

**LICENCE APPEAL  
TRIBUNAL**

**Safety, Licensing Appeals and  
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE  
DE PERMIS**

**Tribunaux de la sécurité, des appels en  
matière de permis et des normes Ontario**



**Tribunal File Number: 17-002589/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:

**Catherine Nelson**

**Applicant**

and

**Wawanesa Mutual Insurance.**

**DECISION**

**ADJUDICATOR:**

**Sandeep Johal**

**APPEARANCES:**

Counsel for the Applicant:

Jesse Tran and Ed Brogden

Counsel for the Respondent:

Andrew Papadimitropoulos

**Heard by teleconference on:**

**December 18, 2017**

## OVERVIEW

- [1] The applicant was injured in an automobile accident on October 18, 2014 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*<sup>1</sup> (the "Schedule").
- [2] The applicant applied for medical benefits that were denied by the respondent. The applicant disagreed with this decision and submitted an Application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

## ISSUES TO BE DECIDED

- [3] The following are the issues to be decided as per the case conference order dated August 3, 2017:
- i. Is the applicant entitled to a medical benefit in the amount of \$1,250.00 for chiropractic and massage therapy, provided by York Medical Centre that was submitted to the respondent on August 15, 2016 and denied on August 26, 2016?
  - ii. Is the applicant entitled to a medical benefit in the amount of \$2,000.00 for chiropractic and massage therapy provided by York Medical Centre that was submitted to the respondent on October 24, 2016 and denied on November 3, 2016?
  - iii. Is the applicant entitled to a medical benefit in the amount of \$2,200.00 for a social work assessment that was submitted to the respondent on February 13, 2017 and denied on February 24, 2017?
  - iv. Is the applicant entitled to the \$265.00 cost of a disability certificate done by York Medical Centre that was submitted to the respondent on October 1, 2015 and denied on October 21, 2015<sup>2</sup>?
  - v. Is the applicant entitled to the \$200.00<sup>3</sup> cost of an in-home assessment done by York Medical Centre that was submitted to the respondent on October 11, 2016 and denied on October 21, 2016?
  - vi. Is the applicant entitled to the \$2,200.00 cost of a psychiatric assessment done by York Medical Centre that was submitted to the respondent on October 21, 2015 and denied on October 28, 2015?

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<sup>1</sup> O. Reg. 34/10.

<sup>2</sup> This appears to be a typographical error, the dates according to the Disability Certificate (OCF-3) and the respondent's submissions show a submission date of March 2, 2015 and a denial date from the Explanation of Benefits (OCF-9) from the respondent on March 31, 2015.

<sup>3</sup> This appears to be a typographical error in the Order, the Treatment and Assessment plan dated October 11, 2016 lists the amount as \$2035 and the respondent also lists the amount as \$2035 in its submissions. For the purposes of this hearing the issue in dispute will be amended to whether the applicant is entitled to the \$2,035 for the cost of an in-home assessment.

**Additional Issue raised by the written submissions:**

- [4] In the applicant's written submissions<sup>4</sup>, she submits that assuming she has established on a balance of probabilities that she should be treated outside the Minor Injury Guideline (the "MIG") then the issues in dispute for this hearing need to be determined to be reasonable and necessary.
- [5] The respondent submits that the applicant's current pain complaints are sequelae of her minor injuries and that the applicant has failed to provide compelling medical evidence that she had a pre-existing medical condition that was documented by a health practitioner before the accident that will prevent her from achieving maximal recovery from the minor injury.
- [6] The issue of the MIG was not in the original order from the case conference and as a result of both parties' submissions on the issue of the MIG I will add it has an issue in dispute for the purposes of the hearing.
- [7] Both parties also requested costs as part of their written submissions and I will also add the issues of costs to this hearing.

**RESULT**

- [8] Based on the totality of the evidence before me, I find:
- i. The applicant has a pre-existing injury that cannot be treated within the MIG limits and the applicant is therefore outside of the MIG.
  - ii. The applicant is entitled to the medical benefits in dispute for chiropractic and message therapy in the amounts of \$1,250 and \$2,000.
  - iii. The applicant is entitled to a social work assessment in the amount of \$2,200.
  - iv. The applicant is entitled to an in-home assessment in the amount of \$2,035.
  - v. The applicant is entitled to a psychiatric assessment in the amount of \$2,200.
  - vi. The applicant is entitled to the cost of a disability certificate in the amount of \$265 and
  - vii. Neither party is entitled to costs.

