



Citation: Hawes v. Aviva General Insurance Company, 2022 ONLAT 20-009483/AABS

Licence Appeal Tribunal File Number: 20-009483/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:

Margaret Hawes

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: Brian Norris

APPEARANCES:

For the Applicant: Sherilyn Pickering, Counsel

For the Respondent: Alexander Dos Reis, Counsel

HEARD: By Way of Written Submissions

BACKGROUND

- [1] Margaret Hawes, (“the Applicant”), was injured in an automobile accident on September 14, 2017 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (Schedule)*¹ from Aviva General Insurance Company, (“the Respondent”).
- [2] The Applicant claimed entitlement to psychological treatment, outlined in two treatment plans. The Respondent partly approved the treatment plans. Predominantly at issue, is whether the Applicant is entitled to receive psychological treatment at an hourly rate of \$149.61 per hour, instead of the rate approved by the Respondent, which is \$100.00 per hour.
- [3] In addition to the dispute regarding the hourly rate of the service provider, the parties disagree as to whether the Applicant is also entitled to certain documentation fees as well as relaxation materials/psychological workbooks.
- [4] The Applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (“Tribunal”) for resolution of this dispute.

ISSUES IN DISPUTE

- [5] The following issues are to be decided:
 - 1) Is the Applicant entitled to a medical benefit in the amount of \$3,396.87, less the amounts approved by the Respondent to-date, for a treatment plan dated November 7, 2018?;
 - 2) Is the Applicant entitled to a medical benefit in the amount of \$2,050.35, less the amounts approved by the Respondent to-date, for a treatment plan dated April 9, 2018?; and
 - 3) Is the Applicant entitled to interest on any overdue payment of benefits?
- [6] Applicant referred to a dispute regarding the payment of an approved psychological assessment. The issue is not listed in the Case Conference Report and Order dated January 12, 2021 and is not addressed by the Respondent. I find it is not properly before me and I decline to comment on it.

¹ O. Reg. 34/10.

RESULT

- [7] I find that the Applicant is not entitled to the unapproved balance of the disputed treatment plans. No interest or costs are payable.

BACKGROUND

- [8] The fee for services provided through the *Schedule* is governed by the *Professional Services Guideline* ("the PSG")², as outlined in section 49(1) of the *Schedule*. Pursuant to the PSG, the Respondent is not liable to pay for expenses related to professional services rendered to an insured person that exceed the maximum hourly rates set out in it. Further, the PSG provides that the maximum hourly rate for psychologists and psychological associates is \$149.62. The rate provided for unregulated professional is \$58.19 per hour. Relevant to this dispute, the PSG states: services provided by health care professionals/providers, unregulated providers and other occupations not listed in the Guideline are not covered by the Guideline. The amounts payable by an insurer related to services not covered by the Guideline are to be determined by the parties involved³.
- [9] Tribunal cases vary on the issue and currently there is no higher authority which would serve as precedent and bind me on the issue. However, the Tribunal has determined that it has the authority to resolve disputes over the hourly rate of a service provider, as is the case in *I.B. v Aviva Insurance Company of Canada* ("*IB*")⁴. I adopt the reasoning in *IB* and find that I have the jurisdiction to hear this dispute.
- [10] To-date, the Respondent has agreed to pay the Applicant's psychologist at the rate of \$100.00 per hour, in accordance with the rate in *Diflorio v. Aviva Insurance Company of Canada*⁵. Thus, the Applicant is entitled to the services provided at \$100.00 per hour, at a minimum.
- [11] The onus is on the Applicant to demonstrate that she is entitled to the enhanced hourly rate and the unapproved goods and services.

² Financial Services Commission of Ontario – Professional Services Guideline, Superintendent's Guideline no. 03/14, September 2014.

³ Ibid

⁴ 2020 CanLII 40329 (ON LAT).

⁵ 2018 CanLII 153161 (ON LAT).

