

**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**

**Date: 2018-02-05**

**Tribunal File Number: 17-003496/AABS**

**Case Name: 17-003496 v TD Insurance**

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:

**Applicant**

**Applicant**

and

**TD Insurance**

**Respondent**

**AMENDED DECISION**

**ADJUDICATOR:**

**Chris Sewrattan**

**APPEARANCES:**

For the Applicant:

**Samia Alam**, Counsel

For the Respondent:

Kevin Temple, Counsel

**HEARD: Written Hearing: November 21, 2017**

**Overview:**

- [1] The applicant was injured in a motor vehicle accident on December 28, 2015. In preparation for a Catastrophic Impairment Assessment, the applicant sought payment for a number of separate assessments under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “*Schedule*”). TD General Insurance Company denied payment for the assessments because, in its view, the applicant had not proven that his psychiatric impairment was caused by the accident and, even if it was, the assessments were not reasonable and necessary. The applicant appeals to the Licence Appeal Tribunal – Automobile Accident Benefits Service for payment of the assessments.

**Issues in Dispute:**

- [2] The following issues are in dispute:
1. Is the applicant entitled to receive payment for a bundle of assessments, totalling \$25,425.00, for a Catastrophic Impairment Assessment, recommended by Dr. T. Al-Rifal on March 13, 2017 and denied March 21, 2017?
  2. Is the applicant entitled to an award under s. 10 of O. Reg. 664, R.R.O. 1990?
  3. Is the applicant entitled to interest on outstanding payment of the bundle of assessments in dispute?
  4. Is the applicant entitled to costs under Rule 19?

**Result:**

- [3] The applicant is entitled to payment for six assessments for a Catastrophic Impairment Assessment. He has a serious psychiatric impairment that may have been in part caused by the accident. It is reasonable and necessary that he be given an opportunity to explore whether he is catastrophically impaired.
- [4] The total cost of the Catastrophic Impairment Assessment is not reasonable. Section 25(5)(a) of the *Schedule* caps payment for each assessment at \$2,000. As a result, the applicant is only entitled to payment for six assessments at a rate of \$2,000 each and \$200 for the Treatment Plan’s preparation, for a total of \$12,200 for the entire Catastrophic Impairment Assessment. HST is also payable where applicable. The applicant is entitled to interest in accordance with s. 51 of the *Schedule*.
- [5] The applicant is not entitled to an award under s. 10 O. Reg. 664, R.R.O. 1990. TD’s withholding of payment was incorrect but not unreasonable. There were and remain serious issues with the applicant’s catastrophic impairment claim.

- [6] The applicant is not entitled to costs. The conduct about which he complains occurred outside of the Tribunal's proceeding. As a result, the impugned conduct is outside of the scope of Rule 19.

## **Facts:**

### Background

- [7] On December 28, 2012, the applicant was the 21-year old passenger of a vehicle that was rear ended. The impact caused the applicant to hit his head on the window.
- [8] The applicant is presently on social assistance and relies on his family for assistance in completing his daily tasks. He was declared incompetent to represent himself in June 2017. His sister has been appointed as his litigation guardian.

### Procedural History of the Issue in Dispute

- [9] In December 2015, the applicant applied to TD for funding for a bundle of assessments for a Catastrophic Impairment Assessment. To review the claim, TD had the applicant examined by multiple medical experts. Based on the results of those examinations, TD denied the applicant funding for the Catastrophic Impairment Assessment. The December 2015 Catastrophic Impairment Assessment application is not the issue in dispute.
- [10] TD conducted its own Catastrophic Impairment Assessment after its denial of funding. The Assessment used many of the same medical experts that assessed the applicant's December 2015 claim for funding. TD's assessment was documented in a report dated March 6, 2016. The Catastrophic Impairment Assessment Report found the applicant's Whole Person Impairment to be 0%. This means that the applicant is not considered catastrophically impaired under the *Schedule*.
- [11] The applicant applied for rebuttal Catastrophic Impairment Assessments by submitting a Treatment and Assessment Plan (OCF-18) dated March 13, 2017. The total cost for the applicant's assessments is \$25,425.00. TD again used its medical experts - a physiatrist and psychiatrist - to conduct paper reviews. Reports generated from the respective paper reviews concluded that the \$25,425.00 Treatment and Assessment Plan is not reasonable and necessary. TD denied payment as a result.
- [12] The issue in dispute in this case is entitlement to payment for the rebuttal Catastrophic Impairment Assessments from the Treatment and Assessment Plan dated March 13, 2017. For simplicity, I will refer to the rebuttal assessments as the "Catastrophic Impairment Assessment".

