



Citation: Griffith v. The Personal Insurance Company, 2020 ONLAT 20-010339/AABS

Licence Appeal Tribunal File Number: 20-010339/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:

Savil Griffith

Applicant

and

The Personal Insurance Company

Respondent

DECISION

VICE-CHAIR:

Brett Todd

APPEARANCES:

For the Applicant:

Sherilyn J. Pickering, Counsel

For the Respondent:

Jonathan B. Schrieder, Counsel

HEARD BY WAY OF WRITTEN SUBMISSIONS

OVERVIEW

- [1] Savil Griffith (the “applicant”) was involved in a motor vehicle accident on April 17, 2018 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”). The Personal Insurance Company (the “respondent”) denied a claim for attendant care benefits (“ACB”) and a number of treatment plans. The applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES IN DISPUTE

- [2] The following issues are in dispute:
1. Is the applicant entitled to ACB in the amount of \$6,000.00 per month from July 10, 2018 to date and ongoing?
 2. Is the applicant entitled to \$2,200.00 for psychological services, proposed by Novo Medical Services, in an OCF-18/treatment plan submitted December 16, 2020?
 3. Is the applicant entitled to \$2,635.40 for chiropractic services, proposed by MacKenzie Medical Rehabilitation Centre, in an OCF-18/treatment plan submitted December 16, 2020?
 4. Is the applicant entitled to \$1,417.70 for chiropractic services, proposed by MacKenzie Medical Rehabilitation Centre, in an OCF-18/treatment plan submitted October 26, 2020?
 5. Is the applicant entitled to \$677.04 (\$1,384.70 less \$707.66 approved) for chiropractic services, proposed by MacKenzie Medical Rehabilitation Centre, in an OCF-18/treatment plan submitted September 14, 2020?
 6. Is the applicant entitled to \$1,297.25 for occupational therapy services, proposed by Rehab First, in an OCF-18/treatment plan submitted May 13, 2020?
 7. Is the applicant entitled to \$1,172.48 for psychological services, proposed by Novo Medical Services, in an OCF-18/treatment plan submitted April 30, 2020?

8. Is the applicant entitled to \$1,582.30 for occupational therapy services, proposed by Rehab First, in an OCF-18/treatment plan submitted November 27, 2019?
9. Is the applicant entitled to \$1,995.51 for occupational therapy services, proposed by Rehab First, in an OCF-18/treatment plan submitted September 15, 2021?
10. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?
11. Is the applicant entitled to interest on any overdue payment of benefits pursuant to s. 51 of the *Schedule*?

[3] In submissions, the applicant withdrew issues listed as #6, #7, #8, #11, #12, and #16 in the Case Conference Report and Order (“CCRO”) dated August 12, 2022 that set this matter down for a written hearing. They have been removed from the list of items in dispute at this hearing. I also adjusted the amount of issue #5 above, to reflect a partial approval that was identified by the respondent in submissions, but not noted in the CCRO.

RESULT

[4] The applicant is not entitled to ACB or the treatment plans in dispute. Given that there is no overdue payment of benefits, neither an award nor interest is payable.

ANALYSIS

Attendant Care Benefits (“ACB”)

- [5] Section 19 of the *Schedule* states 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 for ACB services provided by an aide or attendant.
- [6] Section 42(1) of the *Schedule* provides that an application for ACB must be in the form of, and contain the information required to be provided in, an Assessment of Attendant Care Needs/Form-1. Section 42(5) establishes that an insurer may, but is not required to, pay an expense incurred before a Form-1 is submitted.
- [7] Section 3(7)(e)(i) and (ii) of the *Schedule* establish that an insured person has incurred an expense if the person has received the goods or services to which the expense relates, paid the expense, or is otherwise legally obligated to pay the expense.

