

**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: 17-003989/AABS**

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

**Sahily Borrero Marin**

**Applicant**

and

**Aviva Insurance Canada**

**Respondent**

**DECISION**

**ADJUDICATOR:**

**Robert Watt**

**APPEARANCES:**

Counsel for the Applicant:

David Carranza

Counsel for the Respondent:

Alexander Hartwig

**HEARD: Written Hearing :**

**April 3, 2018**

## OVERVIEW

- [1] The applicant was injured in an automobile accident on September 25, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “Schedule”).
- [2] The respondent denied payment of the cost of an orthopaedic assessment, and the applicant submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the ‘Tribunal”).
- [3] The parties participated in a case conference, but they were unable to resolve the issues in dispute between them.
- [4] With the consent of the parties a written hearing was scheduled for April 3, 2018.

## ISSUES IN DISPUTE

- [5] Is the applicant entitled to receive a medical benefit for an orthopedic assessment in the amount of \$2,000.00 submitted by Dr. Langer of Healthway Medical Management Inc. in a treatment plan, and denied by the respondent on June 21, 2016?
- [6] Is the applicant entitled to interest on any overdue payment of benefits?

## RESULTS

- [7] I find that the applicant is not entitled to payment of the cost of the orthopaedic assessment.
- [8] I find that the applicant is not entitled to interest, as there is no overdue payment of benefits owing.

## BACKGROUND

### Pre- Accident Medical History

- [9] Prior to the accident, the applicant had fibromyalgia, anxiety disorder, pain in the lower back, and was considered to be “substantially disabled.”<sup>1</sup>
- [10] Dr. Kirwin, a physiatrist, on February 12, 2015, indicated in a report to the applicant’s family doctor, that he suspected early right knee osteoarthritis. An MRI report dated May 19, 2015, confirmed Dr. Kirwin’s analysis.

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<sup>1</sup> Ontario Works File dated June 1,2014

- [11] Dr. Kirwin saw the applicant again on February 4, 2016. He noted that the applicant suffered from degenerative pain. There was no note relating the pain to the accident.
- [12] Dr. Molina (GP) indicated in a report dated July 21, 2015, that the applicant had low back pain, stiffness, difficulty with prolonged standing and sitting, and ongoing right knee pain.
- [13] The applicant saw her family doctor Dr. Nestor Fernandez in July 2015, and reported to him that she was experiencing bilateral knee pain, neck and lower back pain, with difficulty in prolonged sitting standing, bending, and lifting, anxiety an insomnia. He assessed her with mechanical neck and low back pain, right sciatica and ongoing knee pain.

### **Post- Accident Medical History**

- [14] On September 25, 2015, the applicant was a front seat belted passenger in a car that was rear ended at a red light. She was taken to Humber River Hospital. Dr. Fernandez assessed her with lumbosacral pain, right wrist tendonitis and post-traumatic anxiety disorder.
- [15] Dr. Fernandez, in a Disability Certificate (OCF-3) dated January 18, 2016, indicated that the level of pain disability and dysfunction was severe.
- [16] Dr. Langer, an orthopaedic surgeon in a Treatment and Assessment Plan (OCF-18) dated June 6, 2016, refers to the applicant's injuries as: whiplash associated (WAD 11) with complaints of neck pain, tension-type headache, injury of other muscle and tendons at wrist and hand level, and radiculopathy.
- [17] Dr. Langer saw the applicant again on August 31, 2016, and diagnosed the applicant with: mechanical spine pain, mainly low back; post-traumatic headache; emotional distress; insomnia and fatigue. The only records reviewed by Dr. Langer for this report were two disability certificates dated January 18, 2016, and January 21, 2018, records from her family doctor with no time frames on those records, and an ultrasound. There is no evidence in his reports that he was aware of the pre-accident medical history.
- [18] The applicant attended the Insurer's Orthopaedic Surgery Examination on August 25, 2016. Dr. V. Naumetz, an orthopaedic surgeon, in his report indicated that the applicant's injuries were: pain on the neck and right trapezius muscle area and right arm, occasionally tingling in the right arm towards the right thumb, occasional low back pain and headache.
- [19] Dr. V. Naumetz noted that there were no physical abnormalities, with the applicant displaying a normal range of motion of the cervical spine and thoracolumbar spines and no muscle spasm of the paracervical muscles and the

paraspinal muscles. Dr. V. Naumetz indicated that the applicant displayed a normal range of motion of the shoulders, elbows, wrist, and fingers and an examination of her lower extremities was normal. There was no evidence of any physical impairments.

- [20] Dr. Naumetz diagnosed the injuries from the accident as a sprain/strain (Wad II) of the cervical spine, sprain/strain of the lumbar spine and a sprain/strain of the right shoulder and right wrist. He felt that the Treatment and Assessment Plan submitted on June 21, 2016, was for "test total body" and was not reasonable and necessary as there were no impairments at this point of time upon physical examination."

## ANALYSIS

- [21] The *Schedule* requires an insurer to pay for medical or rehabilitative benefits that are reasonable and necessary.<sup>2</sup>
- [22] The burden of proof in a claim for accident benefits is with the applicant to establish entitlement.<sup>3</sup>
- [23] It is noted that most of the applicant's post-accident medical complaints already existed before the accident, as evidenced by the medical reports reviewed above.
- [24] The issue before me is has there been any evidence to show an orthopaedic injury resulted from the accident, which requires a further assessment that is reasonable and necessary to provide options for further services? An orthopaedic injury would be an injury, disorder, and disease etc. of the body's musculoskeletal system.
- [25] There is very little evidence if any, before me, differentiating between the applicant's pre-accident pain, low back injury, knee pain etc. and her post accident pain, low back injury, knee pain etc. and the effect of the accident on that pain. Dr. Langer and Dr. Naumetz both agree that there was soft tissue injury resulting from the accident.
- [26] There is no evidence before me that indicates that a further assessment is reasonable and necessary.
- [27] There is no evidence in Dr. Langer's report of a finding of some orthopaedic injury resulting from the accident which requires further assessments. His findings are directed to findings of injuries of a soft tissue nature. This finding of soft tissue complaints does not necessitate an orthopaedic assessment. I note also that the two disability certificates that Dr. Langer reviewed as part of his

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<sup>2</sup> Schedule sections 15, 16

<sup>3</sup> *Scarlet v. Belair Insurance Co.* [2015] ONSC 3635

analysis had no time frames on them. His report also did not refer to any pre-accident injuries, which indicates that he was not aware of pre-accident injuries.

- [28] Dr. Naumetz in his report also found no orthopaedic injury. His report clearly indicates that the applicant displayed a normal range of motion of the shoulders, elbows, wrists, and fingers, and that the lower extremities of the applicant were normal. He found that there were no physical impairments.
- [29] I prefer the report of Dr. Nuametz. His report is more detailed with his examination being more complete of the applicant, and directed towards the issue of the need for a further assessment of an orthopaedic injury.

#### **ORDER**

- [30] The applicant's claim for payment of \$2,000.00 for an orthopaedic assessment is dismissed.
- [31] The applicant is not entitled to receive interest on overdue payment of benefits as there were no overdue payments of benefits owing

**Released: July 23, 2018**



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**Robert Watt, Adjudicator**