### TD's Theory of Causation

- [13] There is a trail of evidence suggesting that the applicant's psychiatric impairment preceded and was not caused by the December 2012 accident. In 2011, the applicant became unwell and was placed on disability. Approximately two months before the accident, in October 2012, the applicant was hospitalized after presenting with psychosis with differential diagnosis between manic episode and schizophreniform disorder.
- [14] There is also evidence that the applicant was not compliant with his psychiatric medication after his discharge from the hospital. What is more, there is evidence that the applicant has been historically non-compliant with taking this medication.
- [15] TD hired two psychiatrists to examine the applicant, Doctors Henry Rosenblat and Shreekant Sharma. Dr. Sharma and Dr. Rosenblat independently concluded that the applicant's psychiatric condition is not accident related. Both doctors noted that adults between the ages of 18 and 22 are vulnerable to the spontaneous presentation of schizoaffective disorder. The applicant was 21 at the time of the accident.

### Funding for assessments

- [16] The applicant has not used his medical and rehabilitation benefits to create any assessment reports. TD places the blame at the feet of the applicant. TD has confined the applicant's medical and rehabilitation benefits within the *Minor Injury Guideline*. According to TD, however, the applicant has funds available to him to pay for a psychological assessment within the *Minor Injury Guideline's* payment limit. TD does not deny that the applicant is entitled to a psychological assessment generally.
- [17] The applicant places the blame at TD's feet. According to the applicant, TD has denied many Treatment Plans to date, including every request for an assessment. The applicant has not provided evidence of applying for a psychological assessment. TD has submitted into evidence a total of 13 medical reports (including addenda). The applicant submitted 0 reports. The applicant attributes the lack of reports to payment denials from TD.

### **Discussion:**

#### The Pathway to Deciding Entitlement to Payment for a Catastrophic Impairment Assessment

- [18] Is the applicant entitled to payment for the multitude of assessments that constitute his Catastrophic Impairment Assessment? The parties provide different pathways out of this question which, according to them, lead to different answers. I conclude that the significance of the divergent pathways is overstated. The pathways lead to the same result in the circumstances of this case.

- [19] The applicant submits that payment for a Catastrophic Impairment Assessment is a substantive right. The applicant points to s. 25(1) of the *Schedule*:

### **Cost of examinations**

25. (1) The insurer shall pay the following expenses incurred by or on behalf of an insured person:

5. Reasonable fees charged for preparing an application under section 45 for a determination of whether the insured person has sustained a catastrophic impairment, including any assessment or examination necessary for that purpose.

The plain wording of s. 25(1)5 suggests that TD must pay the applicant for any reasonable fee charged for an assessment that is necessary for a Catastrophic Impairment Assessment. Under this approach, I only need to consider the reasonableness of an assessment's fee.

- [20] TD's submits that payment for Catastrophic Impairment Assessment is a qualified right. The right is qualified to the extent that the constituent assessments must be reasonable and necessary expenses. In this sense, the analysis is the same as a consideration of a medical or rehabilitation benefit under ss. 15 and 16 of the *Schedule*.
- [21] I do not propose to reconcile the debate between the parties. Regardless of the pathway taken, this case's circumstances steer me to the same answer: the applicant is entitled to payment for the Catastrophic Impairment Assessment, with some qualifications. Because the answer is the same either way, I will use the more difficult pathway advanced by TD. I will consider whether each of the constituent assessments in the Catastrophic Impairment Assessment are reasonable and necessary.

### The Reasonable and Necessary Test for a Catastrophic Impairment Assessment

- [22] The first requirement, necessity, is easily met. The assessment Catastrophic Impairment Assessment is necessary for the purpose of the applicant meaningfully applying for a catastrophic determination. I will have more comments about necessity when I discuss the individual assessments later in this decision.
- [23] The second requirement, reasonableness, is more debatable. TD submits that the Catastrophic Impairment Assessment is not reasonable given the lack of evidence supporting any ongoing injuries or impairments caused by the accident. In particular, there is no evidence showing a link between the accident and the causation of the applicant's psychiatric condition. TD points out that the applicant has not applied for a psychiatric assessment using the funding available under the *Minor Injury Guideline*.

