

BACKGROUND

- [1] The applicant was injured in an automobile accident on January 31, 2019, and sought benefits from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule Effective September 1, 2010* ("*Schedule*"). On December 2, 2020, the applicant's occupational therapist ("OT") submitted an OCF-18 seeking funding for assessments to determine whether she sustained a catastrophic impairment ("CAT") pursuant to s. 3.1 of the *Schedule*.
- [2] Aviva denied the OCF-18 on the basis that it was not submitted in accordance with s. 45(2)1, taking the position that because the OT who authored Part 4 of the OCF-18 is not a physician, the OCF-18 was improper and non-compliant. The applicant disagreed and applied to the Tribunal for resolution of the dispute. At the case conference, the parties agreed to address the dispute through this preliminary issue hearing.

PRELIMINARY ISSUE

- [3] The issue set out in the application is a treatment plan for \$17,967.00, plus interest, for CAT assessments, proposed by Deena Rogozinsky Therapy, in an OCF-18 dated December 2, 2020 and denied on December 11, 2020. The parties agree that a preliminary issue needs to be addressed:
 - i. Whether a non-physician listed in Part 4 of an OCF-18 for CAT assessments complies with s. 45 of the *Schedule*?
 - ii. Is the applicant entitled to costs under Rule 19?

RESULT

- [4] A non-physician listed in Part 4 of an OCF-18 proposing CAT assessments complies with s. 45 of the *Schedule*. I decline to order costs.

ANALYSIS

Sections 25 and 45

- [5] Section 25(1)5 states that an insurer shall pay "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 or examination necessary for that purpose."

- [6] Section 45(1) provides that an insured may apply to an insurer for a CAT determination. Section 45(2)1 provides that “an assessment or examination in connection with a determination of catastrophic impairment shall be conducted only by a physician but the physician may be assisted by such other regulated health professionals as he or she may reasonably require.”

A non-physician may complete Part 4 of an OCF-18 for CAT assessments

- [7] The applicant submits that s. 45(2)1 refers only to the submission of an Application for Determination of Catastrophic Impairment (“OCF-19”) and not to the submission of an OCF-18. On this basis, she argues that non-physicians, including OT’s like Ms. Rogozinsky, are entitled to complete Part 4 of an OCF-18 seeking funding for CAT assessments, so long as said non-physicians do not complete or submit the OCF-19 itself.
- [8] As I understand it, Aviva’s position is that since the assessment recommended in the OCF-18 is “in connection with” a CAT determination, the OCF-18 submitted must be prepared by and signed by a physician because s. 25 and s. 45 of the *Schedule* are related in connection with this issue. It asserts that the words “any assessment or examination necessary for that purpose” must include a treatment plan (OCF-18) for CAT assessments because the actual assessments cannot be funded without a treatment plan having first been prepared. In this sense, Aviva submits that the OCF-18 is the “necessary assessment or examination.”
- [9] I find Aviva’s interpretation is not supported by a plain reading of s. 45. Further, in my view, there is no ambiguity in the section that would invite the type of purposive interpretation that Aviva undertakes in its analysis. The Supreme Court has confirmed that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.¹ Here, the first part of s. 45(2)1 clearly states that “an assessment or examination in connection with a determination of catastrophic impairment shall be conducted only by a physician.” In other words, I agree with the applicant that if the legislature intended to say that “a [Treatment and Assessment Plan/OCF-18] in connection with a determination of catastrophic impairment shall be conducted only by a physician” the legislature would have expressly done so.

¹ *Rizzo & Rizzo Shoes Ltd. (Re.)*, [1998] 1 SCR 27, at 21.

