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: 18-003444/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.R.

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: **Lindsay Lake**

APPEARANCES:

For the Applicant: Deborah Pearce, Counsel

For the Respondent: Jamie Min, Counsel

HEARD IN WRITING: **February 25, 2019**

OVERVIEW

[1] The applicant, J.R., was injured as a driver in an automobile accident on November 5, 2015 (the "accident") and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*") from Aviva Insurance Canada ("Aviva"), the respondent.

[2] Aviva denied J.R.'s claim for several treatment plans. As a result, J.R. submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[3] The parties were unable to resolve the issues in dispute at the September 5, 2018 case conference and a written hearing was scheduled for February 25, 2019.

ISSUES IN DISPUTE

[4] The following issues are to be decided:

(i) Is J.R. entitled to payment of income replacement benefits in the amount of $324.00 per week from May 31, 2016 to date and ongoing?

(ii) Is J.R. entitled to payment for the cost of an examination in the amount of $2,074.81 for a psychological assessment and a psychology in-person screening recommended by Canadian Active Rehab in a treatment plan submitted on April 4, 2016, and denied by Aviva on April 15, 2016?

(iii) Is J.R. entitled to payment for the cost of an examination in the amount of $2,768.50 for a neurological assessment recommended by Pro Care Health in a treatment plan submitted on September 28, 2016, and denied by Aviva on October 26, 2016?

(iv) Is J.R. entitled to interest on the overdue amounts?

RESULT

[5] I find that:

(i) J.R. has failed to prove on a balance of probabilities that but for the accident, her physical impairments would not have arisen;

(ii) J.R. has proven on a balance of probabilities that her psychological impairments were directly caused by the accident;

(iii) J.R. is not entitled to IRBs;

(iv) J.R. is entitled to the psychological assessment and for the completion of the treatment plan as set out in the OCF-18 submitted on April 4, 2016 plus interest in accordance with s. 51 of the *Schedule*. J.R. is not entitled to the remainder of this treatment plan;

(v) J.R. is not entitled to the neurological assessment; and

(vi) Aviva is not entitled to its costs in this matter.

PROCEDURAL ISSUES

Exclusion of Evidence

[6] In its responding submissions, Aviva requests that the October 1, 2018 Medical Legal Assessment Report by Dr. Igor Wilderman be excluded as evidence for this hearing.

[7] J.R. made no reply submissions and no other submissions regarding Aviva's request.

[8] Aviva's request to exclude Dr. Wilderman's report as evidence in this hearing is granted for the following reasons:

(i) The Tribunal's September 5, 2018 Order reflects the parties' agreement to exchange all documents that they intended to rely upon at the hearing by no later than January 7, 2019. Aviva submits it first received Dr. Wilderman's report on February 4, 2019 as part of J.R.'s submissions. Dr. Wilderman's report is dated well before the document exchange deadline and J.R. provided no reasons or explanation as to why the report was not exchanged in accordance with the Tribunal's Order; and

(ii) Aviva argues that it is prejudiced by the receipt of Dr. Wilderman's report as part of J.R.'s submissions as it did not have an opportunity for its experts to review it and to respond to it appropriately. I note that Aviva's submissions and evidence were due only 7 days later. As Aviva has given specific reasons as to how the inclusion of Dr. Wilderman's report would prejudice its ability to fully participate in this hearing, I find that that Aviva would be prejudiced if I allowed the report into evidence.

Missing Documents

[9] Following the case conference held on September 5, 2018, the parties were required to serve and submit their written submissions and evidence on each other, and file same with the Tribunal, according to the schedule outlined in the Tribunal's September 5, 2018 Order for the written hearing.

[10] After reviewing the parties' written submissions and evidence, the following documents were not filed with the Tribunal:

(i) treatment and assessment plan (OCF-18) in the amount of $2,074.81 for other goods and services submitted on April 4, 2016; and

(ii) OCF-18 in the amount of $2,768.50 for a neurological examination submitted on September 28, 2016.

