

**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**

File Number: 18-008248/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:

S.B.

Applicant

and

Intact Insurance Company

Respondent

DECISION

ADJUDICATOR: Lindsay Lake

APPEARANCES:

For the Applicant: Muhammad A. Alam, Counsel
For the Respondent: Jaclyn Kram, Counsel

HEARD IN WRITING: April 29, 2019

OVERVIEW

- [1] On July 26, 2015, the applicant, S.B., was injured in an automobile accident (the “first accident”). Less than two months later, on October 16, 2015, she was involved in another (the “second accident”).
- [2] As a result of the first accident, S.B. sought benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg. 34/10 (the “Schedule”) from Intact Insurance Company (“Intact”). Intact denied S.B.’s claim for several treatment plans and various assessments. As a result, S.B. submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) and the matter proceeded to a written hearing.

ISSUES IN DISPUTE

- [3] The following issues are to be decided:
- (i) Is S.B. entitled to receive medical benefits for physiotherapy services recommended by Ajax Rehabilitation Centre as follows:
 - (a) \$1,314.39 as set out in a treatment plan dated August 19, 2016 and denied by Intact on September 9, 2016?
 - (b) \$2,652.38 as set out in a treatment plan submitted on December 15, 2016 and denied by Intact on January 3, 2017?
 - (c) \$2,652.38 as set out in a treatment plan submitted on March 9, 2017 and denied by Intact on March 16, 2017?
 - (ii) Is S.B. entitled to receive a medical benefit in the amount of \$3,977.71 for psychotherapy services recommended by Pearson Medical Assessment Centre Inc. in a treatment plan submitted on July 13, 2018 and denied by Intact on August 24, 2018?
 - (iii) Is S.B. entitled to payments for the cost of examinations proposed by Pearson Medical Assessment Centre Inc. as follows:
 - (a) \$1,988.80 for an impairment assessment as set out in a treatment plan submitted on August 2, 2017 and denied by Intact on August 17, 2017?
 - (b) \$1,927.64 for a driving evaluation as set out in a treatment plan submitted on August 24, 2017 and denied by Intact on November 22, 2017?

- (c) \$2,000.00 for a psychiatry assessment as set out in a treatment plan submitted on January 3, 2018 and denied by Intact on January 31, 2018?
- (d) \$2,000.00 for a neurology assessment set out in a treatment plan submitted on May 17, 2018 and denied by the respondent on July 3, 2018?
- (iv) Is S.B. entitled to interest on any overdue payment of benefits?
- (v) Is S.B. entitled to an award under O. Reg. 664 because Intact unreasonably withheld or delayed payments of benefits?

PROCEDURAL ISSUES

Intact's Sur-Reply

- [4] On April 26, 2019, following S.B.'s reply submissions, Intact brought a motion requesting permission to file a sur-reply alleging that S.B.'s reply submissions contained new arguments. Intact's motion materials contained its sur-reply submissions.
- [5] S.B. did not provide any motion submissions and did not attend the motion hearing. As a result, Intact's motion was granted.
- [6] S.B. then claimed that she did not have notice of the motion hearing and, thus, brought her own motion seeking permission to file motion submissions.
- [7] S.B.'s motion was granted. As a result, the admissibility of Intact's sur-reply was scheduled to be considered as part of this written hearing, and S.B. was given an opportunity to make written motion submissions in response to Intact's motion.
- [8] I have reviewed Intact's motion and S.B. submissions in response. Intact's sur-reply and S.B.'s subsequent motion submissions address a disputed denial date of the treatment plan for a driving evaluation and the non-receipt of an insurer's examination ("IE") report related to the treatment plan for a psychiatry assessment.
- [9] Given my findings below regarding causation of S.B.'s psychological injuries and/or impairments, as well as regarding S.B.'s failure to prove the reasonableness and necessity of the proposed psychiatry assessment, it is not necessary for me to consider either parties' submissions on the admissibility of Intact's sur-reply, since their content had no bearing on my decision regarding S.B.'s entitlement to these two treatment plans in dispute.

Request to add the Issue of Costs

- [10] Following S.B.'s motion regarding Intact's requested sur-reply, Intact filed a second Notice of Motion dated May 30, 2019, seeking an order for costs pursuant to Rule 19 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission's Common Rules of Practice and Procedure, Version I* (October 2, 2017) (the "*Rules*"), and an order for further case management.
- [11] In response to this motion, the Tribunal held that Intact's motion for costs shall be held in the cause and considered as part of the written hearing. The Tribunal also held that the motion materials filed by both parties, including Intact's Notice of Motion dated May 30, 2019 and S.B.'s reply correspondence of June 12, 2019, shall be placed before me as the hearing adjudicator in this matter.
- [12] In S.B.'s June 12, 2019 correspondence, she is also now requesting costs pursuant to Rule 19 of the *Rules*.
- [13] As a party may make a request to the Tribunal for costs at any time before the decision or order is released in a matter, I order that the issues of costs sought by Intact and S.B. be added to the issues in dispute in this matter.

