

**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**

Tribunal File Number: **17-003047/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:

M.S.

Applicant

and

Economical Mutual Insurance Company

Respondent

HEARING DECISION

ADJUDICATOR: Ian Maedel

APPEARANCES: Paul Barrafato, Counsel for the Applicant
Heather L. Kawaguchi, Counsel for the Respondent

Heard in writing on: October 5, 2017

OVERVIEW

- [1] The applicant was injured in a motor vehicle accident on May 23, 2010. The accident was a head-on collision in which the driver of the other vehicle was pronounced dead at the scene. As a result of the accident, the applicant suffered neck pain, shoulder pain, back pain, pain in knees, headaches, fatigue, anxiety, and a fracture to the right foot including a subtalar dislocation.¹
- [2] The applicant submitted an Application for Accident Benefits (OCF-1) to the respondent on August 1, 2010. The applicant then submitted an application to the Licence Appeal Tribunal (“LAT”) on May 15, 2017, following the denial of a chronic pain assessment, a physiatry assessment, a work site assessment, psychological assessment, attendant care assessment and a function and impairment assessment. There are currently no medical benefits in dispute.
- [3] The applicant submits that he is suffering from chronic pain, lingering physical limitations, psychological effects from the motor vehicle accident and requires a function and impairment assessment to measure his current strength, tolerance and overall physical fitness. Thus, the assessments denied by the respondent are all reasonable and necessary on a balance of probabilities standard.
- [4] The respondent submits that none of the assessments in dispute are reasonable and necessary as there are no weekly benefits in dispute, the medical evidence does not support the need for further assessments and the assessments are duplicitous and unnecessary as previous assessments have already been completed.

ISSUES TO BE DECIDED

- [5] The following are the issues to be decided:
 - i. Is the applicant entitled to the cost of a chronic pain assessment outlined in a treatment plan dated March 23, 2015, submitted by Alliance Diagnostics and Treatments Inc. in the amount of \$1,950.80?
 - ii. Is the applicant entitled to the cost of a physiatry assessment outlined in a treatment plan dated June 1, 2015, submitted by Alliance Diagnostics and Treatments Inc. in the amount of \$1,980.00?
 - iii. Is the applicant entitled to the cost of a work site assessment outlined in a treatment plan dated June 1, 2015 submitted by Alliance Diagnostics and Treatments Inc. in the amount of \$1,285.70?
 - iv. Is the applicant entitled to the cost of a psychological assessment outlined in a treatment plan dated May 9, 2016 submitted by Alliance Diagnostics and Treatments Inc. in the amount of \$1,979.84?
 - v. Is the applicant entitled to the cost of an attendant care assessment outlined in a treatment plan dated January 24, 2017, submitted by Assessment Rehabilitation Treatment Centre in the amount of \$1,500.00?

¹ Disability Certificate (OCF-3) completed by Dr. Derek Ginter, D.C., Dream Crest Rehab Clinic, August 13, 2010. Applicant’s Submissions pg. 631.

- vi. Is the applicant entitled to the cost of a function and impairment assessment outlined in a treatment plan dated January 24, 2017, submitted by Alliance Diagnostics and Treatments Inc. in the amount of \$1,900.00?
- vii. Is the applicant entitled to interest on any overdue payments?

ANALYSIS

- [6] According to s. 24 of the previous version of the *Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996* (“*Schedule*”), the applicant must establish on a balance of probabilities that an examination is reasonably required in connection with a benefit that is claimed or in connection with the preparation of a treatment plan, disability certificate, assessment of attendant care needs or application for the determination of a catastrophic impairment...²
- [7] The applicant has not provided any evidence or submissions on the work site assessment or attendant care assessment, identified as issues iii and v. Given the lack of evidence, these two issues shall be dismissed as the applicant has not proven these assessments are reasonably required on a balance of probabilities standard.
- [8] The respondent submits that assessments must be conducted in relation to a treatment plan or in pursuit of another benefit, they are not stand alone assessments for their own sake. I disagree, while the treatment plans may not specifically be listed as an issue in dispute for these proceedings, the applicant may be simply be waiting to complete further treatment once the results of the assessments are provided. To dismiss these assessments because there are not specific treatment plans linked to each, would be unfair and contrary to the overall purpose of obtaining treatment pursuant to the *Schedule* and the *Insurance Act*.

