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Licence Appeal Tribunal

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Ontario

2017 CanLII 69312 (ON LAT)

Date: 2017-03-09
Tribunal File Number: 16-000517/AABS
Case Name: 16-000517 v Aviva Insurance Canada

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act,* RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

M. F. Z.

Applicant

and

Aviva Insurance Canada

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: Jeffrey Shapiro

APPEARANCES:

For the Applicant: Sahereh Baghbani, Licensed Paralegal

For the Respondent: Petros Yannakis and Nabila Majidzadeh, Counsel

Interpreters: Charles Shen (Fuzhou and Mandarin)

HEARD: **In Person on November 7-8, 2016, and via Teleconference November 9, 2016**

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OVERVIEW

1. The applicant was injured in a motor vehicle accident ("MVA") on January 30, 2015. He applied for and received benefits under the *Statutory Accident Benefits Schedule - Effective after September 1, 2010* (the "*Schedule*"). In particular, he received an Income Replacement Benefit ("IRB") until terminated by the respondent effective August 20, 2015, and received various medical benefits, until further treatment plans were not approved.

2. This is an Application by the applicant to the Licence Appeal Tribunal (the Tribunal") with respect to the resolution of those terminations and denials. The hearing concerned four main issues: (1) whether the applicant is entitled to the IRB after August 20, 2015, (2) whether the applicant's injuries are classified as "minor injuries" under the *Schedule* and thus are governed by the treatment limits in the Minor Injury Guideline ("MIG"), (3) funding of a chiropractic treatment plan, and (3) reimbursement for the cost of a psychological assessment. Additionally, there were claims for prescription costs, interest, and costs of this proceeding.

3. The applicant's position is that his injuries are not "minor injuries" and he is entitled to further medical benefits due to his sustaining both psychological and chronic physical injuries, and/or due to the respondent's non-compliance with the procedural requirements of s. 38 of the *Schedule*. The applicant also claims that he is entitled to an ongoing IRB as those injuries caused both a substantial inability to perform the essential tasks of his pre-accident employment and ongoing wage loss, and also because of the respondent's other procedural breaches.

4. The respondent, in contrast, contends that the applicant sustained "uncomplicated soft tissue injuries" which are "minor injuries," that he never had a psychological impairment from this accident (perhaps at most minor psychological "issues"), that he does not have ongoing physical issues, and that in fact, all aspects of the applicant's claims are clouded by significant over-reporting of his injuries. The respondent also submits that even if the applicant cannot perform his employment, he is not suffering a wage loss. Finally, the respondent submits that technical breaches do not entitle an applicant to benefits, and that it is entitled to its costs.

5. In terms of evidence, the applicant testified on his own behalf, as did his psychological assessor, Dr. Ming Che Yeh, a Psychologist. The respondent called two of its Independent Examination ("IE") Assessors, Dr. Rhonda Nemeth, a Psychologist, and Dr. Esmat Dessouki, an Orthopaedic Surgeon. On consent, at the outset of the hearing, I accepted into evidence the parties' document books but cautioned the parties that I would not necessarily consider documents not referred to. Thus, I have given the most weight to the oral testimony and

documents referred to during the hearing, with use of the other documents mainly for context.

6. Overall, each physician's testimony was generally straightforward and helpful, although I ultimately prefer the IE assessors' testimony for reasons described below. This case, however, largely turns on the applicant's credibility. I find that there were numerous material inconsistencies in and concerning the applicant's testimony, causing me to give less weight to his version of events. I agree that the respondent was non-compliant with s. 38 of the *Schedule* regarding the chiropractic treatment plan, which thus removes the applicant from the minor injury treatment limits and entitles him to approval of that plan. However, when considering the testimony as a whole, I do not find that the applicant met his onus in establishing entitlement to the remaining benefits claimed. Likewise, neither party is entitled to costs.

ISSUES

7. At the outset of the hearing, the parties agreed that the issues in dispute are:
    - Is the applicant entitled to receive an income replacement benefit in the amount of $400 per week, from August 20, 2015 to date and ongoing?
    - Is the applicant entitled to treatment outside the minor injury treatment limits?
    - Is the applicant entitled to receive a medical benefit in the amount of $2,569.08 for chiropractic services, as set out in the treatment plan dated August 31, 2015, at Perfect Physio and Rehab Centre?
    - Is the applicant entitled to receive a medical benefit in the amount of $43.46 for prescriptions at Evergold Pharmacy?[1]
    - Is the applicant entitled to receive cost of examination in the amount of $2,000 for a psychological assessment, as set out in the treatment plan dated February 26, 2015, at Perfect Choice Psychological Service Inc.?
    - Is the applicant entitled to the interest on overdue benefits?
    - Is either party entitled to costs?

FACTS

8. Except as noted, the following timeline is not in dispute; the dispute centres on the extent of the injuries. The applicant is a 50 year old refugee who immigrated to Canada in 2007. He has limited formal education and English skills and speaks two Chinese dialects – Fuchou and Mandarin. There was testimony that communication in Mandarin with various physicians necessitated

[1] The Applicant withdrew a claim for $98.63 in services from Millikan Finch Diagnostic Imaging. The respondent's materials listed this withdrawn amount, together with the amount from Evergold Pharmacy, as one issue.

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accommodations such as speaking slowly. He has had a family doctor for several years. He had in a prior MVA in 2009.

