

**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**

Date: 2018-05-25

Tribunal File Number: 17-007962/AABS

Case Name: 17-007962 v Scottish & York

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:

N.S.

Applicant

and

Scottish & York

Respondent

PRELIMINARY DECISION

ADJUDICATOR: Christopher A. Ferguson

APPEARANCES:

Counsel for the applicant: Dale Rosenberg

Counsel for the respondent: Robert H. Rogers

Written Hearing Held: May 14, 2018

OVERVIEW

- [1] NS, (“the applicant”) was injured in an automobile accident on October 16, 2014 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the “*Schedule*”).
- [2] The applicant applied for benefits from the respondent, and applied to the Licence Appeal Tribunal (the “Tribunal”) when the disputed benefits were denied.
- [3] The issues in dispute include whether or not the applicant is catastrophically impaired as a result of the accident, and her entitlement to attendant care benefits. A claim for occupational therapy is also in dispute.
- [4] The parties are scheduled to resume case conferencing with the Tribunal on July 27, 2018. Before that case conference, they have asked the Tribunal to determine the preliminary issue set out below.

PRELIMINARY ISSUE

- [5] Are assessments to determine catastrophic impairment (“CAT assessments”) included as part of the \$50,000.00 (“\$50K”) limit on medical rehabilitation benefits prescribed by the *Schedule*?

FINDINGS

- [6] CAT assessments are not included as part of the \$50,000.00 limit on medical rehabilitation benefits prescribed by the *Schedule*?

REASONS

CAT Assessments

- [7] Section 18(3) of the *Schedule* sets a \$50K limit on medical and rehabilitation benefits payable to insured persons unless they are catastrophically impaired. The limit includes the costs of medical and rehabilitation assessments.
- [8] Section 25(1)5 of the *Schedule* requires the insurer to pay reasonable fees charged for preparing an application for determination of CAT impairment under s.45, including any assessment or examination necessary for that purpose.
- [9] Section 45 of the *Schedule* prescribes the process for making an application for determination of CAT impairment, and contemplates medical examinations as part of the application process.

¹ O.Reg. 34/10

Background

- [10] On August 22, 2017, the respondent approved an assessment plan valued at \$18,534 for conducting CAT assessments. It notified the applicant that it was approving the assessment plans under ss.14-15 of the *Schedule*. It noted that this amount approved would in effect be deducted from the \$50K currently available to the applicant for medical and rehabilitation benefits.
- [11] The applicant responded with three letters from her counsel respectively dated August 10, 23, and 31, 2017, requesting the respondent to reconsider its position and to fund the approved treatment plan under s.25 of the *Schedule*. Her position is that this would exempt the approved CAT assessments from the \$50K cap.
- [12] By e-mail dated September 21, 2017, the respondent denied the applicant's request and deducted the costs of CAT assessments from the amount available to the applicant under the \$50K cap. The result was that treatment plans sought by the applicant at the time could not be funded because her benefits were deemed exhausted.

Is the cost of CAT assessments covered by the s.18 cap?

- [13] The respondent argues that CAT assessments are included in the cap on benefits because s.18(5) of the Schedule states:
- i. For the purposes of subsections (1) and (3), medical and rehabilitation benefits payable in respect of an insured person include all fees and expenses for conducting assessments and examinations and preparing reports in connection with any benefit or payment [emphasis is the respondent's] to or for an insured person under this Regulation.
- [14] In the respondent's view, even though CAT determination is not a benefit, the underlined language should be interpreted broadly enough to encompass any benefits or payments that might flow as the result of a favorable CAT determination. I find the respondent's reasoning specious.
- [15] I agree with the applicant that the costs of CAT assessments are funded outside the cap on medical and rehabilitation benefits for the following reasons:
- i. My own reading of s.25(1)5 is that it clearly covers CAT assessments. I agree with the reasoning in *Henderson*² that "there is no room for ambiguity – the insurer shall pay the expenses of a CAT assessment". Other adjudicators have reached the same conclusion.³

² *Henderson v. Wawanese Mutual Insurance Company*, FSCO A-14-001758 – submitted by the applicant

³ See for example *16-000258 v Wawanese Mutual Insurance Company*, 2017 CanLII 9809 (ON LAT) – submitted by the applicant.

- ii. My reading of s.18(5) is that it plainly refers to assessments in connection with any payment or benefit. I find the term “in connection with” to mean that the section only restricts the consumption of medical benefits by non-CAT impaired persons, and that this narrow restriction excludes assessments not directly related to a specific benefit or benefits.
- iii. I concur with a body of decisions that CAT determinations are not a benefit, and neither are assessments required to apply for CAT determination. This further persuades me that CAT assessments are not included in any limit placed on payment for benefits.⁴
- iv. I reject the insurer’s proposition that a decision by lawmakers in 2010 to lower the cap for non-CAT medical and rehabilitation benefits from \$100,000 to \$50,000 should be used to interpret this issue because of a “clear intent to limit recovery”. I find no connection between a decision to lower a cap and any decision as to what things should be included under that cap.
- v. The effect of deducting CAT assessment costs from the \$50K available to “not-yet-CAT” consumers would be to force seriously injured people to plan to hold a significant percentage of entitlement – in this case 37% -- in reserve, just in case they need a CAT assessment. This would represent a serious deterrent to seeking needed treatment, or alternatively act as a major barrier to seeking CAT determination. I find it simply unbelievable that such obvious effects are intended or supported by any reasonable interpretation of the *Schedule*.

CONCLUSIONS

- [16] The applicant’s approved costs of \$18,534.00 for CAT assessment cannot be deducted from the \$50K cap set by s.18 of the *Schedule*. They are payable under s.25 of the *Schedule*.
- [17] The respondent must restore \$18,434.00 to the balance remaining in the applicant’s current entitlement for benefits, pending determination of whether she is CAT impaired.

Date of Issue: May 25, 2018

Christopher A. Ferguson, Adjudicator

⁴ For example, *M F.Z. v Aviva Insurance Canada*, 2017 CanLII 63632 (ON LAT) – submitted by the applicant, supported by the courts in such decisions as *Machaj v. REC General Insurance Company*, 2016 ONCA 257 (CanLII)