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Citation: Harvey v. Economical Insurance Company, 2022 ONLAT 19-006159/AABS

Licence Appeal Tribunal File Number: 19-006159/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:

Cecilia Harvey

Applicant

And

Economical Insurance Company

Respondent

DECISION

ADJUDICATOR: **Rebecca Hines**

APPEARANCES:

For the Applicant: Maurice Benzaquen, Counsel

For the Respondent: Jonathan Schrieder, Counsel

Court Reporter: Bruce Porter

HEARD by Videoconference: October 12 and 13, 2021

BACKGROUND

[1] Cecilia Harvey (the "applicant") was involved in an automobile accident on **January 30, 2018**, and sought benefits from Economical Insurance Company (the "respondent') pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)*.The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

[2] The parties participated in a case conference, however, were unable to resolve the issues in dispute. The matter proceeded to a videoconference hearing where I heard the testimony of the applicant and Rosemary Jones, an adjuster for the respondent.

ISSUES

[3] I have been asked to decide the following issues:

1. Is the applicant entitled to the following treatment plans (OCF-18s) for **physiotherapy** recommended by Downsview Healthcare Inc. (Downsview):

   a) $1,590.08 in an OCF-18 dated September 11, 2018;

   b) $1,632.56 in an OCF-18 dated January 15, 2019;

   c) $1,235.04 in an OCF-18 dated March 19, 2019;

   d) $1,771.20 in an OCF-18 dated July 9, 2019;

   e) $1,521.60 in an OCF-18 dated October 29, 2019?

2. Is the applicant entitled to $2,000.00 for a **chronic pain assessment** recommended by Downsview in a plan dated February 15, 2019?

3. Is the applicant entitled to $756.78 for **assistive devices** recommended by Downsview in a plan dated January 15, 2019?

4. Is the applicant entitled to $627.92 for **psychological services** (relaxation and pain CD's) recommended by Downsview in a plan dated January 15, 2019?

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

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

7. Is the respondent entitled to costs pursuant to Rule 19 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)* as amended (the "*Rules*")?

RESULT

[4] After considering the parties evidence and submissions, I find:

i. The applicant is not entitled to the OCF-18s for physiotherapy or the chronic pain assessment recommended by Downsview.

ii. The applicant is not entitled to the OCF-18 in the amount of $627.92 for the psychological relaxation CDs recommended by Downsview.

iii. The applicant is entitled to the OCF-18 for assistive devices recommended by Downsview in the amount of $756.78 plus interest.

iv. The respondent is not liable to pay an award.

v. The respondent is not entitled to costs pursuant to Rule 19.

PROCEDURAL ISSUES

Admission of Surveillance and Transcript from Examination Under Oath (EUO)

[5] The applicant brought a motion seeking to exclude the respondent's submission of surveillance and the transcript from the applicant's EUO. The applicant submits that the respondent conducted surveillance prior to the EUO which demonstrates that it was preparing for litigation as opposed to adjusting her file in good faith. In her view, this was a conflict of interest and its failure to disclose the surveillance prior to the EUO was trial by ambush. Consequently, this evidence should be excluded from the hearing. She also maintains that it was a conflict of interest for the respondent to use the same counsel to handle her accident benefit dispute that conducted the EUO.

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[6] In support of her position, the applicant relied on the Divisional Court's decision in *The Personal Insurance Company v. Jia*, 2020 ONSC 6361 (CanLII)[1]. This was an appeal from a reconsideration decision of the Tribunal, which determined that an EUO obtained in the priority dispute should not be permitted in the accident benefit hearing because it was not obtained in compliance with s.33(2) of the *Schedule*. The court ultimately upheld the Tribunal's decision. The applicant submits that if a reasonable member of the public were to view this situation, they would agree that it is unacceptable to use the same lawyer for the EUO and accident benefit dispute. The respondent owed the applicant a duty of good faith, which in this case quickly turned litigious by obtaining surveillance that was then in turn used to deny the applicant's benefits.

[7] The respondent argues that the case relied on by the applicant is distinguishable as it dealt with a priority dispute. It submits that in accident benefit files, it is not uncommon for the same counsel to have carriage of a file from the date an EUO up until a Tribunal hearing. Further, it did not shift the purpose of the EUO, and it complied with s. 33 (2) of the Schedule. The applicant's statements at the EUO were contradicted by surveillance done two months prior. There is no law to support that this was a conflict of interest.

