



Citation: Santos v. Aviva Insurance Company of Canada, 2026 ONLAT 24-002838/AABS

Licence Appeal Tribunal File Number: 24-002838/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:

Marilyn Santos

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: Amar Mohammed

APPEARANCES:

For the Applicant: Tina Lubman, Paralegal

For the Respondent: Kari-Anne Layng, Counsel

HEARD: By Way Of Written Submissions

OVERVIEW

- [1] Marilyn Santos, the applicant, was involved in an automobile accident on February 18, 2022, 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, Aviva Insurance Company of Canada, and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

PRELIMINARY ISSUE

- [2] Is the applicant barred from proceeding to a hearing for the following benefits: a psychological assessment, a neurological assessment, and a chronic pain assessment because the applicant failed to attend insurer’s examinations (“IEs”) under s. 44 of the *Schedule*?

SUBSTANTIVE ISSUES

- [3] The substantive issues in dispute are:
- i. Are the applicant’s injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the \$3,500.00 Minor Injury Guideline (“MIG”) limit?
 - ii. Is the applicant entitled to a non-earner benefit (“NEB”) of \$185.00 per week from March 22, 2022, to February 18, 2024?
 - iii. Is the applicant entitled to the services proposed by 101 Physio, as follows:
 - a. \$2,764.36 for physiotherapy services, in a treatment plan/OCF-18 (“plan”) dated March 3, 2022?
 - b. \$1,185.54 for physiotherapy services, in a plan dated August 4, 2022?
 - iv. Is the applicant entitled to the assessments and services proposed by 101 Assessments, as follows:
 - a. \$2,560.00 for psychological services, in a plan dated July 22, 2022?
 - b. \$2,460.00 for a psychological assessment, in a plan dated March 8, 2022?

- c. \$2,460.00 for a neurological assessment, in a plan dated July 20, 2022?
- d. \$2,460.00 for a chronic pain assessment, in a plan dated May 2, 2024?
- e. \$2,460.00 for a neuropsychological assessment, in a plan dated June 17, 2024?
- v. Is the respondent liable to pay an award under s. 10 of Reg. 664 because it unreasonably withheld or delayed payments to the applicant?
- vi. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[4] With respect to the preliminary issue, I find that the applicant is barred under s. 55(1)2 from disputing the following benefits at the Tribunal:

- i. the plan proposing \$2,460.00 for a psychological assessment,
- ii. the plan proposing \$2,460.00 for a neurological assessment,
- iii. the plan proposing \$2,460.00 for chronic pain assessment.

[5] On the substantive issues, I find that

- i. The applicant is not subject to the MIG.
- ii. The applicant is not entitled to a NEB.
- iii. The applicant is not entitled to payment under s. 38(11) for the plans proposing \$1,185.54 for physiotherapy services and \$2,764.36 for physiotherapy services.
- iv. The applicant is entitled to payment under s. 38(11) for the plan proposing \$2,460.00 for a neuropsychological assessment and \$2,560.00 for psychological services, once incurred.
- v. The applicant is entitled to interest pursuant to s. 51.
- vi. The respondent is not liable to pay an award.

PRELIMINARY ISSUE ANALYSIS

As a result of the applicant's non-attendance at IEs, the applicant is barred from proceeding to a hearing for the benefits that the scheduled IEs were intended to address.

- [6] I find that the respondent has established that the applicant failed to attend properly scheduled IEs without a reasonable explanation.

