. The two recently approved treatment plans will be listed below as being disputed only for the applicant's claim to an award under s. 10 of O. Reg. 664. The other two disputed issues, both partially approved, remain in dispute for their denial.

¹ O. Reg. 34/10 under the Insurance Act, R. S. O. 1990, c. 1.8

ISSUES TO BE DECIDED

- [4] The following are the issues in dispute to be decided, as set out in the Case Conference Order of September 4, 2019:
1. Is the applicant entitled to a medical benefit in the amount of \$1,298.89 (the unapproved balance of a treatment plan in the total amount of \$3,144.72 minus the approved treatment in the amount of \$1,845.83) for elements of a treatment plan (OCF-18) for psychotherapy prepared on May 2, 2018 from Psychology Health Solutions in Hamilton? The plan was partially approved on July 9, 2019.
 2. Is the applicant entitled to a medical benefit in the amount of \$1,475.61 (the unapproved portion of a treatment plan, submitted June 11, 2019, in the total amount of \$3,656.26, minus the approval of \$2,180.65) for a gym exercise program with an attending kinesiologist, partially approved on June 12, 2019?
 3. Is the applicant entitled to interest on any overdue payment of benefits?
 4. Is the applicant entitled to an award under Ontario Regulation 664 because of the respondent unreasonably withheld or delayed the payment of benefits?
- [5] Issues in dispute only for an award under Ontario Regulation 664 and no longer in dispute for denial are listed below:
1. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$3,170.00 for occupational therapy services, recommended by Ross Rehabilitation in a treatment plan submitted on July 3, 2018 and denied by letter on July 14, 2018? The denial of the plan was reversed and approved 'without prejudice' and conveyed to the applicant by letters dated September 23 and 25, 2020.
 2. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$2,858.20 for other goods and services of a medical nature recommended by Ross Rehabilitation in a treatment plan (OCF-18) submitted on September 24, 2018 and denied on September 28, 2018? The denial of the plan was reversed 'without prejudice' and conveyed to the applicant by letters dated September 23 and 25, 2020.

RESULT

- [6] The denial of the unapproved portion of the psychotherapy treatment plan, denied on July 9, 2019 is maintained.
- [7] The denial of the unapproved portion of the gym program with attending kinesiologist in the treatment plan denied on June 12, 2019 is at this time maintained, pending the report from the kinesiologist regarding the efficacy of the treatment and need for approval of remaining duration.
- [8] No section 10 award is granted for the denial of the occupational therapy program; initially denied on July 3, 2018 and confirmed by letter on July 14, 2018, and subsequently approved on September 23 and 25, 2020.
- [9] No section 10 award is granted for the denial of the aqua-therapy program; initially denied on September 28, 2018 and subsequently approved on September 23 and 25, 2020.
- [10] As there is no amount payable to the applicant for a denial of a portion of the treatment plans still in dispute and no other special award has been granted, there is no payment of interest to be made, except for the amount of incurred treatment for the aqua-therapy program upon presentation of evidence of incurred.

ANALYSIS

Treatment Plans

Injuries sustained in the automobile accident of April 9, 2015

- [11] Neither party's written submissions specifically address the OCF-1 or OCF-3 forms to itemize the injuries sustained in the accident which occurred in 2015, however, they were part of the examination of the witness, Jason Brumwell at the oral component of the hearing. I was able to follow the earlier documentation from the file review in the s. 44 IE report of Jonathan Kaine, OT dated May 7, 2018.²
- [12] Mr. Kaine's report includes reference to the OCF-3, dated June 19, 2015 signed by the family doctor, Dr. Rupika Ghelani; in which the injuries are described as neck pain, shoulder pain and headache. From the same source document, Mr. Kaine reports that the OCF-1, dated May 15, 2015 lists the injuries as "diagnosed

² OT In Home Report of Jonathan Kaine, OT (Tab 15 of Respondent's Submissions, page 3)

with concussion, muscle spasm and bruising. Currently undergoing physiotherapy and constant appointment with family doctor and still in constant pain”.