RESULT

- [14] I find that:
- (i) S.B. has proven on a balance of probabilities that the following physical injuries were caused by the first accident such that they would not have arisen but for the first accident: neck strain, musculoskeletal pain; a whiplash injury; bilateral knee strain; and bilateral shoulder and arm strain;
 - (ii) S.B. has failed to prove on a balance of probabilities that but for the first accident, her psychological injuries and/or impairments would not have arisen;
 - (iii) S.B. is entitled to the proposed impairment assessment and neurological assessment, with interest in accordance with s. 51 of the *Schedule*;
 - (iv) S.B. is not entitled to the remainder of the treatment plans in dispute;
 - (v) S.B. is not entitled an award; and
 - (vi) The parties are not entitled to their costs of the proceeding.

ANALYSIS

Causation

- [15] Intact raises the issue of causation of S.B.'s injuries on two grounds. Intact first asserts that S.B.'s various complaints do not stem from the first accident but rather from her pre-existing injuries. Alternatively, Intact argues that S.B.'s injuries were not caused as a result of the first accident, but rather the second accident.
- [16] In order to determine entitlement to the treatment plans in dispute, S.B. is required to prove, on a balance of probabilities, that the first accident caused her impairments. The applicable test in making this determination is the "but for" test: whether S.B. would have had the impairments but for the first accident.¹ The accident is not required to have been "the cause" – that is, the accident need not be the sole cause or have been sufficient in itself to have caused the impairments at issue. Rather, the accident need only to have been a "necessary cause."²
- [17] I find that S.B. has proven on a balance of probabilities that, but for the first accident, some of her physical impairments, such as neck strain, musculoskeletal pain, a whiplash injury, bilateral knee strain, and bilateral shoulder and arm strain, would not have arisen. That said, I also find that S.B. failed to prove on a balance of probabilities that, but for the first accident, her psychological impairments and/or injuries would not have arisen. As a result, I find that S.B.'s psychological injuries were not caused by the first accident.

S.B.'s Physical Injuries/Impairments

- [18] S.B.'s submissions regarding her health before the first accident is inconsistent at best. For example, she concedes in her initial submissions that she had pre-existing left shoulder tendinopathy and pain. However, once Intact raised the issue of causation, S.B. conceded in her reply submissions that she also had pre-existing pain complaints in her left wrist and arm. Further, in the January 23, 2019 transcript of her Examination Under Oath (the "EUO"),³ S.B. only admitted to having knee pain prior to the first accident. At the EUO, S.B. specifically denied any left shoulder pain, left arm pain and left wrist pain before the first accident.⁴

¹ *Sabadash v. State Farm et al.*, 2019 ONSC 1121 (CanLII).

² *Ibid.* at para. 39.

³ Submissions of the Respondent, tab 1.

⁴ *Ibid.* at pages 24-25.

- [19] S.B.'s family doctors'⁵ clinical notes and records ("CNRs") reflect significant pre-accident health issues. I place more weight on S.B.'s family doctors' CNRs than that of the EUO transcript and S.B.'s submissions as the CNRs do not rely upon S.B.'s recollection. As a result, I find that S.B. suffered from the following pre-existing physical conditions:
- (i) Left wrist strain as a result of repetitive movements with her left hand at work (January 13, 2014);
 - (ii) Pain in her left shoulder and tendinopathy, in her dorsal left forearm and right knee pain. It was noted that S.B.'s right knee was showing mild degenerative change (February 7, 2014);
 - (iii) Foot pain for which S.B. requested a prescription for orthotics (July 21, 2014);
 - (iv) Left wrist tendinitis and pain (October 2, 2014);
 - (v) Tennis elbow (left lateral epicondylitis) with a note that she had right forearm and wrist pain with chronic issues of pain radiating up to her elbow (November 6, 2014); and
 - (vi) Left elbow epicondylitis (November 17, 2014).
- [20] Although S.B. was diagnosed with several conditions prior to the first accident, including one described as "chronic," she did not attend her family doctors' office with any related symptoms or complaints within eight months prior to the first accident. S.B. was also not on any prescription medication for at least one year prior to the first accident, and no records were submitted that confirmed she was receiving any physical therapy during this time.
- [21] Following the first accident, S.B. first attended her family doctors' office three days later on July 29, 2015 and reported headaches, neck pain, bilateral shoulder pain and bilateral arm pain. S.B. also had decreased range of motion in her neck and shoulders. As a result, she was diagnosed with a neck strain, bilateral shoulder strain and bilateral arm strain.
- [22] Therefore, although S.B.'s physical complaints following the first accident had similar pain locations to that of her pre-existing health conditions, I find that S.B.'s physical injuries relating to headaches, neck pain, bilateral shoulder pain and

⁵ S.B. saw numerous family physicians both before and after the first accident at two clinics, Malvern Medical Centre and Family Care Medical Centre. The physicians that she attended with at these two clinics were as follows: Dr. Linda Ingber, Dr. Antonette Michael, Dr. William Cecutti, Dr. Stephen Dawood and Dr. Ferhana Tahir.

bilateral arm pain are not as a result of S.B.'s pre-existing health because S.B. was a-symptomatic in these areas during the eight month period that preceded the first accident.