[8] I agree with the respondent that the decision relied upon is not helpful to the applicant's position as it dealt with evidence obtained in a priority dispute. I also agree that the decision is distinguishable as the respondent obtained the EUO in compliance with s. 33 (2) of the Schedule. I do not find that there was a breach of any firewall between the accident benefit, tort or priority dispute. Further, I agree with the respondent that it is not uncommon for an insurance company to retain the same counsel for the duration of an accident benefit claim. Finally, the applicant did not direct me to any case law dealing with whether there was a conflict of interest due to the timing of the respondent's surveillance or rules for when an insurer is obligated to disclose surveillance in advance of an EUO. Therefore, the applicant's request for the exclusion of this evidence is denied.

Adjuster's Log Notes

[9] In the midst of the hearing, the applicant requested that the respondent produce the unredacted adjuster's log notes or submit them to the Tribunal for evaluation as the records received included numerous redactions with no explanation. The applicant submits that her case was mishandled, and the respondent must justify why it is claiming that certain log notes are protected by litigation privilege. The respondent opposed the applicant's request on the basis that she had over a

[1] The Personal Insurance Company v. Jia, 2020 ONSC 6361 (CanLII)

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year and a half prior to the hearing to make this request but did not. Further, the case conference report and order did not explicitly state for it to provide the reasons for redactions, so it is not in non-compliance with the Tribunal's order.

[10] I agree with the respondent and do not order it to produce the unredacted records to the Tribunal or the applicant. The applicant did not provide any explanation for why she was making this request now in the middle of the hearing. I agree that the applicant had ample time to make this request but did not. In fact, the applicant has brought motions seeking various relief prior to the hearing and did not raise this as an issue. In my view, to request that the Tribunal review unredacted records at this point is time-consuming and should only be requested as a last resort. To consider this request right now would also create significant delay and the hearing has already been adjourned twice. Finally, my review of the case conference report and order reveals that the respondent was not ordered to provide reasons for its redactions. For these reasons, the applicant's request is denied.

Admission of Spreadsheet from Downsview

[11] The respondent opposed the applicant's submission of a spreadsheet from Downsview as the document was not produced in compliance with the deadlines provided in the Tribunal's orders or in advance of the hearing. The respondent argues that it would be procedurally unfair to admit this document as it is unable to verify the truth of its contents or confirm if Downsview even authored same. The applicant submits that the document was prepared by Downsview and the respondent is not prejudiced by the admission of the document as it is simply an outstanding account for services she has incurred. I admit the document. The respondent is not prejudiced, as ultimately, I gave this evidence very little weight in my determination on the issues in dispute.

BACKGROUND

[12] The applicant was involved in an accident on January 30, 2018 when her vehicle was rear ended. The airbags deployed and her vehicle was deemed a write off. She maintains that she sustained injuries to her right hand and shoulder, neck and back and that she suffers a psychological impairment as a result of the accident. She went to a walk-in-clinic the next day and was prescribed pain killers. She commenced treatment at Downsview.

[13] The applicant maintains that all of the disputed OCF-18s are reasonable and necessary as her physical impairments have developed into chronic pain which has interfered with her ability to function in her daily activities and employment.

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She submits that the respondent unreasonably denied all of the disputed benefits as it relied on old insurer examinations (IEs). Therefore, the respondent is liable to pay an award for its handling of her claim.

[14] The respondent maintains that none of the OCF-18s are reasonable and necessary because the applicant is not credible as there are large discrepancies in how she has reported her accident related impairments and functional limitations. It relies on surveillance taken on various dates and the EUO transcript in support of same. In addition, it submits that the applicant has had significant post-accident health issues which are unrelated to the accident. It also contends that the applicant has failed to report any accident related complaints in the bulk of the post-accident medical records, nor did she advise any of the assessors of her post-accident health issues. Finally, it submits that it was under no obligation to conduct additional IEs as it did not receive any new medical records which would have impacted its decision in denying the benefits.

ANALYSIS

Is the applicant entitled to the five OCF-18s for physiotherapy and the chronic pain assessment recommended by Downsview?

