

**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: R.M. v. Certas Home and Auto Insurance Company, 2020 ONLAT 18-007521

**Released Date: 08/06/2020
File Number: 18-007521/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.M.

Applicant

and

Certas Home and Auto Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: Avril A. Farlam

APPEARANCES:

For the Applicant: Kevan Wylie, Counsel

For the Respondent: Aryeh D. Samuel, Counsel

HEARD: By Way of Written Submissions

REASONS FOR DECISION AND ORDER

OVERVIEW

- [1] R.M. (“applicant”) was involved in a motor vehicle accident on August 13, 2015 (“accident”) and sought benefits from Certas Home and Auto Insurance Company (“respondent”) pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule")*.¹
- [2] The applicant was denied benefits by the respondent and she submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service (“Tribunal”) on August 21, 2018. As of March 2019, the respondent paid \$9,632.11 in medical and rehabilitation benefits.

ISSUES

- [3] The issues to be decided in this hearing are:
- i. Is the applicant entitled to payments for the cost of examinations in the amount of \$22,400.00 for a catastrophic assessment (“CAT assessment”), recommended by Novo Medical Assessments in a treatment plan dated March 3, 2018, and denied by the respondent on April 25, 2018?
 - ii. Is the respondent liable to pay an award under *Regulation 664* because it unreasonably withheld or delayed payments to the applicant?
 - iii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [4] I find that the applicant is not entitled to the costs of the CAT assessment as claimed. No interest is payable. No special award is made. The applicant’s application is dismissed.

LAW

- [5] Section 25 (1) 5 of the *Schedule* provides that an insurer shall pay reasonable fees incurred by or on behalf of an insured charged for preparing an application under s. 45 for a determination of whether the insured has sustained a catastrophic impairment, including any assessment necessary for that purpose. Section 45 (1) provides that an insured who sustains an impairment as a result of

¹ O. Reg. 34/10.

an accident may apply to the insurer for a determination of whether the impairment is a catastrophic impairment.

- [6] Section 25 (5) (a) provides that the insurer shall not pay more than \$2,000.00 in respect of fees and expenses for conducting any one assessment or examination and the preparation of the related report.
- [7] The applicant bears the onus of proving the reasonableness of the assessments claimed.

ANALYSIS

Positions of the Parties

- [8] At this hearing, the applicant reduced her claim for costs of examinations to \$2,000.00 per examination reducing the total claim to \$16,000.00, plus fees for the OCF-18 and proposed OCF-19 and interest. The applicant also concedes in reply submissions that the respondent's denial was not late and therefore s. 38(11) of the *Schedule* is not triggered.
- [9] The applicant submits it is reasonable and necessary to determine whether she has suffered a CAT impairment because it is *possible* the applicant may be catastrophically impaired, either under s. 3.1 of the *Schedule*, criteria 7 (whole person impairment) or criteria 8 (marked impairment in three or more areas of function). The applicant also submits that the CAT assessment physician, Dr. Milad, may be assisted by other regulated health professionals under s. 45 (2) of the *Schedule* and therefore the respondent shall pay:
 - i. Physical evaluation (Dr. Milad), \$2,000.00
 - ii. Executive summary (Dr. Milad), \$2,000.00
 - iii. Biopsychosocial (Nazila Isgandarova, social worker), \$2,000.00
 - iv. Medical file review (Dr. Mohsini, chiropractor), \$2,000.00
 - v. Functional ability assessment (Dr. Owliaei, chiropractor), \$2,000.00
 - vi. Psychiatric evaluation, (Dr. Waisman, psychiatrist), \$2,000.00
 - vii. Neuropsychological assessment, (Dr. Vitelli, psychologist), \$2,000.00
 - viii. Occupational therapy, in-home assessment (Julian Amchislavsky, occupational therapist), \$2,000.00

- [10] The applicant also submits that she does not have the means to incur the CAT assessment, nor is she required to personally fund it under the *Schedule* as the respondent is required by law to pay the cost of the CAT assessment under s. 25 (1) 5. The applicant cites several Tribunal and FSCO decisions² in support.
- [11] The respondent submits that the correct test for entitlement to a CAT assessment is that firstly it must be reasonable and necessary and secondly the fees charged for each assessment must be reasonable. It cites several Tribunal decisions in support of this view. The respondent also submits that the applicant has the onus to show that each constituent element that makes up the CAT assessment is reasonable and necessary on a balance of probabilities and that she has failed to satisfy her onus on any of the proposed assessments.

