



FSCO A16-001425

**BETWEEN:**

**(RYAN) MICHAEL DIGBY**

**Applicant**

**and**

**AVIVA CANADA INC.**

**Insurer**

## **REASONS FOR DECISION**

**Before:** Arbitrator Marshall Schnapp

**Heard:** In person at ADR Chambers on May 25 and 26, 2017

**Appearances:** Mr. David Shellnutt and Mr. James Kwan participated for Mr. (Ryan) Michael Digby  
Mr. Geoffrey Keating participated for Aviva Canada Inc.

### **Issues:**

The Applicant, Mr. (Ryan) Michael Digby, was injured in a motor vehicle accident on December 14, 2011 and sought accident benefits from Aviva Canada Inc. ("Aviva"), payable under the *Schedule*.<sup>1</sup> The parties were unable to resolve their disputes through mediation, and Mr. Digby, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

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<sup>1</sup> *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

The issues in this Hearing are:

1. Is Mr. Digby entitled to a payment of \$2,362.00 for a treatment plan for physical therapy, dated August 20, 2014?
2. Is Aviva liable to pay a special award because it unreasonably withheld or delayed payments to Mr. Digby?
3. Is Mr. Digby entitled to interest for the overdue payment of benefits?
4. Is either party entitled to its expenses of the Hearing?

**Result:**

1. Mr. Digby is entitled to a payment of \$2,362.00 for a treatment plan for physical therapy, dated August 20, 2014.
2. Aviva is not liable to pay a special award because it unreasonably delayed payments to Mr. Digby.
3. Mr. Digby is entitled to interest for the overdue payment of benefits.
4. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

**EVIDENCE AND ANALYSIS:**

**The Accident**

The Applicant, Mr. (Ryan) Michael Digby, was involved in a motor vehicle accident on December 14, 2011. At the time of the accident, the Applicant was driving behind a vehicle, and when he changed lanes his vehicle ended up driving underneath a parked truck, which resulted in significant damage to his car.

**Witnesses**

**Mr. (Ryan) Michael Digby**

The Applicant provided his evidence in a candid, straightforward and sincere manner. I found him to be a very credible witness. He was first questioned about his pre-accident medical history, which is very noteworthy and involves a significant number of issues. He was born in 1978, completed grade 12, and has not been employed. In his youth, he played high level hockey and had foot surgery on both feet in 1998 or 1999. The surgeries did not go well and resulted in infections. The Applicant was not able to wear shoes for two years. At present, he has only been wearing shoes for a few years. Due to the complications arising from the foot surgeries, the Applicant went on disability benefits, which he is still receiving. He has weight issues; at one time he weighed 370 pounds, and at present with dieting and exercises he weighs 270 pounds. Other pre-existing medical conditions include diabetes and depression.

The Applicant testified that after the surgeries, his pain was concentrated on his feet, but moved up to his knees and hips. He sees a pain specialist who prescribes medication. The Applicant also said his depression resulted from his medical condition due to the surgeries on both of his feet. He went from being strong and physically active to someone able to do little physically. He also had a drug addiction prior to the accident and is enrolled in a drug program. The Applicant also testified that he was in a previous motor vehicle accident in the year 2000 but cannot recall the exact date. His neck and left shoulder were treated after that accident and he stopped treatment prior to the 2011 accident.

The Applicant recalls that prior to the 2011 accident, he “was functioning for me”, getting to the gym a few times per week and helping his mother. He testified that his functioning level was not the same as a “normal person”. The Applicant testified that his pain and injuries lasted for years and at times things would die down but he still had injuries.

He testified after the impact from the accident on December 14, 2011, he knew he had been hurt but did not know the extent of his injuries. He stated that his neck hurt most following the accident. He was taken by ambulance on a stretcher to Credit Valley Hospital, where he thinks he

was told he suffered a concussion. He recalls after the accident his concentration was off, which was never good to begin with, but was made much worse. As well, he found he had a short temper for a few months after the accident. In addition, he experienced issues with his back, his neck, and he could hardly move one of his shoulders. He testified that prior to the accident, he struggled with depression and he felt the accident made everything worse. As well, he testified that due to his neck pain and it being out of whack, he had difficulty sleeping, which meant he could not function.