The Chronic Pain Assessment

- [9] A Treatment and Assessment Plan (OCF-18) for a chronic pain assessment in the amount of \$1,950.80, was submitted and denied by the respondent on May 15, 2015. The respondent stated that the assessment was not reasonable and necessary based upon the Insurer’s Examination (“IE”) completed by Dr. Lang, Physiatrist on September 19, 2012. Dr. Lang noted that the applicant had completed rehabilitation therapy, was discharged to a self-directed exercise program and had achieved maximal medical recovery.³
- [10] Relief of pain in itself is a legitimate goal of treatment, even if the pain relief is not designed to promote recovery or lead to lasting improvement.⁴ From the medical evidence submitted in this matter, relief of and management of pain and maintaining functionality appears to be the applicant’s primary goal.
- [11] There is no question the applicant suffered a traumatic break to his ankle in the motor vehicle accident as evinced by the medical reports and X-rays relied upon by the treating medical practitioners. The applicant repeatedly claims in the majority of the medical reports submitted that he continues to suffer ankle pain. The potential of the chronicity of symptoms was noted in May 2010 by Dr. Pradeep

² O.Reg. 403/96 at s. 24(11).

³ Insurer Examination by Dr. Michael Lang, Respondent’s Written Submissions, pg. 20.

⁴ General Accident Assurance Co. of Canada and Violi (FSCO P99-00047, September 27, 2000).

Alexander, who stated that the applicant was at a “high risk for complication, stiffness of subtalar joint and possible arthritis”.⁵ This was echoed by Dr. Zeinab Layton, Radiologist in June 2010 who noted “potential small avulsion fractures or sequelae of chronic/previous trauma”.⁶ Orthotics were recommended by Dr. Ali Ghouse, Physiatrist, to combat progressive osteoarthritis as it sets into the applicant’s right ankle.⁷

- [12] Three separate assessment reports submitted on the applicant’s behalf between 2011 and 2015 by Dr. Gomez-Vargas, Neurologist,⁸ Dr. Nguyen, General Practitioner and Dr. Maano, Chiropractor⁹ and Varun Madan, Occupational Therapist,¹⁰ all state that a chronic pain assessment is recommended. Dr. Vitelli, Psychologist, even diagnoses the applicant as “Axis I, chronic pain disorder associated with psychological factors”.¹¹
- [13] Although the report of Dr. Dancyger, Psychologist, who conducted an IE in August of 2016, indicates the applicant did not show the presence of any diagnosable psychological disorder,¹² I must place some weight on the four other reports from medical or therapeutic professionals who state that the applicant requires chronic pain assessment or treatment. In fourteen of fifteen assessment reports provided, it was noted that the applicant was suffering from pain in his right ankle.¹³ This consistency in reports from 2010 to 2015 illustrates that the pain in the applicant’s right ankle remains persistent and at least warrants further medical exploration, thus an updated chronic pain assessment is reasonably required at this time.

Physiatry Assessment

- [14] A Treatment and Assessment Plan (OCF-18) for a physiatry assessment in the amount of \$1,980.00, was submitted and denied by the respondent on July 2, 2015. The respondent stated that the assessment was not reasonable and necessary based upon the Insurer’s Examination (“IE”) completed by Dr. Lang, Physiatrist on September 19, 2012.
- [15] Dr. Lang noted that the applicant had “reached maximum medical recovery and would be left with discomfort in the right foot and ankle, which can be

⁵ ** Please note that the Applicant’s Submissions were received in two batches by the Tribunal; the first being 1,100 pages of various documents including treatment plans and assessment reports, the second, in tabbed form from Tabs A to Z. Throughout the decision, reference may either be made to the page number or Tab where the document was located. Progress Report, Dr. Pradeep Alexander, May 26, 2010. Applicant’s Submissions pg. 201.