[15] For the following reasons, I find the applicant is not entitled to any of the OCF-18s for physiotherapy or the chronic pain assessment.

[16] To receive payment for a treatment and assessment plan under s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable. The test to prove entitlement to an assessment is similar, except the applicant must prove a link between the assessment sought and an accident related impairment.

[17] To avoid repetition, I will address the five OCF-18s for physiotherapy and the chronic pain assessment together as they involve the same evidence.

[18] With the exception of the addition of chronic pain as an accident related impairment, all of the OCF-18s for physiotherapy and chronic pain assessment submitted by Downsview listed soft tissue strain and sprain impairments as the applicant's physical impairments. Further, they all note that the applicant had activity limitations in employment and her activities of normal life. Specifically, they state the applicant was limited in activities involving bending, lifting, carrying,

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stooping and overhead activities. Prolonged sitting, standing and walking are also reported to be provocative.

[19] The goals listed on the OCF-18s are pain reduction and increased range of motion and strength. Under “Evaluation,” it notes that the applicant has demonstrated increased range of motion, decreased pain, increased endurance and general decrease in the frequency and severity of painful episodes. All of the OCF-18s also indicate that the applicant’s overall improvement was 30%. However, I note that the level of improvement did not change from one OCF-18 to the next despite the fact that the applicant continued to attend treatment.

[20] The goals listed on the OCF-18 for the chronic pain assessment are to evaluate the extent of the applicant’s chronic injuries, psychological complaints and to provide a prognosis and recommendation for recovery. Another goal was to return the applicant to her activities of daily living.

[21] In support of her position that the OCF-18s for physiotherapy and the chronic pain assessment are reasonable and necessary, the applicant relied on the OCF-18s prepared by Downsview, the clinical notes and records (CNRs) of Dr. Salim, family doctor and ultrasound of her right shoulder. I do not find the CNRs of Dr. Salim support that any of the disputed OCF-18s are reasonable and necessary as the applicant visited her doctor only four times about any accident related complaints between January 31, 2018 and April 28, 2018. The CNRs note that she complained of pain in her back, neck, and right shoulder as well as anxiety and insomnia. In my view, the four CNRs do not support that the applicant has any ongoing physical impairment as a result of the accident. Further, Dr. Salim’s CNRs do not recommend that the applicant requires additional physiotherapy or support that she suffers from chronic pain as a result of the accident.

[22] Of significance, most of the disputed OCF-18s were submitted in 2019. The respondent submitted the CNRs of Dr. Assad, another family doctor which included various hospital records and reports between 2015 and April 1, 2019. None of these records mention the accident at all. What I find lacking in this case was any CNRs or reports from 2019 documenting any ongoing accident-related complaints. In my view, if the applicant suffered from any ongoing physical impairment or chronic pain as a result of the accident, it would be mentioned in these records. What I also find missing from the evidence was any progress reports from Downsview supporting that the disputed OCF-18s would achieve their stated objectives as they were all identical. That is part of the legal test, which the applicant has failed to meet.

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[23] In addition, I find the evidence about the applicant's reported functional limitations to be contradictory. The applicant reported in her EUO and to the bulk of assessors that she was unable to work as a result of her accident related impairments. Prior to the accident, she was self-employed as a hairdresser, and worked out of her home. Surveillance obtained by the respondent in June 2018 show various women entering the applicant's home and exiting with different hair styles. During cross-examination, the applicant was asked for an explanation and she stated that these women were family members who had come over to use her equipment. I reject this explanation because prior to the accident, the applicant ran a hair salon out of her home. In my view, it is more likely than not that these women were clients of hers as opposed to family members simply using her equipment. I find the applicant's explanation unlikely. I would find the applicant more credible if she just admitted that she was attempting to work. Furthermore, a comparison of the applicant's income tax records from 2017 and 2018 demonstrate that she did not have a significant reduction in income in the year following the accident.

[24] Other surveillance obtained by the respondent showed the applicant doing things that she reported being unable to do in her EUO as well as in her self-reports to assessors. For example, she reported being unable to go shopping, do laundry and wash her car. Surveillance video showed her doing all of these things in June 2018. Further, in one video from August 2019, she can be seen working out in a gym – using a stair climber and several weight machines. She also ran numerous errands. The applicant testified that she has good days and bad days and on a good day she can do things. While I agree that surveillance does not always show the full picture, the applicant's inconsistency in reporting her functional limitations diminishes her credibility. I also agree that she was not forthright about her post-accident health issues. For these reasons, I give her self-reports to assessors and testimony about her accident related impairments and functional limitations little weight.

