



Citation: Gao v. Aviva Insurance Canada, 2022 ONLAT 20-012369/AABS

Licence Appeal Tribunal File Number: 20-012369/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:

Yan Gao

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: Ulana Pahuta

APPEARANCES:

For the Applicant: Yu Jiang, Paralegal

For the Respondent: Geoffrey Keating, Counsel

HEARD: BY WAY OF WRITTEN SUBMISSIONS

BACKGROUND

- [1] The applicant was involved in an automobile accident on April 20, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule, Effective September 1, 2010 (including amendments effective June 1, 2016)*¹ (“Schedule”). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”) for resolution of this dispute.

ISSUES

- [2] The issues to be decided are:
- i. Is the applicant entitled to an income replacement benefit (“IRB”) of \$315.00 per week from February 27, 2020 to date and ongoing?
 - ii. Are the applicant’s injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the \$3,500.00 limit and in the Minor Injury Guideline (“MIG”)?
 - iii. Is the applicant entitled to \$2,200.00 for a psychological assessment, proposed by Somatic Assessments & Treatment Clinic in a treatment plan (“OCF-18”) dated September 30, 2019?
 - iv. Is the applicant entitled to \$2,484.67 for chiropractic treatment, proposed by Total Recovery Rehab Centre in an OCF-18 dated May 22, 2019?
 - v. Is the applicant entitled to \$3,358.86 for physiotherapy treatment proposed by Total Recovery Rehab Centre in an OCF-18 dated June 18, 2019?
 - vi. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] I find that:
- i. The applicant is not entitled to an IRB of \$315.00 per week from February 27, 2020 to date and ongoing;
 - ii. The applicant’s accident-related injuries are outside of the MIG as she suffers a psychological impairment;

¹ O. Reg. 34/10 as amended.

- iii. The applicant is entitled to \$2,200.00 for a psychological assessment, plus interest in accordance with s.51 of the *Schedule*;
- iv. The treatment plans for chiropractic and physiotherapy services are not payable as they are not reasonable and necessary.

INCOME REPLACEMENT BENEFIT

- [4] Entitlement to an IRB is set out in sections 5 and 6 of the *Schedule*. Section 5(1)1(i) provides that the benefit is payable if the insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment. Section 6(1) provides that the benefit is payable for the period in which the insured person suffers a substantial inability to perform the essential tasks of her employment or self-employment.
- [5] Section 6(2) provides that the benefit is only payable after 104 weeks of disability if, as a result of the accident, the person suffers a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience.
- [6] The applicant bears the onus of demonstrating on a balance of probabilities that she is entitled to an IRB².

Productions Issue Raised

- [7] The respondent raises the issue that the applicant has failed to produce certain documentation relevant to the issues in dispute and asks that I draw an adverse inference as a result. The respondent submits that the applicant has not provided her employment files, as well as income tax returns for the period of one year pre-accident to present.³
- [8] The Case Conference Report and Order dated April 21, 2021, is silent as to the specific productions the parties were to have exchanged. As such, the respondent has not directed me to any evidence that the applicant was ordered by the Tribunal to produce her employment files or income tax returns. Moreover, the respondent failed to provide any submissions or evidence indicating that it specifically requested these documents from the applicant. It does not provide examples of any correspondence to the applicant where such production requests were made. Further, the Explanation of Benefits (“EOBs”) submitted,

² 16-004619 v *State Farm Insurance*, 2018 CanLII 13165 (ON LAT)

³ Respondent’s Submissions at paras 13 and 14.

indicate that IRBs were paid until February 26, 2020 and were stopped not due to the applicant's non-compliance with disclosure requests per s. 33 of the *Schedule*, but initially due to her non-attendance at a s. 44 insurer's examination ("IE"), and subsequently, on the basis of the IE examiner's findings.⁴ As such, the respondent has not provided any evidence that it had requested these documents from the applicant or that the applicant had refused to provide them. Given these reasons, I decline to draw an adverse inference, as suggested by the respondent.