- [13] Again, from Mr. Kaine’s review of documents, he reports that on February 23, 2017, Ms. Diflorio consulted with rheumatologist, Dr. Raman Rai, referred by her family doctor. Dr. Rai reported chronic left shoulder pain due to very mild rotator cuff tendinopathy and soft tissue changes which did not respond to two steroid injections, suggesting the possibility of complex regional pain syndrome (CRPS). Dr. Rai then referred Ms. Diflorio to Dr. David T. Harvey, physiatrist, for further evaluation. In a report dated May 7, 2017, Dr. Harvey found no evidence of CRPS, but instead diagnosed the applicant’s conditions as whiplash associated disorder, mild rotator cuff tendinopathy with no sign of CRPS, and postural indiscretion.³
- [14] Injuries from the accident also included psychological sequelae. The report of the s. 44 IE assessor, Dr. Christopher Friesen, neuropsychologist dated July 8, 2019,⁴ supported the treatment plan of Dr. Shahrokhnia and concurred with the need for continued psychological treatment, as after his assessment, Dr. Friesen diagnosed Ms. Diflorio with a mild Adjustment Disorder with Depressed Mood (and irritability) and an Anxiety Disorder Not Otherwise Specified (subthreshold symptoms of a Specific Phobia in relation to walking as a pedestrian).

Is the treatment plan in the amount of \$3,144.72 (minus the approved amount of \$1,845.83) for psychological treatment reasonable and necessary?

- [15] The treatment plan was submitted by Dr. Shahrokhnia, (non-doctoral) psychologist, from Psychology Health Solutions in Hamilton. The plan was prepared on May 2, 2019 and represented a continuation of psychotherapy, conducted by Nigar Yunus, registered psychotherapist. A letter dated May 14, 2019 was sent by Crawford & Company (Canada) Inc. (independent adjusters hired by Aviva) advising the applicant and her counsel that Aviva was rejecting the treatment plan as they understood the applicant to have completed a series of psychotherapy sessions under Nigar Yunus and that the insurer would be arranging a s. 44 IE to provide an opinion on the treatment plan.⁵
- [16] Dr. Christopher Friesen, neuropsychologist, conducted the s. 44 IE and recorded his findings from both interview and objective psychometric testing and found that

³ Consultation report of Dr. David T. Harvey to family doctor, dated May 7, 2017, (Recommendation #3, page 2 of 5)

⁴ Report from s. 44 IE of Dr. Christopher Friesen, July 8, 2019, (Tab 20, p. X of Respondent submissions)

⁵ Correspondence from Crawford & Company (Canada) Inc. at Tab 21 of the Respondent’s submissions

Ms. Diflorio was continuing to deal with chronic pain 4 years after the accident and accompanying emotional distress and diagnosed her with Adjustment Disorder, associated with Depression and Anxiety, Chronic Pain, Specific Phobia and Limitation of activity due to disability (Functional Limitations). Dr. Friesen found the ongoing treatment reasonable and necessary. The respondent approved the 12 sessions of psychotherapy, however, adjusted the rate of remuneration to reflect the negotiated amount of \$99.75 for the professional services of Nigar Yunus as a registered psychotherapist, a rate lower than that for Mr. Shahrokhnia, from the Professional Fee Guideline. The respondent also denied the fee charged in the treatment plan for brokerage fees, educational material, testing and test consumables. The respondent did allow the fee for completion of the OCF-18 and for documentation of treatment services. The unapproved components in no way affected the continuation of professional services as recommended.⁶

- [17] The Professional Fee Guideline has not yet reflected a fee for the now regulated psychotherapy profession, however, the Tribunal regularly sees the term 'negotiated fee' for this profession as \$99.75 per hour. The adjuster's log notes reflect a conversation between the applicant's counsel and the handling adjuster in which Ms. Diflorio was offered the choice of using the dollar value for the amount approved for psychotherapy at the rate of \$99.75 per hour with the psychotherapist she had been treated by, or a reduced number of sessions with Mr. Shahrokhnia at his professional fee (a higher amount).⁷ The applicant chose to continue her care with Nigar Yunus, the psychotherapist. The applicant's submissions include that she has consumed \$895.00 of professional services of the available funds.
- [18] I find it unclear from the applicant's submissions, what the objection is to the partial approval by the respondent of the elements of the treatment plan in dispute. All treatment has been approved at a rate generally negotiated for registered psychotherapists. An assessment, documentation and form completion are covered fully as proposed. The respondent only denied elements that did not directly affect treatment. Not all treatment has been consumed and if Ms. Diflorio requires further treatment after the complete consumption of the allowed treatment, she has not been denied the right to submit further treatment plans. I find the partial approval of the proposed elements of the disputed treatment plan entirely reasonable and maintain the decision made by the

