

**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**

**Citation: Y.D. v. Certas Home and Auto Insurance Company 2020 ONLAT 18-
003066/AABS**

Tribunal File Number: 18-003066/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, R.S.O. 1990, c. I.8., in relation to statutory accident benefits.

Between:

Y.D

Applicant

and

Certas Home and Auto Insurance Company

Respondent

DECISION

ADJUDICATOR:

Patricia McQuaid, Vice-Chair

APPEARANCES:

For the Applicant

Andrew Franzke, Counsel

For the Respondent:

Brian M. Yung, Counsel

HEARD:

By way of written submissions

OVERVIEW

- [1] Y.D. (the “applicant”) was injured in an automobile accident on January 29, 2015 and sought benefits from Certas Home and Auto Insurance Company (the “respondent”) pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010*¹ (“*Schedule*”). The applicant applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service when the respondent denied her claim for benefits on the basis that the claimed treatment plans, assessments, and expenses are neither reasonable nor necessary.
- [2] The parties first filed written submissions regarding these claimed benefits in November 2018. An oral hearing regarding non-earner benefits was to proceed in December 2018, but was adjourned because the applicant had cervical spine surgery. In August 2019, the applicant withdrew her claim for non-earner benefits. The parties were permitted to make further written submissions to address additional medical evidence which arose after November 2018. These written submissions were completed in February 2020.

ISSUES TO BE DECIDED

- [3] The issues to be decided by me are as follows:
- i. Is the applicant entitled to a medical benefit for \$1149.55 for chiropractic services recommended by Spinotec Health Care Solutions submitted on August 5, 2016 and denied on August 25, 2016?
 - ii. Is the applicant entitled to a medical benefit for \$4282.62 for services recommended by Spinotec Health Care Solutions submitted on February 8, 2017 and denied on February 21, 2017?
 - iii. Is the applicant entitled to the cost of examinations in the amount of \$26,400 recommended by Novo Medical Services for a determination of a catastrophic designation submitted on December 29, 2017 and denied on January 16, 2018?
 - iv. Is the applicant entitled to the cost of an examination recommended by Meditecs Independent Medical Examinations in the amount of \$2486 for a physiatry assessment submitted on February 8, 2017 and denied on February 21, 2017?

¹ O. Reg. 34/10.

- v. Is the applicant entitled to a cost of examination recommended by Meditecs Independent Medical Examinations in the amount of \$2486 for a vocational assessment submitted on December 6, 2017 and denied on December 21, 2017?
- vi. Is the applicant entitled to the cost of examination recommended by Meditecs Independent Medical Examinations in the amount of \$2486 for a labour market survey submitted on December 6, 2017 and denied on December 21, 2017?
- vii. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed payment of benefits?
- viii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [4] Based on the totality of the evidence before me, I find that the applicant has met her onus of proving that the medical benefit recommended by Spinotec Health Care Solutions in the amount of \$4282.62 is reasonable and necessary. Interest is payable on that benefit in accordance with s. 51 of the Schedule. The remainder of the claims are dismissed for the reasons that follow.

ANALYSIS

- [5] On January 29, 2015, the applicant was driving her vehicle when it struck another vehicle. She was taken by ambulance to Grand River Hospital. She was examined, prescribed Tylenol 3, and discharged the same day. The applicant saw her family doctor on February 5, at which time she complained of pain in her tailbone radiating to her lower legs. She was sent for x-rays and these showed no abnormality. The applicant has been a patient of her family physician, Dr. Beland, since at least 2012. and has experienced numerous issues, prior to the motor vehicle accident, including reported lower and upper back pain, and a long history of depression for which she received both therapy and medication.
- [6] It is a well-established principle that an applicant has the onus of proving on a balance of probabilities that each of the disputed expenses and assessments are reasonable and necessary. The various claims will be assessed through that lens.

ISSUE 1: Is the applicant entitled to a medical benefit for \$1149.55 for chiropractic services recommended by Spinetec Health Care Solutions submitted on August 5, 2016 and denied on August 25, 2016?