Entitlement to IRBs

- [9] I find that the applicant is not entitled to IRBs for the period in dispute.
- [10] The applicant bears the burden of proving on a balance of probabilities that she is entitled to IRBs. In support of her claim, the applicant relies on the Disability Certificate ("OCF-3") dated May 22, 2019, prepared by Dr. Georgia Palantzas, chiropractor. Dr. Palantzas noted a number of physical impairments, including: sprain and strain of the neck, thorax, lumbar spine, pelvis, shoulders, knee, and sacroiliac joint, radiculopathy, headache and dizziness. The OCF-3 indicates that the applicant was substantially unable to perform the essential tasks of her pre-accident employment, with an expected duration of more than 12 weeks.
- [11] To establish her physical impairments, the applicant submits the clinical notes and records ("CNRs") of her family physician Dr. Peter Pang, which indicate her persistent neck and back pain complaints from April 2019 to July 2019.⁵ Further the applicant submits that diagnostic imaging of her cervical and lumbar spine revealed moderate degenerative disc disease, which contributed to her ongoing pain.⁶ Finally, the applicant submits that she suffers from psychological impairments, submitting the Psychological Assessment Report of Dr. Sedigheh Naisi, psychologist, who diagnosed the applicant with an adjustment disorder with mixed anxiety and depressed mood and other specified somatic symptom and related disorder.⁷
- [12] According to the applicant's submissions, as a result of these physical and psychological impairments, she is unable to continue her employment as a receptionist. The applicant submits that the essential duties of her pre-accident

⁴ Respondent's Submissions, Tabs Q, R and S – Letters from the Respondent dated January 6, 2020, January 15, 2020 and February 26, 2020.

⁵ Applicant's Submissions, Tab 2 – CNRs of Dr. Pang at pgs. 1-3.

⁶ *Ibid* at p.4.

⁷ Applicant's Submissions, Tab 6 – Psychological Assessment Report dated May 25, 2021.

employment involved sitting for long periods of time, upper body coordination, as well as concentration, focus and customer service.

- [13] Although the applicant has provided a list of the essential tasks of her employment, she has not led any evidence to show how her accident-related injuries impair her from completing substantially all of these tasks. It is not sufficient for the applicant to state that she suffers from ongoing pain, or that she was diagnosed with a psychological impairment. Rather, the applicant must adduce sufficient evidence that these impairments render her substantially or completely unable to perform the essential tasks of her employment. I do not find that she has provided sufficient evidence in this regard.
- [14] The applicant relies on the OCF-3 prepared by Dr. Palantzas to establish her inability to work. However, I agree with the respondent's submissions that Dr. Palantzas' OCF-3 simply provides a statement that the applicant is unable to complete her work tasks, without providing any information as to what the work tasks are, or the extent of the applicant's disability. I find the decision cited by the respondent, *S.S.L. v Certas Direct Insurance Company*⁸, to be persuasive on this issue. In this decision, the adjudicator held that the Disability Certificate did not provide sufficient detail as to the essential tasks of employment or how the impairments prohibited the applicant from competing them. As such, I do not find the OCF-3 to be compelling evidence of the applicant's entitlement to IRBs.
- [15] With respect to the objective medical evidence provided, the applicant points to her chronic pain as a serious accident-related physical impairment, impeding her ability to work. However, from the evidence it does not appear that the applicant's family physician, Dr Pang, ever diagnosed her with chronic pain or prescribed pain medication. Moreover, the applicant only directs me to CNR entries of reported pain complaints from April to July 2019, a period of four months post-accident, while IRBs were still being paid. The applicant does not direct me to pain reports that were contemporaneous with the period in dispute, a diagnosis of chronic pain, an opinion from Dr. Pang that the applicant was unable to work, or, most importantly, evidence as to how this pain caused her to be substantially unable to perform the essential tasks of her employment. With respect to the diagnostic imaging revealing moderate degenerative disc disease, the applicant has not provided any evidence linking these degenerative changes to the accident.
- [16] With respect to psychological impairments, the applicant does not provide any evidence as to how Dr. Naisi's diagnoses of an adjustment disorder and somatic

⁸ *S.S.L. v Certas Direct Insurance Company*, 2020 CanLII 63593 (ONLAT).

symptom disorder rendered her unable to work. The applicant provides a general submission that as a result of her psychological and cognitive impairments, she is unable to properly engage with customers.⁹ However, it is well settled that submissions are not evidence. Although in her Psychological Assessment Report Dr. Naisi opined that the applicant's psychological impairments take her outside of the MIG, Dr. Naisi does not provide a similar opinion with respect to IRBs. In fact, in her report Dr. Naisi noted that the applicant reported that at the time of the assessment, she was working part-time as a poultry butcher, which required "a high degree of concentration and physical strength".¹⁰

- [17] Further, I find the respondent's insurer's examination ("IE") assessments to be persuasive. Dr. Gilbert Yee, orthopaedic surgeon, conducted a physical examination where he found that the applicant had a functional range of motion, and that there were no clinical findings to suggest radiculopathy or myelopathy.¹¹ Dr. Yee opined that from an orthopaedic perspective, the applicant did not suffer a substantial inability to perform the essential tasks of her pre-accident employment. Similarly, Dr. Mohammad Nikkhou, neuropsychologist, in his IE Psychology Assessment Report dated February 13, 2020, assessed the applicant's essential tasks of employment, and concluded that from a psychological perspective, there was no barrier to her performing her job.¹²
- [18] Upon a review of the totality of the evidence, I find that the applicant has not met her burden to prove that she has a substantial inability to perform the essential tasks of her pre-accident employment. As such, I find that the applicant is not entitled to IRBs for the period in dispute.

