LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Tribunal File Number: 18-006820/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:

T.A.

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Lindsay Lake**

APPEARANCES:

For the Applicant: Lisa Bishop, Counsel

For the Respondent: Greg Specht, Counsel

HEARD IN WRITING: **March 25, 2019**

OVERVIEW

[1] The applicant, T.A., was injured in an automobile accident on September 17, 2016 (the "accident"). Prior to the accident, T.A. had a long-standing history of mental health conditions, including being diagnosed with schizophrenia in 1996.

[2] Following the accident, T.A. sought benefits pursuant to *Ontario Regulation 34/10* "*Statutory Accident Benefits Schedule" – Effective September 1, 2010* (the "*Schedule*") from the respondent, Aviva General Insurance Company ("Aviva"). At issue between the parties was T.A.'s claim for weekly non-earner benefits, attendant care benefits and several treatment plans. As a result, T.A. submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[3] A case conference was held and the matter proceeded to a written hearing.

ISSUES IN DISPUTE

[4] The following issues are to be decided:

(i) Is T.A. entitled to a non-earner benefit (NEB) in the amount of $185.00 per week from March 17, 2017 to date and ongoing?

(ii) Is T.A. entitled to an attendant care benefit (ACB) in the amount of $91.82 per month from September 17, 2016 to September 17, 2018?[1]

(iii) Is T.A. entitled to payment for the cost of an examination in the amount of $2,197.29 for a psychological assessment recommended by Pro Health Wellness in a treatment plan submitted on March 7, 2017, and denied by Aviva on March 21, 2017?

(iv) Is T.A. entitled to a medical benefit for physiotherapy services recommended by Health Pro Wellness as follows:

(a) in the amount of $246.36, representing the unapproved balance remaining from the initial claim of $1,546.36, in a treatment plan

[1] Originally, T.A. claimed ACBs for the period from September 17, 2016 to date and ongoing. However, in her submissions, T.A. amended the time period and confirmed that she was seeking ACB from September 17, 2016 to the two-year anniversary of the accident, which was September 17, 2018 (Submissions of the Applicant, page 15).

submitted on January 20, 2017, and denied by Aviva on February 3, 2017?

(b) in the amount of $1,892.00 in a treatment plan submitted on June 23, 2017, and denied by Aviva on July 7, 2017?

(v) Is T.A. entitled to interest on any overdue payment of benefits?

(vi) Is T.A. entitled to an award under *Ontario Regulation 664* because Aviva unreasonably withheld or delayed the payment of benefits?

RESULT

[5] Based on the evidence before me, I find:

(i) T.A. is entitled to NEBs in the amount of $185.00 per week from September 22, 2016 to August 28, 2018, less any amounts paid, with interest at the prescribed rate;

(ii) T.A. is not entitled to NEBs from August 29, 2018 to date and ongoing;

(iii) T.A. is not entitled to ACBs;

(iv) T.A. is entitled to the treatment plan for the psychological assessment in the amount of $2,197.29 with interest at the prescribed rate;

(v) T.A. is not entitled to the unapproved balance of $246.36 from the treatment plan submitted on January 20, 2017 in the total amount of $1,546.36 or to the treatment plan for physiotherapy (corrected to be for chiropractic services) in the amount of $1,892.00; and

(vi) T.A. is entitled to an award in the amount of 25% of the amount T.A. is owed for NEBs and for the treatment plan for the psychological assessment in the amount of $2,197.29.

ANALYSIS

Non-Earner Benefits (NEBs)

Aviva's denial of T.A.'s claim for NEBs

[6] I find that Aviva failed to deny T.A.'s request for NEBs in accordance with s. 36 or s. 44 of the *Schedule* until August 28, 2018. As a result, Aviva is required to

pay weekly NEBs to T.A. in the amount of $185.00 from September 22, 2016 to August 28, 2018 less any amounts previously paid.

[7] T.A. argues that Aviva did not properly deny her claim for NEBs in accordance with s. 44(5) of the *Schedule*. T.A. submits that Aviva sent her notices to attend an Insurer's Examination (IE) on March 2, 2017 and on March 20, 2017 but these notices did not contain a denial of NEBs. T.A. also argues that the "medical and any other reasons" for the IEs in these notices fall short of the requirements set out in s. 44(5) of the *Schedule*. As such, T.A. also argues that an IE was not properly requested and, therefore, there was no proper denial of NEBs by Aviva.

[8] Aviva argues that its denial of NEBs was clear and provided sufficient detail of its medical justification. Aviva argues that only now is T.A. disputing the adequacy of any explanation of the denials and, despite T.A.'s repeated non-attendance at scheduled IEs, T.A. did not notify Aviva that she was not ready and willing to participate in the IEs.

