LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

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

File Number: 18-004878/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:

A. Y.

Appellant

and

Aviva Insurance Company

Respondent

DECISION

PANEL:	**Derek Grant, Adjudicator**
APPEARANCES:	
For the Applicant:	Ernest Toomath, Counsel
For the Respondent:	Anne Hurl, Representative Gina Nardella and Sarina Sud, Counsel
HEARD:	**In-Person: February 1, 2019, with closing submissions completed on May 31, 2019**

OVERVIEW

[1] The applicant ("A.Y.") was injured[1] in an automobile accident ("the accident") on June 8, 2017 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* ("*Schedule"*), some of which were denied by the respondent ("Aviva").

[2] A.Y. claims that prior to the accident, he did not have any pre-existing knee impairments. Although he acknowledges that he did have medial and lateral meniscus tears in his knee pre-accident, it was not affecting his functionality and ability to work. A.Y. contends that the subject accident caused his current knee impairments. Further, A.Y. submits that he sustained neck and back injuries that also affected his ability to return to work.

[3] After the accident, A.Y. did not return to work. After a delay, Aviva paid A.Y. a partial IRB amount until it determined A.Y. could return to work and terminated the IRB as of November 21, 2018. Aviva later corrected the amount of the weekly rate of $34.42 to $400 per week, which is the maximum rate under the *Schedule*. A.Y. believes that the delay was improper, entitling him to interest, and also that he is still unable to return to work.

[4] Thus, I must decide (a) if A.Y. is entitled to the interest on the delayed payment, and (b) if A.Y. is entitled to the IRB from November 22, 2018 ongoing. The *Schedule* has a different eligibility requirement after 104 weeks of the benefit, therefore, I will consider A.Y.'s entitlement from November 22, 2018 until June 8, 2019 (the 104-week mark) and then June 9, 2019 (the post-104-week mark) and ongoing.

[5] In addition, I must decide if the treatment plans in this proceeding, listed below, are reasonable and necessary with respect to injuries and impairments that resulted from the June 8, 2017 accident.

ISSUES TO BE DECIDED

Motion to Strike the Reply Submissions

[6] Before proceeding to decide the issues in dispute, Aviva submits I should strike A.Y.'s post-hearing reply submission dated February 27, 2019. Aviva provides several grounds, including A.Y. improperly introduced new evidence and violated page length restrictions pursuant to the Order of December 18, 2018. For the reasons that follow, I grant Aviva's request for the reply submissions, including the memo, to be struck from the evidentiary record for the reasons below.

1 OCF-3 dated April 30, 2018 of Dr. Marciniak, General Physician, indicates diagnosis of: tear of medial meniscus of knee, tear of meniscus of knee, sprain and strain of lumbar spine, sprain and strain of other unspecified parts of knee, sprain and strain of joints and ligaments in other and unspecified parts of neck, reaction to severe stress and adjustment disorder.

Did the reply improperly contain new evidence – The Emma Gibson memo?

[7] First, Aviva argues that A.Y.'s reply submissions improperly included new evidence that had not been part of A.Y.'s main submissions, namely, a memo from Emma Gibson (Accounts Receivable – Sports Medicine Rehabilitation) dated February 26, 2019 referred to in para 2 of the A.Y.'s Reply Submissions.

[8] In considering this argument, I note that all parties participating in a Tribunal proceeding are expected to adhere to the Tribunal Rules governing the timeliness and efficiency of these proceedings.

[9] Parties in a proceeding have a duty to ensure the Tribunal's Orders are adhered to. Should there be a delay, or a foreseeable reason for a delay, the parties have a duty to ensure the timeliness and efficiency of the proceeding is maintained, by notifying the other party of a foreseeable delay. Providing this notice helps to ensure a fair proceeding takes place.

[10] After carefully reviewing A.Y.'s initial and reply submissions, I agree with Aviva that A.Y. used the reply to introduce new information and arguments that should have been addressed in his initial submissions. Further, the reply submissions restate the submissions and arguments made in A.Y.'s initial submissions and at the hearing.

[11] The purpose of the reply is for the party bearing the onus in the dispute to respond to any issues that were raised in the other party's submissions which could not have been reasonably raised in initial submissions. The reply is not an opportunity for the party to raise issues that should have been raised in initial submissions or to reformulate their argument.

