



Citation: Forbes v. TD General Insurance Company, 2021 ONLAT 19-010114/AABS

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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:

Kassandra Forbes

Applicant

and

TD General Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: Cezary Paluch

APPEARANCES:

For the Applicant: Arash Goneh-Farahani, Paralegal

For the Respondent: Pamela Vlastic, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] The applicant, K.F. was involved in an automobile accident on July 29, 2017, and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule").¹ The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").
- [2] A case conference took place on April 14, 2020 and an order was issued dated May 1, 2020 scheduling a videoconference hearing on January 26-29, 2021. The issues identified were income replacement benefits, seven medical benefits, interest and an award.
- [3] However, pursuant to a motion order dated January 5, 2021, on consent of the parties, the issue related to the income replacement benefits was removed and the hearing was changed from video conference to a written hearing format. The remaining issues remained in dispute and are addressed in this decision.

ISSUES

- [4] The issue to be decided in this hearing are:
1. 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)?
 2. Is the applicant entitled to \$3,067.10 for physiotherapy services, recommended by 101 Physio in a treatment plan (OCF-18) dated March 22, 2019?
 3. Is the applicant entitled to \$5,015.12 for psychological services, recommended by 101 Physio in a treatment plan (OCF-18) dated March 26, 2019?
 4. Is the applicant entitled to \$2,460.00 for a Chronic Pain Assessment, recommended by 101 Assessments in a treatment plan dated September 17, 2018?

¹ O. Reg. 34/10.

5. Is the applicant entitled to \$9,026.99 for a Neuropsychological Assessment, recommended by 101 Assessments in a treatment plan dated September 24, 2018?
6. Is the applicant entitled to \$2,460.00 for a Cognitive Assessment, recommended by 101 Assessments in a treatment plan dated April 29, 2019?
7. Is the applicant entitled to \$2,460.00 for a Neurological Assessment, recommended by 101 Assessments in a treatment plan dated April 29, 2019?
8. Is the applicant entitled to \$2,460.00 for a Functional Abilities Evaluation Assessment, recommended by 101 Assessments in a treatment plan dated April 29, 2019?
9. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?
10. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] The applicant has not demonstrated that removal from and treatment beyond the MIG is warranted. The treatment plans in dispute are not reasonable and necessary. As no benefits are overdue, no interest or award is payable.

BACKGROUND

- [6] On July 29, 2017, the applicant was a seat-belted driver of a vehicle travelling on a city street when another vehicle tried to merge and struck her car on the driver's side. Airbags did not deploy upon the collision and the applicant reported that she hit the left side of her head on the window but did not lose consciousness or sustain any cuts or bruises. Police and ambulance personnel did not arrive at the scene and the applicant's boyfriend came and drove her to the collision reporting centre. Later that evening, she went to the emergency department of a hospital due to a headache, localized pain in her lower lumbar spine and left forearm pain. She was discharged, given Tylenol, and told to follow up with her family physician.
- [7] On August 25, 2017, about one month after the accident, the applicant attended at her family doctor, Dr. P. Duchastel, who diagnosed her with neck pain, back pain, was advised to do gentle stretching, take pain medication as needed and

obtain an x-ray. An x-ray of the applicant's cervical spine, dated August 25, 2017, observed a loss of cervical lordosis that could be related to pain but, concluded the findings were otherwise unremarkable. An x-ray of the lumbar spine of the same date, was normal.

- [8] The applicant was also employed full time in an administrative capacity at the time of the accident and continued in this role after the accident, until she was laid off in September 2017. She then received employment insurance benefits before eventually securing employment as an executive assistant in March 2018. In May 2018, she was laid off again. She then attempted to work as an Uber driver and found this difficult. Most recently, in December 2018, she was hired as a dispatch assistant contacting customers and related office administrative duties.

LAW

- [9] Section 18(1) of the Schedule provides that medical and rehabilitation benefits are limited to \$3,500.00 if the insured sustains impairments that are predominantly minor injuries in accordance with the MIG.
- [10] Section 3(1) defines a “minor injury” as “one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury.”
- [11] An insured may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under s. 18(2), that they have a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition precludes maximal recovery if they are kept within the confines of the MIG.
- [12] The Tribunal has also determined that an applicant may be removed from the MIG if they can demonstrate that chronic pain or psychological conditions cause functional impairment that necessitates treatment beyond the limit.
- [13] In all cases, the burden of proof lies with the applicant.²
- [14] The phrase “chronic pain” is not defined in the Schedule. However, in *T.B. vs. Wawanesa Mutual Insurance Company*, cited by the respondent, the Tribunal outlined the following criteria for assessing a claim of chronic pain:

² *Scarlett v Belair Insurance*, 2015 ONSC 3635 (CanLII).