- [24] With regard to physical injuries, TD has laid an evidentiary foundation suggesting that the applicant did not suffer a physical injury of any significance as a result of the accident. The applicant advised two of TD's medical experts, Doctors Williams and Oshidari, respectively, that he did not experience any adverse symptoms immediately following the accident. He also advised the doctors that back pain and headaches only appeared 2 years following the accident. Doctors Williams and Oshidari each believe that the applicant's physical complaints are unrelated to the accident.
- [25] Dr. Sharma spoke with the applicant about physical injuries during an examination. The applicant reported that he did not have any complaints after the accident. It was only 2-3 years after the accident that the applicant "did not feel very good."
- [26] TD has provided evidence indicating that the applicant was able to play soccer and go to the gym in the years following the accident. The applicant denies that he can play soccer.
- [27] TD's submission regarding causation is generally compelling. However, the context of this case is exceptionally unique. The applicant has been declared incompetent (following a capacity assessment) and is represented by a litigation guardian. The applicant was a young man at the time of the accident, 21-years old. He has applied for a number of medical benefits in the past and had every single one of those claims rejected. In all, TD has funded 0 assessments for the applicant to date and has funded for itself a combined 13 assessments and paper reviews.
- [28] It is clear on the evidence that the applicant does not believe that TD will fund any assessment for which he applies. While I make no decision on the wisdom of the applicant's belief, I accept that the belief is sincerely held and reasonable considering the unique circumstances described in the previous paragraph. As a result, I do not fault the applicant for failing to provide me with an assessment linking the accident with the causation of his psychiatric condition. I am prepared to make inferences about causation by considering the applicant's present psychiatric condition and its proximity to the date of the accident.
- [29] I do not need to make strong inferences. The context of analysis is payment for a Catastrophic Impairment Assessment. The purpose of a Catastrophic Impairment Assessment is different from the purpose of the benefits in dispute at this hearing, which are the underlying assessments and medical reports that inform the Catastrophic Impairment Assessment. The purpose of a Catastrophic Impairment Assessment is to determine, among other things, the extent to which the accident caused the applicant's psychiatric impairment. Requiring the applicant to prove causation at this hearing would unfairly force him to prove what the assessment is intended to determine. At this stage of analysis, the applicant is only required to prove on a balance of probabilities that it is

reasonable and necessary for him to determine whether he is catastrophically impaired.

- [30] For analytical purposes, I prefer to break this question into two smaller questions. This is not the creation of a new test. It is an analytical tool to assist in determining whether the applicant is entitled to payment for the disputed assessment. The two questions are:
1. Is it reasonably possible that the applicant is catastrophically impaired?
  2. On a balance of probabilities, is it reasonable and necessary for the applicant to explore the possibility that he is catastrophically impaired?

### Application of the Catastrophic Impairment Assessment Reasonableness Test

- [31] The first question filters meritless claims. It is not a requirement imposed by the *Schedule*. The Executive Chair of the Tribunal commented in *16-001934 v Aviva Insurance Company of Canada*, 2017 CanLII 59514 (ON LAT) at para. 13 that, “if there is no reasonable possibility that [the applicant in that case] has chronic pain syndrome, then an assessment to investigate the condition further is, barring exceptional circumstances, neither reasonable nor necessary.”
- [32] There is a reasonable possibility that the applicant is catastrophically impaired. He has a serious psychiatric condition such that he is required to have a litigation guardian. The biggest question against the existence of a reasonable possibility is causation. The applicant’s psychiatric issues precede the accident, and the applicant has a history of not complying with his medication requirements. As well, there is no real evidence of a physical injury caused by the accident. Notwithstanding these issues, which I acknowledge are significant, there remains a reasonable possibility that the applicant is catastrophically impaired. The threshold is low: possibilities versus probabilities. There is a possibility that the applicant is catastrophically impaired. The possible is reasonable because of the applicant’s psychiatric impairment. A different question is whether it is probable that the applicant is catastrophically impaired. And that is a question that does not require an answer when considering entitlement to payment for an assessment.
- [33] The second question is the heart of the analysis: on a balance of probabilities, is it reasonable and necessary for the applicant to explore the possibility that he is catastrophically impaired? The onus is on the applicant. The applicant has proven on a balance of probabilities that it is reasonable and necessary for him to explore the possibility that he is catastrophically impaired. The exploration is reasonable and necessary<sup>1</sup> for four reasons.

