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

Ontario

Citation: M.M. vs. Aviva Insurance Company, 2020 ONLAT 19-006462/AABS

Released: 05/28/2020
File Number: 19-006462/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:

M.M.

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: **Lindsay Lake**

APPEARANCES:

For the Applicant: Eric Winkworth, Counsel
Peter Murray, Counsel

For the Respondent: Lynn Highley, Adjuster
Melinda Baxter, Counsel

HEARD: **By teleconference on March 17, 2020 and in writing**

OVERVIEW

[1] The applicant, M.M., was injured in an automobile accident on January 15, 2015 (the "accident") and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*") from the respondent, Aviva Insurance Company ("Aviva").

[2] Aviva denied M.M.'s claim for a psychological assessment, an orthopaedic assessment and for payment for the completion of a treatment plan. As a result, M.M. submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[3] The matter was scheduled to proceed to a combination hearing with a teleconference portion to be held on February 10, 2020 with written submissions due in advance. The teleconference portion of the hearing was scheduled for cross-examination and re-examination on an affidavit submitted by the applicant.

[4] Following a Notice of Motion filed by M.M. on December 24, 2019, the Tribunal rescheduled the teleconference portion of the hearing to March 16, 2020.

[5] M.M. filed a second Notice of Motion dated March 9, 2020 seeking an order from the Tribunal to exclude certain hearing evidence filed by Aviva and also requesting that the corresponding portions of Aviva's written submissions be struck from the hearing record. This motion was scheduled to be heard at the teleconference portion of the hearing on March 16, 2020. In fact, this was the only matter remaining to be addressed on March 16, 2020 as M.M. did not file an affidavit as evidence for the hearing.

[6] The March 16, 2020 teleconference portion of the hearing was adjourned as I was not able to access Aviva's submissions for the Motion even though the material was filed with the Tribunal on March 13, 2020. On March 17, 2020, the parties made oral submissions on M.M.'s motion and the hearing was concluded.

ISSUES IN DISPUTE

[7] The following issues are to be decided:

(i) Is M.M. entitled to $200.00 for the preparation of a treatment plan dated April 12, 2018 for a psychological assessment (the total amount of the treatment plan was $2,144.93) recommended by Peter Waxer Psychology, which was denied by Aviva on April 26, 2018?

(ii) Is M.M. entitled to $4,689.50 for psychological and rehabilitation counseling and a vocational assessment, recommended by Dr. Shawn Scherer, in a treatment plan submitted on August 14, 2018, and denied by Aviva on August 24, 2018?

(iii) Is M.M. entitled to $2,000.00 for an orthopedic assessment, recommended by Caring Rehabilitation, in a treatment plan dated June 9, 2017, and denied by Aviva on July 18, 2017?

(iv) Is Aviva liable to pay an award under *Regulation 664* because it unreasonably withheld or delayed payments to M.M.?

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

NOTICE OF MOTION – Exclusion of Evidence and Striking Aviva's Submissions

[8] M.M. filed a Notice of Motion dated March 9, 2020 which sought the following relief:

(i) An order excluding Dr. Esmat Dessouki's Insurer's Examination ("IE") report dated August 22, 2017 from the hearing record; and

(ii) An order striking paragraphs 39 and 41 from Aviva's Written Submissions.

[9] Given my findings below regarding Aviva's non-compliance with s. 38(8) of the *Schedule* and the June 9, 2017 treatment plan seeking funding for an orthopaedic assessment, I do not need to make any determinations in response to M.M.'s motion. The contents of Dr. Dessouki's August 22, 2017 report were not required to determine M.M.'s entitlement to the June 9, 2017 treatment plan in dispute as the repercussions set out in s. 38(11) of the *Schedule* were triggered. As such, I was not required to make a finding regarding the reasonableness and necessity of the treatment plan for an orthopaedic assessment and, therefore, the substance of Dr. Dessouki's August 22, 2017 report was not considered as part of my decision. As such, the relief requested by M.M. in her March 9, 2020 motion is moot.

