

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

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



Citation: R.A. vs. Aviva Insurance Company, 2020 ONLAT 19-004208/AABS

**Released Date: 07/23/2020
File Number: 19-004208/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:

[R.A]

Applicant

and

Aviva Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: Claudette Leslie

APPEARANCES:

For the Applicant: Kate Logushova, counsel for the Applicant

For the Respondent: Louise Kanary, counsel for Aviva Insurance Company

Heard by way of written submissions

OVERVIEW

- [1] The applicant was involved in an automobile accident on **May 6, 2018** and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule")*. The applicant was denied certain benefits by the respondent.
- [2] The applicant disagreed with the denial and submitted an application for dispute resolution to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal"). The parties were unable to resolve their dispute at a case conference held on September 12, 2019, and consequently the matter proceeded to a hearing in writing.

ISSUES

- [3] The following are the issues to be decided:
- i. Is the applicant entitled to receive **cost of examination** in the amount of \$2,010.10 incurred, for chronic pain assessment recommended by Dr. Wilderman in a treatment plan submitted on February 20, 2019, and denied by the respondent on March 5, 2019?
 - ii. Is the applicant entitled to interest on any overdue payment of the benefit?

RESULT

- [4] Based on the relevant evidence considered, I find that, on a balance of probabilities, the applicant is entitled to the chronic pain assessment and the incurred cost thereof in keeping with the *Schedule*, and interest in accordance with s. 51 of the *Schedule*.

BACKGROUND

- [5] On May 6, 2018, the applicant was stopped at a red light at an intersection. Another vehicle collided with her vehicle, in a rear-end fashion. While the airbag did not deploy, she reports that she hit her head against the head rest. She drove home from the scene. Her vehicle was subsequently repaired.
- [6] She reported experiencing, nausea, blurriness, headache and significant pain along her shoulder and neck immediately following the accident. She felt pain in her lower back. The following day she saw her family doctor as a result and was prescribed pain medication and advised to enrol in a

treatment and rehabilitation program. Two weeks after the accident, she began attending therapy sessions once per week, and the indication is she has continued to do so. Her treatment involves physical therapy, with active conditions in the form of strengthening and stretching, chiropractic manipulations and massage therapy.

THE LAW, EVIDENCE AND ANALYSIS

Issue: Whether the applicant is entitled to the cost of the chronic pain assessment recommended by Dr. Igor Wilderman

- [7] The applicant reports that prior to the accident, she had no mental issues, but she had significant hypertension and left shoulder and neck pain from a workplace injury. Her condition was reportedly exacerbated by the subject accident. She indicates that she worked full time as an order picker for [a multinational company] since 2017, and as a personal support worker since 2012. Both largely involved physical manoeuvrings. She went back to work two weeks after the accident, but states she was forced to stop shortly thereafter, due to pain and functional limitations. The applicant was attending family physician Dr. Rajinder Atwal consistently, 1-3 times per month for treatment. On October 23, 2018 Dr. Atwal referred her to pain specialist Dr. Wilderman, to further investigate her pain complaints and whether she had developed fibromyalgia as a result of the accident. Following his examination Dr. Wilderman diagnosed the applicant with, among other things, fibromyalgia.
- [8] In his report, Dr. Wilderman explains fibromyalgia as a chronic disorder “characterized by a constellation of symptoms, including widespread tenderness and pain...” He administered the required tests endorsed by the American College of Rheumatology and based on the results he concluded she suffered from fibromyalgia.
- [9] Sections 14 and 15 of the *Schedule* provide that the insurer shall pay for all reasonable and necessary medical and rehabilitation benefits an insured person incurred as a result of impairments sustained in an accident. The onus to prove entitlement, albeit on a balance of probabilities, rests with the applicant. The *Schedule* does not define the term “reasonable and necessary”. While case law provides useful factors and examples for consideration, “reasonable and necessary” must be determined on a case by case basis.
- [10] With this in mind, I have considered the arguments and relevant evidence submitted by both parties, and in this case, for the reasons that follow, I find that

this assessment and the cost incurred is a reasonable and necessary opportunity for the applicant to explore ongoing pain.