- [8] Section 3(7)(e)(iii) of the *Schedule* sets out two categories of attendant care providers: professional service providers who do so in the course of their ordinary employment, occupation, or profession in which they would have been engaged, but for the accident; and non-professional service providers who have sustained an economic loss as a result of providing goods or services to the injured person.
- [9] Under s. 19(3)(4) of the *Schedule*, the amount of ACB payable is limited to the economic loss sustained by a non-professional care provider while supplying the attendant care services. In addition, s. 19(3)1 of the *Schedule* limits ACB to \$3,000.00 per month if the insured person did not sustain a catastrophic impairment as a result of the accident. Also, s. 20(1) of the *Schedule* sets 260 weeks from the date of the accident as the maximum period of ACB eligibility.
- [10] It is the applicant's burden to demonstrate, on a preponderance of the evidence, that she is entitled to ACB, and that she has incurred the expense in accordance with the provisions of the *Schedule* noted above. Here, the applicant claims entitlement on medical grounds, relying largely on clinical notes and records ("CNRs") of treating physicians and an occupational therapy report.
- [11] The respondent submits that the applicant does not require attendant care services. It relies on an insurer's examination ("IE") occupational therapy assessment and the testimony of the applicant provided in an examination under oath ("EUO"). The respondent also challenges the monthly quantum being sought for ACB as well as the length of the ACB eligibility period, and notes that there is no indication that ACB was incurred.

ACB quantum and eligibility period

- [12] I find that the ACB maximum monthly quantum is \$3,000.00 and the applicant's term of ACB eligibility is November 13, 2019 to April 11, 2023.
- [13] I accept the respondent's submission that the maximum monthly ACB amount payable is \$3,000.00, pursuant to s. 19(3)1 of the *Schedule*. No evidence has been submitted demonstrating that the applicant sustained a catastrophic impairment to warrant the \$6,000.00 claimed in the CCRO. The applicant does not comment on this matter in either her initial or reply submissions.
- [14] I accept the respondent's argument that the applicant's term of eligibility for ACB began on November 13, 2019. This is the date that the applicant submitted her occupational assessment Form-1 completed by Lindsay Hamilton, occupational therapist, to the insurer. As s. 42(5) establishes, the insurer is not obligated to

pay ACB before this date. The applicant does not comment on this matter in submissions.

[15] Lastly, I also accept the respondent's contention that the ACB eligibility period is limited to 260 weeks from the date of the accident, in accordance with s. 20(1) of the *Schedule*. However, I do not accept the respondent's conclusion that this means an ACB end date of April 17, 2023, as 260 weeks from April 17, 2018 is actually April 11, 2023. The applicant provided no submissions regarding this matter, either.

[16] As a result, the maximum monthly ACB is amended to \$3,000.00 and the period of ACB eligibility is amended to November 13, 2019 to April 11, 2023.

The applicant is not entitled to ACB

[17] I find that the applicant is not entitled to ACB. She has not met her burden and demonstrated attendant care services to be reasonable and necessary, nor has she provided evidence that such services were incurred.

[18] The applicant mainly relies on an occupational therapy assessment report dated November 12, 2019 that was completed by Ms. Hamilton in consultation and collaboration with Azrah Lavji, occupational therapist. This report made a number of specific recommendations regarding attendant care assistance, including 35 minutes per week dressing her lower body; 7.5 minutes per week cleaning and trimming toenails; 420 minutes per week for meal preparation; 420 minutes per week to supervise mobility; 490 minutes per week of personal hygiene; and 70 minutes per week bathing. This resulted in a total of 1,442.5 minutes of attendant care per week that amounted to a recommended \$1,539.89 in ACB per month.

[19] However, I assign this report minimal weight. The applicant contradicted the conclusions of Ms. Hamilton and Ms. Lavji in an EUO conducted on December 8, 2020. She testified that, post-accident, she continued to do all of her own housekeeping, cooked her own meals, completed all of her personal hygiene tasks independently, was not depressed or suffering from any emotional issues that led to her restricting personal care activities, and continued working as a self-employed cleaner (she started this business in 2013 upon retirement from Canada Post) on a full-time basis.

