



**Citation: Watts v. Aviva General Insurance 2022 ONLAT 20-008249/AABS**

**Licence Appeal Tribunal File Number: 20-008249/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:

**Sarah Watts**

**Applicant**

and

**Aviva General Insurance**

**Respondent**

**DECISION**

**ADJUDICATOR: Thérèse Reilly**

**APPEARANCES:**

For the Applicant: Sarah Watts, Applicant  
Michael J.A Wolfe, Counsel

For the Respondent: Lynda Mantha, Representative  
Jonathan White, Counsel

Court Reporter: Cindi Adalath

**HEARD: by Videoconference: October 18 and 19, 2021  
and followed with written submissions.**

## BACKGROUND

- [1] The applicant was involved in an automobile accident on **October 6, 2018** and sought benefits pursuant to the Statutory Accident Benefits Schedule *Effective September 1, 2010 (including amendments effective June 1, 2016)*.<sup>1</sup> The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").
- [2] The applicant submitted a claim for a non-earner benefit and medical benefits for physiotherapy and assisted devices. Prior to the accident, the applicant submits she was independent with self-care, child care and able to perform her home maintenance and housekeeping activities including grocery shopping, preparing meals, and participating in social and recreational activities such as hiking and visiting with friends and family. After the accident, and due to her injuries, the applicant submits she suffers a complete inability to carry on a normal life. She maintains the two treatment plans are beneficial in her recovery and reasonable and necessary.
- [3] The respondent denied the claim for the non-earner benefit and the treatment plans for assisted devices and for physiotherapy on the basis of its insurer examinations (IE assessments) and video surveillance evidence taken of the applicant. It claims the applicant does not meet the test for a non-earner benefit and the disputed treatment plans are not reasonable and necessary.
- [4] The applicant, her spouse and mother gave evidence at the videoconference hearing as did the respondent's adjuster, Britney Lichty. The parties submitted additional documents and evidence by way of written submissions.

## ISSUES

- [5] The following are the issues to be decided:
  - a. Is the applicant entitled to a non-earner benefit in the amount of \$185.00 per week from February 23, 2019 to October 6, 2020?
  - b. Is the applicant entitled to a medical benefit for \$7,681.06 for assisted devices recommended by Kim Lamont and Associates in a treatment plan dated November 29, 2018<sup>2</sup>?

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<sup>1</sup> Ontario regulation 34/10.

<sup>2</sup> Exhibit 16, OCF-18 for \$7681.06 for assisted devices dated November 29, 2018.

- c. Is the applicant entitled to a medical benefit for \$5,291.40 for physiotherapy recommended by Arbour Rehabilitation Centre in a treatment plan dated August 28, 2019<sup>3</sup>?
- d. Is the applicant entitled to an award for unreasonably withheld or delayed payments under section 10 of Regulation 664?
- e. Is the applicant entitled to interest on any overdue payment of benefits?

## **RESULT**

- [6] For the reasons set out below, I find that the applicant is not entitled to a non-earner benefit from February 23, 2019 to October 6, 2020. She is not entitled to a medical benefit for physiotherapy treatment and the treatment plan for assisted devices. The claim for an award is dismissed. The claim for interest is dismissed.

## **EVIDENTIARY ISSUE – SURVEILLANCE EVIDENCE**

- [7] An issue was raised at the outset of the hearing by the applicant objecting to the introduction of surveillance video<sup>4</sup> into evidence. The applicant questions their relevance and probative value as the videos are in relation to the non-earner benefit claim and were taken after the time period claimed for the non-earner benefit. The applicant stated the video surveillance was also not received on or before September 21, 2021, the date required for productions set out in the case conference report and order of the Tribunal. The respondent argues the video surveillance evidence should be allowed into evidence on the basis of relevance and it was delivered to the applicant's office on September 22, 2021. After hearing submissions, I allowed the surveillance evidence to be introduced as evidence at the hearing and will assess its relevance and probative value in this decision.

## **OVERVIEW**

### **The Injuries - The Applicant's Evidence**

- [8] As a result of the accident, the applicant testified that she sustained injury to her left shoulder, mid and lower back and right ankle. She saw her family doctor, Dr. Sarah Vorster, general practitioner, the day after the accident and Dr. Vorster

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<sup>3</sup> Exhibit 17, OCF-18 for \$ 5291.40 for physiotherapy dated August 28, 2019.