Is Applicant Entitled to \$16,000.00 for CAT Assessment Plus Fees for the OCF-18 and Proposed OCF-19?

- [12] I agree with the respondent that the applicant bears the onus to show the CAT assessment is reasonable and necessary on a balance of probabilities and that the fees are reasonable. Entitlement to payment for a CAT assessment is not absolute as suggested by the applicant. An insurer is not obligated to pay all CAT assessments but only those that are reasonable and necessary. This has been expressed by the Tribunal before.³ As stated by Vice Chair Lester, "...it does not seem in line with the *Schedule* that there would be no test for entitlement to catastrophic assessment as long as the fees charged were reasonable. Although section 45 does not stipulate a test for determining entitlement to the catastrophic assessment, it is only reasonable to conclude, on the balance of probabilities, that reasonableness and necessity would be the appropriate test. This is the test consistently used in the *Schedule* for determinations of entitlements for assessments."⁴ The applicant submits that the threshold is low based on another Tribunal decision.⁵ Having reviewed this decision I note that in that case the respondent did not produce reports to challenge the applicant's medical documentation. Therefore, I find that those facts are significantly different and I decline to follow it. I will conduct my analysis on the basis of whether the CAT assessment is reasonable and necessary based on the evidence. The applicant's submission that she does not have the means to incur the CAT assessment is not relevant to this analysis.

² *Henderson v. Wawanesa* FSCO A14-001758; *J.M. v. Aviva General Insurance*, 2019 CanLII 51309 at paras 11, 14 (ON LAT); *R.M. v. Unica Insurance*, 2018 CanLII 132569 (ON LAT), paras 25-27.

³ *C.A. v. Intact Insurance Company*, 2018 ONLAT 18-000579/AABS at para 16, 21, 22, 23.

⁴ *Reconsideration Decision, C.A. v. Intact Insurance Company*, 2019 CanLII 101845 (ON LAT), para 11.

⁵ *L.G. v. Unifund*, 2019 CanLII 101604, (ON LAT), para 28.

- [13] I find that the applicant is not entitled to payment of \$16,000.00 for the CAT assessment plus fees for the OCF-18 and proposed OCF-19 because there was no reasonable basis to investigate whether the applicant is catastrophically impaired. There is insufficient objective medical evidence to suggest the applicant may have whole person impairment of 55% or marked impairment in three or more areas of function as a result of the accident. Even bearing in mind that, by their nature, assessments are speculative and their purpose is to determine if an applicant has a specific condition or meets a specific threshold, there must be some suggestion that the specific condition exists and arose from the accident and that further investigation is reasonable and necessary. That is lacking here.
- [14] The applicant relies on the following: the March 6, 2018 OCF-18 treatment plan for the CAT assessment completed by Novo Medical Services Inc.'s Dr. Milad, the applicant's physician; the records of Dr. Moamer, the applicant's spinal surgeon; the March 29, 2019 report of Dr. Wilderman, the applicant's physician; and the September 28, 2019 records of KW Counselling Services, walk-in clinic.
- [15] Dr. Milad's CAT assessment is unsigned, contains some inaccurate information and provides little relevant information about the applicant and her medical condition. As a result, it is not helpful in demonstrating that her condition has deteriorated. Firstly, Dr. Milad states the applicant's birthdate is November 20, 1985 while the applicant's other medical records and her counsel's correspondence show an October 20, 1986 birthdate. Secondly, although Dr. Milad describes the applicant's injuries as "whiplash associated disorder [WAD2] with complaint of neck pain with musculoskeletal signs" this is not supported by any other material medical evidence of neck pain from any of the applicant's treating physicians and is therefore unreliable. Although Dr. Wilderman does record neck pain as one of the applicant's complaints in his 2019 report, I give this report little weight for the reasons set out below. Thirdly, Dr. Milad answers "unknown" to the Part 7 questions about whether the applicant's impairments from the injuries affect her ability to carry out her tasks of employment, and to the Part 8(c) question about modified employment. Fourthly, Dr. Milad describes the applicant's activity limitations in these words: "As a result of a motor vehicle accident, the patient experiences functional ability limitations and difficulties to perform activities of daily living." I find that this is an insufficient description of activities and does not address in any helpful way the impact the injuries may have on the applicant's function.
- [16] I find that the applicant has not brought forward sufficient evidence to establish that any of the eight modalities proposed in the CAT assessment are reasonable

