

**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**

Citation: KYC vs. Unica Insurance Inc., 2019 ONLAT 19-000494/AABS

**Released Date: March 27, 2020
Tribunal File Number: 19-000494/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:

K.Y.C.

Applicant

and

Unica Insurance Inc.

Respondent

DECISION AND ORDER

ADJUDICATOR: Derek Grant

APPEARANCES:

For the Applicant: Sylvia Guirguis, Counsel

For the Respondent: Guy Kartuz, Counsel

HEARD: In Writing October 21, 2019

OVERVIEW

- [1] The applicant, K.Y.C., was involved in an automobile accident on November 25, 2016, and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). K.Y.C. was denied certain benefits by the respondent, Unica.
- [2] In this case, K.Y.C. seeks funding for a multidisciplinary assessment to determine whether she has suffered a catastrophic impairment. The central issue before me is whether catastrophic impairment assessments are funded through the medical benefit limit of \$65,000.00.

ISSUES

- [3] The issues to be decided are as follows:
- (i) Is K.Y.C. entitled to a cost of examination expense in the amount of \$14,746.50 for other goods and services of a medical nature recommended in a treatment plan (OCF-18) submitted on November 26, 2018, and denied on November 7, 2018?
 - (ii) Is K.Y.C. entitled to interest on any overdue payment of benefits?
 - (iii) Is K.Y.C. entitled to an award under *Ontario Regulation 664* because Unica unreasonably withheld or delayed the payment of benefits?

RESULT

- [4] Based on the evidence before me,
- (i) I find that K.Y.C. is entitled to the cost of examination expense as recommended by Omega Medical;
 - (ii) I find that K.Y.C. is entitled to any applicable interest, as per the *Schedule*; and
 - (iii) I find that K.Y.C. is not entitled to an award.

DISCUSSION

- [5] This matter involves three sub issues which I need to determine. The first is whether the cost of a CAT assessment is subject to medical benefit policy limit under the *Schedule*.

- [6] The second sub issue is whether Unica is required to fund assessments to determine catastrophic impairment when the medical benefit policy limit is exhausted.
- [7] The third sub issue is whether the associated costs are reasonable and necessary.

Stare Decisis

- [8] Unica submits that the principle of *stare decisis* has a more limited application in administrative Tribunals than it does in the Courts. Unica relies on previous case law in support of its position. In the Court of Appeal case of *R. v. TransCanada Pipelines Ltd.*, Borins J.A. stated that “there is a well-established principle of administrative law that *stare decisis* does not apply to administrative tribunals. A tribunal is not bound to follow its own decisions on similar issues, although it may find an earlier decision persuasive and finds that it is of assistance in deciding the issue before it”.¹
- [9] Unica further submits that adjudicators of equal standing do not bind one another’s decisions. In an appeal decision at the Ontario Insurance Commission, *Vo and Maplex General*², Director’s Delegate Sachs stated, “just as arbitrator’s are not bound by each other’s decisions, I am not bound by my own or a Director’s Delegate’s decision on the same issue”.
- [10] It is on this basis that Unica’s position is that the wording of s. 25(1)5 of the *Schedule* is that “assessment or examination” is not an explicit reference to multiple assessments or examinations. In addition, Unica submits that s. 18 does not specify that catastrophic impairment assessments are to be paid outside of the medical benefit policy limit.
- [11] K.Y.C. argues that the Supreme Court has recognized that the importance of adjudicative coherence amongst Tribunal decisions is a criterion that is relevant for individual Tribunal adjudicators. In *I.W.A. v. Consolidated-Bathurst Packaging Ltd.*³, Justice Gauthier states, “a decision-maker may also be swayed by the opinion of the majority of colleagues in the interest of adjudicative coherence since this is a relevant criterion to be taken into

¹ *R. v. TransCanada Pipelines Limited*, 2000 CanLII 5713 (ON CA) at para. 129

² *Vo and Maplex General Insurance Company*, FSCO Appeal File No. P-002777 (December 12, 1997), [1997] O.I.C.D. No. 221 at para. 31

³ *International Woodworkers of America, Local 2-69 v Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282 at para. 38

consideration even when the decision-maker is not bound by a *stare decisis* rule”.