- i. The insured person suffers severe and constant pain -- more than simple ongoing or recurrent, intermittent pain;
- ii. The insured person's pain has persisted well beyond the normal healing times for injuries sustained;
- iii. The pain is not a clinically associated sequela to minor injuries; an
- iv. The insured person's pain causes functional impairment and disability. It significantly disrupts or disables pre-accident activities of daily living.³

[15] Although the Schedule does not require me to consider these criteria in relation to chronic pain, I accept them as guiding factors in assessing the applicant's claim of chronic pain, as the Tribunal has consistently found that where pain is severe, constant and causes functional impairment, an applicant may be removed from the MIG.

ANALYSIS

Applicability of the Minor Injury Guideline

- [16] The applicant submits that she should be removed from the MIG on the basis of chronic pain and psychological impairments. Specifically, she submits that she suffers from headaches, neck pain radiating into the shoulders, back pain, difficulty sleeping, right arm pain, along with an adjustment disorder with mixed anxiety and depressed mood. She relies on the clinical notes of her family physician Dr. Duchastel; the clinical notes of Dr. K. Chan Chung (at a walk in clinic); the vocational assessment report of Marg Smith; a chronic pain assessment by Dr. M. Gofeld, a chronic pain specialist who determined that that she has chronic pain and this is proof that her injuries are not predominantly minor and the MIG does not apply; the psychological assessment report of Dr. V. Lopo that she has sustained a psychological impairment; and the clinical notes and records from Integrated Psychological Centre.
- [17] In response, the respondent disagrees with Dr. Gofeld and Dr. Lopo's key findings and diagnosis and relies on two IE assessments of Dr. I. Safir, general practitioner, and Dr. T. Seon, psychologist, who both concluded that the applicant had sustained injuries that were treatable within the MIG.⁴ As well, the respondent submits that causation is at issue in this matter because the applicant

³ *T.B. vs. Wawanesa Mutual Insurance Company*, 2020 CanLII 14474, para 12.

⁴ IE General Practitioner Examination Report and Addendum dated January 30, and March 16, 2018, by Dr. Irina Safir and IE Psychology Examination Report and Addendum dated January 30 and March 16, 2018 by Dr. Terra Seon,

has been involved in two motor vehicle accidents in the 3.5 years since the subject accident.

- [18] At the heart of this hearing is whether I prefer the findings of Dr. Gofeld and Dr. Lopo over the conclusions reached by the IE assessors Dr. Safir and Dr. Seon in conjunction with all of the other medical evidence. On balance, I find that the arguments of the respondent are more persuasive than that of the applicant and prefer the conclusions reached by Dr. Safir and Dr. Seon.
- [19] More specifically, I prefer the s. 44 report of Dr. Safir from the January 17, 2018 assessment regarding the applicant's physical injuries who found that the K.F. demonstrated a mildly decreased range of motion (ROM) of the spine, which appeared to be due to guarding. She demonstrated functional ranges of motion of the upper and lower extremities. The prognosis was favourable and there was no compelling evidence of a pre-existing medical condition that will prevent her from achieving maximal recovery from the "minor injury". The duration of time spent on this in person assessment was approximately 45 minutes. Dr. Safir prepared an addendum report dated March 16, 2018 to review additional documentation (OCF-3, CNRs of Dr. P. Duchastel of various dates and a hospital record from Mount Sinai Hospital). This additional documentation revealed that the applicant underwent x-rays of the cervical spine, lumbar spine, pelvis and hips on August 27, 2017, which revealed no bony or joint abnormalities. Following her review of this additional documentation, Dr. Safir maintained her original opinions. I find Dr. Safir's reports are thorough and comprehensive, as they are supported by a medical file review and more in line with the evidence.
- [20] I also prefer the psychological report of Dr. Seon dated January 30, 2018, following the in-person assessment conducted on January 16, 2018, who found that the applicant's current presentation was not of the magnitude to warrant a psychological diagnosis in direct relation to the injuries from the accident. The duration of this assessment was approximately two hours.
- [21] Dr. Seon noted in her report that the applicant denied any significant symptoms of anxiety, depression, or post-traumatic stress and although she reported ongoing physical symptoms of pain, she denied any significant psychological impairment that negatively interferes with her overall functioning, including engaging in social activities in which she enjoyed prior to the accident. To support her position, Dr. Seon indicated that K.F. continues to own and operate a vehicle, with no significant symptoms of anxiety, fear, or avoidance behaviour. Although K.F. was unemployed at the time of this assessment, she indicated that

she is spending a lot of time job searching and even investigating and working towards becoming an entrepreneur related to delivery service.

