



**Citation: Tyner v Certas Home and Auto Insurance Company, 2023 ONLAT
20-010183/AABS**

Licence Appeal Tribunal File Number: 20-010183/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:

Patricia Tyner

Applicant

and

Certas Home and Auto Insurance Company

Respondent

DECISION

PANEL: Terry Prowse & Jeremy A. Roberts

APPEARANCES:

For the Applicant: Patricia Tyner, Applicant
Warren Whiteknight, Counsel

For the Respondent: Ilona Campbell, Adjuster
Alexander Dos Reis, Counsel
Branson Wong, Counsel

HEARD: by Videoconference: March 13 to 17 & March 20 to 21, 2023

OVERVIEW

- [1] Patricia Tyner, the applicant, was involved in an automobile accident on September 8, 2017, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”). The applicant was denied benefits by the respondent, Certas Home and Auto Insurance Company, as a result of not being deemed catastrophically impaired and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

MOTIONS

- [2] There were three motions dealt with at the start of the hearing:
- (i) Should we add an additional half-day to the schedule in order to accommodate the testimony of Dr. Khaled?
 - (ii) Should the Tribunal compel the independent examination (IE) assessors to produce their internal correspondence?
 - (iii) Should the Tribunal compel the testimony of the applicant’s workplace supervisor?
- [3] On item (i), the respondent and the applicant jointly requested that an additional half day be added to the hearing schedule in order to accommodate the testimony of Dr. Khaled, the doctor who prepared the section 44 catastrophic impairment executive summary. Apparently, the doctor was travelling in Europe during the scheduled hearing dates and would not be available to testify. We denied this motion, as it would not promote an efficient hearing to add an additional half day to a ten-day hearing. We concluded that denying this motion would not adversely prejudice either party as the evidence was already before us in the form of a report.
- [4] On item (ii), the applicant argued that the Case Conference Report & Order had ordered the respondent to produce the full IE assessor files, including internal correspondence (which was not provided). The respondent argued that best efforts were made to produce these and there was no further action possible. We accepted this and concluded that there was no further action that the Tribunal could take.
- [5] On item (iii), the respondent sought to compel the testimony of the applicant’s current workplace supervisor, who may have relevant testimony regarding

whether or not the applicant is catastrophically impaired. The applicant argued that the testimony was not relevant given that there is no income replacement benefit in dispute (which would necessitate an understanding of the applicant's workplace activities). We denied the motion. Firstly, the motion was filed late and did not conform to the Tribunal's deadlines for submitting motions. Secondly, we felt that it would negatively impact the efficiency of the hearing. Further, the motion would not provide ample time for the applicant to respond in a more fulsome manner.

ISSUES

[6] The issues in dispute are:

- (i) Has the applicant sustained a catastrophic impairment as defined by the *Schedule*?
- (ii) Is the applicant entitled to \$4,788.50 for occupational therapy (OT) services, proposed by Andrea Dreifelds, in a treatment plan/OCF-18 ("plan") submitted August 13, 2020 and denied August 18, 2020?
- (iii) Is the applicant entitled to \$4,155.00 for home modification services, proposed by Modern OT in a treatment plan submitted August 4, 2020 and denied August 18, 2020?
- (iv) Is the applicant entitled to \$1,221.92 (\$3,441.90 less \$2,219.98 approved) for physiotherapy services, proposed by Laura Tallen in a treatment plan dated September 16, 2020?
- (v) Is the applicant entitled to \$9,445.71 for case management services, proposed by Joy Beazley, in a treatment plan submitted October 6, 2020 and denied November 17, 2020?
- (vi) Is the applicant entitled to \$5,686.25 for OT services, proposed by Modern OT, in a treatment plan submitted April 28, 2022 denied May 11, 2022?
- (vii) Is the applicant entitled to \$1,736.32 (\$3,404.80 less \$1,668.48 approved) for travel expenses, submitted on a claim form (OCF-6) dated September 23, 2019?
- (viii) Is the applicant entitled to interest on any overdue payment of benefits?

- [7] **Withdrawn Issue:** The applicant withdrew issue 5 as listed on the case conference report and order.

RESULT

- [8] The applicant is not deemed to be catastrophically impaired.
- [9] As a result of not being deemed catastrophically impaired, the applicant is not entitled to the items listed in issues 2 to 8.