⁶ Approval letter dated July 9, 2019, approving \$1845.83 of \$3144.72, Tab 20, Respondent's submissions, specifying Professional Fee Guideline for included services in hourly amount.

⁷ Page 5 of Tab 16 in the documents brief of the Respondent's written submissions

respondent regarding this disputed issue. The denial of specified elements of the treatment plan is maintained.

Is the treatment plan in the amount of \$3,656.26, partially approved in the amount of \$2,180.65, reasonable and necessary?

- [19] The treatment plan submitted on June 11, 2019 by Ross Rehabilitation proposed an exercise program to be held in a gym and supervised by a kinesiologist. The elements included one-year membership and 12 sessions of supervision by the kinesiologist, as well as travel time and mileage expenses for the kinesiologist. A fee was included for planning of the service, and completion of the OCF-18. The response to the plan was made by correspondence dated June 12, 2019 from Crawford & Company (Canada) Inc. approving the 12 sessions of kinesiologist's services but for a slightly reduced time period to 1 1/2 hours for each session, at the rate stated in the FSCO Professional Fee Guideline, and approving travel time and mileage expenses and completion of the OCF-18 form. The respondent approved a reduced fee for planning services and a 6-month membership initially. The insurer welcomed an update regarding the efficacy of the program prior to their pending decision to extend the gym membership to the full year. The applicant's submissions disclose that Ms. Diflorio has consumed \$1,400.16 of the plan. The applicant's written submissions do not disclose the applicant's plans to continue with the exercise program once the restrictions of the pandemic are lifted, however, at the oral component of the hearing, counsel did indicate her intent to continue with the gym/exercise program.
- [20] I find the respondent's cautionary limitation of the program to an initial six-month period, and the requirement for feedback prior to possible extension of the duration of the rehabilitation program for the full period of one year, to be entirely reasonable. Ms. Diflorio had experienced predominantly left-sided shoulder, upper back and neck pain for four (4) years at the time of the recommendation of this exercise plan. Other treatments to date had failed in their effectiveness to deal with the chronic pain; only psychotherapy had proved helpful. It was not unreasonable to ask for an 'intermission' at 6 months to allow for feedback. This allows the kinesiologist to update the recommendations for a continuation for the full year. Neither Ms. Diflorio, nor the service provider knew how she would respond to an active program of this manner, whether it would exacerbate or mitigate the chronic pain. I find the denial of the specific elements of duration and a higher planning fee to be entirely reasonable and necessary and maintain the decision of the respondent to allow full access to the program for a temporarily limited time. The respondent did not close the door on approval of the remaining benefit. If the kinesiologist provides written recommendations for the

concluding 6 months of the treatment recommendations, then access to the remaining period of the gym membership and the remaining kinesiologist's time and expenses would be considered reasonable and necessary.

- [21] I find the denial of the two treatment plans, each one partially approved, to be reasonable and necessary, and thus no further amount is currently payable, and no interest is due, nor any s. 10 award to be granted on these plans.

Award

Is a s. 10 O. Reg. 664 Award to be granted for the two recently approved treatment plans?