[11] The parties also failed to file with the Tribunal a copy of the Disability Certificate (OCF-3) dated December 4, 2015 despite it being referred to as a document reviewed in preparation of reports submitted by both J.R. and Aviva.

[12] As a result, I issued an Order on June 21, 2019 requesting submissions from both parties on whether or not I should allow J.R. to file the above-listed documents as evidence for this written hearing given the Tribunal's Reconsideration Decision of *J.R. v. Certas Home and Insurance Company*.[1] In that decision, Executive Chair Lamoureux highlighted the obligation of the Tribunal to ask parties to submit information that it believes a party meant to rely upon as evidence in a hearing.

[13] For the reasons that follow, the OCF-18s and December 4, 2015 OCF-3 as set out above are admitted into evidence for this hearing despite the fact that they were not filed with the Tribunal in accordance with the Tribunal's September 5, 2018 Order.

[14] In response to my June 21, 2019 Order, J.R. made no submissions and only filed copies of the missing documents.

[15] Aviva argues that allowing the missing documents into evidence would be a breach of procedural fairness and run afoul of the fundamental principal set out by the Divisional Court in *Scarlett v. Belair Insurance*[2] that the burden of proof rests with the applicant. Aviva submits that this principal is echoed by Executive Chair Lamoureux in *J.R. v. Certas* in her following statement, "applicants to the Tribunal are obliged to make their own case. As part of that obligation, applicants must adduce all evidence upon which they need or intend to rely. The Tribunal will not satisfy their evidentiary onus for them."[3] Executive Chair Lamoureux also noted the parties' obligation to ensure all documents that they wish the Tribunal to consider are filed with the Tribunal for the purposes of the hearing in *Aviva Canada Inc. v. R.R.*[4] Aviva submits that the Tribunal should not satisfy J.R.'s evidentiary onus on her behalf.

[16] Aviva also submits that J.R. should not be allowed to file the missing documents as evidence in this matter because the facts in *J.R. v. Certas* are distinguishable. In *J.R. v. Certas*, the applicant included the "insurer fax back" portions of the OCF-18 but failed to file the complete underlying OCF-18s in dispute.[5] Therefore, Aviva argues, Executive Chair Lamoureux focused on the Tribunal's failure to request *complete* versions of the OCF-18s in her reconsideration decision because the applicant clearly intended to rely on such documents but never filed same. Aviva submits that J.R. did not clearly intend to rely upon the missing documents in this case because at no time did she submit complete or partial copies of the documents. As such, her failure to include the documents in any of her submissions does not, and should not, warrant the Tribunal's request for assistance.

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[1] 2018 CanLII 13161 (ON LAT) ("*J.R. v. Certas*").

[2] 2015 ONSC 3635 (CanLII) at paras. 20-24.

[3] *Ibid*. at para. 22.

[4] 2017 CanLII 81569 (ON LAT) at para. 26 ("*Aviva v. R.R.*").

[5] *Ibid*. at paras. 9 and 15.

[17] I disagree with Aviva that requesting the missing documents is satisfying J.R.'s evidentiary burden for her. I agree with Executive Chair Lamoureux's statement in *J.R. v. Certas* as follows:

> Just as an insurer reviews a complete OCF-18 in order to properly decide whether to fund the insured's request, the Tribunal generally requires the same document in order to properly understand both the insured's request and the insurer's response. Put simply, the Tribunal cannot fairly adjudicate an application in most cases without a complete copy of the very document giving rise to the parties' dispute.[6]

[18] As such, the request for the missing documents was not to assist or satisfy J.R.'s evidentiary burden; rather, it was a request for documents to allow me to properly understand J.R.'s request and Aviva's response. In *Aviva v. R.R.*, which Aviva also relied upon, Executive Chair Lamoureux also confirmed that while the onus is on the parties to put their case forward, the Tribunal may request further documentation that it considers necessary.[7] I also do not agree that because J.R. did not file any portion of the missing documents that they are precluded as evidence in this matter.