The Applicant testified that he started treatment a few weeks after the motor vehicle accident and worked with Mr. Sandy Weineger, a physiotherapist, and then he started receiving massage therapy from Mr. Jack Younger. He was receiving massage therapy until the treatment plan in dispute was denied. He recalls he stopped treatment for a short period of time but because things got worse he started to attend for massage treatment again. He estimated it was approximately five months that he went without treatment. According to the Applicant, when he stopped treatment, things started to go backwards, and while he was still going to the gym, things were getting worse and worse, including his shoulder movement and neck pain – the neck pain resulted in him not being able to sleep. The deterioration of his condition resulted in irritability and depression.

The Applicant testified that he used his own funds to pay for physiotherapy and massage treatment after the treatment plan was denied. The Applicant provided copies of invoices documenting these treatments and payment for same.<sup>2</sup> The Applicant explained that things were so bad for him that he decided to use his own savings to obtain treatment as he was having suicidal thoughts. He went back to Mr. Weineger and Mr. Younger, and decided to obtain massage treatment from Mr. Younger for his shoulder and neck. He could only afford one modality so he chose massage as it was more beneficial to him than physiotherapy. This was done in alternating sessions because he could only afford 30-minute treatments. He testified that he went at least three times a month and sometimes twice a week.

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<sup>2</sup> Multiple Invoices from Physiotherapy 2000 and Core Therapeutics Physiotherapy, Exhibit 1, Volume 1, Medical Brief, Tab 8.

The Applicant testified that receiving massage treatment helps with sleep, allows him to workout, provides stress relief, and helps with posture and walking. The treatments are painful but afterwards provide two weeks of mobility. The Applicant also testified that the treatment he is currently receiving from Mr. Younger is the same type of treatment he was receiving when the benefits were terminated. The Applicant is not sure if he requires treatment for the rest of his life but he has made a lot of improvements with the treatment and believes more improvements can be made.

During cross-examination, the Applicant confirmed that he was taking “almost every kind” of medication prior to the 2011 accident, including Percocet, Oxycontin, and now Hydrocontin, as well as being in a Methadone treatment program. He was also taking medication for depression and sleeping. There has been no change in his medications after the 2011 accident as he was already on the highest dosages possible.

The Applicant testified that he was receiving ODSP Benefits prior to the 2011 accident due to a multitude of reasons including: ongoing issues with his feet that resulted in him not being able to walk long distances, previous head injuries, and learning disabilities. He confirmed the accuracy of a document completed by Dr. Zarifa, dated March 7, 2011, for ODSP.<sup>3</sup> The doctor noted the Applicant suffered from chronic pain. The Applicant explained that his chronic pain condition was worsened by his depression and commented that as of March 7, 2011, he was a functioning depressed person. The Applicant explained that before the 2011 accident, his chronic pain condition involved mainly his lower body. He had a lot of problems with his feet, knees and hips, had put on 200 lbs., and had neck and shoulder pain from his 2000 motor vehicle accident and from being beat up by bouncers.

When questioned if he attended for treatment at Physiotherapy 2000 Clinic prior to the 2011 accident, the Applicant replied – “possibly yes”, but could not recall the last time he attended there prior to the 2011 motor vehicle accident. He also noted that he received a lot of treatment after the 2000 motor vehicle accident.

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<sup>3</sup> Health Status Report and Activities of Daily Living Index of Dr. Zarifa, dated March 7, 2011, Exhibit 1, Volume 1, Medical Brief, Tab 4(C).

With respect to treatment at Physiotherapy 2000 after the 2011 motor vehicle accident, the Applicant testified that the treatment was for his shoulders, neck and back. He does not believe his ankles were treated unless they were treated for flexibility. When shown a handwritten note from Physiotherapy 2000, dated January 13, 2012, which noted ankle treatment,<sup>4</sup> he agreed that he had received ankle treatment.

The Applicant testified that he discontinued physiotherapy treatment only after the treatment plan was denied. He went on to say that he presently needs massage treatment. He is worried about regression and thus he needs the treatments three to four times a month to allow him to function.

