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

Ontario

Date: 2017-06-20
Tribunal File Number: 16-000874/AABS
Case Name: 16-000874 v Certas Home and Auto Insurance Company

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:

V. H. T.

Applicant

and

Certas Home and Auto Insurance Company

Respondent

DECISION

ADJUDICATOR: **Susan Sapin**

APPEARANCES:

For the Applicant: Pavlos Achlioptas, counsel

For the Respondent: Nathalie V. Rosenthal, counsel
Risha Majaraj, representative

Cantonese Interpreter: Amy Fung
Observers: Susan Mather, Vice Chair and Monica Purdy, Member LAT

HEARD: Toronto: January 10, 2017

Written submissions provided October 28, November 25, December 9 and December 13, 2016

REASONS FOR DECISION AND ORDER

Overview:

1. The applicant was involved in a T-bone collision on November 27, 2013 when the automobile he was driving was struck on the driver's side by a left-turning vehicle. At the time of the accident, he was 55 years old and had worked in a warehouse as general labourer for the same employer for 35 years. His work is classified as heavy in terms of the strength required to do the job. He did not return to his job and claims he suffered physical and psychological injuries and chronic pain that prevent him from returning to any type of work as a result of the accident.

2. Certas Home and Auto Insurance Company (Certas) paid the applicant an income replacement (IRB) up to December 18, 2015, just over two years, as well as medical benefits. It terminated IRBs on the basis that the applicant could return to some form of suitable employment. The applicant feels that due to his limited command of English, middle school education, general labour experience, lack of any specific skills, chronic pain and physical restrictions, no one will hire him. Certas denied his claims for further chiropractic and massage treatment on the basis that it was not reasonable or necessary.

3. The applicant submitted his evidence by way of affidavit and attended at the hearing for cross-examination. The parties submitted documentary evidence and made written and oral submissions and argument.

Issues:

4. The disputed claims in this hearing are:

    a. An income replacement benefit of $400 per week from December 18, 2015, to date and ongoing;

    b. A medical benefit of $2,480.64 for chiropractic services, recommended by Perfect Physio & Rehab Centre in a treatment plan dated July 2, 2015;

    c. A medical benefit of $2,430.64 for chiropractic services, recommended by Perfect Physio & Rehab Centre in a treatment plan dated September 11, 2015;

d. A medical benefit of $2,142 for chiropractic services, recommend by Perfect Physio in a treatment plan dated December 11, 2015;

e. A medical benefit of $900 for massage treatment, recommended by AA Comfort Health Centre in a treatment plan dated May 20, 2016;

f. Payment of $50 damage to eyeglasses;

g. Interest on any overdue payments.

Decision:

5. For the reasons that follow, I find that:

a. The applicant is entitled to an income replacement benefit of $400 per week from December 19, 2015 and ongoing.

b. The applicant is not entitled to the medical benefits claimed because they are not reasonable or necessary.

c. The applicant is entitled to interest on any overdue payments under s. 51 of the *Schedule.*

Procedural Issues:

6. At the hearing, Certas raised procedural issues arising from the applicant's failure to adhere to the Order made at the case conference of September 27, 2016 regarding the exchange of documents required for the hearing. After considering the submissions of the parties I have made the following rulings bearing in mind Rule 3.1 requiring that the Tribunal's rules will be liberally interpreted and applied and that the Tribunal may apply or vary the rules to facilitate a fair, open and accessible process that will promote a timely resolution on the merits.

a. *Late submission of the applicant's affidavit:*

7. At the September 27, 2016 case conference, an order was made that the applicant's evidence in chief would be provided to Certas by way of affidavit by October 28, 2016. Certas could have approximately 2-3 hours to cross-examine him in person at the hearing. The applicant did not provide his affidavit until he served his reply submissions on December 9, 2016. This was contrary to the timelines set out in the Case Conference Report for the exchange of documents before the hearing and contrary to Rule 9.2 of the LAT Rules of Procedure,

which require disclosure “at least 10 days before the hearing, or at any other time ordered by the Tribunal or undertaken by the party.”

