



**Citation: Niu v. Certas Direct Insurance Company, 2022 ONLAT 20-010066/AABS**

**Licence Appeal Tribunal File Number: 20-010066/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:

**Yong Niu**

**Applicant**

and

**Certas Direct Insurance Company**

**Respondent**

## **DECISION AND ORDER**

**ADJUDICATOR: Stephanie Kepman**

### **APPEARANCES:**

**For the Applicant:** Yu Jiang, Paralegal

**For the Respondent:** Yann Grand-Clement, Counsel

**HEARD:** By way of written hearing

## REASONS FOR DECISION AND ORDER

### BACKGROUND

- [1] The applicant was involved in an automobile accident on **October 6, 2018** and sought benefits pursuant to the Statutory Accident Benefits Schedule - *Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”)<sup>1</sup>. The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).

### ISSUES

- [2] The issues to be decided by the Tribunal are:
- i. Is the applicant entitled to a non-earner benefit of \$185.00 per week from November 4, 2018 to October 6, 2020 (2-year mark)?
  - ii. Are the applicant’s injuries predominantly minor as defined in s. 3 of the Schedule and therefore subject to treatment within the \$3,500.00 limit and in the Minor Injury Guideline?
  - iii. If the applicant’s injuries are not subject to the Minor Injury Guideline:
    - a. Is the applicant entitled to a medical benefit in the amount of \$4,303.90 for chiropractic services recommended by Total Recovery Rehab Centre as per OCF-18 dated July 13, 2019 and denied July 23, 2019?
    - b. Is the applicant entitled to a medical benefit in the amount of \$3,701.88 for psychological services recommended by Somatic Assessment and Treatment Clinic as per OCF-18 dated May 8, 2020 and denied on May 22, 2020?
    - c. Is the applicant entitled to the cost of an examination in the amount of \$2,200.00 for a psychological assessment recommended by Somatic Assessment and Treatment Clinic as per OCF-18 dated April 29, 2019 and denied on May 10, 2019?
  - iv. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

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<sup>1</sup> O. Reg. 34/10 as amended.

- v. Is the applicant entitled to interest on any overdue payment of benefits?

## LAW

- [3] Section 3(1) of the *Schedule* defines an “impairment” as loss or abnormality of a psychological, physiological or anatomical structure or function.
- [4] Section 3(1) of the *Schedule* states that a minor injury consists of one or more a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury. Section 3(1) of the *Schedule* also establishes the treatment framework regarding minor injuries.
- [5] Section 3(7) of the *Schedule* states that a person suffers a complete inability to carry on a normal life as a result of an accident if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.
- [6] Section 12(1)1 of the *Schedule* states that the insurer shall pay a non-earner benefit to an insured person who sustains an impairment as a result of the accident if the insured person suffers a complete inability to carry on a normal life as a result of, and within 104 weeks after the accident and does not qualify for an income replacement benefit (an ‘IRB’).
- [7] Section 18(2) of the *Schedule* provides that the \$3,500.00 funding limit does not apply if an applicant provides compelling medical evidence that she has a pre-existing medical condition that will prevent her from achieving maximal recovery from the minor injury if she is subject to the MIG funding limit.
- [8] Section 51(2) of the *Schedule* states that interest is due on a benefit that is overdue if the insurer does not pay the benefit within the time stated by the *Schedule*.
- [9] In *Scarlett v. Belair Insurance*<sup>2</sup>, the Divisional Court reviewed the minor injury provisions in the *Schedule*, finding that they were a limit on an insurer’s liability, not an exclusion from coverage, and that the onus of establishing entitlement beyond the \$3,500.00 MIG cap rests with the claimant. Applying *Scarlett*, the applicant must establish her entitlement to coverage beyond the \$3,500.00 cap for minor injuries.

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<sup>2</sup> *Scarlett v. Belair Insurance*<sup>2</sup>, 2015 ONSC 3635 at para 24.

- [10] In *Heath v. Economical Mutual Insurance Company*<sup>3</sup>, the Court of Appeal determined the test for a non-earner benefit was if an applicant has, within 104 weeks of the accident, sustained an impairment which results in a “complete inability to engage in substantially all of his pre-accident activities.” This determination is made by comparing the applicant’s pre-accident activities to his post-accident activities, with the applicant bearing the onus of showing that these changes caused the applicant to be continuously prevented from engaging in substantially all his pre-accident activities. With regard to “continuously prevents”, the applicant must show that as a result of the accident, he “suffers from a disability or incapacity of the requisite nature, extent or degree which is and remains uninterrupted.”
- [11] Section 10 of R.R.O. 1990, *Regulation 664, Automobile Insurance* states that if the Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Tribunal, in addition to awarding the benefits and interest to the insured person, may award a lump sum of up to fifty percent of the amount to which the insured person was entitled to at the time of the award, with interest, on all amounts owing to the insured person.