- [23] I am also not persuaded by Intact's reliance upon Dr. Gregory Gelman's opinions contained in his November 9, 2016 insurer's examination ("IE") Independent Medical Examination report⁶ and in his November 14, 2016 IE Independent Medical Examination Addendum report⁷ to support a contrary finding. In his reports, Dr. Gelman fails to explain or provide any analysis as to S.B.'s eight-month a-symptomatic period prior to the first accident.
- [24] Therefore, I do not agree with Intact that S.B.'s injuries and impairments arose as a result of her pre-existing health conditions. However, this finding does not end the causation analysis as S.B. was involved in a second accident on October 16, 2015.
- [25] For the time period between the first accident and the second accident, S.B. attended her family doctors 13 times with the following complaints:
- (i) Pain in both arms and bilateral shoulder and forearm pain. S.B. was diagnosed with musculoskeletal pain (August 2, 2015);
 - (ii) Neck pain and, as a result, S.B. was diagnosed with a whiplash injury. S.B. was prescribed Flexeril (August 6, 2015);
 - (iii) Pain in shoulder, bilateral knees, left deltoid and feet swelling. S.B. was diagnosed with bilateral knee strain and left shoulder strain (August 24, 2015);
 - (iv) Left wrist pain (August 30, 2015);
 - (v) Bilateral suprapatellar bursitis and left shoulder partial supraspinatus tear (August 30, 2015);
 - (vi) Bilateral wrist and forearm swelling caused by repetitive movements. S.B. was diagnosed with tendinitis (September 3, 2015) (my emphasis added);
 - (vii) Left wrist swollen and painful from repetitive movements for which S.B. received a note to be off work for two weeks (September 14, 2015) (my emphasis added);

⁶ Submissions of the Respondent, tab 10.

⁷ Submissions of the Respondent, tab 11.

- (viii) Left arm swelling and radiating pain up arm “X 1 month.” S.B. was diagnosed with tendinitis of her left wrist and thumb and was referred to an orthopaedic surgeon (September 27, 2015);
- (ix) Sore hand and was again diagnosed with bilateral wrist and forearm tendinitis. S.B. was also provided a note to be off work until October 30, 2015 (October 8, 2015);
- (x) Bilateral wrist pain and prescribed Tylenol arthritis (October 11, 2015); and
- (xi) Pain in both knees and numbness in S.B.’s left index and left thumb (October 15, 2015).

[26] At the outset, I do not accept that S.B.’s tendinitis diagnoses are attributable to the first accident, since her family doctors noted the cause of these injuries as repetitive movements. Further, I also do not accept that S.B.’s diagnosis of a bilateral suprapatellar bursitis and left shoulder partial supraspinatus tear following an August 28, 2015 ultrasound are attributable to the first accident. I agree with Intact that there was no indication if the 2015 ultrasound was compared with a left shoulder ultrasound completed on February 18, 2014 that reported calcific tendinopathy and enthesopathy distal supraspinatus, and also that there may be have been a previous tear.

[27] Nonetheless, S.B. clearly reported pain complaints to her family doctors following the first accident and prior to the second accident in her arms, shoulders, forearms, neck, knees, left deltoid, and wrists, and that she also experienced foot swelling. I also find that S.B. was diagnosed with neck strain, musculoskeletal pain, a whiplash injury, bilateral knee strain, and bilateral shoulder and arm strain as a result of the first accident. I find that S.B.’s position that her physical injuries and impairments were caused by the first accident is also supported by the following evidence:

- (i) S.B.’s family doctors’ CNRs note that S.B. was attending for physiotherapy treatment between the first and second accident;
- (ii) in his November 9, 2016 IE Independent Medical Examination report that listed the date of the first accident as the date of loss, Dr. Gelman opined that S.B. sustained physical injuries as a result of “the accident” including a strain/sprain to her cervical spine (WAD II), shoulder girdle musculature and lumbar spine.⁸ While Dr. Gelman was not specifically asked to opine as to causation of S.B.’s injuries as between the two accidents, it is clear that Dr.

⁸ *Supra* note 6 at page 6. Dr. Gelman also found a strain/sprain to S.B.’s left forearm and some bursitis in her knees bilaterally. However, in his November 14, 2016 Addendum report, Dr. Gelman found that S.B.’s pains in her forearms were from repetitive movements as indicated in her family physician.

Gelman was aware of the second accident as he noted that S.B. reported to him that she felt that her symptoms may have been made worse by the second accident;

- (iii) in a November 29, 2016 Independent Physiatry Evaluation report by Dr. Julie Millard, physiatrist,⁹ in relation to the second accident, S.B. reported to Dr. Millard that her injuries from the first accident had improved approximately 20% and that she was still symptomatic at the time of the second accident.¹⁰ S.B. reported that her pain worsened since the second accident, and Dr. Millard reported that, “[b]y her report, these injuries were exacerbated by the subject [second] accident;”¹¹
- (iv) When asked at the EOU whether her injuries “cleared up from the first accident by the time of the second accident,” S.B.’s answer was “no;”¹² and
- (v) I was not directed to any medical reports or opinions by Intact that attributed S.B.’s complaints, injuries and impairments solely to the second accident.

[28] Therefore, I find that S.B. has proven on a balance of probabilities that the following physical injuries were caused by the first accident such that they would not have arisen but for the first accident: neck strain, musculoskeletal pain; a whiplash injury; bilateral knee strain; and bilateral shoulder and arm strain.

S.B.’s Psychological Injuries/Impairments

[29] No evidence was submitted that demonstrated that S.B. sustained any psychological impairments or injuries, or likewise that she was prescribed any medication for any psychological conditions, prior to the first accident, aside from one CNR entry by Dr. Linda Ingber that she had poor sleep on February 7, 2014. As a result, I do not find that S.B. had any pre-existing psychological conditions to which any of her psychological complaints can be attributed.

