



Citation: Boutros v. Economical Insurance Company, 2023 ONLAT 21-007970/AABS

Licence Appeal Tribunal File Number: 21-007970/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:

Christina Boutros

Applicant

and

Economical Insurance Company

Respondent

DECISION

ADJUDICATOR: Ulana Pahuta

APPEARANCES:

For the Applicant: Michael R Switzer, Counsel

For the Respondent: Melinda J. Baxter, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Christina Boutros, the applicant, was involved in an automobile accident on October 14, 2018, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”). The applicant was denied benefits by the respondent, Economical Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

PRELIMINARY ISSUE

- [2] The preliminary issue to be decided is:
- i. Is the applicant statute-barred from proceeding with her claim for non-earner benefits (“NEBs”)?

SUBSTANTIVE ISSUES

- [3] The substantive issues in dispute are:
- i. Has the applicant sustained a catastrophic impairment as defined by the *Schedule*?
 - ii. Is the applicant entitled to NEBs of \$185.00 per week from November 15, 2018 to October 14, 2020?
 - iii. Is the applicant entitled to \$2,000.00 (\$16,283.30 less \$14,283.30 approved) for catastrophic impairment assessments, proposed by Omega Medical Associates in a treatment plan (“OCF-18”) dated November 19, 2020?
 - iv. Is the applicant entitled to \$3,100.00 for chiropractic and massage services, proposed by Alta Vista Chiropractic and Massage Clinic in an OCF-18 dated March 30, 2021?
 - v. Is the applicant entitled to \$2,822.13 for kinesiology services/therapeutic devices, proposed by Revival Rehabilitation Centre in an OCF-18 dated September 23, 2021?
 - vi. Is the applicant entitled to \$240.17 for expenses related to the attendance at the catastrophic impairment assessments, submitted on August 17, 2021?
 - vii. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

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

RESULT

- [4] On the preliminary issue, I find that the applicant's claim for NEBs is statute-barred under s. 36 of the *Schedule*, due to her failure to submit a completed OCF-3 within 104 weeks of the accident.
- [5] On the substantive issues, I find that:
- i. The applicant did not sustain a catastrophic impairment as a result of the accident;
 - ii. The applicant is not entitled to the benefits or expenses claimed, an award or interest.

ANALYSIS

Preliminary Issue – the applicant is statute-barred from proceeding with her NEB claim

- [6] Section 12(1)1 of the *Schedule* provides that an insurer shall pay for NEBs to an insured person who sustains an impairment as a result of an accident and suffers a complete inability to carry on a normal life as a result of that accident within 104 weeks. Sections 12(3)(a) and (c) further state that the insurer is not required to pay a NEB for the first four weeks after the onset of the disability and for any period more than 104 weeks after the accident.
- [7] Section 36 outlines the process for claiming a NEB. Section 36(2) states that an insured person must submit a completed OCF-3 with their application for a specified benefit pursuant to s. 32. Section 36(3) also sets out the entitlement period for the NEB once the completed OCF-3 is received: essentially, an insured person who fails to submit a completed OCF-3 is not entitled to a NEB for any period before the completed OCF-3 is submitted.
- [8] The applicant does not dispute that she submitted an OCF-3 on December 23, 2020. The respondent submits that the applicant did not previously file any other documentation to suggest that she suffered a complete inability to carry on a normal life. Given that the OCF-3 was submitted after the 104 week period of entitlement to NEBs, the respondent argues that pursuant to sections 12 and 36 of the *Schedule*, the applicant is barred from proceeding with her claim for NEBs. In support of its claim, it cites the Tribunal decision *Valentine v. AIG*, 2022 CanLII

75153 and the Superior Court decision *Volpe v. Co-operators Gen. Ins. Co.* 2017 ONSC 261 (CanLII).