[19] Moreover, I do not agree that requesting the missing documents is a breach of procedural fairness because there is no dispute that these documents exist, Aviva was in receipt of them and Aviva is in no way prejudiced by my review of the information contained therein. In fact, the admission of the missing documents into evidence allows me to adjudicate this matter with all of the relevant documentation before me.

[20] For all of the reasons set out above, I am allowing the two OCF-18s in the amount of $2,074.81 and $2,768.50 and the December 4, 2015 OCF-3 into evidence for this hearing.

ANALYSIS

1. Causation

[21] I find that J.R. has failed to prove on a balance of probabilities that but for the accident, her physical impairments would not have arisen. However, I find that J.R. has proven that her psychological injuries were directly caused by the accident.

[22] In order to determine entitlement to both income replacement benefits and to the treatment plans in dispute, J.R. is required to prove, among other things, that the accident caused her impairments on a balance of probabilities. In making my determination on causation, I am guided by the following principals:

[6] *Supra* note 1 at para. 21.
[7] *Supra* note 4 at para. 26.

(i) "Scientific precision is not necessary" to conclude that causation has been established on a balance of probabilities and "scientific reconstruction evidence" is not a necessary condition of finding causation;[8] and

(ii) the applicant must show that, but for the accident, her impairment would not have arisen.[9]

[23] Aviva submits that the evidence from J.R.'s treating physicians supports the notion that her alleged injuries were not caused by the accident. J.R. filed no reply submissions in response to Aviva's causation argument.

J.R.'s Physical Injuries/Impairments

[24] Prior to the accident, Aviva submits, and I agree, that J.R. had made the following complaints or was diagnosed with the following conditions:

- Arthritis following complaints of right knee pain (2010);
- Persistent right knee symptomatic osteoarthritis (2012);
- Carpal tunnel syndrome (2010);
- Mild right-sided carpal tunnel syndrome (2011);
- Shoulder sprain (2012);
- Neck pain and neck sprain (2014);
- Bilateral knee pain (2010 and 2011);
- Left knee pain (July 2010 and January 2015);
- Ongoing right-hand numbness, pain and paraesthesia;
- Right thigh pain (2013);
- Right elbow pain (2011);
- Right shoulder pain (2012);
- Bilateral shoulder pain (2012);
- Back pain from a slip and fall in June 2015 (only 6 months prior to the accident);
- Paraesthesia and numbness on the anterolateral aspect of the right thigh in 2013 that persisted at least until 2016;
- Right leg dysfunction with residual numbness as far back as a pregnancy in the nineteen nineties;
- De Quervain's tenosynovitis (2011); and
- Diminished conduction velocity for the median nerve following a sensory nerve conduction study in 2011.

[25] Following my June 21, 2019 Order, J.R. submitted a December 4, 2015 Disability Certificate (OCF-3) completed by Farnaz Suleman, physiotherapist. The injury and sequelae information included the following physical injuries: radiculopathy, right cervical (C6-7) & right finger; WAD3 with complaint of neck pain with neurological signs, right C6-C7 numbness and weakness' brachial plexus disorders (Right TOS);

[8] *Clements v. Clements,* 2012 2 S.C.R. 181 at p. 183.
[9] *Ibid*.

paraesthesia of skin – right hand & fingers (D2-3), right hamstring to bottom of foot (D1); sprain and strain of thoracic spine, ribs and sternum (pecs bilateral), lumbar spine and shoulder joint, bilateral; impingement syndrome of shoulder (R>L); lateral epicondylitis, right; sprain and strain of sacroiliac joint (R>L); muscle strain (right gluts, piriformis, quad, hamstring, gastroes); sprain and strain of medical collateral ligament of knee (Right grade 1); and headache (suboccipital). Mr. Suleman, however, answered "no" to the question of whether or not J.R. had any disease, condition or injury prior to the accident. It is apparent that Mr. Suleman was not aware of J.R.'s pre-accident medical history at the time the OCF-3 was completed.