<sup>44</sup> Exhibits 25 and 26, Xpera Investigation Video, dated August 5, 6, 28 and 29, 2021 and September 4 and 7, 2021, Tab N3, respondent document brief, page 2009.

noted impaired range of motion of the neck but normal passive movement. Dr. Vorster recommended physiotherapy treatment. A CT scan of the cervical spine taken at the hospital a few days after the accident showed minimal degenerative disc disease at C5-6 and was otherwise normal.<sup>5</sup> Imaging of the chest, pelvis, thoracic and lumbar spine and right ankle was also normal. An ultrasound of both shoulders dated April 2, 2019 did not show any tears and was normal. In addition to injuries to her shoulders, right ankle and low back, the applicant claims she sustained a concussion, suffers from headaches, sensitivity to light and noise and has difficulty with memory. The documentary evidence from the occupational therapy assessments by Kim Lamont and Associates indicate the applicant reported to them that she did not hit her head in the accident and the air bags did not deploy. In her written submissions, the applicant describes her pain after the accident as widespread and excruciating and she experienced headache, nausea, dizziness, mental fogginess, vomiting and sensitivity to light and sound worsened.<sup>6</sup>

- [9] The applicant sought chiropractic treatment immediately after the accident on October 9, 2018<sup>7</sup> with Dr. Mark Citro, chiropractor, who completed a disability certificate (OCF3)<sup>8</sup> dated October 15, 2018 wherein he indicates the applicant sustained a concussion, whiplash, TMJ disorder and sprains and strains to the acromioclavicular joint, ribs, sternum and ankle. As Dr. Citro is a chiropractor, a diagnosis of a concussion and a TMJ disorder is outside his area of expertise. Kim Lamont & Associates in its OT assessment dated November 29, 2018<sup>9</sup> and in the Assessment of Attendant Care Needs dated May 10, 2019<sup>10</sup> refer to a diagnosis of concussion, whiplash and associated disorder. As the assessments are completed by occupational therapists, the reference to a diagnosis of a concussion is beyond their expertise.
- [10] The applicant submitted medical evidence from Dr. David Crisp<sup>11</sup> who completed a neurology consulting report on April 3, 2019. Dr. Crisp told the applicant her symptoms of headache, light and sound sensitivity, nausea, etc. were symptoms of a concussion. His report states “she *unfortunately suffered a concussion and whiplash injury*. He notes *the extent and severity of the symptoms has superseded the pre-existent headache that followed the dental*

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<sup>5</sup> Clinical notes, Ross Memorial Hospital, pages 62 to 68, applicant document brief.

<sup>6</sup> Written submissions of applicant, paragraph 12 and 13 and exhibit 6, Ross Memorial Hospital, patient File November 27, 2018.

<sup>7</sup> Exhibit 2, CNRs dated November 27, 2018, Dr. Mark Citro, chiropractor.

<sup>8</sup> Exhibit 3, OCF 3 of Dr. Mark Citro dated October 15, 2018, written submissions of the applicant, paragraph 15.

<sup>9</sup> OT Initial Assessment, Kim Lamont & Associates, dated November 29, 2018.

<sup>10</sup> Re-Assessment of Attendant Care Needs, Kim Lamont & Associates, dated May 10, 2019, page 1652.

<sup>11</sup> Exhibit 10, Dr. David Crisp, Neurology Consulting report, dated April 3, 2019.

*procedure. Therapy for concussion and migraine are basically the same.”* She was also referred to Dr. Verity John, for a neurology examination completed on February 3, 2020<sup>12</sup> and who stated the diagnosis of the applicant’s symptoms “*is likely a concussion.*” An assessment was completed by Dr. Christopher Hope dated November 4, 2019<sup>13</sup> who concluded there is no indication of a brain injury. Dr. Oshidari in his report<sup>14</sup> reviewed in detail the medical records submitted including the report by Dr. Crisp. He concluded it was difficult to come to a conclusion regarding the potential for a concussion post accident. Dr. Oshidari also noted in his report that there was evidence of some prior symptoms in August 2018 of a concussion about two months before the automobile accident.