[20] While the applicant's EUO testimony supported some aspects of the report—most prominently a limited ability to bend due to shoulder pain and not being able to kneel due to a right knee injury (neck, shoulder, and right knee pain was also noted by her family physician, Dr. Lorraine Cytowski, immediately after the

accident)—she claimed to be independent in many of the areas that Ms. Hamilton and Ms. Lavji recommended attendant care services. The applicant noted that she was experiencing some pain as a result of the accident, although she carried on with regular activities. She testified to reducing the amount of time spent working at her cleaning business to one or two days per week following arthroscopic surgery on her right knee on May 7, 2019. But it is unclear by this testimony if the applicant restricted her workload due to physical limitations or if this also happened as a result of the impact of the Covid-19 pandemic rationing her work opportunities in 2020 and beyond.

- [21] Moreover, the applicant testified in the EUO that she had never received any attendant care services post-accident. The applicant does not direct me to any evidence in submissions indicating that attendant care services were incurred. Nor does the applicant comment on the discrepancy between the \$1,539.89 in ACB per month recommended in the occupational therapy report of Ms. Hamilton and Ms. Lavji and the \$6,000.00 per month sought here.
- [22] In reply submissions, the applicant claimed that the respondent mischaracterized the EUO testimony and that she actually indicated a number of difficulties with personal tasks. I do not find this to be a convincing argument. The applicant clearly testified in the EUO that she was functioning either independently or with minimal changes to the pace with which she completed tasks—and that she had not received any attendant care services. These facts stand for themselves. To reject them would mean rejecting a significant portion of the applicant’s EUO testimony, which I am not prepared to do in the absence of evidentiary reasons why I should doubt her.
- [23] I prefer the medical evidence of the respondent. The occupational therapy IE report dated January 15, 2020 completed by Vinita Tandon, occupational therapist, is in accord with the applicant’s EUO testimony. Ms. Tandon noted in this report that the applicant indicated that she was independent with her personal care and continued to complete her cleaning, cooking, laundry, and shopping tasks independently, even while having some continuing issues with shoulder, lower back, and knee pain, and problems crouching and kneeling. Testing indicated functional range of motion and good muscle strength. The applicant also did not indicate to Ms. Tandon that she had been receiving any attendant care assistance from a provider.
- [24] As a result of the above, Ms. Tandon concluded that the applicant did not require any attendant care assistance, and that she could continue with her tasks by applying pacing techniques as necessary.

- [25] Lastly, I do not concur with the applicant's argument in reply submissions that ACB should be deemed incurred in accordance with s. 3(8) of the *Schedule* as she claims that the benefit was unreasonably withheld or delayed. She argues that the respondent improperly classified her injuries as minor and held her within the Minor Injury Guideline ("MIG") due to a reliance on "faulty reports" such as that prepared by Ms. Tandon, and also an IE physiatry report completed by Dr. Yuri Marchuk, physiatrist, on November 6, 2020.
- [26] I see no reason to find that the respondent unreasonably delayed or withheld ACB. The applicant reported in her EUO that she did not require attendant care services, and that they were not provided. The evidence before me also indicates that the respondent adjusted this file fairly and expeditiously, as shown by multiple IE reports that resulted in the applicant being removed from the MIG. Further, the applicant has not directed me to any part of the *Schedule* connecting ACB entitlement to an insurer making a MIG determination, or shown how the insurer's continuing ACB denial while it removed the applicant from the MIG should be regarded as unreasonable. For these reasons, I decline to deem the ACB as incurred.
- [27] Given the EUO testimony and a preponderance of the medical evidence before me, I find that the applicant has not established attendant care services to be reasonable and necessary. Further, she has not demonstrated that attendant care services were incurred. Accordingly, she is not entitled to ACB, nor interest.

The Treatment Plans

- [28] To be entitled to a treatment plan under ss. 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. The applicant should identify treatment goals, how these goals would be met to a reasonable degree, and that the overall costs of achieving them are reasonable.