RESULT

[10] As a result of Aviva's failure to comply with s. 38(8) of the *Schedule*, I find that M.M. is entitled to the following benefits plus interest in accordance with s. 51 of the *Schedule*:

(i) the $200.00 fee for completion of the April 12, 2018 treatment plan;

(ii) the August 1, 2018 treatment plan for psychological and rehabilitation planning and a vocational assessment; and

(iii) the June 9, 2017 treatment plan for the orthopaedic assessment.

[11] I also find that M.M. is entitled to an award of 20 per cent of the $200.00 fee for completion of the April 12, 2018 treatment plan and the August 1, 2018 treatment plan for psychological and rehabilitation planning and a vocational assessment as a result of Aviva unreasonably withholding payment of these benefits. M.M. is not entitled to an award for the June 9, 2017 treatment plan for the orthopaedic assessment.

ANALYSIS

The Treatment Plans ("OCF-18s")

[12] M.M. submitted that Aviva failed to comply with the requirements set out in s. 38(8) of the *Schedule* regarding its notices denying the treatment plans in dispute.

[13] Sections 38(8) and 38(11) of the *Schedule* set out strict notice requirements for insurers responding to treatment plans and specific consequences if they fail to comply. Section 38(8) requires an insurer to inform an insured person of the medical and other reasons why it considered the goods and services not to be reasonable and necessary if it denies a treatment plan. The requirement of medical reasons was explained in the reconsideration decision of *T.F. v. Peel Mutual Insurance Company*,[1] in which the Executive Chair of the Tribunal stated:

> an insurer's "medical and any other reasons" should, at the very least, include specific details about the insured's condition forming the basis for the insurer's decision or, alternatively, identify information about the insured's condition that the insurer does not have but requires. Additionally, an insurer should also refer to the specific benefit or determination at issue, along with any section of the *Schedule* upon which it relies. Ultimately, an insurer's "medical and any other reasons" should be clear and sufficient enough to allow an unsophisticated person to make an informed decision to either

[1] 2018 CanLII 39373 (ON LAT).

> accept or dispute the decision at issue. Only then will the explanation serve the *Schedule*'s consumer protection goal.[2]

[14] Pursuant to s. 38(11), if an insurer fails to comply with its obligations under s. 38(8), it must pay for all goods, services, assessments and examinations described in the treatment plan starting on the 11th business day after the day that the insurer received the treatment plan until such time that it gives notice that complies with s. 38(8) of the *Schedule*. As such, the insurer is given a window to "cure" a defective notice. Without such a cure, however, any goods, services, assessment and examinations set out in the treatment plan are payable as an analysis as to the reasonableness and necessity of the proposed treatment under s. 15 of the *Schedule* is no longer required.[3]

[15] For the reasons that follow, I find that Aviva failed to comply with its obligations set out in s. 38(8) of the *Schedule* and, as a result, M.M. is entitled to the $200.00 fee for completion of the April 12, 2018 treatment plan, the August 1, 2018 treatment plan for psychological and rehabilitation planning and a vocational assessment and to the June 9, 2017 treatment plan for the orthopaedic assessment.

Fee for Completion of OCF-18 for Psychological Assessment

[16] The $200.00 fee for completion of a treatment plan concerned an April 12, 2018 OCF-18 completed by Dr. Peter Waxer, psychologist, that sought funding for a psychological assessment.[4]

[17] M.M. submits that Aviva did not provide a proper denial in response to this OCF-18 as required by s. 38(8) of the *Schedule*. M.M. submitted that Aviva's reason for its denial was boilerplate, did not refer to M.M.'s medical condition with specific detail, was entirely unclear as to the basis for the provided conclusion, was contrived and, finally, was not supported by the medical documentation available to Aviva.

