Tribunals Ontario
Safety, Licensing Appeals and Standards Division

77 Wellesley Street West, Box 250
Toronto ON M7A 1N3
Tel: 1-844-242-0608
Fax: 416-327-6379
Website: www.slasto-tsapno.gov.on.ca

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

77 rue Wellesley Ouest, Boîte no 250
Toronto ON M7A 1N3
Tél. : 1-844-242-0608
Téléc. : 416-327-6379
Site Web : www.slasto-tsapno.gov.on.ca

Ontario

RECONSIDERATION DECISION

Before: **Nidhi Punyarthi, Adjudicator**

Date: June 12, 2020

File: 18-000467/AABS

Case Name: Marcia MacDonald v. Aviva Insurance Canada

Written Submissions by:

For the Applicant: **Sylvia Gurguis, Counsel**

For the Respondent: **Laura Meschino, Counsel**

Background

[1] On April 25, 2019, the Licence Appeal Tribunal – Automobile Accident Benefits Service ("Tribunal"), held a hearing in File No. 18-000467/AABS. By a prior order of the Tribunal, and on consent of the parties, the hearing was limited to six hours.[1] The hearing proceeded before me.

[2] The question at this hearing, on consent of the parties, was whether the respondent unreasonably withheld or delayed payment of a psychological assessment to the applicant, and whether the respondent was therefore liable to pay the applicant an award under Regulation 664.[2] This assessment had originally been claimed on September 7, 2018. The respondent paid it shortly before the scheduled hearing.

[3] The total amount of the assessment claimed was $1,944.94. Under s. 10 of Regulation 664, the respondent's maximum exposure to an award was 50% of that amount, or $972.47.

[4] On August 7, 2019, I rendered a decision following the hearing ("Decision"). In the Decision, I found that the respondent did not unreasonably withhold or delay payment of the assessment, and was therefore not liable to pay the applicant an award.

[5] The applicant was seeking payment of a psychological assessment by Dr. Waxer. The respondent denied this claim, and requested its own assessment under s. 44 of the *Schedule* (also known as an "IE"). The applicant disputed that it had to attend an IE in order for the benefit to be approved. The applicant communicated that position through a series of letters to the respondent ("Letters").

[6] In the Decision, I found that the respondent conducted itself reasonably with regard to the adjustment of the benefit at issue. I saw a reasonable basis for the first adjuster's repeated requests for an IE, and a reasonable basis for the second adjuster's decision to fund the assessment just before the hearing. As such, I found no basis to grant an award.

[7] I also described the Letters as litigious and as not adding value. In the Decision, I stated that while the respondent should have responded to the Letters, its failure

[1] Order of Vice Chair Terry Hunter dated April 24, 2019.
[2] R.R.O. 1990, Reg. 664: Automobile Insurance, s. 10 ("Regulation 664").

to do so did not mean that it unreasonably withheld or delayed payment of the assessment.

[8] On August 26, 2019, the applicant filed a motion asking that I recuse myself for reasonable apprehension of bias. I heard this motion in writing. On November 19, 2019, I released my decision in the matter ("Motion Decision"). In the Motion Decision, I found that there was no reasonable apprehension of bias and therefore no basis for recusal.

[9] On August 29, 2019, the applicant filed a request for reconsideration of the Decision.

[10] This request for reconsideration was assigned to me.[3]

Additional Material Available For Reconsideration

[11] For the reconsideration, I had the benefit of a full copy of the transcript of the hearing. This transcript had not been made available for the purposes of issuing the Decision.

[12] As will be seen below, the availability of this transcript is material to the result in this reconsideration decision.

Result

[13] The request for reconsideration is granted. The Decision is varied with the following results:

i. The Tribunal finds that the respondent unreasonably withheld or delayed payment of the psychological assessment to the applicant.

ii. The Tribunal orders that the respondent pay the applicant an award in the amount of 45% of the psychological assessment (which amounts to $875.22), along with interest as per s. 10 of Regulation 664, from the date the benefit was first claimed to the date it was finally paid.

Analysis

Basis for Reconsideration

[3] The Common Rules of Practice and Procedure effective October 2, 2017 ("Rules") permit this at Rule 18.1.