8. Certas submits the applicant’s decision to submit his affidavit by way of Reply was tactical and that Certas has suffered “absolute and incurable prejudice” because it had to prepare its responding submissions without the benefit of the affidavit and had no opportunity to respond to the new evidence therein. This constitutes a breach of procedural fairness, which violates the Tribunal’s rules of practice and is grounds for judicial review. Certas objects to the introduction of new evidence by way of the affidavit.

9. The Tribunal’s duty of procedural fairness to parties is to ensure they understand the case they have to meet and allow them to respond accordingly. In this case, I find Certas has not demonstrated any real prejudice in that regard. Certas has had the applicant’s affidavit, a mere three pages double-spaced, since December 9th, a month before the hearing. I find the affidavit does not contain any new information not already in the voluminous records provided and I find Certas has had ample time to review it, prepare a cross-examination, respond, and request appropriate redress at the hearing. I see no reason why the affidavit should not be admitted. Certas did not request an adjournment, and the applicant attended the hearing and was cross-examined. I find there has been no breach of procedural fairness.

10. I reject Certas’ submission that, in the absence of any specific date for the exchange of evidence by the parties in the Case Conference Report, Rule 9.2 of the Tribunal rules requiring evidence to be submitted 10 days in advance of the hearing is “controlling and binding.” I find that Rule 9.4, which provides that a party may seek the consent of the Tribunal to admit evidence where the 10-day rule has not been observed, is a complete answer to Certas on this point.

b. *Late submission of the applicant’s short-term disability (STD) file:*

11. The case conference adjudicator further ordered the applicant to provide to Certas all of the evidence upon which he intended to rely at the hearing by September 30, 2016. This included the STD file from Manulife Insurance, his employer’s disability carrier. The applicant only produced the STD file as part of his Reply materials on December 9, 2016 despite the fact that he had had it since April 2016. No explanation was provided for the delay.

12. As the STD file dates only from the date of the accident and does not contain details of any previous disability claims, Certas submits that it is prejudiced and the applicant has engaged in sharp practice. Furthermore, the applicant should be required to provide proof that a pre-accident STD file does not exist.

Alternatively, I should draw an adverse inference from his failure to produce a complete file in a timely fashion.

13. I agree with Certas that these documents are important and there is no legitimate reason for the delay. However, I find there is sufficient evidence available from the clinical notes and records of the applicant's family doctor, Dr. Raphael Kwok, and the portions of the STD file itself, to permit a fair hearing on the merits, and an adverse inference is not justified in this case. The Tribunal does not require perfection. I also find Certas has had sufficient time to review and respond to the information in this file. Finally, I find this is a case not of sharp practice on the part of the applicant's representatives, but poor practice. Although inexcusable, I am not prepared to penalize the applicant, an unsophisticated man with limited education and command of English, for the shortcomings of his representatives on the facts of this particular case.

c. Report of Dr. S. W. Wong:

14. This procedural issue relates to a medical report from Dr. S.W. Joseph Wong, a physiatrist, prepared and submitted to Certas on October 25, 2016, a full month after the September 27, 2016 case conference, which the applicant seeks to submit as evidence at the hearing (at Tab 30 of Certas' brief submitted November 25, 2016).

15. Dr. S.W Wong treated the applicant between March and September 2016 on a referral from Dr. Kwok. Certas objected to the admissibility of this report on three grounds: 1) the report was obtained solely to bolster the applicant's case at the hearing, and not to rebut the insurer's examination (IE) reports on which Certas based its termination of IRBs in November 2015; 2) the applicant had plenty of time to obtain a rebuttal report; and 3) the report was completed a full month after the September 27, 2016 case conference, and the applicant did not advise Certas that it intended to obtain a report at that time.

16. Although I find that the failure of the applicant's representatives to advise Certas that they intended to seek a further medical report after disclosure had been agreed upon at the case conference is poor practice, I find there is no prejudice to Certas that could not have been cured by an adjournment, which Certas did not seek.