**NON-EARNER BENEFIT FROM NOVEMBER 4, 2018, TO OCTOBER 6, 2020 (2-YEAR MARK)**

- [12] The applicant submitted that as a result of his accident, he suffers a complete inability to carry on a normal life due to his pain and swelling in his right wrist and legs, headaches and dizziness as well as psychological impairments. The applicant submitted that he cannot complete many of his pre-accident activities of daily living (“ADL”s) as a result of his accident -related injuries.
- [13] The applicant relied on the clinical notes and records of Dr. Peter Pang, family doctor. The applicant submitted that he visited Dr. Pang just over a month after his accident<sup>4</sup> and complained of pain and swelling in his right wrist. The applicant submitted that he returned to Dr. Pang approximately four months later<sup>5</sup> with complaints of right hand and lower back pain.
- [14] The applicant relied on Dr. Pang’s clinical notes and records, which showed that the applicant underwent magnetic resonance imaging<sup>6</sup> (“MRI”), where the applicant was found to a cystic lesion between the base of his fourth and fifth proximal phalanges, which was likely a ganglion cyst attached to the sinoatrial

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<sup>3</sup> *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391 at paras 32, 33.

<sup>4</sup> Based on the clinical notes and records of Dr. Pang, dated November 10, 2018.

<sup>5</sup> Based on the clinical notes and records of Dr. Pang, dated February 6, 2019.

<sup>6</sup> Based on the MRI report of Scarborough Hospital, dated January 20, 2019.

tendon or joint capsule. The report also noted that the applicant has had a right-hand nodule between his joints for 3 months.

- [15] The applicant also relied on the clinical notes and records of Qui Xu, physiotherapist. The applicant submitted that when he originally visited Ms. Xu<sup>7</sup>, he reported complaints of headaches, dizziness, tinnitus, back pain, neck pain, poor sleep and nightmares as well as the painful lump in his right hand. The applicant reported to Ms. Xu that the lump has gotten bigger since his accident and he could not close his 4<sup>th</sup> and 5<sup>th</sup> fingers in his right hand.
- [16] The applicant relied on the disability certificate <sup>8</sup>(“OCF-3”) of Ms. Xu, which found that the applicant suffered a complete inability to carry on a normal life, as the applicant was unable to perform his pre-accident ADLs and housekeeping. Ms. Xu also opined that the applicant suffered a substantial inability to perform his housekeeping and home maintenance service that he normally performed before his accident.
- [17] Ms. Xu also opined that the applicant’s anticipated disability duration was more than 12 weeks because of his whiplash pain and dizziness, limited function and decreased range of motion (“ROM”) due the lump in his right hand and was unable to make a fist with this hand. Ms. Xu also noted that the applicant was unable to sit or walk for prolonged periods of time or lift heavy items due to his neck and back pain.
- [18] Ms. Xu noted the following injuries and sequelae in the applicant as a result of his accident: sprain and strain of his cervical and lumbar spine, noise effects on inner ear, non-organic sleep disorder, nightmares, malaise and fatigue, cervicalgia, dorsalgia, whiplash associated disorder (“WAD-II”) contusion of other parts (parts?) of the wrist and hand and other and unspecified parts of the foot, localized swelling, mass and lump, upper and lower limb and dizziness and giddiness.
- [19] The applicant also relied on the clinical notes and records of Dr. Georgia Palantzas, chiropractor, that noted minimal to moderate improvement with his pain and radicular symptoms on his right side<sup>9</sup>. Dr. Palantzas opined the following: “the patient is not at pre-accident state and needs continual uninterrupted therapy for their injuries. Range of motion at the cervical, thoracic,

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<sup>7</sup> Based on the clinical notes and records of Ms. Xu, dated January 4, 2019.

<sup>8</sup> OCF-3 of Ms. Xu, dated January 4, 2019.

<sup>9</sup> Based on the clinical notes and records of Dr. Palantzas, dated March 11, 2019, and the OCF-18 for chiropractic treatment, in the amount of \$1,300.00 of Dr. Palantzas, dated March 11, 2019.

and lumbar spine as well as the shoulder region continues to be restricted and painful. Radicular symptoms are present in the extremities<sup>10</sup>.”