[14] A decision of the Tribunal can be reconsidered where the Tribunal made an error of law or fact such that the Tribunal would have likely reached a different result had the error not been made.[4]

[15] Underpinning the Decision was the premise that the respondent acted reasonably in asking for an IE to see whether the applicant was entitled to the psychological assessment. In the face of this reasonable position, the applicant's numerous Letters were unnecessarily litigious and did not serve to make progress or add value.

[16] This premise was incorrect. This is clear from a close review of the transcript. In particular, the first adjuster admitted on cross-examination that an IE was not required. At the time of the original Decision, I did not appreciate or recognize this admission in the evidence:

> Q. You'll agree with me that between February 12, 2015 and June 4, 2018, Ms. MacDonald did experience psychological symptoms?
>
> A. I'm going to say that after January 2018 there was documented psychological issues. Prior to January 2018 I had no records of any psychological impairments based on the clinical notes and records that had been reviewed prior to this when I received Dr. Waxer's OCF-18 in September of 2017.
>
> Q. You had no clinical notes and records from Dr. Mortellaro?
>
> A. I had clinical notes and records, but they didn't have all this information. All this information, from what I can see was in 2018. The records of her psychological issues were all documented in 2018. In 2017, when I requested the review of Dr. Waxer's OCF-18, there was nothing in her medical records to suggest that there was any diagnosis or psychological impairment.
>
> Q. But what about the records we just went through, February 12th, 2015, March 20th, 2015…

[4] Rule 18.2 of the Tribunal's Common Rules of Practice and Procedure effective October 2, 2017 ("Rules").

A. At that time there was no…

Q. September 14th, 2015?

A. There was no diagnosis, and Dr. Mortellaro did not specify that she needed to see a specialist for any type of anxiety or depression. There was no recommendations for that type of assessment or treatment.

Q. You'll agree her psychological well-being was at issue, was it not?

A. Not from when I looked at the file initially. When I had… in September of 2017, when Dr. Waxer submitted his OCF-18, I didn't… I was not… I didn't have the information that we just went through.

Q. So because…

A. So based on that, I did not… I requested the assessment. That information was not available to me at the time. Had that information been available to me at the time, I definitely would not have requested it. I would have clearly cleared the assessment.

Transcript of the Cross-Examination of C. Mallia, April 25, 2019, p.30, l.22-25, p.31 l.1-25, p.32, l.1-15.

[17] Ultimately, the psychological assessment was approved on the basis of a documentary or paper review. According to the evidence at the hearing, as early as January, 2018, the respondent had relevant medical documents to approve the psychological assessment.

[18] While the respondent received the full clinical notes and records ("CNRs") by August, 2018, the first adjuster testified that she had relevant information on the applicant's condition as early as January, 2018. This information alone, according to her own evidence, would have caused her to approve the assessment. It follows that after January, 2018, there was no basis for her to ask for an IE. And especially after August, 2018, when the full CNRs were in the respondent's hand, there was no basis to ask for the IE.

[19] Even from the day the benefit claim was first submitted in September, 2017, it is not clear why the first adjuster was asking for an IE at all. This is especially the case when a request for documents or a paper review would have provided

additional information to support the claim. It is worth noting that the second adjuster testified that she would have approved the benefit on the basis of the CNRs alone.

[20] Even if I am incorrect on the finding with respect to the date of January, 2018, and the CNRs were in fact received no earlier than August, 2018, the same analysis as above applies. There was no basis to ask for an IE upon receipt of this benefit claim. The respondent should have instead proceeded with a document request or a paper review all along.

[21] Additionally, in light of the above admission made by the first adjuster, the conclusions in the Decision on the Letters and on the respondent's failure to respond to them are also incorrect.

[22] Paragraph 28 of the applicant's submissions contains an undisputed summary of the Letters. This summary is reproduced below for ease of reference:

i. The letter of September 26, 2017 queried how the psychological diagnosis of Dr. Waxer is inconsistent with the treatment plan, and notes that the OCF-3 by Dr. Mortellaro identifies a diagnosis of anxiety;

ii. The letter dated October 5, 2017 clarified that Ms. MacDonald is unable to determine if the proposed insurer examination is reasonable and necessary, and asked the insurer to respond to the prior letter;
The letter dated October 27, 2017 reminded Aviva to respond to prior requests for clarification, notes that its insured requires accommodation for her disabilities that must be provided under the *Human Rights Code*, RSO 1990, c. H.19, to the point of undue hardship, and notes that due to Aviva's action, Ms. MacDonald has been forced to make independent inquiries as to the reasonableness of an in-person examination under section 44;

