Safety, Licensing Appeals and Standards Tribunals Ontario
Licence Appeal Tribunal

Automobile Accident Benefits Service
Mailing Address: 77 Wellesley St. W., Box 250, Toronto ON M7A 1N3
In-Person Service: 20 Dundas St. W., Suite 530, Toronto ON M5G 2C2
Tel.: 416-314-4260
1-800-255-2214
TTY: 416-916-0548
1-844-403-5906
Fax: 416-325-1060
1-844-618-2566
Website: **www.slasto.gov.on.ca/en/AABS**

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario
Tribunal d'appel en matière de permis

Service d'aide relative aux indemnités d'accident automobile
Adresse postale : 77, rue Wellesley Ouest, Boîte n° 250, Toronto ON M7A 1N3
Adresse municipale : 20, rue Dundas Ouest, Bureau 530, Toronto ON M5G 2C2
Tél. : 416 314-4260
1 800 255-2214
ATS : 416 916-0548
1 844 403-5906
Téléc. : 416 325-1060
1 844 618-2566
Site Web : **www.slasto.gov.on.ca/fr/AABS**

Ontario

Tribunal File Number: **16-000670/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:

H.Y.

Applicant

and

Aviva Insurance Company

Respondent

DECISION

Adjudicator:	Anna Truong
Appearances:	
For the Applicant:	H.Y., the Applicant Aislynn Brown, Counsel Michael Wentzel, Paralegal Shane Leroux, Paralegal
For the Respondent:	Ajay Shukla, Litigation Specialist Suzanne Clarke, Counsel
Interpreter:	Saba Jadir, Arabic Interpreter
Heard in-person & in writing:	December 14, 2016

OVERVIEW

[1] H.Y. (the "applicant") was involved in an automobile accident on June 5, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*").

[2] The applicant applied for a non-earner and medical and rehabilitation benefits, but was denied by the respondent. The applicant disagreed with this decision and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal"). The matter proceeded to a Case Conference, but the parties were unable to resolve the issues in dispute.

PRELIMINARY ISSUE

[3] At the hearing, the respondent raised two preliminary issues: one regarding the applicant's failure to call Dr. Ogilvie-Harris and Dr. Pilowsky as witnesses and the second regarding the applicant's claim for a "special award" and the Summons of Ajay Shukla.

Dr. Ogilvie-Harris and Dr. Pilowsky

[4] The respondent submitted that the applicant advised she would summon Dr. Ogilvie-Harris and Dr. Pilowsky at the Case Conference. Since the respondent was unsure if the applicant was going to call the two doctors, it decided to summon them. Dr. Pilowsky refused service of the Summons and Dr. Ogilvie-Harris e-mailed the respondent on December 12, 2016 advising that he did not have enough notice as he was served on December 7 or 8.

[5] The respondent had concerns about Dr. Ogilvie-Harris' qualification and his diagnosis of chronic pain. The respondent submitted that it would be prejudiced and deprived of natural justice, if not given an opportunity to cross-examine Dr. Ogilvie-Harris. The respondent suggested three remedies:

1. Adjourn a portion of the hearing, so the two doctors can be cross-examined;
2. Have their reports struck from the record; or
3. Draw an adverse inference from the applicant's refusal to produce both doctors for cross-examination.

[6] The applicant submitted that she decided not to call the two doctors and only rely on their reports, because she wanted to expedite the hearing. The applicant argued that the main purpose of the in-person portion of the hearing was to hear her testimony. There was never an intention to call Dr. Pilowsky. The applicant further submitted that the respondent took the opposite position at the Case Conference and did not want Dr. Ogilvie-Harris to testify. The applicant argued that it is irrelevant if she calls Dr. Ogilvie-Harris or not, because it is her case to prove.

[7] After considering the submissions of the parties, I decided against the three remedies that the respondent suggested. I ordered that the hearing proceed as scheduled without Dr. Ogilvie-Harris and Dr. Pilowsky. I found that Dr. Pilowsky was never listed as a witness for the hearing and the respondent's concerns about Dr. Ogilvie-Harris' qualifications could be raised in argument. The respondent had a copy of his CV. The Tribunal encourages an expeditious process, so written reports are encouraged. The Case Conference Order does not use mandatory language and neither do the Tribunal's rules, so the applicant has a right to decide not to call a witness.