- [9] I find the caselaw submitted by the respondent to be persuasive, and agree with the conclusion in the decisions that the language in s. 36 is compulsory. Namely, that s. 36 bars an insured person's claim where the OCF-3 was submitted following the 104 week period of NEB eligibility provided by s. 12 of the *Schedule*.
- [10] The applicant has not led any caselaw to refute the respondent's position. Rather, she provides an explanation for her late filing of the OCF-3, including that she was not aware of the NEB entitlement until advised by counsel, that the respondent did not inform her of the fact that she could apply for this benefit and that due to the COVID pandemic, her doctor was not seeing patients or completing insurance forms.
- [11] From her submissions, I infer that the applicant is arguing that she has a reasonable explanation for the delay. However, the fact that the applicant was self-represented and unaware for a period of time is not a reasonable explanation. Rather, an applicant is deemed to know the applicable period for notifying an insurer of her intention to claim accident benefits. Although the applicant argues that the respondent failed to inform her of her right to apply for NEBs, no evidence or specific submissions were provided on this point. The applicant has provided no details as to when she notified the respondent of the accident or her intention to make a claim or what reasonable steps she took to protect her rights to claim benefits. Similarly, no evidence was provided in support of the applicant's claim that her doctor would not complete insurance forms during the COVID pandemic.
- [12] Moreover, I agree with the respondent and the caselaw it cited, that s. 36 of the *Schedule* does not provide any exception to the requirement that an insured person seeking NEBs must first submit a completed OCF-3, and that an insurer is not obligated to make any payment until the application is complete. The fact that the applicant argues that she has an explanation for the delay is irrelevant, given that she failed to comply with the mandatory procedural requirements to make an NEB claim. As such, I find that the applicant is statute-barred from proceeding with her NEB claim due to her failure to comply with s. 36(2) and (3).

Catastrophic Impairment

- [13] I find that the applicant has not met her onus to prove a catastrophic impairment as a result of the accident.

[14] The applicant bears the onus to prove on a balance of probabilities that she is catastrophically (“CAT”) impaired. The test for CAT impairment is a legal test, not a medical test. The criteria to establish CAT are found in s. 3.1 of the *Schedule*. In this case, the applicant claims under criteria 8, and must prove that the impairments she suffered as a result of the accident have resulted in a Class 4 impairment (marked impairment) in at least three or more areas of function that precludes useful functioning, or a Class 5 impairment (extreme impairment) in one or more areas of function that precludes useful functioning, due to mental or behavioural disorder. The chart below sets out the four spheres of functioning and the levels of impairment as outlined in Chapter 14 of the American Medical Association’s Guides to the Evaluation of Permanent Impairment (the “Guides”).

Area or aspect of functioning	Class 1: No Impairment	Class 2: Mild Impairment	Class 3: Moderate Impairment	Class 4: Marked Impairment	Class 5: Extreme Impairment
Activities of Daily Living	No impairment is noted	Impairment levels are compatible with <i>most</i> useful functioning	Impairment levels are compatible with <i>some</i> , but not all, useful functioning	Impairment levels <i>significantly impede</i> useful functioning	<i>Impairment levels preclude</i> useful functioning
Social Functioning					
Concentration, Persistence and Pace					
Adaptation					

[15] The applicant submits that she suffers a marked impairment in the activities of daily living, concentration, persistence and pace, and adaptation. She relies on the CAT reports completed by Omega Medical. The respondent takes the position that the applicant does not suffer a marked impairment in any of the four areas of functioning due to a mental or behavioural disorder. Its assessors determined that the applicant sustained a mild (Class 2) impairment in social functioning, a moderate (Class 3) impairment in the domain of activities of daily living, and mild to moderate (Class 2-3) impairments in the spheres of

concentration, persistence and pace and adaptation. The respondent relies on the CAT assessments of SOMA Medical.

Social Functioning

- [16] I find that the applicant does not suffer from a marked impairment in the domain of social functioning as a result of an accident-related psychological impairment.
- [17] Pursuant to the Guides, the factors to consider under this domain are an individual's capacity to interact appropriately and communicate effectively with other individuals such as family and friends, neighbours, clerks and others. An individual's ability to initiate social contact with others, communicate clearly with others and interact and actively participate in group activities are seen as strengths in social functioning. It is not only the number of aspects in which social functioning is impaired that is significant, but also the overall degree of interference with a particular aspect or combination of aspects.
- [18] The applicant's psychological CAT assessor Dr. Giselle Braganza diagnosed the applicant with major depressive disorder, with anxious distress, somatic symptom disorder, with predominant pain and post-traumatic stress disorder. The respondent's psychiatric CAT assessor Dr. Anil Joseph diagnosed the applicant with somatic symptom disorder, with predominant pain and persistent depressive disorder with anxious distress. I note that both the applicant's and the respondent's assessors did not find that the applicant suffered from a marked impairment in the domain of social functioning. Dr. Braganza found that the applicant sustained a mild to moderate (Class 2-3) impairment in this sphere, while Dr. Joseph concluded that the applicant suffered from a mild (Class 2) impairment.
- [19] I agree with the assessors that the applicant has not sustained a marked impairment in the domain of social functioning. While the applicant reported diminished social interactions post-accident, she continued to get along with her friends and others such as store clerks. Dr. Braganza noted that the applicant saw friends twice a month and continued to possess the necessary skills to appropriately interact and communicate with others in familiar environment. Dr. Joseph noted that post-accident the applicant continued to get along with her ex-husband and her parents, had travelled twice out of the country and was able to communicate quite well. Given the evidence, I find that the applicant is not significantly impeded in her social functioning as a result of the accident.