- [7] The total amount of the physiotherapy and chiropractic treatment recommended by Spinetec was \$4920.30. The respondent concluded that the treatment was reasonable and necessary and gave partial approval, in the amount of \$3770.75. The remainder, \$1149.55, was denied because it either exceeded the Professional Service Guideline (specifically, the fee for service proposed for the acupuncturist was above the permitted rate of \$58.19 per hour) or because an hour of time was being charged when only 25 minutes of chiropractic treatment was provided.² This latter information was confirmed to the respondent by a representative of Spinetec
- [8] The applicant has not provided any evidence that supports payment at a higher amount than set out in the Guideline. The cost of the treatment plan must also be reasonable, and permitted by the Guideline. I find that, based on the evidence before me, the respondent has paid the maximum allowable amount for this treatment plan and no further amount is owing.

ISSUE 2: Is the applicant entitled to a medical benefit for \$4282.62 for services recommended by Spinetec Health Care Solutions submitted on February 8, 2017 and denied on February 21, 2017?

- [9] The applicant is seeking the payment for this treatment comprised of chiropractic treatment, massage, acupuncture and physiotherapy. In response to this treatment plan, the applicant attended for an insurer's examination by physiatrist Dr. Heitzner in March 2017. He concluded that the applicant's musculoskeletal impairment was a direct result of the motor vehicle accident, but opined that the applicant, who at that point had been attending similar treatments 2-3 times a week almost continually since October 2015, had likely reached her maximum medical recovery. He noted that there had been little overall improvement in function or symptom reduction and that further treatments were unlikely to lead to any significant change.³
- [10] The clinical notes of Dr. Beland document that at times the applicant did indicate that physiotherapy, chiropractic and massage therapies were of little benefit, for example in October 2016. However, Dr. Beland in January 2018 was prescribing these treatments for "right shoulder chronic pain since mva and due to heavy

² Explanation of Benefits (OCF-9) dated August 25, 2016.

³ Independent Physiatry Assessment by Dr. Heitzner dated April 4, 2017.

lifting, lumbar discogenic disease and facet arthropathy”.⁴ I give considerable weight to the recommendations of Dr. Beland due to her lengthy history as the applicant’s physician. Though she did not appear to be suggesting that the applicant’s continuing complaints are solely related to the accident, it was nevertheless a contributing cause of her medical complaints at this point in time. In light of this, I find that the treatments were appropriate, and the benefits claimed are reasonable and necessary to address the pain the applicant was experiencing at this point in time.

Issue 3: Is the applicant entitled to the cost of examinations in the amount of \$26,400 recommended by Novo Medical Services for a determination of a catastrophic designation submitted on December 29, 2017 and denied on January 16, 2018?

- [11] The applicant has provided scant evidence to support the reasonableness or necessity of this assessment. The ‘pre-CAT’ assessment report was prepared by Dr. Owliaei, a chiropractor. It is dated December 20, 2017. He opined that the “persistence of post traumatic injuries and symptoms with apparent plateau of improvement would suggest maximum recuperation from said injuries”. He also reported that the applicant indicated that her accident injuries resulted in difficulties and symptom aggravation with performing various pre-accident activities of daily living, housekeeping and home maintenance responsibilities.
- [12] An OCF-19 for determination of catastrophic impairment has not been submitted. There is no indication on the evidence before me that a physician or neurologist, for example, has recommended proceeding with such an assessment in the intervening period. I note that Tribunal decisions have consistently held that the correct test for entitlement to a catastrophic impairment determination assessment is “reasonable and necessary.” While the purpose of an assessment may be to determine if a condition (or in this case a CAT designation) may be warranted, the applicant still has the onus of establishing on a balance of probabilities that the assessment is reasonable and necessary by bringing forward evidence that there is reason to suspect that the applicant has the condition which she is seeking to have assessed.
- [13] When it denied the claim on January 16, 2018, the respondent noted that the applicant had continued to maintain a pre-accident level of functioning. She

⁴ Clinical notes and records of Dr. Beland.

continued to drive. Also, in March 2015 she travelled with her family to Turkey, where they stayed for five months.⁵