- [11] The medical records and testimony that the applicant indicate the applicant suffered from concussion symptoms from the accident. She may have had prior symptoms of a concussion however it is clear the accident made those symptoms worse. The applicant testified that in mid 2019 she paid for treatment at the Shift Concussion Management Clinic (the Clinic), which began in June 2019 and which she found the most useful in treatment of her concussion.<sup>15</sup> The applicant received osteopathic, physiotherapy and massage treatment.<sup>16</sup> She testified that treatment of the concussion symptoms by the Clinic was helpful and continued until the COVID pandemic of 2020.
- [12] The applicant testified and states in her written submissions<sup>17</sup> that she suffers from a kidney disease which was well managed prior to the accident. She further states that one year prior to the accident she suffered no other prior medical conditions, illnesses or injuries . The medical records contradict the applicant’s statement that she had no other prior medical conditions, illnesses or injuries prior to the accident. Dr. Margaliot<sup>18</sup> noted from the medical records that in the months before the accident, there were reports of chronic fatigue, nausea, dizziness, concentration and word-finding. Dr. Oshidari noted in his report of October 15, 2019<sup>19</sup> that the medical records from the family doctor on April 9, 2018 indicated the applicant had a number of complaints and been feeling unwell for at least the past 19 months.

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<sup>12</sup> Exhibit 31, Dr. Verity John, Neurology Consulting report, dated February 3, 2020.

<sup>13</sup> Report by Dr. Christopher Hope dated November 4, 2019.

<sup>14</sup> Dr. Oshidari, Physical Medicine and Rehabilitation Specialist Assessment Report, dated October 25, 2019.

<sup>15</sup> Exhibit 13, Shift Concussion Management, clinical notes, and records, dated August 21, 2019.

<sup>16</sup> Clinical Notes and records of Shift Concussion Management, dated June 2019 to September 2019, Applicant Evidence Brief, tabs L10 and L11.

<sup>17</sup> Applicant written submissions, paragraph 7.

<sup>18</sup> Exhibit 7, Neurology Report of Dr. Adit Margaliot, neurologist, dated February 6, 2019

<sup>19</sup> Dr. Oshidari, Physical Medicine and Rehabilitation Specialist Assessment Report, of October 25, 2019, page 227.

## DENIAL OF THE NON-EARNER BENEFIT AND TREATMENT PLANS

- [13] The respondent relies on its IE assessments to support its position that the applicant does not meet the test for a non-earner benefit and the treatment plans are not reasonable and necessary. On February 11, 2019, Aviva denied the NEB and assistive devices based on IE Multidisciplinary Report of Dr. Basil Johnston (orthopaedic surgeon), Dr. Adit Margaliot (neurologist) and Rod Pritchett (occupational therapist) dated February 6, 2019.
- [14] The multidisciplinary report dated February 6, 2019 included the report by Dr. Johnston<sup>20</sup> who examined the applicant on January 10, 2019 and diagnosed the applicant with a WAD 2 (whiplash associated disorder) neck strain and soft tissue injuries to the shoulders and right foot. The applicant reported limitations with pushing, pulling, lifting and needing help post-accident with washing her hair, grocery shopping and housekeeping. Her hobbies included hiking and cooking. He determined that while she sustained functional impairments from the accident, she continued to function within the limits imposed by her symptoms. He recommended that she be “increasingly active” in all her pre-accident activities, which he identified as therapeutic. As he put it, “the more she does it, the more she will be able to do”.
- [15] Dr. Margaliot<sup>21</sup> completed her assessment on January 14, 2019 and noted complaints of headaches, photophobia, sonophobia, nausea, dizziness, fatigue, tinnitus and memory difficulties. The applicant denied any difficulty with memory or fatigue before the accident. She reported post-accident being unable to do any housework, grocery shopping, outdoor maintenance or push her daughter in a stroller. She was able to prepare simple meals and had resumed driving. Dr. Margaliot concluded that given the lack of objective neurological deficits, the applicant did not meet the non-earner test. She also concluded the treatment plan for assistive devices was not reasonable and necessary from a neurological perspective. The applicant testified that she did not agree with Dr. Margaliot’s conclusions and the comment made in the multidisciplinary report that she was not forthcoming or truthful during the examination.
- [16] Rodney Pritchett, occupational therapist, completed an examination on January 8, 2019 and reported on the applicant’s functionality. He noted she reported having

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<sup>20</sup> Exhibit 8, Orthopaedic Surgery Assessment of Dr. Basil Johnston, dated February 6, 2019, section 44 IE Orthopaedic Assessment.