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<sup>1</sup> Although I have already provided my conclusion on necessity, the necessity of an assessment can dovetail with its reasonableness.

- [34] First, it is reasonable and necessary for the applicant to explore the extent to which the accident caused his psychiatric condition using his own medical examiners. In preparation for the Catastrophic Impairment Assessment, TD commissioned a team of medical practitioners to examine the applicant. Although the practitioners conducted their own inquiries on causation, the Catastrophic Impairment Assessment will be more robust, with rebuttal assessments from the applicant which address causation.
- [35] Second, and as a corollary to the first reason, procedural fairness suggests that the applicant be given an opportunity to provide evidence from his own assessors for a Catastrophic Impairment Assessment. TD has paid for 13 reports and addenda to rebut the applicant's claim. TD has paid for 0 reports and addenda for the applicant.
- [36] Third, TD's medical examiners did not factor the applicant's psychiatric impairment into its Whole Person Impairment percentage. The examiners did not consider the applicant's psychiatric impairment in the Catastrophic Impairment Assessment because they relied on TD's medical examiners' conclusion that the psychiatric impairment was not caused by the accident. It is reasonable and necessary that the Whole Person Impairment analysis include information about the applicant's psychiatric impairment if the applicant's impairment is eventually deemed to have been caused in part or in whole by the accident. In order to include this information in the Whole Person Impairment analysis, the applicant must be examined by his own assessor(s).
- [37] Fourth, as submitted by the applicant, TD's medical practitioners did not fully coordinate with each other in their analysis.<sup>2</sup> For example, Dr. Rosenblat, who again is a psychiatrist, commented that the applicant suffers from cognitive difficulties. But he left those difficulties to be measured by other assessors. The applicant was not examined by a neuropsychologist to assess his cognitive difficulties.
- [38] In making my decision I am mindful that the accident does not appear to have caused the applicant a significant physical injury, and there is valid reason to challenge the causation of his psychiatric condition. These will be factors for the assessor(s) of the Catastrophic Impairment Assessment to weigh. For now, the factors are not sufficient to prevent me from concluding that the applicant has proven on a balance of probabilities that it is reasonable and necessary for the applicant to explore the possibility that he is catastrophically impaired.
- [39] I am also mindful of the reports and addenda TD commissioned from Doctors Williams, Watson, Oshidari, Rosenblat, and Sharma, who all suggest or conclude that a Catastrophic Impairment Assessment is not reasonable and necessary. For the four reasons described above, I disagree with their respective conclusions.

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<sup>2</sup> This fourth factor in my reasoning is less influential than the other three factors. I would decide the issue the same way even without this fourth factor.

Reasonableness continued: Are All Assessments Reasonable?

[40] The Catastrophic Impairment Assessment is composed of six assessments:

1. Occupational Therapy Assessment
2. Functional Ability Assessment
3. Psychiatry Assessment
4. Orthopaedic Assessment
5. Psychology Assessment
6. Neurocognitive Assessment

TD submits that the following assessments are not reasonable:

- “physical” assessments
- occupational therapy assessment
- any neuropsychological assessment that may occur

TD’s submission is based on the medical evaluations of Doctors Oshidari and Watson, respectively. Again, I appreciate that the evidence suggests that the applicant lacks a physical injury as a result of the accident, and there is a question as to whether the accident caused any cognitive impairment. But the Catastrophic Impairment Assessment may need to determine whether the applicant’s physical and/or cognitive condition are connected to or affected by his psychiatric impairment. Because of this, the physical assessments, occupational therapy assessment, and neurocognitive assessment are reasonable.