- [22] Dr. Seon prepared an addendum report dated March 16, 2018, to review additional documentations (OCF-3, CNRs of Dr. P. Duchastel of various dates and a hospital records from Mount Sinai Hospital), and did not alter her original opinion, including that in the absence of a psychological diagnosis, the psychological injuries sustained in the subject accident are considered “minor” as defined in the Schedule for which the Minor Injury Guideline would apply.
- [23] I find Dr. Seon’s report also to be detailed, thorough and more proportional to the overall evidence, especially regarding the applicant’s overall functioning levels. I note that her findings were supported by objective psychometric testing (Brief Battery for Health Improvement 2 (BBHI-2), Pain Patient Profile (P-3), Structured Inventory of Malingered Symptomatology (SIMS)), and her assessment lasted approximately two hours, which was a significant amount of time. The one minor concern I had, as was pointed out by Dr. Seon, is that the majority of Dr. P. Duchastel CNR’s of various dates were illegible and it appears that she was unable to read and fully consider these notes.

Physical Injuries and Chronic Pain

- [24] The only Disability Certificate (“OCF-3”) dated August 17, 2017, about three weeks after the accident, prepared by Dr. Saranjit Khaira, chiropractor, lists the applicant’s injuries as sprain and strain of the cervical, thoracic and lumbar spine, sprain and strain of the pelvis, shoulder region, headaches, sleep disorders and nervousness. Aside from the comments on headaches and psychological health, these injuries are consistent with those that fall within the definition of “minor injuries” under s. 3(1) of the Schedule treatable within the confines of the MIG. Finally, under Part 6, Dr. Khaira indicated that K.F. was disabled from work (substantially unable to perform the essential tasks of her employment) for an anticipated duration of 9-12 weeks when the evidence clearly demonstrates that this was not the case (she had returned to work as he himself noted) and undermines the veracity of the impairments identified in the document.
- [25] Dr. Gofeld in his chronic pain assessment report, diagnosed the applicant with post-traumatic headache, chronic low back pain and somatic symptom disorder with predominant pain, and major depressive disorder with anxious distress. It was not clear to me when this report was finalized, how long the assessment took, where it took place and in what format. In my view, such information can be valuable and an indicator of a reliable report. Such information was included in Drs. Seon’s and Safir’s IE reports.

- [26] Further, one of my principal concerns with the timing of this report is that it appears to have been authored in April 2019, or sometime after, nearly two years post-accident, raising significant causation concerns. In this case, this is a concern because the evidence shows that after her accident, the applicant was involved in another motor vehicle accident on July 6, 2018 where she hit the right side of her head and jerked backwards (whereas in the subject July 2017 accident, she hit the left side of her head on the window) and complained of a headache on the right side of her head and lower back pain.⁵ As well, as per an Autoplus report, dated September 25, 2019, the applicant was involved in a third accident on March 10, 2019, although no further particulars were provided or if she suffered any injuries.⁶ The applicant did not challenge this information. Although she acknowledged the July 6, 2018, accident in her submissions and that she had a headache on the right side and pain in the mid and lower back from this accident, the most recent March 2019 accident is not addressed in any way in the submissions.
- [27] It appears that Dr. Gofeld did not review the clinical notes and records from Dr. Chan, so he would not have been aware of the July 4, 2018 accident, which happened prior to his April 19, 2019 assessment. In his "Instructions Provided" section of his report, Dr. Gofeld states "I have been requested to review the documentation forwarded to me" and in the subsequent "Disclaimer" section he writes that "Review of the medical documentation was done by a trained employee" (my emphasis) and "history was taken and recorded by a physician assistant." Based on this, it appears that Dr. Gofeld personally did not review any documentation, or take the applicant's history himself, even though he did personally perform all the steps of the physical examination and prepared this report.
- [28] In any event, my review of his report is that it appears that the applicant never communicated this second, July 2018 accident to Dr. Gofeld, or at least it is not mentioned anywhere in his report. Remarkably, the applicant did mention a prior motor vehicle accident from 2012 to Dr. Gofeld (which is mentioned on page 8 of his report), but not the one that happened approximately one month prior to this April 2019 assessment. This second accident would have been relevant information, as the applicant also hit her head in the July 2018 accident, and complained of headaches and back pain which are the same symptoms she complained of from the first accident. Likewise, Dr. Gofeld also did not review the clinic notes of Dr. Duchastel, Dr. V. Prigozhikh, neurologist (even though he notes at page 7 of his report that she was also referred to a neurologist in

⁵ CNR Dr. Chan dated July 6, 2018 at Tab 8 of Respondent's Submissions.