### **Mr. Jack Younger**

The Applicant's massage therapist provided testimony. He came across as straight forward and knowledgeable and was found to be a credible witness. He has been a registered massage therapist for 23 years and first started treating the Applicant in 2013. When he first saw the Applicant, his complaints were of pain and sickness in the mornings due to lack of sleep. He recalls the Applicant had pain on range of motion and on function – the pain was in his neck, shoulders, and thoracic spine. Mr. Younger performed very active treatment on the Applicant – Active Release Technique (ART). He tried to be as active as possible, using deep tissue work to actively facilitate the muscles to release. According to Mr. Younger, this is not something the Applicant can do at home on his own. He recalls the above was done under a treatment plan that permitted 12 sessions, once per week.

The treatment plan in dispute was to assist with the Applicant's shoulder pain and joint dysfunction.<sup>5</sup> Mr. Younger explained that he was aware the Applicant had previous shoulder pain due to a previous motor vehicle accident, his own subjective findings and from talking to his peers at the clinic. The goals of the treatment plan were to increase strength and range of motion and it

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<sup>4</sup> Physiotherapy 2000, Physiotherapy Notes, Exhibit 2, Arbitration Brief, Tab 57(A).

<sup>5</sup> Treatment and Assessment Plan (OCF-18) by Mr. Sandy Weineger, Physiotherapist, dated August 20, 2014, Exhibit 2, Tab 7.

was noted to reduce scar adhesions. Upon further questioning, he advised that pain relief was an important goal of the treatment.

The plan called for 20 treatment sessions of massage as the Applicant seemed to be responding to massage treatment more than physiotherapy treatment. Mr. Younger testified that the Applicant's progression had been very slow but it was present. He also noted that if pain was not documented in the plan, he would assume it had improved. The Applicant had been improving but had not fully recovered when the treatment plan was denied.

Mr. Younger was then questioned about the Insurer's medical report which found the treatment plan in dispute was not reasonable and necessary.<sup>6</sup> The witness testified that he had reviewed excerpts of the report and disagreed with the conclusion that the Applicant had reached his maximum therapeutic benefit from the treatment. Mr. Younger agreed that normally this would be the case but it was not the case for the Applicant. It was Mr. Younger's objective findings that the Applicant had not reached maximum therapeutic benefit from the treatment. He also believed that the treatment he provided was active and never passive, as passive treatment would not have assisted the Applicant. Mr. Younger believed that after the 20 treatments, it was possible for a favourable outcome and the Applicant would be able to be on his own.

Mr. Younger was then questioned about the treatment he has provided the Applicant since the treatment plan in dispute was denied. He recalls it was approximately a five- to six-month period when the Applicant did not receive treatment. When he saw the Applicant again, he presented with "upper cross" syndrome. His posture is still a bit like that but it is getting better. In Mr. Younger's view, the Applicant had regressed since the last time he saw him because he was not receiving treatment. He was not attending at the gym and exercising so these were also factors. He continues to receive treatment from May 2016 to present. Mr. Younger does not believe that the Applicant has grown dependent on his treatment, as mentioned in the Insurer's medical assessment. Mr. Younger notes that the Applicant receives less frequent treatments at this time

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<sup>6</sup> Physiotherapy Assessment Report by Mr. Dennis Polygenis, dated October 6, 2014, Exhibit 2, Arbitration Brief, Tab 10.

than he did before. At first he saw him once per week, then once every two or three weeks and now once per month – it varies depending on his needs.

Under cross-examination, Mr. Younger testified that when the Applicant returned to treatment several months after the treatment plan was denied, he treated the Applicant for the same areas as he did prior to the interruption in treatment.

I asked Mr. Younger about his clinical notes and records. He testified that he did not have access to them and while they had been requested, Physiotherapy 2000 did not provide them.

### **Dr. G. Zarifa**

The Applicant's family doctor also testified on his behalf. She has been practicing family medicine since 2002. The Applicant has been her patient since 2002 but in 2005, she became more involved with his care. She described his noteworthy medical history to include the following: type 2 diabetes, hypertension, fatty liver, sleep apnea, urinary issues and chronic pain. She explained his chronic pain condition predominantly stems from the heel/feet surgeries the Applicant had years ago. She also noted he has mental health issues, including depression, for which he has been treated with anti-depressant medication.