The chronic pain assessment:

- [11] The applicant was referred to Dr. Igor Wilderman, a Chronic Pain Consultant at the Chronic Pain Clinic, for assessment due to the applicant's complaint of ongoing, frequent, and disabling pain, and limitations resulting from accident impairments. The assessment was conducted on April 1, 2019, at which time the applicant told the doctor that "non-pharmacologic therapy and over-the-counter pharmacologic therapy" provided no relief. She also indicated to him that despite adhering to her primary care physician's and rehabilitation professional's instructions, her symptoms persisted.
- [12] At that point, approximately a year post-accident, as reported by the applicant, the doctor indicates the applicant was still unable to engage in her pre-accident employment tasks due to pain and among other things "ensuing functional physical limitations, psychological distress, persistent fatigue..." The physician was required to provide a description of his accident-related findings, with the most significant of them listed first. His list appears as follows:
- i. Other chronic pain;
 - ii. Whiplash associated disorder (WAD2) with complaint of neck pain with musculoskeletal signs;
 - iii. Other sprain and strain of cervical spine;
 - iv. Sprain and strain of thoracic spine;
 - v. Sprain and strain of lumbar spine;
 - vi. Mixed anxiety and depressive disorder; and
 - vii. Disorders of initiating and maintaining sleep (insomnia).
- [13] All considered, including the time that had elapsed, Dr. Wilderman reported that an assessment with a chronic pain specialist was beneficial to the applicant in determining the nature of her syndrome as well as for arranging an appropriate multidisciplinary pain management program to help her recover. For his services listed as: chronic pain assessment, review of material, preparation of a report, and completing an OCF-18 Form, the total charged is \$2,010.10. This is the

assessment denied by the respondent, subsequent to conducting its own Insurer Examinations (IEs).

- [14] The applicant cites a number of other medical documents in support of her claim of ongoing pain she was experiencing. Kaivan Sadeghi, a chiropractor of Way Health Clinic Inc., completed the Disability Certificate (OCF-3) the day after the accident, indicating that the applicant sustained a complete inability to carry on a normal life because of “Dysfunctional joints, limited ranges of motion, pain and discomfort associated with the severity of injuries makes it difficult to perform full daily activities as before the accident”. He concludes, based on what is indicated in the OCF-3 as information based on his “most recent examination” of the applicant, and likely self-reporting in the case of headaches, for example, that she had sustained an extensive list of injuries including:

Headaches; subluxation complex (vertebral); dislocation, sprain and strain of joints and ligaments of thorax; dislocation of lumbar vertebra; dislocation, sprain and strain of joints and ligaments of lumbar spine and pelvis; dislocation, sprain and strain of joints and ligaments of shoulder girdle; sprain and strain of unspecified parts of hand; cervicalgia; other sprain and strain of cervical spine; internal derangement of knee; muscle strain; sprain and strain of shoulder joint; sprain and strain of other and unspecified parts of thorax; dislocation, sprain and strain of joints and ligaments of elbow; other chest pain; nonorganic insomnia; dizziness and giddiness; dislocation, sprain and strain of joints and ligaments at wrist and hand level; dislocation of thoracic vertebra; sprain and strain of thoracic spine; dislocations, sprains and strains involving multiple regions of lower limb(s); sprain and strain of other and unspecified parts of shoulder girdle; concussion; and malaise and fatigue. He anticipated 9 – 12 weeks for recovery.

- [15] Her family physician, Dr. Atwal, in a September 9, 2019 report, in his medical capacity agrees with the chiropractor’s recommendation that the applicant pursue further pain evaluations, including psychological and orthopaedic.
- [16] Diagnostic imaging: ultrasound of bilateral shoulder of March 6, 2019 (Dr. Saibil); X-ray of cervical thoracic and lumbar spine of May 12, 2018 (Dr. Liaw); and MRI of cervical and lumbar spine of September 2, 2018 by Dr. Chadha, were all conducted to investigate the applicant’s on-going pain complaints. The ultrasound found among other things, bony surface tear in right and left shoulders; “left acromioclavicular separation” and right and left biceps tenosynovitis.