- [22] Section 10 of the Regulation 664 gives the Tribunal the authority to grant an award in a lump sum up to 50% of the amount to which the insured person (Ms. Diflorio) was entitled at the time of the award together with interest on all amounts then owing (including unpaid interest) if it finds that the respondent has 'unreasonably' withheld or delayed payment for benefits claimed. The Tribunal has been consistent in recognizing the entitlement to an award under s. 10 of the Regulation as a "stringent" test, applied only where any withholding or delay of payment is unreasonable, and unreasonable conduct is described as "excessive, imprudent, stubborn, inflexible, unyielding or immoderate".⁸
- [23] At the time of application, Ms. Diflorio sought an award on all four treatment plans in dispute, indeed at the time she delivered her written submissions dated August 28, 2020, all four plans were in dispute. Prior to the respondent's submissions (submitted October 30, 2020), it advised Ms. Diflorio and her counsel that two of the plans had been approved in their entirety as a result of review of the medical CNR submitted from March to September of 2020, pursuant to the case conference order for productions and s. 33 requests. The applicant argued for a special award for all treatment plans before the Tribunal, in the oral component of the hearing held on November 18, 2020.
- [24] The first of the two plans in which the applicant claims an award, is in the amount of \$3,170.39 recommending 4 occupational therapy sessions. These were to be conducted in Ms. Diflorio's home to provide coping strategies and education regarding her difficulties with housekeeping, and to provide any devices to assist in this manner. The goals also included provision of relaxation techniques, sleep hygiene and other coping strategies. The plan was submitted by Ross Rehabilitation and signed by Padma Arathi, OT, on February 6, 2018, and

⁸ E.K. and Unifund Assurance Company, 2017 CanLII 69237 at para. 39

received by the insurer on February 14, 2018. A Notice of Examination was sent to Ms. Diflorio on March 2, 2018 for an In-Home s. 44 IE. After one failed date, the assessment took place on April 24, 2018 and the report was issued on May 7, 2018.

- [25] The respondent had initially denied the plan based on a lack of compelling medical evidence supporting the need for the elements of the plan and compelled the applicant to attend a s. 44 IE. The plan's elements included four sessions in-home at the cost of \$798.00, devices for \$439.93, of which \$221.95 was for delivery of same, \$611.52 for travel and mileage and \$1,097.25 for various aspects of documentation and planning. The final denial of the OCF-18 relied upon the findings in the report of Mr. Jonathan Kaine, OT arising from the s. 44 IE. Mr. Kaine reported that he found no objective evidence to justify OT treatment or the supply of assistive devices, and that Ms. Diflorio showed sufficient ability to independently carry out her pre-accident housekeeping, albeit with reported pain and guarding of the left upper extremity.⁹
- [26] The second plan in dispute, *only* for a special award, proposed in the amount of \$2,858.20, was for an aqua-therapy program. The plan was submitted on September 24, 2018 and denied on September 28, 2018. The respondent denied the plan, providing the medical reasons that they found insufficient compelling medical evidence to support the proposed treatment, and stating they had relied on the OT report of Mr. Jonathan Kaine (dated May 7, 2018, addressing OT therapies and assistive devices, above). Again, the respondent requested further medical evidence and specified the Clinical Notes and Records they required from the family doctor (dates provided) and other provider's CNR. The subsequent reversal of opinion was made 'without prejudice' two years later.
- [27] The respondent advised Ms. Diflorio and her counsel by correspondence dated September 23, 2020 and September 25, 2020 that the OT plan from Ross Rehabilitation and the aqua-therapy treatment plan had been approved. The reason provided for the approval was that Ms. Diflorio's had provided them with the complete or updated records that had been requested in the denials 2 years prior, specifically, in the respondent's initial denials. Further, the respondent advised that the decision to reverse the denial was made 'without prejudice'. The updated CNR of various healthcare resources were received over a period from March to September 2020. In their correspondence of September 23 and 25, 2020, the respondent described the reversal of position in the following manner: "As such, without prejudice, further to the LAT application Tribunal File Number

⁹ Tab 15 Respondent's written submissions, OT In Home Assessment Report of Jonathan Kaine, dated May 7, 2018.

19-010919/AABS, the issues above have now resolved and are payable to the clinic as described above subject to any Professional fee guideline maximums”.

