



**BETWEEN:**

**FILIZ AYDEMIR**

**Applicant**

and

**AVIVA INSURANCE COMPANY OF CANADA**

**Insurer**

**REASONS FOR DECISION**

**Before:** Arbitrator Barry S. Arbus, Q.C.

**Heard:** In person at ADR Chambers on October 17-19, 23-26, November 1, 2, December 13-15, 2017 and January 4, 2018, and by written submissions completed on January 4, 2018

**Appearances:** Stanley Razenberg and Meral Kesebi, counsel for the Applicant  
Jason Frost, counsel for Aviva Insurance Company of Canada

**Issues:**

The Applicant, Ms. Filiz Aydemir, was involved in a motor vehicle accident which occurred on July 9, 2012. She applied for statutory accident benefits from Aviva Insurance Company of Canada (the "Insurer") payable under the *Schedule*<sup>1</sup>. The parties were unable to resolve their dispute through mediation and Ms. Aydemir applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

The issues in this Hearing are as follows:

1. Did Ms. Aydemir sustain a Catastrophic Impairment within the meaning of the *Schedule* as a result of the accident?
2. Is Ms. Aydemir entitled to receive Non-Earner Benefits at the rate of \$185.00 per week for the period from January 9, 2013 to date and ongoing?

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<sup>1</sup> The *Statutory Accident Benefits Schedule* - Effective September 1, 2010, Ontario Regulation 34/10, as amended.

3. Is Ms. Aydemir entitled to Attendant Care Benefits at the rate of \$6,000 per month for services provided by Sevina Aydemir, Ferhat Aydemir and Elmaz Ocakli for the period from July 9, 2012 to date and ongoing?
4. Is Ms. Aydemir entitled to payments for the costs of examination in the amounts as follows:
  - (a) \$1,803.19 for an Attendant Care assessment provided by Sophie Bielawski dated May 29, 2013?
  - (b) \$1,997.64 for a Mental Health Assessment provided by Dr. John Mills dated February 14, 2013?
5. Is Ms. Aydemir entitled to proceed with a claim for Special Award in this Arbitration and, if so is Ms. Aydemir entitled to a Special Award?
6. Is Ms. Aydemir entitled to interest for the overdue payments of benefits in accordance with the *Schedule*?
7. Is either party entitled to expenses in respect of the Arbitration?

**Result:**

1. Ms. Aydemir did not sustain a Catastrophic Impairment within the meaning of the *Schedule* as a result of the accident.
8. Ms. Aydemir is not entitled to receive Non-Earner Benefits for the period from January 9, 2013 to date and ongoing.
9. Ms. Aydemir is not entitled to Attendant Care Benefits for the period from July 9, 2012 to date and ongoing.
10. Ms. Aydemir is not entitled to payments for the treatment plans as set out in the Application.
11. Ms. Aydemir is not entitled to a Special Award in this Arbitration.
12. Ms. Aydemir is not entitled to interest for any overdue payments of benefits as prescribed in the *Schedule*.
13. If the parties are unable to agree on the amount of expenses, an Expense Hearing may be arranged in accordance with Rules 75 - 79 of the *Dispute Resolution Practice Code*.

**EVIDENCE AND ANALYSIS:**

**Background:**

Ms. Aydemir was born in 1984 in Turkey. At the time of the accident, she was married with two children. She had immigrated to Canada in 2009 with her husband, Ferhat, and son. Her daughter

was born in Canada. Prior to the accident, Ms. Aydemir had been enrolled in ESL classes and claims to have had a relatively normal lifestyle and participated in normal daily activities.

On July 9, 2012, Ms. Aydemir was involved in a motor vehicle accident. At the time, she was a passenger in the right rear seat of a motor vehicle driven by her husband.

At the time of the accident, there appeared to be four or five occupants in the vehicle, including Ms. Aydemir and her 6-month-old daughter. They were travelling approximately 30-40 km/hr when a second vehicle attempted to cut in front of them and there was a collision.