⁶ Autoplus Report March 10, 2019 at Tab 9 of Respondent's Submissions.

September 2017), or Mount Sinai Hospital records, or the applicant's OHIP summary, despite almost two years passing since the subject accident. This ultimately weakened his assessment, as this additional information would have certainly assisted him with his analysis of the applicant's current overall functioning, and whether there could have been another cause for the applicant's pain complaints, as far as his conclusion that the diagnoses are directly related to the subject accident.

- [29] Similarly, with respect to his physical examination of the applicant's spine/back, Dr. Gofeld identified that active ROM of the cervical spine was within normal limits, curvature of the cervical spine, thoracic spine and lumbar spine were all within normal limits, bony features of shoulders and hips are of equal height bilaterally, posture is normal and gait was smooth and steady, yet he diagnosed chronic back pain from the accident. I find that he does not elaborate against what criteria this diagnosis was reached, nor does he account for the applicant's post-accident occupational functionality, even though he indicates in his report that "she works 8 hours days, 5 days per week, and is quite happy in her current role."
- [30] Finally, while Dr. Gofeld indicates that initially pain was affecting some of her daily activities (self-care activities, including bathing), and she required assistance from her mother or sister, over time these tasks have become easier, and she is mostly functioning independently although it takes her longer. I find Dr. Gofeld's report conclusionary and not supported by the evidence and give it limited weight.
- [31] I acknowledge that the clinical notes and records of the family doctors Dr. Duchastel and Dr. Chan Chung include intermittent reports of back pain and headaches; these complaints are not continuous, and, for the most part, are secondary to the applicant's reported fertility issues. I note that the records of Dr. Duchastel do not provide any evidence to substantiate that the applicant was experiencing any accident-related suffering, distress or persistent functional impairment. My own reading of the CNRs and reports, is there is no explicit linkage between K.F.'s pain complaints and the accident, and some suggestions as to alternative causes.
- [32] Similarly, Dr. Chan, who appeared to treat the applicant between August 2017 and November 2018, recorded complaints from the applicant related to back pain, headaches and infertility. Aside from initial reports of issues with standing, sitting and walking in August 2017, Dr. Chan did not document any persistent

functional limitations. The applicant's updated OHIP summary almost exclusively pertains to treatments and testing related to infertility.

- [33] Dr. Chan referred the applicant to Dr. Prigozhikh, neurologist, related to her reported complaints of headaches. Dr. Prigozhikh saw the applicant in August 2017⁷ and, in his reporting letter, stated that the “patient presented with episodic and transient headaches, which she developed after a motor vehicle accident associated with closed head injuries.” Neurological exam was “nonfocal” without sensory deficits, which I understood to mean that there was nothing major that was abnormal with the applicant, and Dr. Prigozhikh did not think that she needed to start preventive pharmacological treatment at this time.
- [34] As well, a section 44 neurologist, Dr. D. Dodig, assessed the applicant on June 7, 2018. Dr. Dodig noted that she has intermittent headaches with migraines. However, based on the mechanism of injury, interval improvement, and elapsed time since the index motor vehicle accident, the prognosis is favourable. Dr. Dodig concluded that there was no evidence of any neurological deficit, and her neurological examination was normal.
- [35] Finally, in the s. 25 Vocational Assessment Report of Marg Smith dated October 2, 2018, the applicant advised Ms. Smith that she was searching for work at the Employment Ontario Centre and COSTI Employment Centre, submitting 5-10 applications a day. The evidence also shows she has been hired by two different employers since the accident. Further, in January 2018, the applicant stated that she still participated in the following activities, post-accident: "girls night" once a month, spending time with her daughter and boyfriend daily, taking her daughter to school and picking her up, actively job searching, listening to music, reading, preparing dinner, visiting family and friends, taking her daughter to playdates and noted that her libido had remained the same post-accident.