[12] As a result of the late filing by A.Y. of the memo, Aviva was prejudiced by restricted timelines and denied the opportunity to respond with any necessary rebuttal of its own.

[13] It is clear from the date of the Emma Gibson letter that this document did not exist at the time of the hearing or prior to the hearing. In addition, the letter appears to have been procured after the parties' submissions. I find this constitutes new evidence and is therefore not permitted as part of the reply submissions.

[14] In circumstances where evidence may not have been available prior to a deadline, it may be admissible, if it is promptly brought forward. However, in the subject proceeding, there is no reason given for why the memo was not produced within submission deadlines.

[15] A.Y. had enough time to notify Aviva that he intended to obtain such a memo and failed to do so. Once he became aware of it, he failed to notify Aviva that the memo would not be obtained within the timelines set out in the Tribunal

Order. A.Y. offered no explanation as to the reason for the delay of meeting any deadlines (for filing) set out in the Tribunal Order or failing to notify Aviva.

[16] The right of reply is a limited one. As a general rule, parties are expected to make the entirety of their cases in their main submissions. New evidence as part of a reply typically is not permitted, because the respondent does not have the opportunity to respond to new evidence that is tendered as part of a reply. To the extent that A.Y. has filed new evidence with his reply, that new evidence is improper and should be struck.

Reply submissions struck

[17] I find that the combination of the reply being used to restate A.Y.'s initial submissions and new evidence contained in the reply submissions is grounds to strike the reply submissions.

[18] In addition, even if I did not strike the reply submissions, because of the issues identified above, I would have given minimal weight to the content of the reply when reaching my conclusion on the substantive issues in dispute. Further, after striking the new evidence of Emma Gibson, I find the remaining submissions restate the previous submissions and do not add any new information.

[19] For the reasons above, A.Y.'s reply is struck and was not considered when rendering my decision on the substantive issues.

Page-length non-compliance

[20] Regarding the page length of A.Y.'s closing submissions, the Order dated December 18, 2018, set a page limit of 15 pages for the submissions. A.Y.'s submissions came in at 27 pages. If A.Y. needed additional pages to properly state his case, he should have sought permission from the Tribunal.

[21] For the reasons above, A.Y.'s submissions are struck beyond the 15-page limit set out in the Order and are not considered when rendering my decision on the substantive issues. The pages beyond the page limit simply restate previous arguments and do not address any issue raised by Aviva.

Substantive Issues

[22] The substantive issues I must decide are:

(i) Is A.Y. entitled to receive an income replacement benefit ("IRB") in the amount of $400.00 per week from November 22, 2018 to date and ongoing?

(ii) Is A.Y. entitled to receive the following medical benefits for treatment recommended by Mark Marciniak of Sports Medicine Rehabilitation:

a. $448.83 which is the remaining balance of psychological services submitted in a treatment plan on November 21, 2017?

b. b.$2,639.00 for physiotherapy services submitted in a treatment plan on February 13, 2018?

c. $800.00 for injections submitted in a treatment plan on February 13, 2018?

d. $3,039.00 for assistive devices/injections submitted in a treatment plan on May 3, 2018?

e. $2,639.00 for physiotherapy services submitted in a treatment plan dated June 14, 2018?

f. $448.83 which is the remaining balance of psychological services submitted in a treatment plan on July 31, 2018?

g. Is A.Y. entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?

h. Is A.Y. entitled to interest on any overdue payment of benefits?

i. Is either party entitled to its costs of the proceeding?

RESULT

[23] For the reasons to follow, I find that:

a. A.Y. is not entitled to the income replacement benefit being sought from November 22, 2018 forward, but is entitled to interest on the income replacement benefit, up to November 21, 2018.

b. A.Y. is not entitled to the remaining balances of the psychological treatment plans or the knee brace/injection and physiotherapy treatment plans.

c. A.Y. is entitled to an award on the overdue interest.

d. Neither party is entitled to costs.

ANALYSIS

Income Replacement Benefit – Pre- and Post-104 entitlement

[24] It is important to this case to recall that the insurer's obligation to pay IRBs, eligibility criteria, and the method of calculating benefit amounts are set out in ss. 4-11 of the *Schedule*. Sections 5 and 6 of the *Schedule* define the level of impairment which must be suffered by the applicant to be eligible for IRBs.