The Law

- [7] Section 44(5)(a) requires that, if an insurer requires an IE, the insurer shall arrange for the examination at its expense and shall give the insured person a notice setting out the medical and any other reasons for the IE, details of the examiner, and details of the attendance. Section 44(9)2.i.-iii. sets out the duties of both parties that must be fulfilled in the context of scheduling and attendance. This includes the insurer's duty to make reasonable efforts to schedule the examination for a day, time and location that are convenient for the insured. This also includes the insured's duty to provide such information and documents as are relevant or necessary for the examination, and ultimately, the duty of the insured to attend the examination and to submit to all reasonable examinations requested by the IE assessor.
- [8] In this context, if an insurer demonstrates that an insured person did not attend an IE that was scheduled in accordance with s. 44, the Tribunal will consider whether the provisions under s. 55(1) apply. Specifically, s. 55(1)2 states that "an insured person shall not apply to the Licence Appeal Tribunal" for a benefit if they did not attend an IE scheduled to address that benefit. The insurer must first prove that a NOE complies with s. 44 of the *Schedule* in order for it to rely on it as a basis to seek a statute bar under s. 55.
- [9] Section 55(2) gives the Tribunal discretion to "permit an insured person to apply" despite non-attendance at an IE, and s. 55(3) allows the Tribunal to "impose terms and conditions" on this permission. The insured person has the onus to show that the discretionary power under s. 55(2) applies and should be exercised. Generally, the Tribunal has found that if the applicant has a reasonable explanation for non-attendance at a *Schedule*-compliant IE, the Tribunal's discretion under s. 55(2) may be warranted, with terms and conditions, if necessary.

The parties' arguments

- [10] The applicant argues that the respondent failed to provide sufficient reasons in its NOEs dated August 2, 2022 and September 9, 2024. Accordingly, the applicant argues that she was not required to attend any of the IEs. In the alternative, the applicant alleges that the respondent failed to make reasonable efforts to accommodate scheduling of the IEs, and therefore, she was not required to attend any of the IEs.
- [11] The respondent submits that it requested medical records from the applicant under s. 33 that were not responded to. The respondent then began to schedule IEs that are compliant with the *Schedule* and that it made reasonable efforts to accommodate the applicant.

Medical and any other reasons under s. 44(5)

- [12] The respondent provided NOEs on three separate dates, August 2, 2022, August 10, 2022, and September 9, 2024. I find that the applicant has not explicitly challenged the reasons in the August 10, 2022, NOEs which scheduled IEs for the purpose of assessing plans proposing physiotherapy services in the amount of \$2,764.36, psychological services in the amount of \$2,460.00, and a psychological assessment in the amount of \$2,560.00. In any case, I have interpreted the applicant's submissions liberally based on her argument that she was not required to attend any of the IEs. On this basis, I have reviewed all of the NOEs, including the ones not specifically challenged in submissions, as the key reasons between these notices are the same. Otherwise, if I was to review the applicant's submissions more strictly, the disputed benefits denied in the August 10, 2022 notices would remain unchallenged.
- [13] In all of the NOEs before me, dated August 2, 2022, August 10, 2022 and September 9, 2024, the respondent sets out, amongst other reasons, the specific medical condition of the applicant as set out in the OCF-3 submitted by the applicant:

The injuries identified appear predominantly minor including injury of muscle and tendon at neck level, muscle strain shoulder region, sprain and strain of thoracic spine, dislocation, sprain and strain of joints and ligaments of shoulder girdle, sprain and strain of lumbar spine, dislocation, sprain and strain of joints and ligaments of lumbar spine and pelvis, headache, malaise and fatigue, nonorganic sleep disorders, reaction to severe stress and adjustment disorders and nausea alone.