9. At the time of the accident, the applicant was working six days a week as a chef at a restaurant. It was an active position involving prolonged walking, standing, reaching, and shelving of boxes. An IE Functional Abilities Evaluation ("FAE") classified it as "medium duty," while the applicant testified that it also involved lifting 100 pound bags of rice. The restaurant described the position's essential tasks as "Lift heavy work frequently [sic]…"[2]

10. The MVA occurred on January 30, 2015. While stopped at a light, the applicant's vehicle was rear ended, causing him to be jolted back and forth. He did not go to the hospital. He did attend at the Toronto Police's "Collision Reporting Centre" and completed a "Self Reporting Collision Report" describing the damage as light.[3] Concerned over losing his job, the applicant continued to the restaurant that day, but he was not able to perform his full job duties and instead performed modified duties. Within a few days he was told not to come back. The restaurant lists his last day as February 8, 2015.[4]

11. On February 10, 2015, the applicant began treatment relating to the MVA at Perfect Physio and Rehab Centre ("Perfect Physio"). Dr. Georgia Palantzas, a chiropractor, issued a Disability Certificate (OCF-3) and a Treatment Confirmation Form (OCF-23) listing Injuries to the neck, back, shoulder and knee, dizziness, headaches, difficulty falling asleep, fatigue, nightmares, anxiety, and recommended a psychological consult. The $3,500 minor injury treatment limit was exhausted with an October 1, 2015 payment to Perfect Physio,[5] with the last treatment in January 2016.[6]

12. On February 16, 2015, the applicant began receiving the IRB.

13. On February 26, 2015, Dr. Min Che Yeh of Perfect Choice Psychological Services ("Perfect Psychological") conducted a telephone consult with the applicant and rendered a diagnosis of "Mixed anxiety and depressive disorder and specific phobias." Dr. Yeh then issued the February 26, 2015 treatment plan in dispute that recommended a full psychological assessment. The respondent denied it. Dr. Yeh ultimately performed the assessment in September of 2016 – two months prior to the hearing – rendering a similar diagnosis.[7]

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[2] See Employer's Confirmation Form (OCF-2), at page 2, Respondent Tab 48.
[3] Respondent Tab 54, at section 1. Though somewhat vague, during his testimony, the Applicant denied using those words.
[4] Respondent Tab 48.
[5] Respondent Tab 12.
[6] Respondent Tabs 15 and 45.
[7] Respondent Tab 17; Applicant Tabs 3 and 24.

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14. On March 27, 2015, the applicant visited Dr. Chu, his family doctor, for the first time following the accident. Subsequent visits occurred on May 27, 2015, August 19, 2015, April 18, 2016, and September 2, 2016. Although Dr. Chu was not called as a witness, his records were discussed by the applicant and several witnesses. The applicant contends he told Dr. Chu about pain from the accident, but the March and May 2015 records only reflect visits for gout and hypertension. The first record mentioning the MVA is not until August 19, 2015, noting "low back pain on and off after MVA," but finding a full range of motion, and diagnosing "low back strain." The two visits the following year contain similar notations of low back strain, although the first does not mention the MVA, while both show full range of motion and no recommendation for treatment. There is a prescription for arthrotec for low back pain, although there is some question if the prescription for pain is related to the accident.[8] The pharmacy's prescription summary doesn't show it was filled.[9]

15. In June and July of 2015, at the respondent's request, the applicant underwent a Multidisciplinary IE related to the IRB with Dr. Dessouki, an Orthopaedic Surgeon, who found no residual musculoskeletal injuries; Dr. Nemeth, a Psychologist, who found no clinical diagnosis but stated there may be prior issues; Jenna Feinstein, an Occupational Therapy, who performed a Work Demands Evaluation, classifying the applicant's position as medium duty; and Peter Rego, a Physical Therapist, and Ms. Feinstein who jointly performed the FAE and opined that the applicant displayed a lack of effort in testing. The IE assessors concluded that the applicant has no substantial inability to perform the essential tasks of his pre-employment position.

16. Drs. Dessouki and Nemeth subsequently issued additional reports with essentially the same conclusions, discussed below.

17. On August 6, 2015, effective August 19, 2016, the respondent terminated the IRB based on the Multidisciplinary IE. The Explanation of Benefits ("EoB"), however, fails to reference the eligibility test in effect for IRBs for the first two years after an accident (the "substantial inability" test); rather, it erroneously references the test in effect *after* two years, which requires a more stringent "complete inability" test.[10]

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[8] Respondent Tabs 3 and 4; Applicants Tab 20 and 21. I note that Dr. Chu's records contain Lab Testing occurring on February 24, 2015. The parties did not address the Lab Testing. It appears it is unrelated to the MVA. Tab 4 contains Dr. Chu's note dated May 25, 2016, specifically stating that "He did not visit me regarding his MVA injuries," and further noting that he did prescribe Norvasc for hypertension and Allopurinol for gout prior the MVA, and "As a result, I did not proscribe any medication for his MVA injuries."

[9] Applicant Tab 21.

[10] Respondent Tab 33.

18. On August 31, 2015, Dr. Thomas Blue of Perfect Physio issued the other treatment plan in dispute, which recommended further chiropractic treatment. He listed the same injuries in the February 10, 2016 OCF-23, and also opined an inability to return to work.[11] It is not clear when this plan was submitted to the respondent.