Reasonableness continued: Quantum

[41] An aspect of considering the reasonableness of a Catastrophic Impairment Assessment is weighing the cost of the constituent assessments. Section 25(5)(a) of the *Schedule* caps payment at \$2,000 “in respect of fees and expenses for conducting any one assessment or examination and for preparing reports in connection with it”. Outside of this cap, an insured person is entitled to up to \$200 for the creation of the Treatment Plan: see *Superintendent’s Guideline No. 03/14*, at page 2 under Forms. The six constituent assessments in the applicant’s claim carry maximum fee of \$2,000 each.

[42] There are a number of additional fees and expenses. I conclude that the applicant is entitled to payment for the following six assessments at a rate of \$2,000 each:

1. Occupational Therapy Assessment
2. Functional Ability Assessment
3. Psychiatry Assessment
4. Orthopaedic Assessment
5. Psychology Assessment
6. Neurocognitive Assessment

In addition to the above-listed six assessments, the applicant is entitled to \$200 for payment for the Treatment Plan's preparation. The applicant is entitled to payment for HST on the six assessments and Treatment Plan preparation, if applicable.

Any additional fees and expenses flowing from these assessments are not TD's responsibility.

- [43] TD submits that the neuropsychological assessment is claimed as three separate assessments to skirt the cap in s. 25(5)(a). Looking at the Treatment and Assessment Plan (OCF-18), I see that a neurocognitive assessment is claimed along with other services that straddle the line of neurocognition and neuropsychology.
- [44] The applicant must prove on a balance of probabilities that the cost for each assessment is reasonable. He has claimed a neurocognitive assessment at the maximum rate of \$2,000. He is entitled to payment for that assessment. He is not entitled to any other neurology-related assessment. The applicant is responsible for explaining the difference between the requested assessments at this hearing. I do not know what the difference is between the \$2,000 neurocognitive assessment and the other neurological-related services. I acknowledge that there may be a difference. But the applicant has failed to explain the difference to me.
- [45] In conclusion, the applicant is entitled to payment for six assessments at a rate of \$2,000 each and \$200 for the Treatment Plan's preparation, for a total of \$12,200 for the entire Catastrophic Impairment Assessment. He is also entitled to payment for HST, where applicable. TD is not required to pay for additional fees and expenses arising from the six assessments, as per s. 25(5)(a).

### Award

- [46] The applicant seeks an award under s. 10 of *Regulation 664* of the *Insurance Act*, R.S.O. 1990, c. I.8. Section 10 provides:

If the Licence Appeal Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Licence Appeal Tribunal, in addition

to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, may award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

- [47] The applicant is not entitled to a special award. TD's withholding of payment for Catastrophic Impairment Assessment was not unreasonable. There were and remain issues about the causal link between the accident and the applicant's impairment. As well, TD had a valid concern about the cost of the Catastrophic Impairment Assessment, a concern which I shared in this hearing and lowered the amount payable as a result. While TD was incorrect to withhold payment for six assessments it was not unreasonable in doing so.

#### Interest

- [48] Interest on the outstanding payments is owed in accordance with s. 51 of the *Schedule*.

#### Costs

- [49] The basis of the applicant's claim is that TD erred in refusing to acknowledge the deficiencies in its Catastrophic Impairment Assessment examination reports and refusing to fund the applicant's rebuttal assessments. The applicant alleges that this conduct was unreasonable, vexatious, and in bad faith.
- [50] The Tribunal can only order costs under Rule 19ac for conduct that occurs within its proceeding. The basis of the applicant's claim, even if true, occurred outside of the Tribunal's proceeding. After all, it is because TD's refusal to fund the applicant's rebuttal assessments that the applicant needed to commence a proceeding at the Tribunal for dispute resolution.

**Conclusion:**

- [51] The applicant is entitled to payment for six assessments at a rate of \$2,000 each and \$200 for the Treatment Plan's preparation, for a total of \$12,200 for the entire Catastrophic Impairment Assessment. HST is also payable if and where applicable. The applicant is also entitled to interest on the outstanding payment in accordance with section 51 of the *Schedule*.
- [52] The applicant is not entitled to an award under s. 10 of O. Reg. 664, R.R.O. 1990.
- [53] The applicant is not entitled to costs.

**Released:** February 5, 2018

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**Chris Sewrattan, Adjudicator**