[30] Intact, however, also raised the issue of causation of S.B.’s psychological complaints. Intact’s position was that S.B.’s psychological symptoms were not caused by the first accident, as S.B. did not make any psychological complaints to any of her medical practitioners between the first and second accident.

⁹ Submissions of the Respondent, tab 22.

¹⁰ *Ibid.* at page 5.

¹¹ *Ibid.* at page 10.

¹² Transcript of Examination Under Oath of S.B. dated January 23, 2019, Submissions of the Respondent, tab 1, page 10, lines 21-23.

[31] S.B. did not independently address causation of her psychological complaints separate from her causation of her physical injuries in her reply submissions.

[32] S.B. submitted a provisional s. 25 Psychological Assessment Report, dated January 13, 2016, by Simran Narula, psychometrist, who was supervised by Dr. Jon Mills, psychologist.¹³ In this report, S.B. is diagnosed with: major depressive disorder, single episode; specific phobia, situational type (motor vehicles); and somatic symptom disorder, with predominant pain.¹⁴ Although the report notes that S.B. was involved in a second accident on October 16, 2015, “which further exacerbated her injuries and impairments,”¹⁵ the report ultimately concluded that, “[S.B.] was involved in a motor vehicle accident on July 26, 2015. The patient continues to experience physical pain and symptoms of emotional distress as a direct result of the accident.”¹⁶ I give little weight to this report for several reasons, including:

- (i) There was no discussion or analysis as to how the conclusion was made that S.B.’s diagnosed psychological impairments were caused by the first accident as opposed to the second accident;
- (ii) The report notes that S.B., “endorsed a change in her emotional functioning after the accident,” without any specific details about when this alleged change occurred. This is extremely important missing information because S.B. did not report any psychological or emotional difficulties to her family doctors between the two accidents;
- (iii) Certain portions of the report contradict other evidence in this matter. For example, the report noted that S.B. experienced a loss of interest in previously enjoyable activities which included travelling. Since the two accidents, S.B. has travelled to Dubai for four weeks¹⁷ and to Saudi Arabia.¹⁸ On December 21, 2017, S.B. also reported to Dr. Michael that she was travelling and was administered the cholera vaccine (Dukoral). S.B. also reported to Dr. Poon that she was “going away for [a] wedding” which was reported in a September 9, 2016 CNR entry; and
- (iv) The diagnoses contained in this report are contradictory to the observations noted by Dr. Michael, one of S.B.’s family physicians, on February 11, 2016, not even one month after S.B.’s assessment with Ms. Narula . At this appointment, Dr. Michael determined if S.B. was fit for travel for four weeks

¹³ Written Submissions of the Applicant, tab 15.

¹⁴ *Ibid.* at page 7.

¹⁵ *Ibid.* at page 4.

¹⁶ *Ibid.* at page 7.

¹⁷ Written Submissions of the Applicant, tab 5, February 11, 2016 entry.

¹⁸ Written Submissions of the Applicant, tab 6, November 9, 2017 entry.

and, in doing so, noted the following in regard to S.B.'s mental and psychiatric status, "alert, oriented in person/time/place; memory and attention span normal; reasoned judgement; normal thought processes, *no significant mood disorder* (my emphasis added)."

[33] I also find that the IE reports submitted by Intact support a finding that the first accident did not cause S.B.'s psychological or emotional injuries or impairments. For example, Intact submitted the Independent Psychological Assessment report dated February 22, 2016 and completed by Dr. Konstantine K. Zakzanis, psychologist,¹⁹ which listed the date of the first accident as the date of loss. In the report, Dr. Zakzanis states, "all of the below-detailed symptoms *reportedly* stem from the subject accident and were exacerbated in the subsequent accident of October 16, 2015 (my emphasis added)."²⁰ Dr. Zakzanis diagnoses S.B. with adjustment disorder with mixed anxiety and depressed mood but also reports that S.B. reported post non-accident related contributory factors that "may have had a bearing" on the present evaluation findings.²¹ Despite these comments, Dr. Zakzanis opines that, "whist acknowledging post-accident factors as contributory causes, but for the subject motor vehicle accident of July 26, 2015, [S.B.'s] objectively demonstrated psychological impairment would not be of the breadth and severity that it is as this time."²² I place little weight on Dr. Zakzanis' report as Dr. Zakzanis accepts S.B.'s reporting that her psychological symptoms arose after the first accident with no other supporting evidence. Further, it is not clear from Dr. Zakzanis' report that S.B.'s family doctors' CNRs were reviewed as part of S.B.'s assessment as under the heading "Documentation available for review," it only lists "Clinical Notes, Various."²³ There is no discussion in Dr. Zakzanis' report that reconciles S.B.'s reports that the first accident caused her psychological symptoms despite S.B. reporting no psychological symptoms to her family doctor between the first and second accident. Therefore, I find that Dr. Zakzanis' report does not assist S.B. in discharging her onus of proving on a balance of probabilities that the first accident caused her psychological injuries.

