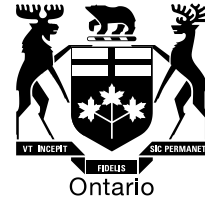


LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards
Tribunals Ontario



Date: **November 29, 2016**
Tribunal File Number: **16-000098/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:

D.J.

Applicant

and

Aviva Insurance Canada

Respondent

DECISION AND ORDER

Adjudicator: Jeanie Theoharis

Written Submissions By:

Counsel for the Applicant:

Jessie V. Tran

Counsel for the Respondent:

Gina Nardella

Heard by way of a written hearing: September 7, 2016

Overview

1. D.J. (the “Applicant”) was injured in an automobile accident on October 26, 2013. The automobile was insured by Aviva Insurance Canada (the “Respondent”).
2. The Applicant submitted an application for dispute resolution services to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) pursuant to section 280(2) of the *Insurance Act*, R.S.O. 1990, c. I.8 (the “Act”), and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, (the “Schedule”).
3. The parties were unable to resolve their dispute at a case conference held on June 30, 2016, and the matter proceeded to a written hearing. All submissions and evidence were filed with the Tribunal by September 6, 2016. A review of those documents forms the basis of this decision.

Background

4. The Applicant, as a result of the accident, suffered both physical and psychological impairments. Her physical impairments were primarily to her neck, shoulders, back and ankle. However, following the accident, the Applicant did exhibit psychological impairments including depression, isolation, and anxiety. The Applicant attended and was treated at the Pain Rehabilitation Clinic Inc. She currently has eight outstanding invoices with the Clinic. The Respondent denied the treatment plans and has not paid any of the invoices.
5. The Applicant submits that the treatment plans should be approved because:
 - a. her injuries are not minor as defined in the *Schedule* and fall outside of the *Minor Injury Guideline* (the “MIG”); and
 - b. the treatment sought is reasonable and necessary.
6. The Respondent denied the treatment plans and costs of assessment. The Respondent submits that:
 - a. the Applicant’s injuries are minor injuries, and thereby treatment would be pursuant to the *MIG*; and
 - b. the treatment plans are not reasonable and necessary.

Benefits in Dispute

7. The benefits in dispute are:

- a. Is the Applicant entitled to receive a medical benefit pursuant to the following treatment plans:
- a) Treatment plan dated March 19, 2014, and submitted by Dr. San Bui, Chiropractor, from Pain Rehabilitation Clinic Inc. for physical rehabilitation sessions in the amount of \$1,770.00?
 - b) Treatment plan dated June 26, 2014, and submitted by Romy George, Physiotherapist, from Pain Rehabilitation Clinic Inc. for physical rehabilitation sessions in the amount of \$1,810.00?
 - c) Treatment plan dated September 10, 2014, and submitted by Pain Rehabilitation Clinic Inc. for physical rehabilitation sessions in the amount of \$3,042.00?
 - d) Treatment plan dated May 20, 2015, and submitted by Dr. San Bui, Chiropractor, from Pain Rehabilitation Clinic Inc. for physical rehabilitation sessions in the amount of \$2,070.00?
 - e) Treatment plan dated September 23, 2015, and submitted by Dr. San Bui, Chiropractor, from Pain Rehabilitation Clinic Inc. for physical rehabilitation sessions in the amount of \$2,000.00?
- b. Is the Applicant entitled to receive payment for the following:
- i. Disability Certificate (OCF-3) submitted by Dr. San Bui, Chiropractor, from Pain Rehabilitation Clinic Inc. in the amount of \$270.00, dated October 30, 2013?
 - ii. Treatment and Assessment plan submitted by Dr. San Bui, Chiropractor, from Pain Rehabilitation Clinic Inc. for a social work assessment in the amount of \$2,530.00, as detailed in a treatment plan dated April 15, 2015?
 - iii. Treatment and Assessment plan submitted by Dr. San Bui, Chiropractor, from Pain Rehabilitation Clinic Inc. for an orthopaedic assessment in the amount of \$2,200.00, as detailed in a treatment plan dated May 20, 2015?

Issues to be Determined

8. To determine the Applicant's entitlement to the above-noted benefits, the issues to be decided are as follows:

- i. Who bears the burden of proof to show that the Applicant's injuries fall outside of the *Minor Injury Guideline*?
- ii. Are the Applicant's injuries outside of the *Minor Injury Guideline*?
- iii. If the Applicant's injuries are found to be outside of the *Minor Injury Guideline*, then I must consider:
 - a. Whether the five treatment plans are reasonable and necessary
 - b. Whether the three costs of assessment are reasonable and necessary
 - i. If the costs of assessment are found to be reasonable and necessary, are any of the costs of assessment limited by the *Schedule* or the *Professional Services Guideline*?
- iv. Are the parties entitled to receive costs?