According to Ms. Aydemir's husband, they were impacted on the driver's side of the vehicle by a vehicle attempting to turn into the intersection. Ms. Aydemir purported to have hit her head on the right rear passenger window at the time of the impact. The infant was taken to the Hospital for Sick Children for assessment and was deemed to have sustained no injuries. Ms. Aydemir was taken to a different hospital and assessed, after which she reports she began experiencing headaches as well as severe discomfort in the entire right side of her body, particularly her neck, right shoulder and lower back. Ms. Aydemir's evidence is that she continues to experience pain and discomfort in all of these areas on an ongoing basis.

The evidence of the witnesses is that Ms. Aydemir has steadily declined in her ability to function both physically and cognitively since the accident.

## **CATASTROPHIC IMPAIRMENT DETERMINATION**

### **Applicant's Position**

Ms. Aydemir submitted an application for Catastrophic Impairment (OCF-19) on October 27, 2015, completed by Dr. D. Panjwani. Dr. Panjwani gave evidence before this Tribunal that Ms. Aydemir suffered a major depressive disorder from a single continuous episode, that she suffered post-concussion syndrome and post-traumatic stress disorder. He stated that Ms. Aydemir has impaired cognitive and executive functions and stated that she cannot function independently, needs constant supervision, shows mental confusion and is not able to communicate relevantly and that she is disoriented with respect to time, place and persons.

Dr. Lionel Gerber's evidence, both in his written report and in the evidence before the Tribunal, was that Ms. Aydemir suffered a mild neurocognitive disorder due to a traumatic brain injury, suffered a personality change due to a medical condition and suffered chronic pain disorder. He also ruled out dissociative amnesia.

Ms. Aydemir produced a number of witnesses, including Ms. Aydemir's husband, Ms. Aydemir herself, the head of the Alevi Association, Ms. Aydemir's brother, cousin and other family members confirming that as a result of the accident, Ms. Aydemir sustained injuries sufficient to qualify her for a Catastrophic designation.

Ms. Aydemir has applied for a designation of Catastrophic Impairment in accordance with the AMA Guides<sup>2</sup> under mental and behavioural disorder. There are eight categories under which an

insured person can apply for a Catastrophic Designation, as set out in Section 2(1.2) of the *Schedule*, including paraplegia, quadriplegia, total impairment, loss of an arm or a leg, total vision in both eyes, brain impairment, or physical impairment translating into a 55% whole person impairment. The present Application is under that provision of Section 2(1.2) which provides that,

for the purpose of this regulation, Catastrophic Impairment caused by an accident that occurs after September 30, 2003 is: (g) subject to Section 1.4(2.1); and (3) an impairment that is in accordance with the American Medical Association's Guides, *The Evaluation of Permanent Impairment*, 4<sup>th</sup> Edition, 1993 results in Class 4 Impairment (Marked Impairment) or Class 5 Impairment (Extreme Impairment) due to mental or behavioural disorder.

In order for Ms. Aydemir to succeed, we must examine the four categories of functions and determine whether or not Ms. Aydemir has a marked or extreme impairment in any one of the four areas set out in each of the categories.

In determining whether an Insured Person has a Catastrophic Impairment due to a Mental or Behavioural Disorder, an examination of the four categories of function is required. These are: 1) **Activities of Daily Living**; 2) **Social Functioning**; 3) **Concentration, Persistence and Pace**; and 4) **Deterioration or Decompensation in Work or Work-like settings (commonly referred to as "Adaptation")**.

The Table at page 301 of the AMA Guides then provides a guide for rating mental impairment in each of the four areas of functional limitation on a five-category scale as follows:

Class 1 -	No Impairment -	No impairment is noted;
Class 2 -	Mild Impairment -	Impairment levels are compatible with most useful functioning;
Class 3 -	Moderate Impairment -	Impairment levels are compatible with some, but not all, useful functioning;
Class 4 -	Marked Impairment -	Impairment levels significantly impede useful functioning;
Class 5 -	Extreme Impairment -	Impairment levels preclude useful functioning.