- [14] The evidence, in particular the clinical notes and records of Dr. Beland, chronicle the applicant's health issues before and after the accident. There is evidence of a long history of depression and extreme stress at home. At the same time, the records also indicate a person who has persevered. She left her marriage in the summer of 2016, despite cultural pressure to remain. She found alternate housing for herself and her two children, for whom she continued to be the primary caregiver, and returned to school to train as a developmental service worker. This required work placements, which she completed, and then secured part-time employment. In light of these facts, I cannot conclude, based on, Dr. Owliaei's assessment, that a CAT determination is either reasonable or necessary.
- [15] Subsequent to Dr. Owliaei's assessment, the applicant did undergo spinal surgery, as noted above. The parties' submissions of January 2020 focus on the applicant's treatment and assessments post-surgery. I will review these submissions in the context of this particular issue, the CAT assessment, noting that the applicant's representative submits that this evidence generally supports findings that the treatments plans and cost of examinations are reasonable and necessary, though specificity with respect to each is lacking.
- [16] Prior to the accident, the applicant had complained of right shoulder pain and back pain as well as numbness in her extremities. However, as a result of an exacerbation of symptoms post-accident, Dr. Beland referred her to Dr. Marmor, a neurosurgeon. He examined the applicant in November 2015, at which time he observed relatively mild degenerative changes in her spine, but overall her neurologic examination was unremarkable. I note here that in March 2016, the applicant also saw Dr. Giles, a neurologist, who recorded that the applicant had a long history of pain, both pre-accident and increasing after the accident. She observed that there was mild degenerative change in her spine. The applicant was examined by Dr. Marmor again in October 2018. In his report, he stated that "about one year ago she began noticing increasing pain in her neck with radiation down her right arm". An MRI in July 2018 appeared to indicate increased degenerative changes resulting in central canal stenosis. Dr. Marmor recommended gentle physiotherapy. However, upon Dr. Marmor's review of a follow up MRI, which was done in October 2018, he recommended surgery as there was clear evidence of fairly significant spinal cord compression. That surgery took place in December 2018. The surgery went well, and the applicant

⁵ Explanation of Benefits, January 16, 2018.

reported improvement, though as recently as May 2019 she continued to have ongoing symptoms, with lower back and leg pain and hand weakness. She exhibited signs of cervical myelopathy, which is a degenerative condition.⁶

- [17] The applicant had an orthopaedic assessment with Dr. West in March 21, 2019. He indicated that the applicant suffered from “myofascial strain and cervical strain with disc protrusion” which he attributed to the accident, and further noted that she was “completely asymptomatic” before the accident. In submissions, the applicant’s representative suggests that the context for that statement is that there were no objective findings of any kind indicating that the applicant had issues with her cervical spine prior to the accident, nor did her pre-accident health complaints prompt her treating physicians to order an x-ray of her cervical spine. While that latter statement seems to be correct, the clinical notes and records of Dr. Beland cannot reasonably be interpreted to suggest that the applicant was asymptomatic before the accident. For example, in September and December 2014, the applicant reported low back pain and aches in her legs as well as numbness in her hand. The applicant was then referred to a neurologist in October 2014 for a nerve conduction study.
- [18] There is agreement that the applicant has suffered degenerative changes to her spine. The applicant submits that, while there may be differences in opinion with respect to causation, on a balance of probabilities, her ongoing issues with her cervical spine were caused by the accident.⁷ While it may be unusual to see degenerative changes in someone as young as the applicant, there is nothing to suggest that it was caused by the accident. Her symptoms reported to Dr. Beland prior to the accident are consistent with the issues she reported Dr Marmor in November 2015. She did report to Dr. Marmor that she experienced debilitating pain after the accident but also indicated that she was “enjoying some degree of improvement.”⁸ I find it persuasive as well that the applicant did not see Dr. Marmor again until October 2018 and, at that time, stated that she began noticing increasing pain in her neck with radiation down her right arm “one year ago.” Taken as a whole, the evidence presented does not satisfy the “but for” test of causation, but rather, is more consistent with a progressive degenerative condition.
- [19] Finally, I have also considered the applicant’s submission regarding her psychological condition. She has seen Dr. Ghuman, a psychiatrist, in 2017 (she

⁶ Dr. Marmor’s reports: November 16, 2015, October 12, November 16 and 26, 2018 and April 17 and May 24, 2019.

⁷ Applicant’s submissions dated January 15, 2020, paragraph 10.

⁸ *Supra* note 6.

was discharged in August 2017) and again in January 2019. Dr. Beland's records reveal that the applicant has suffered with depression since 2012. She has endured extreme stress, much related to her family situation. In December 2014, psychotherapy was needed. Unfortunately, these psychological issues are not new to the applicant since the accident. And there is little basis on which to reasonably conclude, as urged by the applicant's representative, that her psychological issues are separate and distinct from any pre-accident issues with depression.⁹ The documented history, as evidenced in the notes and records of Dr. Beland belie any such conclusion.