- [14] The applicant argues that the facts before me are analogous to those in *Roper v Pembridge Insurance Company*, 2024 CanLII 6511 (ON LAT) ("*Roper*"); specifically, that the NOEs do not provide:
- i. specific details about the applicant's condition forming the basis of the decision to seek an IE or, alternatively
 - ii. information about the insured's condition that the insurer does not have but requires.
- [15] I note that *Roper* is not binding on me, and I find that the facts before me are not analogous to those in *Roper*. In *Roper*, the Tribunal found that the language in the NOE simply stated that there is "no compelling medical evidence to support that you have sustained injuries which are not predominantly minor in nature". The Tribunal also considered the respondent's position that it had referenced "soft tissue injuries" as the applicant's medical condition. The Tribunal accepted that this was a reference to a specific medical condition, however it was not contained within the NOE and was instead found in an explanation of benefits sent two years prior. In this case, I have found, as set out above, that the NOEs specifically reference the applicant's medical condition.
- [16] The applicant further argues that the September 9, 2024, NOEs must contain references to a diagnosis of a mild traumatic brain injury or mild concussion, psychological diagnoses, and must refer to the applicant's complaints of pain over three months post-accident as reported to a psychological assessor. The applicant argues these references must be made by the respondent instead of referring to the injuries and sequelae listed in the OCF-3. I am not referred to any authority for this interpretation and I am not persuaded that the respondent must include every complaint reported by the applicant to various health practitioners or every diagnosis made by them to sufficiently explain its decision. In context, the applicant claims she should not be subject to the MIG, and the respondent refers to all of the injuries and sequelae experienced by the applicant as attested in an OCF-3 as part of the reasons why the respondent believes the applicant is subject to the MIG.
- [17] I find that all of the NOEs contained comprehensive reasons including reference to the applicant's medical condition that complied with s. 44 of the *Schedule*.

Reasonable efforts to accommodate the applicant under section 44(9)2.i.

- [18] The applicant's position is that the respondent has been unreasonable in failing or refusing to schedule the requested IEs after 5:00 p.m. on weekdays or at any

time on weekends. The applicant argues the respondent has therefore not cooperated with the applicant in scheduling the IEs outside of her work hours.

- [19] The respondent's position is that the applicant has been unreasonable in refusing to attend IEs during normal business hours. The respondent submits that it has not acted unreasonably because it made reasonable efforts to reschedule IEs on weekends, but this was outside the assessors' work schedules and the applicant was advised of this. The respondent also rescheduled the psychological IE as a virtual appointment and was able to find a time late in the afternoon, at 3:00 p.m. to make it easier for the applicant to attend. The respondent also rescheduled an IE to 4:45 p.m. relating to a plan proposing physiotherapy services to try to accommodate the applicant. Despite these efforts, the respondent argues that the applicant did not attend any of the IEs and has not provided a reasonable explanation for her non-compliance. Indeed, the applicant has not argued she has a reasonable explanation, other than her general argument that her scheduling requests were due to her working hours.
- [20] The applicant argues that the respondent's position that non-attendance at IEs bars her from pursuing these issues at the Tribunal lacks any merit. To the contrary, s. 44(9)2 i-iii sets the expectation for both parties to fulfill their duties in scheduling and attending IEs, and s. 55(1)2. sets out the consequence, as reviewed above.
- [21] Under the circumstances, I find that, under s. 44 (9)2.i., the respondent fulfilled its duty to make reasonable efforts to schedule the examination for a day, time and location that are convenient for the applicant. I am not persuaded by the applicant that independent assessors must make themselves available outside of normal business hours, whether that is late into the evening or on weekends, in order for the respondent to meet the threshold of having made reasonable efforts to accommodate the applicant. While attending assessments during work hours may be less convenient, the applicant did not substantiate an inability to attend any assessments during work hours on weekdays. Accordingly, the applicant did not fulfill her duty to attend the examinations and submit to all reasonable physical, psychological, mental and functional examinations requested by the person or persons conducting the examination under s. 44 (9)2.iii.
- [22] In total, the respondent scheduled nine IEs between August 2022 and October 2024. In my view, on the facts before me, failing to attend the IEs frustrated the respondent's ability to assess the applicant and prejudiced the respondent. Further, the applicant has made no submissions under s. 55(2) requesting that I permit the application despite her non-attendance.

- [23] Under these circumstances and for the reasons above, I find, on a balance of probabilities, that the applicant did not attend IEs that were scheduled by the respondent in compliance with s. 44 of the *Schedule*. Therefore, under s. 55(1)2, the applicant is barred from applying to the Tribunal for the following plans in dispute, as framed by the parties at the case conference:
- i. the plan proposing \$2,460.00 for a psychological assessment,
 - ii. the plan proposing \$2,460.00 for a neurological assessment,
 - iii. the plan proposing \$2,460.00 for chronic pain assessment.