MINOR INJURY GUIDELINE

- [19] The MIG establishes a framework available to injured persons who sustain a minor injury as a result of an accident. A "minor injury" is defined in s. 3(1) of the *Schedule* as, "one or more of a strain, sprain, 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 defined in the *Schedule*.
- [20] Section 18(1) of the *Schedule* limits recovery for medical and rehabilitation benefits for predominantly minor injuries to \$3,500.00. An applicant may receive payment for treatment beyond the \$3,500.00 cap if they can demonstrate that a

⁹ Applicant's Submissions, at para 25.

¹⁰ Applicant's Submissions, Tab 6 – Psychological Assessment Report dated May 25, 2021 at p.5.

¹¹ Respondent's Submissions, Tab P – IE Report of Dr. Yee, dated January 6, 2020.

¹² Respondent's Submissions, Tab N – IE Report of Dr. Nikkhou dated February 13, 2020

pre-existing condition, documented by a medical practitioner, prevents maximal medical recovery under the MIG or if they provide evidence demonstrating that their injuries are not included in the minor injury definition.

- [21] The onus is on the applicant to show, on a balance of probabilities, that her injuries fall outside of the MIG.¹³
- [22] I find that the applicant has met her onus to establish that her accident-related impairments require treatment beyond the MIG, on the basis of a psychological impairment.

Psychological Impairment

- [23] Psychological impairments, if established, fall outside of the MIG, because such impairments are not included in the definition of “minor injuries”.
- [24] To establish a psychological impairment, the applicant relies in large part on the Psychological Assessment Report of Dr. Naisi, in which Dr. Naisi diagnosed the applicant with an adjustment disorder with mixed anxiety and depressed mood, and other specified somatic symptom and related disorder. Dr. Naisi made these diagnoses following a clinical interview with the applicant and the administering of several psychometric tests. The applicant’s scores on the Beck Depression Inventory-2 (“BDI-2”) indicated moderate depression, on the Beck Anxiety Inventory (“BAI”) indicated severe anxiety and on the Patient Pain Profile (“P3”) measured above average on the scales measuring depression.
- [25] The respondent refutes the findings contained in Dr. Naisi’s Psychological Assessment Report, arguing that: Dr. Naisi did not review medical documentation in support of her report; that Dr. Naisi’s credentials were “somewhat odd”¹⁴ as there was a period when she was only authorized to practice with supervision or was not practicing; and that there were inconsistencies in her assessment report. The respondent further notes that the CNRs of Dr. Pang do not indicate that the applicant reported psychological impairments to her family physician.
- [26] I do not find the respondent’s arguments that Dr. Naisi’s assessment should be given limited weight to be persuasive. Firstly, although Dr. Naisi did not appear to review medical documentation for her report, it does not appear that the respondent’s IE assessor, Dr. Nikkhou reviewed a significant amount of medical documentation either, limiting his review to the OCF-18 in dispute and Dr. Yee’s Orthopedic IE Assessment. In addition, although the respondent questions Dr.

¹³ *Scarlett v. Belair Insurance*, 2015 ONSC 3635, para. 24 (Div. Ct.).

¹⁴ Respondent’s Submissions, at para 19b.

Naisi's credentials stating that in the years prior to the assessment Dr. Naisi was not registered or did not practice autonomously, the respondent does not dispute that at the time of her assessment and report, Dr. Naisi was registered to practice autonomously and is presently so authorized. Further, while there are some discrepancies in Dr. Naisi's report, I find that they are minor.