Entitlement to Income Replacement Benefits 104 Weeks after the Accident

The legal test:

17. To be entitled to ongoing IRBs more than 104 weeks after the accident, the applicant must satisfy the post-104 week disability test by establishing on a

balance of probabilities that he suffers a "complete inability to engage in any employment for which [he] is reasonably suited by education, training or experience" as a result of the accident. The accident need not be the only cause, but it must have been a significant contributing factor to the injuries and impairments that continue to prevent the applicant from returning to work.

18. It is well established, in the jurisprudence, that reasonably suitable employment means employment "in a competitive, real-world setting, taking into account employer demands for reasonable hours and productivity."[1] The work should also be comparable in terms of status and wages.

19. Having reviewed all of the evidence, I find that the applicant sustained soft tissue injuries to his neck, shoulder and back in the accident that did not heal within the time frame expected. These injuries aggravated pre-existing arthritis in his right hand and contributed significantly to persistent pain and functional limitations. His pain became chronic and he developed depression and anxiety. Although his family doctor cleared him to return to work half days on modified duties using his left hand only, this type of work was not available. I am satisfied on a balance of probabilities that these functional restrictions, as well as the applicant's limited education, experience, English skills and age indicate he is unable to engage in the occupations identified by the insurer. I find therefore that the applicant meets the post-104 week eligibility test for income replacement benefits.

The applicant's position:

20. The applicant claims that he suffers from persisting and debilitating chronic pain due to the soft tissue injuries to his neck, back, hip, thigh and chest that he received in the accident and that are well documented in the records of his treating practitioners. He maintains his accident injuries aggravated pre-existing arthritis, especially in his right hand, such that he cannot use it for anything except the very lightest of activity. In addition, his own doctors as well as Certas' have diagnosed him with an adjustment disorder and depressed mood. He continues to require treatment and medication for his physical and psychological condition.

21. There is no dispute that the applicant qualified for IRBs up to 104 weeks after the accident, on the basis that he was substantially unable to perform the essential tasks of his pre-accident employment as a result of the accident. His employer paid him short term disability (STD) payments for loss of income until December 3, 2015, and Certas topped up this amount to $400 per week with an IRB of $49.30 until it terminated the benefit on December 18, 2015. The applicant submits he is not competitively able to perform the essential tasks of any manual

[1] *Burgess v. Pembridge* (FSCO A11-001160, June 14, 2013).

labour jobs, which is the only type of work he is suited for, and modified duties are not available from his employer.

Certas' position:

22. Certas relies on the opinions of its medical assessors that the applicant suffered soft tissue whiplash injuries to his neck, back, left chest wall, right shoulder and upper arm in the accident that should have healed within a few months. It submits that he has lead no evidence to show that he suffers a complete inability to engage in any reasonable employment as required by the stringent post-104 week disability test. Instead, he relies on self-serving general and subjective comments as to his inability to seek alternative employment. Certas maintains that the only factors interfering with the applicant's ability to work are pre-existing cervical degenerative disc disease and arthritis, and pain and restricted mobility of his right hand, which are not related to the accident. From a psychological perspective, Certas submits that the applicant's primary barrier to returning to work is his perceived high level of disability related to pain. It further submits the applicant had periods of modified work up to a month before the accident due to a left knee injury, which was not injured in the accident. It also submits the applicant's family doctor cleared him for return to modified duties in November 2015 (shortly before the two-year anniversary of the accident), and that modified work was available to him. Finally, Certas submits that the jobs identified by its vocational consultant in a Transferable Skills Analysis – material handler, grocery clerk and store shelf stocker, kitchen helper, food service worker and dishwasher – should be considered appropriate for the applicant's physical and psychiatric tolerances and abilities.[2]

23. Certas also submits that the applicant failed to provide evidence that his collateral benefits carrier, Manulife Financial, ever discontinued his STD benefits, or that long term disability (LTD) benefits were not available. Therefore, there is insufficient evidence to calculate an IRB. I reject this argument. The October 23, 2015 Manulife Explanation of Benefits [3] states, in plain English: "Short Term Disability benefits have been extended up to and including December 3, 2015 *which is the maximum benefit end date*. [Emphasis added]." Manulife's file includes "Case Management Action Plans," standard forms completed by a benefits specialist that all contain the line: "Contractual Considerations: No LTD." I find these to be unmistakeable references to the fact that STD was exhausted and LTD benefits are not available to the applicant.