The applicant is not entitled to the psychological treatment plans

- [29] I find that the applicant is not entitled to the psychological treatment plans submitted December 16, 2020 and April 30, 2020, as she has not demonstrated them to be reasonable and necessary. It follows that as she is not entitled to these benefits, she is also not entitled to interest.
- [30] The plan submitted on December 16, 2020 was for a social work, mental health, and biopsychosocial assessment in the amount of \$2,200.00. The applicant did

not provide the treatment plan submitted on April 30, 2020 for psychological services, nor did she make any written submissions on this plan.

- [31] The applicant argues in submissions that the December 16, 2020 plan should be deemed reasonable to help her emotionally and to re-integrate into her family, social, and community networks. She relies on the opinions of Dr. Leon Steiner, psychologist, who concluded in a psychological assessment report dated January 27, 2020 that the applicant suffered from major depressive disorder as a direct result of the accident and recommended 12-16 sessions of psychotherapy over a period of three-to-four months.
- [32] In addition, the applicant relies on a November 7, 2021 psychovocational assessment report completed by Allan Walton, registered psychotherapist, and Dr. Philip Miller, psychologist. They diagnosed the applicant with a collision-related Adjustment Disorder with Mixed Anxiety and Depressed Mood, as well as a specific situational phobia (vehicular) and features of a collision-related Somatic Symptom Disorder with Predominant Pain and Post-Traumatic Stress Disorder ("PTSD").
- [33] The respondent counters that the applicant denied suffering from emotional or psychological issues as a result of the accident in her EUO detailed above and also during an IE psychological assessment performed by Dr. Janet Clewes, psychologist, that resulted in a report dated November 26, 2020. It argues that both treatment plans should be denied on this basis, adding that the April 30, 2020 should also be denied as the applicant has not met her burden due to providing no submissions on this plan.
- [34] I agree with the respondent with regard to both treatment plans.
- [35] There is minimal objective evidence that the applicant actively sought treatment for psychological or emotional issues resulting from the accident. She noted feeling "nervous" on just a single occasion, during an appointment with Dr. Cytowski that took place on April 18, 2018. No evidence has been submitted indicating that the applicant was referred for psychological treatment by Dr. Cytowski, or that any psychological medication was prescribed.
- [36] The Dr. Steiner report is contradictory enough to make me doubt his conclusions and to assign it minimal weight. He writes that the applicant told him that her spouse had taken over most home chores, that Pain Catastrophizing Test scores indicated that the applicant felt entirely hopeless that her pain would ever diminish, and that she felt "guilty and ashamed over her current physical state." Such negative reporting seems incongruous with Dr. Steiner writing elsewhere in

the assessment that the applicant's "behavioural presentation was jovial and pleasant and she appeared energetic throughout the interview."

- [37] Despite all of the above, Dr. Steiner did not mention if the applicant desired or felt that she required psychological treatment. He did, however, recommend a multidisciplinary pain management program along with a social work assessment to identify social and environmental variables impairing the applicant's return to her pre-accident condition.
- [38] The Mr. Walton/Dr. Miller report does not fully agree with the Dr. Steiner report or other evidence such as the EUO or the Dr. Clewes report. The applicant told the assessors that she generally did all the domestic chores herself (with some task modifications) and that she had no cleaning income since the accident, which contradicts evidence in other reports and makes me doubt the overall accuracy of the report.
- [39] Also, results of the testing completed by Mr. Walton/Dr. Miller indicate minimal/average depression, mild/below average anxiety, and a PTSD score that "exceeded the cut-point" (there was no further interpretation of this in the report, leaving the full clinical significance of this test unknown). These test results do not entirely support the assessors' diagnoses that the applicant met the criteria for anxiety, depression, and a vehicular phobia, or that she demonstrates signs of a somatic disorder and PTSD. Accordingly, I assign this report minimal weight.
- [40] In all, the accounts in the reports of Dr. Steiner and Mr. Walton/Dr. Miller are largely contradictory to the EUO, where the applicant testified that she felt "good" emotionally, that she was "not depressed," and that she had no other symptoms besides pain.
- [41] The applicant made similar comments to Dr. Clewes, who noted that the applicant told her that she had no interest in psychological treatment and that she reported no pre- or post-accident psychological or emotional issues. Dr. Clewes also wrote that the applicant's results in the Trauma Symptom Inventory-2 Test were deemed invalid, suggesting that she could be underestimating her mental health symptoms, but also that she could be "an individual who is not bothered by any type of mental health symptoms." Given the applicant's failure to report psychological issues to her family doctor and the EUO comments that she neither wanted nor required psychological treatment, I believe that the latter is the more likely explanation.
- [42] At any rate, Dr. Clewes concluded that the applicant did not suffer from accident-related psychological impairments and that the recommendations made by Dr.