SUBSTANTIVE ISSUE ANALYSIS

The applicant is not subject to the MIG

- [24] I find that the applicant sustained impairments that are not predominantly a minor injury and she is therefore not subject to the MIG.
- [25] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to \$3,500.00 if the insured sustains impairments that are predominantly a minor injury. Section 3(1) defines a “minor injury” as “one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury.”
- [26] An insured may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under s. 18(2), that they have a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition precludes recovery if they are kept within the confines of the MIG. The Tribunal has also determined that chronic pain with functional impairment or a psychological condition may warrant removal from the MIG. In all cases, the burden of proof lies with the applicant.
- [27] The applicant argues that she should be removed from the MIG because she sustained a serious head injury which falls outside of the MIG and a psychological condition which warrants removal from the MIG. If the applicant can establish either of these claims, on a balance of probabilities, a removal from the MIG may be warranted.

Does the applicant's head injury fall outside of the MIG?

- [28] The applicant argues that she should be removed from the MIG because she sustained a serious head injury which falls outside of the MIG.
- [29] The applicant's submissions on this position and her evidence can be summarized as follows. The applicant attended Sunnybrook Health Sciences Centre (Sunnybrook) on February 19, 2022, the day after the accident. The applicant complained of right shoulder pain, headache, and sensitivity to light to Nadine Narain, occupational therapist. The applicant was provided with a handbook on concussion. On the same day, Sunnybrook records including a Medical Imaging Report state that the applicant was admitted because of a head injury. However, the imaging report was limited to her right shoulder, and it was confirmed there was no fracture. I also note that while some Sunnybrook records from February 19, 2022 state that the applicant was admitted due to a head injury, in other places within the same records, it is stated she was admitted due to right shoulder pain and that this is her chief complaint.
- [30] On February 23, 2022, the applicant completed a Concussion Symptom Inventory at 101 Physio Medical Rehabilitation Centre, scoring a total of 35 out of 66. I give this score little weight because I am not referred to a medical opinion for interpretation of this total score and I am not referred to particulars about how it was administered, or by whom. However, I note the applicant's endorsements with a view that it is a corroborating piece of evidence as to what the applicant was reporting on that particular day, just a few days post-accident.
- [31] On March 4, 2022, the applicant was diagnosed with a WAD 1 cervical strain and a mild traumatic brain injury or mild concussion at Sunnybrook by Dr. David Wasserstein of the Division of Orthopedic Surgery. Dr. Wasserstein noted the applicant developed a headache and sound sensitivity within 24 hours post-accident. I note that this is the sole mention in the evidence of the applicant complaining of sound sensitivity, however, she had endorsed light sensitivity previously which Dr. Wasserstein does not note. Dr. Wasserstein offered to send the applicant to the Orthopedic Rehabilitation Institute for follow up relating to concussion management but opined that the applicant did not require any concussion related therapy, specifically mentioning vestibular or ocular therapy.
- [32] The applicant was diagnosed with post-concussive syndrome by Dr. Vincenzo Santo Basile in a neurological evaluation report dated August 10, 2022. I will review this report in more detail. First, I need to assess the contemporaneous evidence of a concussion, since I have this evidence before me, before I need to assess evidence of post-concussive syndrome.