These change over time after the accident. For this case, the relevant requirements are:

i. Within 104 weeks after the accident, the insured person suffers a "substantial inability to perform the essential tasks of his or her pre-accident employment…or self-employment."

ii. After the first 104 weeks of disability, the insured person is "suffering a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience."

First 104 Weeks – to June 8, 2019

[25] I will first address A.Y.'s claim that he is entitled to the IRB from the November 21, 2018 stoppage until the June 8, 2019 104-week mark. As above, A.Y. bears the onus of establishing on a balance of probabilities that he suffered from a substantial inability to perform the essential tasks of his employment during that time.

[26] For the reasons that follow, I find that A.Y. does not suffer a substantial inability to perform the essential tasks of his employment. As such, A.Y. is not entitled to the IRB from November 22, 2019 to June 8, 2019.

[27] There is no dispute about A.Y.'s employment duties prior to the accident. A.Y. was working full-time for his son's construction company, which involved painting, installing drywall and ceramic tile, cleaning the job site, bringing in the material and gardening. He also had his own company and engaged in buying, inspecting, fixing and exporting earth-moving equipment. Based on income earned during this period prior to the accident, Aviva determined that A.Y. was entitled to a partial IRB amount following the accident until it terminated the IRB on November 21, 2018.

[28] A.Y. asserts that after and as a result of the accident, he was no longer able to work. In support of his position that he is unable to perform his employment duties after November 21, 2018, A.Y. relies, in part, on the following:

(i) Dr. Waddel's (Orthopaedic Surgeon) note dated June 27, 2017 that A.Y. sustained a partial tear of his medial collateral ligament in his left knee.

(ii) The MRI report of Dr. Eisen, Radiologist, dated February 3, 2018 shows multiple abnormalities, damage to meniscus, damage to anterior cartilage, linear tear posterior horn and medical meniscus and a complex tear involving the anterior horn lateral meniscus.

(iii) The reports and treatment plans of Dr. Marciniak, Rehabilitation Specialist. Dr. Marciniak recommended a Synvisc injection for A.Y.'s knee injury. In his February 13, 2018 report, Dr. Marciniak notes that A.Y. requires an orthopaedic consultation to consider arthroscopy. Dr. Marciniak goes on to further comment that A.Y. will require injections after the arthroscopy; that the knee will never be normal; however, A.Y. can expect some improvement after surgery and injections. Dr. Marciniak concludes that A.Y. may require a knee replacement. Dr. Marciniak also recommends a knee brace, physiotherapy, and referred A.Y. to Dr. Syed, Orthopaedic Surgeon.

(iv) Dr. Marciniak, completed an April 30, 2018 Disability Certificate ("OCF-3"). The OCF-3 indicates diagnoses of: tear of medical meniscus of knee, current; tear of meniscus of knee, unspecified; sprain and strain of lumbar spine; sprain and strain of other unspecified parts of knee; sprain and strain of joints and ligaments in other and unspecified parts of neck; reaction to severe stress and adjustment disorder.

(v) In his notes dated January 7, 2019, Dr. Syed, Orthopaedic Surgeon, diagnosed A.Y. with a left knee medial meniscal tear. Dr. Syed provided A.Y. with an injection and suggested that A.Y. continue with physiotherapy to work on strengthening and range of motion. Dr. Syed also opined that A.Y. would be a candidate for a knee replacement.

[29] In support of its position that A.Y. did not suffer a substantial inability to perform the essential tasks of his employment after November 21, 2018, Aviva relies in part on the following:

(i) The report of Dr. Gelman, Medical Physician, dated October 25, 2018. Dr. Gelman's physical examination showed some self-limiting and pain-focusing behavior. Dr. Gelman was unable to identify any significant, objective signs of ongoing strain sprain-type injuries through his neck and back. Dr. Gelman opined that as a result of the accident, A.Y. sustained a sprain strain injury to his cervical spine (WAD II) and lumbar spine. He also likely sustained a soft tissue/strain/sprain injury to his left knee, superimposed on top of pre-existing meniscal tears and degenerative changes. Dr. Gelman concluded that based on the nature of the injuries and length of time that has elapsed, as well as taking into account A.Y.'s pre-existing left knee issues, Dr. Gelman found no objective sign of accident-related musculoskeletal impairment that would result in a substantial inability to perform his previous employment activities. Dr. Gelman opined, "I recognize A.Y. was involved in very physical activities and his participation in these physical activities may be limited because of pre-existing knee issues at this time. However, at this point, there is no evidence of ongoing strain sprain or soft tissue-type injuries to A.Y.'s neck and back and the current knee complaints can be attributed to his pre-existing knee issues".