19. The respondent, in turn, issued Explanations of Benefits ("EoBs") dated September 15 and 16, 2015, denying the treatment plan and scheduling an IE assessment with Dr. Dessouki. Neither EoB stated that the respondent believes that the injuries are minor and the MIG applies and both state "Medical Reason[:] The frequency of care does not generally diminish over time."[12]

20. On January 3, 2016 – approximately a year following the accident – the applicant returned to work on modified hours. It is unclear who was the employer, the income earned, or any detail of the employment.[13] As of late January 2016, he worked at a "noodle restaurant," and in June 16, 2016 he worked at another restaurant where he was still employed at the time of the hearing ("current restaurant").

21. This Tribunal's Order dated September 1, 2016 directed the applicant to disclose particulars of his post-accident employment. I find that the applicant's response was vague and insufficient, consisting of (1) a single cheque from the noodle restaurant which does not list any details of the employment or even identify the pay period, and (2) a letter from the current restaurant which states he is "a permanent part-time Restaurant chief [sic]. His employment start date was Jun [sic] 16th, 2016. He currently earns and [sic] annual salary of $12,000 and works a minimum of 20 hours per week…."[14] The employer's letter is signed but no name or title was provided.

22. Given the non-compliance, without notice to the applicant, the respondent summoned to the hearing an assistant manager from the current restaurant. As the Tribunal's Order specified the only witnesses to be called, nor was notice of the witness given, I disallowed the witness, but the parties agreed that the applicant could be asked about the documents brought by the witness. The testimony of the four witnesses who did testify is summarized below, with a focus on disputed topics.

[11] Respondent Tabs 38 and 39; Applicant Tab 29.
[12] Respondent Tab 33.
[13] Respondent Tab 13. It was unclear from the testimony if this was the same or different employer as the "noodle restaurant." I note that names of the pre-accident employer, noodle and current restaurant were provided.
[14] Respondent Tabs 50-52. The disclosure was provided under cover letter from Yueng and Associates.

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Applicant's Testimony

23. The applicant described that while he went back to his employment for several days following the MVA, he was unable to perform all his job duties, and in particular, the lifting which the job entailed. Within several days, his supervisor advised him not to return to work. He stated that in January 2016, he attempted to work at the noodle restaurant, but was limited in his duties and did not last there very long. He said that because he no longer worked there, the restaurant was not responsive to his request for his employment particulars. Neither he nor counsel offered an explanation of why he did not produce particulars to the best of his own knowledge.

24. In June of 2016, he began working at his current restaurant, also in the kitchen. When asked why he could not return to his job as a chef, he said that he was unable to - it hurts his arm and neck – as he motioned to his left arm and neck. It was only with prompting by his representative that he mentioned his lower back and knee.

25. The applicant explained that the treatment at Perfect Physio was helpful, but once the respondent stopped paying for it, he could not afford it, so he stopped. He said he still feels pain in his lower back and neck, and that further treatment would be helpful. When asked further, he described pain and weakness in his left hand and pain in both knee caps. He also described his anxiety about the pain. In that regard, he related that he has nightmares and cannot fall back to sleep worrying about what will be if he cannot return to work. He described being irritable, arguing with his wife, and generally feeling like he wants to fight. In his sleep, he has started fights with his wife, and so he now sleeps in different rooms.

26. I find the applicant's testimony was either vague, contradictory or both. For example:
    - During direct examination, he had trouble recalling his own address, stating it is '3000 something 164,' adding he 'can't remember the name of the street.' When his representative suggested a specific address' he confidently affirmed that address. However, when presented with surveillance pictures of his vehicle parked outside another house, he acknowledged it was his wife's house, where he lives.
    - When asked how he came to receive treatment at Perfect Physio, he said he was referred by a friend. Other documents, based on his self-reporting, indicate that he was referred by a doctor, and others by a friend.
    - He testified that he told Dr. Chu (his family doctor) about the accident at the first visit, but Dr. Chu's records conflict with his testimony.
    - As mentioned above regarding his failure to comply with this Tribunal's Order to produce particulars of his post-accident employment, he failed to provide a cogent explanation of why he did not provide meaningful

documents from at least his current employment, and the particulars in his own words.[15]

- Important details he did provide during direct examination regarding the current employment, such as working approximately 20 hours a week, proved false on cross examination when faced with surveillance evidence showing that he worked shifts of ten or eleven hours a day. While there may be some basis to his explanation that the restaurant was closed for stretches between lunch and dinner, his employer's letter also contradicts this, nor was his testimony convincing that he did not work during those hours or was not paid.
- Likewise, he initially testified that he does not work on Saturdays, yet on cross examination admitted he "sometimes" does, and upon further questioning acknowledged that he is 'regularly scheduled for the weekends.' His manager's letter indicated his "every week shift schedule" is five hours on Friday, and ten hours on Saturday and Sunday. The letter also conflicts with the applicant's direct testimony where he said he works five or six days a week, for four to five shifts, and on the weekend six hours.
- He testified that the accident was "severe," yet his report to the Collision Reporting Centre indicates in that the damage to the vehicle was "light".
- The surveillance pictures showed him carrying large food trays.
- The doctors' testimony and records also produced further inconsistencies.