[18] In a general response to the issues raised by M.M. regarding the sufficiency of its denial notices, Aviva argued that M.M.'s submissions, "appear to be an attempt by counsel to frustrate the right of insurers to make use of the limited tools made

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[2] *Ibid*. at para. 19.
[3] See *M.F.Z. v Aviva Insurance Canada*, 2017 CanLII 63632 (ON LAT) at paras. 50-52, 59 and 64.
[4] While the treatment plan was denied in full on April 25, 2018, the only issue to be determined in this hearing regarding this OCF-18 is whether M.M. is entitled to the $200.00 fee for its completion. The remainder of the treatment plan is not in dispute.

available to them by the Legislature to investigate claims before deciding whether they are reasonable and necessary."[5] To support its position, Aviva sought to draw an analogy between the decision in *Aviva Insurance Company of Canada v. McKeown*,[6] which addressed an insurer's request for examinations under oath, with an insurer's request for an assessment under s. 44 of the *Schedule* and the provision of reasons for denials. Aviva further described M.M.'s raising of these issues regarding the sufficiency of its notices as "gamesmanship," "causing a total abrogation of responsibility by the Applicant to conform to her obligations under the [*Schedule*]."[7] In addition, Aviva maintained that its denials complied with its obligations under s. 38(8) of the *Schedule*.

[19] The relevant portion of Aviva's April 26, 2018 denial of the entire April 12, 2018 treatment plan stated, "upon review of the Treatment and Assessment Plan, we are unable to determine whether the recommendations are reasonably required for the injuries you received in this motor vehicle accident."[8] Aviva also provided notice to M.M. of her obligation to attend a s. 44 IE assessment because, "the type(s) of treatment does not appear consistent with the patient's diagnosis."[9]

[20] Substantially similar reasons and language were provided to M.M. in additional correspondence from Aviva dated May 8, 2018, May 29, 2018, August 24, 2018 and October 15, 2018.

[21] Aviva submitted that it clarified its "medical and other reasons" in a further letter to M.M. dated November 27, 2018 regarding its continued denial of the disputed treatment plans and its requests for an examination. The November 27, 2018 correspondence contained substantially similar language that was included in all of the previous correspondence from Aviva listed above but did add the following statement:

> Multiple providers, specialists, consultants, or referrals occur without an apparent documented explanation in the clinical records of the medical necessity. The Psychological assessment requests appears to be a duplication of an assessment already requested. The claimant has continued to work her full time job and has never presented a claim for

[5] Written Submissions of the Respondent, para. 19.
[6] 2017 ONCA 563 (CanLII) ("*McKeown*").
[7] *Ibid*. at para. 23.
[8] Evidence Brief of the Applicant, tab 24.
[9] *Ibid*.

> IRBs so it is unclear why a vocational assessment would be required at this time, more than 3.5 years post loss.[10]

[22] I agree with M.M. that Aviva's "medical and any other reasons" set out in all of its correspondence referenced above did not discharge Aviva's onus of including specific details about M.M.'s condition forming the basis of Aviva's decision. In the letters preceding the November 27, 2018 correspondence, there was no information of M.M.'s condition that formed the basis of Aviva's position and no details were given with respect to why the proposed treatment was not consistent with the diagnosis. Further, while several notices for examinations were included in Aviva's correspondences, it is unclear from Aviva's denials what information about M.M.'s condition that Aviva did not have but required via the IEs regarding the proposed psychological assessment at issue in the April 12, 2018 treatment plan.

[23] Moreover, while Aviva provided additional statements in its November 27, 2018 correspondence to M.M., I find that the November 27, 2018 denial notice also fails to comply with s. 38(8) of the *Schedule*. The statement, "multiple providers, specialists, consultants, or referrals occur without an apparent documented explanation in the clinical records of the medical necessity," is incomplete, unclear, lacks particulars and is not sufficient enough to allow an unsophisticated person to make an informed decision to either accept or dispute Aviva's decision. Further, while the notice did state that the psychological assessment appeared to be a duplication of an assessment already requested, the previous psychological assessment requested in 2017 by Dr. Wexler was denied.[11] As a result, I find that Aviva's reference to a previously requested psychological assessment provided no further information on M.M.'s condition forming the basis of Aviva's denial or details on further information that Aviva required about M.M.'s condition.

