

**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**



Tribunal File Number: 16-002126/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:

M.Z.

Applicant

and

ROYAL AND SUN ALLIANCE INSURANCE (RSA)

Respondent

DECISION

ADJUDICATOR: Khizer Anwar

WRITTEN SUBMISSIONS BY: Yu Jiang, representative for the Applicant
Alexander Hartwig, counsel for the Respondent

HEARD IN WRITING ON: February 28, 2017

OVERVIEW

[1] M.Z. (“the applicant”) was injured in an automobile accident on September 2, 2011 (“the accident”), and sought benefits from her auto insurer (“the respondent”) pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (“Schedule”).

- [2] The applicant submitted three treatment and assessment plans (OCF-18) to the respondent, requesting funding for physiotherapy/chiropractic services, psychological services and a vocational assessment. The respondent denied funding for chiropractic services and vocational assessment, as it deemed the requests to be not reasonable and necessary. The respondent provided partial funding to the applicant to obtain psychological services.
- [3] The applicant disagreed with the respondent's decision on all three treatment and assessment plans and submitted an application for dispute resolution services to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal").

ISSUES TO BE DECIDED

- [4] The issues in dispute identified by the parties in their submissions and to be decided are:
1. Is the applicant entitled to a medical benefit in the amount of \$1,647.00, for physiotherapy and chiropractic services, as outlined in the Treatment and Assessment plan (OCF-18) dated June 4, 2015, completed by Elli Luy at Perfect Physio and Rehab Centre ("Perfect Physio")?
 2. Is the applicant entitled to a medical benefit in the amount of \$1,046.34 (\$3,571.88 less \$2,525.54 – partially approved), for psychological services, as outlined in the Treatment and Assessment plan (OCF-18) dated August 18, 2015, completed by Dr. Ming Che Yeh at Perfect Physio?
 3. Is the applicant entitled to a cost of examination incurred in the amount of \$1,496.25, for a vocational assessment, as outlined in the Treatment and Assessment plan (OCF-18) dated October 29, 2015, completed by Raymond Wong at Perfect Physio?
 4. Is the applicant entitled to interest on overdue payment of benefits?

RESULT

- [5] Based on the totality of evidence before me, I find that:
1. The applicant is entitled to the medical benefit in the amount of \$1,647.00.
 2. The applicant is entitled to the medical benefit in the amount of \$1,046.34.
 3. The applicant is entitled to the cost of examination in the amount of \$1,496.25.

4. The applicant is entitled to interest on overdue payments on above-noted benefits.

ANALYSIS

[6] As this is a written hearing, the only evidence before me is in the form of documentary evidence and I have considered all of the documents submitted.

[7] The respondent made a motion, which I will address first. Thereafter, I will turn to the treatment plans in dispute and whether they are reasonable and necessary.

1. Motion

[8] In its motion, the respondent requests that I exclude Dr. Ming Che Yeh's expert evidence submitted in the form of an expert report, dated February 2, 2017. Mr. Yeh provided psychological treatment to the applicant.

[9] The respondent questions Dr. Yeh's objectivity, impartiality and fairness and submitted that he was in violation of *Rule 10.2(b)(i)* of the *Licence Appeal Tribunal's Rules of Practice and Procedure* ("LAT Rules") for the following reasons: 1) he is the applicant's treating psychologist and has treated the applicant on multiple occasions; and 2) he is an employee of Perfect Physio, a treatment providing facility that has submitted the treatment and assessment plans in dispute in this hearing. Therefore, the respondent argues that Dr. Yeh "has a personal and financial interest in the outcome of this dispute", and his evidence should be excluded.

[10] The applicant submits that there is no objective evidence that 1) Dr. Yeh has not complied with *Rule 10.2(b)(i)* of the LAT Rules; 2) Dr. Yeh is not fair, objective and non-partisan; and 3) Dr. Yeh has a personal or financial interest in the outcome of this dispute. The applicant refutes the respondent's position by arguing that payment for services does not qualify as a justifiable reason to conclude that "an expert is incapable of providing a fair, objective and non-partisan opinion"; otherwise all of the respondent's assessors should be disqualified as experts as well, as they all received compensation from the respondent in return for their expert opinion.