iii. The letter dated May 14, 2018 sought the final position of Aviva in light of its ongoing failure to meet its obligation to identify the medical and all other reasons more than 7 months after the deficiency was brought to the attention of Aviva;

iv. The letter dated May 31, 2018 advised that Ms. MacDonald would not attend the IE as Aviva continued not to provide adequate reasons;

v. The letter dated August 29, 2018 advised that paper reviews are ideal according to *The Joint OPA/CAPDDA Guidelines for Best Practices in Psychological Insurer Examinations;*

vi. The letter dated September 5, 2018 notified Aviva that someone in the office of Dr. Syed appeared to be interfering with Ms. MacDonald's right to access personal information contrary to privacy legislation (PIPEDA);

vii. The letter dated October 23, 2018 reminded Aviva that it had not answered the question posed in the letter dated August 29, 2018 asking why a paper examination was not being done;

viii. The letter dated November 7, 2018 notified Aviva's privacy officer that there appeared to be serious privacy breaches and questioned the delays in receiving IE reports; and

ix. The letters dated November 28, 2018, August 29, 2018, December 7, 2018, and January 7, 2019 reminding Aviva to respond to the unanswered communications.

[23] Overall, these Letters queried and challenged the very basis of asking for the IE in the first place. Given the above admission made by the first adjuster, which I now appreciate, there was merit to the concerns raised within the Letters. The IE was not required.

[24] This finding is also consistent with what ultimately took place on the file. The benefit was approved without an IE. It is also consistent with the evidence of the second adjuster that the CNRs alone would have caused her to approve the benefit.

[25] The applicant has therefore established that the Decision should be reconsidered on the basis that a material error of fact was made in reviewing and drawing conclusions from the evidence at the hearing. Three of the applicant's grounds for reconsideration were based on this argument.[5]

[26] I accept that the Decision should be reconsidered on the basis of these three grounds. As a result, the Decision is varied, and, in effect, overturned by this

[5] In order of the submissions made by the applicant on reconsideration, these grounds were (ii) mistaking reasonably necessary for reasonable with respect to the IE; (iii) mischaracterizing why the respondent did not respond to the Letters; and (v) finding that a diagnosis was required to approve the IE.

reconsideration decision. Given this result, there is no need for me to consider the other grounds raised in the applicant's reconsideration request.

Basis for an Award under s. 10 of Regulation 664

[27] For an award to be payable under s. 10 of Regulation 664, the Tribunal must first be satisfied that the respondent unreasonably withheld or delayed payment of the benefit at issue. Even though the Tribunal did not have to make a finding on whether the specific psychological assessment of Dr. Waxer was payable, the parties in this case agreed that the Tribunal can nonetheless engage in the analysis of whether the respondent unreasonably withheld or delayed payment of this assessment to the applicant.

[28] As stated in the Decision, there must be evidence of "behaviour that was excessive, imprudent, stubborn, inflexible, unyielding, or immoderate."[6]

[29] In this case, there was evidence of stubborn, inflexible, and unyielding behaviour on the part of the respondent. By the respondent's own admission, there was no need for an IE. Instead, there was a need for relevant medical information. At some point, the respondent had this information (whether it was in January, 2018 or August, 2018). Contrary to the position taken at the hearing – that the benefit would have been approved without an IE – the respondent continued to ask for an IE even after receiving the information.

[30] Even before receiving the information, why was the respondent asking for an IE at all? The fact that the respondent was asking for an IE is particularly troubling, because additional documents on the applicant's medical condition would have supported her need for the psychological assessment. All along, the Letters were pointing out that the IE request was questionable and a paper review would be more appropriate. These were legitimate concerns, given that the benefit claim could have been evaluated and was ultimately evaluated on the basis of documents alone.

[31] The respondent did not request a paper review or documentation, as was being proposed by the applicant in the Letters. Instead, the respondent kept asking for an IE. To me, this appears to be a position without rational basis, particularly when the respondent gave evidence that an IE was unnecessary upon receipt of relevant medical information and documents. The position maintained by the

[6] Decision, at para. 30.

respondent that an in-person IE was required, whether before or after receiving medical records, was a position that was "stubborn, inflexible, and unyielding."

