LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Tribunal File Number: 18-004290/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:

J.T.

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: **Lindsay Lake**

APPEARANCES:

For the Applicant: Anna Korolkova, Paralegal

For the Respondent: Ashley A. Shmukler, Counsel

HEARD IN WRITING: **January 14, 2019**

OVERVIEW

[1] The applicant, J.T., was injured in an automobile accident on June 27, 2016 (the "accident") and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*") from Aviva Insurance Company ("Aviva"), the respondent.

[2] Aviva denied J.T.'s claim for a weekly income replacement benefit (IRBs) and four treatment plans. Aviva took the position that all of J.T.'s injuries fit the definition of "minor injury" as prescribed by s. 3(1) of the *Schedule*, and therefore, fall within the Minor Injury Guideline (the "MIG").[1] As a result, J.T. submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[3] The parties were unable to resolve their dispute at the case conference and the matter proceeded to a written hearing on January 14, 2019.

ISSUES IN DISPUTE

[4] On December 18, 2018, J.T. withdrew her claim for IRBs. As a result, the following are the remaining issues to be decided:

(i) Did J.T. sustain predominately minor injuries as defined under the *Schedule*?

(ii) If the answer to issue (i) above is "no," then I must determine the following issues:

(a) Is J.T. entitled to receive a medical benefit in the amount of $2,472.00 for physiotherapy services, chiropractic therapy, massage therapy, supervised functional exercise program and needle/laser acupuncture recommended by Toronto Healthcare Inc. in a treatment plan submitted on August 8, 2016 and denied by Aviva on August 17, 2016?

(b) Is J.T. entitled to receive a medical benefit in the amount of $226.00, representing an unpaid balance remaining of the initial claim for $1,276.00 for physiotherapy services, chiropractic therapy, massage therapy, supervised functional exercise program and needle/laser acupuncture recommended by Toronto Healthcare Inc. in a

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

treatment plan that was submitted on April 6, 2017 and denied by Aviva on April 24, 2017?

(c) Is J.T. entitled to receive a medical benefit in the amount of $3,335.98 for psychological services recommended by Toronto Healthcare Inc. in a treatment plan that was submitted on April 6, 2017 and denied by Aviva on April 24, 2017?

(d) Is J.T. entitled to payment for the cost of an examination in the amount of $2,000.00 for a psychological assessment, performed by Toronto Heathcare Inc. which was submitted on October 20, 2016 and denied by Aviva on March 27, 2017?

(e) Is J.T. entitled to interest on any overdue payment of benefits?

PRELIMINARY ISSUE: Exclusion of Evidence

[5] Aviva requested that the Consultation Report by Dr. Alfonse Marchie, physiatrist, dated November 29, 2018 and the Med Legal Report by Dr. Domenic Minnella, chiropractor, dated December 12, 2018 be excluded as evidence in this hearing because they were not served on Aviva by November 5, 2018 in accordance with the Tribunal's September 25, 2018 Order.

[6] Contrary to Aviva's arguments, the Tribunal's September 25, 2018 Order did not order the parties to exchange all documents that they intended to rely upon for the written hearing by November 5, 2018. Instead, the September 25, 2018 Order stated, "the parties agreed to exchange documents listed in the respondent's case conference summary and those discussed at the case conference no later than November 5, 2018."

[7] Neither of the two documents sought to be excluded were "listed in the respondent's case conference summary" and no evidence was submitted regarding the documents being discussed at the case conference.

[8] The Tribunal's September 25, 2018 Order required J.T. to serve Aviva, and file with the Tribunal, her written submissions *and evidence* by December 17, 2018. Aviva submits that it did not receive J.T.'s submissions and evidence in their entirety until December 21, 2018.

[9] Aviva argues that it would be a breach of procedural fairness and natural justice to allow the two reports into evidence as it was not provided with an opportunity to have its experts comment on the reports. Aviva further submits that there is no reason for the late production of Dr. Minnella's report because J.T. had been

attending Toronto Healthcare Inc. since 2016. Aviva argues that J.T. should have been ready to proceed with her application before commencing her appeal at the Tribunal and that she has not provided any excuse for the late production of the reports.