- [27] Finally, although I agree with the respondent that the applicant did not provide evidence that she raised psychological impairments to Dr. Pang, the applicant did provide evidence that she had reported post-traumatic stress to her cardiologist, Dr. Ching-Ming Chow.¹⁵ Although I agree with the respondent's submissions that a cardiologist is not able to provide psychological diagnoses, the CNR entry does indicate that in December 2019, the applicant was complaining of psychological impairments.
- [28] Most importantly, I find it persuasive that the respondent's IE assessor, Dr. Nikkhou, also found that the applicant's score fell in the moderate depression range when conducting psychometric testing, namely the BDI-2. The applicant also reported a 50% negative change in her emotional condition since the onset of her injuries. Dr. Nikkhou's report further indicated that the rehabilitation checklist found that the applicant's pain, anxiety/stress, lack of energy and difficulty sleeping were barriers to recovery. However, despite the results of these psychometric tests, Dr. Nikkhou concluded that the applicant's psychological impairments were not of a substantive nature and diagnosed her with subclinical features of adjustment reaction. Dr. Nikkhou further noted that due to the possible effects of cultural and linguistic factors on the psychometric tests, the reported symptomatology should be interpreted "with caution".¹⁶
- [29] In considering the two reports, I place greater weight on Dr. Naisi's report for several reasons. Firstly, Dr. Nikkhou did not conduct the BAI to test for anxiety, nor did he conduct the P3 which measures the emotional distress associated with pain. Dr. Naisi had found that the applicant's BAI score indicated severe anxiety and the P3 was in the above-average score for depression.
- [30] In addition, Dr. Nikkhou, and the respondent in its submissions, place substantial weight on the applicant's statements to Dr. Nikkhou denying feelings of depression, in arguing that the applicant's psychological impairments are not substantial. However, at the same time, Dr. Nikkhou stated in his report that the applicant's reported symptomatology should be interpreted "with caution" due to

¹⁵ Applicant's Submissions, Tab 2 – CNRs of Dr. Pang at p 7.

¹⁶ Respondent's Submissions, Tab N – IE Psychological Assessment Report of Dr. Nikkhou dated February 13, 2020 at p. 9.

possible cultural and linguistic factors. I find that it is inconsistent to both claim that the applicant's statements may not be reliable, but to also place significant weight on selected statements.

- [31] Most importantly, I place great weight on the fact that both the applicant's and the respondent's psychological assessors conducted psychometric testing which yielded results of moderate depression, in addition to the additional findings on psychometric testing summarized above. Although Dr. Nikkhou claims that the results should be viewed with caution due to possible cultural and linguistic factors, his report notes that the applicant completed the assessment with the assistance of a Mandarin speaking interpreter and that the Standalone Symptom Validity Test produced an overall valid profile. As such, I find that the psychometric test results reported by Dr. Nikkhou corroborate Dr. Naisi's findings of moderate depression.
- [32] For all of these reasons I place greater weight on Dr. Naisi's diagnosis of an accident-related adjustment disorder with mixed anxiety and depressed mood, and other specified somatic symptom and related disorder. As such, I find that the applicant has proven on a balance of probabilities that she has sustained a psychological impairment as a result of the accident warranting removal from the MIG limits.
- [33] Even though I have found the applicant's psychological impairments are not minor injuries, and therefore not subject to the treatment limits of the MIG, the applicant must still establish the treatment and assessments sought are reasonable and necessary pursuant to sections 14 and 15 of the *Schedule*.

TREATMENT PLANS

- [34] Sections 14, 15 and 16 of the *Schedule* set out that an insurer shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured as a result of an accident.
- [35] The applicant has the onus of proving on a balance of probabilities that the treatment plans are reasonable and necessary because of the accident. To meet this burden, the applicant should identify the goals of the plan, how the goals are being met to a reasonable degree and whether the time and cost expended to achieve these goals is proportional to the benefit.

OCF-18 dated September 30, 2019 for psychological assessment

- [36] I find that the applicant has proven on a balance of probabilities that the OCF-18 for the psychological assessment is reasonable and necessary.
- [37] In determining whether an assessment is reasonable and necessary, it must be noted that assessments, by their nature, are speculative. The purpose of an assessment is to determine if a condition exists. Notwithstanding their speculative nature, the applicant still bears the onus of establishing on a balance of probabilities that an assessment is reasonable and necessary.
- [38] Given the evidence cited above, regarding both the applicant's and the respondent's assessors psychometric testing yielding results of moderate depression and Dr. Naisi's diagnoses of adjustment disorder with mixed anxiety and depressed mood and other specified somatic symptom disorder, I am satisfied that the applicant has provided objective grounds for a psychological assessment. As such, I find that the proposed OCF-18 for a psychological assessment is reasonable and necessary pursuant to the *Schedule*.