Ms. Aydemir, in both the written evidence and the oral evidence of the witnesses, including Ms. Aydemir, her family and religious leader, and Drs. Panjwani and Gerber, together with Dr. Braganza and Arely Diaz, supported the view that Ms. Aydemir was catastrophically impaired. Dr. Panjwani, who, as her treating psychiatrist, saw her more frequently than any other medical advisor, diagnosed her with major depressive disorder, single episode, severe with generalized anxiety, post-concussion syndrome and post-traumatic stress disorder and chronic pain. His

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2 *AMA Guides to the Evaluation of Permanent Impairment (6<sup>th</sup> Edition), December 2001* American Medical Association

evidence was that, although he was familiar with the AMA Guides, he did not use the standards set out therein to conclude that Ms. Aydemir was catastrophically impaired. The other witnesses, other than Dr. Gerber, although not medically qualified, concluded similarly that Ms. Aydemir's lack of functioning was sufficient to place her in the Catastrophic category.

Ultimately, it was Dr. Gerber who applied the criteria set out in the AMA Guides to determine that in two of the four areas Ms. Aydemir suffered from marked impairment and in two areas, she suffered from extreme impairment.

1. Activities of Daily Living

In the first sphere, which is "Activities of Daily Living", Dr. Gerber identified that Ms. Aydemir has a Class 4 impairment (Marked Impairment), stating that she has problems with self care and personal hygiene and she is only able to complete some very basic housekeeping chores when under supervision and noted that her family does not leave her on her own because of concerns as to what might happen to her.

2. Social Functioning

The second area that Dr. Gerber addressed was "Social Functioning", where he determined she similarly suffers from a Class 4 impairment (Marked Impairment), noting that since the accident, she is extremely limited socially whereas prior to the accident, she appeared to get along with others and was appropriate in social situations. He noted that only on very good days was she able to be very superficially sociable with her immediate and extended family; whereas when she was not feeling well, she was not even able to do this.

3. Concentration, Persistence and Pace

In the third sphere, which is "Concentration, Persistence and Pace", Dr. Gerber classified Ms. Aydemir as having a Class 5 impairment (Extreme Impairment), which precludes useful functioning. Dr. Gerber noted that she was not able to concentrate, made errors, could not perform even basic calculations, was not able to complete tasks without assistance and, even with assistance, is extremely limited. It should be noted that according to the AMA Guides (page 294),

*Concentration, Persistence and Pace* are called "task completion" in proposed SSA Rules. These refer to the ability to sustain focused attention long enough to permit the timely completion of tasks commonly found in work settings. In activities of daily living, concentration may be reflected in terms of ability to complete everyday household tasks. Deficiencies in concentration, persistence, and pace are best noted from previous work attempts or from observations in worklike settings, such as day-treatment centers and incentive work programs. Describing specific examples of the patient's capabilities is useful. Major impairments of these abilities can often be assessed through direct psychiatric examinations or psychological testing. However, mental status examinations or psychological test data alone should not be considered adequate to describe fully the patient's concentration and sustained ability to perform work tasks.

A person who appears to concentrate adequately during a mental status examination or a psychological test might not do so in a setting more like that of the working world.

4. Deterioration/Adaptation

Lastly, according to the AMA Guides (page 294), Dr. Gerber deals with the following in evaluating this category, and assesses Ms. Aydemir as Category 5 (Extreme Impairment),

*Deterioration or decompensation in worklike settings* refers to repeated failure to adapt to stressful circumstances. In the face of such circumstances the individual may withdraw from the situation or experience exacerbation of signs and symptoms of a mental disorder; that is, decompensate and have difficulty maintaining activities of daily living, continuing social relationships, and completing tasks. Stresses common to the work environment include attendance, making decisions, scheduling, completing tasks, and interacting with supervisors and peers.

Dr. Gerber stated that Ms. Aydemir would not be able to attend work; she would be unable to make decisions of any kind in a work situation, would be unable to interact with co-workers, nor would she be able to remember procedures. He stated that Ms. Aydemir would be unable to work, even with special supervision.

Dr. Gerber's evidence is supported in all these areas by the evidence of family, friends and other clinical witnesses in their written evidence.

Insurer's Position

The Insurer, in order to contradict the evidence of Drs. Panjwani, Gerber and others, relies primarily on the evidence of Dr. Gnam both in his written report and his oral evidence at the Hearing where he relies primarily on the Rey 15 test and identifies Ms. Aydemir as a malingerer. In addition, the Insurer submits in support of its position the surveillance evidence.