[32] At all material times, this was an unreasonable position for the respondent to maintain. An in-person IE request should never have been made to assess whether this particular benefit should be paid. Instead, the respondent should have adjusted the benefit by way of requesting documents or conducting a paper review. There was no basis to continue to ask for an IE especially after receiving the CNRs, because the respondent was then in possession of the necessary information to approve the benefit. This finding comes directly from the first adjuster's admission on cross-examination, excerpted above.

[33] By maintaining the unreasonable position that an IE was required, when in fact it was not, the respondent unreasonably withheld or delayed payment of the psychological assessment to the applicant.

Quantum

[34] Following a finding of unreasonable withholding or delay, whether an award is ordered is within the discretion of the Tribunal.[7] When it comes to determining the amount or percentage of an award, there is consensus within Tribunal case law that the following considerations apply:

i. the overall length of the delay;

ii. the blameworthiness of the insurer's conduct;

iii. the vulnerability of the insured person;

iv. the harm or potential harm directed at the insured person;

v. the need for deterrence;

vi. the advantage wrongfully gained by the insurer from the misconduct;

[35] take into account any other penalties or sanctions that have been or likely will be imposed on the insurer due to its misconduct.[8]
The factors that are of importance in any given case will depend on the facts of each individual case.

[7] s. 10 of Regulation 664.
[8] See, for example, *A.A. v. Aviva General Insurance Company*, 2020 CanLII 19571 (ON LAT), at para. 50.

[36] In this case, the evidence shows the following:

Length of the Delay

[37] From September, 2017 to April, 2019, the psychological assessment was unpaid. This was a very long delay. In my view, this is an aggravating factor. Because of the long delay during which the respondent maintained an unreasonable position, an award closer to the higher end of the limit should be ordered.

Blameworthiness of the Respondent's Conduct

[38] After a new adjuster was put on the claim file, the benefit was approved. This process took about a month. While I see no basis for the respondent's position from September, 2017 to March, 2019, I credit the respondent, for the one-month period from March to April, 2019. During this final month, a new adjuster came on the file and corrected the situation.

[39] In my view, the respondent's blameworthiness for most of the period of the delay is an aggravating factor, but the respondent's corrective action during the final month of the delay is a mitigating factor. The final percentage of the award should reflect this mitigating consideration.

Vulnerability, Harm, and Wrongful Advantage

[40] In this case, there was no principled basis for asking for an IE when the benefit could have been more reasonably and promptly adjusted through other means. As a result of the respondent maintaining an unreasonable and inflexible position for a lengthy period of time, the applicant suffered the harm of not receiving payment for the benefit more promptly.

[41] This type of conduct on the part of the respondent should be sanctioned, considering that the respondent is a sophisticated and well-resourced party, and the applicant is a vulnerable injured person.

Need for Deterrence

[42] Given the above analysis of vulnerability, harm, and wrongful advantage, I am of the view that there is a need for deterrence here.

[43] The applicant submitted that in a similar fact scenario, the same respondent was ordered to pay an award of 40%. This, according to the applicant, was insufficient to deter the respondent from conducting itself in a similar manner. The applicant submits that for this reason, the full 50% of the award should be ordered.

The respondent did not make specific submissions as to quantum. Given that the respondent's position was that there was no unreasonable conduct, I am prepared to infer that the respondent's position on quantum was 0%.

[44] Unreasonable and unsupported positions should not be maintained when adjusting a benefit. The percentage of the award should reflect the need for deterrence, particularly when there is a significant power imbalance between the parties, and the effect of the unreasonable conduct of the more powerful party is to the detriment of the more vulnerable party.

Other Penalties and Sanctions

[45] I am not made aware of other penalties and sanctions against the respondent for its unreasonable withholding or delay during the relevant period.

Conclusion on Quantum

[46] Most of the factors I am invited to consider turn out to be aggravating factors for the respondent in this case. There is one mitigating factor relating to the corrective action taken during the final month of the delay.

[47] Given all of the above considerations, the percentage of the award should be 45% in this case. The percentage reflects the significant aggravating factors that worked against the respondent in this evidence, but also recognizes the mitigation that the respondent engaged in near the end.

[48] In this instance, a 45% award amounts to $875.22. The respondent shall pay this amount, along with interest for the period of the delay (from the date the benefit was first claimed to the date it was finally paid) in accordance with s. 10 of Regulation 664.

[49] The respondent had asked for its costs of the reconsideration. I decline to make such an order, given the findings set out above.

Released: June 12, 2020

Nidhi Punyarthi
Adjudicator