[8] Although the rules do not specify a timeline for serving a Summons, that does not allow a party to wait until the last minute to do so. Dr. Ogilvie-Harris did not have prior notice of the hearing and the respondent served him approximately a week before the scheduled hearing. This is not sufficient notice. Finally, it was my opinion that Dr. Ogilvie-Harris was not needed as we had his report and there were already two expert witnesses prepared to testify. Any issues with respect to what weight should be given to Dr. Ogilvie-Harris' evidence could be addressed in argument.

"Special Award" and Ajay Shukla

[9] The respondent submitted that the applicant failed to particularize her claim for a "special award" and that Mr. Ajay Shukla, Litigation Specialist for Aviva, was not properly served with the Summons to attend the hearing.

[10] The applicant submitted that she could not particularize her claim, because she only received the adjuster's log notes from the respondent on Monday December 12, 2016. Additionally, the applicant argued that she did notify the respondent by e-mail that she would be calling Mr. Shukla. The applicant further submitted that she could not confirm if Mr. Shukla was properly served, because she did not have the Affidavit of Service with her. In any event, Mr. Shukla attended at the hearing.

[11] After hearing the submissions of the parties, I allowed the cross-examination of Mr. Shukla. I limited the cross-examination to the contents of the log notes, because the applicant had not particularized her claim for the award. As the respondent had custody of the log notes, it was already aware of the contents and would not be prejudiced. Failure to properly follow procedural rules with respect to the Summons should not prevent the applicant from exploring a substantive issue in this case. The issue of an award was raised at the Case Conference and it was included as an issue in dispute in the Case Conference Adjudicator's Order.

ISSUES TO BE DECIDED

[12] The following are the issues to be decided:

1. Is the applicant entitled to a non-earner benefit in the amount of $185 per week from June 7, 2016 and ongoing?

2. Did the applicant sustain predominately minor injuries as defined under the *Schedule*?

3. If the answer to issue two is no:

    a. Is the applicant entitled to a medical benefit as outlined in the Treatment and Assessment Plan (OCF-18) dated March 3, 2016 completed by Dr. Judith Pilowsky, psychologist, for psychological treatment in the amount of $4,605.48?

    b. Is the applicant entitled to a medical benefit as outlined in the Treatment and Assessment Plan (OCF-18) dated May 4, 2016 completed by Michael Hofstatter, physiotherapist, for physiotherapy in the amount of $1,290?

    c. Is the applicant entitled to the cost of a psychological assessment as outlined in the Treatment and Assessment Plan (OCF-18) dated February 9, 2016 completed by Dr. Pilowsky, in the amount of $2,520?

    d. Is the applicant entitled to the cost of an orthopaedic assessment as outlined in the Treatment and Assessment Plan (OCF-18) dated April 25, 2016 completed by Dr. J. Ogilvie-Harris, in the amount of $2,670?

4. Is the applicant entitled to interest for any overdue payment of benefits?

5. Is the applicant entitled to an award, because the respondent unreasonably withheld or delayed payments pursuant to section 10 of Ontario Regulation 664?

RESULT

[13] Based on the totality of the evidence before me, I find that:

1. The applicant is not entitled to a non-earner benefit.

2. The applicant sustained predominately minor injuries.

3. The applicant is not entitled to any of the treatment plans and cost of assessments.

4. The applicant is not entitled to any interest.

5. The applicant is not entitled to an award pursuant to section 10 of Ontario Regulation 664.

ANALYSIS

1. **Non-Earner Benefit**

[14] The test for entitlement to a non-earner benefit is set out in section 12 (1) of the *Schedule*. The applicant must prove that she suffers from a complete inability to carry on a normal life within 104 weeks of the accident. Section 7(b) of the *Schedule* states that a person suffers a complete inability to carry on a normal life as a result of an accident if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.