Concentration, Persistence and Pace

- [20] I find that the applicant does not suffer a marked impairment in concentration, persistence and pace as a result of the accident.
- [21] The Guides define this sphere as having the ability to sustain focused attention long enough for the timely completion of tasks commonly found in work settings. Deficiencies in concentration, persistence and pace are best noted from previous work attempts or from observations in work-like settings. In activities of daily living, this may be reflected in terms of the ability to complete everyday tasks. The Guides specify that psychological tests are useful in assessing intelligence, memory, and concentration. Frequency of errors, the time it takes to complete a task and the extent of which assistance is required to complete a task.
- [22] Dr. Braganza, the applicant's assessor, opined that the applicant suffered from a marked (Class 4) impairment. She noted that the applicant reported difficulties with slower information processing speed, concentration, sustained attention, multi-tasking, initiating and completing tasks. The applicant's occupational therapy (OT) assessor Mr. Ali Habash noted that the applicant reported that pre-accident she led an active social life, worked as an interpreter, cared for her toddler son and managed all housekeeping activities. Post-accident she reported that she could no longer work as an interpreter, did minimal housework and largely avoided socializing.
- [23] With respect to functional testing, Mr. Habash noted that while the applicant was able to complete some tasks, such as meal planning and grocery shopping without major difficulty, she was unable to complete the Walmart task or several housekeeping tasks, citing fatigue, pain and weakness. With respect to work-related tasks, Mr. Habash found that the applicant struggled due to her reduced concentration and poor working memory. In an interpretation test, she missed large chunks of discourse and misinterpreted words. The applicant reported that post-accident, she was forgetful and would lose her keys and wallet, struggled to focus on conversations, could not multitask and had reduced planning and organizational skills.
- [24] In contrast, the respondent's assessor Dr. Joseph opined that the applicant suffered a mild to moderate (Class 2-3) impairment. He found that the applicant was able to keep her concentration and focus for 1½ hours, but did have difficulty keeping on topic and needed to be redirected from time to time. Dr. Joseph noted that the applicant had resumed driving, continues to pay her bills and manage her money. While he noted the applicant's reports that post-accident she had problems with focussing, planning and organizing and that she needed prompting to keep her appointments, Dr. Joseph highlighted that the applicant was not

presently taking medication for ADHD, which she had been diagnosed with prior to the accident. He further considered Dr. Braganza's findings of a Class 4 impairment under concentration, persistence and pace and found that in her report, Dr. Braganza did not appear to take into account the fact that the applicant was not receiving any treatment for her ADHD.

- [25] When considering the CAT assessments of Dr. Braganza and Dr. Joseph, I place more weight on Dr. Joseph's report. I find that Dr. Joseph considered the impact of the applicant's pre-existing ADHD condition, when assessing her performance under the sphere of concentration, persistence and pace, while Dr. Braganza did not appear to consider this pre-accident diagnosis in her initial report.
- [26] In the applicant's self-reports to her CAT assessors, there is no mention of any pre-accident ADHD diagnosis. In her submissions, the applicant argues that her ADHD had resolved by 2014 and that she had not needed to take medication for this since 2014, until post-accident, when her ADHD condition had returned. However, this is not supported by the medical record. I note the clinical note entry from Dr. Samuel Hetz dated August 17, 2017, where the applicant reported symptoms related to her concentration due to her "ADD". The applicant further reported her difficulties in concentration in a letter dated October 5, 2016 in support of her ODSP application. In addition to a number of mental health impairments, the applicant reported her lack of concentration and inability to focus on specific tasks.
- [27] In a pre-accident psychological assessment report dated June 10, 2017 in support of her ODSP appeal, Dr. Alex Weinberger noted the applicant's self-reports of difficulties in concentration and memory, her ADHD diagnosis, that she had been placed on medication for ADHD, but had stopped taking it at the time of her pregnancy (2016). He noted that the applicant found it hard to concentrate at work for any sustained length, especially if the information required attention to detail, that the applicant suffered from severe restrictions and limitations in her work-skills area. As such, I do not find that the medical record supports the applicant's argument that her ADHD had "resolved" by 2014. Moreover, although the applicant provides a general submission that her ADHD condition returned due to the accident and she has since had to resume her medication, no evidence was provided in support of this claim. No medical records from a treating physician were provided by the applicant to establish the timing and extent of any ADHD symptoms or any treatment she received for this condition pre or post-accident.