Steiner were not reasonable and necessary. I find this to be the most accurate assessment of the applicant's psychological condition, as it accounts for the applicant's EUO statements and a preponderance of the medical evidence.

- [43] Lastly, I find that the applicant has not met her burden regarding the April 30, 2020 treatment plan as she has proffered no argument for it, has not included the OCF-18 itself, and does not mention this plan in submissions aside from noting it on the list of items in dispute.
- [44] For the reasons detailed above, the applicant is not entitled to the psychological treatment plans, nor interest.

The applicant is not entitled to the chiropractic treatment plans

- [45] I find that the applicant is not entitled to the chiropractic treatment plans submitted September 14, 2020, October 16, 2020, and December 16, 2020, as she has not demonstrated them to be reasonable and necessary. It follows that as she is not entitled to these benefits, she is also not entitled to interest.
- [46] Each of these plans featured assessments along with a range of physical therapy sessions including exercise, manipulation, chiropractic therapy, and massage therapy. Injuries and sequelae listed included various sprains and strains in the spine and right knee, injury of shoulder and arm, and joint pain. Goals were reducing pain, increasing range of motion, and increasing strength, all to help the applicant return to normal living and to her pre-accident work activities.
- [47] The applicant argues that these plans should be found to be reasonable and necessary, as pain relief is an accepted goal of such treatment and this form of treatment has led to an improvement in her overall condition. She relies on the treatment plans themselves; CNRs of Dr. Cytowski; CNRs of MacKenzie Medical Rehabilitation Centre; a number of diagnostic imaging reports; the report of Ms. Hamilton/Ms. Lavji; a number of consulting reports from Dr. Rajesh Chakraverty, orthopedic surgeon; a report dated January 20, 2020 from Dr. Margaret Dziedic, physiatrist; and a December 13, 2021 occupational therapy re-assessment report completed by Patricia Saad, occupational therapist.
- [48] The respondent counters that the applicant has not provided sufficient objective medical evidence to support the treatment plans, and that her condition has now reached a plateau more than four years following the accident. It relies largely on the IE report of Dr. Marchuk dated November 6, 2020, which formed the basis of the insurer's denials of these plans.