⁶ Examination Findings, Dr. Zeinab Layton, Radiologist, June 30, 2010. Applicant’s Submissions pg. 203.

⁷ Independent Physiatry Assessment Report, Dr. Ali Ghouse, Physiatrist, November 4, 2014. Applicant’s Submissions pg. 477-478.

⁸ Independent Neurological Assessment Report, Dr. Andrew Gomez-Vargas, Neurologist, November 4, 2014. Applicant’s Submissions, pg. 451.

⁹ West Side Diagnostic Centre, Dr. Chinh Nguyen, M.D. and Dr. Rhuel Maano, D.C., February 12, 2011, Applicant’s Submissions, pg. 612.

¹⁰ Independent Functional Abilities Evaluation Assessment Report, Varun Madan, Occupational Therapist, April 1, 2015, Applicant’s Submissions, pg. 368.

¹¹ Independent Psychological Assessment Report by Dr. Romeo Vitelli, November 6, 2014, Applicant’s Written Submissions at pg. 413.

¹² Psychology – Insurer’s Examination by Dr. Gerry Dancyger, September 6, 2016, Respondent’s Written Submissions, pg. 125.

¹³ Dr. Dancyger, Psychologist, was the only assessor that failed to note any reference to the applicant’s right ankle pain.

accommodated with a custom foot orthosis”.¹⁴ The applicant relies on the report of Dr. Ghouse, Physiatrist, dated November 4, 2014, who noted that the applicant’s pain was likely to continue in the “foreseeable future” and the applicant had suffered a “permanent, serious impairment” and would require physiotherapy, chiropractic and massage therapy to alleviate exertion-related symptoms.¹⁵

[16] Both physiatrists agree that the applicant will suffer pain into the future, we know from the reports submitted above, he continues to suffer pain as a result of the motor vehicle collision. The applicant has not been assessed by a qualified physiatrist in more than 3.5 years and we have no updated, definitive medical report or opinion regarding his current prognosis. We do know that from past reports, he is at risk of developing progressive osteoarthritis in his right ankle,¹⁶ however, we do not know the current status of his injuries. Given the plethora of reports generated between 2010 and 2015 as referenced above, and the lack of an updated diagnosis, I find an updated physiatry assessment is reasonably required at this time.

Psychological Assessment

[17] The applicant is seeking a psychological assessment in accordance with the Treatment and Assessment Plan (OCF-18) dated May 9, 2016 and denied by the respondent on June 6, 2016. The respondent based the denial on the lack of any signs of psychological impairment in the six years following the accident and upon the findings of the report of Dr. Cheng dated April 5, 2011.¹⁷

[18] The respondent conducted an additional IE by Dr. Dancyger, Psychologist, who provided a report dated September 6, 2016. The applicant did not self-report any emotional issues as part of the assessment.¹⁸ Following psychometric testing, Dr. Dancyger found that the applicant did not have any significant psychological problems or diagnosable psychological disorder.¹⁹ He agreed with the diagnosis provided by Dr. Cheng in April of 2011, stating that the applicant’s psychological impairments did not appear to result in any substantial impairment in any domain of functioning.²⁰

[19] The applicant relies on the Psychological Assessment Report of Dr. Romeo Vitelli dated November 6, 2014. In stark contrast to the two psychological reports filed by the respondent’s experts, Dr. Vitelli found that the applicant was suffering from Chronic Pain Disorder associated with Psychological Factors and a General Medical Condition, Adjustment Disorder with Depressed Mood, Post-Traumatic Stress Disorder and having moderate symptoms/difficulty in role functioning related to motor vehicle accident sequelae.²¹

[20] Although the applicant indicated flashbacks and intrusive thoughts in two

¹⁴ Insurer Examination by Dr. Michael Lang, September 26, 2016, Respondent’s Written Submissions, pg. 39.

¹⁵ Physiatry Assessment Report by Dr. Ali Ghouse, Applicant’s Written Submissions, pg. 476-477.

¹⁶ Physiatry Assessment Report by Dr. Ali Ghouse, Applicant’s Written Submissions, pg. 478.