- [28] As a result, I agree with the respondent that Dr. Braganza did not consider the applicant's pre-existing medical history and functional limitations when rendering her impairment rating. In a subsequent rebuttal report dated November 30, 2022, Dr. Braganza maintained her Class 4 impairment rating in this domain, but conceded that the applicant had not reported her ADHD diagnosis, and had stated that her cognitive symptoms only started after the subject accident. Dr. Braganza further stated that as such she did "*not know what impact that her pre-accident attention issues were having on her functioning at the time of the accident or continue to have on her functioning post-accident*". Although Dr. Braganza noted the applicant's self-reports that there were no limitations in her functioning prior to the accident. I agree with the respondent that Dr. Braganza's report is heavily dependent on the applicant's subjective self-reports and is not consistent with the objective medical record.
- [29] As such, I place greater weight on Dr. Joseph's report and find that the applicant did not suffer from a marked impairment in the domain of concentration, persistence and pace as a result of the accident.
- [30] Since I have found that the applicant did not sustain a Class 4 or marked impairment in the domains of social functioning and concentration, persistence and pace, I do not need to address the remaining two functional domains. In order to meet the criteria for CAT determination under Criterion 8, the applicant would have to have marked impairments in at least three of the four functional domains.

Treatment Plans

- [31] Sections 14, 15 and 16 of the *Schedule* set out that an insurer shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of an accident.
- [32] The applicant has the onus of proving on a balance of probabilities that the treatment plans are reasonable and necessary because of the accident. To meet this burden, the applicant should identify the goals of the plan, how the goals are being met to a reasonable degree and whether the time and cost expended to achieve these goals is proportional to the benefit.

OCF-18 dated November 19, 2020 for CAT assessments

- [33] I find that the applicant has not established that the outstanding balance of the OCF-18 dated November 19, 2020 is reasonable and necessary, or payable.

- [34] The applicant submitted an OCF-18 for CAT assessments, in the amount of \$16,283.30. By letter dated June 1, 2021, the respondent approved the treatment plan in the amount of \$14,283.40, for the individual physiatry, psychology, neurology and OT assessments, together with a CAT summary and form fees. It denied the amount of \$2,000.00, for a centralized comprehensive file review.
- [35] The respondent submits that the outstanding balance is not reasonable and necessary, and cites the Tribunal decision *P. V. v. Aviva*, 2019 CanLII 110074, where the Tribunal held that such a file review was a duplication of services and not reasonable and necessary. The applicant did not provide any submissions on the reasonableness and necessity of the file review, but rather states that since the respondent did not deny the treatment plan until June 1, 2021, it is “deemed approved” and payable. Although not expressly cited, I infer that the applicant is arguing that the remaining balance of the OCF-18 should be payable pursuant to s. 38(8) of the *Schedule*, as the denial letter was provided outside of the ten business day time limit.
- [36] I agree with the respondent that the applicant has not established that the respondent was non-compliant with the time limitations in s. 38(8). It submits an initial denial letter dated December 3, 2020, where the respondent denied the OCF-18 in full. It argues that it subsequently adjusted the file and then partially approved the proposed CAT assessments by letter dated June 1, 2021, denying only the comprehensive file review. I agree with the respondent that its initial denial letter was within the 10 business day limit stipulated in s. 38(8).
- [37] The applicant has not provided any submissions on the reasonableness and necessity of the comprehensive file review. Nor has the applicant provided any submissions or caselaw to rebut the respondent’s argument that a centralized comprehensive file review is duplicative. I find the decision cited by the respondent to be persuasive on this point.
- [38] As such, I find that the applicant has not met her onus to prove, on a balance of probabilities, that the outstanding balance of the OCF-18 dated November 19, 2020 is reasonable and necessary, or payable.