<sup>21</sup> Exhibit 7, Neurology Report of Dr. Adit Margaliot, neurologist, dated February 6, 2019, written submissions of the applicant and Exhibit 9, Rodney Pritchett section 44 IE OT In-Home Assessment, February 6, 2019, Exhibit Book pp. 86 – 114. Exhibit 15, Rodney Pritchett, occupational therapist, In Home Assessment and Form 1, dated October 2, 2020.

difficulty applying makeup and with fingernail and toenail care but was able to bathe and dress. She reported being unable to fully complete her pre-accident housekeeping, but gradually resumed personal care tasks, light housekeeping and caregiving tasks. He concluded the applicant demonstrated sufficient functional ability to manage most aspects of personal care and at least light housekeeping and caregiving tasks. She was able to dust, prepare light meals, and had resumed driving. In his form 1 re-assessment on October 2, 2020 <sup>22</sup> he noted the applicant had achieved 50% recovery from the accident and had reported doing about 50% of her normal activities prior to the accident. She was still however dealing with musculoskeletal and post concussion issues. The applicant testified that the statement that she was 50% recovered was accurate but she was only capable of doing 50% of her pre-accident activities.

- [17] Addendum reports<sup>23</sup> were completed by all three IE assessors on May 22, 2019. Their opinions remain unchanged.

### **Non-Earner Benefit**

- [18] The test for entitlement to a non-earner benefit is set out in sections 3(7)(a) and 12(1) of the *Schedule*. Section 12 (1) states the insurer shall pay a non-earner benefit to an insured in the amount of \$185 per week who sustains an impairment as a result of an accident if the insured person satisfies that he or she suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and does not qualify for an income replacement benefit. Section 3(7)(a) of the *Schedule* states that a person suffers a complete inability to carry on a normal life as a result of an accident if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.
- [19] The parties rely on the *Heath v. Economical Mutual Insurance Company*<sup>24</sup> decision and the principles stated that apply to determine whether the applicant is entitled to a non-earner benefit. These principles to assess entitlement to a non-earner benefit include the following:
- (a) A comparison of the insured person's daily life activities before and post-accident.

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<sup>22</sup> Exhibit 15, Rodney Prichett, occupational therapist, In Home Assessment and Form 1, dated October 2, 2020.

<sup>23</sup> Exhibit 20, Addendum reports, Respondent LAT Exhibit Brief, tab 88, page 153.

<sup>24</sup> *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391 (CanLii), paragraph 50, and written submissions of the applicant, paragraph 54, written submissions of the respondent, paragraphs 26 to 28.

- (b) The comparison involves an assessment of the insured persons activities and circumstances over a reasonable period prior to the accident, the duration of which will depend on the facts of the case.
- (c) In considering an insured person's pre-accident activities greater weight can be placed on activities seen as more important to the insured person pre accident.
- (d) It is not sufficient for an insured person to demonstrate that there were changes in his or post-accident life. An insured person must establish that the injuries continuously prevent him or her from engaging in substantially all of their pre-accident activities. The disability has to be uninterrupted. It is insufficient if the insured person is only sometimes or occasionally prevented.
- (e) The evidence must demonstrate that the insured person has significant restrictions in performing an activity as a result of the injuries sustained in the accident. "Engaging in" should be interpreted from a qualitative perspective. Even if an insured person can still perform an activity, if the insured experiences significant restrictions when performing that activity, it may not count as "engaging in" that activity.
- (f) In cases where pain is a primary factor that allegedly prevents the insured person from engaging in his former activities, the question is not whether the insured person can physically do these activities, but whether the degree of pain experienced, either at the time or subsequent to the activity, is such that the individual is prevented from engaging in those activities.

[20] Based on the totality of the evidence and for the reasons set out below, I find the applicant has not established that she is entitled to the non-earner benefit from February 23, 2019 to October 6, 2020 for the following reasons.

[21] The applicant maintains the evidence will demonstrate that as a result of her physical injuries and post concussion symptoms, she is incapable of engaging in her pre accident meaningful activities such as childcare, domestic, social and recreational activities that she engaged in regularly before the accident.<sup>25</sup> Prior to

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<sup>25</sup> Written submissions of the applicant, paragraph 55.



the accident she states that she had an active lifestyle, was independent with self-care and child care and she was engaged in physical and recreational activities such as exercising and using the local gym, engaging in painting and crafts. She enjoyed going to church and driving. She was responsible for all housekeeping activities, laundry, meal preparation and grocery shopping. .