and necessary. I find the proposed physical evaluation is not reasonable and necessary. There is no evidence from Dr. Ghally, the applicant's family doctor, or any other physician that she sought treatment when the accident occurred although the applicant did tell one of the respondent's independent examiners ("IE") assessors that she sought treatment about one week after the accident. The applicant provided no records from Dr. Ghally at all although the applicant told one of the respondent's IE assessors that eventually she did see Dr. Ghally and was given medication but preferred not to take it. The applicant was evaluated by the respondent's IE psychiatrist, Dr. John Heitzer, some two months after the accident. The applicant told Dr. Heitzer that she was maybe taking Advil once a month and the only physical symptom she reported was daily pain from the right side of her neck into her right lateral shoulder and right upper scapula which pain level she rated at 7.5 out of 10. In his report dated October 15, 2015, Dr. Heitzer found that there was no ongoing musculoskeletal limitation or restriction. Even though this IE assessment was for a non-earner benefit claim, I prefer it over the applicant's reports because it is the closest in time to the accident and involved a comprehensive physical examination by a specialist in physical condition.

[17] I find that none of the other seven CAT assessment components are reasonable and necessary. The executive summary proposed by Dr. Milad is not a separate assessment and appears to be a duplication of services. A medical file review by Dr. Mohsini, chiropractor, is not reasonable and necessary given that that he is not a proposed assessor. The proposed psychiatric evaluation by Dr. Waisman, psychiatrist, and neuropsychological assessment by Dr. Vitelli, psychologist, are not reasonable and necessary as the evidence does not support that the applicant may be catastrophically impaired due to a mental or behavioural impairment arising from the accident. The evidence also does not support that the proposed biopsychosocial assessment by Nazila Isgandarova, social worker, functional ability assessment by Dr. Owliaeyi, chiropractor, and occupational therapy in-home assessment by Julian Amchislavsky, occupational therapist, are reasonable and necessary to investigate catastrophic impairment in these areas due to injuries arising from the accident. Although Dr. Wilderman's report might tend to indicate otherwise, I attribute little weight to this report for the reasons given below.

[18] The applicant's lumbar spine magnetic resonance imaging report dated November 27, 2016 showed a "broad-based posterior left L5/S1 disc protrusion". The applicant's cervical spine magnetic resonance imaging report dated November 21, 2016 showed "mild diffuse disc bulging at C3-C4, C4-C5 and C5-C6. No...disc herniation or significant stenosis at any level. Mild ectopia of the

cerebellar tonsils, a normal variant.” The applicant’s lumbar spine magnetic resonance imaging report dated October 15, 2018 showed the following: “At L5-S1 there is a left subarticular disc protrusion which is slightly larger. This is compressing and displacing the traversing left S1 root. There is no other disc herniation or canal stenosis.” Without a specific medical opinion explaining how this imaging supports a CAT assessment, this imaging on its own is not enough to support the request for a CAT assessment.

[19] The report of Dr. Moammer, the applicant’s spinal surgeon, dated March 7, 2017, records that he saw the applicant for the sole complaint of lower back pain which started in “August 2013(*sic*) after her car accident”. Dr. Moammer records that her back pain is intermittent and localized to the lower lumbar spine and it increases with activity. Dr. Moammer reported that, “She does not have any leg pain what so ever...has normal alignment of her spine...normal power and sensory of the lower extremity along all dermatomes and myotoes. No signs of upper motor neuron lesion. She had an MRI done to her lumbar spine which showed that she has L5-S1 left posterolateral disc bulge compromising the lateral recess of the canal.” Dr. Moammer concluded that in the absence of neurological symptoms, he did not see any indication for surgery and did not rebook her for a follow up appointment. The record of Dr. Moammer dated March 19, 2019 does not contain a diagnosis. Dr. Moammer’s opinion is that “we decided to proceed with non operative approach including physiotherapy and home exercise program” and follow-up in three months. Dr. Moammer’s report does not establish the need for a CAT assessment.