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<sup>4</sup> Paragraph 6.3 of the Applicant's Initial Written Submissions page 7.

## ANALYSIS

### ***Are the applicant's injuries within the Minor Injury Guideline?***

- [9] The MIG establishes a framework for the treatment of minor injuries. The term "minor injury" is defined in section 3 of the *Schedule* as "one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury." The terms "strain," "sprain," "subluxation," and "whiplash associated disorder" are also defined in section 3. Section 18(1) limits recovery for medical and rehabilitation benefits for such injuries to \$3,500.
- [10] Section 18(2) of the *Schedule* provides for injured persons who have a pre-existing medical condition to receive treatment in excess of the \$3,500 cap. To access the increased benefits, the injured person's healthcare provider must provide compelling evidence that the person has a pre-existing medical condition, documented prior to the accident that will prevent the injured person from achieving maximal recovery if benefits are limited to the MIG cap.
- [11] In the decision of *Scarlett v. Belair Insurance*,<sup>5</sup> the Divisional Court found that the onus of establishing entitlement beyond the MIG limits rests with the claimant. Applying *Scarlett*, the applicant must establish his entitlement to coverage beyond the \$3,500 cap for minor injuries on a balance of probabilities.

### ***Requirements to be removed from the MIG***

- [12] If the applicant's injuries fall within the definition of the MIG, the applicant can still be considered to be out of the MIG in accordance with section 18(2) of the *Schedule*. In order to do so, the applicant must meet all three of the following requirements in order to escape the MIG under this section:
- a. There was a pre-existing medical condition;
  - b. The pre-existing medical condition was documented by a health practitioner before the accident; and
  - c. The pre-existing condition will prevent maximal recovery from the minor injury if the person is subject to the \$3,500 limit under the MIG.
- [13] I find that the applicant has established on a balance of probabilities that she has a pre-existing medical condition being her back pain, which was documented by a health practitioner before the accident and it will prevent her from maximal recovery if she is subjected to the MIG limits. The evidence from the applicant and the respondent support that she is out of the MIG based on a pre-existing injury which was aggravated as a result of the accident.

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<sup>5</sup> 2015 ONSC 3635.

- [14] The applicant submits she had three back surgeries prior to the accident. One in 1983, one in 1996 and then again in 1997 all on her lower back. The medical documentation from her orthopaedic surgeon is dated March 1, 1984 and it states the applicant had a large sequestered disc at the L5-S1 level requiring a discectomy which was completed. On July 31, 1996 the applicant had another discectomy at the L4-5 level performed by Dr. Mac Con.
- [15] The respondent's insurer examination ("IE") doctor, Dr. Michael Martin opines that the applicant's "problems appear to have been a strain to the lower back..." and "her symptoms improved but not resolved with time."<sup>6</sup> On page 15 of Dr. Martin's report under the Responses to Specific Referral Questions section he answers "yes" to the question of whether the person had pre-existing injuries and/or medical conditions that were aggravated or made symptomatic by the accident. Dr. Martin states that "prior to the accident (the applicant) had history of returning back problems necessitating three surgeries. Her condition was stable and controlled, but was aggravated by the accident."
- [16] The applicant visited Dr. Martin again on June 14, 2017 and her current symptoms and complaints are that she has pain in the midline of the lower back and then opines that the applicant has a strain to the lumbar spine and the symptoms have not resolved despite time, medication and therapy.<sup>7</sup>
- [17] The applicant's chiropractor, Dr. San Bui in his affidavit states that in his professional opinion the applicant suffered an injury that was aggravated because of prior medical conditions that prevent her from attaining maximum potential recovery if her treatment is confined to the monetary limits of the MIG.<sup>8</sup> I agree with Dr. Bui and the IE's that state the applicant's injuries have been aggravated by the accident.
- [18] Based on the foregoing, I am satisfied that the applicant has a pre-existing medical condition that cannot be treated within the MIG limits as a result of the current accident and she has satisfied the requirements of section 18(2). Having found that the applicant has a pre-existing injury that would take her outside of the MIG, I will now conduct an analysis on whether each of the treatment plans in dispute are reasonable and necessary.

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<sup>6</sup> Dr. Martin report dated October 11, 2016 page 4.

<sup>7</sup> Dr. Martin report dated June 27, 2017 page 8-9.

<sup>8</sup> Dr. San Bui Affidavit dated October 31, 2017 para. 16.