- [20] The applicant also relied on further clinical notes and records<sup>11</sup> from Dr. Palantzas, that noted that the applicant still had radicular symptoms in his right upper extremity and loss of strength. The applicant relied on a subsequent treatment plan<sup>12</sup> (“OCF-18”) of Dr. Palantzas which noted that the applicant’s chronic injuries were a barrier to his recovery.
- [21] With respect to the applicant’s ADLs, the applicant submitted that before his accident, he was in good health and independent. The applicant submitted that his injuries and impairments have impacted his housekeeping tasks as a result of his wrist and lower back injuries.
- [22] The applicant submitted he has difficulty with his grocery shopping, meal preparation, cooking, cleaning, and home maintenance activities and relied on his Activities of Normal Life <sup>13</sup>(“OCF-12”) to demonstrate this. The applicant submitted that he was having trouble with his housekeeping tasks due to his hand pain including bathing, grooming, dressing, toileting and other. The applicant indicated he was “partially” able to complete these tasks.
- [23] The applicant also relied on the OCF-12 with respect to his psychological injuries, as he indicated on the form that he was “partially” able to complete the following functional ability activities: walking, climbing stairs, driving, riding in car, public transportation, standing and sitting. Based on this information, the applicant submitted that his accident-related impairments have prevented him from carrying on a normal life as a result of his accident.
- [24] To this point, the applicant relied on the matter of *Bissessar v. State Farm Mutual Automobile Insurance Company*<sup>14</sup>, where the Financial Services Commission of Ontario (“FSCO”) found that though the threshold to qualify under the complete inability was very high, it should not be read so strictly that it is impossible to qualify.
- [25] The applicant also relied on the matter of *Galdamez v. Allstate Insurance Co. of Canada*<sup>15</sup>, where the Ontario Court of Appeal found that an applicant may qualify

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<sup>10</sup> Page 7 of the OCF-18 for chiropractic treatment, in the amount of \$1,300.00 of Dr. Palantzas, dated March 11, 2019.

<sup>11</sup> Dated July 13, 2019.

<sup>12</sup> OCF-18 of Dr. Palantzas in the amount of \$4,303.90, dated July 13, 2019.

<sup>13</sup> OCF-12 of the applicant dated February 1, 2019.

<sup>14</sup> *Bissessar v. State Farm Mutual Automobile Insurance Company* FSCO A11-000204.

<sup>15</sup> *Galdamez v. Allstate Insurance Co. of Canada*, 2012 ONCA 508 at para. 48.

for an NEB if the person has “suffered a severe diminution in their overall quality of life.”

- [26] The applicant also relied on decision *16-000879 v Unifund Assurance Company*<sup>16</sup>, where the Tribunal found that if an applicant is “experiencing significant restrictions, it may not count as “engaging in” that activity<sup>17</sup>”.
- [27] Based on all of this caselaw, the applicant submitted that he has shown that as a result of his accident, he is unable to engage in his ADLs due to significant restrictions.
- [28] The applicant also relied on the Psychological Assessment<sup>18</sup> of Yvonne Ma, psychotherapist, supervised by Dr. Sharleen McDowell, psychologist. Ms. Ma reported that the applicant reported experiencing headaches, and continuous pain and heaviness in his legs and right wrist. The applicant also reported that the accident impacted his ADLs and job, as the applicant could no longer complete his work tasks and could now only do light work like cleaning. Though the applicant did work in a cleaning business, he acknowledged that this issue in dispute related to an NEB.
- [29] The applicant also reported to Ms. Ma that he experienced irritability and avoidance behavior as a result of his accident. The applicant reported to Ms. Ma that he had avoided seeing friends after his accident. The applicant further reported that he did engage in socialization such as visiting friends and family in prior to his accident but stopped after his accident due to low mood and loss of motivation. He reported a loss of interest in activities he enjoyed pre-accident, and poor sleep due to nightmares and intrusive thoughts.
- [30] The applicant additionally relied on the clinical notes and records<sup>19</sup> of Dr. Heung-Wing Li, physician, where the applicant reported experiencing depression, poor sleep with nightmares and driving phobia. Dr. Li noted that the applicant was crying in the office and appeared frustrated. Dr. Li noted “pt is clearly sad and downcast with significant depressed affect feel himself dying [sic]”. Dr. Li noted a diagnosis of depression and post-traumatic stress disorder (“PTSD”) and provided the applicant with a referral for a psychological assessment<sup>20</sup>.

