



**Citation: Najem-Youssef v. Co-operators General Insurance Company, 2023  
ONLAT 21-005486/AABS**

**Licence Appeal Tribunal File Number: 21-005486/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:

**Souad Najem-Youssef**

**Applicant**

and

**Co-operators General Insurance Company**

**Respondent**

**DECISION**

**ADJUDICATOR: Harry Adamidis**

**APPEARANCES:**

For the Applicant: Souad Najem-Youssef, Applicant  
Hamish Mills-McEwan, Counsel

For the Respondent: Beverly Wade, Claims Specialist  
Kelly Kirkwood, Adjuster  
Alexander Dos Reis, Counsel

Interpreters: Charbel El-Chaar (Arabic)  
Fonar Rafo (Arabic)

Court Reporter: Paula Monahan

**HEARD by Videoconference: September 26-28, 2022**

**Motion by Teleconference: April 19, 2023**

## OVERVIEW

- [1] The applicant was involved in an automobile accident on February 7, 2019, and sought benefits pursuant to the Statutory Accident Benefits Schedule - *Effective September 1, 2010 (including amendments effective June 1, 2016)* (“Schedule”). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”) for resolution of the dispute.

## ISSUES

- [2] The issues to be decided in this hearing are:
1. Is the applicant entitled to attendant care benefits in the amount of \$752.54 monthly for services recommended by Lisa Manninen for the period of September 8, 2020, to date and ongoing, submitted September 8, 2020, denied by the respondent on December 8, 2020?
  2. Is the applicant entitled to receive medical benefits in the amount of \$2,594.00 for physiotherapy services recommended by Bishoy Soleman, in a treatment plan submitted July 11, 2019, denied by the respondent on July 23, 2019?
  3. Is the applicant entitled to receive medical benefits in the amount of \$1,995.00 for physiotherapy services, recommended by Hillary Soster, in a treatment plan submitted January 6, 2021, denied by the respondent on March 2, 2021?
  4. Is the applicant entitled to receive medical benefits in the amount of \$2,730.00 for psychological services recommended by Ghassan Arabieh, in a treatment plan submitted March 20, 2021, denied by the respondent on March 31, 2021?
  5. Is the applicant entitled to receive medical benefits in the amount of \$948.00, for occupational therapy services recommended by Christine Abi-Khaled, denied by the respondent on July 20, 2020?
  6. Is the applicant entitled to receive costs in the amount of \$310.55 for medication, denied by the respondent on August 25, 2020?
  7. Is the respondent liable to pay an award under s. 10 of Reg.664 because it unreasonably withheld or delayed payments to the applicant?

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

- [3] Issues 5 to 11 from the Case Conference Report and Order were resolved prior to the hearing. The above eight issues remain and are the subject of this proceeding.

## **RESULT**

- [4] I find that the applicant is not entitled to an attendant care benefit, physiotherapy, psychological services, occupational therapy services, medication costs, nor an award.
- [5] As no outstanding benefits are owing, I further find that no interest is payable.

## **PROCEEDURAL ISSUES**

### **Motion brought by the applicant**

- [6] Prior to the hearing, on September 22, 2022, the applicant filed a motion to add an issue to this proceeding from a separate application. The applicant submitted that this new issue, a recently denied treatment plan, does not add complexity and can be easily integrated into this proceeding without additional hearing time. As well, adding this issue ensures efficiency by avoiding multiple proceedings and the duplication of testimony.
- [7] The respondent objected. The recent denial involves thousands of pages of documents. Respondent's counsel has not had the opportunity to review this documentation and is not prepared to respond to this new issue.
- [8] The applicant replied to the respondent's concerns by stating that the respondent is already familiar with the denied treatment plan. The respondent has everything it needs to effectively proceed with this issue. Moreover, it is unfair for the applicant to wait for this issue to be resolved when it can be dealt with in this proceeding.
- [9] I find that it would be procedurally unfair to add this issue to this proceeding. The respondent's denial letter was issued 12 days before the hearing. The Notice of Motion to add this issue was filed four days before the hearing. These events are quite recent. I accept the respondent's submission that it has not had a sufficient opportunity to prepare, and it would be unfairly prejudiced if this issue was added to this proceeding.

### **Motion brought by the Respondent**

- [10] On the final day of the hearing, the respondent sought to add the issue of misrepresentation under section 53 of the *Schedule* to this proceeding. It submitted that testimony elicited during the hearing brought this new issue to light. Consequently, it was not possible to raise this issue earlier.
- [11] The applicant objected. They submitted that it is highly prejudicial to bring forward a new issue at the end of the hearing.
- [12] I find that it is procedurally unfair to add this new issue because the applicant has not had a reasonable opportunity to prepare. Moreover, the respondent is not prejudiced by the decision to not add this new issue. It may bring a motion to add this issue in the other application filed in September, 2022.