I do, however, accept applicant's explanations of the following apparent discrepancies:

- When he reported to the police officer that he was not injured, he was referring to no bleeding, broken bones or similar, but not that he was without pain.
- The respondent argued his *testimony* regarding past mental health issues was inconsistent. I do not agree. On direct, he testified to no issues within *the past year*, while on cross examination, when asked a different question, he acknowledged issues *several years before*, and in particular, from a 2009 car accident. However, the history he gave to Dr. Nemeth was less accurate.
- I find little significance that the applicant could not recall meeting Dr. Yeh prior to the September 2016 assessment, as the prior "meeting" was by telephone.

Dr. Ming Che Yeh – The applicant's Psychological Assessor

[15] Respondent Tab 52.

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27. Dr. Yeh, a certified Psychologist, authored the initial February 26, 2015 treatment plan, and in turn, performed the requested Assessment on September 6, 2016. I do not find his testimony persuasive in this matter, for the reasons below.

28. Dr. Yeh testified that he has been working in the field for 35 years. For the last eight years, he has been a community psychologist and has conducted hundreds of assessments. Although the respondent objected to him being qualified as an expert, I accepted his qualifications.

29. Dr. Yeh explained he authored the treatment plan based on his telephone interview with the applicant, conducted in Mandarin, concluding that the applicant suffered from "Mixed anxiety and depressive disorder and specific phobias."

30. The full September 2016 assessment produced a diagnosis of Adjustment Disorder (with mixed anxiety and depressive reaction).[16] The assessment consisted of a clinical interview and 3 diagnostic tests, i.e. the Beck Depression Inventory ("BDI"), the Beck Anxiety Inventory ("BAI"), and Pain Patient Profile ("P3"). The applicant showed symptomology of depression, anxiety, and scored in the average range on the P3. Dr. Yeh indicated that the P3 score showed the applicant was not over- reporting. He did not feel the need for cognitive, memory or other testing.

31. Dr. Yeh acknowledged that none of the tests he administered have built-in validity testing. He acknowledged that one of the most useful tests of validity testing is the PAI (used by Dr. Nemeth), but essentially made a power-imbalance argument of why he did not use it, to which argument I do give some weight. He explained that it is not commonly administered by private clinical psychologists because of resource issues – e.g. it is very time-consuming and thus too expensive. He opined that it is consistently used by IE assessors who are not funded by the patients but rather by insurance companies who have greater resources.

32. Because he did not have the resources to conduct the PAI, Dr. Yeh addressed validity concerns by relying on what he referred to as 3 pieces of "objective" evidence provided by the applicant – (1) the applicant was only working 20-25 hours a week at the time of the interview, (2) he is sleeping in separate beds from his wife, and (3) he had reduced food intake. I understood Dr. Yeh's testimony to be that not all self-reported information is equal. A patient's degree of pain is inherently subjective and/or unverifiable, while other facts are more objective, so that people do not normally lie about them, i.e. intimate personal details or hours worked. Thus, such facts are (more) clinically reliable.

[16] Respondent Tab 17; Applicant Tabs 3 and 24.

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33. I accept Dr. Yeh's testimony that distinguishing between types of 'self-reported' information is a useful clinical tool. However, in this case, unknown to Dr. Yeh, the "objective" facts of hours worked had been proven earlier in this hearing to be unreliable, if not intentionally understated. Likewise, the "objective" reduced food intake amounted to a self-reported weight loss of a few pounds over a few weeks, without any comparative data or norms.

34. Dr. Yeh's February 26, 2015 treatment plan also records inaccurate self-reported information. The applicant stated "he visited his physician and was referred to a rehabilitation clinic," although as noted above, the applicant's physician's records (i.e. Dr. Chu) show no such visit or referral. Dr. Yeh's September 2016 assessment also contains a self-reported history that indicates a normal childhood and no experience of any emotional issues, and that "he never had the need to see a psychiatrist, psychologist, or any mental health professional before the subject accident",[17] which is at odds with the fact the applicant had claimed a mental health impairment and received treatment in connection with the 2009 MVA. Though less directly, it is at odds with his refugee claim and history given to Dr. Nemeth. While I accept Dr. Yeh's opinion that MVA patients can give variances in their histories, the 'variances' here were significant.

35. Dr. Yeh acknowledged that meeting with a patient several times rather than once helps to provide a more accurate diagnostic picture, as does preforming a PAI – two advantages that Dr. Nemeth had and that he did not. He disagreed, however, with Dr. Nemeth's interpretation of the PAI, opining that the "careless and random responding" she noted on the PAI does not amount to her conclusion of over-reporting. Rather, he still would have interpreted the test but with caution. It appears to him that the PAI indicates that one cannot rule out that the applicant does not have "*something*."

36. While I am mindful that Dr. Yeh would interpret the PAI differently, this issue was not extensively explored during the hearing, and more importantly, the belief that the applicant may have "something" does establish causation with the accident.

Dr. Rhoda Nemeth – Psychological IE Assessment

37. Dr. Nemeth, a Psychologist, examined the applicant three times for IE assessments. She issued three reports: one on May 7, 2015 (regarding a treatment plan – i.e. for the psychological assessment), one on July 9, 2015 (regarding IRBs), and one on April 19, 2016 (Addendum Report based on further records). A

[17] Applicant Tab 24.

fourth Report is still forthcoming with regard to the last examination was in October 2016. I found her testimony persuasive.

38. Dr. Nemeth testified that she has conducted thousands of third party assessments and is currently the team lead for the Function and Pain Program at Mount Sinai Hospital, an interdisciplinary pain management program providing treatment to patients with chronic pain and other accident-related sequelae.