- [12] K.Y.C.’s position is that there is no reason for the Tribunal to depart from the established precedent that has upheld that CAT assessments should not be funded out of the medical benefit policy limit. I agree.
- [13] I find that Unica’s interpretation of s. 25 of the *Schedule* is incorrect. When interpreted broadly and liberally, as a consumer protection legislation like the *Schedule* should be, s. 25’s language of “including *any* assessment or examination necessary” allows for multiple assessments, not just a single assessment, as Unica suggests. I find the use of the word “*any*” to mean that more than one assessment or examination may be necessary for the purpose of determining whether an insured has sustained a catastrophic impairment. I will address s. 18 below.
- [14] Although Tribunal adjudicators are not bound by previous decisions of this Tribunal, the Financial Services Commission or the Ontario Insurance Commission, relevant guidance is obtained by the consideration of previous jurisprudence and, therefore, consistency is maintained. Unless dealing with a novel issue, Tribunal decisions should be consistent, and that consistency includes consideration of previous similar jurisprudence.
- [15] I agree and am persuaded by the decisions which support that CAT determinations are not a benefit, and neither are assessments required to apply for CAT determination. I am persuaded that CAT assessments are not included in any limit placed on payment for benefits.

CAT Assessments

- [16] Section 25(1)5 of the *Schedule* requires the insurer to pay reasonable fees charged for preparing an application for determination of CAT impairment under section 45, including any assessment or examination necessary for that purpose.
- [17] Section 45 of the *Schedule* prescribes the process for making an application for determination of CAT impairment and contemplates medical examinations as part of the application process.
- [18] Applying this approach, it is clear that section 25 creates an obligation on the respondent to pay expenses, including assessments. It lists five types of expenses including and specific to this proceeding:

1. Reasonable fees charged for preparing an application under section 45 for a determination of whether the insured person has sustained a catastrophic impairment, including any assessment or examination necessary for that purpose.

ANALYSIS

Sub-issue 1: Whether the cost of a CAT assessment is subject to medical benefit policy limit under the Schedule?

- [19] K.Y.C. submits that the appropriate legal test is outlined in section 25(1)5 of the *Schedule*. The section 25 test is established in *17-007962 v. Scottish & York*,⁴ which distinguishes that a claim for catastrophic determination is not the same as a claim for specified benefits. K.Y.C.'s position is that section 25 would apply to determine if the fees charged are reasonable. Section 25(5)a states the amount the respondent would have to pay is limited to \$2,000 for any one assessment, examination or report. K.Y.C. has submitted a treatment plan setting out multiple assessments and lists the cost of each assessment at \$2,000 or less. I find this to be in line with the requirements under section 25 of the *Schedule*.
- [20] Section 25(1)5 clearly covers catastrophic impairment assessments. I agree with K.Y.C.'s submission regarding the reasoning in *Henderson v. Wawanese Mutual Insurance Company*,⁵ which also considered the application and scope of section 25 and found that "there is no room for ambiguity – the insurer shall pay the expenses of a CAT assessment".
- [21] I find that K.Y.C. has properly relied on section 25 in arguing that assessments for the purpose of determining catastrophic impairment are not medical benefits. This is further supported in the reconsideration decision of Executive Chair Linda Lamoureux in *M.F.Z. v. Aviva Insurance Canada*⁶ where she states, "a determination that one is catastrophic is also a status and a category of impairment that may result in enhanced benefits".
- [22] Applying this principle, assessments for the purpose of determining catastrophic impairments are not benefits. A determination of catastrophic impairment allows access to enhanced benefits, however, the assessments themselves, are not

⁴ *17-007962 v. Scottish & York*, 2018 CanLII 81950 (ON LAT)

⁵ *Henderson v. Wawanese Mutual Insurance Company*, FSCO File No. A-14-001758 (July 9, 2015), [2015] O.F.S.C.D. NO. 191 at para. 52

⁶ *M.F.Z. v. Aviva Insurance Canada*, 2017 CanLII 63632 (ON LAT) at para. 47

benefits. As such, the assessments are not payable out of the medical benefit policy limit.