OCF-18 dated March 30, 2021 for chiropractic and massage services and OCF-18 dated September 23, 2021 for kinesiology services/therapeutic devices

- [39] I find that the applicant has not established that the OCF-18s in dispute are reasonable and necessary.

- [40] The applicant submitted an OCF-18 dated March 30, 2021 in the amount of \$3,100.00 for chiropractic and massage services and an OCF-18 dated September 23, 2021 in the amount of \$2,822.13 for various therapeutic devices, including a heating pad, back brace, weighted blanket, VR system and apple watch.
- [41] The respondent denied both treatment plans based on the IE assessment and paper review of Dr. Mark D'Souza dated August 31, 2021 and November 12, 2021. Dr. D'Souza found that the applicant had likely sustained soft tissue injuries to her neck, back and left leg as a result of the accident. He noted that there were no medical records on file from before the accident to January 2020, a period of over a year, and that most notes on file related to mental health rather than physical issues. Dr. D'Souza opined that any physical impairment relating to the accident had likely resolved and that the applicant's current presentation was unrelated to the subject accident. The respondent further submits that the applicant was involved in a subsequent motor vehicle accident in March 2019, which she did not report to Dr. D'Souza. She has reported to various other assessors that this accident exacerbated all of her other symptoms and the respondent argues that this subsequent accident could be the cause of her present physical complaints.
- [42] The applicant has not provided any specific submissions on the reasonableness and necessity of proposed chiropractic and massage treatment, or the therapeutic devices. The applicant simply makes the general submission that the Omega CAT assessment reports "confirms on a preponderance of evidence that treatment was reasonable and necessary". However, I have not been directed to any specific portion of a CAT assessment recommending such treatment and devices. The Tribunal cannot presume to know which evidence, or portion thereof, that a party intends to rely on in advancing her case.
- [43] Although in her submissions the applicant states that she has attended for treatment with a kinesiologist, massage therapist, chiropractor and physiotherapist, no treatment records or progress reports were provided from any treating clinic, to show what type of treatment was provided or what progress she had made from prior treatment. Nor has the applicant provided any medical records from a treating physician with respect to her ongoing physical impairments or any recommendations for treatment, to rebut the conclusions of Dr. D'Souza.
- [44] The burden of proof rests with the applicant. Without specific submissions or medical evidence establishing that the goals of the proposed treatment and

devices were being met to a reasonable degree, I am unable to find that the applicant has established that the OCF-18s in dispute are reasonable and necessary.

OCF-6 in the amount of \$240.17

- [45] The applicant submitted a claim form dated August 17, 2021 in the amount of \$240.17 for various out of pocket expenses incurred when attending the CAT assessments. These included costs for transportation services and food expenses.
- [46] The respondent submits that there is no requirement under the *Schedule* to fund such transportation or food expenses. The applicant has not provided any specific submissions on this point, but simply states that they are reasonable and necessary and ought to be reimbursed.
- [47] As previously noted, the burden of proof rests with the applicant. Although the applicant argues that the expenses are reasonable and necessary, submissions alone are not evidence. Rather, evidence must be provided in support of a claim. The applicant has not directed me to any statutory reference or Tribunal case law supporting her claim that such expenses should be reimbursed pursuant to the *Schedule*. Without specific submissions or evidence on this point, I find that the applicant has not established the reasonableness and necessity of the food and transportation expenses.

Interest

- [48] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. As no benefits are payable, the applicant is not entitled to interest.

Award

- [49] Section 10 of Regulation 664 provides that a special award may be granted if the respondent unreasonably withheld or delayed payments.
- [50] I find that the respondent is not liable to pay an award. Although the issue of an award was listed as an issue in dispute in the Case Conference Report and Order dated November 8, 2021, the applicant has not provided any submissions on this point and therefore presented me with no grounds to consider an award in favour of the applicant. As such, I decline to order an award.

ORDER

[51] For the foregoing reasons, I find that:

- i. The applicant is barred from proceeding with her NEB claim pursuant to s. 36 of the *Schedule*;
- ii. The applicant did not sustain a CAT impairment as a result of the accident;
- iii. The applicant is not entitled to the OCF-18s or OCF-6 in dispute, an award or interest.

[52] The application is dismissed.

Released: October 24, 2023



Ulana Pahuta
Adjudicator