[22] In her written submissions, the applicant summarized the state of her impairments and impact on her meaningful activities of daily living after the accident as follows:

- a. At 3 months (from the date of the accident to January 6, 2019), she cannot perform basic childcare activities. Her mother in law took over some of the meal preparation and child care activities.<sup>26</sup> Dr. Margaliot in her report indicates the applicant had by January 2019 resumed 20% of her pre-accident activities. The applicant had reported to Dr. Margaliot that she was still post-accident unable to do any housework, grocery shopping, outdoor maintenance or push her daughter in a stroller but she was able to prepare simple meals and had resumed driving. Rodney Prichett in his reports notes the applicant had resumed personal care, light housekeeping and caregiver tasks.
- b. At 6 months (from January 7, 2019 to April 6, 2019) the applicant states she is incapable of holding her child. Her husband took over meal preparation. She hired a personal support worker (PSW) as she needed assistance with personal care such as showering and pushing a stroller. The applicant testified that she agreed with the comments of the occupational therapist<sup>27</sup> that she had found ways to adapt to her impairments. Kim Lamont the occupational therapist indicated in February 13, 2019 that the applicant had resumed 20% of her pre-accident activities.<sup>28</sup> In addition, in March 2019 the applicant travelled to Florida with her family at which time her pain was tolerable and she had family to assist her during the vacation time.
- c. At 9 months (May 2019 to July 2019) she attended public places like the library but had difficulties. For example, in June 2019 she tried to attend a farmers market with her child and spouse but her symptoms flared up. She wasn't able to stay at the event. The applicant testified

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<sup>26</sup> Applicant written submissions, paragraph 17.

<sup>27</sup> Exhibit 11, Shannon Pendenza, occupational therapist, Re-Assessment of Attendant Care Needs and Form 1, dated May 10, 2019.

<sup>28</sup> Kim Lamont and Associates, February 13, 2019 report of a telephone call with the applicant.

that her heightened vehicle anxiety continued. The occupational therapist, Kim Lamont and Associates stated in their report of May 10, 2019 that the applicant feeds herself independently, is able to prepare light meals, has the help of a PSW with meal preparation, and grocery shopping. The applicant was also doing 45 minute walks.

- d. At 12 months (August 2019 to October 6, 2019) she submits she continued to suffer severe post concussion symptoms <sup>29</sup> and was relying on the assistance of the PSW for self care and had hired a housekeeper to perform housecleaning.

[23] In summary, the applicant in May 2019 had resumed exercising including a daily 45 minute walk. The clinical notes from the Clinic of September 26, 2019, indicate the applicant was driving. The physiotherapist noted that in November 2019, the applicant was “able to lift her daughter easier” with some pain and her “balance is improved greatly”. She was doing 15 minute gentle fit exercise videos “without adverse affect”. By the end of 2019 the applicant was able to return to some Yoga classes which went online during the COVID pandemic. She was also able to travel to Buffalo and travelled to Florida in March 2019 for a two week vacation which is a significant activity.

[24] A January 17, 2020 progress note<sup>30</sup> from the Clinic reported the applicant was able to watch TV with her daughter and was walking and had completed Pilates classes once a week. She was able to do more with less symptoms. The August 21, 2020 telephone consultation note from the Clinic indicated improvement in her daily activities. She had increased strength. She was able to lift her daughter (30 pounds) and was able to do more meal preparation. She had noted improvement in her concussion symptoms since being at home during the pandemic. Rodney Prichett in his In Home Assessment report of October 2, 2020 <sup>31</sup> indicated the applicant could perform household duties such as vacuuming, sweeping, making beds and preparing simple meals. As mentioned previously, he noted the applicant had achieved by October 2, 2020 a 50% recovery from the accident and had reported doing about 50% of her normal activities prior to the accident.

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<sup>29</sup> Written submissions of the applicant, paragraph 25.

<sup>30</sup> Exhibit 13, Progress Note from the Clinic dated January 17, 2020.

<sup>31</sup> Exhibit 15, Rodney Prichett, occupational therapist, In Home Assessment and Form 1, dated October 2, 2020.