ANALYSIS

- [10] All of the issues in dispute turn on whether or not the applicant is deemed catastrophically impaired under criterion 6 or 7. Given that more than 260 weeks have elapsed since the date of the accident, no medical or rehabilitation benefit can be paid out unless the applicant is deemed catastrophically impaired.
- [11] In order to be found to have a catastrophic impairment under the *Schedule* under criterion 6 or 7, the applicant must prove on a balance of probabilities that the impairments they suffer from as a result of the accident have, under criterion 6, a physical impairment rating that results in a Whole Person Impairment (WPI) rating of 55% or more using the American Medical Association (AMA) Guides (the “Guides) 4th Edition. They may also be found catastrophically impaired under criterion 7 if the addition of a rating for mental/behavioural impairments under the Guides 6th edition results in a 55% or more WPI. The test to determine whether the applicant has sustained a catastrophic impairment is a legal test and not a medical one: *Liu v. 1226071 Ontario Inc.*, 2009 ONCA 571.
- [12] The Guides are a compilation of chapters, which contain specific rating criteria for the degree of impairment of individual body systems. Each chapter is dedicated to a particular body system. In order to arrive at a total WPI rating under the *Schedule*, each individual impairment must first be rated separately under the corresponding chapters within the Guides to obtain an individual impairment rating. Once all the individual impairment ratings are obtained, they are combined according to a formula in the Guides to arrive at the total WPI rating. The combination relies on a formula rather than a straight addition method. Importantly, the Guides are concerned with impairments, not specific diagnoses.
- [13] The onus is on the applicant to prove their case. To establish causation, pursuant to *Sabadash vs. State Farm et al.*, 2019 ONSC 1121, the applicant must establish that her impairments would not have occurred “but for” the accident.

- [14] There is much agreement between the section 25 and section 44 assessors on the bulk of the ratings for WPI in this case. For example, both executive summaries contain a rating for orthopaedic impairments. The section 25 assessment rates this impairment at 32%, while the section 44 assessor puts it at 31%.
- [15] The disagreements center around three specific ratings and their uses: (A) Dr. Milne's 12% rating under chapter 9, table 6 of the Guides 4th Edition; (B) Dr. Ross' 14% rating under chapter 4, table 2 of the Guides 4th Edition; and (C) Dr. Ross' 14% rating under chapter 4, table 3 of the Guides 4th Edition.
- [16] When these three impairment ratings are combined with either of the independent examination assessors' orthopaedic ratings, the applicant receives a 56% WPI rating, qualifying them for catastrophic impairment designation.
- [17] However, if the applicant fails to demonstrate the appropriateness of any of these three ratings, they would not meet the 55% threshold required for catastrophic impairment designation.

The applicant is not catastrophically impaired under either criterion 6 and 7

- [18] We do not find the applicant to be catastrophically impaired under criterion 6 or 7 based on our not accepting a 12% rating from Dr. Milne under chapter 9, table 6 of the Guides 4th Edition. Without this 12%, the applicant does not achieve the 55% threshold required for a catastrophic impairment designation.
- [19] When considering this rating, the applicant argued that Dr. Milne's 12% rating under chapter 9, table 6 of the Guides 4th Edition was reasonable and appropriate given that the applicant was suffering from diet and chewing impairments related to a temporomandibular joint ("TMJ") diagnosis. This finding was supported by OTs Dreifelds and Mullane as well as well as Dr. Bagg.
- [20] The applicant argued that there were no records of jaw pain pre-accident, only after. They pointed to numerous medical reports from Drs. Gallimore, Ross, Younes, and Bagg, as well as OT Virgo, which all document this pain appearing after the accident. Moreover, they pointed to the OCF-18 for physiotherapy services, which listed "sprain and strain of jaw" as an injury that was as a direct result of the accident. Dr. Milne suggested that some symptoms may only become present some time after the accident, as was the case with Dr. Zakzanis' diagnosis of a mild traumatic brain injury.

