



Citation: Aussem v. Aviva Insurance Company of Canada, 2026 ONLAT 24-004907/AABS

Licence Appeal Tribunal File Number: 24-004907/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:

Kathrine Aussem

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: Kathleen Wells

APPEARANCES:

For the Applicant: Devan T. Schafer, Counsel

For the Respondent: Jordan A. Hochman, Counsel

HEARD: By way of written submissions

OVERVIEW

[1] Kathrine Aussem, the applicant, was involved in an automobile accident on August 8, 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, Aviva Insurance Company of Canada, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

1. Is the applicant entitled to \$798.00 for physiotherapy services, proposed by Total Health Physio in a treatment plan/OCF-18 (“treatment plan”) dated October 3, 2023?
2. Is the applicant entitled to interest on any overdue payment of benefits?
3. Is the respondent liable to pay costs pursuant to Rule 19 of the *Licence Appeal Tribunal Rules, 2023, (the “Rules”)*?

RESULT

[3] I find that:

1. The applicant is not entitled to \$798.00 for physiotherapy services in the treatment plan dated October 3, 2023.
2. As no payments are owing, no interest is due.
3. The respondent is not liable to pay costs.

PROCEDURAL ISSUES

Respondent’s motion to strike part of the applicant’s reply submission

[4] The respondent filed a Notice of Motion on June 3, 2025 requesting that the applicant’s request for costs at paragraph 4 through 7 of the applicant’s reply submissions be struck from the record, on the grounds that it was first raised in the applicant’s reply submissions. In the alternative, the respondent requests to be granted a sur-reply to respond to the request for costs.

- [5] The applicant argues that paragraphs 4 through 7 of her reply submissions should not be struck, because the request for costs was raised in response to the respondent improperly raising a limitation defence without providing prior notice to the applicant, and it was done in bad faith.
- [6] I decline to strike the applicant's request for costs in her reply submissions, because although it is a new issue, I agree with the applicant that it was raised at the first opportunity in response to an issue raised in the respondent's submissions. Further, in accordance with Rule 19 of the *Licence Appeal Tribunal Rules, 2023 (Rules)* a request for costs may be made to the Tribunal in writing or orally at a case conference or hearing at any time before a decision or order is released.
- [7] The applicant argues that the respondent's Notice of Motion is, in itself, an abuse of process, because by filing the Motion, the respondent is seeking to extend the process and increase the cost of the hearing in an attempt to escape costs due to the applicant. The applicant submits that the respondent should not be entitled to a sur-reply, and that the applicant should be awarded additional costs as a result.
- [8] I am not persuaded that the respondent is seeking to extend the process, because its motion submissions acknowledge that the respondent erred in raising the limitation defence, and withdrew the submissions on the limitation period, which renders the issue moot. Further, procedural fairness dictates that the respondent be given an opportunity to make submissions in response to the applicant's request for costs. Therefore, I will consider the respondent's motion submissions as a sur-reply to the issue of costs.
- [9] The respondent's request to strike part of the applicant's reply is denied. I will consider the applicant's requests for costs below.

ANALYSIS

Is the applicant entitled to \$798.00 for physiotherapy services in a treatment plan dated October 3, 2023?

- [10] I find that the applicant is not entitled to the treatment plan in dispute.
- [11] To receive payment for a treatment and assessment plan under s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should identify the goals of treatment, how the

goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.

- [12] The goals of the October 3, 2023 treatment plan, prepared by Marra McLellan, physiotherapist are: pain reduction, increased strength, and a return to the activities of normal living. It sets out 8 sessions of extracorporeal shockwave therapy for a total cost of \$798.00.
- [13] The applicant submits that she suffers from ongoing hip pain as a result of the accident, and relies on the physiatry report of her physiatrist, Dr. Ryan Williams, dated March 3, 2022. Dr. Williams noted that the applicant had paused her physiotherapy as a result of an unrelated medical condition, and that her pain had returned. He opined that the applicant's hip pain was a result of the accident, and recommended physiotherapy, shockwave therapy, and massage to alleviate the pain.
- [14] The applicant further submits that she subsequently underwent a course of surgery and treatment for an unrelated medical condition. The evidence reveals that she underwent cancer surgery on May 25, 2022, and June 21, 2022, and began maintenance therapies on August 3, 2022.
- [15] The respondent initially submitted that the treatment plan was submitted outside of the limitation period, but acknowledged in its sur-reply submissions that the limitation defence was put forward in error, and that the applicant had purchased optional benefits which allow for coverage beyond the five-year limitation period.
- [16] The respondent's remaining arguments are that, in his November 23, 2023 s.44 orthopedic surgeon insurer's examination ("IE") report, Dr. Alexander Rabinovich, orthopaedic surgeon, opined that the treatment plan was not reasonable and necessary. The applicant had also reported to Dr. Rabinovich that she had experienced an 80% recovery from her accident-related injuries two years after the accident, in an October 2020 IE also conducted by Dr. Rabinovich.
- [17] The applicant submits that Dr. Rabinovich's November 23, 2023 IE report is flawed, because he did not consider the applicant's updated medical records, the report is internally inconsistent, and its conclusions are inconsistent with his November 8, 2020 IE report.
- [18] Even if I were to agree with the applicant and assign less weight to Dr, Rabinovich's report, I find that the evidence does not establish on a balance of probabilities that the treatment plan is reasonable and necessary, because the applicant has not directed me to contemporaneous medical evidence in support

of the treatment plan. While I accept that the applicant experienced a delay in her physiotherapy treatment due to her surgery and recovery, the applicant's most recent physiotherapy progress report is from the applicant's previous physiotherapy provider, Lifemark, and is dated February 16, 2021.

- [19] Further, the applicant has not made submissions or directed me to a subsequent referral for physiotherapy or shockwave therapy from a treating physician after Dr. Williams' recommendation on May 3, 2022, more than one year prior to the submission of the treatment plan.
- [20] As a result, I find that the applicant has not met her burden to prove that the treatment plan is reasonable and necessary. Accordingly, the applicant is not entitled to \$798.00 for physiotherapy services in the treatment plan dated October 3, 2023.

Interest

- [21] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. As no payments are owing, no interest is due.

Costs

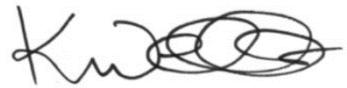
- [22] According to the provisions of s. 19 of the Rules, a party may make a request to the Tribunal for costs if it believes that the other party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith. It is the burden of the party that raises a request for costs to support allegations of misconduct.
- [23] The applicant sought costs against the respondent for raising a limitation defence without providing notice to the applicant. She further submits that the applicant is entitled to costs because the respondent filed a Motion to strike the request for costs or in the alternative file a sur-reply, and that both the limitation defence and Motion were evidence of bad faith because the respondent knew that the applicant had purchased optional benefits to extend her coverage.
- [24] I find that the applicant has not established that the high bar to warrant costs has been met in this instance. Moreover, in its Notice of Motion, the respondent acknowledged its error in raising the limitation defence, and apologized to the applicant. As such, I am not persuaded that the the course of conduct on the part of the respondent meets the unreasonable, frivolous, vexatious, or in bad faith threshold for costs. Accordingly, the respondent is not liable to pay costs.

ORDER

[25] I find that:

1. The applicant is not entitled to \$798.00 for physiotherapy services in the treatment plan dated October 3, 2023.
2. As no payments are owing, no interest is due.
3. The respondent is not liable to pay costs.

Released: January 30, 2026



Kathleen Wells
Adjudicator