ANALYSIS

- [12] The PSG includes reference to psychologists and psychological associates, but not psychotherapists. As noted above, the service provided is a registered psychotherapist and the PSG is silent on the maximum hourly rate of a psychotherapist. Thus, the psychotherapist is not covered by the PSG and it is left to the parties to decide on what an acceptable hourly rate for the services. Since the parties are unable to agree on an acceptable hourly rate, it is up to me to determine what that rate would be.
- [13] The Applicant relies mainly on three cases to support her position: *JV and Aviva* (“JV”)⁶, *I.B. V. Aviva Insurance Company of Canada* (“IB”)⁷, and *[A.S.] v Aviva Insurance Company* (“AS”)⁸. In *JV*, the Tribunal determined that the Applicant in that case was entitled to services provided by a psychotherapist at the rate of \$149.61 per hour. The reasoning behind that decision was because the psychotherapist provided cognitive behavioural therapy (“CBT”) that was akin to the services of a psychologist. That decision also considered the service provider’s training in CBT, the fee charged for treatment for uninsured persons, and the College’s communication with FSCO seeking to be added to the PSG, at a rate of \$149.61. In *LB*, the Tribunal determined that the psychologist’s rate was most appropriate for a psychotherapist based on the fee guide of the Ontario Psychological Associate and the similarity between the services provided by psychologists and psychotherapists. In *AS*, the Tribunal found that a psychotherapist was performing the same services as a psychologist and was therefore entitled to payment at the rate of a psychologist.
- [14] The Respondent relies on *Baranov v. Aviva General Insurance* (“Baranov”)⁹. In that case, the Tribunal determined that a psychotherapist was entitled to a rate of \$99.75 per hour on the basis that the service provider’s educational level (holding a Master’s degree) and experience. The adjudicator in *Baranov* distinguished *JV* because the treatment plan in *Baranov* sought psychotherapy by a psychotherapist and the plan made no reference to CBT.
- [15] I find that *Baranov* is the most applicable case and I agree with the findings therein. Amongst the other things that I will address later, the services proposed in treatment plans in dispute are counseling, mental health and additions. The service provider is a psychotherapist. There is no mention of CBT or the services

⁶ 2019 CanLII 130366 (ON LAT)

⁷ 2020 CanLII 40329 (ON LAT)

⁸ 2020 CanLII 12787 (ON LAT)

⁹ 2020 CanLII 87933 (ONLAT)

of a psychologist. To me, the *Baranov* decision was based on the services proposed in the treatment plan, the proposed service provider, and the absence of any reference to CBT. Thus, I find the scenario at hand is analogous to *Baranov*.

- [16] The Applicant's reasons to distinguish *Baranov* are unconvincing. Whether the adjudicator found that the psychotherapist is an unregulated provider, which I note is not my interpretation of the decision, had little impact on the outcome of the decision. What is relevant for the case at hand is that the adjudicator in *Baranov* determined that a psychotherapist is not listed in the PSG and is subject to an hourly rate agreed upon by the parties or imposed by the Tribunal. The fact that the psychotherapist in *Baranov* sought a rate higher than a psychologist had no impact on the decision - the adjudicator awarded a rate which is less than what was proposed and less than that of a psychologist.
- [17] The absence of any reference to CBT in the treatment plans is not a "red herring" as the Applicant submits. She suggests that this is unnecessary to refer to CBT because other service providers, such as physiotherapists, are not required to outline whether they will perform laser therapy or electronic muscle stimulation. I find that this position fails to appreciate that the psychotherapist is not captured in the PSG and it is incumbent on the Applicant, in conjunction with her service provider, to provide the relevant information to justify paying a certain hourly rate. The treatment plans in dispute here both have additional comment sections, which both fail to make any reference to CBT. The counselling records make no mention of CBT. In fact, the first note in those records concludes that the Applicant is willing to try "psychotherapy". The counselling records do not indicate that the Applicant's psychotherapy treatment is specialized in any way.
- [18] A psychotherapist is not akin to a psychologist, that is precisely why a psychotherapist is not entitled to a psychologist's rate. Here, the psychotherapist holds a Master's degree in psychology and is in the process of completing a doctoral degree in psychology. While the psychotherapist is well into the process of completing her requisite education to become a psychologist, the service provider is not entitled to the rate of a psychologist or a psychological associate until she achieves that distinction. In addition, the service provider's training in different interventions or subspecialties, including CBT, holds little weight because the PSG groups service providers by designation and not by their subspecialties within the profession. Nevertheless, I acknowledge that the Applicant's psychotherapist confirmed that CBT was a component of the treatment provided to the Applicant, but that is not reflected in the counselling records.