Dr. William Gnam found that there was conscious symptom amplification/fabrication throughout his assessment based on objective testing and clinical judgment. Dr. Gnam applied the Rey 15 test to Ms. Aydemir and determined that she did not pass the validity testing set out by the Rey 15 test. Dr. Gnam, in both his written report and in the evidence given before the Tribunal, stated that Dr. Gerber's three-time administration of the Rey 15 test was idiosyncratic and not accepted by the medical community. Dr. Gnam was extremely critical of Dr. Gerber's report and methodology in determining the validity of Ms. Aydemir's claim for Catastrophic Impairment. In addition, Dr. Gnam felt that in Dr. Panjwani's completion of the OCF-19 on October 27, 2015, his diagnosis was based mostly on reports by Ms. Aydemir's husband, and he did not engage in any form of validity or credibility testing of Ms. Aydemir. Dr. Panjwani's evidence was that although he had read the AMA Guides, his diagnosis relied on his "clinical judgment" and not on objective testing. The Insurer's position is that Ms. Aydemir is a malingerer and to support Dr. Gnam's position, it relied on the surveillance evidence and the inconsistency in the evidence

given by Ms. Aydemir's witnesses, including the evidence of Arcely Diaz, Ms. Aydemir's occupational therapist.

### Analysis and Conclusion

The onus of proving the Catastrophic Impairment of Ms. Aydemir is clearly on Ms. Aydemir. I am satisfied that Ms. Aydemir has not met this onus.

The surveillance evidence together with the questionable information given to Ms. Diaz in her interview in performing the occupational therapy assessment, is sufficient to question the validity of Ms. Aydemir's assertions and suggest the probability of malingering by her.

I accept Dr. Gnam's evidence that Dr. Gerber's attempting the Rey 15 test three times until Ms. Aydemir passed it is professionally unacceptable and accordingly I must treat Dr. Gerber's entire assessment with some scepticism.

The other troubling aspect of Dr. Gerber's diagnosis and that of Dr. Panjwani and Dr. Braganza is that each medical practitioner's diagnosis is inconsistent and different from one another. There is no consistent diagnosis between Ms. Aydemir's medical practitioners as to the diagnosis suffered by Ms. Aydemir.

I also found the evidence of Mr. Sam Kodsí, the automobile accident reconstruction expert, compelling. In Mr. Kodsí's report dated November 29, 2012 he sets out in detail all the particulars of the accident. Mr. Kodsí points out the damage to the vehicle driven by Ms. Aydemir's husband sustained minor damage primarily to the left front of the vehicle, including a dented front bumper together with scratch marks on the left fender and left front door. Although no photographs of the other vehicle were presented, the MVA report indicated the other vehicle had light damage to the right centre and right rear of that vehicle.

Mr. Kodsí concluded that the acceleration that the occupants in the Aydemir vehicle would have experienced would have been very similar to everyday activities such as braking, swerving, riding the straight portion of a rollercoaster, or coughing. It does seem implausible that the impairment claimed to have been suffered by Ms. Aydemir could have been caused by the auto accident in question.

I therefore conclude that Ms. Aydemir has not established that the impairment suffered qualifies as a Catastrophic Impairment.

### NON-EARNER BENEFITS

#### Applicant's Position

Ms. Aydemir claims entitlement to receive a Non-Earner Benefit ("NEB") at the rate of \$185 per week for the period from July 9, 2013 to date and ongoing. In order to succeed, s. 12(1) of the *Schedule* provides that Ms. Aydemir must show that as a result of the accident, she sustained an impairment which results in a complete inability to carry on a normal life. Ms. Aydemir, in relying on the case of *Heath v. Economical Mutual Insurance Company*,<sup>3</sup> quotes the Court of

Appeal in stating that, “we must compare the Claimant’s activities and life circumstances before the accident to his or her activities and life circumstances after the accident.”

Ms. Aydemir claims that her life before the accident was one where she took care of her family, cleaned her home, attended school and socialized within her Turkish community. Ms. Aydemir acknowledges that she did have some symptoms of anxiety and depression arising from her life circumstances in Turkey and the immigration process to Canada but she attempted to demonstrate that these symptoms did not interfere with her ability to live life independently before the accident. Ms. Aydemir claims that the medical evidence, being that of Dr. Panjwani and Dr. Gerber, supports the findings that her ability to function independently has been significantly compromised. Ms. Aydemir claims that she is unable to do most of her pre-accident activities of daily living and her cognitive and emotional impairments interfere with these activities to such an extent that she suffers a complete inability to carry on a normal life.