(ii) The reports of Dr. Moshiri, psychologist, dated March 26, 2018, September 17, 2018 and October 25, 2018. The denial of the IRB was based on the October 25, 2018 report. Dr. Moshiri opined that based on DSM-5 diagnostic categories his diagnosis is Adjustment Disorder with mixed anxiety and depressed mood; Insomnia Disorder, persistent, with other sleep disorders. Dr. Moshiri concluded from a psychological perspective the claimant does not suffer a substantial inability to perform the essential tasks of his pre-accident employment as a direct result of the motor vehicle accident. Dr. Moshiri did, however, recommend psychological treatment.

[30] I find that A.Y.'s knee injuries were not worsened by the subject accident. My finding is based on the following:

(i) The MRI of September 25, 2013, reports medial and lateral meniscus tears. This is the same injury noted in the OCF-3 mentioned in paragraph 28 (iv);

(ii) The consult note dated June 27, 2017 of Dr. James Waddell, Orthopaedic Surgeon, indicates, "at present time, the patient states that his knee pain has improved….his knee is stable". Dr. Waddell opines that A.Y. "sustained a partial tear of his medial collateral ligament….I have reassured him that this will heal with time". Dr. Waddell recommended exercises; and

(iii) An MRI dated February 3, 2018 also diagnoses a medial meniscus tear and an anterior horn lateral meniscus tear. This is the same injury as noted pre-accident.

[31] I am not persuaded by the medical evidence that the subject accident has worsened A.Y.'s pre-existing left knee impairment. Over a three to five-year period[2], the reports of the tears are consistent, the difference being left knee osteoarthritis mentioned in the February 2018 MRI report. In addition, Dr. Abouali and Dr. Cheifetz both note ongoing pre-accident knee pain, with Dr. Cheifetz noting "chronic knee pain" prior to the accident.

[32] Based on the above, I agree that A.Y. did suffer injuries as a result of the subject accident. However, these impairments have resolved, and Aviva has paid him IRBs, which I agree A.Y. is entitled to up until the date of stoppage. Despite this, I must still determine if A.Y. is entitled to an IRB beyond June 8, 2019 (the post-104 period).

Post-104 Week – June 9, 2019 and ongoing

[33] In order for A.Y. to be eligible for the income replacement benefit after the first 104 weeks from the date of the accident, he must show, on a balance of

2 Between the 2013 MRI report and the February 2018 MRI report

probabilities, that he is completely unable to engage in any employment for which he is reasonably suited by education, training or experience. This is commonly referred to as the more stringent "complete inability test" or the "post-104 test".

[34] A.Y. does not direct me to any evidence that addresses the eligibility test for entitlement to post-104 IRBs. As such, I am not able to make a determination that A.Y. has met his onus to establish entitlement to the IRB from June 9, 2019 and ongoing. The only medical evidence in support of A.Y.'s eligibility for the benefit is the treatment plans that check off a box indicating that he meets the test. I find that the evidence, medical or otherwise, does not establish that A.Y. suffers a complete inability to engage in any employment. Further, there is no evidence that A.Y. is not able to engage any employment that he is reasonably suited by education, training or experience. Therefore, I find that A.Y. is not entitled to post-104 IRBs.

[35] On the contrary, Aviva relies on the report of Dr. Gelman, regarding A.Y.'s pre- and post-104 IRB entitlement, and submits neither eligibility test has been met. I agree.

[36] Based on the above, A.Y. has not satisfied me, on a balance of probabilities, that he suffers from a substantial or complete inability to engage in any employment for which he is reasonably suited by education, training or experience.