### **Post-Hearing Motion brought by the Respondent**

- [13] The respondent filed a motion on February 24, 2023 seeking an order for the applicant to pay each s. 44 insurer examination (IE) assessor an expert witness fee under Tariff A of the Rules of Civil Procedure. This motion was heard by teleconference on April 19, 2023.
- [14] The applicant summoned three IE assessors. All three appeared and gave testimony at the hearing. The applicant paid a \$50.00 attendance fee to each assessor, but not the \$350.00 per day rate for expert witnesses.
- [15] The respondent submits that all three witnesses gave opinion evidence based on their expertise. The respondent notes that the applicant referred to the witnesses as “your experts” in email communication. Both of these points show that these witnesses are expert witnesses. The respondent also submits that the witnesses should be compensated for the time they spent preparing for the hearing.
- [16] At the motion hearing, the respondent also noted that the witnesses have now invoiced the respondent for their appearances at the hearing because the applicant has refused to pay the appropriate witness fee. Contrary to 8.3 of the *Rules*, the respondent has been put in the position to pay the fees for the witnesses called by the applicant. The respondent seeks to rectify this situation by asking the Tribunal to grant the relief it is seeking.
- [17] The applicant notes that she received an invoice from Dr. Nemeth totaling \$1,017.00. This includes fees for preparation time. Dr. Gianchino sent an invoice for \$593.25. The respondent forwarded an invoice from Ms. Roberts totaling \$598.50 and asked the applicant to pay \$498.75 of Ms. Robert’s fees.

- [18] The applicant submits that an expert witness must be affirmatively qualified at the request of the party that relies on the witness as an expert. These are the respondent's experts and the respondent did not undertake to qualify them as experts. 10.2 and 10.3 of the Rules requires the respondent to provide prescribed information regarding the witnesses. This was not done. As well, the respondent did not provide the Acknowledgement of Expert Duty forms of the IE assessors to the applicant as required by 10.2(b) of the Rules. For these reasons, it is not possible for these witnesses to be expert witnesses.
- [19] The applicant further submits that she did not challenge the qualifications of the witnesses as these witnesses were not tendered as experts by the respondent.
- [20] As well, the applicant submits that she should not be required to pay fees beyond the statutory witness fee.
- [21] I find that the three witnesses are expert witnesses and that they are to be paid according to the provisions of Section 28 of Tariff A of the Rules of Civil Procedure which states that "For an expert who gives opinion evidence at the hearing or whose attendance was reasonably necessary at the hearing, a reasonable amount not exceeding \$350 a day, subject to increase in the discretion of the assessment officer."
- [22] Under 10.1 of the Rules, an expert witness is a person qualified to provide information and opinions based on special knowledge in respect of the matters on which they testify. There are no other elements in this definition.
- [23] The applicant does not argue that the three witnesses fail to meet any of the elements found in this definition. Instead, the applicant raises procedural deficiencies. None of these deficiencies changes the context or purpose of their testimony. These witnesses provided information and opinions based on their special knowledge. This makes them expert witnesses.
- [24] Tariff A of the Rules of Civil Procedure requires the applicant to pay \$350.00 per day to each expert witness. The applicant has already paid \$50.00 to each witness. The balance of \$300.00 is to be paid to each witness within 90 days after the release of this decision.
- [25] There are no further statutory requirements in regard to fees for these witnesses. As such, I cannot consider the respondent's request for additional fees to be paid to the witnesses.

## ANALYSIS

### **Issue 1: Is the applicant entitled to an attendant care benefit (ACB) in the amount of \$752.54 per month from December 8, 2020 and ongoing?**