[34] Intact also relied upon the September 28, 2018 IE Independent Psychological Assessment report by Dr. Drenfeld, psychologist.²⁴ In this report, Dr. Drenfeld opines that "there is no objective evidence indicating that [S.B.] sustained a psychological impairment as a result of the subject [first] accident."²⁵ Despite

¹⁹ Document Brief of the Respondent, tab 19A.

²⁰ *Ibid.* at page 3.

²¹ *Ibid.* at page 4.

²² *Ibid.*

²³ *Ibid.* at page 18.

²⁴ Submissions of the Respondent, tab 18.

²⁵ *Ibid.* at page 12.

diagnosing S.B. with a psychological condition (Other Specified Depressive Disorder: Depressive episode with insufficient symptoms) and failing to identify the cause of this condition, Dr. Drenfeld's ultimate opinion is consistent with Dr. Zakzanis' opinion and the lack of any reports of psychological or emotional problems by S.B. to her family doctors between the two accidents.

- [35] For all of the reasons set out above, I find that S.B. has failed to prove on a balance of probabilities that but for the first accident, her psychological injuries and/or impairments would not have arisen. Therefore, I find that the first accident did not cause her psychological conditions, injuries or impairments.

Treatment Plans

- [36] S.B. submitted that Intact failed to comply with its obligations under s. 38(8) of the *Schedule* regarding several of its notices denying the treatment plans in dispute.
- [37] Sections 38(8) and 38(11) of the *Schedule* set out strict notice requirements for insurers responding to treatment plans and specific consequences if they fail to comply. Section 38(8) requires an insurer to inform an insured person of the medical and other reasons why it considered the goods and services not to be reasonable and necessary if it denies a treatment plan. The requirement of medical reasons was explained in the reconsideration decision of *T.F. v. Peel Mutual Insurance Company*,²⁶ in which Executive Chair Lamoureux stated:

an insurer's "medical and any other reasons" should, at the very least, include specific details about the insured's condition forming the basis for the insurer's decision or, alternatively, identify information about the insured's condition that the insurer does not have but requires. Additionally, an insurer should also refer to the specific benefit or determination at issue, along with any section of the *Schedule* upon which it relies. Ultimately, an insurer's "medical and any other reasons" should be clear and sufficient enough to allow an unsophisticated person to make an informed decision to either accept or dispute the decision at issue. Only then will the explanation serve the *Schedule's* consumer protection goal.²⁷

- [38] Pursuant to s. 38(11), if an insurer fails to comply with its obligations under s. 38(8), it must pay for all goods, services, assessments and examinations described in the treatment plan starting on the 11th business day after the day that the insurer received the treatment plan until such time that it gives notice that complies with s.

²⁶ 2018 CanLII 39373 (ON LAT).

²⁷ *Ibid.* at para. 19.

38(8) of the *Schedule*. As such, the insurer is given a window to “cure” a defective notice but without such a cure, any goods, services, assessment and examinations set out in the treatment plan are payable as an analysis as to the reasonableness and necessity of the proposed treatment under s. 15 of the *Schedule* is no longer required.²⁸

[39] For the remainder of the treatment plans where S.B. did not raise issues concerning Intact’s denials, S.B. bears the onus of proving her entitlement to the claimed goods, services and assessments by proving that the treatment plans are reasonable and necessary on a balance of probabilities.²⁹

[40] I find that S.B. is entitled to the impairment assessment and the neurological assessment as a result of Intact’s failure to comply with its requirements under s. 38(8) of the *Schedule*. S.B. is not entitled to the remaining disputed treatment plans.

a) *Physiotherapy Services*

[41] There are three treatment plans (“OCF-18s”) in dispute between the parties for physiotherapy services.

[42] S.B. submits that Intact did not provide a proper denial to the first OCF-18 dated August 19, 2016 as required by s. 38(8) of the *Schedule*. S.B. submitted that Intact failed to provide the medical reasons for its denial and, therefore, Intact is required to pay for the treatment plan pursuant to s. 38(11).

[43] Intact made no submissions regarding S.B.’s reliance upon s. 38 of the *Schedule* regarding this treatment plan. Nevertheless, the relevant portion of Intact’s September 9, 2016 denial is reproduced as follows:

As per Section 38(8) of the Statutory Accident Benefits Schedule, I am unable to consider funding for the above noted goods and services for the following medical and all of the other reasons: As your injuries are predominantly soft tissue, the healing time is approximately 6-12 weeks. As such, due to the amount of time that has passed and the amount of treatments that has been received we require a second opinion to determine if the treatment plan is reasonable or necessary.

²⁸ See *M.F.Z. v Aviva Insurance Canada*, 2017 CanLII 63632 (ON LAT) at paras. 50-52, 59 and 64.

²⁹ Sections 14 and 15 of the *Schedule* and *Scarlett v. Belair Ins. Co.*, 2015 ONSC 3635, paras. 20-24 (Div. Ct.).