¹⁷ Respondent’s Written Submissions, pg. 101.

¹⁸ Psychology – Insurer’s Examination by Dr. Gerry Dancyger, September 6, 2016, Respondent’s Written Submissions, pg. 121.

¹⁹ Ibid, pg. 123.

²⁰ Ibid, pg. 124 and Insurer Examination, Dr. Michael Cheng, Psychologist, April 25, 2011, pg. 111-112.

²¹ Independent Psychological Assessment Report by Dr. Romeo Vitelli, November 6, 2014, Applicant’s Written Submissions at pg. 413-414.

psychological intake or pre-screening questionnaires in March 2015 and May 2016²² a psychological impairment is not supported by a review of the clinical notes and records of Dr. Hussain, the applicant's family doctor. Dr. Hussain noted many ongoing symptoms related to the physical injuries sustained in the accident, but the closest he comes to noting any psychological symptoms are night sweats, insomnia and headaches.²³ The lack of referral for psychological treatment and the lack of medication prescribed by his family doctor suggests that no psychological symptoms were reported to Dr. Hussain in the years following the accident and lend further credence to the psychological findings of Dr. Cheng and Dr. Dancyger. I place the most weight upon both of these psychological IE reports. These reports were conducted by two separate medical professionals five years apart, and both found that the applicant did not suffer from any major psychological impairment.

- [21] One driver was killed and one of the applicant's passengers catastrophically injured as a result of this accident, clearly it was a traumatic event in the applicant's life, but I see no documented evidence of any psychological disorder prior to the assessment by Dr. Vitelli in 2014. Had there been any previous evidence of psychological disorder to illustrate a causal link in the four years following the accident, a psychological assessment would be required. However, given the evidence provided, the applicant has not established that a psychological assessment is reasonably required at this time.

Function and Impairment Assessment

- [22] The applicant is seeking a function and impairment assessment the amount of \$1,900.00 in accordance with the Treatment and Assessment Plan (OCF-18) submitted by Dr. Nathanson, Chiropractor, dated January 24, 2017 and denied by the respondent on February 27, 2017. The respondent based the denial on the lack of any supporting medical documentation regarding self-care, housekeeping and home maintenance.
- [23] The applicant relies on the report of Varun Madan, Occupational Therapist, dated April 1, 2015, who concluded that he had a substantial inability to carry on normal activities of life, as he suffered from pain in his right wrist and right ankle. Mr. Madan recommended a rehabilitation program consisting of stretching and strengthening exercises and that he avoid tasks that aggravated his pain. He further recommended a graduated Work Hardening Program focusing on tolerances for standing/walking/carrying.²⁴ He did not recommend any caregiver or housekeeping assistance and it was clear from his report that the applicant was independent in his daily self-care.²⁵
- [24] The respondent submits that a functional and impairment assessment at this stage would be redundant, repetitive and unnecessary. They submit there is no claim for IRB, attendant care and housekeeping benefits were terminated years ago and those claims are now statute-barred, as the two year period to entitlement has elapsed.

²² Treatment and Assessment Plan (OCF-18), May 9, 2016, Applicant's Written Submissions at pg. 846 and Tabs AB and AC.

²³ Clinical Notes and Records of Dr. Hussain, Applicant's Written Submissions at Tab P, Q, R.

²⁴ Independent Functional Abilities Evaluation Assessment Report, Varun Madan, Occupational Therapist, April 1, 2015, Applicant's Written Submissions at page 368.

²⁵ Ibid, pg. 397.