Result

9. Based on a review of the evidence presented, I find that:

- i. The Applicant bears the onus to establish on a balance of probabilities that her injuries fall outside the *Minor Injury Guidelines*.
- ii. The Applicant has established on a balance of probabilities that she falls outside of the *Minor Injury Guidelines* because of her psychological symptoms. The extent of the Applicant's depression, anxiety and cognitive impairments do not fall within the definition of 'minor injury.'
- iii. Having found that the Applicant's injuries are outside of the *Minor Injury Guideline*:
 - a. I find the five treatment plans are not reasonable and necessary. The treatment plans are for the treatment of the Applicant's physical impairments in a facility-based program. I find the treatment plans are not reasonable and necessary because, based on the totality of the evidence further facility-based therapy will not produce further recovery for the Applicant.
 - b. I find that the cost for a disability certificate and cost for a social work assessment is reasonable and necessary. I do not find the cost for an orthopaedic assessment is reasonable and necessary.
 - i. The entitlement for the cost of a disability assessment has not been established by the Applicant. The amount payable for the cost of a social work assessment is limited to \$2,000.00 pursuant to s. 25(5)(a) of the *Schedule*.

- iv. Each party requested costs. The parties did not establish that costs of the proceeding should be awarded. There was no evidence to show that either party acted in an unreasonable, frivolous, vexatious manner, or in bad faith.

Law

10. The *Minor Injury Guideline* (“MIG”) establishes a framework for the treatment of minor injuries. The objectives of the *MIG* are to provide individuals with faster access to rehabilitation, improve health care resources, provide certainty around cost and payment to the parties, and be more inclusive in providing treatment for those who have minor injuries. The focus is on the application of a functional restoration approach.
11. 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 any clinically associated sequelae.”
12. An insurer, pursuant to section 14 of the *Schedule*, is liable to pay an insured person medical and rehabilitation benefits if the insured person has sustained an impairment as a result of an accident, and the benefits are reasonable and necessary expenses that have been incurred by or on behalf of the insured person as a result of the accident.
13. Section 18(1) of the *Schedule* provides a maximum limit of \$3,500.00 for any one accident for medical and rehabilitation benefits for persons who have sustained a predominantly minor injury. As a result, the *MIG* will apply where an insured’s accident related injuries are predominantly minor.
14. Sections 14 and 18 create three tiers of benefits relating to medical and rehabilitation benefits: (1) a maximum of \$3,500.00 for an impairment that is predominantly a minor injury; (2) a maximum of \$50,000.00 if the impairment is not a minor injury and is not catastrophic; and (3) a maximum of \$1,000,000.00 for an impairment that is catastrophic.

Analysis

Who bears the burden of proof to show that the Applicant’s injuries fall outside of the Minor Injury Guideline?

15. The Respondent submits that the burden of proof is with the Applicant to establish entitlement to the appropriate level of benefits. The Respondent relies on the case of *Scarlett v. Belair Insurance Co.* [2015] ONSC 3635 (“Scarlett”) to support

this position. The Applicant, in her written reply, submits that the *Scarlett* case does not apply in the present situation.

16. I find that the Applicant has the burden of proof to establish that her injuries fall outside of the *MIG*. The Court in *Scarlett* at paragraph 24 held that an applicant has the burden of proof to establish that his or her accident-related injuries are not predominantly minor, and as such fall outside of the *MIG*. If an applicant's injuries fall outside of the *MIG*, the \$3,500.00 limit on the medical benefits does not apply.

Are the Applicant's Injuries outside of the Minor Injury Guideline?