[9] When an insured person applies for NEBs by submitting an Application for Accident Benefits (OCF-1) and a Disability Certificate (OCF-3), the insurer is required to respond in writing within 10 business days.[2] In its written response, the insurer can either notify the insured person that the insurer:

(i) will pay the NEB; or

(ii) will not pay the NEB with reasons why the insurer is not paying the NEB including a medical reason along with any other reason why it denied the NEBs; or

(iii) requests further information from the insured person under s. 33 of the Schedule.3

[10] If the insurer fails to provide the insured person with notice that complies with the requirements of the *Schedule* within 10 business days, the insurer is required to pay NEBs until it does provide the proper notice to the insured person.[4]

[11] T.A. submitted as evidence her Application for Accident benefits (OCF-1) dated September 20, 2016 and a Disability Certificate (OCF-3) dated September 22,

[2] Section 36(4) of the *Schedule*.
[3] *Ibid*.
[4] Section 36(6) of the *Schedule*.

2016. This OCF-3 confirmed that T.A. suffered a complete inability to carry on a normal life and, therefore, supported her entitlement to NEBs. I am satisfied that T.A.'s application for NEBs was complete as of September 22, 2016.

[12] Aviva's first response to T.A.'s application for NEBs was on March 2, 2017 via a Notice of IE. The reasons for the IE included to determine initial entitlement to NEBs. On the copy of the notice submitted by Aviva, a physician assessment was scheduled for March 18, 2017 with Dr. Ahmed Belfon. I find that this notice of IE did not notify T.A. that Aviva would not be paying NEBs as required by s. 36(4)(b) of the *Schedule* and it also failed to give T.A. any explanation of the medical and any other reasons why Aviva did not believe that T.A. was entitled to NEBs.

[13] On March 20, 2017, Aviva sent a second Notice of IE to T.A. for an occupational therapy IE scheduled for April 1, 2017. The reasons for the examination included "to determine Non-Earner Benefits." I again find that this notice neither notified T.A. that Aviva would not be paying NEBs nor provided any reasons as to why Aviva believed T.A. was not entitled to NEBs.

[14] On August 28, 2018, Aviva sent correspondence to T.A. advising that T.A. does "not qualify to receive the Non-Earner Benefit" based on the conclusion that T.A. does not suffer from a complete inability to carry on a normal life in two IEs.

[15] I find that Aviva breached its requirement under s. 36(4) of the *Schedule* to respond to T.A. within 10 business day following T.A.'s application for NEBs on September 22, 2016 with a notice explaining the medical and any other reasons why it did not believe that T.A. was entitled to NEBs. I do not agree with Aviva's submission that the mere fact that an insurer misses a procedural timeline does not mean that an insured person is automatically entitled to a benefit, as the insured person still bears the burden of proving entitlement to a benefit regardless of any procedural arguments.[5] Aviva relied upon the Ontario Court of Appeal decision of *Stranges v. Allstate Insurance Company of Canada*[6] to support this argument. I find that this decision is distinguishable as *Stranges* was decided under a different version of the *Schedule* that did not contain parallel consequences in what is now s. 36(6) and I am obliged to apply the mandatory provisions of the *Schedule*.

[5] Written Hearing Submissions of the Respondent, page 15, para. 47.
[6] 2010 ONCA 457 (CanLII) ("*Stranges*").

[16] I find that no denial of NEBs that complied with s. 36(4) of the *Schedule* was provided to T.A. until August 28, 2018. As a result, the consequences of s. 36(6) of the *Schedule* are engaged and Aviva is required to pay NEBs to T.A. for the period of September 22, 2016 to August 28, 2018 in the amount of $185.00 per week, less any amounts previously paid, plus interest in accordance with s. 51 of the *Schedule*.

Is T.A. Entitled to NEBs from August 28, 2018 to date and ongoing?

[17] I find that T.A. failed to prove on a balance of probabilities that she suffered from a complete inability to carry on a normal life as a result of the accident for the period of August 28, 2018 to date and ongoing. Therefore, T.A. is not entitled to NEBs for this period.

[18] The test for entitlement to a NEB is set out in s. 12(1) of the *Schedule*. It states that an applicant must prove that he or she suffers from a complete inability to carry on a normal life as a result of, and within 104 weeks of, an accident.

[19] Section 3(7)(a) of the *Schedule* states that a person suffers from "a complete inability to carry on a normal life" if, as a result of an accident, the person sustains an impairment that continuously prevents that person from engaging in substantially all of the activities in which that person ordinarily engaged before the accident.

[20] The term "substantially all" is not defined in the *Schedule*. However, the phrase has been interpreted by the Tribunal to mean "more than most, a majority, but not all activities."[7]

[21] Aviva cited *Heath v. Economical Mutual Insurance Company*,[8] the leading decision on NEBs, wherein the Court of Appeal held that:

> the starting point for the analysis of whether a claimant suffers from a complete inability to carry on a normal life will be to compare the claimant's activities and life circumstances before the accident to his or her activities and life circumstances after the accident.[9]

[22] *Heath* also outlines several principles for determining entitlement to NEBs, which include:

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[7] *16-003195 v State Farm Insurance Company*, 2017 CanLII 99136 (ON LAT) at para. 10.
[8] 2009 ONCA 391 (CanLII) ("*Heath*").
[9] *Ibid*. at para. 50.