***Is the applicant entitled to the medical benefits?***

***Chiropractic and Message Therapy***

- [19] I find the treatment plans for chiropractic and message therapy to be reasonable and necessary for the following reasons.
- [20] The first treatment plan for chiropractic and message therapy is dated August 15, 2016 and recommends seven physical rehabilitation sessions over the course of twelve weeks with the goal of the plan to reduce pain, increase the range of motion in order to achieve a return to activities of normal living and pre-accident activities.
- [21] The second treatment plan is for physical therapy which includes massage, chiropractic and/or acupuncture with the plan and goals similar to the treatment plan from August 15, 2016.
- [22] Dr. Bui notes that the previous treatments plans have resulted in reduced pain for the applicant.<sup>9</sup> The applicant states in her affidavit that the treatment plans have reduced the pain in her back and the home based exercise does not help like the treatments in the clinic.<sup>10</sup>
- [23] The respondent's IE doctor, Dr. Dumitrascu in her affidavit states the applicant continues to experience pain in her left side neck and lower back.<sup>11</sup> Dr. Martin in his affidavit states he saw the applicant almost two years post-accident and he concluded her initial problems appear to have been a strain to her lower back, contusion/strain to her left shoulder and elbow as well as pain in her neck and trapezius area.<sup>12</sup>
- [24] Dr. Martin states that he would have normally expected resolution of her pain through the period of time from the date of the accident to the time of his assessment but provides no reasons for the length of time other than to say facility based care is not required and for the applicant to continue with home based exercises but he does not provide a recommendation of what types of exercises the applicant should continue to do two years post-accident in his report or affidavit.
- [25] The reduction of pain for an applicant, is in my opinion, a necessary goal and she is entitled to choose treatment that reduces pain and increases strength. As a result of the foregoing conclusions from the doctors and the fact that she is still suffering from pain, I find the treatment plans to be reasonable and necessary.

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<sup>9</sup> OCF-18 dated August 15, 2016 part 9b

<sup>10</sup> Affidavit of the applicant dated October 31, 2017 at para's 52 and 54.

<sup>11</sup> Dr. Tatiana Dumitrascu Affidavit dated November 25, 2017 at para 6.

<sup>12</sup> Dr. Michael Martin Affidavit, undated at paragraph 4.

***Is the applicant entitled to a social work and psychiatric assessment?***

- [26] I find the applicant is entitled to the social work and psychiatric assessment for the following reasons.
- [27] Dr. Horvath, the applicant's family doctor states in her clinical notes and records that the applicant has had sleep difficulties which has become a chronic problem and have become worse since the accident.<sup>13</sup> On the same date Dr. Horvath states the symptoms are "consistent with PTSD (post-traumatic stress disorder) related to MVA (motor vehicle accident)." She also reports that the applicant is more anxious when driving<sup>14</sup> and recommends counselling and provided the applicant with names of therapists in the area who specialize with PTSD.
- [28] The applicant also testified that the accident has brought back memories of the death of her 3 year old son and what could have happened if her grandchildren were with her in the vehicle and she worries about losing them. She is nervous when driving, only drives short distances and is unable to go to her grandchildren's tournaments because of a fear of long distance car trips.<sup>15</sup> The joy of being around her grandchildren has diminished as the applicant states that after the accident she now cries when she thinks of them because what comes to her mind is that she is going to lose them because had she not been late the day of the accident, her grandchildren would have been in the car with her and the side her vehicle was impacted was the side her grandchildren would have been sitting.<sup>16</sup>
- [29] The recommendation for the social work and psychological assessments are based on medical practitioners who have worked with the applicant over the course of many months<sup>17</sup> and as a result of these visits the applicant's medical practitioners were able to identify social and psychological concerns and they recommend a referral in order for an assessment to be done to determine if there are psychological or social issues that need to be addressed. I find this to be a reasonable request for an assessment to be completed by a qualified psychologist.
- [30] Based on the recommendations, the applicant's family doctor who has had the opportunity to see the applicant on multiple occasions and has also noted psychological, anxiety symptoms and nightmares and has recommended a referral to a specialist, along with the applicant's own testimony as discussed above, I find the social work assessment and the psychological assessment both to be reasonable and necessary.

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<sup>13</sup> Clinical notes and records of Dr. Horvath dated July 28, 2016.

<sup>14</sup> Dr. Horvath Affidavit dated November 9, 2017 at para 9.