## **Evidence from the applicant's spouse and mother**

[25] The applicant's spouse and mother testified that the applicant had an active life prior to the accident and had engaged in cycling, races, attending concerts, church and visiting family and friends. Going to church, cooking for family and friends and child care were meaningful activities for the applicant. Both testified "everything changed after the accident." Her spouse testified that the concussion symptoms worsened in mid 2019. Prior to the accident, the applicant independently managed all the child care, housekeeping and self care activities. He noted that after the accident she had difficulties attending outings. For example, in a drive to Buffalo in 2019, she had to forego a trip to the aquarium with her spouse and child because of a flare up of her symptoms. He testified after the accident he took over child care and household chores. She still does not go to church and she drives short trips and cannot watch movies as before. Her mother testified that she helped by driving the applicant to medical appointments, including to the Clinic and helping with child care and meal preparations. Her daughter had to avoid certain activities like grocery shopping and vacuuming.

## **Video Surveillance Evidence**

[26] The respondent submitted a surveillance report and video surveillance evidence<sup>32</sup> taken on August 5, 6, 28 and 29 and September 4 and 7, 2021. The applicant is observed in the videos:

- a. shopping at a grocery store under fluorescent lights without wearing sunglasses,
- b. reaching above her head with her left arm to close her vehicle's trunk,
- c. using a cell phone while pushing her stroller,
- d. socializing with others at an outdoor event, entering a coffee shop with her stroller and daughter while holding open the door with her right arm, multitasking at a park, rocking a stroller and lifting and holding her newborn daughter,
- e. sitting at a playground with children and parents, and

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<sup>32</sup> Exhibits 25 and 26, Xpera Investigation Video, dated August 5, 6, 28 and 29, 2021 and September 4 and 7, 2021, Tab N1 to 3, respondent document brief.

- f. walking, bending at the waist, enter and exit a car with no difficulty or assistance.

[27] I find that the surveillance evidence with reference to the non-earner benefit is of little probative value as the surveillance is taken in August and September 2021, some 10 and 11 months after the end of the period claimed for the non-earner benefit. The video shows the applicant is able to resume some of her normal activities of daily living in August and September 2021 such as walking, bending, pushing a stroller, child care and shopping.

### **ANAYSIS OF THE NON-EARNER BENEFIT**

[28] I find that the applicant has not established that she meets the test for a non-earner benefit to support her claim that she suffers a complete inability to carry on a normal life as a result of an accident from February 23, 2019 to October 6, 2020.

[29] *Heath* requires that even if an insured can still perform an activity, if the insured person experiences significant restrictions when performing that activity, it may not count as “engaging in” that activity. I find the applicant in 2019 had regained some independence with self-care activities such as bathing and dressing. Although she needed the assistance, she was able to perform light housekeeping and meal preparation, was able to resume grocery shopping although needed help with heavier items and had resumed child care including being able to lift and carry her daughter and push her stroller. She had also restarted exercising such as daily walks, and Yoga and Pilates classes.

[30] Based on the applicant’s testimony, by May 2019 and June 2019 she is engaging in social activities although some difficulties are noted due to the post concussion symptoms. For example, in June 2019 she tried to attend a farmers market with her child and spouse but her symptoms flared up and so she wasn’t able to stay at the event. She travelled to Buffalo in 2019 but had to forego a trip to the aquarium due to a flare up of her symptoms. The applicant testified that despite heightened vehicle anxiety, she was driving. The occupational therapist, Kim Lamont and Associates stated in their report of May 10, 2019 that the applicant feeds herself independently, is able to prepare light meals, but has the help of a PSW with meal preparation, grocery shopping and had also hired a housekeeper to perform housekeeping. Based on the principles in *Heath*, I find despite some restrictions the applicant is engaging in her pre accident activities such as self care, child care, driving, exercising, meal preparation, grocery shopping and housekeeping that she ordinarily engages in pre-accident.

[31] I agree with the respondent that it is not sufficient for the applicant to demonstrate that there were changes in his or her post-accident life. Rather, it is necessary that the applicant establish that those changes amounted to being continuously prevented from engaging in substantially all of that person's pre-accident activities. The phrase "continuously prevents" means that a claimant must prove "disability or incapacity of the requisite nature, extent or degree which is and remains uninterrupted".