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<sup>16</sup> *16-000879 v Unifund Assurance Company*, 2017 CanLII 9811 (ON LAT) at para. 34.

<sup>17</sup> As seen in *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391 at para. 42.

<sup>18</sup> Psychological Assessment Report of Ms. Ma dated May 1, 2020.

<sup>19</sup> Dated November 13, 2019.

<sup>20</sup> Based on Dr. Li’s Referral Memo, dated November 19, 2019.

- [31] The applicant also submitted that he experienced significant psychological impairments as a result of his accident and relied on Ms. Ma's Psychological Assessment, where the applicant reported his difficulties with sleep. The applicant relied on Ms. Ma's assessment, which diagnosed the applicant with major depressive disorder with anxious distress, somatic symptom disorder – predominated with pain as well as specific phobia – travel as a result of his accident.
- [32] Ms. Ma also commented on the applicant's psychological function and submitted that he has suffered a psychological impairment which requires psychological treatment and "impeded his ability to function in his daily life".
- [33] The applicant argued that the respondent failed to consider all of the above-mentioned evidence, and this was demonstrated by the respondent's failure to have the applicant subjected to an Insurer's Examination ("IE") to determine his NEB eligibility.
- [34] The respondent argued that the applicant has not shown that he suffers from a complete and continuous inability to carry on a normal life. The respondent submitted that based on the principles of *Heath*, the applicant has not met his evidentiary burden.
- [35] The respondent addressed the clinical notes and records of Dr. Pang, family physician the respondent submitted they were of little value as the majority of them were illegible.
- [36] The respondent noted that the applicant was seen by Dr. Pang with respect to a painful lump in his right hand<sup>21</sup>, lower back pain<sup>22</sup>, and his continuing right-hand pain which was diagnosed as fibroma.
- [37] The respondent also relied on the applicant's Ontario Health Insurance Plan ("OHIP") summary and commented that this document shows that the applicant did not receive OHIP treatment from February 21, 2019, to November 13, 2019, when the applicant visited Dr. Li for influenza. As this was the final entry in the applicant's OHIP summary, the respondent submitted that the applicant's accident-related injuries are minor, because if they were as severe as alleged, the applicant would have sought further OHIP funded treatment.

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<sup>21</sup> Based on the clinical notes and records of Dr. Pang, dated November 10, 2018.

<sup>22</sup> Based on the clinical notes and records of Dr. Pang, dated January 7, 2019



- [38] The respondent also took issue with Dr. Palantaz's, chiropractor, evidence on this basis and noted that the physical injuries reported by the applicant were not reported to his family doctor.
- [39] With respect to the alleged psychological impairments of the applicant, the respondent submitted that the applicant has not met his evidence onus of showing such.
- [40] The respondent submitted that the evidence of Dr. Li should be ignored, as the doctor has had his medical license suspended many times over the last 40 years and been subjected to practice restrictions by the College of Physicians and Surgeons of Ontario. The respondent submitted that the doctor is not a reliable source of medical information due to not being "trustworthy", nor is his evidence corroborated by other evidence.
- [41] The respondent also took issue with the psychological report of Ms. Ma, specifically, that the applicant referred to it is "Dr. McDowall's" report. The respondent submitted that this was misleading, as the report was prepared by Ms. Ma and Dr. McDowall likely had little to do with its preparation, as the interview and assessment were both conducted by Ms. Ma.
- [42] The respondent also took issue with Ms. Ma's diagnosis of "severe emotional and psychological distress" as this diagnosis was not supported by the evidence of Dr. Pang, who did not note any psychological symptomology or complaints from the applicant.
- [43] The respondent also argued that as Ms. Ma's findings were made over a year and a half after the applicant's accident, and the fact that Dr. Pang has no notes with respect to the applicant's psychological impairments show that this evidence should be given little to no weight.
- [44] The respondent noted that Ms. Ma did not review the applicant's clinical notes and records before her assessment and report, meaning that it should be given little weight, as it was not based on vital information related to the applicant's health.
- [45] The respondent also relied on a medical questionnaire<sup>23</sup> authored by Dr. Pang, which noted that the applicant did not suffer a substantial nor complete inability to carry on a normal life and did not suffer a substantial or complete inability to complete his pre-accident housekeeping duties.