[24] I also do not accept the analogy that Aviva attempts to draw from *McKeown* to denials under s. 38(8) of the *Schedule*. Aviva highlighted certain portions of *McKeown* that refer to the insured person co-operating with the insurer so that the insurer has the information necessary to determine entitlement to a benefit. While this analogy may be applicable to s. 44 IE assessments, which Aviva goes on to provide a comparison to, the same cannot be said of denials. Aside from the requirements of a treatment plan set out in s. 38(3), there are no similar obligations on insured persons in s. 38 that require an applicant to act like those under s. 33 for examination under oaths, which was the focus in *McKeown*, or under s. 44 for IEs. As such, I do not agree with Aviva that the rationale applied

[10] Written Submissions of the Respondent, tab D.
[11] Evidence brief of the Applicant, tab 28.

in *McKeown* can equally be applied to denials of treatment plans. I also do not agree with Aviva's characterization of M.M. raising her concerns over Aviva's non-compliance with s. 38(8) as "gamesmanship" – M.M. has every right to raise such issues before the Tribunal.

[25] I also do not agree with Aviva's submission that the doctrine of *issue estoppel* applies to this disputed treatment plan. *Issue estoppel* applies if the following criteria are met:

(i) The same question has been decided;

(ii) The decision under review is final; and

(iii) The parties are the same.[12]

[26] Aviva submits that this treatment plan is *similar* to a previous OCF-18 dated September 7, 2017 that was also submitted by Dr. Waxer seeking funding for a psychological assessment.[13] Aviva maintains that the September 7, 2017 treatment plan was the subject of a prior dispute between the parties in *M.M. v Aviva Insurance Canada*[14] in which, Aviva argues, the Tribunal found the treatment plan was not reasonable. I disagree.

[27] The only issue that proceeded to a hearing before the Tribunal in the 2019 Decision was M.M.'s entitlement to an award under *Regulation 664* regarding the September 7, 2017 OCF-18.[15] No findings were made by the Tribunal in the 2019 Decision as to the reasonableness or necessity of the September 7, 2017 treatment plan. In that decision, the Tribunal only found that payment for the September 7, 2017 treatment plan was not *unreasonably withheld* by Aviva.[16] As a result, I find that the question to be determined in this matter regarding entitlement to a portion of an April 12, 2018 treatment plan (the $200.00 OCF-18 completion fee) as a result of Aviva's deficient denials has not been previously decided by the Tribunal because not only was M.M.'s entitlement to the September 7, 2017 treatment plan not in dispute in the 2019 Decision, but also because at issue in this matter is a different treatment plan that was dated over seven months *after* the September 7, 2017 OCF-18. For all of these reasons, I find that *issue estoppel* does not apply.

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[12] See *17-006903 v Aviva Insurance Canada*, 2018 CanLII 115644 (ON LAT) at para. 9.
[13] Written Submissions of the Respondent, tab O.
[14] 2019 CanLII 94050 (ON LAT) (the "2019 Decision").
[15] *Ibid*. at para. 2.
[16] *Ibid*. at paras. 3.

[28] As I have found that Aviva's denials fall short of its obligations under s. 38(8) of the *Schedule* regarding the April 12, 2018 treatment plan for all of the reasons set out above, the consequences set out in s. 38(11) are triggered. As such, the $200.00 in dispute for completion of the OCF-18 is payable as Aviva no longer has the opportunity to issue a proper denial notice as a decision has been rendered regarding this treatment plan.

Psychological and Rehabilitation Counselling and Vocational Assessment

[29] The August 1, 2018 OCF-18 sought funding for psychological and rehabilitation planning and a vocational assessment.[17]

[30] M.M. made similar arguments in response to Aviva's August 24, 2018 denial of this treatment plan as she did for the remainder of the OCF-18s in dispute.