- [33] The respondent's position, with reference to evidence of the applicant's claim of a head injury or concussion, can be summarized as follows. The Sunnybrook records of February 19, 2022 show that the applicant's chief complaint was her right shoulder rather than a head injury. These records also confirm that the applicant drove her vehicle into the rear of a stationary vehicle at a slow speed or an estimated 40 km/h. Further, that the applicant did not hit her head, there was no loss of consciousness, she was wearing her seatbelt, and there was no airbag deployed. However, these records also note "mild tenderness without swelling over occiput (where she struck headrest)". Upon consolidating the records before me, I find that the records support that the applicant did hit her head to some extent on recoil during the collision, but there was no head strike otherwise, such as on the steering wheel.
- [34] The respondent emphasizes that Dr. Bertz's emergency department assessment notes at Sunnybrook on February 19, 2022 provide no diagnosis for a concussion or head injury. The respondent challenges Dr. Wasserstein's March 4, 2022 diagnosis on the basis that the purpose of the referral by Dr. Bertz was to address her shoulder pain at the Soft Tissue Injury Specialist Clinic at Sunnybrook. Further, it argues that it is unclear what the basis of Dr. Wasserstein's diagnosis is. The respondent further challenges the diagnosis because in Dr. Wasserstein's opinion the applicant did not require any therapy as a result, except for monitoring, which the applicant did not pursue.
- [35] I find that the applicant suffered a head injury upon hitting the headrest on recoil during the accident, causing mild tenderness for which the goods and services provided under the MIG are appropriate. I find that Dr. Wasserstein's diagnosis of a mild traumatic brain injury or mild concussion is sufficient to warrant removal from the MIG. Both parties agree that a concussion is not captured by the MIG. In giving Dr. Wasserstein's diagnosis weight, I considered the corroborating complaints post-accident at Sunnybrook, at 101 Physio, and to Dr. Wassertsein. On a balance of probabilities, the applicant met the criteria for a concussion diagnosis in Dr. Wasserstein's opinion. As to challenging the diagnosis from a medical perspective, I do not have a medical opinion challenging the diagnosis. While I have found that this is because the applicant did not attend IEs without a reasonable explanation, the applicant is not barred from proceeding on the issues in dispute outside the scope of the preliminary issue that was framed by the parties at the case conference, which does not include the MIG.
- [36] Dr. Wasserstein also opined that the concussion diagnosis does not warrant any therapy or treatment, and that it would resolve on its own, likely within 6 weeks. As it relates to Dr. Wasserstein's referral for monitoring, this was provided to the

applicant and there is no evidence of the applicant pursuing it. I am not persuaded by the respondent that this undermines the diagnosis, rather, it speaks to whether treatment is required which is not a consideration under the test for removal from the MIG.

- [37] While the applicant also argued removal from the MIG on the basis of a psychological condition, it is unnecessary to engage in an analysis of that argument based on removal from the MIG for reasons already stated.
- [38] For the reasons above, on a balance of probabilities, the applicant is not subject to the MIG.

The applicant is not entitled to payment under s. 38(11) for the plans proposing \$1,185.54 for physiotherapy services and \$2,764.36 for physiotherapy services.

- [39] I find that the plans proposing physiotherapy services were denied in compliance with s. 38(8). The applicant did not make substantive submissions to argue that these plans are reasonable and necessary.
- [40] Section 38(8) requires an insurer to inform an insured person, within 10 business days after it receives the treatment plan, of the medical and other reasons why it considered the goods and services not to be reasonable and necessary if it denies a plan. Pursuant to s. 38(11), if an insurer fails to comply with its obligations under section 38(8), it must pay for the goods and services that relate to the period starting on the 11th business day after the insurer received the application and ending on the day the insurer gives a notice described in s. 38(8) and it is prohibited from taking the position that the insured person has an impairment to which the MIG applies.
- [41] As for the plans proposing physiotherapy services, the applicant argues that the only reason provided was that the applicant's injuries are predominantly minor. Upon review, there are further reasons provided. The respondent confirmed its position that the applicant was subject to the MIG, it confirmed partial approval of the plan proposing physiotherapy services up to the MIG limit. The respondent confirmed review of the applicant's documentation and requested that the applicant obtain and provide medical records describing her current condition so that it can continue to adjust the file. I have taken into account that the respondent, under s. 33, requested basic medical records from the applicant on July 26, 2022, followed up by email on November 2, 2022, and then sent a further request on February 21, 2023 without the applicant's compliance with the requests. The applicant did not rebut this. Accordingly, it is reasonable that the

respondent's focus in its denials was requesting updated records that may challenge its position on the MIG.

- [42] For the reasons above, on a balance of probabilities, I find that the respondent's notice denying the plan proposing physiotherapy services and psychological services did comply with s. 38(8) of the *Schedule*.