[20] Based on the foregoing, I find that the applicant has not established, on a balance of probabilities, that the CAT cost of examination is either reasonable or necessary.

ISSUE 4: Is the applicant entitled to the cost of an examination recommended by Meditecs Independent Medical Examinations in the amount of \$2486 for a psychiatry assessment submitted on February 8, 2017 and denied on February 21, 2017?

[21] In her submissions made in October 2018, the applicant stated that the psychiatry assessment will be able to provide an opinion on all the benefits she would be able to obtain under the SABS.¹⁰ The necessity for the assessment was not specifically addressed in the January 2020 submissions. The applicant did attend for the insurer's independent psychiatry assessment in March 2017.¹¹ After reviewing the Dr. Heitzner's report, the respondent provided an OCF-9 wherein it denied the treatment and assessment plan, stating that the applicant had been assessed by her family doctor regularly, as well as a neurologist and a psychiatrist.¹²

[22] As the evidence shows, since February 2017, the applicant has had spinal surgery, with Dr. Marmor's reports flowing from that, as well as multiple attendances with her family doctor, treatment and assessment by Dr. Ghuman, and assessment by Dr. West. In other words, the applicant has been treated and/or assessed by multiple physicians in the interim who are well positioned to opine as to the benefits the applicant may be eligible for under the SABS.

[23] There is insufficient evidence before me to support a finding that this particular assessment is reasonable or necessary in order for the applicant to understand

⁹ *Supra* note 7 at paragraph 4.

¹⁰ Amended opening submissions of the applicant dated October 5, 2018, paragraph 20.

¹¹ *Supra* note 3.

¹² OCF-9 dated April 5, 2017.

the level and nature of her impairment. Her condition, at this point, is already well-documented.

Issue 5: Is the applicant entitled to a cost of examination recommended by Meditecs Independent Medical Examinations in the amount of \$2486 for a vocational assessment submitted on December 6, 2017 and denied on December 21, 2017?

Issue 6: Is the applicant entitled to the cost of examination recommended by Meditecs Independent Medical Examinations in the amount of \$2486 for a labour market survey submitted on December 6, 2017 and denied on December 21, 2017?

[24] I will address both of these issues together as they are related. As submitted by the applicant's representative, the vocational assessment and labour market survey would be able to provide a better understanding of the applicant's future employment capabilities, keeping in mind that one of the goals of the SABS is to ensure the applicant is able to re-enter the labour market.¹³ Again, these issues were not specifically addressed in the January 2020 submissions.

[25] The respondent denied these claims in December 2017 on the basis that the claimant was not employed at the time of the accident and she had applied for a non earner benefit. As noted above, the applicant withdrew the claim for non earner benefits in August 2019. But, at the time that these claims were submitted, the applicant had gone back to school (in October 2016) for a year-long course in a developmental service worker program. She received her qualifications in 2017 and obtained employment. The clinical notes and records of Dr. Beland reveal that the applicant affirmed her intention and desire to be a developmental service worker and that the applicant was working in April 2018. The applicant was motivated to pursue her studies and vocation and appears to have been successful in this regard.

[26] Given these facts, there is no evidence on which I can conclude, on a balance of probabilities, that these assessments are either reasonable or necessary.

ISSUE 7: Is the applicant entitled to an award under Ontario Regulation 664

[27] In light of my findings on the issues, as set out above, I do not find that the respondent has unreasonably withheld payment of a benefit. This claim is dismissed.

¹³ Supra, note 10 at paragraph 22

ISSUE 8: Is the applicant entitled to interest on any overdue payment of benefits?

[28] Having decided that the medical benefit of \$4282.62 by Spinetec Health care Solutions is reasonable and necessary, the applicant is entitled to interest on these medical benefits in accordance with the *Schedule*.

ORDER

[29] For the reasons outlined above, I find that the applicant is entitled to a medical benefit for \$4282.62 for services recommended by Spinetec Health Care Solutions submitted on February 8, 2017, plus interest pursuant to section 51 of the *Schedule*.

[30] The applicant is not entitled to any other benefits claimed and is not entitled to an award.

Released: May 19, 2020



**Patricia McQuaid
Adjudicator**