[25] The respondent relied on the insurer examinations (IEs) of Dr. Tansey, orthopaedic surgeon and Dr. Angel, neurologist dated June 1, 2018 to deny the OCF-18s. Dr. Tansey determined that the applicant sustained uncomplicated myofascial strain-type injuries and the doctor did not identify any objective evidence of any accident related impairment in relation to the injuries sustained in the accident. Dr. Tansey opined that further facility-based treatment was not reasonable and necessary and that the applicant had recovered from her accident related impairments. Dr. Angel opined that the applicant's right shoulder impairment was more than likely connected to her occupation as a hairdresser versus any accident related impairment. In the absence of medical

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evidence supporting that the applicant has any ongoing accident-related physical impairments or supporting that the OCF-18s would achieve their objectives, I accept the opinions of the respondent's IE assessors.

[26] The applicant has not met her onus in proving on a balance of probabilities that any of the disputed OCF-18s for physiotherapy or the chronic pain assessment are reasonable and necessary.

Is the applicant entitled to $756.78 for the OCF-18 for assistive devices recommended by Downsview in a plan dated January 15, 2019?

[27] I find the applicant is entitled to the OCF-18 for assistive devices in the amount of $756.78 for the following reasons.

[28] The goal of this OCF-18 was to provide the applicant with the necessary assistive devices to return her to her activities of normal living. Under the additional comments section, it notes that the OCF-18 was composed in accordance with the recommendations made by Pravin Kedar, occupational therapist in the attendant care assessment report dated May 18, 2018. Ms. Kedar's report noted that the applicant reported pain and stiffness in her right shoulder, neck and upper and lower back. Her right shoulder pain caused aggravation with lifting, carrying, pushing, pulling and reaching. Ms. Kedar noted that the applicant had limited grip strength in her right hand and has difficulty completing activities such as mopping and vacuuming. In her report Ms. Kedar recommended the following assistive devices:

Preparation services:	$45.72
Instruction, personal care:	$40.00
Documentation:	$60.00
Long handle Bath Scrubber:	$15.54
Long handled Bath Scrubber:	$16.20
Exercise Equipment:	$55.14
TENS Unit:	$90.00
Light weight vacuum cleaner	$83.99
Heat pad	$96.60

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Steam Mop	$179.00

[29] The respondent sent the applicant an explanation of benefits (EOB) dated January 25, 2018 denying the OCF-18. In its reasons for denying same, it stated that the IE of Ms. Oh, occupational therapist recommended a “long handled back scrub at a cost of $18.00 and long handled tub scrub in the amount of $20.00.” The letter advised the applicant that she could purchase the two items and provide an invoice (“OCF-6”) and receipts for payment of same.

[30] Although I have determined that there are credibility issues in the applicant’s reporting of her accident-related functional limitations, I find the OCF-18 for assistive devices to be reasonable and necessary. Of significance, both parties’ occupational therapists determined that the applicant required assistive devices to carry out her heavier housekeeping and home maintenance tasks. Therefore, I prefer the recommendations of Ms. Kedar and find the OCF-18 in its entirety to be reasonable and necessary.

Is the applicant entitled to $627.92 for psychological services (relaxation and pain CD’s) recommended by Downsview in a plan dated January 15, 2019?

[31] I find the applicant is not entitled to the OCF-18 for $627.92 for psychological services recommended by Downsview.

[32] The OCF-18 authored by Dr. Pivtoran, chiropractor noted that the applicant was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood; Specific Phobia as a result of the accident. The goal of the OCF-18 was to provide the applicant with methods of relaxation for pain management, stress reduction, improving sleep and to achieve and maintain overall healthy balanced emotional state. The OCF-18 was broken down as follows: $400.00 for pain management and relaxation cd set of 4; $63.72 for form completion and $112.20 for patient education and instruction for a total cost of $627.92.