The doctor testified that according to a review of her notes, dated January 19, 2012, January 16, 2015, and August 5, 2015, the Applicant mentioned he was receiving physiotherapy due to the motor vehicle accident. She also explained that when she saw the Applicant on February 17, 2016, he made reference to his rehabilitation treatment including physical therapy and massage to deal with his pain.<sup>7</sup> She went on to say that she advised the Applicant that physical therapy would be more helpful. The doctor also testified that she would recommend the Applicant continue treatment if he reports decreased pain and increased functionality from treatments. When asked if chronic pain would make the body more susceptible, Dr. Zarifa replied "to some extent, makes

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<sup>7</sup> Typed Clinical Notes of Credit Valley Family Health Team and Records, Exhibit 2, Arbitration Brief, Tab 18.



recovery harder, you don't go back to the base line, and it usually takes longer to treat the re-injury.”

The doctor was asked again about her February 17, 2016 note during cross-examination. In her note she wrote:

...the difficulty with Mister Digby is the fact that he has an underlying chronic MSK pain and disability which in general has a tendency to flare at times. He continues to be disabled but I am not sure whether his disability has worsened as a result of the injuries he sustained in that accident.<sup>8</sup>

The doctor believes she was not in a position to decide if his condition was aggravated by the motor vehicle accident or if it was a flare up. She explained that his underlining musculoskeletal pain mainly refers to his pain in his heels, ankles and toes, although there was another note in her records that mentioned generalized musculoskeletal pain.

Dr. Zarifa also discussed her clinical note, dated May 5, 2011. This note reads as follows:

The patient is in because he wants to address some of his musculoskeletal pains. He tells me that over the years he has had multiple injuries to his back and his neck through either fights or car accidents. His concern is that she (sic) does not want to be doing any exercise that would be aggravating his neck or knees.<sup>9</sup>

According to the doctor, this was the first time the Applicant came to her with this generalized complaint. The doctor referred him for x-rays and a physiatry assessment. She went on to say that when people have chronic pain, there can be flare ups at any point. The doctor also confirmed that she signed a form in support of the Applicant receiving ODSP Benefits in March of 2011, which outlined his significant functional issues. The doctor was not aware whether or

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<sup>8</sup> *Ibid.*

<sup>9</sup> Clinical Notes and Records of Dr. G. Zarfia for the period of October 6, 2010 to May 3, 2013, Exhibit 1, Volume 1, Medical Brief, Tab 4(B).

not his functionality improved before the 2011 motor vehicle accident. She also testified that she never referred him for massage or physical therapy.

**Mr. Sandy Weiniger**

The Applicant's physiotherapist also provided testimony during the Hearing. He has been a physiotherapist for 33 years. He has been the manager at Physiotherapy 2000 for the past year, and for the previous 32 years, he was the owner of Physiotherapy 2000. Mr. Weiniger was aware the Applicant was involved in a motor vehicle accident in 2011. He also testified that "he may have known him before" and could not recall how long he treated him without looking at his records. Mr. Weiniger testified that he had not reviewed the Applicant's file prior to testifying because it was off site and not at the clinic. When questioned on the Insurer's assessment used to deny the treatment plan in dispute, Mr. Weiniger agreed with the report in that the Applicant had shown some improvement with the treatment he received. Mr. Weiniger explained the goal was to get the Applicant to function on his own and get him independent. However, Mr. Weiniger noted that the Applicant was not a normal patient and when he took a break from treatment, he would come back stiff and weak. He also did not agree with the Insurer's assessment when it found the Applicant had reached his maximum medical recovery because each time he saw the Applicant, he had regressed – got stiffer and weaker – and it was not like he was plateauing. The goal of continued treatment was to maintain, get him active and moving, and to improve his function to allow him a more regular lifestyle. Mr. Weiniger explained that for someone who has pre-existing injuries, recovery is impacted and will take longer. He did not see any dependencies developing as noted in the Insurer's assessment. He recalls the Applicant went to the gym on his own and was trying to become independent but it wasn't working.