39. At the first assessment, Dr. Nemeth conducted an interview and administered three tests, with the assistance of a Mandarin interpreter. She stated that normally she would get 'substantial information, but the applicant needed a lot of follow-up' – noting it was difficult getting precise information from him. He didn't seem interested, talked on the phone, though he was polite and participated. He said he did not want treatment. He denied sadness but stated he had loneliness and irritability. He said the scar on his wrist was from a fall in Toronto and that he had not had other car accidents. (At a later assessment, he admitted to her that he had prior accident.)

40. Regarding the diagnostic tests, the Rey 15-item Visual Memory Test ("Rey 15"), which measures effort, showed the applicant put forth good effort. However, the 344 question Pain Assessment Inventory ("PAI") which measures personality and clinical disorders, with built-in validly testing, produced an invalid result as he 'endorsed so many things'[18] to such extent that Dr. Nemeth could not interpret the test. The Pain Catastrophizing Scale ("PCS") relates to how a person thinks about trauma and how it affects them. Dr. Nemeth's Report indicates his score was significant, which is a risk factor for ongoing disability. At the time, she struggled with the result as she "didn't want to write him off [as not credible]". She concluded that she could not make a diagnosis and requested further documentations.

41. At the July 2015 assessment, the applicant acknowledged a prior car accident and that his sleep was disturbed by dreams from issues in his homeland in his youth – not as car accident related, as he previously described. She performed the PAI and PCS again. He made some "idiosyncratic responses" which suggested to her a deliberate attempt to skew the results, sloppiness, or maybe a cry for help given his negative view of life. She noted the FAE assessor opined that he did not put forth effort. The records she reviewed from Dr. Chu and Dr. Wong showed the applicant had said the scar was from a car accident, not a fall as he had previously told her. At that time, she felt that *if* he did have a psychological issue, it was minor enough that it didn't interfere with his job and could be treated within

[18] Her Report described that the Applicant "did not attend appropriately to item content. He endorsed a very high number of items that are rarely endorsed by others, many of these reflecting highly unlikely experiences..." Respondent Tab 20, p. 5-6.

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the MIG treatment limits. Her report indicated he had mild impairments related to poor sleep causing fatigue, but that the extent or severity of any reported impairment is difficult to ascertain, given his vagueness and denial of past issues, which records show existed.

42. Dr. Nemeth's April 19, 2016 Addendum Report reached a similar result.

43. On cross-examination, Dr. Nemeth admitted that she did not conduct validity tests for the interpreter. She noted during her October 2016 assessment that the interpreter indicated the applicant's answers were vague. She agreed that underlying psychological problems such as Post Traumatic Stress Disorder can cause a person to be disinterested but had tested for it and ruled it out. Ultimately, she relied on her observations, clinical interview, documents and tests. She concluded that she assessed him three times and does not think he has a problem from the accident, but it has "been difficult," with vagueness and over-endorsing on the PAI. While she had not yet issued a report from the last assessment a few weeks ago, she felt that the testing indicated deliberate falsification.

44. Dr. Nemeth finds the P3 utilized by Dr. Yeh redundant to the PAI, and the Beck tests are better for research than clinical use because they do not have validity testing.

45. When asked about the applicant's vagueness, translation, and answers, I found Dr. Nemeth to be credible and accepted her whole-picture approach. My sense was she genuinely struggled to arrive at an accurate diagnosis despite inconsistencies. She acknowledged that he might have some mild issues not related to the accident and perhaps those were culturally influenced, but doubted such exist, and she explained why, if they did exist, they were not related to the accident.

Dr. Esmat Dessouki – Orthopaedic IE Assessment

46. Dr. Dessouki, a certified General Practitioner with a specialty in Orthopaedic Surgery, assessed the applicant on July 20, 2015 to determine if he has a substantial inability to perform the essential tasks of his pre-employment position. He issued a report on July 20, 2015. He also issued a subsequent report regarding the chiropractic treatment plan. On balance, I found his testimony to be persuasive.

47. Dr. Esmat Dessouki is an assistant professor at Queens University. He has been preforming insurance examinations for 25+ years. He also sees many patients with chronic pain management issues.

48. During the assessment, the applicant told Dr. Dessouki about the accident and that

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immediately after the accident he did not have pain. The applicant said that he was referred to physiotherapy by a friend and that his first doctor's visit was a month later. Dr. Dessouki opined that the applicant was receiving "normal" treatment for the complaints that he had.

49. In terms of the physical complaints, the applicant advised Dr. Dessouki that he had pain in his neck and upper back made worse with prolonged sitting and improved with exercise. The applicant described the neck pain as sore and stabbing, with the level of pain as 7-8 out of 10. The Doctor did not perform a full body assessment or assess areas listed in other documents [i.e. in the OCF-3 or treatment plans]; rather he limited his physical exam to what the applicant told him was bothering him. During cross-examination, Dr. Dessouki related that through the tests he performed, the lumber spine is essentially reviewed.

50. Dr. Dessouki concluded that the physical exam did not match the reported complaints. He found no muscle spasms despite the fact that those would be expected with the level of pain the applicant described, and in fact, the muscles were "quite soft." Likewise, there was an unexpected tenderness to light touch, despite the fact that light touch should not hurt, leading the doctor to suspect a "psychological overlay" or symptom magnification. He described it as "a mismatch." The shoulder exam and thoracic spine exam were normal, as were x-rays. He noted that the FAE assessors found self-limiting behavior.