Medical Evidence:

[2] Transferable Skills Analysis Report, November 34, 2015, Exhibit 2A, Tab 16.
[3] Exhibit 2A, Tab 7

24. I find the medical evidence indicates the applicant's pain and restricted function of his right hand result from his accident injuries.

25. In support of its position that the only physical factors interfering with the applicant's ability to work are pre-existing arthritis and pain and restricted mobility of his right hand unrelated to the accident, Certas relies on the report of Dr. A. Oshidari. Dr. Oshidari, a physiatrist, conducted an insurer's examination (IE) for Certas in November 2015, to determine if he met the post-104 week disability test. Dr. Oshidari noted the applicant's subjective complaints of aching pain and discomfort in his neck which radiated into the right shoulder and upper arm with numbness, tingling and weakness, and that the applicant was receiving four injections a week into his neck and shoulder for pain. However, Dr. Oshidari opined that any sprain or strain of the neck due to the accident should have healed "a long time ago," on the basis that "we expect the prognosis for this type of soft tissue injury to be for full recovery in less than three months." He stated that the applicant had reached "pre-injury status or maximum medical improvement." He reported that there was no correlation between the applicant's reported constant pain in the right wrist, aggravated by activity, and restricted range of motion of the small joints of the hand and the accident because the applicant first complained of this symptom over a year later. The pain was due to arthritis and, possibly, diabetes.

26. I reject Dr. Oshidari's opinion that diabetes might be a factor, a comment he did not explain or support. The applicant does suffer from Type 2 diabetes as well as high blood pressure. However, I note that Dr. T. Abouhassan, an endocrinologist, specifically addressed diabetes in an assessment at Certas' request and ruled it out as a cause of the applicant's neuropathic pain because his diabetes was well controlled and he was under the care of an endocrinologist.

27. Regarding the applicant's fitness for work, Dr. Oshidari felt that the applicant could return to his "pre-loss activity levels," including occupational duties, but that due to osteoarthritic changes in his right hand, he would have difficulty performing fine motor movements. He simultaneously concluded the applicant was capable of engaging in all of the occupations listed in the Transferrable Skills Analysis report obtained by Certas, but that the pre-existing arthritis in his hands presented a barrier to his return to work.

28. I place little weight on Dr. Oshidari's opinion. Having reviewed the clinical notes and records of Dr. R. Kwok, the applicant's family doctor, which date from April 2011 to February 2016, I disagree with Dr. Oshidari's opinion that there is no correlation between the accident and the applicant's hand pain. According to Dr. Kwok's notes, the applicant complained of tingling symptoms in his right hand as early as January 2014, a month after the accident, and complained consistently

of right hand pain, tingling, numbness, weakness and inability to make a fist at every monthly visit thereafter.[4]

29. Furthermore, although Dr. Kwok's notes indicate the applicant complained of pain in his right middle finger in May 2011 and swollen PIP joints in his hand in December 2011, which he attributed to arthritic flare-ups, there was no mention of any hand pain or arthritic flare-up from that time until the month after the accident, over two years later, despite regular visits about other health issues.

30. Dr. L. Majl, a neurologist who saw the applicant on a referral from Dr. Kwok, connected the applicant's hand pain to the accident, reporting in August 2014 that the applicant suffered from constant ongoing neck pain since the accident that radiated to his right hand. The pain was not, however, neurological, EMG studies finding no nerve root impingement. In a report dated September 27, 2014, Dr. Kwok acknowledged that the applicant still had neck and back pain, but his right hand pain and weakness had become his main concern, and although it was not well defined, it seemed to be a chronic pain syndrome related to soft tissue injury.