[15] The parties both submitted the seminal case of *Heath v. Economical Mutual Insurance Company,* 2009 ONCA 391 ("*Heath"*), which outlines several principles for the determination of entitlement to a non-earner benefit. These principles include:

- There must be a comparison of the applicant's activities and life circumstances before the accident to those post-accident.

- The applicant's activities and life circumstances before the accident must be assessed over a reasonable period prior to the accident. The duration of which will depend on the facts of the case.

- All of the applicant's pre-accident activities must be considered, but greater weight may be placed on activities that were more important to the applicant's pre-accident life.

- The applicant must prove that his/her accident related injuries continuously prevent him/her from engaging in substantially all of his/her pre-accident activities. This means that the disability or incapacity must be uninterrupted.

- "Engaging in" should be interpreted from a qualitative perspective. Even if an applicant can still perform an activity, if the applicant experiences significant restrictions when performing that activity, it may not count as "engaging in" that activity.

- If pain is the primary reason that an applicant cannot engage in former activities, the question is whether the degree of pain practically prevents the applicant from performing those activities. The focus should not be on whether the applicant can physically perform those activities.

[16] I have noted these principles and used them to guide my analysis with respect to the applicant's entitlement to a non-earner benefit.

Evidence

[17] The hearing consisted of a one day in-person hearing and written submissions. The purpose of the in-person hearing was to hear evidence with respect to the non-earner benefit. The applicant, Dr. Esmat Dessouki, orthopaedic surgeon, and Ms. Christina Kovacic, occupational therapist, testified and were cross-examined. Mr. Shukla was briefly cross-examined until it was discovered that he was not the adjuster on the file. I have reviewed all of the evidence and summarized what I found relevant to my determination below.

Applicant's Testimony

[18] The applicant testified and was cross-examined at the hearing. In summary, the applicant testified that pre-accident she was the primary caregiver of her four children and a homemaker, who was socially, physically and religiously active. The applicant testified that post-accident:

- She is afraid of leaving the house and going outside.
- She is unable to take care of her baby, because she is unable to cuddle him, carry him and change his diaper. Her other children have to assist her.
- She is unable to do snow shovelling.
- She is unable to cook. She can only make light meals for the family.
- She continues to drive, but only if necessary.
- She no longer takes out the garbage, just separates it.
- She continues to go grocery shopping.
- She continues to clean the bathroom, because her children cannot do it.
- She goes out less, but travelled to Saudi Arabia and Norway and Sweden.

[19] The applicant testified that post-accident, she travelled to Norway and Sweden with her baby. Her other children did not come along, because they had to attend school. The applicant further testified that the flight to Norway was 10-11 hours and she stayed in Norway for ten days before going to Sweden for 4-5 days.

[20] The applicant's testimony is not consistent with the medical evidence before me. There are conflicting reports of what she can and cannot do after her accident.

Treating Records

[21] The applicant's treating records do not indicate anything other than soft tissue injuries and they do not indicate that the applicant suffers from a complete inability to carry on a normal life.

[22] The record of the applicant's treating physiotherapy clinic, Elite Physio, dated May 19, 2016, noted that the applicant forgot about pain, when distracted. The record dated June 13, 2016, stated that "patient suddenly reacts to pain where there was no tenderness earlier. Pain more when not distracted."

[23] Dr. Dev Sarathy, the applicant's treating chiropractor, completed two OCF-3 Disability Certificates dated July 3, 2015 and January 14, 2016, which both state that the applicant suffers from a whiplash associated disorder (WADII) with complaint of neck pain with musculoskeletal signs, sprain and strain of thoracic spine, sprain and strain of lumbar spine, headache, and sprain and strain of jaw. In Part 6 of these OCF-3s, Dr. Sarathy indicated that the applicant met the test for a non-earner benefit for a duration of 9-12 weeks. In Part 8, Dr. Sarathy indicated that prior to the accident, the applicant did not have any diseases, condition or injury that affected her ability to perform activities in Part 6.