51. Thus, he opined that the applicant's diagnosis from the MVA was a cervical and thoracic spine strain but that it had resolved by the time of the assessment. In short, he found no impairments that prevented the applicant from returning to work.[19]

52. Dr. Dessouki later reviewed the chiropractic plan and issued a Paper Review Report on September 23, 2015 opining that it was not reasonable and necessary. He found it unnecessary to re-examine the applicant given that the applicant was functionally recovered at the time of the first exam, the chiropractic treatment plan did not contain new complaints or diagnoses, and the reports did not indicate any deterioration. He opined that the chiropractic treatment plan was treating areas that the applicant was not complaining about, and that it would neither hurt nor help.

53. On cross examination, Dr. Dessouki acknowledged that while he had the FAE, he did not have the exact weight of the objects the applicant carried in his pre-accident employment – rather he assumed a general impression of a job as a chef – regularly carrying 20-25 pounds. When asked if it would change his opinion knowing now that the job involved carrying 100 pound bags, or 11 hour shifts, he

[19] Dr. Dessouki's Report, page 7, question 3, states "Mr. Zheng does not suffer a substantial inability to perform the essential tasks of his employment as a direct result of this motor vehicle accident."

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responded that that 'when I examined him, I didn't think he was disabled…' so that if he could do the job before the MVA, he should be able to do it now. He explained that the earlier in- person exam result was normal, and gross neurological examination was normal. Although no MRI was performed, he opined there was nothing to justify it.

54. While most of Dr. Dessouki's testimony was straightforward, I found his answers concerning the length of the exam slightly unclear or evasive and the fact he did not examine all areas within his professional expertise as provided to him in the records, weaken his testimony. Nevertheless, on balance, I accept his testimony over the limited notes in Dr. Chu's records or as contained in the various disability certificates and treatment plans by Perfect Physio.

ANALYSIS

What are the applicant's Impairments and Functional Abilities?

55. A central issue in the hearing was that the evidence established the unreliability of the applicant's testimony and self-reporting, which undermined his claims regarding his alleged inability to work, the nature and extent of his injuries, and need for treatment. He was inconsistent with such basic things as where he lives and the hours and schedule of his current employment. There was a lack of compliance with the pre-hearing order to disclose hours worked. Surveillance evidence was inconsistent with the picture presented by the applicant. The inconsistencies also cover his medical history such as whether he was in a prior MVA, the source of his scar, the receipt of prior mental health treatment, and the cause of his bad dreams.

56. Regarding the applicant's alleged psychological injuries, he has not met his onus of proof. I do not accept Dr. Yeh's diagnosis of Adjustment Disorder because it was based on "objective" self-reporting which proved to be false, as mentioned above. Likewise, I prefer Dr. Nemeth's testimony over Dr. Yeh's testimony for the reasons stated above, including that she had the benefit of more thorough testing and multiple examinations. Dr. Nemeth's comment from the initial assessment mirrored my own observation, i.e. that his presentation was vague, but she did not want to write him off. I am not prepared to conclude that the applicant does not suffer from any psychological issues, but I find that the applicant has not established he suffers from a diagnosable psychological impairment caused by the MVA.

57. Regarding the applicant's physical injuries, there were further inconsistencies. For instance, Dr. Dessouki diagnosed "a *cervical* and *thoracic* spine strain," while his family doctor's notes mention "*low back* pain" but no prescriptions for treatment

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and perhaps limited prescription for medication, and yet the various records of Perfect Physio predominately mentioned soft tissue injuries *all over* his body. At the hearing, the applicant seemed most concerned with pain in his *neck and arm* – which appears related to a prior accident.

58. Against those variances, I generally accept Dr. Dessouki's diagnosis of cervical and thoracic spine strain and that the applicant did not suffer from a muscular-skeletal impairment by the time of his examination and his testimony that the intense pain described and the examination findings do not match. Still, there was a fair amount of agreement among the medical providers that whatever the physical injuries were, they were soft tissue injuries.

59. While the applicant's representative suggested that chronic pain was described, and I do not rule out that the applicant may have *some* limited lingering pain related to the accident since Dr. Dessouki's examination, no evidence was presented of any *diagnosis* of "chronic pain syndrome" or even "chronic pain," or that it is caused by the MVA. If, in fact, there is limited pain related to the accident – which has not been proven – at such a limited level, it strikes me that it would be a *sequelae the soft tissue injuries*; thus, applicant's injuries are predominately soft tissues injuries.

Issue 1: Is the applicant entitled to a continuation of the IRB?

60. The applicant is not entitled to a continuation of the IRB past August 20, 2015.

61. The test for entitlement to payment of an IRB *within* 104 weeks after the accident is found in s. 5(1) of the *Schedule*. S. 5(1) provides that an injured party must prove he was employed at the time of the accident and, as a result of the accident, "suffers a substantial inability to perform the essential tasks of [his pre-accident employment]."

62. The procedure for terminating the benefit is found in s. 37(4), which provides that "If the Insurer determines that an insured person is…no longer entitled to receive [the IRB], the insurer shall advise the insured person of its determination and the medical and any other reasons for its determination."