[10] In her reply submissions. J.T. argues that she provided all *available* medical documents by the November 5, 2018 date. J.T. submits that she was served with Dr. Marchie's consultation report and Dr. Minnella's Med Legal Report on December 12, 2018 and December 18, 2018 respectively. J.T argues that these documents should not be excluded because:

(i) They are essential for the Tribunal to make a well-informed decision on the issues in dispute;

(ii) She could not have complied with the November 5, 2018 deadline as the reports were not in her possession or control, and they were delayed as a result of arranging necessary referrals by J.T.'s family doctor. J.T. argues that the reports were exchanged as soon as they became available;

(iii) Aviva will suffer no prejudice; and

(iv) J.T. offered to adjourn the written hearing to allow Aviva appropriate time to review/respond to the medical documents.

[11] Aviva's request to exclude the two reports is denied. The two documents sought to be excluded are relevant and were exchanged with Aviva only 4 days beyond the expiry of the timeline set out in the Tribunal's September 25, 2018 Order. I do not accept J.T.'s submission that she did not receive Dr. Minnella's report until December 18, 2018 and, therefore, was unable to adhere to the deadlines in the Tribunal's Order. J.T.'s submissions and evidence were faxed to the Tribunal on December 17, 2018 at 6:03 p.m. and this fax included Dr. Minnella's report. I do acknowledge, and place weight on, J.T.'s offer to consent to an adjournment to cure any prejudice to Aviva that may arise from the inclusion of the two reports in the evidence for this hearing. I find that Aviva did not act on J.T.'s adjournment proposal, which would have been the appropriate remedy for the late service of the documents as opposed to their exclusion from the hearing. I find that Aviva's reasons for the exclusion of the two documents (i.e. that their experts did not have time to review and comment upon them) were not of enough concern to Aviva to take steps prior to the hearing and, therefore, I am not satisfied that Aviva would suffer any prejudice if the two reports are not excluded from the evidence in this matter.

PRELIMINARY ISSUE: Adding the Issue of Costs

[12] In its submissions, Aviva requests to add the issue of whether it could recover its costs of this proceeding because J.T. acted unreasonably, frivolously, vexatiously, or in bad faith pursuant to Rule 19.1 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I* (October 2, 2017) (the "*Rules*"). Aviva is requesting $3,000.00 in costs.

[13] I order that the issues of costs be added to the issues in dispute in this matter because:

(i) J.T. made no reply submissions regarding Aviva's request to add the issue of costs;

(ii) J.T. failed to show that she would be prejudiced by the addition of the issue; and

(iii) Aviva is not out of time to request to add the issue of costs as the request may be made at any time before a decision is released pursuant to Rule 19.2 of the *Rules*.

RESULT

[14] Based on the totality of the evidence before me, I find that J.T.'s soft tissue injuries fall within the MIG and she is not removed as a result of chronic pain or any psychological condition. It is, therefore, unnecessary to consider the reasonableness of the treatment plans or the issue of interest because the maximum of $3,500.00 for medical and rehabilitation benefits under the MIG has been exhausted.

[15] Aviva is not entitled to its costs of the proceedings because it failed to prove on a balance of probabilities that J.T. acted unreasonably, vexatiously, frivolously or in bad faith.

ANALYSIS

Did J.T. sustain predominately minor injuries as defined under the *Schedule*?

a) The Minor Injury Guideline ("MIG")

[16] The MIG establishes a framework available to injured persons who sustain a minor injury as a result of an accident. A "minor injury" is defined in s. 3(1) 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.” The terms, “strain,” “sprain,” “subluxation,” and “whiplash associated disorder” are defined in the *Schedule*.

[17] Section 18(1) of the *Schedule* limits the entitlement for medical and rehabilitation benefits for minor injuries to $3,500.00.