(i) there must be a comparison of the applicant's activities and life circumstances before the accident to those post-accident;

(ii) the applicant's activities and life circumstances before the accident must be assessed over a reasonable period prior to the accident, and the duration of that period will depend on the facts of the case;

(iii) all of the applicant's pre-accident activities must be considered, but greater weight may be placed on activities that were more important to the applicant's pre-accident life;

(iv) the applicant must prove that his/her accident-related injuries continuously prevent him/her from engaging in substantially all of his/her pre-accident activities (this means that the disability or incapacity must be uninterrupted);

(v) "engaging in" should be interpreted from a qualitative perspective, such that even if an applicant can still perform an activity, if the applicant experiences significant restrictions when performing that activity, it may not count as "engaging in" that activity; and,

(vi) if pain is the primary reason that an applicant cannot engage in former activities, the question is whether the degree of pain practically prevents the applicant from performing those activities. The focus should not be on whether the applicant can perform those activities.[10]

[23] Further, the Tribunal has held that an applicant must provide evidence of the frequency and time commitments of the applicant's pre-accident activities to compare how much less he or she is able to dedicate to the same activity post-accident to discharge his or her burden of proving that he or she is prevented from engaging in "substantially all" of the pre-accident activities in which he or she ordinarily engaged.[11]

[24] The court in *Heath* did not state what the reasonable time period was to examine a claimant's pre-accident activities. In this case, neither party made submissions on this issue. I find that examining the period of time from approximately one year prior to the accident is a reasonable period in this matter to assess T.A.'s pre-accident activities.

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[10] *Ibid.*
[11] *16-003141 v Aviva Insurance Canada*, 2017 CanLII 46352 (ON LAT) at para. 17.

[25] This hearing was entirely in writing. As a result, the only evidence of T.A.'s pre-accident activities is found in various expert reports and clinical notes and records (CNRs). I find that T.A.'s pre-accident activities were as follows:

- Attended group therapy sessions at Mackenzie Heath since 2006;[12]
- Completed household chores such as vacuuming, mopping, sweeping, laundry, grocery shopping, putting away groceries and washing dishes;[13]
- Skated;
- Walked in her neighbourhood three to four times per week;
- Attended a gym two or three times per week;[14]
- Parented and provided caregiving to her daughter;
- Walked her daughter to the school bus and volunteered at her daughter's school;[15]
- Participated in leisure activities, including going to the movies, taking her daughter to ringette and attending occasional family events;[16]
- Drove independently;[17] and
- Was responsible for all of the cooking.[18]

[26] T.A., however, failed to identify the amount of time she engaged in these activities and the frequency that she engaged in several of these activities. Furthermore, T.A. did not lead any evidence as to what activities were more important to her pre-accident.

[27] The only evidence that T.A. relied upon to demonstrate her restrictions post-accident for the period in dispute is from the Psychological Assessment Report

[12] IE Psychiatric Assessment Report by Dr. Velan Sivasubramanian dated August 16, 2018, Applicant's Book of Exhibits, tab 12.
[13] Psychological Assessment by Dr. Fahimeh Aghamohseni dated October 19, 2018, Applicant's Book of Exhibits, tab 14, page 8.
[14] *Ibid.*
[15] IE Occupational Therapy In-Home Assessment Report by Ms. Shoabana Kugathasan dated August 16, 2018, Written Hearing Submissions of the Respondent, tab 11, page 5.
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.* at page 10.

dated October 19, 2018 by Dr. Fahimeh Aghamohseni, psychologist.[19] T.A. reported to Dr. Aghamohseni that after the accident:

- Household tasks became difficult for her to complete including vacuuming, mopping, sweeping, laundry, grocery shopping, putting away groceries, washing dishes and shovelling snow. T.A. reported that her husband was responsible for these tasks post-accident;
- Personal tasks became difficult for T.A., or take longer, such as toenail care and showering;
- Most of her pre-accident activities such as skating, walking and going to the gym have ceased and T.A.'s physical activity had decreased dramatically;
- Parenting her daughter has been more challenging; and
- She goes out less with her friends and is socially withdrawn.[20]

[28] Dr. Aghamohseni's report also noted that T.A. reported that she has not worked since the accident.[21]

[29] In contrast, the August 16, 2018 IE in-home occupational therapy assessment report dated just weeks prior to the period in dispute that was completed by Ms. Shoabana Kugathasan, occupational therapist, noted that post-accident, T.A.:

- Was independent in all personal care activities;
- Cooked, primarily on the weekdays, and her husband does more of the grocery shopping and barbeques on the weekends;
- Shared laundry duties with her husband;
- Continued to volunteer at her daughter's school and walk her daughter to school;
- Lost motivation for work but that she was working on a new business venture;

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[19] *Supra* note 13.
[20] *Ibid*. at page 8.
[21] *Ibid*. at page 7.

- Tried to go to the movies last week with her husband but became anxious in the parking lot and required medication;
- Drove less due to anxiety;
- Went to the gym 1-3 times per week depending on her motivation to participate in classes such as kick boxing, Zumba and muscle mix;
- Was on the waitlist to become a speaker at the Centre for Addiction and Mental Health;
- Went for walks; and
- Continued to participate in activities such as going with her husband to her daughter's ringette and going to group therapy at Mackenzie Heath.