[24] Nine excerpts of the clinical notes and records of Dr. Adilson Araujo, the applicant's current family physician, were submitted. These records show that the applicant suffered from benign hypertension prior to the accident. Post-accident, Dr. Araujo's records indicate that the applicant suffers from soft tissue injuries as a result of the accident. Of note, Dr. Araujo's records do not indicate any psychological sequelae until his notes of April 18, 2016 and May 9, 2016, and he does not indicate that it is accident related.

Psychological Assessments

[25] With respect to the psychological assessments, I did not place much weight on Dr. Pilowsky's assessment and preferred the assessment of Dr. Syed, because I found it to be more reliable as Dr. Syed did validity testing. Dr. Syed found no objective psychometric evidence to substantiate the applicant's subjective reports of psychological impairment. Dr. Syed opined that the applicant's injuries were minor and she does not suffer from a complete inability to carry on a normal life.

[26] In the Psychological Report of Dr. Judith Pilowsky, clinical psychologist, dated April 19, 2016, she noted the activities that the applicant reports doing pre-accident. Dr. Pilowsky noted that post-accident, the applicant reports that:

- She is no longer able to perform her housekeeping and home maintenance tasks due to her pain and physical limitations and has to rely on her son to complete them.
- She is no longer able to perform her caregiver tasks due to her pain and physical limitations as a result of the accident and her teenage son has to perform these duties.
- She is no longer an active participant in her social and recreational activities, because she has lost motivation due to her pain and physical limitations.

- She is no longer able to pray due to her pain and physical limitations, which prevents her from sitting on the floor for extended periods of time, as well as frequently standing and bending.

[27] Dr. Pilowsky diagnosed the applicant with Major Depressive Disorder, Post-Traumatic Stress Disorder (PTSD) and Somatic Symptom Disorder. Dr. Pilowsky opined that the applicant suffers a complete inability to carry on a normal life as a result of the subject accident, because her difficulty coping with pain and her depressive and anxiety symptoms "undermines her motivation to engage in such activities". Dr. Pilowsky also opined that the applicant did not sustain a minor injury, because her diagnoses are not within the definition of a "minor injury".

[28] In the Insurer's Psychologist Assessment of Dr. Amena Syed, clinical psychologist, dated March 22, 2016, she noted that the applicant could be suffering from some psychological distress, but the results of the evaluation indicate a greater degree of distress than what the applicant is truly experiencing. Dr. Syed explained that the applicant's responses were indicative of infrequent and atypical responding and her scores on performance and embedded validity measures were indicative of feigning psychological impairment. Due to the unreliable and invalid findings, Dr. Syed ruled out an Adjustment Disorder with Anxiety and Depressed Mood.

[29] Dr. Syed concluded that the psychological investigation found no objective psychometric evidence to substantiate the applicant's subjective self-report of psychological impairment. Dr. Syed further concluded that the applicant does not suffer from a complete inability to carry on a normal life from a psychological perspective and can return to all her pre-accident activities. Dr. Syed completed a second Insurer's Psychologist Assessment dated May 12, 2016, in which she reached the same conclusion and opined that the applicant's injuries could be treated within the MIG.

[30] The applicant argued that Dr. Syed erred by basing her determination solely on the psychometric testing, because the testing may have yielded inaccurate results as a result of the applicant's language barrier, cultural and social background, and education, economic and political disposition. I am not persuaded by this argument. Dr. Syed used Arabic interpreters throughout her psychological examination. Additionally, on page 21 of her report, Dr. Syed stated:

> It is acknowledged that the administration of psychometric measures with an interpreter reflects non-standardized administration, and that language and/or cultural factors may have impacted upon [the applicant]'s performance on the testing described below and will be given due consideration whilst interpreting the results.

[31] Dr. Syed also took a full history from the applicant, which included her cultural, social, education and economic background. Therefore, I am satisfied that Dr.

Syed did take these factors into account. Furthermore, a review of Dr. Pilowsky's report does not indicate that she did anything different than Dr. Syed and there is no indication that Dr. Pilowsky took these factors into consideration, when she was interpreting her psychometric testing results.