[18] The onus is on J.T. to show that her injuries fall outside of the MIG.[2] In the event that I find that J.T.’s injuries are “minor injuries” as prescribed by the *Schedule*, J.T. argues in the alternative that she should be removed from the MIG because she has developed a chronic pain condition and/or sustained psychological injuries as a result of the accident.

[19] I find that J.T. has not provided the evidence necessary to establish that her injuries are outside of the MIG.

Soft Tissue Injuries

[20] Following the accident, J.T. was diagnosed with the following soft-tissue injuries: hip and thigh – sprain and strain of joints and ligaments (right); abdominal pain; sprain/strain of the cervical, thoracic and lumbar spine; sprain/strain of the shoulder girdle (bilateral) and of the wrist and hand (bilateral); post traumatic headache;[3] whiplash neck, upper back and lower abdomen wall;[4] neck pain;[5] cervical spondylosis, whiplash injury;[6] and cervical disc degeneration with strain/sprain.[7]

[21] I cannot conclude that J.T.’s abdominal pain, wrist and hand injuries were caused as a result of the accident because J.T. was diagnosed with cholelithiasis (gallstones) months after the accident. J.T. also had previous wrist pain complaints and underwent testing and saw a specialist for bilateral carpal tunnel syndrome in the year prior to the accident.

[22] In any event, I find that the remainder of J.T.’s soft issue injuries diagnosed after the accident where “minor injuries” as defined in the *Schedule*. Therefore, I must

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[2] *Scarlett v. Belair,* 2015 ONSC 3635, para. 24 (Div. Ct.).
[3] Disability Certificate dated July 12, 2016 completed by Dr. Domenic Minnella, Applicant’s Document Brief, tab 6.
[4] Clinical Notes and Records (CNRs) of Dr. Vela dated March 22, 2016, Applicant’s Document Brief, tab 8.
[5] *Ibid.* CNR entry dated July 12, 2018.
[6] Consultation Report by Dr. Hendry Chan dated October 10, 2018, Applicant’s Document Brief, tab 10.
[7] Dr. Alfonse Marchie, physiatrist, correspondence dated November 29, 2018, Applicant’s Document Brief, tab 11.

now consider whether J.T. is removed from the MIG as a result of chronic pain and/or psychological injuries.

Chronic Pain

[23] I find that J.T. does not suffer from chronic pain from the accident that would place her injuries outside of the MIG as a result of the inconsistent and large gaps in her pain reporting, unexplained discrepancies in her evidence and credibility issues as a result of her failure to disclose relevant pre-accident health conditions and relevant health conditions that occurred post-accident.

[24] Both parties submitted and relied upon the decision of *Arruda v. Western Assurance Co.*,[8] and Aviva also submitted various other Tribunal decisions, including 16-*000438 v The Personal Insurance Company*,[9] for the following propositions concerning chronic pain:

(i) ongoing pain alone is insufficient to take an insured person out of the MIG; rather, ongoing pain must be accompanied by some functional impairment;

(ii) chronic pain must be of a severity that it causes suffering and distress accompanied by functional impairment or disability; and

(iii) an insured person will not meet his or her burden of showing that chronic pain is more than mere sequelae without discussions as to the level of pain, its effects on the person's function and whether the pain is bearable without treatment.

[25] Neither party, however, referred to the reconsideration decision in *T.S. v. Aviva General Insurance Canada*,[10] in which Executive Chair Lamoureux found that the Tribunal erred in its interpretation of s. 3 of the *Schedule* as chronic pain, if established, should not be included in the MIG's definition as a sequelae to minor injuries. Executive Chair Lamoureux defined chronic pain as "a condition that persists for three to six months after an initial trigger or injury."[11]

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[8] [2015] O.F.S.C.D. No. 177 (FSCO).
[9] 2017 CanLII 59515 (ON LAT).
[10] 2018 CanLII 83520 (ON LAT) ("*T.S. v. Aviva*"). Aviva relied upon the decision of *17-006136 v Aviva Insurance Canada*, 2018 CanLII 95571 (ON LAT) ("*17-006136*") in its submissions on the issue of chronic pain. This decision, however, was released prior to *T.S. v. Aviva*. Therefore, the Tribunal did not have the benefit of the reconsideration decision in *T.S. v. Aviva* when making its decision in *17-006136*.
[11] *Ibid*. at para. 19.