[30] I prefer the description of T.A.'s post-accident activities by Ms. Kugathasan over T.A.'s self reports to Dr. Aghomohseni because they are more consistent with the CNRs from Mackenzie Health where T.A. attended group therapy for 12 years. Aviva submitted these CNRs from July 2017 to May 2018. During this time, T.A. attended 26 group therapy sessions. The CNRs from these sessions record that T.A.:

- Had a business that was doing well (July 18, 2017);
- attended a religious group on Monday nights;
- gave a talk at the Learning Disability Association and sold a number of her mood bracelets (August 8, 2017);
- had dinner with her in-laws and was going to Canada's Wonderland (August 4, 2017);
- was enjoying time with her daughter (August 15, 2017);
- Attended her daughter's ringette tournament (October 6, 2017);
- Did math work with her daughter (October 31, 2017);
- Took her daughter to school (November 28, 2017);
- Was looking forward to her daughter's birthday party on the weekend (January 16, 2018); and

- Quit being an UBER driver (March 20, 2018).

[31] The evidence from Ms. Kugathasan's IE Report of T.A.'s post-accident activities is also more consistent with the following evidence:

(i) an August 8, 2018 CNR entry of Dr. Robin Shear, T.A.'s family physician, in which Dr. Shear noted that T.A. walked daily but went to the gym less;

(ii) in Dr. Velan Sivasubramanian's August 16, 2018 IE Psychiatric Assessment Report, T.A. reported that she worked as an UBER driver for 3 months, that she attended a gym three times per week when the weather was poor but more recently had been walking more, that she and her husband went to the movie together and that she enjoyed spending time with her daughter watching TV or playing board games;[22]

(iii) T.A. also reported to IE assessors that she attends her daughter's ringette practices and games, some of which are out of town,[23] and confirmed the operation of her home-based business of making mood bracelets;[24] and

(iv) surveillance evidence from August 2018 relied upon by Aviva confirmed that T.A. went shopping, carried garbage to the curbside on two occasions, ate at restaurants, and drove a child (presumably her daughter).[25]

[32] I also disagree with T.A.'s argument that Aviva failed to fully assess her entitlement to NEBs as it failed to provide an opinion from a physical assessor. T.A. was assessed by Ms. Kugathasan, occupational therapist, and by Dr. Mansour Alvi, orthopaedic surgeon, who both opined that T.A. did not suffer a complete inability to carry on a normal life post-accident. As such, I find that there were at least two IE assessors that provided their opinion on T.A.'s entitlement to NEBs from a physical perspective.

[33] Based on the evidence before me, I find that T.A.'s post-accident activities after August 28, 2018 are not so significantly restricted or different when compared to her pre-accident activities that it can be said that T.A. is unable to "engage in" most of her pre-accident activities after August 28, 2018. Therefore, I find that T.A. has failed to prove on a balance of probabilities that she suffers from

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[22] *Supra* note 12 at page 6.
[23] *Ibid*.
[24] IE Orthopaedic Assessment Report by Dr. Mansour Alvi dated November 8, 2018, Written Hearing Submissions of the Respondent, tab 16, page 3.
[25] Surveillance Report dated August 30, 2018 by Intrepid Investigations, Written Hearing Submissions of the Respondent, tab 36.

a complete inability to carry on a normal life as a result of the accident from August 29, 2018 to date and ongoing and, as a result, T.A. is not entitled to NEBs for the period of August 29, 2018 to date and ongoing.

Attendant Care Benefits (ACBs)

Aviva's denial of T.A.'s claim for ACBs

[34] T.A. claims entitlement to ACBs in the amount of $91.82 per month from the date of the accident to September 17, 2018. T.A. applied for ACBs on October 6, 2016 by submitting a Form 1 completed by Yana Granovsky, registered nurse, who recommended that T.A. receive $91.82 per month in ACBs.

[35] T.A. argues that Aviva failed to provide a proper denial of ACBs. T.A. submits that Aviva's notices of IEs dated March 2, 2017 and March 20, 2017 were not a denial of ACBs and that the "medical and any other reasons" for the IEs fall short of the requirements set out in the *Schedule*. As such, T.A. argues that an IE was not properly requested and, therefore, there was no proper denial of ACBs.

[36] I am unable to considering the arguments advanced by T.A. regarding the sufficiency of Aviva's denial of ACBs because ACBs are not available to insured persons whose injuries are found to be within the Minor Injury Guideline (MIG) pursuant to s. 14 of the *Schedule*. As such, even if I agreed with T.A.'s arguments regarding Aviva's denial of ACBs, T.A. was not entitled to ACBs until August 28, 2018 when she was released from the MIG.

Is T.A. entitled to ACBs from August 28, 2018 to September 17, 2018?

[37] Section 19 of the *Schedule* states that the insurer shall pay for all reasonable and necessary expenses that are incurred by or on behalf of the insured person as a result of the accident for services provided by an aide or attendant.