According to Mr. Weiniger, the purpose of the disputed treatment plan was to avoid gaps and keep him functioning.

When under cross-examination, Mr. Weiniger testified that he did not review the Applicant's file prior to appearing as a witness, as he was just subpoenaed a few days ago; he advised he was answering questions based on his memory. He recalled the Applicant and testified by reading

through documents being referred to by counsel, his memory therefore being refreshed. When asked about the Applicant's pre-accident medical history, Mr. Weiniger explained that his knowledge of that was based on what the Applicant told him, which was that he had pain in his heels, back, shoulders, and elbows. He also testified that his heel/bi-lateral foot pain would cause back pain.

When questioned about the disputed treatment plan that he completed, he agreed that there were multiple errors in the document, including some missing documentation and some incorrect information.

### **Ms. Ann Digby**

The Applicant's mother was the last witness to provide testimony on his behalf. She has been retired for approximately 15 years and lives with her husband and the Applicant in Mississauga. When asked how the Applicant's health was approximately six months prior to the accident, she testified that the Applicant always had pain in his shoulders and back but it was manageable. She also did not believe he was receiving regular treatment before the 2011 accident. After the accident, she recalls the Applicant suffered from headaches and it caused his neck and shoulders to get much worse. She noticed that days following the accident, the soreness the Applicant was feeling caused him to stiffen up. She testified that she encouraged him to see his doctor to obtain a referral for treatment. Ms. Digby testified that it took a long time for the physiotherapy to help the Applicant but over 1.5 years after the accident, he improved. She also recalled the physiotherapist got him to exercise and the massage was very beneficial. Ms. Digby saw an increase in the Applicant's functioning and commented that when he is not in as much pain he can focus, follow-through on tasks, socialize, and get out to the gym to exercise.

Ms. Digby testified that she was aware the Applicant's treatment stopped in August 2014. She recalls he stopped treatment for approximately five months. She noticed a complete difference in her son's condition. The pain came back, he was functioning less, he had no motivation, he gained 60 pounds, his personal hygiene suffered and he became a recluse.

According to Ms. Digby, the Applicant resumed therapy in or around January 2015. Both she and her husband talked the Applicant into returning to treatment because at that point he could not do anything. After the Applicant returned to treatment he was in less pain, able to focus, complete tasks, socialize, lose weight, and return to the gym. She testified the Applicant continued to obtain treatment and has paid for it himself. The Applicant reports to her that he obtains relief from his treatment sessions. She believes the Applicant paid about \$2,700.00 to Physiotherapy 2000 and \$1,200.00 to Core Therapeutics, the clinic at which Mr. Jack Younger now works. At present, the Applicant receives massage treatments twice per month and will have more if required.

Ms. Digby also testified that the Applicant no longer receives physiotherapy from Mr. Weiniger, and was aware that Mr. Weiniger had to be subpoenaed to attend at the Hearing.

### **Mr. Dennis Polygenis**

Mr. Polygenis appeared as an expert witness for Aviva. He is a physiotherapist who conducted a physiotherapy assessment on the Applicant. His report, dated October 6, 2014, was used by Aviva in support of the denial of the treatment plan at issue.<sup>10</sup> When Mr. Polygenis questioned the Applicant about his condition, the Applicant complained of pain in his neck and left shoulder and constant pain in his lower back. During his examination, Mr. Polygenis noted superficial tenderness but found no objective signs or clinical evidence of biomechanical dysfunction in the areas assessed. On page 7 of his report, the following was written:

Typical soft injuries of this nature are expected to have a positive prognosis, with anticipated recovery within 8-12 weeks post-injury. Standard clinical guidelines would not support ongoing therapy... He currently continues to suffer from subjective pain related to the initial injuries. However, after extensive formal conservative therapy over the course of almost 3 years, it is not expected that further significant clinical gains will

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<sup>10</sup> Physiotherapy Assessment Report by Mr. Dennis Polygenis, dated October 6, 2014, Exhibit 2, Arbitration Brief, Tab 1.

occur. Mr. Digby has achieved maximum therapeutic benefit...from a physiotherapy perspective.<sup>11</sup>

Mr. Polygenis further noted that continued physiotherapy treatment may reinforce a maladaptive cycle of pain management or create disincentives for the Applicant to approach his pain management in the expected active and functional manner.<sup>12</sup> As well, Mr. Polygenis testified if the Applicant had been diagnosed with chronic pain, he would not have recommended the treatment plan.