- [44] Attached to the denial was a Notice of Examination dated September 9, 2016 advising S.B. of her required attendance at a s. 44 general practitioner assessment with Dr. Gelman on September 22, 2016.
- [45] S.B. argues that the September 9, 2016 denial failed to adhere to the requirements of the *Schedule* because it stated that S.B.'s injuries were "predominantly soft tissue," but that Intact failed to specify the source of this determination. S.B. argues that her injuries were not predominantly soft tissue in nature and, therefore, Intact failed to provide the "medical reasons" as required.
- [46] I disagree with S.B.'s position that the September 9, 2016 denial letter failed to set out the medical reasons for Intact's denial because the letter stated that S.B.'s injuries were predominantly soft tissues injuries, which is confirmed by the conditions set out in the injury and sequelae portion of the OCF-18 in dispute. The notice also set out the reason why Intact required a second opinion as it did not have information as a result of the time that had passed since the accident and the treatment received to date. I find that Intact referred to the specific treatment plan in dispute in its correspondence and the information contained in Intact's denial letter was clear and sufficient to meet its obligations under s. 38(8) of the *Schedule*. As a result, the repercussions set out in s. 38(11) are not triggered and I must consider the reasonableness and necessity of this treatment plan.
- [47] This OCF-18 was completed by Ali Kanji, physiotherapist at Ajax Rehabilitation Centre, and sought funding for eight sessions of physiotherapy as well as four sessions of massage therapy over an eight-week period. The following conditions were listed in the injuries and sequelae information section of this OCF-18: dislocation, sprain and strain of joints and ligaments of shoulder girdle; dislocation, sprain and strain of joints and ligaments of wrist and hand level; other sprain and strain of cervical spine; and sprain and strain of lumbar spine. The OCF-18 indicated that S.B.'s impairments were predominately minor injuries and that services were required within the Minor Injury Guideline (the "MIG").³⁰ The goals of this treatment plan were pain reduction, increased range of motion, return to activities of normal living and return to pre-accident work activities. This OCF-18 noted that minimal progress had been made since the accident and additional treatment was required to prevent further complications. There were no attachments to the treatment plan.

³⁰ Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act*.

- [48] I find that S.B. failed to prove on a balance of probabilities the reasonableness and necessity of the first disputed treatment plan for physiotherapy and massage therapy for the following reasons:
- (i) There was no recommendation or referral for massage therapy from any of S.B.'s treating practitioners prior to this treatment plan being submitted to Intact;
 - (ii) I do not agree with S.B.'s position that the treatment plan is reasonable and necessary because her family physicians' CNRs show that her injuries have continued to date. The last visit to her family doctors prior to the submission of this treatment plan for any accident-related complaints was on August 4, 2016, for left arm soreness and right knee pain, and on August 10, 2016 for the results of a knee ultrasound. No recommendation was made at either of these visits for physiotherapy or massage therapy. Prior to these two visits, S.B. failed to mention any accident-related complaints to her family physicians for approximately six months, even though she visited for various other reasons during this time;
 - (iii) The most recent family doctor CNR entry prior to the submission of this treatment plan was dated January 25, 2016 by Dr. Dawood, who does recommend that S.B. continue physiotherapy. I give this recommendation little weight, however, as it was made approximately seven months prior to the treatment plan in dispute;
 - (iv) I do not agree that Dr. Pat Poon's CNRs³¹ support the reasonableness and necessity of this treatment plan as submitted by S.B. While Dr. Poon noted on October 27, 2016 that S.B. needed to exercise and that she was "doing physio," Dr. Poon made no referral or recommendation for physiotherapy or massage therapy and it is unclear if Dr. Poon was stating S.B. needed to exercise as a result of the first accident or for other reasons given that S.B. was referred to Dr. Poon for dietary counselling; and
 - (v) I give little weight to an August 30, 2016 letter by Dr. Suzanne Padhi's which was relied upon by S.B. because this letter only refers to the second accident.

[49] The second OCF-18 for physiotherapy, and also for massage therapy, in the amount of \$2,652.38 was submitted to Intact on December 15, 2016. The injury and sequelae information portion of the OCF-18 listed the same injuries as were listed on the August 19, 2016 treatment plan but also included "tear of medical meniscus of knee, current." The goals of this treatment plan were also the same as

³¹ Applicant's submissions, tab 3.

those set out on the August 19, 2016 treatment plan. This OCF-18 also indicated that S.B.'s impairments were predominately minor injuries and that services were required within the MIG.

- [50] I find that S.B. has also failed to prove on a balance of probabilities that this treatment plan is both reasonable and necessary. The only additional submissions S.B. made to support her claim for this treatment plan in addition to the August 19, 2016 treatment plan was that this OCF-18 now included "tear of medical meniscus of knee, current" in the list of injuries. S.B. argued that this is a worsening of her condition; however, how this injury was determined is unclear. S.B. only points to an August 27, 2015 bilateral knee ultrasound that indicated a bilateral supra-patellar bursitis pattern. No tear was indicated in this report and S.B. did not direct me to any other evidence supporting the newly listed injury of a tear of medical meniscus of the knee. Finally, while I appreciate S.B.'s criticisms of the January 13, 2017 IE Paper Review Report by Dr. Gelman, which was prepared to respond to this treatment plan, the onus remains on S.B. to prove the reasonableness and necessity of the treatment plan and this onus never shifts to Intact to disprove entitlement.
- [51] The third treatment plan in dispute, which was purportedly for physiotherapy services but only sought funding for chiropractic services and massage therapy, was submitted on March 9, 2017 in the amount of \$2,652.38. The injury and sequelae information, as well as the goals, listed in this plan were the same as in the December 15, 2016 treatment plan. This treatment plan stated that S.B.'s symptoms were still consistent and ongoing daily and, as a result, further treatment was advised. This OCF-18 also indicated that S.B.'s impairments were predominately minor injuries and that services were required within the MIG.
- [52] I also find that S.B. has failed to prove on a balance of probabilities the reasonableness and necessity of this treatment plan because:
- (i) None of S.B.'s treating practitioners made any recommendation at any time for chiropractic treatment;
 - (ii) The only CNR entry from S.B.'s family doctors regarding massage was dated April 23, 2017. This CNR entry, however, reflects that S.B. requested massage as opposed to it being recommended as a treatment by her family doctors;
 - (iii) S.B. relied upon a March 7, 2017 letter from Dr. Matthew Tsuji, orthopaedic surgeon, in support of this treatment plan. Dr. Tsuji's letter only supports continued physiotherapy, which was not sought under this treatment plan,