- [19] The efficacy of treatment does not entitle the service provider to a higher rate. The Applicant highlights that the psychological treatment she receives, which includes CBT, has been effective in reducing her psychological symptoms. However, the PSG does not factor in the efficacy of the treatment when assigning the maximum hourly rate for a service provider.
- [20] The service providers rate for matters unrelated to the *Schedule* is not binding on the Respondent or the Tribunal. I appreciate that this psychotherapist is authorized to charge a rate ranging from \$168.75 to \$191.25 for services provided outside of the *Schedule* and that information can be considered in determining a reasonable rate, along with other factors such as precedent. I am aware that the PSG provides maximum hourly rates that are below market value. This is captured in *JV*, where the adjudicator noted that the PSG recommends a rate for psychologists that is significantly less than the rate recommended by the Ontario Psychological Association. Thus, a rate of \$100.00 per hour, may be below market value but is consistent with *Baranov* and the discounted rate contemplated by the PSG for other services.
- [21] A change in the service provider's credentials between the submission of a treatment plan and the provision of the services does not entitle the service provider to a higher rate. The reason for this is not to discredit or disregard a service provider's credentials. Instead, it is because the Respondent did not agree to fund the services at a higher rate. Instances like this are rare, and I would encourage parties to negotiate a reasonable solution in those situations.
- [22] In light of the above, I find that the Applicant has not met her onus to demonstrate that she is entitled to an enhanced hourly rate for psychotherapy services.

ANCILLARY FEES IN DISPUTE

- [23] The Applicant also seeks entitlement to ancillary fees proposed in the November 7, 2018 treatment plan. Notable for this discussion, that treatment plan seeks 3 hours, or \$448.83, for "documentation, support activity" ("the DSA fee") and \$55.00 for relaxation materials/psychological workbooks ("workbooks").
- [24] The Respondent denied the DSA fee as well as the workbooks. It stated that it was unaware of the purpose of the DSA fee and needed more information about the service before approving funding for it. It also found that the workbooks were a duplication of goods and services because it approved funding for the same item in the April 9, 2018 treatment plan.

- [25] The Applicant made no submissions on this issue in her initial submissions. Instead, she used her reply submissions to address the topic, after the Respondent made submissions noting the Applicant's failure to make her case. The Respondent was permitted a sur-reply to respond to the Applicant's submissions made in reply to maintain procedural fairness.
- [26] The Applicant submits that the DSA fee is for a progress report. She submits that progress reports are regularly recommended and funded. She further submits that the reports provide updates to the stakeholders associated with the Applicant's claim as well as the various treatment providers, which operate out of different clinics. With respect to the workbooks, she submits that they are not a duplication because the previous workbooks were completed, and new ones are being proposed.
- [27] I find that the evidence does not support the Applicant's claims and she has failed to meet her onus on the issue of the ancillary fees.
- [28] The evidence does not indicate that a progress report is a required component of her treatment. The psychotherapist is required to document the services provided to the Applicant and this information ought to be sufficient to update other treatment providers or to determine whether additional treatment is required. Here, other than submitting that she has a complex brain injury and post-concussion syndrome, the Applicant provides no compelling reason why a progress report is a reasonable and necessary component of the treatment plan. I find no reasons for a progress report in the treatment plan or the counselling records, and there is no evidence that other treatment providers requested or require a progress report.
- [29] Similarly, the evidence does not indicate that the Applicant requires new materials and workbooks. The counselling records make no reference to the goods. There are no notes to suggest that the Applicant completed the first set of workbooks, that the newly proposed materials and workbooks are different than the ones previously approved, and there is no evidence on the efficacy of the workbooks. Thus, I find that the Applicant has failed to meet her onus to demonstrate that the goods proposed are reasonable and necessary as a result of her accident-related injuries.
- [30] As I have determined that no benefits are owing, it follows that no interest is payable pursuant to section 51 of the *Schedule*.

COSTS

- [31] Pursuant to Rule 19.1 of the *Common Rules of Practice and Procedure, October 2, 2017* (“the *Rules*”), costs may be requested where a party believes another party has acted unreasonably, frivolously, vexatiously, or in bad faith.
- [32] The Applicant, in her reply submissions, seeks costs associated with this matter. She submits that the Respondent’s previous counsel made a number of unproven and unsubstantiated allegations with respect to the Applicant’s psychotherapist. She also asks that the issue of costs be addressed separately to that certain evidence can be put forward to the Tribunal for consideration. The Respondent never addressed the issue of costs in the sur-reply.
- [33] I find no entitlement to costs in this matter and deny the Applicant’s request to address the issue separately.
- [34] The Applicant infers that the behaviour of the Respondent’s previous counsel may be considered to be unreasonable, frivolous, vexatious, or of bad faith. However, she proffered no evidence of the behaviour such as emails between the parties. Further, the Applicant has not distinguished whether the behaviour occurred during the course of the proceeding. As a result, I find that the Applicant has not met her onus to demonstrate that costs are warranted in this matter.

CONCLUSION

- [35] For the reasons outlined above, I find that the Applicant is not entitled to the unapproved balance of the psychotherapy treatment plans or interest;
- [36] No costs are payable; and
- [37] This application is dismissed.

Released: August 3, 2022



**Brian Norris
Adjudicator**