[32] I find based on the activities listed in detail in paragraph 22 to 24 above, that the applicant has not shown that she is continuously prevented her from engaging in substantially all of her pre-accident activities during the time period from February 2019 to October 6, 2020. Post-accident she:

- a. engaged in child care activities such as washing her daughter's hair and bathing her (by end of 2019), lifting her daughter into the stroller when needed (by August 2020) and going to coffee shops, parks and the drug store (by fall 2019).
- b. was exercising including walking, which was encouraged by the occupational therapist, attending a 6 class yoga pass (by the end of 2019), participating in 15 minute exercise videos and Pilates classes.
- c. had not yet returned to going to church in person and concerts with her spouse however due to the COVID pandemic in 2020, church activities were online and not in person. The applicant stated to an IE assessor that she was attending church online.
- d. had not returned to hosting gatherings and preparing meals for her friends and family although she had successfully travelled to Florida with her family for two weeks in March 2019. I also note that due to the COVID pandemic in 2020, family and recreational activities were also restricted.

[33] Counsel for the applicant submits the non-earner benefit is not just about whether you can physically do an activity but the degree of pain experienced at the time of the activity such that the applicant is practically prevented from engaging in those activities.<sup>33</sup> In support of that position, counsel refers to the case of *S.B. v Aviva*<sup>34</sup> where soft tissue injuries prevented the applicant from engaging in several activities that were meaningful to him. The applicant testified

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<sup>33</sup> Written submissions of the applicant, paragraph 54.

<sup>34</sup> *S.B. v Aviva General Insurance Company*, 2021 CanLii 2055 (ON LAT), , applicant book of authorities, Tab 1 and see also *I.D.C. v. Aviva Insurance Canada*, 2019 CanLii 101540 (ON LAT), , book of authorities, applicant, Tab 2.

her pain continued and at time was excruciating however as outlined above she was able to return and engage in numerous activities of daily living despite the pain complaints. She also testified her treatment at the Clinic for the concussion symptoms was very helpful

- [34] I do not find evidence to support the position that the applicant's pain is such that she is prevented from engaging in the activities she normally engaged in prior to the accident. As specified in paragraphs 24 and 25 above, the applicant in 2019 and 2020 despite pain complaints has resumed a number of activities including child care, exercise classes, going to church, albeit online. The COVID pandemic of 2020 would also have impacted the ability to visit or host family and friends, attend exercise class and church in person as these were curtailed in 2020 due to the COVID pandemic.
- [35] Based on the totality of the evidence, the applicant has not met her burden to establish that she meets the non earner test for the period claimed from February 2019 to October 6, 2020. .

#### **TREATMENT PLANS FOR PHYSIOTHERAPY AND ASSISTED DEVICES**

- [36] The applicant bears the burden of proving the treatment plans are reasonable and necessary.
- [37] Under section 15 of the *Schedule*, for medical benefits, subject to section 18, the insurer "shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of an accident".
- [38] The standard to determine if a treatment plan is reasonable or necessary is whether:
- a. The treatment goals, as identified, are reasonable;
  - b. The treatment goals are being met to a reasonable degree; and,
  - c. The overall costs of achieving these goals are reasonable.
- [41] Based on the totality of the evidence, I find the applicant has not satisfied the reasonableness and necessity test as outlined above for the physiotherapy treatment and the assisted devices.

#### **THE TREATMENT PLAN FOR PHYSIOTHERAPY**

- [42] The OCF-18<sup>35</sup> refers to the injuries as including a sprain and strain of the upper arms, thoracic spine and shoulders and a concussion and whiplash. The applicant testified the treatment plan for physiotherapy was to treat post concussion symptoms which included vestibular manipulations. The goals are listed as reducing pain, improving range of motion and vestibular and ocular function and a return to activities of normal living.
- [42] The OCF 18 however identifies the treatment as osteopathic, massage and physiotherapy treatment and states that applicant has been attending physiotherapy and chiropractic treatment but with minimal improvement.
- [43] Dr. Oshidari completed a review of the treatment plan and in his report<sup>36</sup> concluded that the treatment plan for physiotherapy was neither reasonable nor necessary. He stated the applicant had attended chiropractic and physiotherapy treatment and despite this treatment the applicant still had headaches, neck and back pain. He noted the applicant had constant pain in her neck which radiated to her shoulders and upper extremities. He diagnosed the applicant with sprain and strain of the cervical, thoracic and lumbar spine, contusion of the shoulder and tension headaches. He stated that after a year of treatment she had not significantly increased her function or decreased her symptoms dramatically and had physically reached maximum medical improvement. The treatment plan was therefore not reasonable and necessary.
- [44] Based on the documentary evidence and testimony of the applicant, there is insufficient evidence to establish that the treatment goals for additional physiotherapy are being met to a reasonable degree. The treatment plan is not reasonable and necessary.