[11] I find that there is no objective evidence to disqualify Dr. Yeh as an expert and to exclude his evidence. The respondent's arguments are speculative in the absence of objective evidence that would underline any personal or financial interests in this matter for Dr. Yeh. In addition, I accept Dr. Yeh's signed acknowledgment of expert's duty as proof that he understands his responsibility as an expert to provide fair, objective and non-partisan evidence.

[12] As a result, I accept Dr. Yeh as a duly qualified expert and will consider his evidence in this written hearing.

2. Pre-existing Medical History

- [13] I find it appropriate to address the applicant's pre-existing medical history at the outset of my analysis and prior to discussing the reasonableness and necessity of the treatments in dispute.
- [14] The applicant relies on Dr. Kwok's clinical notes and records ("CNRs") documented prior to the accident to establish that she did not suffer from pre-existing medical conditions, particularly relating to her back and psychological health. The respondent has not disputed the applicant's position.
- [15] Based on Dr. Kwok's CNRs and in the absence of evidence to the contrary, I am satisfied that the applicant did not suffer from pre-existing medical conditions documented by Dr. Kwok or any other health practitioner.

3. Accident related injuries and Post-Accident health

- [16] The applicant refers to the following as evidence of her accident related injuries in her submissions:
1. Clinical notes and records (CNRs) of Dr. Raphael Kwok
 2. CT scan, October 2012
 3. MRI, December 2012
 4. OCF-18 submitted by Elli Luy
 5. OCF-18 submitted by Dr. Ming Che Yeh
 6. OCF-18 submitted by Raymond Wong
- [17] The applicant further relies on the reports and opinions of the following experts, whom she consulted upon referral from Dr. Kwok:
1. Dr. Daniel Wong, neurologist
 2. M.T. Wong, rheumatologist
 3. Dr. Kevin Grant, orthopaedic surgeon
- [18] The applicant started visiting her family doctor, Dr. Kwok, in relation to the accident related injuries a few days after the accident, and as per Dr. Kwok's CNRs, continued to do so until 2016. During the first visit, Dr. Kwok noted the applicant's injuries to be: 1) mild tenderness at neck and neck pain; 2) back pain and mild tenderness at L5-S1; 3) dizziness; 4) headaches; and 5) mood changes. Dr. Kwok made no further recommendations at that time.
- [19] The applicant submits that her accident related injuries gradually deteriorated and she started visiting Dr. Kwok in relation to sciatica pain from August 2012

onward. Upon Dr. Kwok's recommendation, the applicant underwent a CT scan in October 2012, which revealed that the applicant suffered from degenerative disc disease in her lumbar spine, specifically at L3-L4, L4-L5 and L5-S1, and noticeable disc herniation at L5-S1 with possible S1 nerve root compression. Based on the results of the CT scan, Dr. Kwok referred the applicant to a neurologist, rheumatologist and an orthopaedic surgeon.

- [20] Dr. Daniel Wong, a neurologist, confirmed the findings of the CT scan and diagnosed the applicant with "S1 left radiculopathy". Dr. Wong's recommendations included: 1) MRI of the lumbar spine; 2) specific neurophysiotherapy; and 3) neuropathic pain medicine, on an as needed basis.
- [21] Upon examination Mr. M.T. Wong, a rheumatologist, found the applicant to be suffering from: 1) decreased left ankle reflex compared to the right; 2) tenderness in L4-5 region; and 3) decreased lumbosacral range of motion with paraspinal muscle spasm. Mr. Wong concluded that his findings were consistent with left-sided sciatica with possible herniated disc L5-S1 and S1 root compression. Mr. Wong's recommendations included pelvic traction, intensive lumbar stretching exercises and paying attention to lumbar support.
- [22] The MRI results further corroborated the findings of the CT scan and reaffirmed the conclusions of Dr. Wong and Mr. Wong. In addition to mild bulge and protrusion at L3-L4 and broad based central disc protrusion indenting thecal sac at L4-L5, the MRI results revealed a large left sided L5-S1 disc herniation with compression traversing S1 nerve root, likely causing radiculopathy in the applicant.
- [23] Dr. Kevin Grant, an orthopaedic surgeon, confirmed all the findings noted above. After examining the applicant, Dr. Grant's potential treatment options for the applicant included surgery, a left sided L5-S1 posterolateral decompression and discotomy, which after deliberation, the applicant refused with an intention to focus on non-surgical rehabilitation.