#### Insurer’s Position

The Insurer takes the position that since the onus is on Ms. Aydemir to show that she has a complete inability to carry on a normal life as a result of the accident, she does not qualify for NEBs. The Insurer argues that whatever activities Ms. Aydemir was engaged in before the accident, she quit once she secured her immigration status in Canada. In support of this, Ms. Aydemir confirmed that she had stopped attending school and stopped volunteering at the Alevi Centre prior to the accident. The Insurer uses the surveillance evidence to demonstrate the activities that Ms. Aydemir engaged in were her usual activities, including taking her children to school, looking after them, cooking, going for walks, banking, shopping, driving a car and spending time with her family. The Insurer also contends that Ms. Aydemir continued breast-feeding her infant daughter after the accident. Accordingly, the Insurer maintains that Ms. Aydemir has not sustained any impairment resulting in her complete inability to carry on a normal life.

#### Conclusion

Once again, the onus of proving the entitlement to NEBs lies with Ms. Aydemir. The test for proving an entitlement to NEBs requires an applicant to prove that he or she sustained an impairment as a result of the accident resulting in a complete inability to carry on a normal life. This requires an applicant to establish what their normal life was before the accident and demonstrating that the accident itself has resulted in an impairment causing a complete inability to carry on a normal life.

The first roadblock to Ms. Aydemir is establishing what her normal life was before the accident. There is some question as to the lifestyle of Ms. Aydemir immediately before the accident, since the evidence does demonstrate that because of her history of depression and psychological difficulties, there was a deterioration in her lifestyle activities once she had attained immigration status in Canada.



Notwithstanding this, I am satisfied that the surveillance evidence and the other evidence demonstrates that Ms. Aydemir did not suffer a complete inability to carry on a normal life as a result of the accident. Although there might have been some diminution in Ms. Aydemir's level of activity following the accident, I am not satisfied that this is attributable totally to the accident itself. In addition, the surveillance evidence is such that it demonstrates that Ms. Aydemir's level of activity, including taking her children to school, cooking, walking, banking, shopping and driving the car are such that they demonstrate a level of activity greater than a complete inability to carry on a normal life.

Accordingly, I deny Ms. Aydemir's claim for NEBs.

### **ATTENDANT CARE BENEFITS**

#### **Applicant's Position**

Ms. Aydemir claims entitlement to receive Attendant Care Benefits at the rate of \$6,000 per month for the period from July 9, 2012 to date and ongoing. Section 19 of the *Schedule* sets out the requirements for Attendant Care Benefits. Section 19(1) provides that Attendant Care Benefits "shall pay for all reasonable and necessary expenses that are incurred by or on behalf of the Insured Person as a result of the accident for services provided by an aide or attendant or by a long-term care facility...".

Sections 19 and 20 go on to limit the amount of entitlement to Attendant Care Benefits in the event Ms. Aydemir is determined not to have sustained a Catastrophic Impairment as a result of the accident.

Ms. Aydemir also claims that s. 3(7)(e) of the *Schedule*, which sets out the requirements to satisfy the definition of "incurred", is subject to s. 3(8) of the *Schedule*. Ms. Aydemir claims that s. 3(7)(e) which states that, "subject to subsection (8), an expense is not incurred by an insured person unless the insured person has received the goods and services, the insured person has paid the expense or promised to pay the expense and the person who provides the goods and services either did so in the course of employment or sustained an economic loss as a result of providing the goods or services."

Section 3(8) of the *Schedule* provides that if a Court or arbitrator finds that an expense was not incurred because the insurer unreasonably withheld or delayed payment of a benefit in respect of the expense, the Court or arbitrator may, for the purpose of determining an insured person's entitlement to the benefit, deem the expense to have been incurred.