[38] T.A. submitted no evidence that she incurred the services of an attendant care provider during the period in dispute. Instead, T.A. requests that I deem the expenses incurred pursuant to s. 3(8) of the *Schedule*, which allows me to deem an expense incurred if an insurer has unreasonably withheld or delayed payment of a benefit.

[39] There is no evidence before me that Aviva unreasonably withheld or delayed the payment of ACBs upon T.A. being eligible to receive this benefit after she was removed from the MIG. Additional correspondence was sent to T.A. on

August 28, 2018, the same day that she was removed from the MIG, that complied with Aviva's obligations under the *Schedule* and notified T.A. that she was "no longer entitled to receive" ACBs. As a result, I find that T.A. is not entitled the ACBs from August 28, 2018 to September 17, 2018.

Treatment Plans

[40] Sections 14 and 15 of the *Schedule* provide that the insurer shall pay for medical benefits to, or on behalf of, an applicant so long as the applicant sustains an impairment as a result of an accident and the medical benefit is a reasonable and necessary expense incurred by the applicant as a result of the accident.

[41] T.A. bears the onus of proving that the claimed treatment plans are reasonable and necessary on a balance of probabilities.

[42] For the reasons that follow, I find that T.A. is entitled to the treatment plan for a psychological assessment but not to the two treatment plans for physical treatment.

Psychological Assessment

[43] The treatment plan (OCF-18) in dispute for a psychological assessment was completed by Dr. Aghamohseni and sought funding in the amount of $2,197.29.

[44] T.A. submits that Aviva did not provide a proper denial to this OCF-18 as required in s. 38 of the *Schedule* and, therefore, Aviva is required to pay for the psychological assessment pursuant to s. 38(11). Aviva's denial, dated March 21, 2017, is reproduced in relevant as follows:

> Based on a review of your complete file and the documentation we received to date, we do not agree to fund the goods and services proposed on this Treatment and Assessment Plan at this time for the following reasons:
>
> Upon review of the Minor Injury Guideline (MIG) and the treating practitioner's medical opinion, we have concluded the health practitioner has not provided compelling medical evidence the impairment sustained is not predominantly a minor injury.

[45] Aviva also provided notice of an IE at this time to determine "whether the goods and services proposed on this treatment and assessment plan are reasonable

and necessary" for the injuries that T.A. sustained in the accident. No further reasons for the IE were provided.

[46] T.A. relies upon the Financial Services Commission of Ontario (FSCO) decision of *Augustin v. Unifund Insurance Company*,[26] which has been followed numerous times by the Tribunal, where the Arbitrator held that where an insurer believes that the MIG might apply, its IE notice must indicate, at a minimum, that it has:

(i) reviewed the treating health practitioner's opinion;

(ii) reviewed the MIG and compared it to the treating health practitioner's opinion; and

(iii) concluded that, in the view of the insurer, the applicant's treating health practitioner has not provided compelling evidence that the applicant's injuries fall outside the MIG.

[47] I find that Aviva's notice was deficient because it did not clearly state that it reviewed the MIG and made a comparison of it with T.A.'s treating health practitioner's opinion. The notice simply states, in very generic terms, that the MIG was reviewed, the treating practitioner's (with no indication who this was) medical opinion was reviewed and Aviva's conclusion that the health practitioner (with no specifics as to who this was) has not provided compelling medical evidence the impairment sustained is not predominantly a minor injury. Aviva failed to provide an analysis or any critique of whichever treating health practitioner's opinion it was referring to. I find that Aviva's correspondence dated March 21, 2017 was boilerplate and did not specifically address the unique merits of T.A.'s claim to the disputed treatment plan, especially given her long standing mental health history and pre-existing diagnosis of schizophrenia.

[48] As a result, the consequences of s. 38(11) of the *Schedule* is triggered. Therefore, Aviva is required to pay for all goods, services, assessment and examinations described in the treatment plan for the psychological assessment starting on the 11th business day after receiving the OCF-18 ending when Aviva gives notices that complies with the requirements of the *Schedule*.

[49] Aviva is also precluded from taking the position after March 21, 2017 that T.A. has an impairment to which the MIG applies pursuant to s. 38(11) of the *Schedule* regarding this treatment plan *only* and not for any future treatment

[26] FSCO A12-000452 (2013-11-13) ("*Augustin*").

plans as argued by T.A. The decisions relied upon to support her position are not the current state of the law on this issue. The Divisional Court has held that the language used in s. 38 of the *Schedule* refers to the specific treatment plan in question and, as a result, s. 38(11) does not impose a permanent prohibition on an insurer with respect to whether an insured person's impairments is covered by the MIG or is subject to the $3,500.00 limit in s. 18(1).[27]

[50] On August 28, 2018, Aviva notified T.A. that it was removing her from the MIG following a Psychiatric IE with Dr. Sivasubramanian but that it was maintaining its denial of the psychological assessment based on Dr. Sivasubramanian's opinion. As a result, I disagree with T.A. and find that this notice complies with the requirements of the *Schedule* and is a proper denial of the OCF-18 in dispute.

