

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

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

Tribunal File Number: 18-008742/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:

F. A–W.

Applicant

And

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: Brian Norris

APPEARANCES:

For the Applicant: Alan J. Clausi, Counsel

For the Respondent: Michelle Friedman, Counsel

HEARD: In writing on May 27, 2019

OVERVIEW

- [1] The applicant was injured in an automobile accident on January 10, 2017 and sought benefits from the respondent pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg. 34/10 (the “*Schedule*”). The respondent refused to pay for certain costs of examinations and, in response, the applicant applied to the Licence Appeal Tribunal – Automobile Accident Benefit Service (“Tribunal”) for resolution of this dispute.

ISSUES

- [2] The issues to be determined are as follows:
- i) Is the applicant entitled to a cost of examination in the amount of \$12,400.00, less \$10,400.00 approved by the respondent, for a catastrophic impairment assessment proposed by Dr. H. Becker, submitted on August 24, 2018, and denied on September 6, 2018?
 - ii) Is the applicant entitled to interest on any overdue payment of benefits?
 - iii) Is the applicant entitled to an award under Ontario Regulation 664 on the basis that the respondent unreasonably withheld or delayed the payment of benefits?

RESULT

- [3] I find as follows:
- i) The applicant is not entitled to the unpaid balance of the catastrophic impairment assessment and no interest is payable as a result.
 - ii) The applicant is entitled to an award in the amount of \$2,080.00.

BACKGROUND

- [4] The applicant was the driver of a vehicle which was struck from behind by another vehicle. As a result of the accident, the applicant suffered injuries significant enough to lead the him to contemplate a claim for a determination of catastrophic impairment pursuant to section 45 of the *Schedule*.
- [5] The applicant submitted a treatment and assessment plan dated August 24, 2018, proposing \$12,400.00 in fees for various assessments. The respondent denied funding for the assessments on the basis that the applicant had

exhausted the \$65,000.00 funding limit on treatment for non-catastrophic injuries provided by Section 18(3)(a).

- [6] However, about eight months later, the respondent later changed its position and, on April 23, 2019, approved up to \$10,400.00 for the assessments. The applicant claims entitlement to the unpaid balance of the proposed catastrophic assessment plus interest, and an award for the unreasonable delay resulting from the respondent's initial denial.

THE CATASTROPHIC ASSESSMENT

- [7] In order to make his claim for a determination of catastrophic impairment, the applicant asked the respondent to fund five assessments and related services. Although the respondent initially denied funding for the catastrophic impairment assessment, it reversed its decision and agreed to fund the assessment, less the \$2,000.00 proposed for clinic file review. The applicant claims entitlement to this amount.
- [8] I find the applicant is not entitled to the unpaid balance of the catastrophic impairment assessment because the expense is not reasonable and necessary.
- [9] Section 25(1)(5) of the *Schedule* provides the respondent shall pay for the reasonable fees charged for preparing an application under section 45 for a determination of whether the insured person has sustained a catastrophic impairment, including any assessment necessary for that purpose. Section 25(5)(a) provides the respondent is not liable to pay more than \$2,000.00 plus HST for fees and expenses for conducting any one assessment or examination and the preparation of the related report.
- [10] I find the applicant is not entitled to any additional amounts for a file review because it is a duplication of services. Reviewing documents in advance is a necessary part of an assessment and is contemplated in section 25(5)(a) of the *Schedule*. I agree with the reasoning in *J. S. v. Aviva*,¹ which also found the fees associated with file review are captured in the \$2,000.00 funding limit for fees and expenses for conducting any one assessment or examination.

AWARD

- [11] The applicant claims entitlement to an award and submits the respondent unreasonably withheld or delayed approval of the catastrophic impairment assessments. The respondent submits the decision to deny funding was because

¹17-007215 v Aviva General Insurance, 2018 CanLII 141011 (ON LAT)

it took the position that the costs of catastrophic impairment assessments are subject to the funding limits on treatment outlined in section 18 of the *Schedule*. The respondent asserts it is permitted to disagree with the applicant and this position has not exceeded the limit of what is reasonable.

- [12] Pursuant to section 10 of O. Reg. 664, the applicant may be entitled to an award if the respondent unreasonably withheld or delayed payment of a benefit.
- [13] I find the respondent was aware of the caselaw at the time of the decision to deny funding and unreasonably chose to disregard it. The applicant wrote the respondent on September 6, 2018, provided a copy of *Henderson v. Wawanesa Mutual Insurance Company*², and advised the Tribunal had applied the same principle. The respondent wrote back later that day and advised it was aware of the decision but *continues to maintain the position that the cat assessments are payable from the medical benefit policy limit*'.
- [14] I find the respondent's decision to deny all funding for the catastrophic impairment assessment was unreasonable in the face of the relevant caselaw that was available at that time, namely *N.S. v. Scottish & York*³ and *J.M. v. Aviva*.⁴ Both of the noted decisions contemplated whether the costs for determinations of catastrophic impairment are captured under the funding limit provided by section 18 of the *Schedule*. Both found these costs were not. The respondent submits that these were wrongly decided. I disagree. More importantly, while the respondent may disagree with the outcome of decisions by the Tribunal, it is not permitted to ignore them.
- [15] The above decisions, as well as *Henderson v. Wawanesa Mutual Insurance Company*, may not be binding on this Tribunal. However, this does not give license to the respondent to ignore the jurisprudence. These decisions provide a guideline on how catastrophic assessment costs are allocated. It would be reasonable to follow the findings in the absence of any counter authority. The respondent provides no caselaw or other historical basis for its position.
- [16] A successful applicant is entitled to up to 50% of the amount withheld. I chose to award only 20% of the amounts delayed. This is because the respondent mitigated the unreasonable delay by approving funding about two weeks prior to the start of this hearing.

² *Henderson and Wawanesa*, FSCO A14-001758.

³ *N.S. v. Scottish & York* (2018 CanLII 81950)

⁴ *17-007215 v Aviva General Insurance*, 2018 CanLII 141011 (ON LAT)

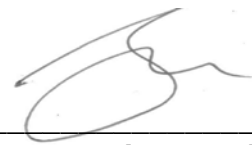
CONCLUSION

- [17] The applicant is not entitled to the unpaid balance of the disputed treatment and assessment plan dated August 24, 2018, nor interest.
- [18] The respondent's delayed approval of the disputed treatment and assessment plan was unreasonable and the applicant is entitled to an award of \$2,080.00 pursuant to section 10 of Regulation 664.

ORDER

- [19] The respondent must pay the applicant an award of \$2,080.00.

Released: January 24, 2020



**Brian Norris
Adjudicator**