- [10] In this vein, and as the applicant points out, the *Schedule* is not light on instances where "Treatment and Assessment Plan" is specifically employed, appearing some 30 times in the legislation. Nowhere in s. 45(2) does the phrase "Treatment and Assessment Plan" or "OCF-18" even appear. In turn, nowhere in s. 45(2) does it state, explicitly or otherwise, that a non-physician is prohibited from authoring an OCF-18 for CAT assessments. More specifically to this dispute, nowhere in s. 45(2) does it state that a non-physician is prohibited from authoring Part 4 of an OCF-18 for CAT assessments.
- [11] I find no ambiguity in the language of s. 45(2)1 that would lead me to reasonably conclude that the phrase "an assessment or examination in connection with a determination of catastrophic impairment" means that an OCF-18 proposing CAT assessments must be completed by a physician, or more specifically, that it cannot be completed by a non-physician, like an OT. Rather, I find it clear that the language is referring to the actual act of conducting the CAT determination for the purposes of completing the OCF-19 and not the completion of an OCF-18 or the signing of Part 4 of same.
- [12] The second part of s. 45(2)1 provides support for this interpretation: "[...] but the physician may be assisted by such other regulated health professionals as he or she may reasonably require." I do not accept that this phrase simply means that a physician is entitled to assistance from as many regulated health professionals as they require to fill out Part 4 of an OCF-18 form. There is a certain absurdity to that interpretation. Rather, I find it is clear that a physician must complete the CAT assessments/determination and submit the OCF-19 to be compliant with the *Schedule*, but that a physician may be assisted by as many regulated health professionals to do so as is reasonable and necessary. Given the complexity of a CAT determination and the specialists involved, this makes sense.
- [13] Accordingly, s. 45(2)1 refers only to the submission of an OCF-19 and not an OCF-18. I agree with the applicant that this interpretation is supported by the OCF-19 form on its face as well as industry practice and standards. Indeed, only physicians (save for neuropsychologists conducting an assessment based on criterion 4 of s. 3.1 of the *Schedule*) may complete and submit an OCF-19. In fact, the OCF-19 form mirrors s. 45(2), as it specifically requests the "Physician Information" in Part 2, the "Physician's Report of Catastrophic Impairment" in Part 3, the "Physician Explanation or Comments for Criteria Selected Above" in Part 4, and the "Signature of Physician" in Part 5.

- [14] Aviva's interpretation is also undermined by the OCF-18 form itself. Any health practitioner itemized in the options available in Part 4 of an OCF-18 may author same, including a chiropractor, dentist, nurse practitioner, OT, optometrist, physician, physiotherapist, psychologist, or speech-language pathologist. I agree with the applicant that the *Schedule* does not distinguish between an OCF-18 for assessments related or unrelated to CAT assessments. Where the form for recommending CAT assessments states that it may be completed by a non-physician, it would be illogical to suggest that s. 45(2)1—which, again, does not specifically reference an OCF-18—somehow acts as a bar to non-physicians.
- [15] I note that Aviva has advanced this position at the Tribunal before, finding success on one occasion.² While Tribunal cases are not binding on me, for clarity, I prefer the adjudicator's findings in *Z.J. v Aviva Insurance Company of Canada* (and subsequent dismissal on reconsideration) over the findings made by the adjudicator in *A.B. v. Aviva Insurance Canada*. First, with respect, the adjudicator in *A.B.* erred in conflating the completion of an OCF-18 recommending CAT assessments with the s. 45(2)1 requirement that an OCF-19 be completed by a physician. Second, the adjudicator's analysis stemming from this error was not particularly fulsome. Third, unlike the OCF-18 here, there was no reference to a physician in the completion of the CAT assessments or in any of the related examinations in that case.
- [16] Instead, I agree with the adjudicator's analysis in *Z.J.*, where they determined that s. 45(2)1 speaks to who may conduct CAT assessments (with assistance) to complete an OCF-19 and not who may make recommendations to attend for such assessments in an OCF-18. The adjudicator dismissed Aviva's claim that the OCF-18 was non-compliant, and I see no reason to depart from that finding here. Much like the OCF-18 in *Z.J.* and unlike the OCF-18 in *A.B.*, the OCF-18 here features other practitioners beyond the OT, being a psychologist and an orthopaedic surgeon. Here, the OCF-18 and its additional comments clearly state that the "Executive Summary Report and Ratings" and the "Completion of the OCF-19" items would be completed by Dr. Getahun, orthopaedic surgeon, and not by the OT who signed the OCF-18. In my view, and given my interpretation above, this easily complies with the requirements of s. 45(2)1.
- [17] Aviva offered several alternative arguments specific to this dispute that I do not find particularly relevant or persuasive. It stresses the importance of OT's being defined in s. 25(1)4 and not in s. 25(2)5; submits that an OT is not equipped to

² See: *Z.J. v Aviva Insurance Company of Canada*, 2020 CanLII 37597 (ON LAT); *Z.J. v Aviva Insurance Company of Canada*, 2020 CanLII 98733 (ON LAT Reconsideration); *A.B. v Aviva Insurance Canada*, 2019 CanLII 130375 (ON LAT).

render a diagnosis on causation; that the OCF-18 seeks an "exploration" of CAT; that the OCF-18 is ambiguous; that the OT proposes an assessment by herself and two other physicians and "an unspecified "other" examiner" and that her "clear lack of understanding substantiates the mischief caused when there is lack of compliance."