31. I find Dr. Oshidari's opinion that the applicant's soft tissue injuries should have healed within three months of the accident has no factual basis. It is unfounded editorial opinion given that the applicant continued to complain of pain to the neck and shoulders and received weekly injections for this pain. It is well known that in a small percentage of cases, soft tissue injuries do not heal within the expected time. I find it was unreasonable for Dr. Oshidari to simply dismiss the applicant's pain complaints, and not address the issue of referred pain to the arm and hand as a possible explanation, or the possibility that the accident injuries might have aggravated the underlying arthritis or caused it to become symptomatic. As the pain was not due to any neurological cause, I find on a balance of probabilities that it was likely due to unresolved soft tissue injury from the accident.

32. Certas also relies on the opinion of Dr. G. Moddell, neurologist. Dr. Moddell noted the applicant's presenting concerns of significant neck pain with pain radiating down his right arm into his right hand. Consistent with the other neurological reports in evidence,[5] Dr. Moddell concluded there was no evidence of any nerve root impingements, and the neck pain was soft tissue in nature and the arm pain musculoskeletal. As there was no neurological component to the applicant's symptoms, Dr. Moddell's opinion that "from a neurological perspective" the applicant had an excellent neurological prognosis, had reached

[4] January 27, February 21, March 10, March 21, April 24, May 30, June 18, October 28, November 24, 2014; January 29, 2015.
[5] Dr. L. Majl, October 26, 2014; Dr. C. Lim, April 11, 2014

maximum neurological improvement, and therefore could return to his pre-accident activities and occupational duties is somewhat moot.

33. Regarding the applicant's psychological and pain symptoms, Certas relies on the psychiatric opinion of Dr. A. Zielinsky. Dr. Zielinsky diagnosed the applicant with an Adjustment Disorder with Mixed Anxiety and Depressed Mood as a result of the accident. He reported that the applicant scored high on a test that indicated a significant level of perceived disability attributed to pain. On another test, the applicant was found to not have a high level of catastrophization, magnification or helplessness. Dr. Zielinsky opined that although the applicant continued to have issues coping with pain and perceived physical limitations, he did not report significant emotional distress attributed to pain and was "a good coper."

34. Dr. Zielinsky concluded that although the applicant's accident-related condition and injuries had not reached maximum medical improvement, his prognosis was favourable and would depend on his response to treatment and "attitude/motivation to overcome his limitations." He felt the applicant could return to work, and that he was capable of engaging in any or all of the occupations listed in the Transferrable Skills Analysis, from a psychological perspective. As I find it is the applicant's physical limitations that prevent him from returning to work, this opinion is not particularly helpful.

35. The legal question that I, as an adjudicator, must decide on all of the available evidence is whether the applicant is unable to engage in any occupation for which he is reasonably suited by education, training or experience. On that issue, I find the medical evidence contained in the clinical notes and records of the family doctor, Dr. Kwok, to be compelling. Dr. Kwok appears to have been tireless in his referrals to specialists in an attempt to assist his patient with his physical pain and limitations and his psychological distress.

36. The findings and treatment recommendations of these specialists support the applicants claims that his pain and psychological distress are genuine and limiting: Dr. Majl recommended physiotherapy and pain medication (Lyrica); Dr. Lim, neurologist, also recommended physiotherapy and referral to a pain specialist to consider cortisone injections; Dr. A. A. Khajedhdehi of the Rothbart Pain Centre recommended injections and psychological treatment; Dr. C. Hong, a plastic and reconstructive surgeon, recommended physiotherapy and nerve block injections for the applicant's hand; and Dr. D.W.W. Lowe, a psychiatrist diagnosed chronic pain, recommended he continue antidepressant therapy, but concluded he could provide no further help.