[33] It is not disputed that both parties’ psychological experts have diagnosed the applicant with an accident related psychological impairment. The applicant relied on the reports of Dr. Shaul and IE of Dr. Almpack, both psychologists, in support of her position that this OCF-18 is reasonable and necessary. In addition, the applicant relied on a letter authored by Dr. Shaul to the respondent in support of the doctors’ position of why the CDs are necessary. Dr. Shaul indicated that the CDs are made up of various methods of relaxation to teach skills and strategies for pain management, stress reduction, improving sleep, and to achieve and maintain an overall healthy and balanced emotional state.

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[34] The respondent sent the applicant an EOB dated January 25, 2019 denying the OCF-18. In its reasons for denying the plan, it indicates that the CDs are a duplication of psychological treatment that the applicant was already receiving. In addition, the respondent states "it is unclear why the material is being requested at this time. The recommendation for further muscle relaxation training should be implemented during in-office sessions. The fees associated with the aforementioned CDs are exorbitant and not reasonable or necessary. We have attached pricing comparisons obtained through google search indicating the costs associated for the requested material."

[35] I agree with the respondent that $400.00 for 4 CDs is excessive. The applicant did not submit any evidence to justify that the cost of the OCF-18 is reasonable. Nor did she really explain why the CDs were needed in addition to the psychological treatment she was already receiving. Consequently, I agree with the respondent that this OCF-18 is a duplication of services.

[36] For the above-noted reasons, the applicant has not established on a balance of probabilities that the OCF-18 in the amount of $627.92 for the relaxation CDs is reasonable and necessary.

Is the respondent liable to pay an award under s.10 of *Ontario Regulation 664* because it unreasonably withheld or delayed payments to the applicant?

[37] I do not find that the respondent is liable to pay an award.

[38] The applicant seeks an award under s. 10 of O. Reg. 664. Under s. 10, the Tribunal may award up to 50% of the total benefits payable if it determines that the insurer unreasonably withheld or delayed the payment of benefits. For conduct to attract a s. 10 award, the conduct must rise above being an incorrect decision and be "excessive, imprudent, stubborn, inflexible, unyielding or immoderate."[2]

[39] The main basis for the applicant's claim for an award was that the respondent relied on old IEs in denying the OCF-18s in dispute. There is nothing in the Schedule which provides that an IE is mandatory in order to deny a benefit. Further, the applicant did not point me to any evidence to support that she had submitted updated medical records to the respondent which would necessitate the need for it to re-evaluate its position or schedule additional IEs. The applicant has not met her onus in proving that the respondent unreasonably

[2] Plowright and Wellington Insurance Company (FSCO A-003985, October 29, 1993) at page 17

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withheld any of the disputed benefits or that its behaviour met the threshold of being excessive, imprudent, stubborn, inflexible, unyielding or immoderate. Therefore, I do not find that the respondent is liable to pay an award.

COSTS

Is the respondent entitled to costs?

[40] Under Rule 19 of the Tribunal's *Common Rules of Practice & Procedure*, the Tribunal may award costs if it determines that a party acted unreasonably, frivolously, vexatiously or in bad faith during the proceedings

[41] The respondent requested costs under Rule 19 because the applicant withdrew her dispute involving the attendant care and income replacement benefit on the eve before the hearing. The respondent submits that this is not appropriate as it had incurred costs preparing its witnesses on these issues for the hearing. Further, it had recently learned that the applicant had returned to work. Therefore, for her to pursue and maintain these claims at the Tribunal was unreasonable.

[42] The respondent's request for costs pursuant to Rule 19 is denied. It is well established law that an applicant can withdraw an issue at any stage in the process and that this is not grounds for costs. The respondent has failed to convince me that the applicant's conduct during the process meets the threshold of being unreasonable, frivolous, vexatious or in bath faith.

ORDER

[43] For all of the above-reasons, I find:

i. The applicant is not entitled to the OCF-18s for physiotherapy or the chronic pain assessment recommended by Downsview.

ii. The applicant is not entitled to the OCF-18 in the amount of $627.92 for the psychological relaxation CDs recommended by Downsview.

iii. The applicant is entitled to the OCF-18 for assistive devices recommended by Downsview in the amount of $756.78 plus interest in accordance with s. 51 of the *Schedule*.

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iv. The respondent is not liable to pay an award.

v. The respondent is not entitled to costs pursuant to Rule 19.

Released: February 17, 2022

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Rebecca Hines
Adjudicator

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