[51] T.A. underwent and incurred the expenses of a psychological examination on October 19, 2018 with Dr. Aghamohseni. Because the fees were not incurred between the 11th business day following Aviva's receipt of the OCF-18 and prior to a proper denial by Aviva, I must now consider whether the treatment plan is reasonable and necessary.

[52] The goals of the OCF-18 for the psychological assessment were pain reduction, a return to pre-accident level of psychological functioning and a return to activities of normal living. The injury and sequelae information section included: problems related to life-management difficulty; pain, not elsewhere classified; other sleep disorders; nervousness; stress, not elsewhere classified; unhappiness; symptoms and signs involving emotional state; state of emotional shock and stress, unspecified; specific [isolated] phobias; and adjustment disorders.

[53] Dr. Aghamohseni also included a pre-screen report in the additional comments section of the OCF-18 that followed a brief interview that he conducted with T.A. on March 2, 2017. Dr. Aghamohseni opined that T.A. presented with sufficient psychological difficulty as to warrant a more comprehensive psychological assessment to obtain a thorough understanding of T.A.'s difficulties and to plan reasonable and necessary treatment. Dr. Aghamohseni also noted that prior to the accident, T.A. had chronic schizophrenia that could affect her response to treatment for her injuries.

[54] T.A. submitted that the treatment plan was reasonable and necessary primarily based upon the findings of Dr. Aghamohseni in his October 19,

[27] See *Zheng, Cai v. Aviva Insurance Company of Canada*, 2018 ONSC 5707 (CanLII) at para. 21.

2018Psychological Assessment Report. This report, however, was not in existence at the time the OCF-18 was submitted to Aviva and was only incurred over two and a half years later.

[55] I do, however, place weight on Dr. Aghamohseni's pre-screen report included in the OCF-18 as it is clear that he was aware of T.A.'s mental health history and her diagnosis of schizophrenia and, given this diagnosis, I find that it was reasonable and necessary for Dr. Aghamohseni to conduct a more comprehensive psychological assessment to plan psychological care that is specific to T.A.'s unique psychological needs.

[56] I also give no weight to Aviva's argument that Dr. Aghamohseni's hourly rate of $149.61 is not justified for the reason that Dr. Aghamohseni is only a psychological associate as opposed to a doctor. Dr. Aghamohseni's Psychological Assessment Report dated October 19, 2018 lists her credentials as "psychologist" and, in the qualifications portion of the assessment, it states that Dr. Aghamohseni is a psychologist and is licensed to practice by the College of Psychologists of Ontario. Aviva submitted no evidence that Dr. Aghamohseni is not a psychologist.

[57] The only arguments presented by Aviva disputing the OCF-18 for the psychological assessment are based upon Dr. Sivasubramanian's findings in her August 16, 2018 Psychiatric IE Assessment Report. I give this report little weight, however, as it was not in existence at the time the treatment plan was submitted and was completed well over two years later.

[58] In the event that I am wrong in assigning little weight to Dr. Sivasubramanian's report, I agree with T.A. that his opinion was given as to the necessity of psychological *treatment* as opposed to the reasonableness and necessity of the psychological *assessment*. Furthermore, Dr. Sivasubramanian opined that T.A. had a worsening of her pre-existing traffic-related anxieties as a direct result of the accident, that she currently met the criteria for a Specific Phobia (driver and passenger anxiety) and that she developed an illness anxiety disorder. Despite these diagnoses, Dr. Sivasubramanian opined that psychological treatment was inappropriate for T.A. as she was currently receiving group therapy treatment but also given her schizophrenia and learning disabilities. I give Dr. Sivasubramanian's opinion very little weight as it is unclear how he can opine that T.A.'s group therapy was meeting her needs following any accident-related mental health conditions when he did not review any psychiatric documentation from Mackenzie Health, T.A.'s group therapy provider, leading up to and subsequent to the accident.

[59] For the reasons stated above, I prefer Dr. Aghamohseni's initial pre-screening recommendation for a psychological assessment over Dr. Sivasubramanian's report and find that T.A. has proven on a balance of probabilities that the OCF-18 for the psychological assessment is reasonable and necessary. T.A. is, therefore, entitled to this treatment plan with interest at the prescribed rate.

Physiotherapy Services

[60] Neither of the two treatment plans for physiotherapy services actually sought funding for physiotherapy. The first OCF-18 dated January 19, 2017 sought funding for chiropractic services, acupuncture and massage therapy. The second OCF-18 sought funding chiropractic services. Both treatment plans were completed by Allya Salayeva, chiropractor, and both listed the identical following goals: pain reduction; increase in strength and range of motion; and return to activities of normal living.

a) The January 19, 2017 OCF-18

[61] T.A. submits that this OCF-18 was reasonable given that she confirmed slow, but some, improvements. T.A. relies upon her statement contained in the Dr. Aghamohseni's Psychological Assessment Report dated October 19, 2018, in which she responded, "it [physical rehabilitation] helps a bit. I'm improving but I'm not the same." T.A. submits that it is well-settled law that pain relief is, in and of itself, a legitimate medical and rehabilitative goal of a treatment plan and, therefore, the OCF-18 was reasonable and necessary even if it did not promote her recovery.