[20] The Tribunal allowed the applicant to file Dr. Wilderman’s March 29, 2019 report. Dr. Wilderman, the applicant’s general practitioner with a focused practice designation in pain management, reports that the applicant complains of neck pain, upper and lower back pain and headaches. There are issues with Dr. Wilderman’s report which undermine its reliability. Dr. Wilderman diagnoses chronic pain disorder and 13 other medical conditions including moderate PTSD which he links to the accident. The PTSD diagnosis may be outside Dr. Wilderman’s expertise as he is not a psychiatrist or psychologist and he suggests his “diagnosis in this area would be best corroborated by a specialist in the field of psychology or psychiatry.” Dr. Wilderman does not list in his report that he reviewed the report of the respondent’s IE assessor, Dr. Ligate, psychiatrist, from September 2015 or discussed with the applicant the history outlined in that report. As a result, Dr. Wilderman does not appear to have been made aware of the applicant’s pre-accident history of mental issues. Further, Dr. Wilderman does not explain in sufficient detail how all of these medical conditions could have arisen from the accident. Dr. Wilderman opines that “further treatment

targeted at chronic pain sufferers is reasonable and necessary” yet identifies “female sex” as one of the barriers to recovery. More importantly, while Dr. Wilderman states that the applicant “...sustained a serious and permanent impairment of an important physical and psychological function as a result of the MVA...”, he does not indicate the applicant may be catastrophically impaired or have a whole person impairment of 55% or marked impairment in three or more areas of function consistent with the criteria in the *Schedule*. For all these reasons I place little weight on Dr. Wilderman’s report. It does not establish the need for a CAT assessment.

- [21] With respect to the applicant’s mental condition, I prefer the report of Dr. Ligate dated September 15, 2015. Dr. Ligate’s assessment is within some two months after the accident and records in detail the applicant’s pre-accident history. Dr. Ligate found that the applicant had a pre-existing adjustment disorder with anxiety and depression which was aggravated by the accident but that the psychiatric issues after the accident are unrelated to the accident and are instead a continuation of the applicant’s pre-existing patterns of behaviours as set out in the report including abuse from various family members.
- [22] The records of K.W. Counselling Services, the applicant’s walk-in counselling clinic, show that on September 28, 2017 the applicant sought counselling because she was “in a car accident 2 years ago and continues to experience anxiety, depression and an overall sense of loss of control in triggering situations”. The applicant was there for one and one half hours and is reported to be on a waitlist for ongoing counselling. These records do not establish the need for a CAT assessment.
- [23] Arising from matters apparently unrelated to the accident, the applicant was assessed in March 2018 by Dr. Ghuman, the applicant’s psychiatrist, at the request of her family doctor after she was taken to the Grand River Hospital emergency department with a high blood alcohol level. The applicant told the doctors that she was experiencing increased stress due to a custody battle with her ex-spouse and enrolled in a residential treatment program through Alcontrol. Dr. Ghuman’s report does not reference the accident but does reference the applicant’s divorce, dealings with family agencies due to alcoholism and courts.
- [24] Although the applicant may have sustained some injuries in the accident and undergone some treatment as a result, in totality, the weight of the applicant’s medical evidence does not approach catastrophic impairment levels or indicate that the applicant’s injuries might possibly reach whole person impairment of 55% or marked impairment in three or more areas of function as a result of the

accident as suggested by the applicant. The CAT assessment is therefore not reasonable and necessary.

[25] I also find that the overall cost of the CAT assessment is not reasonable. The cost of \$16,000.00 plus reasonable fees for the OCF-18 and proposed OCF-19 is unreasonable given the lack of evidence that such assessment is warranted.

[26] I find that the applicant has not established that the CAT assessment is reasonable and necessary with respect to injuries resulting from the accident and that the applicant is not entitled to the payment claimed.

Special Award

[27] Section 10 of Ontario Regulation 664 provides that a special award may be granted if the respondent unreasonably withheld or delayed payments. As there are no benefits payable, the respondent has not unreasonably withheld or delayed the payment of benefits. Therefore, there is no award.

Interest

[28] As no benefits are payable, no interest is payable under s. 51.

ORDER

[29] For the reasons outlined above, I find that the applicant is not entitled to the costs of the CAT assessment as claimed. No interest is payable. The applicant's application is dismissed.

Released: August 6, 2020



**Avril A. Farlam
Vice Chair**