<sup>15</sup> Applicant Affidavit dated October 31, 2017, para's 35, 48

<sup>16</sup> Ibid para's 37, 38, 40.

<sup>17</sup> Dr. San Bui Affidavit dated October 31, 2017 para. 20.

***Is the applicant entitled to the cost of an in-home assessment?***

- [31] I find the in-home assessment to be reasonable and necessary for the following reasons.
- [32] The cost of an In-home assessment is payable by the respondent under section 25 of the *Schedule* but only for an applicant whose injuries do not fall within the MIG.<sup>18</sup>
- [33] As I have found the applicant to be outside of the MIG, she would be eligible for the in-home assessment if it is determined to be reasonable and necessary.<sup>19</sup>
- [34] The applicant's pain complaints to the respondent's IE doctor, Dr. Martin on June 14, 2017 are similar to her complaints from when he last met her from September 2016. Her pain complaints are to her neck, left shoulder and in the midline of her back. Dr. Martin notes that she continues to do most of the homemaking tasks, however, they are done with pacing and modification.<sup>20</sup>
- [35] Dr. Martin's physical findings are that the applicant has discomfort through the end ranges of motion in her neck, she was tender along the left trapezius muscle and her lower back was painful through the end range and rotation to the left and right sides were full with pain at the end ranges of motion.<sup>21</sup> Dr. Martin opines that her symptoms as of the date of his report which is two years and eight months post-accident have not resolved despite time, medication and therapy.
- [36] As a result of the above I find that the in-home assessment is reasonable and necessary to allow for an assessment to be done which would help determine how the applicant's injuries, which have not resolved and continue to cause her pain, may affect her home functioning.

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<sup>18</sup> S. 25(2) of the *Schedule*

<sup>19</sup> S. 38 of the *Schedule*

<sup>20</sup> Dr. Martin Report dated June 27, 2017 at page 8

<sup>21</sup> *Ibid*, at page 8



***Is the applicant entitled to the cost of the disability certificate?***

- [37] I find the applicant is entitled to the cost of the disability certificate. The applicant submits that if the other issues in dispute are in her favour, the cost of this disability certificate follows automatically as it is the tool for the treatment and assessment plans. I agree with the applicant. The disability certificate is the document to claim a specified benefit as the respondent submits however the disability certificate is also required to notify or update the insurer on the impairments or injuries of the applicant. In this case the applicant's injuries changed according to her health practitioner and the appropriate way to notify the insurer of these new impairments is by way of a new disability certificate. Once that is done, the applicant can submit a new treatment plan seeking treatment for those impairments and it also allows for the respondent to decide whether to schedule an insurer's examination in order to determine entitlement to a benefit under the *Schedule*.
- [38] The disability certificate was submitted approximately five months post-accident with new impairments that the applicant would be seeking treatment for and I find it to be reasonable and necessary for the above reasons.

**COSTS**

- [39] Rule 19.1 of the Licence Appeal Tribunal Rules of Practice and Procedure (the "*Rules*") provides that a party may make a request to the Tribunal for costs where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith. I find that neither party is entitled to costs for the following reasons.
- [40] The applicant submits she should be entitled to costs because the respondent should have known the circumstances of the matter meant the applicant should not have been confined to the MIG and because the applicant was compelled to waste time and resources to argue the issue of the MIG, therefore costs should be imposed.
- [41] I am not convinced that the respondent's position on the issue of the MIG based on the IE reports is evidence of unreasonable, frivolous, vexatious or bad faith behaviour in the proceeding.
- [42] The respondent also requests costs but does not provide any submissions as to why or how the applicant acted unreasonably, frivolously, vexatiously or in bad faith. The respondent has not shown on a balance of probabilities that costs in accordance with rule 19.1 of the *Rules* should be awarded and their request is also denied.

**ORDER**

[43] For the reasons outlined above, I find that:

- (a) the applicant has established that she has a pre-existing medical condition that prevents recovery under the MIG and therefore the applicant is not within the monetary limits of the MIG. The applicant is entitled to the following benefits:
- i. \$1,250 for chiropractic and massage therapy from August 15, 2016
  - ii. \$2,000 for chiropractic and massage therapy from October 24, 2016
  - iii. \$2,200 for a social work assessment
  - iv. \$2,035 for an in-home assessment
  - v. \$2,200 for a psychological assessment
  - vi. \$265 for the cost of the disability certificate.

[44] Neither party is entitled to costs.

**Released: June 06, 2018**



**Sandeep Johal, Adjudicator**