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<sup>23</sup> Medical Questionnaire of the applicant, authored by Dr. Pang, dated October 6, 2018.

- [46] The respondent also relied on the OCF-12 mentioned above, which the respondent noted that the applicant's responses do not say he is unable to do any of his ADLs but rather, has difficulty with them. The respondent submitted that this supports its position that the applicant does not suffer a complete inability to carry on a normal life.

After considering the submissions and evidence of the parties, based on a balance of probabilities, I find that the applicant has not shown that he suffers a complete inability to carry on a normal life as a result of the accident.

- [47] In terms of the respondent's submissions regarding *Heath*, I also chose to adopt said criteria, as I find it to be a useful tool when assessing NEB requests, which state the applicant:

- Must have a comparison of the applicant's activities and life circumstances before the accident to those post-accident.
- Include an assessment of the applicant's activities and life circumstances before is accident over a reasonable period, with the duration depending on the circumstances.
- Consider all of the applicant's pre-accident ADLs, with greater weight on the activities that were more important to the applicant's pre-accident life.
- Must show that his accident-relate injuries continuously prevent him from engaging in substantially all of his pre-accident activities, meaning the disability or incapacity must be interrupted.
- "Engaging in" is to be interpreted from a qualitative perspective, meaning that if an applicant has significant restrictions when performing an activity, it may not count as "engaging in" said activity.
- Should the applicant advance pain as the primary barrier related to pre-accident activities, the question becomes the degree of pain that prevents the applicant from doing said activities and not if the applicant can physically perform said activities.

- [48] Though the applicant did make submissions with respect to the facts of *Heath*, namely that:

- Before his accident, he was in good health and independent. He submitted that as a result of his accident, he could not perform his ADLs.

- That the applicant was avoiding social activities due to low mood and fear avoidance.
- That the applicant sustained a serious psychological impairment.

- [49] I agree that this evidence did not satisfy the test of *Heath*. This is because the applicant did not provide a fulsome comparison of his pre- and post-accident activities beyond his OCF-12 and self-reporting during medical appointments, assessments and tests. The applicant also did not provide that the applicant's disability was uninterrupted, as the respondent was able to show that the applicant was able to engage in most of his ADLs, albeit with some difficulty. Moreover, as the applicant alleged his pain prevents him from engaging in his ADLs, the applicant has not led persuasive evidence with respect of the degree of pain he experiences with respect to his ADLs.
- [50] I also agree that the applicant has not shown that he satisfied the disability test of section 3(7) of the *Schedule*, meaning a complete inability to carry on a normal life as a result of his accident and sustained an impairment that continuously prevents him from engaging in substantially off of his activities which he normally engaged in before his accident.
- [51] Though I am alive to the applicant's argument with respect to *Bissessar* in that the threshold to qualify for a NEB should not be read so strictly that it is impossible to qualify, I also agreed with the respondent's submission that the applicant had not met his evidentiary onus.
- [52] I also am alive to the applicant's submissions with respect to *Galdamez* and that an applicant may qualify for a NEB if they have suffered a severe diminution in their overall quality of life. However, I agree with the respondent's argument that the applicant has not proven he satisfies the section 3(7) disability test.
- [53] With respect to *16-000879 v Unifund Assurance Company*, I agree that an applicant is "experiencing significant restrictions, it may not count as "engaging in" that activity.
- [54] However, when considering this matter with respect to the 5th *Heath* principle, I find that the applicant has not shown "experiencing significant restrictions" in his activities.
- [55] With respect to the applicant's OCF-12, I found this evidence to be less than persuasive in demonstrating that his ADLs had been significantly restricted by his accident-related injuries. I agree with the respondent's position that this

document did not show that the applicant had a complete inability to carry on a normal life, but rather he experienced difficulty with his ADLs