37. The only medical opinion tendered by the applicant to the effect that he is unable to work at any occupation due to "multiple injuries" is contained in the October 25, 2016 report of Dr. S.W. Joseph Wong, a physiatrist who treated the applicant on six occasions between March and September 2016. I do not find Dr. Wong's

opinion as persuasive as that of Dr. Kwok because his opinion that the applicant's main complaint is upper back pain is not consistent with that of Dr. Kwok, who identified right hand and elbow pain and functional limitation as the main restrictions in returning to modified duties. In addition, Dr. Wong's report does not describe what objective tests led to this conclusion. Furthermore, the report provides no insight into the applicant's functional tolerances or abilities.

38. Based on the medical evidence of Dr. Kwok and the specialists he referred the applicant to, I am persuaded on a balance of probabilities that the applicant's chronic pain condition and inability to use his right result from the accident and, as set out below, prevent him from engaging in employment.

Suitable Work:

39. The applicant bears the onus of proving, on a balance of probabilities, that he suffers a complete inability to engage in any employment for which he is reasonably suited by education, training or experience. I find he has satisfied that onus.

40. The applicant was employed at the same warehouse job for 35 years. His duties are described in a Case Management Action Plan in his employer's STD file. They are to verify and update the company's inventory system online and count inventory on the plant floor. This included reshelving boxes and using a pick truck. The functional requirements are as follows:

- Medium: lift and carry 35 lbs occasionally; rarely up to 70 lbs;
- Manual Dexterity: frequent fine finger movements – keyboarding, reaching for files;
- Other: frequent twisting, bending, sitting and standing; outside work;
- Repetitive motions: typing;
- Endurance: frequent standing and walking.

41. The Transferrable Skills Assessment of November 24, 2015 by Ms. Hadida, Forensic Rehabilitation Counsellor, adds that the job included lifting and carrying heavy items such as copy machines, copy paper and furniture.

42. An October 19, 2015 entry in the STD file notes that Dr. Palantzas placed the following medical restrictions on the applicant: no lifting; standing 10 – 15 minutes only due to limited endurance; limited manual dexterity as the applicant was unable to make a fist with right hand; inability to engage in repetitive motions due to limited movement, tingling, numbness and pain with both hands. I was not pointed to this report of Dr. Palantzas by the applicant and was unable to find it in the documents submitted. However, I note the employer accepted this opinion and confirmed that it was unable to accommodate the applicant's restrictions,

and that disability benefits would be extended to the maximum end date of December 3, 2015, as it was anticipated there would not be enough improvement in the applicant's condition for him to return to work.

43. Dr. Kwok's clinical notes indicate that a month later, on November 20, 2015, he noted the applicant could return to modified duties for half days using his left hand only. As the applicant's primary treating physician who followed his patient's progress closely and regularly, I find Dr. Kwok's opinion persuasive. I find the applicant's limited use of his right hand is a significant limiting factor in his ability to return to some form of employment.

44. There are other limitations as well. In her TFA, Ms. Hadida concluded that the applicant had the "education, training/skills and/or experience" for work as a material handler, grocery clerk, store shelf stocker, kitchen helper and dishwasher. These jobs require manual dexterity and physical strength and upper limb coordination, for example, removing garbage, scrubbing pots, carrying trays, *etc*.

45. In her Vocational Evaluation Report, Ms. Hadida reported that the applicant was limited to unskilled manual work because of below average reasoning and problem-solving skills, Grade 2 comprehension for spelling and math, limited computer skills and the narrow scope of his work experience. She specifically noted that the applicant's reported functional limitations with his right arm, wrist and hand did not support his participation in these types of jobs.

46. The applicant's tax returns for 2012 indicate he earned $48,561 for a Monday to Friday 9 – 5 job, which works out to $23.35 an hour for a 40 hour workweek. The jobs identified by Ms. Hadida are entry-level minimum wage jobs. I find on the evidence before me that these jobs are not reasonably comparable to his previous employment in terms of wages, status or the work itself.