- [23] I have considered and agreed with the *Scottish* decision's conclusion that the cost of CAT assessments, are outside the payment limits in s. 18 of the *Schedule*.

Sub-issue 2: Whether Unica is required to fund assessments to determine catastrophic impairment when the policy limit is exhausted?

- [24] I find that pursuant to section 25, Unica shall pay the reasonable fees for assessments in respect of the determination of catastrophic impairment.
- [25] Section 18(5) refers to assessments in connection with any benefit or payment to or for an insured person. I find the term "in connection with" to mean that the section only restricts the consumption of medical benefits by non-catastrophically impaired persons, and that this narrow restriction excludes assessments not directly related to a specific benefit or benefits.
- [26] The treatment plan that is the subject of this proceeding is not tied to a benefit. It is trite law that catastrophic impairment assessments are not tied to a benefit but determine whether an insured has access to the next tier of accident benefits above the \$65,000 non-catastrophic limit. Unica denied a request for a catastrophic impairment assessment regarding the accident. The subject treatment plan is not tied to a benefit.
- [27] For these reasons, I find that Unica is required to pay for the assessments.

Sub-Issue 3: Whether the fee for clinical file review is reasonable and necessary?

- [28] K.Y.C. must show she is entitled to a payment for the various fees listed in the disputed treatment plan. K.Y.C. is also seeking \$2,000 for clinical file review.
- [29] With respect to the fees for clinical file review, I am not provided with any evidence or submissions by K.Y.C. as to why the additional fee is reasonable and necessary. With the onus on K.Y.C. to prove her entitlement to the benefit, I find the onus has not been satisfied, and accordingly, I find K.Y.C. is not entitled to the fee for clinical file review.
- [30] I find that clinical file review is a necessary part of an assessment, and it should be treated as part of the assessment's expense. I find seeking a clinical file review as a separate fee to be a duplication and therefore, it is unreasonable to

bill for clinical file review in addition to a \$2,000 assessment. K.Y.C.'s assessors should be able to examine files within the \$2,000 payment limit established by the *Schedule*. I was not provided with any evidence as to why this was not the case.

[31] My plain language reading of section 25(5) reads that the *Schedule* establishes that medical practitioners conduct an assessment and clinical file review within the \$2,000 limit. Section 25(5) specifically states that “an insurer shall not pay more than \$2,000 in respect of fees and expenses for conducting any one assessment”. Since a file review is a necessary and inherent component of an assessment, it is a fee or expense captured within section 25(5)'s \$2,000 payment limit.

[32] I find the fees for the remaining assessments to be reasonable and necessary, and therefore payable by Unica.

Award under Regulation 664

[33] Section 10 of Regulation 664 (“the Regulation”) permits the Tribunal to award a lump sum of up to 50% of the amount to which the insured person (i.e. K.Y.C.) was entitled at the time of the award together with interest on all amounts then owing (including unpaid interest), if it finds that that an insurer (i.e. Unica) has “unreasonably” withheld or delayed payments.

[34] I find that K.Y.C. is not entitled to an award based on Unica's denial of the treatment plan. It was not unreasonable for Unica to deny the treatment plan based on its interpretation of the *Schedule*.

CONCLUSION

[35] By the power vested in me by the Tribunal, I Order the following:

- i. K.Y.C. is entitled to payment the cost of examination expense as follows:
 - a. \$2,000 cost of each of the following; psychiatry, psychology, psychology AMA Guides Testing 6th Edition, occupational therapy activities of daily living, occupational therapy situational/community, CAT summary/final ratings;
- ii. K.Y.C. is entitled to the reasonable cost of the completion of the treatment plan and the fee for completion of the application for determination of catastrophic impairment form;

- iii. K.Y.C. is entitled to interest on any overdue amounts in accordance with the *Schedule*;
- iv. K.Y.C. is not entitled to the cost of clinical file review; and
- v. K.Y.C. is not entitled to an award.

Released: March 27, 2020



**Derek Grant
Adjudicator**