[31] Aviva's August 24, 2018 correspondence again stated, "we're unable to determination whether the recommendations on your OCF 18 are reasonable and necessary for the injuries you sustained and we're not able to pay your benefits at this time."[18] The letter also stated, "the type(s) of treatment does not appear consistent with the patient's diagnosis," under the "medical reasons" portion. The exact same wording appears in correspondence to M.M. concerning this treatment plan dated October 15, 2018 and October 19, 2018.

[32] I find that Aviva's August 24, 2018, October 15, 2018 and October 19, 2018 correspondences fail to discharge Aviva's obligations set out in s. 38(8) of the *Schedule*. None of these notices provide any details about M.M.'s condition that formed the basis of Aviva's decision or any specific details regarding the information Aviva required about M.M.'s condition. Further, Aviva provided no details as to why the proposed treatment was not consistent with the diagnosis.

[33] Aviva, however, also relied upon its November 27, 2018 letter to M.M., the details of which are set out above at paragraph [21], and again argued that this letter clarified its "medical and other reasons" regarding its continued denial of the treatment plans and its continued requests for examinations. M.M. maintained that this notice also failed to adhere to the requirements set out in s. 38(8) of the *Schedule* as it did not specifically reference M.M.'s condition.

[34] I do not agree with Aviva that its November 27, 2018 correspondence discharged Aviva's onus under s. 38(8) of the *Schedule* regarding the portion of the

[17] Evidence Brief of the Applicant, tab 11.
[18] Written Submissions of the Respondent, tab D.

treatment plan that sought funding for psychological and rehabilitation counselling for the same reasons set out in paragraphs [22] and [23] above.

[35] Aviva did, however, state in its November 27, 2018 letter to M.M. that, "the claimant has continued to work her full time job and has never presented a claim for IRBs so it is unclear why a vocational assessment would be required at this time, more than 3.5 years post loss." While this statement appears to provide a reason why Aviva determined that the vocational assessment was not reasonable and necessary, I find that it does not fully discharge Aviva's obligations under s. 38(8) because no medical reason was provided for the denial. Aviva did not even refer to M.M.'s condition giving rise to its determination in relation to the proposed vocational assessment.

[36] For all of these reasons, I find that Aviva's denials of the August 1, 2018 OCF-18 fall short of its obligations under s. 38(8) of the *Schedule*. As a result, the consequences set out in s. 38(11) are triggered and the psychological and rehabilitation planning and vocational assessment as set out in the August 1, 2018 treatment plan is payable as Aviva no longer has the opportunity to issue a proper denial notice as a decision has been rendered regarding this treatment plan.

Orthopaedic Assessment

[37] The June 9, 2017 treatment plan sought an orthopaedic assessment and was completed by Courtney Samotie, occupational therapist.

[38] On July 18, 2017, Aviva sent correspondence to M.M. denying the June 9, 2017 treatment plan. The correspondence stated, "we're unable to determine whether the recommendations on your OCF 18 are reasonable and necessary for the injuries you sustained and we're not able to pay your benefits at this time."[19] The correspondence then gives notice for M.M. to attend an IE under s. 44 of the *Schedule* and provides the following, "diagnostic studies appear to be ordered for parts of the body not injured in the accident or do not appear necessary to confirm or support the diagnosis. Diagnostic studies appear to be ordered or repeated without objective clinical documentation for their necessity."[20]

[39] M.M. again argued that the reasons provided by Aviva for its denial of this treatment plan and subsequent scheduling of an IE fall far short of what is required under s. 38(8) of the *Schedule*. M.M. maintained that Aviva's denial

[19] Evidence Brief of the Applicant, tab 22.
[20] *Ibid*.

reasons were boilerplate, failed to provide reference to M.M.'s condition and were unclear as to the basis for the provided determination. Additionally, M.M. correctly noted that the treatment plan did not seek funding for any diagnostic studies.