17. The Respondent submits that the Applicant's injuries are minor injuries and are governed by the *MIG*. I find that the Applicant has established that the Applicant's injuries fall outside of the *MIG* because the Applicant's psychological impairments are not within the definition of 'minor injury.'
18. As a result of the motor vehicle accident, the Applicant sustained both physical and psychological injuries. The Applicant's social work assessment completed by Shayna Pilc, dated November 9, 2015, referred to an OCF-3 dated July 7, 2015. The OCF-3 noted that the Applicant was diagnosed with "Whiplash Associated Disorder, [WAD3] with complaint of neck pain and neurological signs, dislocation, sprain and strain of joints and ligaments of shoulder girdle, other headache syndromes, dislocation, sprain and strain of joints and ligaments of thorax, dislocation, sprain and strain of joints and ligaments of lumbar spine and pelvis, and sprain and strain of shoulder joint."
19. During the assessment Ms. Pilc, a social worker, made clinical findings that the Applicant's social and cognitive behaviour has been impacted as a result of the accident. Throughout her report, she makes reference to the Applicant's struggles. By way of example the report notes instances when
- a. the Applicant "states very clearly how she has adjusted her life since the accident, 'I go out less,' she begins, 'I communicate less with people, ...'"
 - b. "Before the accident [the Applicant] was a confident person, she was 'capable of handling any job, or situation.' Now [the Applicant] wonders about her potential job prospects, even the opportunity to change."
 - c. The Applicant "faces symptoms of stress and anxiety as well. She related this to her driving, 'I am worried sometimes, if a car is speeding sometimes I am afraid to look behind me.'"
 - d. The Applicant "reports having a loss in energy and lifestyle in response to the accident. She states, 'a loss of motivation, when it comes to myself, my kids and my home, I used to be very tidy now I'm not that reasonable. I leave dishes for two (2) days, (I wonder) should I cook? (and conclude) no and go buy food.'"

- e. The Applicant confirms “having many symptoms of depression. She comments having feelings of hopelessness and helplessness “most of the time”. She has “for sure” lost interest in daily activities, as is evident in many of her previous statements. She has lost weight, and experienced sleep changes, anger or irritability and a loss of energy.”
20. In particular Ms. Pilc, throughout her report, notes that since the accident the Applicant socialized less, suffered with headaches, pain in her shoulders, lower back, ankle, and neck, has trouble sleeping, has nightmares about the accident, worried about driving, stress, anxiety, loss of motivation, loss in energy, hopelessness, helplessness, weight loss, anger, irritability, concentration problems and has become more reclusive and isolated.
21. Ms. Pilc noted in her report that the Applicant’s injuries do not fall under the *MIG* because of “apparent psychological symptoms and issues, specifically symptoms of depressions, cognitive issues and anxiety symptoms.” She recommended 10-12 individual counselling training sessions to assist in the Applicant’s emotional, psychological and social aspects, including alleviating her anxiety when driving; treat the Applicant’s symptoms of depression; increase her happiness by raising her sense of independence, individuality and social interactions; and increase her motivation and confidence.
22. These psychological problems following the accident are also noted in the Applicant’s family doctor’s clinical notes and records. Following the accident Dr. Tranqui, the Applicant’s family doctor, noted that the Applicant complained about nightmares, insomnia, poor sleep, depressed mood, increased anxiety, the Applicant was calling counsellors for help, decreased energy, decreased appetite, decreased motivation, and avoiding socialization. The family doctor noted that he had a discussion that the Applicant should consult with a psychotherapist.
23. The Applicant attended an independent psychologist assessment with Dr. Bruce Cook at the Respondent’s request. In Dr. Cook’s report, dated June 17, 2015, Dr. Cook notes that the Applicant admitted that she had engaged in psychotherapeutic services, that she started to experience psychological problems following the accident, her sleep pattern is disturbed, she wakes up due to pain, her short-term memory may be impaired, she gets anxious, worries about driving, engages in avoidance behaviours, and has nightmares of the accident.
24. A psychometric test, conducted by Dr. Cook, found that the Applicant’s answers indicated problems that merits further inquiry, including “unusual sensory-motor problems; impact of traumatic events; frequent routine physical complaints; physical signs of depression; distrust; suspiciousness; disruptions in thought

process; preoccupation with physical functioning; physical signs of anxiety; tension and apprehension; unsupportive family or friends; hostility and bitterness; and rumination and worry.”

25. Also during the Applicant’s assessment with Dr. Cook, the Applicant completed the Beck Depression Inventory (BDI-II) and scored in the mildly depressed range; the Burns Anxiety Inventory (BAI) scoring a 21, which places her in the lower range of the moderately anxious range; and the West Haven-Yale Multidimensional Pain Inventory (MPI) where it indicated that the pain impacts her life, and the Applicant perceives a significant pain experience, including pain severity, self-control and negative mood indices.
26. Dr. Cook acknowledged that the Applicant may have difficulty admitting to her emotional or mental health issues, and despite the objective findings he opined that overall, the Applicant is functioning relatively well from a psychological point of view.
27. I do not find Dr. Cook’s conclusion persuasive given his objective findings; and I find his conclusion that the injuries are within the *MIG*, is inconsistent with his findings. Dr. Cook’s report confirms the Applicant’s evidence from Ms. Pilc and Dr. Tranqui. Dr. Cook noted that the Applicant is mildly depressed, moderately anxious and perceives significant pain. Dr. Tranqui’s clinical notes and records and Ms. Pilc’s assessment report generally agree with Dr. Cook’s findings, however, Ms. Pilc comes to the opposite conclusion. She opines that the Applicant is not within the *MIG* due to her psychological evaluation. Because of the inconsistency of Dr. Cook’s conclusion with his own findings, and having considered the evidence before me, I accept Ms. Pilc’s report as being accurate in establishing that the Applicant’s psychological impairments are not a ‘minor injury’ and as such the Applicant’s injuries are outside of the *MIG*.