- [26] The applicant is not entitled to an ACB. She has not proven, on a balance of probabilities, that her impairments were caused by the motor vehicle accident (MVA).
- [27] The respondent is liable to pay an ACB to cover the cost of all reasonable and necessary attendant care expenses that are incurred by or on behalf of the insured person as a result of the accident for services provided by an aide or attendant or by a long-term care facility.
- [28] The applicant relies on the report by Lisa Manninen, an occupational therapist, and the attached OCF-1 dated August 24, 2020. She is seeking an attendant care benefit of \$752.54 per month. The report states that the applicant has the physical ability to perform most personal care tasks. However, pain and low mood prevent her from initiating those tasks.
- [29] The applicant testified that her health was very good, and she was quite active prior to the MVA. She cleaned the bedrooms, washrooms, kitchen, and all three floors of her house. She did the cooking and the laundry. She looked after her grandchildren. She also exercised and went on three hour walks everyday.
- [30] Her son testified that the applicant took care of the housework. She was always well-dressed, liked to laugh, and liked to go for walks. After the MVA, he testified that she became the opposite. Her mood is always down. She is not physically involved with her grandchildren. As well, family members have had to take on household duties previously performed by the applicant.
- [31] In testimony, Ms. Manninen confirmed that the applicant's physical injuries are minor and do not prevent her from completing her activities of daily living. The applicant was diagnosed with a somatic symptom disorder by Dr. Suddaby, a psychiatrist. This affects how she experiences pain and impairs her ability to perform her activities of daily living. The applicant was also diagnosed by Dr. Suddaby with a major depressive disorder. This psychological impairment prevents her from initiating and completing personal care tasks.
- [32] The applicant submits that her testimony and the testimony of her son establishes that she was healthy and fully functional before the MVA. The accident caused the pain and major depressive disorders that render her unable

to perform the activities of daily living. As such, attendant care is reasonable and necessary.

- [33] The respondent submits that the applicant could not have been healthy before the accident. She had a significant opioid dependency prior to the MVA. Therefore, it argues, her impairments cannot be attributed to the MVA, and she is not entitled to ACBs.
- [34] In 2010, some nine years before the MVA, Dr. Plotnick, a psychiatrist, diagnosed the applicant with a pain disorder and a severe to extreme major depressive disorder.
- [35] Dr. Plotnick's Psychological Report of May 10, 2010 shows that the applicant had serious impairments that prevented her from completing the activities of daily living:
- ...her involvement in functional activities is ostensibly negligible as she spends much of her day watching movies, awaiting opportunities to eat meals prepared by her husband and either lying down or sleeping. Further still, she advises of the extensive needs for assistance including in the area of activities of daily living such as for putting on her clothes and going to the shower.
- [36] The clinical notes and records of Dr. Ronald Eliosoff, the applicant's family doctor, cover the period from May 6, 2016 to February 23, 2019. His notes show that the applicant was being treated for chronic pain and depression. She was prescribed similar amounts of medication for pain and depression prior to the MVA as she was in 2010. This is inconsistent with the applicant's account of her pain and depression subsiding before the MVA.
- [37] For example, in 2010 the applicant was diagnosed with a major depressive disorder and was prescribed 20mg per day of the anti-depressant Fluoxetine. The same dosage of Fluoxetine was prescribed to her from May 6, 2016 to January 14, 2019. This is an indication that the applicant's major depressive disorder continued up to the time of the accident.
- [38] In 2010, the applicant was prescribed 112 tablets of Oxycocet per month. Dr. Eliosoff prescribed 100 tablets of Oxycocet per month from May 6, 2016 up to the time of the accident. Again, this shows that the applicant was being treated for a chronic pain disorder prior to the accident.

[39] Dr. Ken Suddaby, a psychiatrist, issued two Independent Psychiatric Evaluations. In both instances he found that the MVA caused the applicant's somatic pain disorder and depression. This finding is based on the applicant's account of having recovered from her previous pain disorder and depression. He also relied on information provided by her son.

[40] However, I find that Dr. Suddaby's report relies on factually incorrect and unreliable information provided by the applicant and her son. The following is noted from his first evaluation in 2019, with comments on how it conflicts with the facts before me:

- a) The applicant told Dr. Suddaby that she recovered from back pain within two years of her 2008 workplace accident. This conflicts with her 2010 pain disorder diagnosis.
- b) Her 2016-2018 medical records at CareMedics do not show any prescriptions for narcotic analgesics. She denied seeing any other physicians and denied having prescriptions for narcotic analgesics. In reality, Dr. Eliosoff, her family doctor, was prescribing 100 tablets of Oxycocet per month during this time.
- c) Dr. Suddaby reviewed a document from Shopper's Drug Mart that indicated the applicant was prescribed Oxycocet prior to the MVA. The applicant could not explain why she was being prescribed narcotic analgesics before the accident despite having no pain.