[40] Aviva did not specifically dispute M.M.'s submissions that the July 18, 2017 correspondence failed to comply with its obligations under s. 38(8) of the *Schedule* outside of its general submissions regarding the sufficiency of its notices. Aviva did, however, refer to its August 24, 2017 correspondence at paragraph 41 of its submissions arguing that Aviva provided sufficient "medical and other reasons" in accordance with s. 38(8) of the *Schedule* in this letter to M.M. The August 24, 2017 letter asks M.M. to review the enclosed August 22, 2017 IE report by Dr. Dessouki. The August 24, 2017 correspondence then states, "they determined the treatment/assessment recommended is not reasonable and necessary from the injuries sustained in the motor vehicle accident. Therefore, Aviva will not fund any treatment/assessment incurred relating to this treatment plan."[21]

[41] I find that neither the July 18, 2017 correspondence nor the August 24, 2017 correspondence discharged Aviva's obligations under s. 38(8) of the *Schedule*. Neither denial provided any details regarding M.M.'s condition that formed the basis of Aviva's decision. More specifically, the August 24, 2017 letter simply informs M.M. that "they," when she was only assessed by Dr. Dessouki, determined that the "treatment/assessment," without specifically referencing the orthopaedic assessment, recommended that it was not reasonable and necessary. Aside from lacking meaningful details, this "reason" is the conclusion of Aviva's consideration of the disputed treatment and provides no explanation why Aviva concluded the plan was not reasonable and necessary. While I agree that Aviva referenced Dr. Dessouki's August 22, 2017 report in this letter, simply attaching an IE report to a denial letter and asking an applicant to review it with a bare statement that the assessor determined that the proposed "treatment/assessment" was not reasonable and necessary from the unidentified "injuries" sustained in the accident is not sufficient enough to allow an unsophisticated person to make an informed decision to either accept or dispute the decision at issue and certainly does not serve the *Schedule*'s consumer protection goal.

[42] For all of these reasons, I find that Aviva's denial falls short of its obligations under s. 38(8) of the *Schedule*. As a result, the consequences set out in s.

[21] Evidence Brief of the Applicant, tab 23.

38(11) are again triggered and the treatment plan for an orthopaedic assessment is payable as Aviva no longer has the opportunity to issue a proper denial notice as a decision has been rendered regarding this medical benefit.

Award

[43] Section 10 of Regulation 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.

[44] While I have found Aviva's denial notices all to be deficient, this finding in and of itself does not amount to unreasonable withholding or delay of payment of a benefit that would entitle M.M. to an award. However, for the reasons that follow, I find that M.M. is entitled to an award in this matter of 20 per cent of the following disputed amounts:

(i) the $200.00 fee for completion of the April 12, 2018 treatment plan; and

(ii) the August 1, 2018 treatment plan for psychological and rehabilitation planning and a vocational assessment ($4,689.50).

[45] Aviva maintains that M.M. has not met the threshold for establishing entitlement to an award and, instead, argues that M.M.'s request for an award is an abuse of process, an attempt to re-litigate issues that have already been decided and, again, that *issue estoppel* and *res judicata* applies to M.M.'s claim for an award.

[46] To support its position, Aviva relies upon the 2019 Decision. Aviva submitted that M.M. made similar allegations in this matter to support her claim for an award as those already determined in the 2019 Decision. Aviva also maintained that M.M. cited and relied upon much of the same evidence in this matter when compared to the evidence relied upon in the 2019 Decision including certain correspondence from Aviva to M.M.[22] and certain correspondence from M.M.'s counsel to Aviva.[23] Aviva submits that given the overlap in the parties involved, the facts/evidence and the file handling at issue, "this matter was already dealt with by Adjudicator Punyarthi."[24]

[22] Aviva specifically referred to its correspondence to M.M. dated May 8, 2018, May 29, 2018, October 15, 2018, November 26, 2018 and November 27, 2018.
[23] Aviva specifically referred to correspondence from M.M.'s counsel dated May 31, 2018, August 29, 2018 and December 7, 2018.
[24] Written Submissions of the Respondent, para. 48.