and the letter made no recommendation, or even mentioned, massage therapy or chiropractic treatment; and

- (iv) I do not agree that the records from Ajax Rehabilitation Centre that show that S.B.'s attendance for the period of December 19, 2016 to April 5, 2017 support a conclusion that the goals of the proposed treatment plan are being met because the service that S.B. received during this time was only described as "physical rehab session." As a result, her attendance for physiotherapy does not speak to the reasonableness and necessity of the proposed chiropractic treatment and massage therapy.

b) Psychotherapy Services and Driving Evaluation

- [53] S.B. argued that the denial provided by Intact in response to the treatment plans for psychotherapy services and for the driving evaluation failed to set out the medical reasons for its denials as required by s. 38(8) of the *Schedule*.
- [54] Section 38(1)(a) of the *Schedule* states that s. 38 applies to medical and rehabilitation benefits other than benefits payable in accordance with the MIG.
- [55] Section 15(1) of the *Schedule* lists medical benefits that are payable following an inquiry as to the reasonableness and necessity but also notes that such benefits are those that are *as a result of an accident*.
- [56] As I have previously found that S.B.'s psychological injuries and/or impairments were not caused by the first accident, I find that the requirements set out in s. 38(8) do not apply to these two treatment plans for psychotherapy services and for a driving evaluation as the proposed medical benefits are not as a result of the accident. Likewise, I find that S.B. is not entitled to these treatment plans given my finding on causation of S.B.'s psychological injuries and/or impairments.

c) Impairment Assessment

- [57] S.B. submitted that Intact did not provide a proper denial as required by s. 38(8) of the *Schedule* to this OCF-18 for an impairment assessment as Intact failed to provide the medical reasons for its denial.
- [58] Intact again made no submissions regarding S.B.'s reliance upon s. 38 of the *Schedule* regarding this treatment plan. Intact's August 21, 2017 denial letter stated:

Dr. Gregory Gelman completed an Insurer's Examination Report on August 1, 2017 which he concluded you have already been

evaluated through variety of assessments including the subsequent Motor vehicle accident October 2015. Your treatment requirement is direct relation to the subject accident have already been adequately address. As such requesting a second opinion to determine if the OCF18 is reasonable or necessary.

[59] I agree with S.B. that Intact's "medical and any other reasons" as set out in its August 21, 2017 correspondence do not discharge its onus of including specific details about S.B.'s condition forming the basis of the insurer's decision. Further, while a Notice of Examination was included in the correspondence, it was for another paper review by Dr. Gelman. It is unclear from the information provided what information Intact did not have but required from a further paper review by Dr. Gelman given that one had already taken place on only 20 days prior. In addition to the grammatical errors in the notice, which I find also makes the correspondence less clear to an unsophisticated person, I agree with S.B. that Intact provided no medical reasons for the denial and, even more confusingly, specifically referred to the second accident and not solely to the first. For all of these reasons, I find that Intact's denial is not clear and falls short of its obligations under s. 38(8) of the *Schedule*.

[60] As a result of my findings of Intact's non-compliance with s. 38(8) of the *Schedule*, the consequences set out in s. 38(11) are triggered and the treatment plan for the impairment assessment is payable as Intact no longer has the opportunity to issue a proper denial notice as a decision has been rendered regarding this medical benefit.

d) *Physiatry Assessment*

[61] This OCF-18 was completed by Lorne Papernick, chiropractor, and sought funding for a physiatry assessment. The goals of this treatment plan were pain reduction, increased strength, increased range of motion and to return S.B. to activities of normal living. The additional comments section stated that the physiatry assessment was requested in order to fully understand the nature and extent of S.B.'s physical complaints and to plan treatment.

[62] S.B. submits that this assessment is "deemed to have been approved" because of the defect in the Notice of Examination resulting in a denial of the opportunity to S.B. to attend an IE. S.B. argues that the date of the scheduled IE *preceded* the date of Intact's letter and notice of IE.

[63] I do not agree with S.B.'s position. While I acknowledge, and Intact also conceded, that the paper IE assessment proceeded *prior to* the date of Intact's denial letter,

s. 38(8) does not speak to notice of IEs as one of the requirements of an insurer's denial letter. Instead, IE notices are addressed in s. 38(10) of the *Schedule*, which states that the insurer "may" notify the insured person that the insurer requires an IE under s. 44. The consequences set out in s. 38(11) only address notices that do not comply with the requirements in s. 38(8). As a result, I find that the consequences in s. 38(11) are not triggered in regard to this treatment and I must determine its reasonableness and necessity.