Ms. Aydemir quotes the Director Delegate Blackman Decision of *Rezaiezhadeh v. State Farm*<sup>4</sup> where Delegate Blackman observed that, "an insurer's plea of ignorance of the exact ramification of its unreasonable withholding or delay of benefits does not provide absolution from the application of subsection 3(8)."

Ms. Aydemir claims that the Insurer kept her within the Minor Injury Guidelines ("MIG") and accordingly she is precluded from seeking payment of Attendant Care Benefits, and because she

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<sup>4</sup> *Rezaiezhadeh v. State Farm Mutual Automobile Insurance Co.*, 2016 CarswellOnt 3304 at paragraph 10.

was kept within the MIG, she did not have access to funding for personal care assistants under the *Schedule*. Ms. Aydemir therefore claims that in relying on s. 3(8) of the *Schedule*, she should be entitled to past care benefits having therefore been deemed incurred because of the Insurer's position in this matter.

Ms. Aydemir claims entitlement to Attendant Care Benefits on the basis of the in-home assessment prepared by Sophie Bielawski, Occupational Therapist, the neuropsychological report of Dr. Braganza carried out on March 5, 2015, and the IME report of Johanna Harding, OT, prepared by the Insurer on March 9, 2016.

There are a number of aspects to a claim for Attendant Care. As pointed out in FSCO Bulletin AO2/11, "it is incumbent upon insurers to ask for documentation and information as necessary to verify that a covered expense was actually incurred within the meaning of the SABS before paying an invoice."

#### Insurer's Position

The Insurer takes the position that on August 10, 2012, shortly after the accident, Ms. Aydemir was advised that if her injuries fell outside the MIG, she could be eligible for Attendant Care Benefits. The Insurer pointed out that Ms. Aydemir needed to submit a completed Form 1 showing what expenses were incurred, including a complete description of the expenses incurred and complete details of the service providers. Further, on December 8, 2015 and January 13, 2016, the Insurer advised Ms. Aydemir that subject to her attendance at a s. 44 in-home assessment, the Insurer would pay for expenses that she had incurred for Attendant Care services. The Insurer further points out that on at least 20 occasions, Ms. Aydemir was advised that the \$3,500 MIG limit did not apply to her claim but she took no action in that regard.

The Insurer further points out that on 22 occasions between May 29, 2014 and August 31, 2017, the Insurer requested names and contact information for any person or facility providing Attendant Care to Ms. Aydemir, together with proof of economic loss sustained by the Attendant Care service provider and received no response. The Insurer also points out that the Application for Arbitration dated April 1, 2014 did not identify any service providers and on May 29, 2014, the Insurer requested contact information for Ferhat, Sevina and Elmaz, along with proof of economic loss and confirmation of the live-in caregiver mentioned by Ms. Bielawski. Ms. Aydemir, on February 20, 2015 at the Pre-Hearing confirmed her service providers were Ferhat, Sevina and Elmaz. Pinar was subsequently identified as a service provider by Ms. Aydemir. Sevina and Elmaz did not testify at the Hearing as to any Attendant Care services provided by them. Pinar did provide evidence but the Insurer claims that both her evidence and Ferhat's failed to provide any credible evidence of economic loss sustained by them as a result of providing Attendant Care services.

For Ms. Aydemir to succeed, then, she must establish that, (a) the attendant care services were provided; (b) the service provider sustained an economic loss as a result of providing the services; and (c) the Insurer unreasonably withheld or delayed payment of the benefit. Ms. Aydemir argues that the Insurer kept Ms. Aydemir within the MIG so as to preclude payment for Attendant Care Benefits.

I think it is clear from the outset that the Insurer at no time stated that the refusal to pay Attendant Care Benefits was because Ms. Aydemir was kept within the MIG. In fact, Ms. Aydemir was advised that if her injuries fell outside the MIG, she could be eligible for Attendant Care Benefits and to do so, she needed to submit a completed Form 1 along with the proper OCF showing that the expenses were incurred. This advice was given on August 10, 2012, shortly after the accident.

