



**Citation: Zhao vs. Allstate Canada, 2021 ONLAT 20-000134/AABS**

**File Number: 20-000134/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:

**Dan Feng Zhao**

**Applicant**

and

**Allstate Canada**

**Respondent**

**DECISION**

**ADJUDICATOR:** **Kimberly Parish**

**APPEARANCES:**

For the Applicant: Yu Jiang, Paralegal

For the Respondent: Suzanne Clarke, Counsel

**HEARD:** **By way of written submissions**

## OVERVIEW

- [1] The applicant was involved in an automobile accident on November 19, 2017 and sought benefits pursuant to the Statutory Accident Benefits Schedule – *Ontario Regulation 34/10 - Effective September 1, 2010 (the "Schedule")*. The applicant was denied certain benefits by the respondent and submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service ("Tribunal").
- [2] The applicant was a passenger in a vehicle which was T-boned at high speed on the passenger side. She attended the emergency department and sustained a fracture to the right distal radius, and soft tissue injuries to her left shoulder and right elbow.<sup>1</sup> The applicant is right-hand dominant.
- [3] The applicant's submissions noted the issues in dispute for this hearing include:
- i. Is the applicant entitled to \$ 2,200.00 for an attendant care assessment recommended by Somatic Assessments and Treatment in a treatment plan dated April 10, 2018?
  - ii. Is the applicant entitled to interest on the overdue repayment?
- [4] The applicant's submissions noted all of the other treatment plans (OCF-18's) noted within the case conference report and order dated July 24, 2020 ("July 24, 2020 order") were either resolved by the parties or withdrawn by the applicant. The applicant's submissions did not reference the claim for an award under *Regulation 664* but the July 24, 2020 order referenced a claim for an award.

## PRELIMINARY ISSUE

- [5] The respondent raised a preliminary issue and submitted the applicant failed to comply with the July 24, 2020 order which noted a document disclosure deadline of July 28, 2020 for evidence to be relied on at the hearing. Further, the respondent requests the claim for an award be dismissed because: 1) the applicant failed to provide particulars of the award claim by July 28, 2020, 2) the applicant's submissions are devoid of any claim for an award, 3) the applicant is barred from making further arguments relating to the award claim pursuant to Rule 9.4 of the Tribunal's *Common Rules of Practice and Procedure* ("Tribunal Rules")<sup>2</sup> and, 4) it would be a breach of procedural fairness for the Tribunal to accept subsequent particulars from the applicant relating to the award claim. The applicant provided email correspondence to the Tribunal and the respondent's counsel on October 28, 2020 which noted "Please be advised the applicant will not be providing reply submissions."

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<sup>1</sup> Tab 1A of applicant's submissions – North York General Hospital records, at page 5.

<sup>2</sup> *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version 1 (October 2, 2017)*.

[6] I find the applicant's claim for an award is dismissed because the particulars of the award claim were not produced to the respondent by the document disclosure deadline of July 28, 2020 as required by the July 24, 2020 order. I find the applicant has violated Rule 9.4 of the Tribunal Rules. The applicant has not requested consent from the Tribunal to file the particulars of the award claim late. I find the consequence of not producing the particulars to the respondent by July 28, 2020 is that the applicant cannot proceed with the claim for an award. I find it would be a breach of procedural fairness to the respondent to allow the applicant to proceed with the award without the particulars being produced in advance of the hearing. Therefore, the claim for an award is dismissed.

## ISSUES

- [7] The issues in dispute to be decided at this hearing are as follows:
- i. Is the applicant entitled to \$ 2,200.00 for an attendant care assessment recommended by Somatic Assessments and Treatment in a treatment plan dated April 10, 2018?
  - ii. Is the applicant entitled to interest on the overdue repayment?

## RESULT

[8] I find the applicant is not entitled to an attendant care assessment in the amount of \$2,200.00. The applicant is not entitled to interest on the attendant care assessment.

## ANALYSIS

### **Is the applicant entitled to an attendant care assessment in the amount of \$2,200.00?**

- [9] I find the applicant is not entitled to the attendant care assessment for the reasons which follow.
- [10] A prior attendant care assessment report was completed on November 24, 2017 by Raymond Wong, occupational therapist<sup>3</sup> which recommended \$3,126.89 per month for attendant care. The respondent submitted it funded the cost of this assessment and to date the applicant has not incurred any attendant care expenses. This was not refuted by the applicant.
- [11] The applicant underwent an occupational therapy in home reassessment report dated May 2, 2018 which was issued by Raymond Wong ("Mr. Wong")<sup>4</sup>. The report noted the applicant required \$2,784.51 per month for attendant care

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<sup>3</sup> Tab 2 of applicant's submissions - attendant care assessment report of Raymond Wong, dated November 24, 2017.