- [56] I also found that the applicant's evidence in OCF-12 did not provide a fulsome comparison of the applicant's pre- and post-accident activities and did not satisfy the 1<sup>st</sup> principle of *Heath*.
- [57] Normally, I would have expected the applicant to substantiate his pre- and post-accident activities via an affidavit or testimony to provide fulsome information with respect to the impact and effect the accident has had on his pre and post accident ADLs. I was not provided with this evidence.
- [58] With respect to Dr. Pang's clinical notes and records, I agree with the respondent's submissions that much of them were illegible. However, I was able to decipher that: the applicant had visited Dr. Pang after his accident with respect to his right-hand pain and lower back pain; he underwent an MRI; and his hand injury was diagnosed as fibroma.
- [59] I also noted that I did not find any evidence of the applicant reporting headaches, dizziness or psychological symptoms to Dr. Pang. Nor did the applicant provide any evidence from Dr. Pang as to the applicant's future treatment of his right-hand fibroma.
- [60] I agree with the respondent's comments on Dr. Pang's medical questionnaire demonstrating that the doctor found that the applicant did not suffer a substantial or complete inability to carry on a normal life, or to engage in his pre-accident ADLs and found this evidence to be persuasive.
- [61] I also agree with the respondent's comments with respect to the applicant's OHIP summary, namely that this document showed that the applicant did not attend at a family or walk in doctor's office for a period of over eight months. I find that the OHIP summary showed that the applicant did not experience continuous, and uninterrupted disability.
- [62] With respect to Ms. Xu's evidence, I agree with the respondent's comments that the applicant's symptoms noted by Ms. Xu ought to have been noted on his OHIP summary and were not. Furthermore that the applicant's alleged impairments listed by Ms. Xu were not substantiated by the applicant's OHIP summary. Therefore, I found all of Ms. Xu's evidence to be unpersuasive.

- [63] Moreover, I put no weight on Ms. Xu's findings with respect to the applicant's psychological impairment, as this goes beyond Ms. Xu's scope of practice as a physiotherapist.
- [64] With respect to Dr. Palantzas's evidence, again, I echo my comments with respect to the applicant's lack of OHIP evidence with respect to his alleged injuries. I also put no weight on the doctor's recommendation that the applicant required uninterrupted therapy for his injuries, as this was not substantiated by the applicant's family doctor's clinical notes and records.
- [65] I also put less weight on Ms. Ma's Psychological Assessment, as with respect to the applicant's physical injuries. Assessing physical injuries goes beyond the scope of a psychotherapist and therefore, only considered this evidence as the applicant self-reporting them. I accepted that the applicant reported experiencing physical pain in his wrist and lower back as a result of his accident, however this evidence does not satisfy the NEB disability test.
- [66] I agree with the respondent's submissions that Ms. Ma's diagnoses with respect to the applicant's psychological injuries were not reflected in the applicant's OHIP summary, nor in Dr. Pang's clinical notes and records. Therefore, I found this evidence less than persuasive.
- [67] I also agree with the respondent's submissions that Ms. Ma's report did not rely on the applicant's clinical notes and records from Dr. Pang was concerning. Ms. Ma did not have a complete picture of the applicant's pre-accident and post-accident life and health and therefore, I put little weight on Ms. Ma's report.
- [68] Finally, with respect to the evidence of Dr. Li, I understand the applicant's submissions that he reported to Dr. Li experiencing depression, poor sleep with nightmares and driving phobia. As a result, Dr. Li diagnosed the applicant with depression and driving phobia.
- [69] However, I agree with and am persuaded by the respondent's submissions with respect to Dr. Li's evidence, namely that the doctor's medical license has been subject to many sanctions and restrictions over the last 40 years due to issues with his practice. As the applicant did not directly address this issue, I found that Dr. Li was not a reliable source of evidence, due to issues of trustworthiness and the fact that his clinical notes and records were not corroborated by contemporaneous medical evidence.
- [70] Therefore, for all of the reasons above, the applicant is not entitled to an NEB for the period in dispute.

## APPLICABILITY OF THE MIG

- [71] The applicant submitted that as a result of the accident, he suffers from chronic pain and psychological injuries, both which require removal from the MIG.
- [72] The respondent disagreed with this position and submitted that the applicant does not have chronic pain or a psychological injury as a result of the accident, and his injuries do not require removal from the MIG.

### ***Chronic Pain***

- [73] When the Tribunal considers chronic pain, for it to warrant removal from the MIG, said pain must have an impact on an applicant's functionality.
- [74] The applicant submits that he suffers from chronic pain, which removes him from the MIG, because the prescribed definition of "minor injury" does not include chronic pain conditions.
- [75] To this point, the applicant relied on the decision of *C.G. v The Guarantee Company of North America*<sup>24</sup>, where the Tribunal found: "chronic pain is a condition that persists for three to six months, and a formal diagnosis of chronic pain is not required to remove an applicant from the MIG."
- [76] The applicant argued that his medical evidence confirms that he has issues with his housekeeping chores, and with sitting and standing for prolonged periods of time<sup>25</sup>.
- [77] The applicant submitted that his has not returned to his pre-accident functionality and continues to deal with pain and emotional distress as a result of his accident-related chronic pain.
- [78] The applicant concluded by submitting that based on the above, it is clear that he suffers from chronic pain in his hand, wrist and back, based on the American Medical Association Guidelines<sup>26</sup> ("AMA Guides") for chronic pain and argued that:

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<sup>24</sup> *C.G. v The Guarantee Company of North America*, 2020 CanLII 63599 (ON LAT) at para. 37.