47. Ms. Hadida's Labour Market Analysis indicates relatively high unemployment rates for these jobs, and I find they may not be readily available.

I find that in light of the above factors, as well as his age, the applicant is not competitively employable in any occupation for which he is reasonably suited by education, training or experience. He is therefore entitled to IRBs beyond 104 weeks after the accident under s. 6(1)(b) of the *Schedule*, as well as interest on the overdue benefits.

Entitlement to Medical Benefits

a. $2,480.64 for chiropractic services by Perfect Physio & Rehab Centre in a treatment plan dated July 2, 2015

48. Under the *Schedule,* an insured person requesting payment for treatment must establish that the treatment is necessary because of the accident, and that it is reasonable. Certas refused to pay for the treatment outlined in the above treatment plan by Dr. G. Palantzas, chiropractor, on the basis that it did not meet this test.

49. The treatment plan recommended passive treatments such as ultrasound, TENS/IFC, massage and acupuncture as well as active therapy and encouragement. I note the plan describes conditions the applicant does not have, such as cervical radiculopathy, as well as conditions the treatment is not designed to treat, such as sleep disorder.

50. Certas relied on a September 11, 2015 assessment conducted by Dr. Oshidari. Dr. Oshidari noted the applicant's complaints of neck pain that radiated through the shoulder and down the arm to the fingers, and that the pain was aggravated by motion of the neck. He cited soft tissue injuries from the accident as the cause, but felt these had resolved and maximal medical recovery had been achieved. He observed reasonably good range of motion of the neck, back, shoulders and hips, although noting complaints of discomfort on end range motion. Because the applicant had received extensive identical treatment in the past, he concluded the treatment described in the treatment plan was neither reasonable nor necessary, and the applicant should continue with a home-based exercise programme. Certas submits that the applicant had already had over $30,000 worth of this type of treatment, with no appreciable benefit other than temporary pain relief. Although temporary pain relief can be a legitimate goal of treatment, the applicant testified that he only felt "a little bit better" for a short period of time after treatment. I am not satisfied from the applicant's testimony that the pain relief was anything more than transitory. I agree with the opinion of Dr. Oshidari that more of the same kind of treatment as outlined in the July 2, 2015 plan was necessary or reasonable.

b. $2,430.64 for chiropractic services by Perfect Physio & Rehab Centre in a treatment plan dated September 11, 2015:

51. This treatment plan recommends essentially the same type of treatment as the July 2, 2015 plan above. Dr. Oshidari conducted a paper review January 12, 2016, referencing a physical examination he conducted November 2, 2015. This time he specifically included the applicant's poor response to previous similar treatment in his reasons for concluding the treatment was not reasonable or necessary. He strongly urged a home exercise program. I find the treatment plan is not reasonable or necessary for the same reasons as above.

c. $900 for massage treatment by AA Comfort Health Centre claimed as

an out-of-pocket expense on an OCF-6 (Application for Expenses Form) dated May 20, 2016:

52. Under s. 38(2), an insurer is not required to pay for any treatment prior to the submission of a treatment plan. As the applicant did not submit this expense through a treatment plan to Certas, this expense is not payable.

d. Payment of $50 for damage to eyeglasses:

53. Section 24 of the *Schedule* provides that an insurer shall pay for certain items damaged in an accident, which includes prescription eyeglasses. The applicant submitted this claim to Certas more than two years after the accident. I accept Certas' submissions that there was no evidence that the applicant suffered injuries to his face or head or that his glasses were damaged in the accident. I find it unreasonable for the applicant to submit such a remote claim at such a late date. The applicant is therefore not entitled to payment.

Decision:

54. Having regard for the evidence in this case, I find that:

a. The applicant is entitled to an income replacement benefit of $400 per week from December 19, 2015 and ongoing;

b. The applicant is not entitled to the medical benefits claimed because they are not reasonable or necessary; and

c. The applicant is entitled to interest on any overdue payments under s. 51 of the Schedule.

Released: June 20, 2017

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Susan Sapin, Adjudicator