### **The Applicant's Position**

According to the Applicant, the issue before me is whether or not the treatment plan at issue was reasonable and necessary in light of the Applicant's acknowledged injuries and significant pre-accident medical conditions. The evidence provided by the Applicant's treating physiotherapist and massage therapist show the treatment plan was related specifically to his 2011 motor vehicle accident impairments. The goals noted in the treatment plan and elaborated upon by the Applicant and his providers were to increase function and reduce pain. The Applicant, his mother and his two treatment providers gave evidence that his treatment helped with his function, mobility, mood, focus, depression, stiffness and allowed him to socialize.

As well, based on the testimony from the Applicant, his mother and his massage therapist, there are approximately two years of post-denial evidence that demonstrates that the massage therapy aspect of the plan was beneficial to the Applicant, a therapy that he paid for on his own.

The Applicant takes the position that the findings made by Mr. Dennis Polygenis are generalizations and are not applicable to the Applicant given his pre-accident condition, which included chronic pain, and given the benefits he experienced from resuming treatment on his own after treatment was terminated.

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<sup>11</sup> *Ibid.*, pg. 7.

<sup>12</sup> *Ibid.*

With respect to the claim for a special award, after the treatment plan was denied, the Applicant submitted supporting letters from his treating massage therapist as well as some updated records. However, the Insurer did not respond nor did it carry out its duty to reassess its decision upon receipt of further information. The Applicant is taking the position that this Hearing was unnecessary as all he wanted was appropriate treatment.

### **The Insurer's Position**

The Insurer agrees that the evidence shows the Applicant had a long pre-accident history of disability, chronic pain and severe functional limitations and as noted by his family doctor, the Applicant's condition affected his entire body. However, the Insurer submits that neither the Applicant's family doctor nor his pain specialist provided evidence or a report that his condition worsened because of the 2011 accident.

The Insurer also notes that its expert witness was more prepared and provided more accurate testimony than the Applicant's treating physiotherapist and massage therapist. As well, the Insurer noted inconsistencies in the Applicant's testimony, specifically that he did not recall receiving treatment from Physiotherapy 2000 prior to the 2011 accident for his ankles and that his chronic pain prior to the 2011 accident mainly affected his feet, ankles and legs, however his family doctor's testimony showed it affected his entire body.

The Insurer explained its theory of the case as follows: as a result of the 2011 motor vehicle accident, the Applicant suffered uncomplicated strain and sprain injuries that resolved in the months after the accident. As of August 20, 2014, his ongoing back, shoulder and neck complaints represented a flare up in his pre-accident chronic pain condition, unrelated to the 2011 accident. In support of this theory, the Insurer relied on the findings of Mr. Polygenis, the history of flare ups of the Applicant's chronic pain condition, Mr. Weiniger's evidence that the Applicant's issues with his heels, ankles and calves could result in back issues, and no evidence of objective injuries from post-2011 accident diagnostic imaging. Also, the Insurer is relying on clinical notes and records from Physiotherapy 2000 post-2014 which mainly refer to therapy being

provided to the Applicant with respect to issues and body parts with which he had difficulties prior to the 2011 accident.

The Insurer relied on the decision in *Ali and Certas* in asserting that the onus is always on the Applicant to prove entitlement to the specific benefits they are claiming.<sup>13</sup> The Insurer also takes the position that I should find the treatment plan not reasonable and necessary because the evidence demonstrates there were errors made when it was completed. There was insufficient evidence to show treatment goals were being met, and insufficient evidence was provided to show that follow-up assessments to track progress were being carried out.