4. Are the proposed treatment plans reasonable and necessary?

- [24] The respondent denied treatments to the applicant based on the opinions of the following assessors:
1. Dr. Lyndon Mascarenhas, general practitioner
 2. Dr. Garry Moddel, neurologist
 3. Dr. Godwin Lau, psychologist
 4. Tony Jung, occupational therapist
- [25] The respondent submits that: 1) the applicant suffered uncomplicated soft tissue injuries; and 2) a significant time lapse between the applicant's complaints and

the accident served as evidence that the applicant's injuries were unrelated to the accident.

[26] I will now address the reasonableness and necessity of each disputed treatment and assessment plan ("treatment plan").

(i) Treatment Plan # 1: For physiotherapy and chiropractic services in the amount of \$1,647.00

[27] The respondent's denial of this treatment plan is largely based on the medical reports of Dr. Mascarenhas and Dr. Moddel, completed by them following their respective assessments of the applicant. Dr. Mascarenhas opined that the applicant suffered from "uncomplicated soft tissue injuries" and had already received sufficient facility-based treatment. He was of the view that any additional treatment for the applicant was not reasonable and necessary. Dr. Mascarenhas did, however, refer the applicant to a neurologist. The respondent took the position that the referral was merely out of precaution.

[28] Dr. Moddel, a neurologist, was of the opinion that the accident "played no part in the development of [the applicant's] sciatica" and that the condition was occurring on a degenerative basis. Dr. Moddel concluded that had the accident been the cause of radicular pain in the applicant, she would have felt pain immediately. He also found that the applicant did not require any additional formal treatment.

[29] Based on the objective results of the CT scan and MRI, as well as corroborating medical opinions of examiners discussed in the previous section, I reject the conclusions of both Dr. Mascarenhas and Dr. Moddel. In the absence of documented pre-existing medical history and another intervening event, as well as taking into account the applicant's young age, I am satisfied that the applicant's injuries, namely disc protrusion, disc bulge, sciatica and radiculopathy, and resulting impairments were caused by the accident.

[30] The treatment plan in dispute identified pain relief and assisting the applicant in returning to pre-accident social and recreational activities as primary goals of the treatment. The treatment plan referred to the following impairments that necessitate treatment: a) difficulties with prolonged sitting, standing and lying down due to increased pain and stiffness in the lumbar spine; b) inability to bend forward due to pain; and c) constant change in positions to relieve discomfort.

[31] The applicant submitted that pain relief is a legitimate goal and makes the treatment plan reasonable and necessary in her case. To support her position, the applicant relied upon Adjudicator Sewrattan's finding with respect to pain relief as a legitimate goal in *L.W. v. Cooperators General Insurance Company*, 2016 CanLII 93133 (ON LAT). In that case, Adjudicator Sewrattan echoed the words of Arbitrator Renahan from *Wong and Allstate Insurance Co. of Canada*, FSCO A99-000545, and found that "[c]are which relieves physical pain, and

therefore improves function, is a legitimate medical and rehabilitative goal...even in the absence of a formal chronic pain syndrome.”