The Insurer validly states that on at least 20 occasions, Ms. Aydemir was advised that the \$3,500 MIG limit did not apply to her claim and if she provided the name and contact information for the Attendant Care service providers, as well as proof of economic loss, she could qualify for Attendant Care Benefits. I am also not satisfied that s. 3(8) overrides the requirements of s. 3(7) so as to entitle Ms. Aydemir to either past or future Attendant Care Benefits. I do agree with the FSCO Decision of *Veley*<sup>5</sup> whereby Directors Delegate Evans found that, “s. 3(8) of the SABS does not apply to deem an expense to be incurred if Ms. Aydemir fails to provide evidence that the expenses for received services were incurred.” I agree that this is not a case of an applicant not receiving services due to an insurer’s unreasonable withholding of benefits. There has been no proof of economic loss or the precise services provided to Ms. Aydemir and accordingly the claim for Attendant Care Benefits and any related claim should be dismissed.

#### COSTS OF EXAMINATION

Ms. Aydemir claims entitlement to two costs of examination, one being for an Attendant Care Assessment in the amount of \$1,803.19 provided by Sophie Bielawski and the second being a Mental Health Assessment provided by Dr. John Mills in the amount of \$1,997.64 dated February 14, 2013.

Section 25 of the *Schedule* provides that, “an insurer shall pay the following expenses incurred by or on behalf of an insured person: reasonable fees charged by an occupational therapist or a health practitioner provided they meet the criteria set out in s. 42 or 45.”

It is clearly necessary for Ms. Aydemir to establish that each of the requests for funding were reasonable and necessary and that the Insurer ought to have approved the request. Although there is evidence in the filed documents on behalf of both Ms. Aydemir and the Insurer, I saw no evidence presented by Ms. Aydemir to satisfy the tests set out in s. 25 to satisfy me that both costs of examinations were payable by the Insurer.

#### SPECIAL AWARD

Ms. Aydemir takes the position that advancing a claim for a Special Award based on the Insurer’s unreasonably having withheld or delayed payment of a number of benefits including Attendant Care Benefits, NEBs and expenses. I am satisfied that a claim for Special Award is always before a Hearing Arbitrator and it is within my discretion to consider. However, because Ms. Aydemir was not successful in her claim for any of the benefits claimed, there is no need for me to consider a claim for a Special Award in this matter.

#### INTEREST

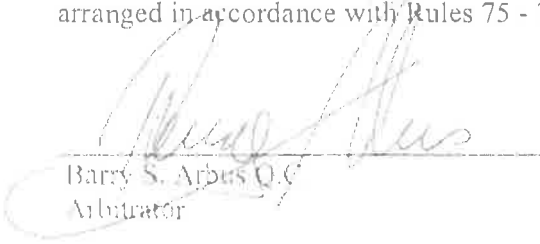
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<sup>5</sup> *MVACF v. Veley*: P14-00041V April 20, 2015.

Because there are no payments due from the Insurer to Ms. Aydemir, Ms. Aydemir is not entitled to any interest on overdue payments.

**EXPENSES**

If the parties are unable to agree on the amount of expenses, an Expense Hearing may be arranged in accordance with Rules 75 - 79 of the *Dispute Resolution Practice Code*.

  
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Barry S. Arbus, Q.C.  
Arbitrator

March 5, 2018

\_\_\_\_\_  
Date

Financial Services  
Commission  
of Ontario

Commission des  
services financiers  
de l'Ontario



Ontario

FSCO A14-003170

**BETWEEN:**

**FILIZ AYDEMIR**

**Applicant**

and

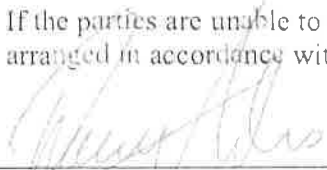
**AVIVA INSURANCE COMPANY OF CANADA**

**Insurer**

**ORDER**

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. Ms. Aydemir did not sustain a Catastrophic Impairment within the meaning of the *Schedule* as a result of the accident.
14. Ms. Aydemir is not entitled to receive Non-Earner Benefits for the period from January 9, 2013 to date and ongoing.
15. Ms. Aydemir is not entitled to Attendant Care Benefits for the period from July 9, 2012 to date and ongoing.
16. Ms. Aydemir is not entitled to payments for the treatment plans as set out in the Application.
17. Ms. Aydemir is not entitled to a Special Award in this Arbitration.
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Barry S. Arbus Q.C.  
Arbitrator

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March 5, 2018

Date