<sup>4</sup> Tab 3 of applicant's submissions – occupational therapy in home reassessment report of Raymond Wong, dated May 2, 2018.

services. It further noted she experienced pain in her neck, low back, both shoulders, elbows, wrists, and experienced headaches and dizziness with vomiting. Mr. Wong noted under the heading titled Physical Performance/Mobility Screening<sup>5</sup> that due to headaches, dizziness, and lower back pain, the applicant was assessed and could not perform the following independently: standing, walking, climbing, stairs, balancing, stooping, kneeling, crouching, crawling, and reaching. The report noted she required assistance with meal preparation, and she was observed to be unable to carry a pot of water from the sink. Further, it was noted she was assessed to require assistance with washing dishes, cleaning the tub/shower/sink after her own use and with making her bed and changing the bed linens. Further, it was noted that she was unable to independently dress, groom, transfer to the bath/shower, nor bathe and dry herself. Finally, the report noted she was assessed to require basic supervisory care to be able to respond in an emergency due to her feeling dizzy, fainting episodes, and headaches.

- [12] I find the report has little persuasive value as Mr. Wong relied to a large extent on the applicant's self-reporting and limited objective testing. While the report notes range of motion testing was conducted, the report failed to provide the details of the specific tasks the applicant was asked to perform. Other than noting she was unable to carry a pot of water from the sink, the majority of the tasks noted she was assessed but unable to perform the required tasks. Further on page 18 of his report, Mr. Wong noted she reported being independent with her mobility. This contradicts what was noted earlier in the report that the applicant experienced issues with mobility due to headaches, dizziness, and lower back pain and as a result, the applicant was unable to perform many of the assessed attendant care tasks. For the above reasons, I am not persuaded that the findings noted in the report support that she required attendant care.
- [13] The respondent provided confirmation through the adjuster's log notes that the applicant did not produce a copy of this in-home assessment report, dated May 2, 2018 until September 2, 2020<sup>6</sup>. The applicant has not provided an explanation as to why this report was not submitted to the respondent until 20 months after its completion. I find this evidence supports the attendant care assessment is not reasonable and necessary.
- [14] I find the medical reasons which form the basis of the respondent's denial for this assessment to be sufficient. The assessment was denied through an Explanation of Benefits ("EOB") which noted a fax confirmation date of April 26, 2018<sup>7</sup>. The EOB noted the x-ray report of February 9, 2018 indicates the distal right radial fracture has healed in anatomic alignment and as such, ongoing attendant care does not appear to be required. The EOB further noted an occupational therapy

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<sup>5</sup> *Ibid*, at pages 11-13.

<sup>6</sup> Tab 7 of respondent's submissions – redacted log note entry dated September 2, 2020 confirming receipt of the in-home assessment report dated May 2, 2018.

<sup>7</sup> Tab 4 of applicant's submissions - Explanation of Benefits from respondent with fax confirmation noting date of April 26, 2018.

in-home section 44 insurer's examination ("IE") assessment is scheduled for April 30, 2018 to assess the ongoing need for attendant care services.

[15] The occupational therapy in home IE assessment took place on June 2, 2018. Neither party noted the reason for the reschedule from April 30, 2018.

[16] I am not persuaded that the medical evidence below supports the disputed assessment is reasonable and necessary. While I find the medical evidence below supports the applicant continued to experience ongoing pain in her right wrist and had some functional limitations, I do not accept the attendant care recommendations made by Mr. Wong for the reasons I addressed already. Mr. Wong's report largely attributes her inability to complete a large number of the assessed attendant care tasks due to her headaches, dizziness, and low back pain. Further there has been no further medical documentation produced by the applicant which supports that she was experiencing dizziness, headaches and low back at the time of this assessment, or that these symptoms are a result of the accident. I find the medical evidence below supports the applicant was experiencing ongoing pain in her right wrist, but I am not persuaded that she required attendant care for the reasons I address below.