- [17] The applicant submitted an unrelated, independent assessment conducted by Dr. Waseem on June 11, 2019, which was commissioned by Great West Life for her employer, [the multinational company]. The report indicates a chronic pain diagnosis. While unconnected to the accident, the applicant points out that the diagnosis does confirm that her post-accident pain complaints were still evident at least 1 year post-accident.
- [18] On the other hand, while the insurer accepts that the applicant had two workplace incidents in close proximity to the accident in November of 2017 and April 2018, its position is that her alleged ongoing issues are as a result of her pre-accident workplace injuries, and unrelated to the accident. It argues that contrary to the applicant's claim, this was not a serious accident but a "modest rear-ender", resulting in vehicle/labour repairs costs of \$1,122.90. Despite its claim that she sustained minor sprains and strains, the insurer does not dispute nor deny the indication that it approved her for medical/rehabilitation treatment outside of the Minor Injuries Guideline (MIG) limit of \$3500 at the September 2017 case conference, when she was removed from the MIG limit for treatment purposes.
- [19] It was the insurer's position that the applicant's family physician, Dr. Atwal's notes regarding her physical restrictions before the accident in his April 17 and 24, 2018 CNRs, are similar to those noted after the accident. As well, in its view, the lengthy list of injuries indicated in the OCF-3 completed by chiropractor Kaivan Sadeghi is not supported by any objective evidence. Diagnoses done six days post accident are reflected as normal, which the respondent suggests provided a better reflection of her condition.
- [20] In denying the chronic pain assessment, Aviva relied on the conclusions of several IE assessors including that of Physiatrist, Dr. Michael Ko and Psychologist/Neuropsychologist Dr. Amena Syed, of September 25, 2018. From a physical perspective, and as demonstrated by the applicant, Dr. Ko concluded the applicant's impairments were limited to sprain/strains, with no clinical indication of any specific restrictions. Of note here is that in response to a question posed in the report, Dr. Ko indicates the origin of the following impairments was the accident: Sprain/strain injuries affecting the cervical spine region; sprain/strain injuries affecting the thoracic spine region; sprain/strain injuries affecting the lumbar spine region; sprain/strain injuries of the bilateral trapezii; sprain/strain injuries of the hands; and sprain/strain injuries of the lower extremities.

[21] Dr. Ko examined the applicant again on July 15, 2019. He confirmed his previous diagnosis, and he indicated she had achieved maximum medical improvement. Psychologist/Neuropsychologist Syed, in his IE report, found there were no psychological impairments related to the accident. A July 23, 2019 IE conducted by Psychologist Dr. Nikkhou found that the applicant was not suffering from any significant impairment as a result of the accident. Her complaints at that point were reported as neck pain, pain in both shoulders, entire back pain, pain in both legs. The insurer also refers to a 2019 IE report by general practitioner, Dr. Frank Loritz, who also concluded that the applicant had achieved maximum medical improvement, and that additional facility-based treatment would not be beneficial.

Is the chronic pain assessment reasonable and necessary?

[22] I must first address Aviva's claim that any ongoing impairments experienced by the applicant are as a result of her pre-accident workplace injuries and not the accident. I agree the situation is complicated by the fact that she had pre-accident hypertension and left shoulder and neck pain for which she was being treated by her family physician. However, there is no indication that the issue of causation was something that the IE assessors considered or were concerned about. In fact, one IE assessor indicated his impairment diagnosis was attributed to the accident. I accept the applicant's submission that her pain issues worsened and became more extensive after the accident, as indicated in the disability certificate (OCF-3) submitted. At the very least, this indicates to me that the accident materially contributed to her impairment (pain). As such applying the "but for" test which would require the applicant to prove her impairments would not have developed had the accident not occurred, or that the accident was the sole cause, in my view, would be irrational and is unnecessary here where it is reasonably inferred that the accident materially contributed to her impairment/pain.