[62] On February 3, 2017, Aviva partially approved the January 19, 2017 OCF-18 in the amount of $1,300.00 as T.A. was being treated within the MIG at that time and this amount was the remainder of her unused MIG monetary limits. Notice was provided to T.A. of her required attendance at an IE in order for Aviva to determine whether or not the remainder of the treatment was reasonable and necessary for the injuries T.A. sustained in the accident. No further details of the IE were provided at that time.

[63] On March 2, 2017, a notice of IE was sent to T.A. This notice indicated as reasons for the IE medical and rehabilitation benefits, the applicability of the MIG and the OCF-18 dated January 19, 2017. On the copy of this document submitted by Aviva, it showed a physician assessment scheduled for March 18, 2017.

[64] Again, Aviva maintains that T.A. failed to attend several scheduled IEs but failed to submit any evidence to support this position.

[65] Aviva relies upon the Dr. Alvi's Orthopaedic Assessment Report, dated November 8, 2018,[28] to support its partial approval of this treatment plan. Dr. Alvi opined that T.A. suffered from mild myofascial strain to the cervical and lumbar spine with no overt traumatic-based compressive neurological deficit as a direct result of the index accident. Dr. Alvi concluded that he could not identify a disability objective orthopaedic impairment as a direct result of the index accident *at this stage of her rehabilitation* (my emphasis added).[29] I place little weight on Dr. Alvi's opinion as it was provided almost two years *after* the OCF-18 in dispute was submitted to Aviva for consideration.

[66] Nonetheless, the burden is still on T.A. to prove her entitlement to the treatment plan in dispute. While I accept T.A.'s submission that pain relief is, in and of itself, a legitimate medical and rehabilitative goal of a treatment plan, I am not satisfied that one reported statement by T.A. persuades me on a balance of probabilities that the unapproved portion of this treatment plan is reasonable and necessary. The specific question asked to T.A. to elicit her response by the assessor was not provided, and it is also not clear what physical rehabilitation modality she was referring to. Additionally, there was only one referral for rehabilitative therapy prior to the submissions of the treatment plan from T.A.'s family doctor on September 9, 2016, but it was for physiotherapy and not for the treatments that this OCF-18 actually sought funding for. For all of these reasons, T.A. is not entitled to the unapproved balance of this treatment plan.

b) The June 15, 2017 OCF-18

[67] The June 15, 2017 OCF-18 sought funding for 12 seventy-five-minute sessions of chiropractic services with Ms. Salayeva. The OCF-18 noted that T.A. continues to have low back pain due to her prior injury of an ankle fracture and that she has not regained full range of motion. The OCF-18 also reports that T.A. has difficulty with gait, difficulty engaging in proper strengthening program without supervision due to her anxiety and that she has not yet reached maximum medical recovery. Ms. Salayeva recommended that she proceeded with active therapy.

[28] *Supra* note 24.
[29] *Ibid*. at pages 8-9.

[68] On July 7, 2017, Aviva denied this treatment plan advising that it was of the position that T.A.'s impairments appear to be predominantly minor and that T.A. had reached the funding limits for a minor injury of $3,500.00. No other reasons for Aviva's denial were provided.

[69] On October 9, 2018, Aviva provided notice that T.A. was required to attend a re-scheduled orthopaedic IE assessment with Dr. Anvi regarding the June 15, 2017 treatment plan in dispute. No other correspondence from Aviva was submitted as evidence regarding this OCF-18.

[70] T.A. takes issue with Aviva's denial of this treatment plan and submits that because Aviva failed to comply with s. 38(8) of the *Schedule* on the previously dated OCF-18 for the psychological assessment, that Aviva was precluded from "taking a MIG position" regarding this treatment plan. As I have found above, this is not the current state of the law and, as a result, I give this argument no weight.

[71] In the alternative, T.A. argues that Aviva's July 7, 2017 correspondence failed to provide her with any medical or other reason to deny the OCF-18, or any specific information as to which documents it had received in arriving at its decision. T.A. argues that Aviva's reason for the denial of the treatment plan were vague and unclear and not all specific to suggest to T.A. what evidence Aviva's position, that T.A.'s injuries were minor injuries falling within the MIG, was based upon.

[72] I do not agree with T.A. that Aviva failed to provide a medical or other reason for the denial of the OCF-18 as the applicability of the MIG and the exhaustion of the monetary MIG limit are such reasons. As a result, s. 38(11) of the *Schedule* is not engaged and I must now consider the reasonableness and necessity of the treatment plan.

[73] The evidence relied upon by the parties in support of, and against, this OCF-18 is the same as the evidence they relied upon for the January 19, 2017 OCF-18. There is one additional family doctor CNR entry dated July 6, 2017 that I give little weight to, as it simply advises to continue with "rehab program" without any details about what modalities that program included.