- a. The February 9, 2018 medical report of Dr. I. Mayne, orthopedic surgeon at North York General Hospital,<sup>8</sup> noted the right wrist distal radial fracture appears healed in anatomic alignment and that the applicant could return to modified work duties with a restriction that she could not lift more than 10 pounds. The report further noted she could return to full work duties as of March 9, 2018. From this evidence, I accept the applicant's right wrist fracture had healed and I accept Dr. Mayne's finding at that time that she could return to work with no restrictions as of March 9, 2018.
- b. An MRI of her right wrist<sup>9</sup> confirms a scapholunate ligament injury. The assessment report of Dr. R. Paul, orthopedic surgeon<sup>10</sup> noted he assessed the applicant on December 3, 2018 and he noted central dorsal radial wrist pain and reduced grip strength in her right wrist. A wrist laser was recommended to be worn for three weeks with splinting of her wrist at night. It was noted by Dr. Paul on February 7, 2019<sup>11</sup> that her wrist pain is improved with wearing a wrist splint for 6 weeks. He also noted a right scapholunate ligament partial tear as result of the accident and that she will experience periodic wrist pain which may require splinting in the future. Based on this evidence, I accept the applicant was experiencing pain in right wrist which was improved with splinting but there is nothing noted by Dr. Paul regarding any restrictions/limitations regarding the use

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<sup>8</sup> Tab 6 of respondent's submissions – report of Dr. I. Mayne, dated February 9, 2018.

<sup>9</sup> Tab 5 of applicant's submissions – MRI of right wrist, dated August 26, 2018.

<sup>10</sup> Tab 6 of applicant's submissions – report of Dr. R. Paul from Toronto Western Hospital Hand Clinic noting findings of December 3, 2018 assessment.

<sup>11</sup> Tabs 6 & 7 of applicant's submissions – medical report of Dr. Paul transcribed on February 7, 2019, based on assessment of the applicant. Medical note from Dr. Paul, dated February 7, 2019.

of her right wrist. As a result, I am not persuaded the applicant required attendant care at this time.

- [17] I find the occupational therapy IE report of Ms. E. Korman, occupational therapist, dated June 18, 2018<sup>12</sup> is persuasive. The report noted the applicant reported pain in her neck, right wrist and shoulder. It also noted the applicant reported she returned to full work duties as an MRI technician but required assistance with the heavier aspects of her job. The report noted no issues with mobility and that she reported she could stand for one hour and walk for two hours. No issues were noted when the applicant was observed squatting, kneeling, bending, transferring, balancing, and reaching. The applicant was observed lifting and carrying a 7 lb. weighted bag in her right hand for 15 steps and an additional 25 steps with the weighted bag in her left hand. Ms. Korman noted the applicant is right hand dominant and she was observed to have bilateral gross motor hand function when completing the grip strength assessment. The applicant successfully demonstrated: opening and closing cupboard doors, putting on and removing a shirt, fastening buttons on her shirt, putting on and removing socks, opening up a number of bottles, washing dishes in a sink using both hands, carrying two casserole dishes with both hands, lifting up a pot, straightening a blanket and folding it over, and wiping down bathroom counters. It was noted that she was observed performing her self-care tasks and feeding/meal preparation independently. I note the report provided the specific details of the tasks the applicant performed and what the assessor specifically observed. The report also noted the applicant reported independence with completing her personal care tasks. Ms. Korman's finding concluded attendant care was not required.
- [18] I find Ms. Korman's IE report was thorough. It contained significant findings based upon objective testing. The report provided details relating to the attendant care tasks being assessed and the specific details of what Ms. Korman observed. I accept that her findings support the applicant does not require attendant care. I find it persuasive that the report noted the applicant is independent with her personal care tasks as this is consistent with the findings noted within the report. The orthopedic IE assessment report of Dr. J. Abouli dated July 13, 2018 noted the applicant was independent with her self-care.<sup>13</sup> I find this evidence provides further support that the applicant did not require attendant care at the time the disputed OCF-18 for an in-home assessment was submitted to the respondent.

## CONCLUSION

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<sup>12</sup> Tab 9 of respondent's submissions – occupational therapy IE report of E. Korman, dated June 18, 2018.

<sup>13</sup> Tab 10 of respondent's submissions – orthopedic IE report of Dr. J. Abouli, dated July 13, 2018, at page 4.

[19] For the reasons I have noted above, I find the applicant has not met her onus to establish the in-home assessment of attendant care needs is reasonable and necessary. As no benefit is payable, no interest is payable.

[20] The applicant's claim is dismissed.

**Released: January 28, 2021**



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**Kimberly Parish, Adjudicator**