[23] Also, contrary to what appears to be speculation on the insurer's part that Chiropractor Sadeghi's extensive diagnosis in the OCF-3 as indicated above was not evidence based, I find that without having conducted an assessment/examination within the scope of his medical capacity, the doctor would not have been able to determine, for example, the various dislocations injuries noted in the OCF-3. I note here, that a chiropractor is one of the listed health practitioners authorized to complete the disability form. The form also contains a stern warning to health practitioners that "it is an offence under the *Insurance Act* to knowingly make a false or misleading statement..." I find it

unlikely that the list of diagnoses, as it appears, was randomly concocted by the medical practitioner or based solely on the applicant's self-reporting.

- [24] I also disagree with the insurer's assessment that the applicant's complaints ought to be considered in the context of an accident it classifies as a modest rear-ender. The indication was that her car was pushed forward, and she hit her head on the head rest. In my view, despite the amount of damage to the rear bumper, she was likely jolted back and forth, and likely suffered the strains indicated from tightening her body and her grip. Even so, I am not convinced that generally, the way the accident happened is a reliable basis for inferring how the collision impacted the applicant, given that it is reasonably understood that each individual experiences trauma/pain differently.
- [25] I find, while subjective, one consistent complaint of the applicant throughout the medical documentation is that of pain in various areas of her body to the extent that she was motivated to take steps to explore other options for pain relief. She underwent an X-ray of the cervical and lumbar spine in May of 2018; MRI of cervical and lumbar spine in September 2018, and an ultrasound of bilateral shoulder in March 2019. The only reasonable reason I can infer from her undergoing such tests, almost a year after the accident, is that she was pursuing multiple options in her search for understanding and finding pain relief. Otherwise, it would have been unnecessary to have been prescribed and pursued these diagnostics. An assessment of the applicant in June of 2019, more than a year after the accident, albeit due to a work-related, insurance matter unrelated to the accident, nonetheless indicated the applicant had chronic pain. She was also found to have pain due to fibromyalgia, almost a year post accident.
- [26] One of Aviva's IE assessors, Psychiatrist Dr. Ko, in both his September 2018 and the paper review of July 2019 reports diagnoses of sprain/strain injuries in various regions of the applicant's body as a result of the accident. During a July 2019 IE assessment with Dr. Nikkhok, 14 months after the accident, the applicant complained at that time of neck pain, pain in both shoulders, entire back pain, and pain in both legs.
- [27] Of note, at the Tribunal's September 2019 case conference, there was a meeting of the minds as the insurer removed the applicant from the Minor Injuries Guideline (MIG) treatment limit of \$3500. The removal, in my view indicates an understanding between the parties, that her pain treatment likely warranted more than the \$3500, treatment limit for defined minor injuries.

[28] In the May 2018 OCF-3, Chiropractor Sadeghi projected a 9 - 12-week recovery. Yet the evidence establishes that the applicant's pain complaints were ongoing for over a year, and her pain had not improved over time, despite the evidence that she actively, pursued medical intervention to mitigate the situation, including the chronic assessment claim at issue. The issue here is not whether the applicant is required to prove that she suffers from chronic pain/syndrome. She is required to prove, on a balance of probabilities, that the chronic pain assessment is reasonable and necessary. I find, the chronic pain assessment is reasonable/necessary, for her to determine, at approximately 1 year after the accident, whether she suffers from chronic pain or chronic pain syndrome, and if further treatment is reasonable and necessary.

CONCLUSION/ORDER

[29] Having found that the applicant is entitled to the chronic pain assessment and cost thereof, it follows that she is entitled to interest in accordance with section 51 of the *Schedule*.

[30] I order that, the applicant is entitled to the chronic pain assessment and the incurred cost, as agreed/in keeping with the *Schedule*, and the corresponding interest in accordance with section 51 of the *Schedule*.

Released: July 23, 2020

**Claudette Leslie
Adjudicator**