[26] J.R. relies upon Dr. Ian Finkelstein's Insurer's examination (IE) report following his examination of J.R. on April 21, 2016[10] in which he confirmed that J.R. sustained an impairment as a direct result of the accident.[11] Dr. Finkelstein reported that his physical examination revealed pain inhibited restricted mobility in J.R.'s neck, right shoulder and low back. Dr. Finkelstein also opined that J.R.'s neurological exam revealed decreased sensation to pinprick in the right C5-6 dermatome of the upper extremity and L4-5 dermatome in the right lower extremity, but the remainder of J.R.'s neurological exam was normal. Dr. Finkelstein diagnosed J.R. with cervical strain with neurological signs, bilateral shoulder strain, tension type headaches and lumbar strain. Dr. Finkelstein found that J.R.'s injuries would be accident-related given the temporal relationship of symptom onset and the accident in question.

[27] The difficulty in placing weight on Dr. Finkelstein's conclusion about the causation of J.R.'s injuries is the lack of documentation from prior to the accident that was available to him in preparing his report. Dr. Finkelstein did not have J.R.'s family doctor's CNRs or the CNRs of Dr. Ross Roussev, J.R.'s treating neurologist. Furthermore, J.R. was not forthcoming with information about her pre-accident medical condition, as Dr. Finkelstein notes that she denied any prior medical history aside from minor surgery in her right axilla.

[28] J.R. also relies upon Dr. Roussev's May 11, 2017 letter in which Dr. Roussev stated that after the accident, J.R. has been complaining of neck and shoulder pain with radiation to the arm. Dr. Roussev notes that J.R. was last seen by him because of back pain radiating to the right leg with numbness and that her right leg symptoms remain unchanged, but he fails to provide any date references regarding his symptom comparisons. He also noted that J.R. reported hitting her right shoulder in the accident and that she *continues* to complain of arm symptoms, right leg symptoms *similar to previous visits*. Dr. Roussev explains that J.R. had been complaining of "protracted symptoms, *escalated* after her 2015 MVA" (my emphasis added). Dr. Roussev also previously saw J.R. in 2011 for right-sided carpal tunnel syndrome (CTS) and that she continued to have electrodiagnostic features of mild CTS.

[29] The earliest document from Dr. Roussev submitted by J.R. was the May 11, 2017 letter. However, it is clear from J.R.'s submissions, and from Dr. Roussev's letters, that Dr. Roussev was J.R.'s treating neurologist at least since 2011. For whatever

[10] Document Brief of Aviva Insurance Canada, tab 7.
[11] *Ibid*. at page 8.

reason, even after Aviva raised the issue of causation in its submissions, J.R. failed to file any CNRs from Dr. Roussev dated prior to the accident. This information would have been extremely helpful in comparing J.R.'s post-accident complaints to her previous visits with Dr. Roussev especially given Dr. Roussev's comparisons to previous visits and remarks about J.R.'s symptoms escalating after the accident.

[30] Additional evidence submitted indicated that J.R.'s family doctor, Dr. Chanmugam Mahendira, requested a right knee x-ray in 2010, an x-ray and an ultrasound of J.R.'s right shoulder in 2012 and a knee x-ray and ultrasound in July 2015. No diagnostic imaging reports following these investigations were submitted by J.R. Furthermore, I agree with Aviva that J.R. was referred to a number of specialists prior to the accident including a rheumatologist and an orthopaedic surgeon for right knee pain in 2010 and a gastroenterologist in 2012. None of these records, assuming they exist, were filed by J.R. as evidence in this hearing.[12]

[31] Compounding the causation issue, J.R. submits that she hit her *right* shoulder on the door frame as stated in her submissions. J.R. has also consistently reported this to several assessors and to her treating physicians. Aviva argues that it would have been impossible for J.R., as the seat belted driver of her vehicle, to have struck her *right shoulder* on the door frame. J.R. did not provide any response to this argument. As many of J.R.'s pain complaints are on the right side of her body, including her right shoulder, or she's reported bilateral pain to be greater on the right side than on her left side, as in the December 4, 2015 OCF-3, a response to Aviva's proposition would have also been of assistance in determining causation in this matter.