- [49] I agree with the respondent.
- [50] Most of the applicant's evidence is focused on issues with her right knee. Diagnostic imagining indicates that her right knee was undergoing degenerative changes (osteoarthritis) as early as 2012 and was aggravated in the accident to the point where she required arthroscopic surgery by Dr. Chakraverty on May 7, 2019. Other reports relied upon by the applicant deal entirely or predominantly with the right knee. Diagnostic imagining reports are initially for the right knee (only later ones include the left knee). Dr. Chakraverty's reports concern the right knee. Dr. Dziedic recommended assistive devices and medication to largely address right-knee issues. The reports of Ms. Hamilton/Ms. Lavji , Ms. Saad noted functional limitations mainly involving the applicant's ability to bend and kneel, again connected to her right knee impairment.
- [51] However, the treatment recommended in these plans is not specific to the right knee. Instead, it more comprehensively addresses other accident-related injuries to her neck, shoulders, and back that are more sparsely documented. Pain and tenderness in the applicant's neck, shoulders, and back were noted by Dr. Cytowski in appointments shortly after the accident in April and May 2018. But the family physician ruled out more serious issues such as a rotator cuff tear in favour of diagnosing strains and sprains.
- [52] Later CNRs of Dr. Cytowski indicate that her opinion did not change in 2020 and 2021. Although the applicant complained of neck, shoulder, and lower back pain in at least two appointments during this timeframe, knee issues and osteoarthritis were her predominant concerns. Dr. Cytowski noted that the applicant had been taking physiotherapy, but she did not recommend a specific course of action.
- [53] In all, there is negligible support for these treatment plans in the CNRs of Dr. Cytowski. While the applicant has documented issues with her right knee post-accident, the same cannot be said of her other physical injuries, which are a major focus of all three treatment plans in dispute here.
- [54] I also prefer the IE report of Dr. Marchuk, as it is the most thorough (he reviewed 69 sets of records, reports, and treatment plans) assessment as well as the only one before me that addresses the entirety of the applicant's post-accident physical condition. It also seems most in harmony with the CNRs of Dr. Cytowski when it comes to the applicant's neck, shoulder, and back pain, given Dr. Marchuk's conclusion that she sustained whiplash and soft-tissue injuries in the accident and that her condition had "plateaued" with regard to physical medical treatment. He partially approved the plan submitted September 14, 2020, while recommending that the applicant then transition to an independent home

exercise program. The insurer cited this recommendation in its denial of the other chiropractic plans.

[55] Accordingly, the applicant is not entitled to the chiropractic treatment plans, nor interest.

The applicant is not entitled to the occupational therapy treatment plans

[56] I find that the applicant is not entitled to the occupational therapy treatment plans submitted November 27, 2019, May 13, 2020, and September 15, 2021. It follows that she is also not entitled to interest.

[57] These three plans propose a variety of occupational therapy services to address injuries and sequelae including low back pain, pain in shoulder joint, pain in lower leg, unsteadiness on feet, sleep disorders, need for assistance due to reduced mobility, tear of knee meniscus, and problems relating to employment and unemployment. They propose an in-home assessment, exercise, a pool pass for aquatherapy, kinesiology sessions, education, and a number of assistive devices ranging from a long-handled bath scrubber to an electrical seat lift. Goals include pain reduction, an assessment of the applicant's functionality, and a return to the activities of normal living and work.

[58] The applicant submits that all three plans should be found reasonable and necessary, as she has demonstrated post-accident functional limitations. She relies mainly on the occupational therapy reports noted above.

[59] The respondent submits that the plans should be denied, relying largely on the IE report of Dr. Marchuk that indicated the applicant's condition had plateaued and that further active physical therapy is not reasonable and necessary.

[60] I agree with the respondent, for similar reasons to those expressed above regarding attendant care and chiropractic services.

[61] In short, I cannot reconcile the applicant's self-reported level of activity—which includes the independent ability to complete household tasks (albeit with some modifications and pace changes) and working on a full-time and part-time basis post-accident—with finding these plans to be reasonable and necessary. The applicant's EUO testimony and what she reported to a number of assessors do not support that she needs these treatment plans or the assistive devices.

[62] A preponderance of the evidence before me indicates that the applicant was completing all of her regular tasks and activities by pacing herself as required—not that she needed added treatment and assistive devices. Also, the authors of

these plans clearly considered the applicant to be at a much lower level of functionality than the applicant attested in her own words on multiple occasions. Given the contradictions between the applicant's comments and the conclusions and recommendations of these plans, I cannot find them to be reasonable and necessary.

[63] Due to the reasons detailed above, the applicant is not entitled to the occupational therapy treatment plans, nor interest.

ORDER

[64] The applicant is not entitled to ACB or the treatment plans in dispute as she has not demonstrated that they are reasonable and necessary. Accordingly, interest and an award are also not payable.

[65] The application is dismissed.

Released: December 6, 2023



**Brett Todd
Vice-Chair**