[32] I adopt Adjudicator Sewrattan’s finding and accept the applicant’s position that pain relief is a legitimate medical and rehabilitative goal. The results of the CT scan and MRI are objective, unequivocal and clear. Based on the objective evidence and the corroborating medical opinions of the three medical practitioners discussed in paragraphs 21, 22 and 24, I find that the treatment plan in dispute in the amount of \$1,647.00 is reasonable and necessary.

(ii) Treatment Plan # 2: For psychological services in the amount of \$1,046.34

[33] This treatment plan was partially approved by the respondent. The unapproved and unpaid amount is in dispute.

[34] The respondent relies on Dr. Lau’s report, which diagnosed the applicant with a chronic adjustment disorder with anxiety, which is similar to Dr. Yeh’s diagnosis of adjustment disorder and vehicular phobia. However, Dr. Lau disagreed with the length of the sessions proposed in the treatment plan and believed one hour to be sufficient as opposed to an hour and half proposed by Dr. Yeh.

[35] Both Dr. Lau and Dr. Yeh diagnosed the applicant with similar psychological impairments. In the absence of specific reasoning as to why the extra half hour proposed in the treatment plan would be unreasonable and unnecessary, and therefore accept the evidence of Dr. Yeh over that of Dr. Lau. I find that the applicant has met her onus and accept that she would benefit from comprehensive psychological treatment. Therefore, I find the treatment plan in dispute to be reasonable and necessary in its proposed form.

(iii) Treatment Plan # 3: For vocational assessment in the amount of \$1,496.25

[36] This treatment plan identified transferable skill analysis and labour market survey as primary objectives of the vocational assessment. The respondent relies on Tony Jung’s paper review to deny the assessment proposed in the treatment plan. Mr. Jung opined that a transferable skills evaluation and labour market survey are only conducted for those applicants who were employed prior to or at the time of an accident.

[37] I reject Mr. Jung’s conclusion and find such an evaluation to be reasonable and necessary for the applicant in this matter.

[38] I also accept the Applicant’s reply to the respondent’s submissions. I find that the treatment plan is necessary to assist the applicant in evaluating her current limitations as they pertain to nursing school and potential career as a nurse. The applicant has expressed concerns to various assessors and has questioned her own ability to complete the nursing program and successfully meet the demands of the profession thereafter due to her injuries and impairments caused by the accident. I find the applicant’s need for this type of assessment to be reasonable

and valid, as it will enable her to evaluate alternative future career prospects. Hence, I find this treatment plan to be reasonable as well as necessary.

Interest

[39] I find that the applicant is entitled to interest as the medical benefits are payable. Interest will be payable on the applicable amount of benefits owed to the applicant to the date of this decision in accordance with the *Schedule*.

CONCLUSION

[40] For the reasons noted above, I find that:

1. The applicant is entitled to the medical benefit in the amount of \$1,647.00.
2. The applicant is entitled to the medical benefit in the amount of \$1,046.34.
3. The applicant is entitled to the cost of examination in the amount of \$1,496.25.
4. The applicant is entitled to interest on all overdue payments.

COSTS

[41] Under *Rule 19.1* of the LAT Rules, a party may make a request to the Tribunal for costs if that party believes that another party in a proceeding acted unreasonably, frivolously, vexatiously, or in bad faith.

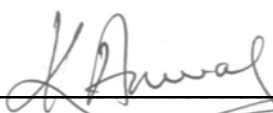
[42] The respondent requested costs in its submissions. It was the respondent's position that its denials were proper and that the applicant's claim lacked evidence, which should have been apparent to her. Hence, she acted unreasonably and improperly in bringing her claim before the Licence Appeals Tribunal.

[43] The applicant also claimed expenses to the hearing based on improper denials by the respondent.

[44] In light of all the evidence before me, I do not find either party's conduct during the proceedings to be unreasonable, frivolous, vexatious, or in bad faith.

[45] Hence, no costs are awarded in favour of either party in this matter.

Released: August 22, 2017



Khizer Anwar, Adjudicator