The applicant is entitled to payment under s. 38(11) for the plans proposing \$2,460.00 for a neuropsychological assessment, and \$2,560.00 for psychological services

- [43] I find that the plans proposing a neuropsychological assessment and psychological services were not denied in compliance with s. 38(8).
- [44] The applicant argues that the denial notices are insufficient and unclear, and therefore these plans are payable under s. 38(11). The applicant alleges that the respondent does not refer to the MIG and is therefore not compliant with the notice requirements of s. 38(8). Upon review, the respondent's notice did not advise the applicant that it believes the MIG applies to the applicant's impairment, as required by s. 38(9). Therefore, the June 26, 2024 notice denying the proposed plan for a neuropsychology assessment and the July 25, 2022 notice denying psychological services are payable under s. 38(11).
- [45] I note that I was not referred to any subsequent notice relating to these proposed plans and the shall-pay period is therefore not capped in advance of this hearing.
- [46] I also note that the applicant did not refer me to evidence of the proposed plans being incurred. I have considered that the *Schedule* being consumer protection and remedial legislation does not mean consumer windfall. Accordingly, I find that these plans are payable under s. 38(11), once they are incurred.
- [47] For the reasons above, on a balance of probabilities, I find that the respondent's notice denying the neuropsychology assessment and psychological services did not comply with s. 38(8) of the *Schedule*, triggering the shall-pay provision of s. 38(11)2. Accordingly, the applicant is entitled to the proposed plans, once they are incurred.

The applicant is not entitled to a non-earner benefit

- [48] I find that the applicant is not entitled to a non-earner benefit of \$185.00 per week from March 22, 2022, to February 18, 2024.

- [49] Section 12(1) provides that an insurer shall pay an NEB to an insured person who sustains an impairment as a result of the accident, if the insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident. Section 3(7)(a) defines a “complete inability to carry on a normal life” as “an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.” The Court of Appeal set out the guiding principles for NEB entitlement in *Heath v. Economical Mut. Ins. Co.*, 2009 ONCA 391, which, generally, focuses on a comparison of the applicant’s pre- and post-accident activities.
- [50] The applicant did not address this issue in her submissions. Accordingly, the respondent argues that the applicant has not met her onus and has abandoned her claim for an NEB. Since the applicant did not make submissions and refer me to evidence to establish entitlement, the applicant has not her onus on this issue.
- [51] For the reasons above, on a balance of probabilities, the applicant is not entitled to a non-earner benefit of \$185.00 per week from March 22, 2022, to February 18, 2024.

Interest

- [52] The applicant is entitled to interest on overdue benefits pursuant to s. 51 of the *Schedule*.

Award

- [53] The applicant sought an award under s. 10 of Reg. 664. Under s. 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits. The applicant did not address her claim for an award in her submissions. Therefore, I find that the applicant has not met her onus in establishing that any benefits that she is entitled to were unreasonably withheld or delayed.

ORDER

- [54] For the reasons above, I make the following orders:
- [55] The applicant is barred under s. 55(1)2 from disputing the following benefits at the Tribunal:
- i. the plan proposing \$2,460.00 for a psychological assessment,
 - ii. the plan proposing \$2,460.00 for a neurological assessment,
 - iii. the plan proposing \$2,460.00 for chronic pain assessment.
- [56] The applicant is not subject to the MIG.
- [57] The applicant is not entitled to a NEB.
- [58] The applicant is not entitled to payment under s. 38(11) for the plans proposing \$1,185.54 for physiotherapy services and \$2,764.36 for physiotherapy services.
- [59] The applicant is entitled to payment under s. 38(11) for the plan proposing \$2,460.00 for a neuropsychological assessment and \$2,560.00 for psychological services, if incurred.
- [60] The applicant is entitled to interest pursuant to s. 51.
- [61] The respondent is not liable to pay an award.
- [62] The application is granted in part.

Released: January 29, 2026

Amar Mohammed
Adjudicator