OCF-18s for chiropractic and physiotherapy treatment

- [39] The applicant submits two OCF-18s completed by Total Recovery Rehab Centre, dated May 22, 2019 and June 18, 2019 for chiropractic and physiotherapy treatment. I find that the treatment plans in dispute are not reasonable and necessary.
- [40] The applicant submits that the proposed OCF-18s are reasonable and necessary based on the stated goals of pain reduction, increased strength, increased range of motion, a return to activities of normal living and a return to modified work activities. The applicant argues that the medical evidence establishes that she continues to experience ongoing pain and functional limitations as a result of the accident and that her family doctor, Dr. Pang, has continued to recommend that she attend physical therapy.
- [41] In response, the respondent submits that the applicant has not provided any evidence that ongoing treatment would assist in pain reduction or that previous physiotherapy and chiropractic treatment has been helpful or met its stated goals.
- [42] I find that the applicant has not adduced sufficient objective medical evidence that additional physiotherapy and chiropractic treatment is reasonable and necessary. It is well-settled that a treatment plan alone is not compelling

evidence in support of ongoing treatment and is insufficient to meet the applicant's burden. Rather, there must be compelling, contemporaneous evidence in support of the treatment plans. In the matter at hand, the applicant has not directed me to sufficient medical evidence in support of the need for ongoing physiotherapy and chiropractic treatment.

- [43] The applicant submits that her ongoing pain reports to Dr. Pang and his recommendation for further physical treatment, are sufficient medical evidence of the reasonableness and necessity of the proposed plans. However, I find the recommendations for physical therapy to be undermined by the fact that the applicant reported to numerous assessors (including her own psychological assessor), that she stopped attending at physiotherapy and chiropractic treatment, as she did not find it helpful.
- [44] The applicant reported to Dr. Nikkhou during the September 2019 assessment, that she had "stopped physiotherapy two months ago as it was not helpful for her" and that she did not trust physiotherapy, since "when she received it, it made her neck pain worse".¹⁷ The applicant reported that instead she did 14-15 minutes of physiotherapy exercises at home. Therefore, from the applicant's self-reports, it appears that she stopped physiotherapy around the time the OCF-18s in dispute were submitted, as she did not find the treatment helpful.
- [45] This is corroborated by the applicant's reports to her own assessor, Dr. Naisi. In her report, Dr. Naisi reports that the applicant had previously commenced physiotherapy, which included chiropractic treatment. The applicant reported to Dr. Naisi that she discontinued her treatment "as she did not experience any improvement in her pain symptoms".¹⁸ The applicant also reported to Dr. Yee that she had stopped attending at physiotherapy and just did exercises at home.
- [46] In her submissions, the applicant states that the OCF-18s in dispute are reasonable and necessary to alleviate her ongoing pain. However, from the evidence it appears that the applicant has consistently reported that she stopped such treatment, as it did not help with her reported pain and in fact, had increased her neck pain.
- [47] With respect to the other stated goals of the OCF-18s in dispute, namely, increased strength, increased range of motion, a return to activities of normal living and a return to modified work activities, the applicant has not led any evidence establishing how the goals are being met to a reasonable degree and

¹⁷ Respondent's Submissions, Tab N – IE Psychological Assessment Report of Dr. Nikkhou dated February 13, 2020 at p 5-6.

¹⁸ Applicant's Submissions, Tab 6 – Psychological Assessment Report dated May 25, 2021 at p. 2.

whether the time and cost expended to achieve these goals is proportional to the benefit. I note that the applicant reported to all of her assessors that she had previously attended at physiotherapy and chiropractic treatment once per week. However, no treatment records are provided from the applicable clinic or treatment provider.

- [48] The applicant has not provided any evidence, such as progress reports or clinic records from her physiotherapy and chiropractic clinic. No details or evidence is provided as to the specific treatment modalities she had been receiving, what progress she had made, whether she found it helpful and how the stated goals were being met.
- [49] Without such information, and particularly in light of the applicant's reports that she did not find such treatment helpful, I find that the applicant has not adduced sufficient evidence that the stated goals of the OCF-18s in dispute are being met to a reasonable degree or that the time and cost expended to achieve these goals is proportional to the benefit. As such, I find that the applicant has not met her burden to prove that the proposed treatment plans for physiotherapy and chiropractic treatment are reasonable and necessary.

Interest

- [50] The applicant is entitled to interest in accordance with s. 51 of the *Schedule*, for the OCF-18 dated September 30, 2019 for the psychological assessment.

ORDER

- [51] For the reasons outlined above, I find that:
- i. The applicant is not entitled to IRBs for the period in dispute;
 - ii. The applicant has met her burden of proving on a balance of probabilities that her accident-related impairments warrant removal from the MIG on the basis of a psychological impairment;
 - iii. The applicant is entitled to the OCF-18 dated September 30, 2019 for a psychological assessment, plus interest in accordance with s.51 of the *Schedule*;

- iv. The applicant is not entitled to the May 22, 2019 and June 18, 2019 OCF-18s for chiropractic and physiotherapy treatment.

Released: December 16, 2022

**Ulana Pahuta
Adjudicator**