[26] Aviva argues that J.T. failed to meet her onus of proving that she should be removed from MIG as a result of chronic pain *syndrome*. Aviva submits that there is no expert opinion that J.T. suffers from chronic pain *syndrome* and, in the alternative, if J.T. is experiencing pain, that it is not more than sequelae from her soft tissue injuries. I disagree with Aviva's position that J.T. would only be removed from the MIG on the basis of a chronic pain *syndrome* diagnosis or on the basis that her chronic pain was not sequelae of her soft tissue injuries. I agree with Executive Chair Lamoureux's reconsideration decision in *T.S. v. Aviva* that chronic pain, distinguished from chronic pain *syndrome*, is also not captured by the definition of "minor injury" in the *Schedule*. Chronic pain, however, must still be established on a balance of probailities by the applicant.

[27] J.T. argues that her injuries fall outside of the MIG because of her chronic pain condition. J.T.'s pain reporting, however, was inconsistent and raises credibility issues. J.T.'s evidence also contained unexplained inaccuracies that she failed to respond to in her reply submissions once highlighted by Aviva. As a result, I have significant difficulty placing weight on J.T.'s pain reporting as evidence that she suffers from chronic pain.

[28] J.T. relied upon two Disability Certificates (OCF-3s), both completed by Dr. Minnella, chiropractor, dated July 12, 2016 and November 17, 2016. The July 12, 2016 OCF-3 listed various soft-tissue injuries in the injury and sequelae information section including sprain/strain of joints and ligaments of J.T.'s right hip and thigh and headaches. Dr. Minnella's July 12, 2016 OCF-3 confirmed that J.T. was unable to perform the essential tasks of her employment, that she was unable to return to work on modified duties, that she was completely unable to carry on a normal life and was restricted in her ability to perform her pre-accident housekeeping and home maintenance services.

[29] Only one day prior, J.T. attended an initial assessment with Lifemark Physiotherapy on July 11, 2016 in which her job was listed as a house cleaner and her current work status was listed as "Full-time, regular duties." This discrepancy in J.T.'s employment status was identified by Aviva in its submissions and not addressed by J.T. in her reply submissions. Furthermore, J.T. failed to report any hip or thigh pain, or headaches to Lifemark.

[30] Additionally, the Lifemark Physiotherapy initial assessment form listed J.T.'s treating physician as Dr. Kanna Vela. However, in her submissions, J.T. identified Dr. Rotor and Dr. Balasingam as being her treating physicians and the authors of the clinical notes and records (CNRs) submitted in her document brief at tabs 8 and 9, respectively. The CNRs at both tabs, however, are identical to

entries in the CNRs of Dr. Vela submitted by Aviva. In fact, included in the version of CNRs submitted by Aviva is correspondence from J.T.'s representative addressed to Dr. Vela requesting her CNRs. J.T. failed to explain this discrepancy of the authors of the CNRs in her reply submissions.

[31] Dr. Vela's CNRs report that the first time that J.T. saw her following the accident was on June 29, 2016. On this date, Dr. Vela diagnosed J.T. with whiplash of her neck, upper back and lower abdomen wall.

[32] The next CNR entry, which was omitted in the version of Dr. Vela's CNRs submitted by J.T., was dated January 10, 2017 in which J.T. saw Dr. Vela as a result of vomiting. There was no mention of the accident or any accident related complaints in this CNR entry. Following this visit, J.T. underwent an abdominal ultrasound on January 18, 2017 which found that she had cholelithiasis (gallstones).

[33] Dr. Vela's CNRs contain a note from Dr. Igor Goussev dated April 18, 2017 in which Dr. Goussev agrees with Dr. Vela that J.T. would benefit from laparoscopic cholecystectomy as she presented with complaints and symptoms consistent with symptomatic cholelithiasis. No information about any gallstones are included in any of the medical documents submitted by J.T. as evidence except in one consultation note in late 2018. This omission is important as one of the areas of J.T.'s pain complaints was her abdomen.