[37] Although I acknowledge A.Y.'s testimony with respect to his physical and psychological impairments, I find that his self-reports[3] are not sufficient enough to persuade me on a balance of probabilities that he suffers from a substantial or complete inability to engage in any employment for which he is reasonably suited by education, training or experience. This is particularly true in conjunction with the totality of the medical evidence. I also find that the medical opinions of his treating health practitioners fail to persuade me that he meets the "post-104" test.

[38] Given the discussion above, regarding both A.Y.'s pre- and post-104 inability, I am not persuaded, on a balance of probabilities, that A.Y. suffered from an inability to engage in any employment or self-employment for which he is reasonably suited by education, training or experience.

[39] In summary, I find that A.Y. is not entitled to IRB's beyond November 21, 2018.

3 A.Y. submits that pre-accident he was healthy and active, although limited details were provided about what pre-accident activities he participated in. A.Y. further submits that he worked in construction and renovation, pre-accident. Post-accident, he submits he has pain in his neck, back and legs, and was not able to return to his work in construction and renovation.

Is A.Y. entitled to interest on the previously paid IRB, and as a result, an award because Aviva unreasonably withheld or delayed payments for the period of June 16, 2017 to November 21, 2018?

[40] Despite my finding that A.Y. is not entitled to an IRB after November 21, 2018, I must still determine if A.Y. is entitled to interest on payment for the IRB he did receive on the basis that the payment was delayed, and also if an award is due for the non-payment of interest on the IRB for the period of June 16, 2017 to November 21, 2018.

[41] For the reasons that follow, I find A.Y. is entitled to interest, and an award for the period that interest is owing on the outstanding balance of payment.

[42] Aviva initially started paying A.Y. $34.42 per week for the period June 16, 2017 to September 1, 2017 which was paid on April 20, 2018. The amount was later corrected and a payment of $23,103.15 was made on December 3, 2018, without interest. A further payment of $4,685.71 was made on December 28, 2018. A.Y. has been paid a total of $28,172.40 for the period of June 16, 2017 to November 21, 2018.

[43] Aviva submits that its accountant was not provided the necessary documents in order to make the correct IRB calculation. However, even after discovering and making the correction there was a delay of several months in paying the adjusted correct amount.

[44] A.Y. submits the corrected payment amounts should have been paid with interest, and Aviva made no submissions on the non-payment of interest on those late IRB payments. For the reasons that follow, I find that A.Y. is entitled to interest on the late payment of the IRB. In addition, I find that an award under section 10 of Ontario Regulation 664, R.R.O. 1990 ("O. Reg. 664") is warranted.

[45] Entitlement to interest is governed by section 51 of the *Schedule*. The applicable provisions with respect to the current matter are those that address the calculation of interest where payment of a benefit is overdue.

[46] A.Y. submits that RSM Canada's December 10, 2018 report[4] confirms that A.Y. is entitled to $400.00 per week. For the period of June 16, 2017 to August 31, 2018, the outstanding amount was $24,872.00. A.Y. further submits that the IRB was not paid until approximately 18 months post-accident, without interest, and only to August 31, 2018. A.Y. also submits that a further amount was acknowledged to be payable for the period of August 31, 2018 to November 21, 2018. This latter amount, A.Y. submits, was not paid until December 28, 2018, again without interest. A.Y.'s position is that the IRB should be paid at a rate of $400.00 per week plus interest. I agree.

4 Accounting Firm commissioned by A.Y. to calculate the IRB entitlement

[47] Both RSM Canada, on behalf of A.Y., and MD&D, Aviva's accountant, were provided the same financial and other supporting documents in order to properly calculate the IRB. RSM was able to calculate and conclude the weekly IRB amount, the time period of IRB entitlement, and interest. MD&D was not able to make a similar calculation, based on the same information provided to it.

[48] Aviva contends that its accountant did not receive the necessary financial records in order to correctly calculate the IRB. I do not agree with Aviva's position, as there is a clear record of dates/documents that were provided to MD&D, along with confirmation that RSM received the same documents, which A.Y. detailed in his evidence. As such, I find that Aviva has not provided a clear explanation for the delay in paying the corrected amount of IRB. Further, Aviva offered no explanation for why interest was not paid on the outstanding payment(s) of the IRB.