[25] There was a Functional Abilities Evaluation IE conducted on March 9, 2011, by Abbey Thawer, Registered Physiotherapist and Beth Donna, Certified Kinesiologist who examined the respondent for IRB, housekeeping and home maintenance entitlement.²⁶ They concluded that the applicant was substantially able to perform the essential tasks of his employment and there was no substantial inability to perform housekeeping and home maintenance.²⁷

[26] The respondent relies on a number of reports including that of Andrew Wilcock, Occupational Therapist, dated April 25, 2011, who concluded the applicant did not meet the eligibility tests for housekeeping benefit, non-earner benefit and attendant care. Dr. Prior, Orthopaedic Surgeon, in his report dated April 25, 2011, stated that the applicant had reached full recovery except for residual pain in the right ankle with certain activities and there were no restrictions or limitations to prevent him from achieving a maximum medical recovery.²⁸ Dr. Lang, Physiatrist, provided an IE report dated September 26, 2012, and stated that the applicant had reached maximum medical recovery and that he had resumed the majority of normal life activities.²⁹ Dr. Dancyger, Psychologist, in his report of September 6, 2016 opined that from a psychological perspective, the applicant did not have an impairment as a result of the accident.³⁰

[27] None of these assessments addresses the test of whether a functional abilities evaluation is reasonably required for medical/rehabilitation or assessment purposes. The majority of the tests completed are in regard to non-earner benefit, attendant care, housekeeping and home maintenance. However, it is apparent from the findings in these reports that the applicant is independent with his self-care, has completed high school, attended college, obtained a diploma and now works in his field of study as a truck driver and mechanic. Aside from issues of pain management, which an updated physiatry and chronic pain assessment will address, it is clear that this applicant is independent in his self-care and is able to complete the daily tasks required for his current employment. Thus, the applicant has not established that a function and abilities evaluation is reasonably required at this time, nearly 8 years post-accident.

INTEREST

[28] Section 46(2) of the applicable version of the *Schedule* clearly states that interest is payable on overdue benefits.³¹ Once the ruling is made that benefits are payable, the test is met; if benefits are overdue, interest is payable. Thus, interest shall be paid on any benefits outstanding as per this decision and according to the *Schedule*.

ORDER

[29] The Tribunal orders that:

²⁶ Insurer Examination – Functional Abilities Evaluation by Abbey Thawer, Registered Physiotherapist and Beth Madonna, Senior Certified Kinesiologist, March 9, 2011, Applicant’s Written Submissions at pg. 536.

²⁷ *Ibid*, pg. 541.

²⁸ Insurer Examination – Orthopaedic Surgeon, Dr. Don Prior, April 25, 2011, Respondent’s Written Submissions at pg. 188

²⁹ Insurer Examination - Physiatrist, Dr. Michael Lang, September 26, 2012, Respondent’s Written Submissions at pg. 39.

³⁰ Psychology – Insurer’s Examination by Dr. Gerry Dancyger, September 6, 2016, Respondent’s Written Submissions, pg. 124.

³¹ O.Reg. 403/96 at s. 46(2).

- i. The applicant is entitled to the cost of a chronic pain assessment in the amount of \$1,950.80, as per the treatment plan dated March 23, 2015. This assessment is reasonably required pursuant to the *Schedule*.
- ii. The applicant is entitled to the cost of a psychiatry assessment in the amount of \$1,980.00 as per the treatment plan dated June 1, 2015. This assessment is reasonably required pursuant to the *Schedule*.
- iii. The applicant is not entitled to the cost of a work site assessment as per the treatment plan dated June 1, 2015. The applicant failed to provide any evidence regarding this treatment plan or why it is reasonably required. Application for this benefit is dismissed.
- iv. The applicant is not entitled to the cost of a psychological assessment as per the treatment plan dated May 9, 2016. The applicant failed to meet their burden and establish that this treatment plan is reasonably required as per the test in the *Schedule*. Application for this benefit is dismissed.
- v. The applicant is not entitled to the cost of an attendant care assessment as per the treatment plan dated January 24, 2017. The applicant failed to provide any evidence regarding this treatment plan or why it is reasonably required. Application for this benefit is dismissed.
- vi. The applicant is not entitled to the cost of a psychological assessment as per the treatment plan dated January 24, 2017. The applicant failed to meet their burden and establish that this treatment plan is reasonably required as per the test in the *Schedule*. Application for this benefit is dismissed.
- vii. The applicant is entitled to interest on overdue payments for the outstanding psychiatry (issue i) and chronic pain assessments (issue ii) as per section 46(2) of the previous version of the *Schedule*.

Released: April 23, 2018

Ian Maedel
Adjudicator