[34] Following her first post-accident related visit to Dr. Vela on June 29, 2016, the next accident related entry in Dr. Vela's CNRs was on September 20, 2017, well over one-year later. On this date, J.T. complained of intermittent right-side neck pain since the accident but failed to provide any evidence of any pain or treatments during the year in between these two visits. Additionally, J.T. reported that she was not taking any pain medication and the pain does not keep her up at night. Dr. Vela noted that J.T. had no tenderness to palpation on her neck midline or latera and that she had full range of motion. Dr. Vela renewed her recommendation for physiotherapy at this time.

[35] On February 21, 2018, five months later, J.T. next visited Dr. Vela and complained of chronic right sided neck pain and lower back pain "for a few weeks." Dr. Vela noted that J.T. had limited range of motion in her neck in all directions due to pain and diagnoses J.T. with chronic neck pain and "msk injury." Following this visit, J.T. had a cervical spine x-ray that was completed on February 21, 2018. The x-ray report dated March 1, 2018 noted "changes of

moderately severe degenerative disc disease at C5-C6 with lesser changes at C6-C7."[12]

[36] J.T. submitted a consultation report dated October 10, 2018 by Dr. Hendry Chan. Dr. Chan diagnosed J.T. with cervical spondylosis, whiplash injury and recommended a referral to a pain specialist for chronic pain management. I am unable to place weight upon Dr. Chan's report for the following reasons:

(i) Dr. Chan reported that J.T. had "good past health," and failed to comment on J.T.'s gallstones or on the impact of J.T.'s degenerative disc disease on his diagnosis and recommendation for a pain specialist for chronic pain management;

(ii) Dr. Chan's report that J.T. had prior physiotherapy treatment with good compliance in doing home exercise is contrary to the evidence in Dr. Vela's CNRs. On September 17, 2018, not even one month prior to Dr. Chan's report, J.T. reported that she was doing her home exercises only occasionally and on August 22, 2018, she reported to Dr. Vela that she was not doing her home exercises regularly; and

(iii) Dr. Chan's report that J.T.'s pain "stays the similar over time" is not supported by J.T.'s reports to Dr. Vela. On September 17, 2018, J.T. reported that her right-side neck pain was intermittent, occurring once every two weeks. J.T. consistently reported that her pain was intermittent to various other service providers and experts.

[37] I also place little weight on Dr. Minnella's December 12, 2018 Med Legal Report for several reasons. First, 9 of the 11 pages of Dr. Minnella's report is a detail summary of other documents and/or reports relied upon by J.T. in this hearing. No new evidence was offered in this portion of his report. Second, Dr. Minnella reports that J.T. was, "re-evaluated several times following the motor vehicle accident. Given the findings of these evaluations – her injuries have become chronic." It is unclear to me if Dr. Minnella is referring to his evaluations, none of which were included in J.T.'s evidence, or if this was his opinion of other expert evaluations. This statement is vague and does not assist me in determining whether or not J.T. suffers from chronic pain.

[38] Dr. Minnella's statements regarding J.T.'s daily living and employment are also not consistent with other reports. For example, Dr. Minnella states that J.T.'s chronic physical pain and emotional disturbances continue to interfere with "all

[12] Applicant's Document Brief, tab 8.

aspects of her activities of daily living. Moreover, post-accident, [J.T.] attempted to return to work but was unable to maintain her job demands. The injuries sustained in the subject MVA prevented her from returning to her previous employment." Dr. Minnella ultimately concludes that J.T. continues to suffer from chronic pain and "recent consultations with various providers highlight her ongoing dysfunction and the need for ongoing treatment."