## **TREATMENT PLAN FOR ASSISTED DEVICES**

- [45] The OCF-18<sup>37</sup> treatment plan of \$7,681.06, dated November 29, 2018 included Occupational Therapy (OT) sessions and a number of devices. Rodney Prichett found the recommended 120 minute 5 OT sessions, and associated travel, session notes and OT progress notes for a total of \$2,394.50 were reasonable. The balance of the treatment plan for the assistive devices was not reasonable and necessary according to Rod Prichett because the devices are cost prohibitive and contrary to and hinder her participation in her daily activities and the applicant's rehabilitative goals.

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<sup>35</sup> OCF-18 dated August 28, 2019, Tab D1, respondent document brief, Exhibit 17.

<sup>36</sup> Dr. Oshidari, Physical Medicine and Rehabilitation Specialist Assessment Report, dated October 25, 2019.

<sup>37</sup> Exhibit 16, OCF-18 dated November 29, 2018.

- [46] The proposed assistive devices included a stroller at a cost of \$1,249, a Roomba vacuum cleaner for \$349, a mattress for \$1,874, kitchen equipment to assist with preparing meals for \$150, a laundry basket on wheels for \$50, and ergonomic mat for \$150 and a bath seat for \$80 and front clasping bra for \$50. The goals listed were numerous and include independence with home maintenance, self care, community transportation, improving pain management, cognitive symptoms, sleep and a return to leisure and normal activities of life.
- [47] I find there is limited evidence that the assisted devices would assist the applicant to reach the stated goals on the basis that early in 2019 she had resumed at least 20% of her normal activities of daily living, including driving, and in mid 2019 was using a stroller to push her daughter. The applicant also testified she personally purchased a light weight stroller and mattress. The evidence indicates the applicant's medical condition continued to improve such that in 2019 she has regained independence with self care and some independence child care and housekeeping. The applicant was able to return to her activities of daily living without these assisted devices other than a lighter stroller and mattress. I find there is insufficient evidence that the balance of the treatment plan for the assisted devices is reasonable and necessary.

## **AWARD**

- [48] Section 10 of Regulation 664 permits the Tribunal to award a lump sum of up to 50% of the amount to which the insured person (i.e. the applicant) was entitled at the time of the award together with interest on all amounts then owing (including unpaid interest) if it finds that that an insurer (i.e. the respondent) has "unreasonably" withheld or delayed payments.
- [49] It is well settled that an award should not be ordered simply because an insurer made an incorrect decision. Rather, in order to attract an award the insurer's conduct must be excessive, imprudent, stubborn, inflexible, unyielding or immoderate.<sup>38</sup> The respondent relied on its IE assessors reports that concluded in February 2019 and confirmed in their addendum reports of May 22, 2019 that the applicant did not suffer a complete inability to carry on a normal life. Dr. Johnston in February 2019 recommended the applicant return to an active lifestyle. This was also the same conclusion reached by Rod Prichett who did not

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<sup>38</sup> See: *17-006757 v Aviva Insurance Canada*, 2018 CanLII 81949 (ON LAT) at para. 28 and *S.M. v Unica Insurance Inc.*, 2020 CanLII 61460 (ON LAT Reconsideration) at para. 39 ("S.M. v Unica").



find certain assisted devices reasonable and necessary as they are not consistent with the view that returning to an active lifestyle was beneficial to the applicant in her recovery.

- [50] The respondent adjuster, Britney Lichty was cross examined on the denial process of the treatment plans and the non-earner benefit claim. Her testimony did not establish any basis to allow an award claim. The respondent relied on the reports of its IE assessors which did not support a claim for a non-earner benefit and the treatment plans. It was reasonable for the respondent to rely on these IE reports. I find there is no evidence or basis on which to make an award and the claim for an award is therefore dismissed.

### **INTEREST**

- [51] The claim of interest is dismissed.

### **CONCLUSION**

- [52] For the reasons outlined, the applicant is not entitled to a non-earner benefit from February 23, 2019 to October 6, 2020. She is not entitled to the medical benefit for physiotherapy and assisted devices as the treatment plans are not reasonable and necessary. The claims for an award and interest are dismissed.

**Released:** March 16, 2022



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**Thérèse Reilly, Adjudicator**