Are the five treatment plans and costs of assessment reasonable and necessary?

28. As I have found the Applicant is out of the *MIG*, she can access benefits greater than the \$3,500.00 cap in the *MIG*. However, I still must determine whether each of the treatment plans and costs of assessment are reasonable and necessary.
29. I find that none of the five treatment plans are reasonable and necessary. With respect to the costs of assessments/examinations, I find that the orthopaedic assessment cost is not reasonable and necessary; and I find that the costs for a social work assessment and a disability assessment are reasonable and necessary.

Treatment Plans

30. The five treatment plans are all requests for facility based type of treatment for muscular/skeletal injuries. The proposed treatment would employ massage, acupuncture, and TENS treatment to treat the Applicant's neck, shoulders, back and ankle.
31. I accept the conclusions of the IE assessments that the treatment plans are not reasonable and necessary because the Applicant has reached maximal recovery for her sprain/strain-type injuries. The Applicant's physical ailments have been appropriately treated, and further supervised physical rehabilitation sessions, as proposed by the Pain Rehabilitation Clinic, will not produce further recovery. Finally, the Applicant has been shown a home-based exercise program, and may continue with her home-based exercise program.
32. The Applicant attended three insurer independent examinations for the purpose of determining whether the treatment plans were reasonable and necessary. She was assessed by Dr. Bob Karabatsos, Orthopaedic Surgeon, on July 8, 2015; Dennis Polygenis, Physiotherapist, on July 24, 2014; and Dr. Ijaz Chaudhry, Physician, on July 26, 2016.
33. Dr. Karabatsos diagnosed the Applicant with soft tissue injuries, also noted the injuries as uncomplicated sprain/strain-type injuries. Dr. Karabatsos did not suggest that further ongoing treatment was needed. He had observed the Applicant during the assessment. He noted that the Applicant did not have any sitting intolerance, had normal body alignments, no muscle spasms, no asymmetrical muscle atrophy, had full range of motion and no instability. He opined that the Applicant should continue with a home-based exercise program.
34. Dennis Polygenis' concluded that the Applicant appeared to have sustained uncomplicated soft tissue injuries, and would fall within the minor injury definition. At the time of the assessment the Applicant had engaged in approximately 9 months of facility based treatment. Based on his assessment Mr. Polygenis opined that the Applicant did not show any significant consistently reproducible musculoskeletal/orthopaedic clinical evidence of ongoing impairment or injury due to the accident. Mr. Polygenis concluded the accident-related injuries for the most part had resolved, that the Applicant has achieved maximum therapeutic benefit, and would not require further facility-based physiotherapeutic treatment. Mr. Polygenis recommended the Applicant continue with her self-directed home based exercise program.
35. Also Dr. Chaudhry assessed the Applicant on July 26, 2016 and concluded that the Applicant suffered soft tissue injuries only which fall within the definition of a

minor injury; and further treatment was not needed as the Applicant's range of motion and strength testing was normal.

36. The Applicant's family doctor, Dr. Tranqui, also suggests that facility-based treatment would not be reasonable or necessary. The clinical notes and records noted, in part, that the ultrasound reports concluded there was a normal lumbar spine; and normal left shoulder. It is further noted that the acupuncture, massage therapy and physiotherapy is providing some temporary and/or limited relief.
37. The Applicant submits that the insurer's independent examination assessments should not be relied upon because the health practitioners failed to consider the Applicant's cultural tendency as a woman to mistrust and not openly convey and identify her health issues to the male health practitioners whom she is meeting for approximately 1-2 hours. The Applicant suggests that the assessment reports, conducted by the male health practitioners, are therefore incomplete and unreliable. I disagree.
38. Upon reading each of the independent examinations, none of the reports indicate that the Applicant was uncooperative, unwilling to participate, or unwilling to speak with the assessors because they are male. The Applicant's social worker, Shanya Pilc, a female, noted that the Applicant is a very private person. There is no concrete evidence to show that the Applicant was not willing to openly answer and participate in the assessments due to having a male health practitioner. A bald assertion without evidence is not enough to support the Applicant's claim. Had this been a concern, the Applicant's counsel may have requested female health practitioners to accommodate the Applicant. There is no evidence before me to suggest that the Applicant made this request, and that it was denied.
39. Based on the totality of the evidence before me I find that the treatment plans for facility based treatments are not reasonable and necessary. The Applicant sustained minor physical injuries. She has already attended facility-based treatment, reached maximal recovery and as such, I do not find that further facility-based treatment is reasonable and necessary. The Applicant is able to continue with her home-based exercise program.