<sup>25</sup> Based on the OCF-18s Dr. Palantzas.

<sup>26</sup> Based on the six criteria seen in *P.M. v Aviva General Insurance*, 2020 CanLII 80284 (ON LAT) at para. 17.

- The applicant also submitted that due to his chronic, on-going pain, he reported he relied on medication from China for his pain and inflammation<sup>27</sup>, satisfying criteria 1 of the AMA Guides.
- The applicant continues to suffer from chronic pain satisfying criteria 5 of the AMA Guides, as shown in the clinical notes and records of Dr. Pang confirm that the applicant is still dealing with hand, wrist and back pain<sup>28</sup>.
- The applicant submitted he has withdrawn from his social engagements due to his on-going, chronic pain, and satisfied criteria 4.

[79] The respondent disputed that the applicant had chronic pain that required removal from the MIG as a result of his accident. The respondent noted that the applicant had not been diagnosed with chronic pain by any of his treating medical professionals.

[80] The respondent further submitted that the Tribunal has repeatedly adopted the approach of assessing an applicant's claim of chronic pain against the six criteria described in the *American Medical Association Guides (AMA Guides)*,<sup>29</sup> which state that at least three of the following criteria must be met for a diagnosis:

- (i) Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances;
- (ii) Excessive dependence on health care providers, spouse, or family;
- (iii) Secondary physical deconditioning due to disuse and or fear-avoidance of physical activity due to pain;
- (iv) Withdrawal from social milieu, including work, recreation, or other social contacts;
- (v) Failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family or recreational needs; and
- (vi) Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviors.

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<sup>27</sup> Based on the Psychological Assessment Report of Ms. Ma dated May 1, 2020.

<sup>28</sup> Based on OCF-12, dated February 1, 2019, and the OCF-18s Dr. Palantzas.

<sup>29</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 6<sup>th</sup> Edition, 2008, pages 23-24.

- [81] The respondent submitted the following with respect to the six criteria:
- (i) The applicant has not provided evidence of overuse of prescription drugs.
  - (ii) The applicant has not provided evidence of excessive dependence on a third party, or medical professional, as demonstrated by the applicant's OHIP summary.
  - (iii) The applicant has not provided evidence of physical deconditioning due to disuse/fear-avoidance of physical activity due to pain and was able to do most of his household activities, albeit on a partial basis<sup>30</sup>.
  - (iv) The applicant has not provided evidence of withdrawal from his social milieu, and indicated he was still able to socialize on a partial basis<sup>31</sup>.
- [82] The respondent did not address the remaining criteria, as it submitted that the applicant had not shown that he suffers from chronic pain requiring removal from the MIG.
- [83] After considering the submissions of the parties, based on a balance of probabilities, I find that the applicant has not met his evidentiary onus in order to escape the MIG on the basis of chronic pain.
- [84] With respect to the AMA Guides, I find these to be a useful tool when assessing chronic pain, and, on consent of the parties, will adopt them in this decision.
- (i) I was not presented with persuasive evidence that the applicant relied on or abused prescription drugs. The applicant disclosed he took Chinese medicine for his pain and inflammation, but failed to disclose the name, dosage or prescriber of medication. Therefore, the applicant has not fulfilled this criterion.
  - (ii) I was not provided with evidence of applicant depending excessively on health care providers, a spouse or family member. Though I did note that the applicant frequently received paramedical care after his accident, I did not find this to be being excessive.
  - (iii) The applicant did not provide persuasive evidence of physical deconditioning to disuse and/or fear-avoidance of physical activity due to pain. Though I noted the applicant reported having issues with his ADLs

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<sup>30</sup> Based on the answers in the applicant's OCF-12.

<sup>31</sup> *Ibid.*



in his OCF-12, he reported being able to complete the majority of them in a partial capacity, which does not fulfil this criterion. Moreover, the applicant failed to provide corroborating contemporaneous evidence to support this.