[39] In contrast, the November 29, 2018 consultation note by Dr. Alfonse Marchie, physiatrist, submitted by J.T. did not recommend ongoing facility-based treatment. Although Dr. Marchie diagnosed J.T. with cervical disc degeneration with strain/sprain, he recommended treatment to maintain range of motion of neck and shoulders with stretching exercises which were demonstrated to J.T., massage area of tenderness, encourage gradual increase in aerobic activities, maintaining proper posture while sitting/standing and topical anti-inflammatories and Advil when pain flares.

[40] Additionally, Dr. Marchie's report contrasted Dr. Minnella's statements as Dr. Marchie noted that J.T. "works in the cleaning industry" and stated, "it does appear at this point that her pain symptoms are quite manageable and does not impinge on the quality of life." Dr. Marchie reported that he discussed other potential options, such as oral medications and injections, with J.T. but that he did not believe that J.T. would be a candidate given the fact that the pain appears to be manageable. J.T. reportedly agreed with this plan. Dr. Marchie noted full range of motion in J.T.'s cervical spine and shoulder movements. Dr. Marchie also noted no areas of tenderness on light tactile palpation.

[41] I prefer the evidence of Dr. Marchie over that of Dr. Minnella's because Dr. Marchie's report followed an examination of J.T. whereas it appears that Dr. Minnella's opinions and statements regarding J.T.'s current status appear to be based only on a paper review. Further, Dr. Marchie was the only specialist who was made aware of J.T.'s medical history that included her gallstones. Finally, Dr. Marchie's report is corroborated by the CNRs of Dr. Vela from in or about the same period of time as Dr. Vela noted on September 17, 2018 that J.T. had normal range of motion, no tenderness on palpation of spine or paraspinal musculature and had muscle tension bilaterally, with the right side greater than the left.

[42] Based on all of the evidence before me, I am unable to find that J.T. suffers from chronic pain from the accident that would place her injuries outside of the MIG.

Psychological injuries

[43] I also find that J.T. is not removed from the MIG as a result of a psychological condition.

[44] J.T. submits her injuries are not subject to the MIG because she suffers from psychological impairments as a result of the accident including adjustment disorder with Mixed Anxiety and Depressed Mood and specific phobia (travelling in and around a vehicle).

[45] To support her position, J.T. relies upon a psychological report dated January 5, 2017.[13] This report states that J.T. was assessed by Helen Ilios, psychotherapist, on December 28, 2016 under the supervision of Dr. Andrew Shaul, psychologist. The assessment of J.T. included a clinical interview and the administration of psychological self-report questionnaires. The report states, "based on both the clinical interview and test results, it is my opinion that [J.T.] requires and would benefit from assistance for her current emotional state," and that her overall presentation, again based on the clinical interview and self-report questionnaires, indicated that J.T. was suffering from an Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia (travelling in and around a vehicle).[14]

[46] I am unable to assign weight to the January 5, 2017 psychological report and the findings or opinions contained therein for the following reasons:

(i) It is unclear to me whose opinion is reflected in the report and who is diagnosing J.T. The report states that J.T. was assessed by Ms. Ilios under the supervision of Dr. Shaul and refers to "us" at least twice throughout and "I" without any indication who is the speaker. Further, the report repeatedly states, "it is my opinion," but is signed by both Ms. Ilios and Dr. Shaul. Also, the diagnosis of J.T. outlined above were based on J.T.'s clinical interview, which was completed by Ms. Ilios, and self-report questionnaires. If I accept that the report reflects Dr. Shaul's opinion, he has failed to provide an explanation on how he was able to diagnose J.T. as he did not conduct the clinical interview;

(ii) The report notes that the only documents reviewed in preparation of the report were Dr. Minnela's July 12, 2016 OCF-3 and July 11, 2016 Treatment and Assessment Plan (OCF-18); and

[13] Applicant's Document Brief, tab 12.
[14] *Ibid*. at page 12.