- [21] The respondent argued that there is no direct causation link between the accident and the TMJ, which is causing her to have to eat a soft food diet. In particular, it noted that there is no mention of jaw pain in the initial post-accident medical reports, including the ambulance report, the emergency department report, and the first family doctor visit. Dr. Milne does not address causation in his report.
- [22] We agree with the respondent. None of the medical documentation adequately establishes, on the balance of probabilities, that the TMJ was caused by the accident. All of the medical professionals who comment on this symptom or diagnosis fail to state how the TMJ would not have been present “but for” the accident. Moreover, we do not find Dr. Milne’s explanation that these symptoms appeared later, like the post-concussion symptoms, convincing for two reasons:
- (i) Dr. Zakzanis was very specifically speaking about neurological and cognitive impairments sometimes appearing after the accident. He made no reference to physical symptoms, like jaw pain. In this regard, we do not find Dr. Milne’s explanation satisfactory; and
 - (ii) The applicant effectively established causation between the accident and the post-concussion syndrome through the references to the applicant’s “dazed state” immediately following the accident. However, with regards to the TMJ, no such link was established that meets the “but for” test.
- [23] While the respondent failed to provide a reasonable alternative theory to explain the TMJ, the onus is ultimately on the applicant to prove causation. The evidence does not establish that the applicant would not have suffered from TMJ but for the accident.
- [24] Accordingly, we do not find that Dr. Ross’ 12% rating under chapter 9, table 6 is reasonable and appropriate due to a lack of proven causation. Without this 12%, the applicant would only receive a combined rating of 50% WPI, falling short of the required threshold.
- [25] Given that we have not accepted this rating, the applicant is not deemed catastrophically impaired under criterion (6) or (7).

The applicant is not entitled to the treatment plans in issues 2, 3, 4, and 6

- [26] Per s. 20(1) and (2) of the *Schedule*, the insurer does not have to pay for treatment plans if incurred more than 260 weeks after the accident, unless the applicant sustains a catastrophic impairment as a result of the accident.

[27] Given that more than 260 weeks have elapsed since the accident and given that the applicant is not deemed to be catastrophically impaired, the applicant is not entitled to these treatment plans.

The applicant is not entitled to case management services

[28] Per s.17(1)(a) and (b) the applicant is not entitled to case management services unless the applicant is deemed catastrophically impaired as a result of the accident or they have purchased optional benefits from the insurer.

[29] Given that the applicant is not deemed catastrophically impaired and no evidence was presented that she has purchased optional benefits from the insurer, the applicant is not entitled to case management services.

The applicant is not entitled to the balance of the travel expenses

[30] According to the definition of “authorized transportation expense” found in s. 3(1) of the *Schedule*, the insurer does not have to pay for transportation expenses incurred after the first 50 kilometres of a trip unless the applicant sustains a catastrophic impairment as a result of the accident.

[31] Given that the applicant did not sustain a catastrophic impairment as a result of the accident, the amount already paid by the insurer for travel expenses is deemed to be in line with the *Schedule*.

[32] Accordingly, the applicant is not entitled to the balance of the travel expenses.

The applicant is not entitled to interest

[33] As there are no payments owed, the applicant is not entitled to interest.

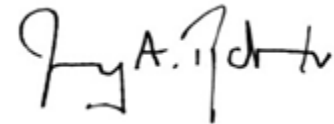
ORDER

[34] In closing, the Tribunal orders the following:

- i. The applicant has not sustained a catastrophic impairment as defined by the *Schedule*.
- ii. The applicant is not entitled to \$4,788.50 for OT services, proposed by Andrea Dreifelds, in a treatment plan submitted August 13, 2020.
- iii. The applicant is not entitled to \$4,155.00 for home modification services, proposed by Modern OT, in a treatment plan submitted August 4, 2020.

- iv. The applicant is not entitled to \$1,221.92 for physiotherapy services, proposed by Laura Tallen, in a treatment plan dated September 16, 2020.
- v. The applicant is not entitled to \$9,445.71 for case management services, proposed by Joy Beazley, in a treatment plan dated October 6, 2020.
- vi. The applicant is not entitled to \$5,686.25 for OT services, proposed by Modern OT, in a treatment plan submitted April 28, 2022.
- vii. The applicant is not entitled to \$1,736.32 for travel expenses, submitted on an OCF-6 dated September 23, 2019.
- viii. The applicant is not entitled to interest.

Released: May 17, 2023



Jeremy A. Roberts
Vice-Chair



Terry Prowse
Adjudicator