[32] I did not give much weight to Dr. Pilowsky's report for two reasons. First, Dr. Pilowsky concluded that the applicant meets the non-earner test from a psychological perspective, but Dr. Pilowsky's report indicates that the applicant is unable to do her pre-accident activities as a result of her physical limitations. This is outside Dr. Pilowsky's scope of practice and her report does not support her conclusion.

[33] Second, Dr. Pilowsky did not conduct any validity testing and her conclusions are solely based on the applicant's subjective reports. When Dr. Syed and Dr. Pilowsky's psychometric test results are compared, the results are similar. The clinical presentation is of someone with a high degree of psychological distress. However, Dr. Pilowsky does not conduct any validity testing to confirm the accuracy of the results before drawing conclusions from them. Therefore, I prefer Dr. Syed's report as I find it more reliable and objective.

Physical Assessments

[34] With respect to the physical assessments, I did not place much weight on Dr. Ogilvie-Harris' assessment and preferred the assessment of Dr. Dessouki, because I found his report more objective. Dr. Dessouki found the applicant self-limiting during the assessments and diagnosed her with soft tissue injures. He opined that she sustained minor injuries and does not suffer from a complete inability to carry on a normal life.

[35] In his Orthopaedic Consultation Report dated May 27, 2016, Dr. Ogilvie-Harris opined that he "feels" the applicant did sustain soft tissue injuries to her neck and back as a result of the accident. However, he opined that the applicant currently presents as a patient with a Chronic Pain Syndrome with central sensitization. Dr. Ogilvie-Harris summarized the activities that the applicant reports she used to do pre-accident and noted that the applicant can only do 10% of what she did previously. He concluded that due to the applicant's Chronic Pain Syndrome, she sustained an impairment that continuously prevents her from engaging in substantially all of the activities in which she ordinarily engaged in before the accident. Dr. Ogilvie-Harris also opined that the MIG does not apply to patients with a Chronic Pain Syndrome.

[36] Dr. Ogilvie-Harris did not provide an explanation as to how he arrived at the 10% figure and he did not provide an explanation as to why the applicant is only able to do 10% of her previous activities. Dr. Ogilvie-Harris stated that the applicant reports she can no longer do these activities. His opinion is not based on objective medical testing.

[37] Dr. Ogilvie-Harris administered two questionnaires for the applicant to complete. There was no indication in Dr. Ogilvie-Harris' report that an interpreter was used. Again, these questionnaires were based solely on the applicant's subjective reporting and no validity testing was done to confirm the results. Dr. Ogilvie-Harris is not very clear in his explanation and interpretation of the questionnaire results. For example, he concluded that one of the questionnaires placed the applicant "in the lowest 5th percentile of the population in terms of disability and impairment". It is unclear if this result indicates that the applicant has a high or low level of disability. Dr. Ogilvie-Harris' explanation and conclusions are unclear to the reader and he does not connect the questionnaire results to the applicant's functioning.

[38] Dr. Ogilvie-Harris arrived at a Chronic Pain Syndrome diagnosis, but provided no objective medical findings to support this. Dr. Ogilvie-Harris did not find any objective medical impairment during his assessment. He even stated in his report that "accurate measurements were not possible because of her pain related limitations". Furthermore, it appears that Dr. Ogilvie-Harris was not provided with the applicant's complete medical file and he based the psychological portion of his Chronic Pain Syndrome diagnosis on Dr. Pilowsky's report. I have already explained why I do not find Dr. Pilowsky's report reliable. For these reasons, I am not satisfied that Dr. Ogilvie-Harris can accurately conclude that the applicant suffers from Chronic Pain Syndrome. Consequently, I placed little weight on Dr. Ogilvie-Harris' report and his diagnosis of Chronic Pain Syndrome.

[39] In the Insurer's Orthopaedic Surgeon Assessment of Dr. Dessouki dated January 29, 2016, he noted the activities that the applicant reported doing pre-accident and the activities the applicant reported she could no longer do post-accident. Dr. Dessouki noted that the applicant complained of pain in her left shoulder radiating to her left arm, pain in her left forearm and hand, and pain in her left knee. He further noted that the applicant had a pre-existing history of benign hypertension, pain in both knees and minimal degenerative disc disease of the thoracic spine. Dr. Dessouki diagnosed the applicant with left shoulder strain and left knee sprain. He concluded that the applicant does not suffer a complete inability to carry on a normal life and she is capable of returning to her pre-accident activities.