[64] S.B. failed to make any submissions as to the reasonableness and necessity of the physiatry assessment. Given the very broad goals of the treatment plan and no further explanation as to why such an assessment was required to "fully understand the nature and extent" of S.B.'s physical complaints and to plan treatment when S.B. was being followed by a number of other medical professionals, I find that S.B. has failed to prove on a balance of probabilities that the treatment plan is reasonable and necessary. As a result, she is not entitled to the proposed physiatry assessment.

e) *Neurological Assessment*

[65] This OCF-18 was completed by Dr. Richard Gladstone, physician, and sought funding for a neurological assessment.

[66] S.B. maintains that Intact's denial of this treatment plan on June 6, 2018 did not provide any "medical reasons" for the denial and, therefore, failed to comply with s. 38(8) of the *Schedule*.

[67] Once again, Intact made no submissions regarding S.B.'s reliance upon s. 38 of the *Schedule* regarding this treatment plan. Intact's June 6, 2018 stated that it was unable to consider funding for the neurological assessment for the following medical and all of the other reasons:

Based on our review of your Accident Benefits file and your current medical diagnosis and prognosis, we want to determine if a neurological assessment is warranted for the injuries caused by the motor vehicle accident. We would like to arrange an insurance examination to determine if the OCF 18 Treatment and Assessment Plan completed by Gladstone, Richard dated May 17, 21018 is reasonable and necessary.

[68] I agree with S.B. that Intact's Denial letter fails to comply with s. 38(8) of the *Schedule* as its correspondence did not provide any specific details about S.B.'s condition forming the basis for Intact's decision or identify any information about S.B.'s condition that Intact required. I find that Intact failed to provide any medical

and any other reasons that are clear and sufficient enough to allow an unsophisticated person to make an informed decision to either accept or dispute the denial.

- [69] As a result of my findings of Intact's non-compliance with s. 38(8) of the *Schedule*, the consequences set out in s. 33(11) are triggered. Therefore, the treatment plan for the neurological assessment is payable as Intact no longer has the opportunity to issue a proper denial notice as a decision has been rendered regarding this medical benefit.

Interest

- [70] S.B. is entitled to interest in accordance with s. 51 of the *Schedule* for the treatment plans for the impairment assessment and the neurological assessment.

Award

- [71] Section 10 of O. Reg. 664 provides that if the Tribunal finds that an insurer has unreasonably withheld or delayed payment of benefits, the Tribunal may award a lump sum of up to 50 per cent of the amount in which the person was entitled.
- [72] The basis of S.B.'s claim for an award is that, in her opinion, the treatment plans in dispute were reasonable and necessary and Intact unreasonably withheld or delayed payments of same. S.B. provided no further particulars of her claim for an award except that she sought an award in the amount of 50% of the total outstanding amounts.
- [73] I find that S.B. has not met her burden of proving on a lance of probabilities that Aviva unreasonably withheld or delayed payments as she failed to provide any detailed information about her claim for an award. As a result, S.B.'s claim for an award is dismissed.

Costs

- [74] Rule 19.1 of the *Rules* provides that a party may make a request to the Tribunal for its costs where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith.
- [75] Both parties in this matter are requesting their costs. Intact requests its costs because of the additional steps it was required to take in this matter, such as filing two Notice of Motions, which necessitated additional submissions that resulted in addition time and fees incurred. Intact argues that it was obliged to take additional steps in this matter as S.B. raised new submissions in both her reply submissions

and in her motion response. Intact argues that raising these new submissions was done in bad faith as they were misleading, untrue and not supported by objective evidence.

[76] S.B. requests her costs and argues that Intact has acted unreasonably, frivolously and in bad faith by filing two motions in this matter. S.B. also argues that Intact made misleading and untrue submissions in both of its motions and argues that it is misusing the Tribunal process. S.B. also highlighted the additional steps that she was required to take in response to Intact's two motions.

[77] Both parties submitted voluminous documents in this matter which involved two causation arguments and technical arguments regarding sufficiency of denials. I do not find that any steps taken by the parties in this matter reach the high threshold of unreasonable, frivolous, vexatious or bad faith that would warrant an order for costs but rather likely resulted from a combination of the format of the hearing and the complex issues that needed to be determined.

[78] As a result, based on the evidence and submissions made by both parties, I find that neither party is entitled to their costs as neither party has proven that the other reached the high threshold of acting in an unreasonable, frivolous, vexatious or bad faith manner in this matter.

CONCLUSION

[79] For the reasons outlined above, I find that:

- (i) S.B. has proven on a balance of probabilities that the following physical injuries were caused by the first accident such that they would not have arisen but for the first accident: neck strain, musculoskeletal pain; a whiplash injury; bilateral knee strain; and bilateral shoulder and arm strain;
- (ii) S.B. has failed to prove on a balance of probabilities that but for the first accident, her psychological injuries and/or impairments would not have arisen;
- (iii) S.B. is entitled to the proposed impairment assessment and neurological assessment, with interest in accordance with s. 51 of the Schedule;

- (iv) S.B. is not entitled to the remainder of the treatment plans in dispute;
- (v) S.B. is not entitled an award; and
- (vi) The parties are not entitled to their costs of the proceeding.

Released: March 25, 2020



**Lindsay Lake
Adjudicator**