[74] For the same reasons stated above regarding the January 19, 2017 OCF-18, I also find that T.A. has failed to prove the reasonableness and necessity of this OCF-18 on a balance of probabilities. As a result, T.A. is not entitled to this treatment plan.

INTEREST

[75] T.A. is entitled to interest on the overdue amounts of NEBs and the treatment plan for the psychological assessment in the amount of $2,197.29 in accordance with s. 51 of the *Schedule*.

AWARD

[76] T.A. is entitled to an award in the amount of 25% of the amount owed for NEBs and for the treatment plan in the amount of $2,197.29 for the psychological assessment.

[77] Section 10 of *O. Reg. 664* provides that if the Tribunal finds that an insurer has unreasonably withheld or delayed payment of benefits, the Tribunal may award a lump sum of up to 50 per cent of the amount in which the person was entitled.

[78] T.A. sought an award with respect to her entitlement to NEBs as a result of Aviva's failure to assess and/or adjust her file and also as a result of Aviva's failure to comply with the *Schedule*. T.A. also argues that an award is warranted as Aviva failed to continue to adjust her file regarding her need for further treatment and her removal from the MIG based on her pre-existing conditions following her submissions of medical documents to Aviva in early 2018.

[79] Aviva maintains that there is no basis for an award in this matter and holds T.A. accountable for any delay by Aviva in assessing her entitlement to benefits following her no-shows and lack of cooperation with reasonably required IEs.

[80] As I have determined that there were several occasions that Aviva failed in to comply with its obligations under the *Schedule*, specifically regarding its notices of IEs and denials of benefits to T.A., I find that Aviva's actions exceeded what is reasonable which delayed payment to T.A. of NEBs and the treatment plan for the psychological assessment. I am also not persuaded by Aviva's arguments that T.A. is responsible for any delay as Aviva has failed to file any supporting evidence of her non-attendance at IEs, as opposed to evidence of requests to reschedule, save and except one non-attendance on May 28, 2018 at an orthopaedic assessment with Dr. Gilbert Yu Ming Yee. No notice of this assessment was submitted as evidence and it is unclear from the "Notice of Failure to Attend Examination by Insurer" letter of the same what the purpose of this assessment was. For all of these reasons, I find that an award is warranted in this matter.

[81] Neither parties made submissions on the amount of the award that is appropriate. The Tribunal has adopted the following factors to consider in determining the amount of an award:

(i) the blameworthiness of the insurer's conduct;

(ii) the vulnerability of the insured person;

(iii) the harm or potential harm directed at the insured person;

(iv) the need for deterrence;

(v) the advantage wrongfully gained by the insurer from the misconduct;

(vi) take into account any other penalties or sanctions that have been or likely will be imposed on the insurer due to its misconduct; and

(vii) The overall length of the delay.[30]

[82] Although there was no evidence of any conscious decision to withhold or delay benefits, there was evidence that Aviva did not respond with reasonable promptness to T.A.'s claim for benefits. I also consider the unique vulnerability of T.A. It is undisputed that T.A. suffers from schizophrenia and Aviva, in its submissions, noted that as a result of her condition, T.A. has been hospitalized on numerous occasions prior to the accident due to auditory hallucinations, anxiety, and fear of hurting herself and her daughter. It is obvious that Aviva was aware of the unique vulnerability of T.A. and its actions in failing to comply with its obligations under the *Schedule* call for a need for deterrence.

[83] As a result, and based on the factors listed above, I find that the appropriate amount of the award in this matter is 25% of the amount T.A. is owed for NEBs and for the treatment plan in the amount of $2,197.29 for the psychological assessment.

[30] See *17-006757 v Aviva Insurance Canada*, 2018 CanLII 81949 (ON LAT) at paras. 44 and 45.

CONCLUSION

[84] For the reasons outlined above, I find:

(i) T.A. is entitled to NEBs in the amount of $185.00 per week from September 22, 2016 to August 28, 2018, less any amounts paid, with interest at the prescribed rate as a result of Aviva's failure to comply with its obligations set out in s. 36 and s. 44 of the *Schedule*;

(ii) T.A. is not entitled to NEBs from August 29, 2018 to date and ongoing as she failed to prove on a balance of probabilities that she suffered from a complete inability to carry on a normal life as a result of the accident for this period;

(iii) T.A. is not entitled to ACBs;

(iv) T.A. is entitled to the treatment plan for the psychological assessment in the amount of $2,197.29 with interest at the prescribed rate as T.A. proved on a balance of probabilities that this treatment plan was reasonable and necessary;

(v) T.A. is not entitled to the unapproved balance of $246.36 from the treatment plan submitted on January 20, 2017 in the total amount of $1,546.36 and to the treatment plan for chiropractic services in the amount of $1,892.00 as T.A. failed to prove on a balance of probabilities that the unapproved portion of the first treatment plan and the entirety of the second treatment plan were reasonable and necessary; and

(vi) T.A. is entitled to an award in the amount of 25% of the amount T.A. is owed for NEBs and for the treatment plan in the amount of $2,197.29 for the psychological assessment.

Released: October 3, 2019

Lindsay Lake
Adjudicator