In response to the claim for a special award, the Insurer takes the position firstly that as the treatment plan was not reasonable and necessary, it did not withhold payment unreasonably. It also submitted the treatment plan was assessed by a competent assessor who found it was not reasonable and necessary and this is what the denial was based upon. The Insurer also did not find the letters provided by Mr. Weiniger and Mr. Younger useful or persuasive and thus did not change its view on the treatment plan. Lastly, the Insurer takes the position that it attempted to rehabilitate the Applicant after the 2011 accident but it is not fair to ask it to pay for treatment not related to the 2011 accident.

## **Findings**

### **The Treatment Plan**

After considering all the evidence before me and the submissions made by the parties, I find that the treatment plan in dispute was reasonable and necessary. In coming to this decision, I am relying heavily on the testimony provided by the Applicant and his mother. Both came across as very credible witnesses. Both were able to demonstrate how the treatment being provided to the Applicant was required after the accident and how it continued to be necessary when the treatment plan was denied. Their evidence was very consistent and showed how the Applicant's level of functioning and mental health was impacted by the treatment.

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<sup>13</sup> *Ali and Certas Direct Insurance Company* (FSCO A13-002459, March 23, 2016), at pg. 13.

I also find the evidence demonstrated how the Applicant's condition deteriorated rapidly after he stopped treatment in 2014, after the denial, and then improved again when he was receiving treatment for which he personally paid. I also note that the evidence provided by both of his treating practitioners regarding his response to treatment and the negative effects when treatment ceased was consistent with the Applicant's and Ms. Digby's evidence.

In this matter, the Applicant has a complex and significant pre-accident medical condition that included long-standing chronic pain issues. With this evidence, I am unable to agree with the expert's opinion of the Insurer that the Applicant's anticipated recovery should have been 8-12 weeks post-injury, nor that the Applicant achieved maximum therapeutic benefit from a physiotherapy perspective when the treatment plan was denied.

The Applicant's, Ms. Digby's and Mr. Younger's evidence of how he responded positively following the return to treatment after the denial and how at present he receives on average two treatments per month, which is a decrease in treatments overall, demonstrate that, given the Applicant's significant pre-accident medical condition, he had not achieved a maximum therapeutic benefit from the physiotherapy when the treatment plan was denied.

While I do recognize there were issues with the treatment plan, including errors in completing it and some questions surrounding the documentation provided by the clinic, overall, I find the evidence presented demonstrates that the Applicant had significant health issues prior to the 2011 accident that required a longer course of treatment than somebody without his medical history, and thus I find that this treatment plan was reasonable and necessary.

### **Special Award**

From the cases on this issue, it is only if an Insurer acted in a manner that was imprudent, stubborn, and inflexible with respect to benefits being claimed, that an Order for a special award shall be made.



From the evidence before me, I cannot find that this was the case. The Insurer relied on its expert's opinion in determining the treatment plan was not reasonable and necessary. As well, from the documentation the Insurer had, there was a very real question on whether or not the treatment being sought was related to the Applicant's pre-2011 accident condition.

It was only after and because of the credible testimony from the Applicant and Ms. Digby that I have found that the treatment plan was reasonable and necessary. I do not find this an appropriate case to order a special award as I do not find the Insurer acted in an imprudent, stubborn, and inflexible manner.

**EXPENSES:**

The parties are encouraged to resolve the issue of expenses for this matter on their own. If they are unable to do so, they may schedule an Expense Hearing in writing before me according to the provisions of Rule 75 to 79 of the *Dispute Resolution Practice Code*.

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Marshall Schnapp  
Arbitrator

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August 14, 2017  
Date



FSCO A16-001425

**BETWEEN:**

**(RYAN) MICHAEL DIGBY**

**Applicant**

**and**

**AVIVA CANADA INC.**

**Insurer**

## **ARBITRATION ORDER**

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario *Regulation 664*, as amended, it is ordered that:

1. Mr. Digby is entitled to a payment of \$2,362.00 for a treatment plan for physical therapy, dated August 20, 2014.
2. Aviva is not liable to pay a special award because it unreasonably delayed payments to Mr. Digby.
3. Mr. Digby is entitled to interest for the overdue payment of benefits.
4. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

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Marshall Schnapp  
Arbitrator

August 14, 2017

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Date