[47] I do not agree with Aviva's arguments that M.M.'s claim for an award as set out in this matter has already been determined and is an abuse of process for two reasons. Firstly, the Tribunal only addressed M.M.'s entitlement to an award regarding Aviva's actions in relation to the September 7, 2017 treatment plan for a psychological assessment in the 2019 Decision. I reiterate my comments from paragraph [27] above that the September 7, 2017 treatment plan, and any actions of Aviva in response to it, is not in dispute in this matter.

[48] Secondly, M.M. submitted as evidence several letters from her counsel to Aviva dated May 14, 2018, May 31, 2018, August 29, 2018, November 28, 2018, December 7, 2018 and April 17, 2019. All of these letters raise M.M.'s concerns over Aviva's denials of the first two disputed treatment plans and Aviva's non-compliance with s. 38(8) of the *Schedule*. While there may be overlap between certain correspondences referred to by M.M. in the 2019 Decision as in this decision, this does not automatically lead to the conclusion, as suggested by Aviva, that *issue estoppel* or *res judicata* applies. The 2019 Decision only addressed issues raised by M.M. regarding the notices of examinations for s. 44 IE assessments in the correspondence from Aviva and no reference was made to s. 38(8) of the *Schedule* or the denials of treatment plans in dispute in this matter.

[49] I do agree with Adjudicator Punyarthi's statement in the 2019 Decision that a finding of entitlement to an award is fact specific[25] and it is clear that the Tribunal had very different evidence before it in the 2019 Decision, which included testimony from two adjusters on behalf of Aviva, than what is before me. Here, the parties made their submissions in writing except in regard to M.M.'s March 9, 2020 Notice of Motion. Further, while Adjudicator Punyarthi found that the standstill between the parties could have been avoided with a telephone call for the purposes of brainstorming solutions to address the parties' positions regarding the requested s. 44 IEs,[26] I do not agree that any such solution would be possible regarding denials of treatment plans and I would not expect M.M. to make any such proposals regarding the issues in dispute before me as was suggested in the 2019 Decision.[27]

[50] In fact, I find that because M.M. could not be expected to propose solutions like those suggested in the 2019 Decision in response to the notices of IEs, it was reasonable for M.M. to send her letters to Aviva requesting clarification of its denials and compliance with s. 38(8) of the *Schedule*. When Aviva was given an

[25] *Supra* note 14 at para. 28.
[26] *Ibid*. at para. 22.
[27] *Ibid*. at para. 24.

opportunity to "cure" the issues raised by M.M. regarding its notices, however, Aviva failed to provide any further information to M.M. until its November 27, 2018 correspondence which, for the reasons set out above, still remained deficient. Moreover, Aviva was sent two further letters from M.M.'s counsel after Aviva's November 27, 2018 letter. Aviva filed no evidence that it responded to either of these letters which only leads me to conclude that it simply stopped responding to M.M.'s concerns which, in my opinion, contributed to a delay in payment of benefits to M.M. for the first two disputed treatment plans.

[51] A further aggravating factor in this matter is the release of the Tribunal's decision on a preliminary issue in dispute between M.M. and Aviva in *18-000467 v Aviva Insurance*.[28] In that decision, the Tribunal found, among other things, that Aviva's explanation of benefits was deficient as it advised M.M. that the type of treatment did not appear consistent with the diagnosis but gave no further information. As the decision *18-000467* was released on September 6, 2018, I find that Aviva knew, or ought to have known, that all of its prior denials regarding the first two disputed treatment plans were deficient as the language at issue in *18-000467* was substantially similar to the denial language used by Aviva in its denials of the first two disputed treatment plans in this matter. Aviva, however, waited almost three months after the release of *18-000467* before sending out further correspondence on November 27, 2018 in an attempt to "clarify" its prior denials.