[40] Dr. Dessouki assessed the applicant again on May 27, 2016 to assess the applicability of the MIG. In his report dated June 10, 2016, he noted, upon examination, there was no objective evidence of any residual musculoskeletal impairment. He noted that the applicant was self-limiting in some range of motion examinations. For example, he noted that the applicant was severely self-restricted with movement of the left knee in the standing position, but she had full range of motion of the left knee in the supine position.

[41] Dr. Dessouki opined that the applicant's accident-related diagnosis is consistent with cervical strain, lumbosacral strain, left shoulder strain and left knee sprain

based on the history, physical examination and review of documentation. Dr. Dessouki concluded that the applicant suffers from predominantly minor injuries.

[42] The contents of Dr. Dessouki's reports were tested during the hearing and his testimony held up to cross-examination. I find his testimony to be credible. Dr. Dessouki explained the various inconsistencies he found during his two assessments of the applicant. He explained that in the January assessment, six months post-accident, the applicant was almost pain free and had full range of motion, yet four months later during the second assessment, the applicant complained of pain in other areas that she did not complain of before. Dr. Dessouki testified that this is unusual and cannot be explained medically.

[43] Dr. Dessouki testified that he thought the applicant was self-limiting and not doing her best during the assessment, because there was a discrepancy between the applicant's ability to raise her leg in the supine and sitting positions. He explained that this mismatch cannot be explained medically. Furthermore, Dr. Dessouki testified that during the second assessment, despite reports of back pain from the applicant, he did not find any muscle spasms on examination. He explained that the presence of muscle spasms is important, because when a patient experiences back pain, muscles go into spasms to protect itself.

[44] Dr. Dessouki testified that he disagreed with Dr. Ogilvie-Harris' diagnosis of Chronic Pain Syndrome. When asked why his opinion should be preferred over Dr. Ogilvie-Harris', he explained that he had the advantage of examining the applicant twice, which allows him to assess the progression of the applicant's symptoms. Dr. Dessouki explained that chronic pain is something that develops over time and does not respond to modalities of treatment. It starts and does not go away. He testified that in January, six months post-accident, the applicant had almost no pain, which does not support this diagnosis.

[45] In the Insurer's In-Home Assessment of Ms. Christina Kovacic, occupational therapist, dated February 11, 2016, she noted that the applicant's participation in the assessment was limited. She noted that the applicant was limited in completing upper extremity and lower extremity range of motion testing and the applicant refused to complete lower body range of motion testing, and home chores and tasks. Ms. Kovacic noted that during the assessment, the applicant demonstrated the following physical tolerances and functional activities:

- Functional range of motion in the neck, right shoulder, bilateral elbows and bilateral wrists.
- Functional tolerances for sitting and standing.
- Functional mobility for walking.
- Functional ability to perform all transfers.
- Functional light lifting and carrying abilities with the right and left upper extremity.
- Reaching overhead and accessing the back of her neck with her right hand.

- Reaching above shoulder level with the right upper extremity.

[46] Ms. Kovacic noted that the applicant reported that she can perform most personal care tasks independently with self-pacing post-accident. Ms. Kovacic noted that the applicant reported she is able to perform simple meal preparations and complete simple chores in the home that do not require heavy lifting. Ms. Kovacic concluded that the applicant does not suffer a complete inability to carry on a normal life.

[47] Ms. Kovacic gave testimony at the hearing and was cross-examined. She struggled during cross-examination with respect to the non-earner test. I cannot place much weight on Ms. Kovacic's conclusion that the applicant does not meet the non-earner test, because it was apparent on cross-examination that what Ms. Kovacic conducted was more reminiscent of a functional evaluation. While I cannot place much weight on Ms. Kovacic's non-earner benefit conclusion, that does not discount her entire report and all her findings. I do place weight on Ms. Kovacic's assessment with respect to the applicant's physical functioning.