[41] There is further support for this finding in Dr. Suddaby's subsequent evaluation. The following is noted from his second evaluation in 2021, with comments on how the second report conflicts with the facts before me:

- a) The applicant now acknowledges that she was not pain free prior to the MVA. She had intermittent back pain. She further states that she disposed her unused Oxycocet tablets at the end of the month. She could not explain why she did not simply delay the renewal of her prescription. In testimony, she explained that she did not want the prescription to stop, so she continued to renew it even though she did not consume much of the Oxycocet she received.
- b) The applicant's son told Dr. Suddaby that he had some awareness of how many pills his mother took. He estimated that it was 40 to 70 pills per month. He understood that his mother may have been throwing away pills because they were near the expiration date. In testimony, the applicant's



son said that he does not know how many pills of Oxycocet she threw away. He also testified that he witnessed her throwing away pills on only one occasion.

- [42] Dr. Suddaby opines that Dr. Eliosoff's scant clinical notes do not comment on the level of the applicant's pre-MVA functional impairments. For this reason, he preferred the information provided by the applicant and her son to find that she was fully functional prior to the MVA.
- [43] In my view, the information provided by the applicant is unreliable. She denied having any pain before the accident. She denied having a doctor who prescribed Oxycocet to her. By the time of Dr. Suddaby's second report, she acknowledges having some pain and being prescribed Oxycocet, but claims that she threw away unused pills. According to Dr. Suddaby, the applicant is a poor historian, and these inconsistencies are of little consequence.
- [44] I find that these inconsistencies cannot be explained in the manner suggested by Dr. Suddaby. The applicant denied being treated by a physician prescribing her Oxycocet while being on such a prescription. This was not a distant historical event, but a current event at the time of Dr. Suddaby's first evaluation. As well, the applicant's son's statements on his mother's use of painkillers are speculative. He testified that his estimate of the applicant's decreased use of painkillers pre-MVA is based on a single occasion when he witnessed her throwing away pills. As such, he has limited insight into his mother's use of narcotic analgesics. Consequently, I give little weight to Dr. Suddaby's finding that the applicant's pre-existing impairments had resolved prior to the MVA because his conclusion is based on the unreliable information provided by the applicant and her son.
- [45] The applicant was diagnosed with a pain disorder and major depression in 2010. She continued to be treated for a pain disorder and depression up to the time of the MVA. The dosage of Oxycocet and Fluoxetine prescribed to her in 2010, when she was unable to complete her tasks of daily living, was virtually unchanged at the time of the MVA. This evidence is more persuasive than the testimony of the applicant and her son that portrayed her as highly active and unimpeded by a pre-existing pain disorder or major depression. For these reasons, I find that the applicant has not established, on a balance of probabilities, that the impairments necessitating attendant care were caused by the accident.
- [46] In light of the above, I find that attendant care expenses are not reasonable and necessary. Therefore, the applicant is not entitled to an ACB.

### **Issues 2-3: Is the applicant entitled to the OCF-18s for physiotherapy?**

- [47] The respondent is liable to pay medical benefits to, or on behalf of, the applicant if the applicant sustains an impairment as a result of the MVA, and the medical benefit is a reasonable and necessary expense incurred by the applicant as a result of the accident.
- [48] The applicant submits that the Independent Medical Examination Report of Dr. Finestone, a physiatrist, establishes that the two disputed physiotherapy plans are reasonable and necessary. The report states that the applicant has left ankle and foot pain, and left lateral thigh pain that developed post-MVA. Dr. Finestone also opines that the MVA exacerbated the applicant's pre-existing low back pain.
- [49] The respondent submits that physiotherapy is not reasonable and necessary. It relies on the two reports completed by Dr. Giachino, an orthopedic surgeon, which state that the applicant does not have accident-related musculoskeletal impairments.
- [50] I find that the applicant is not entitled to physiotherapy as the applicant has not established, on a balance of probabilities, that her pain syndrome is not accident-related.
- [51] The applicant sustained a left ankle fracture in the MVA. An x-ray from October 9, 2019 shows a "Complete bony union has occurred..." As such, the fracture has healed. Despite this, the applicant continues to report pain in this area. Dr. Finestone opines that the applicant likely has pain syndrome.
- [52] This is consistent with the evidence of Ms. Manninen. Specifically, that the applicant's physical injuries are minor and do not prevent her from completing her activities of daily living. Ms. Manninen and Dr. Finestone attribute the pain experienced by the applicant to pain syndrome rather than to an unresolved physical injury.
- [53] The applicant's pain disorder is a longstanding condition that was diagnosed by Dr. Plotnick in 2010. She continued to be treated for a pain disorder by Dr. Eliosoff up to the time of the accident.
- [54] The applicant's pain is not caused by an unresolved injury from the MVA. Her pain disorder is a pre-existing condition that she has struggled with since the 2008 workplace accident.
- [55] Consequently, I find that the applicant is not entitled to the two treatment plans for physiotherapy because her impairment has not been caused by the accident.