Costs of Assessment

40. I find that the orthopaedic assessment cost is not reasonable and necessary. The evidence shows, as noted above, that the Applicant suffered physical impairments that fall within the *MIG*. The request for an orthopaedic assessment is not needed, as her impairments have been successfully treated pursuant to the *MIG*.

41. I find that the costs for a social work assessment and a disability certificate are reasonable and necessary. The Applicant has sustained psychological impairments which are not considered to be a “minor injury”. The treatment of these impairments continues, and has not yet been rectified by the treatment already undertaken. The Applicant’s psychological impairments are outside of the *MIG*, and have not yet been treated appropriately. As such I find that the assessments are reasonable and necessary.

Is the Amount Claimed for a Cost of Examination Limited by the Professional Services Guideline?

42. I find that the costs for a social work assessment in the amount of \$2,530.00 and a disability certificate in the amount of \$270.00 are reasonable and necessary.

Social Work Assessment

43. The Respondent argues that the social work assessment in the amount of \$2,530.00 is limited by the *Schedule* or the *Professional Services Guideline*.

44. I find that the social work assessment is limited to \$2,000.00 pursuant to subsection 25(5)(a) of the *Schedule* and the disability certificate assessment is limited to \$200.00 pursuant to the *Professional Services Guideline*.

45. Subsection 25(5)(a) of the *Schedule* notes that an insurer shall not pay more than \$2,000.00 in respect of fees for any one assessment or examination. The amount of \$2,000.00 ought to be paid to the Applicant.

Disability Certificate

46. I find that the Applicant has not established that they are entitled to this cost.

47. I accept the Respondent’s submissions that (i) the Respondent did not receive a claim for the costs of a disability certificate dated November 7, 2013; (ii) that the Respondent would not be required to pay for a disability certificate that was not submitted by the Applicant for consideration; and (iii) the amount claimed by the Applicant exceeds the allowable amount as the maximum amount payable for an OCF-3.

48. I accept the Respondent’s submissions on the disability certificate because the Applicant has not provided me with any evidence to suggest otherwise.

49. Even if the Applicant had established that the disability certificate had been submitted to the Respondent, the *Professional Services Guideline* establishes a \$200.00 maximum fee for a disability certificate (OCF-3).

50. The Applicant is not entitled to the costs for the disability certificate.

Costs

51. The requests for costs are denied.

52. Pursuant to Rule 19.1 of the *Licence Appeal Tribunal Rules of Practice and Procedure*, (the “*Rules*”) a party may make a request to the Tribunal for its costs where a party believes that another party in a proceeding has acted in an unreasonable, frivolous, vexatious manner or in bad faith.

53. Rule 19.4 further sets out a requirement that a party’s submission on costs shall “set out the reasons for the request and the particulars of the other party’s conduct that are alleged to be unreasonable, frivolous, vexatious, or in bad faith.”

54. Both parties have requested costs however neither provided evidence of how the respective party behaved poorly.

55. The Respondent submits that the Applicant acted unreasonably in bringing a claim before the LAT because it should have been apparent to the Applicant that the Respondent’s denials were proper, and there was no evidence to dispute the denials. No further submissions were provided.

56. The Applicant submitted a request for costs on their written reply. The Applicant did not provide particulars about how the Respondent’s behaviour was unreasonable, frivolous, vexatious, or in bad faith.

57. Neither party provided sufficient evidence to show that either was acting in an unreasonable, frivolous, vexatious manner or in bad faith. A blanket statement regarding conduct and request for costs without supporting evidence fails to prove one’s request for costs. The claims for costs, from both parties, are denied.

ORDER

After considering the evidence, pursuant to the authority vested in it under the provisions of the Act, the Tribunal orders that:

58. The Applicant's injuries do not fall within the *Minor Injury Guideline*.

59. The Applicant is entitled to receive a medical benefit pursuant to a treatment plan submitted by Dr. San Bui, Chiropractor, from Pain Rehabilitation Clinic Inc. for a social work assessment in the amount of \$2,000.00, as detailed in a treatment plan dated April 15, 2015.

Released: November 29, 2016



Jeanie Theoharis,
Adjudicator