(iii) The report contains contradictory statements. For example, the report noted that prior to the accident, J.T. "enjoyed being social and would partake in social gatherings on a regular basis. She described herself as being active, social and optimistic."[15] However, the report later states that J.T., "has never socialized a great deal. She explained that she has always been shy."[16] Additionally, J.T.'s score on the Beck Anxiety Inventory (BAI) demonstrated that she was experiencing mild levels of anxiety.[17] The report later states that J.T. "is currently suffering from elevated levels of anxiety."[18]

[47] To refute J.T.'s claims that she suffered a psychological injury as a result of the accident, Aviva relied upon a psychology assessment addendum report dated October 12, 2018 by Dr. David Prendergast, psychologist. Dr. Prendergast noted that he previously assessed J.T. on January 11, 2017. At that time, he did not find that she suffered from a diagnosable psychological condition following a clinical interview that he carried out himself. At that time, J.T. reported that she was planning a return to employment as a house cleaner as soon as possible and that she had no interest in mental health services.

[48] In his addendum, Dr. Prendergast had an opportunity to review additional documents, which included the January 5, 2017 psychological report, and noted that J.T. stated that she had no recall of a prior meeting with a mental health examiner in her original assessment. Dr. Prendergast also stated that the self-reporting questionnaires used by Dr. Shaul and Ms. Ilios in J.T.'s assessment are "meant to be assistive devices for the psychologist to determine the presence of such symptomatology. It remains for the psychologist to determine the significance of these test results." Dr. Prendergast's opinion remained unchanged following his review of the additional documents that at the time he first assessed J.T., that she did not suffer from a diagnosable psychological condition.

[49] In reviewing the evidence before me on the issue of whether or not J.T. sustained a psychological impairment as a result of the accident, I prefer the evidence of Dr. Prendergast over J.T.'s January 5, 2017 psychological report because Dr. Prendergast's findings are more consistent with the lack of any reports of any psychological complaints to Dr. Vela by J.T. in addition to the issues outline above with Dr. Shaul's and Ms. Ilios' report.

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[15] *Ibid*. at page 5.
[16] *Ibid*. at page 8.
[17] *Ibid*. at page 10.
[18] *Ibid*. at page 12.

[50] As a result, J.T. failed to prove on a balance of probailities that she sustained a psychological impairment as a result of the accident and, therefore, she is not removed from the MIG on this basis.

Treatment Plans

[51] As I have found that J.T.'s injuries do not fall outside of the MIG and she has exhausted the $3,500.00 MIG funding limit for medical and rehabilitation benefits, it is not necessary for me to determine the reasonableness and necessity of the treatment plans in dispute.

Interest

[52] Because I have found that there are no benefits or costs that are overdue, no interest is payable.

Costs

[53] I find that Aviva has failed to prove on a balance of probabilities that J.T. acted unreasonably, vexatiously, frivolously or in bad faith in these proceedings and, therefore, Aviva is not entitled to costs of the proceedings.

[54] 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.

[55] Aviva argues that it is entitled to its costs of this proceeding because of the late exchange of the two reports by J.T. that it sought to exclude as evidence.

[56] As stated above, J.T.'s evidence was not due on November 5, 2018 as argued by Aviva. Instead, the documents were served 4 days late on December 21, 2018. While I have not accepted some of J.T.'s evidence as to when she received Dr. Minnella's Med Legal Report, I find that J.T.'s actions in failing to comply with the Tribunal's September 25, 2018 Order do not rise to unreasonable, frivolous or vexatious actions and did not interfere with a fair, efficient and effective hearing.

[57] For the reasons set out above, Aviva is not entitled to its request for costs in the amount of $3,000.00.

CONCLUSION

[58] For the reasons outlined above, I find:

(i) J.T. sustained predominately minor injuries as defined under the *Schedule*;

(ii) J.T. is not removed from the MIG as a result of chronic pain or any psychological condition;

(iii) it is not necessary to determine whether or not the treatment plans in dispute are reasonable and necessary because the maximum of $3,500.00 for medical and rehabilitation benefits under the MIG has been exhausted;

(iv) J.T. is not entitled to interest;

(v) Aviva is not entitled to costs; and

(vi) The application is dismissed.

Released: August 28, 2019

Lindsay Lake
Adjudicator