#### **Issue 4: Is the applicant entitled to the OCF-18 for psychological services?**

- [56] The applicant submits that the two reports of Dr. Suddaby establish that the applicant's major depression disorder was caused by the MVA. Consequently, she is entitled psychological treatment.
- [57] The stated goal of the treatment plan is for the applicant to develop positive coping skills to manage depressive and anxiety patterns, use behavioral activation to overcome amotivation and loss of interest, help her work through and resolve irrational guilt, and use cognitive behavioural therapy and mindfulness to optimize therapeutic outcomes. In my view, these treatment goals relate to managing the effects of her major depressive disorder.
- [58] As previously noted, the Tribunal does not accept Dr. Suddaby's finding with regard to the MVA causing applicant's major depressive disorder. For this reason, I find that the applicant is not entitled to psychological services. She has not established, on a balance of probabilities, that this treatment is reasonable and necessary to treat a psychological disorder caused by the MVA.

#### **Issue 5: Is the applicant entitled to the OCF-18 for occupational therapy?**

- [59] The applicant submits that the following recommendation from Dr. Suddaby's 2021 report supports her entitlement to occupational therapy:
- Ms. Najem-Youssef should be treated within a multidisciplinary treatment program, inclusive of, but not limited to: Pain medicine physician; psychology; psychiatry; occupational therapy; and any medically indicated physical rehabilitation interventions that would produce behavioural activation.
- [60] The OCF-18 for occupational therapy was submitted by Christine Abi-Khaled, an occupational therapist, and identifies the treatment goals as pain reduction and a return to activities of daily living. Ms. Abi-Khaled further adds that the goals of the treatment are to decrease depression symptoms and increase motivation.
- [61] The occupational therapy being sought by the applicant is meant to help her manage her pain disorder and depression in a way that allows her to become more active and to resume her activities of daily living. However, the Tribunal has found that the applicant's pain disorder and major depressive disorder are not accident-related. Consequently, she is not entitled to occupational therapy as it is not reasonable and necessary as a result of accident-related impairments.

**Issue 6: Is the applicant entitled to \$310.55 in OCF-6 expenses for medication?**

- [62] The applicant submits that she increased her use of Oxycocet after the accident. This caused stomach ulcers which was treated with a new medication, Pantoprazole Magnesium. She submits she is entitled to this medication because it treats an injury caused by the accident.
- [63] I find that the applicant is not entitled to \$310.55 for medication because the evidence does not establish that this medication treats an accident-related injury.
- [64] The applicant had stomach issues pre-MVA. In 2016, Dr. Eliosoff notes that she has gastroesophageal reflux disease that he treated by prescribing her Pariet.
- [65] Dr. Maan Saad, the applicant's family doctor after Dr. Eliosoff, maintained a prescription of 100 tablets of Oxycocet per month until September 25, 2019. He subsequently prescribed 150 tablets of Oxycocet per month.
- [66] The applicant was prescribed Pantoprazole Magnesium from May 1, 2019 to October 25, 2019. This predates her increased use of Oxycocet by almost five months. As such, the increased use of Oxycocet could not have caused the applicant to be prescribed Pantoprazole Magnesium.
- [67] Consequently, I find that the applicant is not entitled to \$310.55 for medication because the evidence does not support her argument that the medication was prescribed for an accident-related injury.

**Issues 7 and 8: Is the applicant entitled to an award and interest?**

- [68] Given that no benefits are payable, the respondent cannot be found to have unreasonably withheld or delayed the payment of benefits to justify an award pursuant to s. 10 of Regulation 664. Thus, no award is payable.
- [69] As there are no overdue payments of benefits, the applicant is not entitled to interest pursuant to s. 51 of the *Schedule*.

**CONCLUSION AND ORDER**

- [70] The applicant is not entitled to an attendant care benefit, physiotherapy, psychological services, occupational therapy services, medication, nor an award.
- [71] No outstanding benefits are owing; therefore, no interest is payable.
- [72] This application is dismissed.

[73] The applicant shall pay \$300.00 to each witness; Dr. Nemeth, Dr. Gianchino, and Ms. Roberts, within 90 days after the release of this decision.

**Released:** June 14, 2023

A handwritten signature in black ink, appearing to be 'Harry Adamidis', is positioned above a horizontal line.

**Harry Adamidis**  
**Adjudicator**