[49] Even if MD&D made the same or similar calculation as RSM Canada, the fact is the proper calculation was not only made a significant time after the accident, it was paid even later and without interest. While it is commendable that Aviva ensured that the correct IRB calculation was made, the late payment should have been paid with interest. Section 51 *Schedule* is clear, "if a payment of a benefit…is overdue, the insurer shall (my emphasis) pay interest on the overdue amount". Aviva delayed payment of the IRB and is therefore indemnified to A.Y. by paying interest as a result of the late payment.

[50] Based on the evidence before me, I find that A.Y. is entitled to interest on the late payment of the IRB for the period June 16, 2017 to November 21, 2018, in accordance with section 51 of the *Schedule*. Further, due to the non-payment of interest on the overdue payment of the benefit, I find an award in the amount of 20 per cent is reasonable. The 20 per cent amount should be calculated based on the total of the correct amount of IRB that was paid. The period to be calculated is for June 16, 2017 to November 21, 2018.

[51] I have not been provided evidence of the total correct amount of IRB paid for the above period, and as such, I am unable to determine a specific calculation for the amount of the award, and I therefore assign a percentage amount.

TREATMENT PLANS

[52] Sections 14 and 15 of the *Schedule* provide that an insurer is only liable to pay for medical expenses that are reasonable and necessary as a result of the accident. A.Y. bears the onus of proving on a balance of probabilities that the proposed treatment plans are reasonable and necessary. I will address the requested plans in order.

Psychological Treatment

[53] A.Y. is not entitled to payment of the remaining balances for psychological assessment/treatment (Issues b. and g.) as proposed in the treatment plans[5] because he has failed to prove on a balance of probabilities that they are reasonable and necessary.

[54] Aviva partially approved the treatment plan for both the assessment and treatment portion. I agree that the assessment/treatment portions are reasonable and necessary, based on Dr. Marciniak's conclusion that A.Y. suffers from Post-Traumatic Stress Disorder, and Aviva's assessor, Dr. Moshiri, who also concluded that A.Y. suffered from Adjustment Disorder with Mixed Anxiety and Depressed Mood.

[55] These were the first treatment plans for psychological assessment/treatment. The initial assessment recommendation was for a psychotherapist to conduct the assessment. Dr. Moshiri concluded that A.Y. "will benefit the most if he received psychological attention under the care of a registered psychologist". As such, Aviva partially approved the OCF-18 for the assessment. The initial treatment recommendation being for 15 sessions, with Dr. Moshiri recommending12 sessions. Aviva subsequently approved 12 treatment sessions. I accept the diagnoses of both Drs. Marciniak and Moshiri, and I find that 12 sessions of psychological treatment are reasonable. The medical evidence does not establish whether A.Y. has received any of the approved treatment.

[56] Despite this partial approval, A.Y. does not provide me with sufficient evidence regarding his entitlement to the remaining balance. As such, I do not find the remaining balances to be reasonable and necessary.

[57] Although A.Y. provided me with medical evidence in support of his removal from the MIG, I note this occurred on April 17, 2018. Other than the treatment plans, recommending psychotherapy treatment, A.Y. has not directed me to any persuasive medical evidence that establishes that the remaining balances are reasonable and necessary.

[58] The onus is on A.Y. to establish the treatment plan, in whole or in part, is reasonable and necessary; however, he has not. As such, A.Y. has not satisfied his burden that the remaining balances of the October 31, 2017 and July 31, 2018 treatment plans are reasonable and necessary.

5 October 31, 2017 treatment plan - Dr. Moshiri recommended 1.5 hours for clinical interview, 1.5 hours for psychological testing, 1.5 hours for evaluation and interpretation of tests, 2 hours for report preparation, 1 hour for a feedback interview and the remaining balance for completion of the treatment plan (OCF-18); July 31, 2018 treatment plan – Dr. Moshiri recommended 12 hours of cognitive psychotherapy, once a week.

Physiotherapy, Knee Brace and Injections

[59] A.Y. is not entitled to the treatment plans (Issues c., d., e. and f.), as he has not established on balance that the pre-existing left knee injuries are worsened as a result of the accident. I am not persuaded by the medical evidence before me that the treatment plans are reasonable and necessary.