63. The Court of Appeal has held, however, that where an Insurer begins paying but then terminates an IRB, technical non-compliance with termination requirements of the *Schedule* does not automatically entitle an applicant to continuation of a benefit until properly terminated; rather, the applicant still has the onus to show entitlement. *Stranges v. Allstate Insurance Company of Canada*, 2010 ONCA 457

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(CanLII).[20]

64. Applying that standard to the applicant, from a procedural perspective, while the Respondent's termination letter's[21] stated reason refers to the incorrect "complete inability" test for an IRB that applies *after* 104 weeks, it is nevertheless a reason, and the termination was actually based on the multidisciplinary IEs which utilized the correct "substantial inability" test that applies *within* 104 weeks, and which were included in the notice. Neither party pointed me to provisions of the *Schedule* that require the reasons in the termination notice to be legally correct. Thus, I find the error to be one of technical non-compliance as in *Stranges*, which does not defeat the termination.

65. Substantively, for the reasons discussed above, I accept the opinions of both Dr. Dessouki and Dr. Nemeth that as of the dates of their assessments culminating in the termination date in August 20, 2015, the applicant did not suffer a substantial inability to perform the essential tasks of his pre-accident employment.

66. Additionally, as of January 2016 to date, the applicant has not established that he suffered a wage loss. Despite the Order, the applicant has not produced the relevant records to allow this Tribunal to make a proper determination as to his wage loss, if any. Likewise, his testimony lacked the expected detail and was varied enough under cross-examination to leave further uncertainty as to his wages.

Issue 2: Are the applicant's Injuries Classified as "Minor Injuries" and Subject to the MIG?

67. I find the Respondent is prohibited from taking the position that the applicant has an impairment to which the MIG applies, based on procedural grounds, as follows:

68. As a starting point, s. 18(1) of the *Schedule* limits recovery for medical and rehabilitation benefits to a person "who sustains an impairment that is *predominately* a minor injury" to $3,500 minus any amounts paid in respect of an insured person under the MIG. The term "minor injury" is defined in s. 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*." (Emphasis added.) The terms "strain", "sprain,"

[20] Although not cited by the parties, this same result was recently reached by directors delegate decision of the Financial Services Commission of Ontario ("FSCO") in *Zupnik and State Farm Mutual Automobile Insurance Company*, (FSCO Appeal P15-00037, September 19, 2016)(*citing Stranges*).

[21] Respondent Tab 33.

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"subluxation," and "whiplash associated disorder" are also defined in s. 3. I will collectively refer to these as "soft tissue injuries".

69. There are ways an injured person who sustains soft-tissue injuries can avoid having the $3,500 limit apply. For example, the injured party can establish the existence of certain pre-existing injuries under s. 18(2)[22]; establish the injuries are not or are no longer soft tissues injuries as defined in the *Schedule*; or establish the Insurer's non- compliance with certain claims processing provisions in s. 38 of the *Schedule*.

70. For example, in *Ali and Ferozuddin v. Certas Direct Insurance Company*, (FSCO A13-002459 and A13-002460, March 23, 2016) a recent FSCO decision, Arbitrator Fadel found that chronic pain which developed out of soft tissues injuries is not "clinically associated sequelae to such an injury," for purposes of the MIG, but is a separate diagnosis that removes a person from the MIG. In *Ali*, the chronic pain was formally diagnosed and supported by the evidence.

71. As for procedural requirements, s. 38(8) of the *Schedule* imposes four requirements on an Insurer after an injured party makes a request for a benefit in a treatment plan (i.e. outside of the MIG). Namely, the Insurer must (1) respond within 10 days, (2) state what it will pay, (3) state what it will not pay, and (4) give medical and other reasons for not paying. *Ferawana and State Farm Mutual Insurance Co.* (FSCO A13-005319, August 29, 2016)(Appeal pending). S. 38(9) adds a fifth requirement, that if the Insurer "believes" the MIG applies, the response must also say so.

72. If the Insurer does not do so, s. 38 (11) sets forth two mandatory consequences:

> 38 (11) If the insurer fails to give notice…the following rules apply:
>
> 1. The insurer is prohibited from taking the position that the insured person has an impairment to which the Minor Injury Guideline applies.
>
> 2. The insurer shall pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day the insurer received the application and ending on the day the insurer gives a notice described in subsection (8).

[22] Sec. 18(2) of the *Schedule* provides that "…the $3,500 limit…does not apply to an insured person if his or her health practitioner determines and provides compelling evidence that the insured person has a pre-existing medical condition that was documented by a health practitioner before the accident and that will prevent the insured person from achieving maximal recovery from the minor injury if the insured person is subject to the $3,500 limit…" However, while briefly raised in the Applicant's Submission at para. 51, this issue was not meaningfully raised at the hearing, and I do not find evidence was established of such pre-existing conditions.

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73. The Arbitrator in *Ferawana* found these requirements are mandatory, as did Arbitrator Sapin in *Augustin and Unifund Assurance Company* (FSCO A12-000452, November 13, 2013). Thus, the ruling in the *Stranges* case cited above regarding the termination of an IRB is not wholly dispositive regarding the denial of a treatment plan. Regarding a treatment plan, the *Schedule* provides mandatory consequences for the enumerated situations.