[52] In summary, I find that cumulatively Aviva's response, or lack thereof, to letters from M.M.'s counsel and the three month delay before sending out a "clarified" response after the release of the Tribunal's decision in *18-000467* amounts to an unreasonable withholding of payment in regards to the first two treatment plans in dispute. I find that in this matter, it was reasonable for M.M. to put Aviva on notice regarding M.M.'s concerns over Aviva's deficient notices. Aviva's lack of response to M.M.'s letters demonstrate that Aviva acted in a manner that was imprudent, stubborn, inflexible and unyielding with respect to the benefits claimed.

[53] However, I find that M.M. is not entitled to an award for the June 9, 2017 treatment plan for an orthopedic assessment. While I have found that Aviva's correspondences dated July 18, 2017 and August 24, 2017 did not discharge Aviva's obligations under s. 38(8) of the *Schedule*, there was no evidence before me that M.M. took any steps to notify Aviva of its concerns over the denial of this treatment plan to provide an opportunity for Aviva to "cure" the notices as it did

[28] 2018 CanLII 112135 (ON LAT) ("*18-000467*").

with the other treatment plans in dispute. As such, there is no evidence regarding the third treatment plan that lead me to conclude that Aviva acted in an imprudent, stubborn, inflexible and unyielding manner as it did with the first two treatment plans and, therefore, there is no basis for an award regarding this OCF-18.

[54] Pursuant to s. 10 of Regulation 664, I have discretion to award up to 50 per cent of the disputed amount, including interest, for amounts unreasonably withheld or delayed.

[55] M.M. did not make submissions regarding the amount of the award that she sought. Likewise, Aviva made no submissions as to the quantum of the award.

[56] I find that the appropriate quantum of the award in this matter is 20 per cent of the amounts set out in paragraph [44] above. I do not find Aviva's withholding to be on the extreme end of unreasonable behaviour that would call for an award of 50 per cent and I do note that M.M. availed herself of other remedies available to her under s. 38(11) regarding Aviva's denials. Nonetheless, deterrence is warranted in this matter especially in light of Aviva's characterization of M.M.'s actions as "gamesmanship" for raising issues with Aviva's notices under s. 38(8). Additionally, ignoring M.M.'s letters is not an appropriate way to respond to a client of an insurer, even if their counsel's conduct may be considered challenging.

[57] Ultimately, the timeliness and process by which Aviva's denials were communicated to M.M. failed to provide the readily available information required to uphold the consumer protection mandate of the *Schedule* and an award in the amount of 20 per cent is well within the range of awards ordered by the Tribunal for breaches of insurer obligations under s. 38(8) of the *Schedule*.[29]

Interest

[58] M.M. is entitled to interest in accordance with s. 51 of the *Schedule* for the $200.00 fee for completion of the April 12, 2018 treatment plan, the August 1, 2018 treatment plan for psychological and rehabilitation planning and a vocational assessment and for the June 9, 2017 treatment plan for the orthopaedic assessment.

[29] See *A.A. v. Aviva General Insurance Company*, 2020 CanLII 19571 (ON LAT) and *18-000289 v Unica Insurance Inc., 2019 CanLII 34602* (ON LAT).

CONCLUSION

[59] For the reasons outlined above, I find that M.M. is entitled to:

(i) the following benefits plus interest in accordance with s. 51 of the *Schedule*:

(a) the $200.00 fee for completion of the April 12, 2018 treatment plan;

(b) the August 1, 2018 treatment plan for psychological and rehabilitation planning and a vocational assessment; and

(c) the June 9, 2017 treatment plan for the orthopaedic assessment; and

(ii) an award in the amount of 20 per cent of the the $200.00 fee for completion of the April 12, 2018 treatment plan and the August 1, 2018 treatment plan for psychological and rehabilitation planning and a vocational assessment.

Released: May 28, 2020

Lindsay Lake
Adjudicator