[48] Ms. Kovacic testified that based on her assessment and observations of the applicant's ability to sit, stand, reach, ascend and descend stairs, the applicant should be independent in completing all of her self-care activities and any household activities with self-pacing.

Surveillance

[49] The respondent submitted a Surveillance Report from Mantis Investigation Agency dated October 31, 2016 and surveillance footage of the applicant dated October 2, 2016. I watched the entire footage and I found the report to be an accurate depiction of what occurs in the video. The applicant is seen driving her baby and son to Costco, where the applicant shops for approximately 45 minutes. She is seen squatting, bending, reaching overhead, lifting boxes and milk bags and pushing her baby in a shopping cart full of groceries. The applicant did not address the surveillance in her submissions or testimony.

Non-Earner Analysis

[50] I am unable to reconcile the applicant's subjective reports with the medical evidence and surveillance before me. There are conflicting reports of what she can and cannot do after her accident. For example, the applicant testified that she has problems caring for her baby, yet she was able to travel to Norway and Sweden with him alone. The applicant refused testing during her in-home assessment with Ms. Kovacic, yet she was seen in the surveillance footage to squat, reach overhead, bend and move smoothly with unrestricted range of motion. There are contradictions and inconsistencies between the applicant's testimony and the other evidence on record. There is also an overall theme of overstatement of symptoms and restrictions.

[51] From the evidence before me, it would appear that the applicant was a homemaker and mother of four before the accident. Post-accident, she continues to be a homemaker and mother of four, albeit with some impairments and difficulties. Being unable to engage in activities post-accident that you engaged in pre-accident is not determinative of entitlement to a non-earner benefit. The applicant must prove that she is continuously prevented from engaging in substantially all of her pre-accident activities.

[52] Post-accident, the applicant continued to care for her children, drive them to school, cook and clean and perform all of her personal care tasks. The applicant may suffer from some impairments sustained in the accident that make some of these tasks more difficult and I understand that *Heath* indicates that if the applicant is experiencing significant restrictions, it may not count as "engaging in" that activity. However, based on the medical and surveillance evidence before me, the applicant does not suffer from significant restrictions in her activities. She continues to be able to perform most of her caregiving and homemaking activities post-accident.

[53] The non-earner test is a high bar to meet and in this case, the applicant has not met it. In short, the applicant has not adduced enough evidence to prove on a balance of probabilities that her accident related injuries prevent her from engaging in substantially all of her pre-accident activities. Therefore, based on the totality of the evidence before me, I find that the applicant does not suffer from a complete inability to carry on a normal life.

2. **Applicability of the Minor Injury Guideline**

[54] The MIG establishes a framework for the treatment of minor injuries. The term "minor injury" is defined in section 3 of the *Schedule* as "one or more of a strain, sprain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury." The terms "strain", "sprain," "subluxation," and "whiplash associated disorder" are also defined in section 3. Section 18(1) limits recovery for medical and rehabilitation benefits for such injuries to $3,500 minus any amounts paid in respect of an insured person under the MIG.

[55] Section 18(2) of the *Schedule* makes provision for some injured persons who have a pre-existing medical condition to receive treatment in excess of the $3,500 limit. To access the increased benefits, the injured person's healthcare provider must provide compelling evidence that the person has a pre-existing medical condition, documented prior to the accident, which will prevent the injured person from achieving maximal recovery if benefits are limited to the MIG limit.

[56] The Respondent submitted the decision of *Scarlett v. Belair Insurance*, 2015 ONSC 3635 (CanLII) ("*Scarlett*"). In this case, the Divisional Court reviewed the

minor injury provisions in the *Schedule*, finding that they were a limit on an insurer's liability, not an exclusion from coverage, and that the onus of establishing entitlement beyond the limit rests with the claimant. Applying *Scarlett*, the applicant must establish her entitlement to coverage beyond the $3,500 limit for minor injuries.