- [28] The adjuster relied on the report of Jonathan Kaine, OT. This report was created in respect of a different TP for OT services. Mr. Kaine’s report set out the list of documentation he reviewed which included the report and recommendations of Dr. David T. Harvey, physiatrist. Dr. Harvey made many recommendations, including specific directions for Ms. Diflorio to pursue a course of aqua-therapy exercise. When Mr. Kaine referenced Dr. Harvey’s consultation report, he listed every recommendation of Dr. Harvey’s except for aqua-therapy. It is important to note that Dr. Kaine’s report preceded the submission of the aqua-therapy OCF-18 and the omission of that recommendation was irrelevant to the issue of an in-home assessment being considered.
- [29] The adjuster relied on the report of Jonathan Kaine, OT; a report generated on the question of reasonableness and necessity of an OT treatment plan for involvement regarding the applicant’s difficulties with housekeeping duties, not exercise programs. There was much good material in that report and the list of documentation reviewed by the author was covered thoroughly. In his document review, Mr. Kaine included the recommendations of Dr. David T. Harvey, physiatrist, from his consultation report following his examination of Ms. Diflorio, on referral from the family doctor, and from Dr. Rai, rheumatologist. In Dr. Harvey’s report he made many recommendations including specific directions for Ms. Diflorio to pursue a course of aqua-therapy exercise. When Mr. Kaine referenced Dr. Harvey’s consultation report in his s. 44 IE report (on OT services) he listed every recommendation of Dr. Harvey’s except for aqua-therapy. It is important to note that this report preceded the submission of the aqua-therapy OCF-18 and the omission of that recommendation was irrelevant to the issue of an in-home assessment, on which he was charged to comment. The adjuster did not refer to the consultant report from Dr. Harvey directly, which did include specific reference to the benefits of aqua-therapy.
- [30] In the initial denial of the aqua-therapy treatment plan, the adjuster either overlooked or disregarded the report of Dr. Harvey. I find this constitutes an incorrect decision on the part of the insurer, however I do not find this meets the stringent test for ‘unreasonable’ conduct on the part of the respondent, allowing the grant of a s. 10 award under O. Reg. 664. As in *16-002858 v State Farm Insurance Company*¹⁰, I am not satisfied the respondent *unreasonably* withheld or delayed payment for a benefit. *The standard does not demand perfection.*

¹⁰ 16-002858 v State Farm Insurance Company

- [31] The terminology used by the respondent, 'without prejudice' generally is applied to facilitate settlement, to be paid in good faith, not necessarily representing a change in the party's position on the issue. It can be viewed as an "ex gratia" payment. It is interesting that the applicant's submissions also ends with the paragraph titled 'Conclusion', in which Ms. Diflorio's counsel states that his client "is hopeful a mutually agreeable resolution can be reached and she can move on with her life after the hearing". Both parties were clearly working towards a resolution of the file.
- [32] The two plans are approved in their full amount upon presentation of invoices. The applicant has testified that there was no incurred amount of OT services arising from the disputed plan, however reported an amount of \$2,804.20 consumed for aqua-therapy. No documents were provided to substantiate that amount.
- [33] I do not find the denials constituted conduct that met the standard of unreasonable behaviour, as described as "excessive, imprudent, stubborn, inflexible, unyielding or immoderate"¹¹

Interest

- [34] I do find that upon presentation of an invoice for the already incurred amount for the aqua-therapy program, the respondent shall pay the interest due as in s. 51 of the *Schedule* on that amount.

CONCLUSION

- [35] For the reasons I have given above, I find that:
- i. The treatment plan in the amount of \$3,144.72 (minus the approved amount of \$1,845.83) for psychotherapy treatment was properly denied (partially approved) and that denial is maintained.
 - ii. The treatment plan in the amount of \$3,656.26 (minus the approved amount of \$2,180.65) for a gym program for one year including 12 sessions of kinesiology oversight was properly denied (partially approved) and that denial is maintained.
 - iii. The original denial of the treatment plan in the amount of \$3,170.00 for occupational therapy and assistive devices was properly denied and there are no grounds for an award under s. 10 of O. Reg. 664 and no interest

¹¹ Ibid, E.K. and Unifund Assurance Company, 2017 CanLII 69237 at para. 39

payable. The plan has subsequently been approved and as yet no invoices have been submitted.

- iv. The original denial of the treatment plan in the amount of \$2,858.20 for an aqua-therapy exercise program was denied without grounds for an award under s. 10 of O. Reg 664. The applicant asserts an amount has been incurred and when submitted to the respondent shall be paid along with interest on the amount pursuant to s. 51 (4) of the *Schedule*.

Released: March 24, 2021



Eleanor White
Vice Chair