- [85] I agree with the applicant's submissions with respect to *C.G. v The Guarantee Company of North America* and agree that chronic pain does not require a formal diagnosis for an applicant to be removed from the MIG.
- [86] I also accepted that the applicant made many self-reports regarding his right hand/wrist pain and lower back after his accident, as seen in the evidence of Dr. Pang, Dr. Palantzas and Ms. Ma.
- [87] As the applicant has not fulfilled at least three of the above criteria, I find he does not suffer from chronic pain and therefore does not require removal from the MIG.

### ***Psychological Impairment***

- [88] Psychological impairments, if established, fall outside the MIG, because such impairments are not included in the prescribed definition of "minor injuries" In the *Schedule*.
- [89] The applicant submitted that as a result of his accident, he suffers from psychological impairments.
- [90] The applicant relied on the CNRs of Ms. Xu, where the applicant reported poor sleep and nightmare as a result of the accident<sup>32</sup>. The applicant also relied on Ms. Xu's OCF-3<sup>33</sup>, which noted the following additional symptoms: dizziness and giddiness, and malaise and fatigue.
- [91] The applicant also relied on the Psychological Assessment<sup>34</sup> of Ms. Ma, as discussed above. This assessment diagnosed the applicant with major depressive disorder with anxious distress, somatic symptom disorder – predominated with pain as well as specific phobia – travel as a result of his accident.

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<sup>32</sup> Clinical notes and records of Ms. Xu dated January 4, 2019.

<sup>33</sup> OCF-3 of Ms. Xu, dated January 4, 2019.

<sup>34</sup> Psychological Assessment Report of Ms. Ma dated May 1, 2020.

- [92] The applicant also relied on the evidence of Dr. Heung-Wing Li, physician, who diagnosed the applicant with depression and PTSD and referred the applicant for a psychological assessment<sup>35</sup>.
- [93] The respondent denied that the applicant suffered from psychological impairments as a result of his accident.
- [94] The respondent argued that Dr. Li's evidence should be given little to no weight due to issues with being an "unreliable" doctor<sup>36</sup>.
- [95] The respondent also argued that Ms. Ma's evidence should be disregarded, as she failed to consider the applicant's clinical notes of the applicant's family doctor
- [96] The respondent submitted that that Ms. Ma's evidence should also be afforded little to no weight on the basis that Ms. Ma, Ms. Xu, Dr. McDowall and Dr. Palantzas all work for the same service provider. This is therefore a conflict of interest, as they all would gain financially if the applicant were removed from the MIG, and further treatment was ordered beyond the MIG limit.
- [97] After considering the submissions and evidence of the parties, and based on a balance of probabilities, I find that the applicant not shown that he suffers from a psychological impairment as a result of his accident.
- [98] I did not find Ms. Xu's evidence demonstrative of anything beyond the applicant self-reporting that he had poor sleep, nightmares, dizziness, giddiness, malaise and fatigue after his accident. Ms. Xu is a physiotherapist, and assessing psychological issues goes beyond the scope of her practice.
- [99] In terms of Dr. Li's evidence, I find that the doctor's evidence is of little value, as I agree with the respondent's submissions that he is not a reliable source of medical evidence due to his frequent and repeated practice issues. Therefore, I put little weight on it.
- [100] With respect to Ms. Ma's Psychological assessment, I also agreed with the respondent's submissions that this report was not supported by Dr. Pang's clinical notes and records, and therefore, I found it to be less persuasive. I would have expected the applicant's family doctor and/or OHIP summary to corroborate the applicant's ongoing psychological impairments, which they did not.

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<sup>35</sup> Based on Dr. Li's Referral Memo, dated November 19, 2019.

<sup>36</sup> As alleged by the respondent's submissions.

Therefore, I find that the applicant does not suffer from a psychological impairment as a result of his accident.

- [101] As the applicant has exhausted the MIG limit, I do not need to address the treatment plans in dispute.

### **INTEREST AND AWARD**

- [102] As I have found that the applicant is not entitled to an NEB, or any of the treatment plans in dispute, he is not entitled to interest or an award.

### **CONCLUSION AND ORDER**

- [103] The applicant is not entitled to a non-earner benefit.
- [104] The applicant's injuries are found to be within the MIG and he has exhausted the MIG limit.
- [105] The applicant is not entitled to interest.
- [106] The applicant is not entitled to an award.
- [107] The applicant's application is dismissed.

**Released:** October 3, 2022



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**Stephanie Kepman**  
**Adjudicator**