- [18] First, the fact that OT's are defined in s. 25(1)4 (which addresses attendant care and not CAT) but not referenced in s. 25(1)5 or elsewhere in s. 25(1) is irrelevant to this determination and, in my view, has no bearing on CAT assessments under s. 45(2)1. Second, while I agree that an OT should not render a diagnosis on CAT causation, I find Ms. Rogozinsky's completion of Part 9 can hardly be described as a legal opinion on causation. In any event, it is well-settled that OCF-18s are not medical evidence and causation is not at issue here.
- [19] Third, an "exploration" into an insured's CAT status is precisely the purpose of an OCF-18 recommending CAT assessments. I see no ambiguity. That the OT recommended she conduct an OT assessment herself or that the OT also recommended that other physician's complete assessments is not the smoking gun Aviva seems to think it is. Rather, it is part of the multidisciplinary CAT assessment process and, in my view, supports the applicant's position in this hearing and my own interpretation of the latter part of s. 45(2)1. Again, the OCF-18 makes recommendations for assessments by other physicians because the other relevant assessments for determining CAT—and completing an OCF-19—are beyond the scope of her practice as an OT. Meanwhile, the mysterious "other examiner" Aviva takes issue with is actually clearly identified in the OCF-18 and additional comments as a "Transportation to/from assessments" item.
- [20] Finally, where the *Schedule* is consumer-protection legislation, it is unclear what "mischief" Aviva believes is at play, and especially so where the OT who authored Part 4 of the OCF-18 in dispute is rather qualified to do so. Even though it is not determinative of the issue here, Ms. Rogozinsky is an OT with a Certificate in CAT Impairment Evaluation (C-CAT) and a designation of "C-CAT (Functional Observer)" from the Canadian Society of Medical Evaluators, as well as the applicant's treating OT. I find it difficult to accept Aviva's position that she is somehow incapable or prohibited under s. 45(2)1 to complete and sign the form for recommending CAT assessments. Indeed, she may very well be more qualified to complete an OCF-18 recommending CAT assessments than, say, a random family physician who has no knowledge of the *Schedule*, the *AMA Guides*, or the applicant's impairments.

- [21] In conclusion, so long as a physician opines as to whether the applicant sustained a CAT impairment and completes the OCF-19, an OT like Ms. Rogozinsky's role in completing an OCF-18 recommending CAT assessments is appropriate under s. 45(2)1. The *Schedule* provides no support for Aviva's interpretation that Part 4 of an OCF-18 recommending CAT assessments must be completed by a physician. For these reasons, the OCF-18 for CAT assessments proposed by OT Ms. Rogozinsky is compliant with s. 45 of the *Schedule*. The applicant is successful on this preliminary issue.

Costs

- [22] In submissions, the applicant sought costs in the amount of \$25,000 on account of Aviva's vexatious and bad faith approach in knowingly and improperly denying funding for the OCF-18 on the basis that the OT is not a physician. Rule 19 of the Tribunal's *Common Rules* provides that the Tribunal may award costs up to \$1,000.00 per day where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith.
- [23] I decline to order costs, but with some trepidation. I find Aviva's position on s. 45(2)1 to be concerningly narrow and its submissions—for example, that the applicant simply ask a physician to sign Part 4 or that Aviva did not actually deny the OCF-18—disingenuous. The resulting delay in the applicant's ability to obtain CAT assessments is also not lost on the Tribunal. While the applicant made no specific submissions to support an award under s. 10 of O. Reg. 664, I note that there is no quantum of benefits in dispute in this preliminary issue hearing.
- [24] In any event, given the Tribunal's decision in *A.B.*, I cannot find that Aviva acted unreasonably, frivolously, vexatiously or in bad faith when it denied the applicant's claim because her OT signed Part 4 of an OCF-18 recommending CAT assessments. In a similar vein, none of the relevant considerations under Rule 19.5 are met: Aviva advanced a legitimate position based on Tribunal jurisprudence, it did not breach a decision or order of the Tribunal, its position did not interfere with the Tribunal's ability to carry out a fair and efficient hearing and the outcome has not prejudiced the applicant.

ORDER

- [25] A non-physician listed in Part 4 of an OCF-18 proposing CAT assessments complies with s. 45 of the *Schedule*. The OCF-18 for CAT assessments proposed by OT Ms. Rogozinsky is therefore compliant. I decline to order costs. The parties are directed to contact the Tribunal to schedule a case conference to determine how to proceed with the substantive hearing, if needed.

Released: November 29, 2021



Jesse A. Boyce
Vice-Chair