Psychological Impairments

- [36] The applicant’s claim for removal from the MIG is also rooted in psychological difficulties that she alleges arose from the accident. She argues that these impairments - adjustment disorder with mixed anxiety and depressed mood - justify removal from the MIG.
- [37] With respect to Dr. Lopo’s report that diagnosed somatic symptom disorder with predominant pain and major depressive disorder, I find Dr. Lopo’s diagnosis to be detached from the overall medical evidence and almost entirely reliant on the

⁷ See reporting letter dated August 18, 2018 at tab of Respondent’s Submissions.

applicant's self-reporting. For example, the applicant reports that her weight has increased since the accident because of her low mood, but does not specify what amount of weight she has gained and over what period. As well, the psychological testing that was administered consisted of essentially self reporting rating scales. As a result, I find that Dr. Lopo's opinion is not based on any objective evidence, but rather on speculation based on the applicant's self-reporting, which in my view calls into question their diagnoses.

- [38] In the similar vein, Dr. Lopo states that it is possible that the applicant also had a concussion, but does not refer to any corroborating medical evidence. Finally, nowhere in her report does Dr. Lopo indicate that she reviewed any clinical notes, reports or any documents related to the applicant's health, alleged injuries or impairments, and is based almost entirely on the applicant's self-reporting. In contrast to Dr. Lopo's approach, prior to assessing the applicant, Dr. Seon reviewed the clinical notes and records of Dr. Duchastel, the OHIP summary and various parts of the applicant's accident benefits file.
- [39] The applicant met with Dr. Seon again in June 2018, which confirmed the following: she remained the primary caregiver for her daughter; dropping her off and picking her up from school each day, walking for approximately 45 minutes, the applicant completed light housekeeping, was actively looking for employment, taking her daughter to the park, inviting her daughter's friends over (keeping "fun" in the house), regularly taking her daughter out for ice cream and helping her with any homework. The applicant specifically stated that she has not experienced any decline in desire or motivation to engage in her pre-accident social activities.⁸
- [40] The applicant was also assessed in May 2020 by Dr. Gratzer, psychiatrist, who confirmed three years post-accident, that he agreed with Dr. Seon in that the applicant did not meet the criteria for a psychiatric disorder (no DSM-5 diagnosis), and that her injuries were treatable within the MIG.
- [41] The applicant has included several handwritten pages, allegedly from the Integrated Psychological Centre to verify that she has started to receive psychological counselling. The notes are dated around July 13, 2018 but are difficult to read. I did not place a lot weight on this information because I was not certain who the author was and what the context of this information was. There did not seem to be any formal diagnosis or indication of any prescriptions for

⁸ IE Psychological Examination Reports of Dr. Seon dated January 30, 2018 at p. 7 -8 and June 21, 2018 at p. 7-8.

medications. Overall, they do not support the applicant's position that she is suffering from an accident-related psychological impairment.

- [42] Overall, although I acknowledge that the applicant's pain has persisted well beyond the normal healing times for the injuries sustained, it is not continuous or severe enough and accompanied by some functional impairment to prevent her from pursuing work, family and recreational needs. As a result, I find that the applicant's ongoing pain has not adversely affected her well-being and functionality to warrant removal from the MIG. Moreover, it appears that some symptoms were unrelated to the accident and may have been attributed to a more recent vehicle accident.
- [43] Accordingly, I find the applicant has not met her burden of demonstrating on a balance of probabilities that her accident-related pain warrants removal from and treatment beyond the MIG.

Are the treatment plans reasonable and necessary?

- [44] Having determined that the applicant has not demonstrated that removal from and treatment beyond the MIG is required, an analysis of whether the treatment plans in dispute are reasonable and necessary is not required, as it is my understanding that the MIG limits have been exhausted. For instance, the March 27 and 28, 2019 and May 10, 2019 letters from the respondent to the applicant all state: "To date we have paid up to the limits of \$3500.00."⁹

AWARD

- [45] The applicant seeks an award. Pursuant to s. 10, the Tribunal may award up to 50% of the total benefits payable if it determines that an insurer has unreasonably withheld or delayed the payment of benefits.
- [46] I find that award is not appropriate. The applicant was unsuccessful in meeting her burden of proof regarding her placement within the MIG. There was no unreasonable withholding of payment or delay. Consequently, as there are no benefits payable, there cannot be an order for an award.

CONCLUSION AND ORDER

- [47] The applicant has not demonstrated that her sustained injuries as a result of the accident, justify removal from the MIG. As her injuries are predominantly minor

⁹ Respondent's Submissions at tab 25.

injuries, an analysis of the OCF-18 for treatment is not required. As no benefits are overdue, no interest or award is payable.

Released: July 12, 2021

Cezary Paluch
Adjudicator