[60] A.Y. claims he suffered left knee injuries as a result of the accident and denies any pre-accident knee symptoms. However, the medical evidence contradicts A.Y.'s self-reporting. Diagnostic imaging of A.Y.'s left knee prior to the accident, confirms that he sustained medial and lateral meniscal tears and an Orthopaedic Consult was recommended. According to the clinical notes and records of Dr. Abouali, Orthopaedic Surgeon, there was a consult in 2015, again on June 7, 2017 (one day prior to the accident) with ongoing left knee pain reported and a return visit to occur on June 13, 2017.

[61] A.Y.'s denial of pre-accident knee pain is also contradicted by the clinical notes and records of Dr. Cheiftez's, Family Physician, such as a May 2, 2017 record, where A.Y. is diagnosed with chronic knee pain. In addition, a letter from Dr. Cheiftez dated May 6, 2017, referred A.Y. back to Dr. Abouali due to worsening knee pain.

[62] As discussed in paragraph 29(i), Aviva relies on Dr. Gelman's report, where he concluded that A.Y. sustained a sprain/strain injury to the left knee superimposed on the pre-existing meniscal tears as a result of the accident. Dr. Gelman agreed that injections and a knee brace are reasonable in regard to the pre-existing knee pain/injuries but did not agree they were necessary for the accident-related injuries.

[63] I agree with Dr. Gelman, as there is no medical evidence that shows the tears were accident-related, or that the tears were worsened as a result of the accident. A.Y.'s medical evidence supports that there are left knee impairments, however, the evidence does not support that the left knee injuries were caused by or exacerbated by the accident. As a result, I find the treatment plans for the knee brace and injections are not reasonable and necessary for treatment of A.Y.'s injuries that were not caused as a direct result of the accident. Further, the medical evidence shows that A.Y.s knee pain was significant pre-accident (being diagnosed as chronic) and is not shown to be worsened by the subject accident.

[64] In this matter, there is a lack of objective medical evidence before me that supports the recommended treatment. I find more is required than numerous treatment plans which simply list barriers to recovery and goals of the recommended treatment, over a one-year period.

[65] I find the knee injury noted in 2013 and pre-accident in 2017, appears to be the same knee injury reported post-accident in 2018. The fact that A.Y. worked in a

physically demanding job with a pre-existing knee injury is a significant factor to be considered in determining whether the pre-existing knee impairment was worsened by the subject accident. The evidence points to the same level of knee impairment pre-and post-accident, and I find other contributing factors, such as age, the physical demands of the pre-accident employment and the diagnosed left knee osteoarthritis that are causing the left knee pain.

COSTS

[66] Rule 19.1 permits a party to request that the Tribunal order the other party to pay costs, where the requesting party "believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith".

[67] Both A.Y. and Aviva requested costs in this matter. A.Y. submits that Aviva's conduct was improper and amounts to bad faith. In addition, that Aviva's actions worsened A.Y.'s condition. A.Y. did not specifically direct me to what actions Aviva undertook that were unreasonable, frivolous, vexatious or done in bad faith.

[68] Aviva submits that A.Y.'s actions such as the improper reply submissions and breaches of the Tribunal Rules/Orders forced it to incur unnecessary costs. Aviva specifically requests costs in the amount of $1,000.00.

[69] I deny A.Y.'s requests for costs, as Aviva based it's denials on the opinions of it's assessors. A differing of opinions regarding treatment or entitlement to a benefit does not establish the grounds for costs. The Rule requires bad faith, vexatious, frivolous or unreasonable behaviour in a proceeding. A simple disagreement on the basis of denials does not satisfy that requirement.

[70] I deny Aviva's cost request because I am not convinced that A.Y.'s actions in this case meets the level of conduct contemplated by Rule 19.1 for a cost remedy.

ORDER

[71] A.Y. is entitled to interest for the period of June 16, 2017 to November 21, 2018. In addition, A.Y. is entitled to an award in the amount of 20 per cent of the amount of interest owing on the income replacement benefit for the period of June 16, 2017 to November 21, 2018 pursuant to the *Schedule*. A.Y. is not entitled to the other benefits requested. Neither party is entitled to costs.

Released: November 4, 2019

Derek Grant, Adjudicator