74. The onus to prove entitlement to the specific benefits, nevertheless, remains on the applicant. *Ali and Ferozuddin*. The Divisional Court recently held that the onus remains with the injured party to prove that he is out of the MIG, rather than on an Insurer to prove he is in it. This is because the MIG provisions are a limit on liability, rather than an exclusion of benefits. *Scarlett v Belair Insurance*, 2015 ONSC 3635 (*CanLII*)(Div. Ct.). The proof must be "on the balance of probabilities." *16-000045 v Aviva Canada*, 2016 CanLII 60728 (ON LAT), para. 6 – 8.

75. In application to this matter, the applicant's injuries are predominately soft tissue injuries as stated above. However, I find that there has been non-compliance with the procedural requirements of s. 38(8). While I cannot ascertain whether a response was provided within 10 days, the "medical reason" provided is so unclear – i.e. "The frequency of care does not generally diminish over time" – that it is meaningless. It is no reason at all. The requirement is to provide a medical reason, not leave the applicant to guess what the reason is. The language is more than just an obvious grammatical error that might be considered a technical error under *Stranges*; rather it is so unclear as to not constitute any medical reason at all and thus violate the requirements of s. 38(8). Likewise, no mention is made of the MIG.

76. Thus, under s. 38(11)(1), the Insurer is prohibited from taking the position that the applicant has an impairment to which the MIG applies. That does not mean, however, that *all* treatment plans are approved, as addressed below.

Issues 3-4: Is the applicant entitled to chiropractic treatment & prescriptions?

77. Regarding the chiropractic treatment plan, s. 38 (11) provides besides that the applicant is not subject to the MIG, and thus the Respondent "shall pay for all…services…described in the treatment…plan that relate to the period starting on the 11th business day after the day the insurer received the application and ending on the day the insurer gives a notice described in subsection (8)." I have nothing before me to indicate the Respondent ever provided a compliant notice. Thus, the chiropractic treatment plan is approved.

78. Regarding the $43.46 in prescriptions which are not governed by s. 38(11), although the Respondent is prohibited from taking the position that the MIG applies,

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> "it is not automatic that…[an applicant is] entitled to all medical and rehabilitation benefits beyond $3,500.00. The test set out in the Schedule at s. 15 is that the medical benefits be 'reasonable and necessary'." *Ali and Ferozuddin*.

79. The applicant's own doctor states that he did not prescribe treatment or medication, while his notes indicate he *may* have prescribed the prescriptions. Still, the prescription alleged to have been prescribed for the back pain does not appear on the summary provided by the pharmacy and I am not convinced it was prescribed by a medical provider in connection with the MVA. The applicant has not met his burden that the prescriptions are reasonable and necessary.

Issue 5: Is the applicant entitled to the psychological assessment?

80. As for the psychological assessment, I do not find that it was reasonable and necessary. I accept Dr. Nemeth's conclusion that the applicant does not have a psychological impairment related to the accident, if at all. I also have difficulty accepting the possibility that the request for the assessment was reasonable and necessary at the time it was requested, even if the assessment proved negative. Dr. Yeh's supporting information in the February 26, 2016 treatment plan was based on inaccurate self-reporting. The applicant has not met his onus of proof.

81. Based on the above findings, no benefits are overdue.

Costs

82. Both parties sought costs in this matter. No jurisprudence on costs was provided by either party. Rule 19 of the Licence Appeal Tribunal (LAT) Rules of Practice and Procedure, Version 1 (April 1, 2016). Rule 19.1 provides as follows:

"Where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs."

83. Rule 19.4 further sets out the requirements for that request, which must include the reasons for the request and the particulars of the alleged conduct.

84. The parties' submissions were very limited. The applicant argued that the Respondent acted unreasonably, and requested costs, but did not particularize his claims addressing Rule 19. The applicant has not proven its claim for costs.

85. The Respondent acknowledged that entitlement to costs is a high standard under

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Rule 19, but submits an award is warranted based on its belief the inconsistences were intentional and due to the applicant's lack of compliance with the disclosure order.

86. While I accept that there were numerous inconsistencies in respect of the applicant's evidence, I do not find that they amount to bad faith behaviour.

87. The applicant's minimal production of details of his post-employment is, however, closer to the threshold of Rule 19. While *some* records were provided, and it appears much of the problem may be with the ***employer's*** record keeping, given the disclosure order and an approaching hearing, the applicant should have supplied an explanation of his efforts to secure the records and at least a "will say statement" or similar explanation of the particulars based on his own knowledge.

88. Pursuant to the authority vested in this Tribunal under the provisions of the Act, the Tribunal directs that:

    1. The applicant is not entitled to receive an income replacement benefit in the amount of $400 per week, from August 20, 2015 to date and ongoing.
    2. The Respondent is prohibited from taking the position that the Minor Injury Guideline ("MIG") applies to the applicant's impairment.
    3. The applicant is entitled to receive a medical benefit in the amount of $2,569.08 for chiropractic services, as set out in the treatment plan dated August 31, 2015, at Perfect Physio and Rehab Centre.
    4. The applicant is not entitled to receive a medical benefit in the amount of $43.46 for prescriptions at Evergold Pharmacy.
    5. The applicant is not entitled to receive cost of examination in the amount of $2,000 for a psychological assessment, as set out in the treatment plan dated February 26, 2015, at Perfect Choice Psychological Service Inc.
    6. The applicant is not entitled to interest.
    7. Neither party is not entitled to costs.

Released: March 9, 2017

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Jeffrey Shapiro, Adjudicator

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