[57] The applicant submitted that her injuries are not minor, because she has been diagnosed with Major Depressive Disorder, Post-Traumatic Stress Disorder (PTSD) and Somatic Symptom Disorder as well as Chronic Pain Syndrome. It was doctors Pilowsky and Ogilvie-Harris that provided these diagnoses and I have already stated above that I do not place much weight on their reports.

[58] With respect to the applicant's psychological impairments, it is evident that the applicant suffers from some psychological symptoms as a result of the accident. However, psychological symptoms alone do not take you out of the MIG. Other than Dr. Pilowsky's report, none of the treating physicians or independent assessors diagnose her with a psychological impairment as a result of the accident. Dr. Syed was unable to make a diagnosis due to the invalid psychometric testing results. There are two records from Dr. Araujo post-accident that note some psychological symptoms, but he does not indicate that they are accident related. Additionally, he does not diagnose her with a psychological disorder. The applicant has not provided sufficient medical evidence to demonstrate that she is unable to recover under the MIG as a result of her psychological symptoms. Therefore, she has not met the onus of establishing her entitlement beyond the MIG limits.

[59] With respect to the applicant's physical injuries, all of her treating physicians and assessors opine that the applicant suffered soft tissue injuries as a result of the accident. Dr. Ogilvie-Harris opined that the applicant sustained soft tissue injuries initially, but it has turned into Chronic Pain Syndrome. Based on the totality of the evidence before me, I do not find that the applicant suffers from Chronic Pain Sydnrome. I find that the applicant suffered soft tissue injuries and associated sequalae as a result of the accident, which is corroborated by the OCF-3s, diagnostic imaging, the clinical notes and records of the treating physicians and the reports of independent assessors. This falls within the definition of minor injury.

[60] Based on the evidence that the applicant has adduced, I find that she has not met the burden that on a balance of probabilities she sustained anything other than minor injuries. Therefore, I find that the applicant sustained predominately minor injuries, as defined under the *Schedule*, as a result of the accident.

[61] A review of the applicant's medical file show that prior to the accident, she suffered from benign hypertension, minimal degenerative disc disease of the thoracic spine, bilateral knee pain and gestational diabetes (which resolved pre-accident). However, the applicant has not adduced any compelling medical evidence that show these pre-existing conditions prevent her from recovering under the MIG.

Therefore, I find that the applicant does not suffer from any pre-existing conditions, which prevents her from achieving maximal recovery under the MIG.

3. **Treatment Plans and Cost of Assessments**

[62] The parties did not lead any evidence or make any submissions as to whether or not the applicant has exhausted the MIG limit. Since there is no evidence before me, I cannot make a determination as to the remaining limit under the MIG.

[63] Since I have found that the applicant sustained predominately minor injuries, I do not need to determine whether the treatment plans and cost of assessments in dispute are reasonable and necessary. The applicant is entitled to a maximum of $3,500 for medical and rehabilitation benefits less amounts paid.

4. **Interest**

[64] Since I did not find any benefit to be payable, no interest is applicable. Therefore, the applicant is not entitled to any interest.

5. **An Award Under Ontario Regulation 664 (O/Reg 664)**

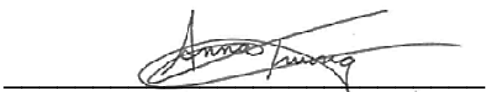
[65] After discovering that Mr. Shukla was not the adjuster on the file, the applicant realized that the cross-examination of Mr. Shukla would not be beneficial. I ordered that the parties submit written submissions with respect to the award after the hearing. The applicant's claim was restricted to the adjuster's log notes.

[66] Section 10 of O/Reg 664 states that an amount of up to 50 per cent with interest on all amounts owing may be awarded if an insurer has unreasonably withheld or delayed payments. Since I found nothing payable, the respondent cannot have unreasonably withheld or delayed payments. As such, no award will be granted.

CONCLUSION

[67] For the reasons outlined above, I find that the applicant is not entitled to a non-earner benefit and that she sustained predominately minor injuries. I find that the applicant is not entitled to any of the treatment plans and cost of assessments, interest, or an award pursuant to section 10 of Ontario Regulation 664.

Released: May 19, 2017



Anna Truong, Adjudicator