[32] J.R. did submit an MRI report of her cervical and lumbar spine dated July 27, 2017 which showed no central canal narrowing in the cervical spine and no cervical nerve root impingement. The MRI report noted that, "at L4-5 there is mild central canal narrowing with a small broad-based disc extrusion contacting both traversing L5 nerve roots. Small right paracentral disc protrusion L5-S1 contacts the traversing right S1 nerve root."[13] This report, however, did not speak to causation of any of the issues noted therein.

[33] J.R. met with Dr. Roussev after the MRI and Dr. Roussev reported on April 24, 2018 that J.R. had extensor tendonitis of the right 4th digit and musculoskeletal bilateral shoulder pain, but he did not mention the accident in this letter. Furthermore, Dr. Roussev noted that there was no indication of radiculopathy.[14]

[34] Despite Dr. Roussev's conclusions regarding radiculopathy, Dr. Mahendira referred J.R. for a neurological and a chronic pain assessment on May 9, 2018. In his referral, Dr. Mahendira noted that J.R. required continued rehabilitation due to chronic cervical and lumbosacral radiculopathy, "in keeping with MRI findings." Dr. Mahendira's

[12] I distinguish J.R.'s failure to submit pre-accident medical documents from the decision of *J.R. v. Certas,* as discussed above, because this lack of evidence is not akin to missing documents giving rise to the parties' dispute.

[13] North York General Department of Medical Imaging, July 27, 2017, Written Hearing Submissions on Behalf of the Applicant, tab 3.

[14] Dr. Roussev Letter dated April 24, 2018, Written Hearing Submissions on Behalf of the Applicant, tab 6.

remarks about radiculopathy are not consistent with Dr. Roussev's opinion that there were no indications of radiculopathy following the MRI.

[35] Dr. Mahendira's statements are also contradictory and unclear regarding the causation of J.R.'s injuries. For example, Dr. Mahendira hand-wrote an undated letter that J.R. submits is from November 19, 2018,[15] in which Dr. Mahendira first states, "it is possible that her symptoms are *aggravated* by this accident on November 15, 2015," which indicates that symptoms were present *prior* to the accident. However, Dr. Mahendira continues, "it is my opinion her symptoms are *caused by* the accident on November 5, 2015." It is unclear to me from Dr. Mahendira's undated report which of J.R.'s symptoms she is referring to as being aggravated by the accident verses those being caused by the accident.

[36] In comparison, Aviva submitted an August 17, 2016 IE Neurological Assessment by Dr. Garry Moddel, neurologist. Dr. Moddel opined that J.R. did not suffer any neurological impairments "as far as the subject motor vehicle accident is concerned," and concluded that there was no evidence of neurological sequelae.[16] Dr. Moddel noted that while J.R. described some numbness in her right arm and right leg, he did not find any evidence of nerve root impingement and felt that the numb sensation was non-anatomical in nature.[17]

[37] I find that J.R. has failed to prove on a balance of probabilities that but for the accident, her physical impairments would not have arisen because:

(i) the opinions of the assessors regarding the causation of J.R.'s physical injuries are of little value because they were not aware of J.R.'s pre-accident medical history and, as a result, there was no analysis by the experts of the effect of J.R.'s pre-accident medical history on her physical complaints post-accident;

(ii) J.R. failed to file a number of pre-accident medical documents following Aviva raising a causation issue. These documents would likely have been helpful in resolving the causation of J.R.'s physical complaints because the locations of her pain complaints post-accident are substantially similar to the physical pain complaint locations prior to the accident; and

(iii) J.R. failed to address Aviva's inquiry of how her right shoulder hit the vehicle's door frame when she was the seat belted driver of the vehicle.

J.R.'s Psychological Injuries/Impairments

[38] No evidence has been submitted that J.R. sustained any psychological impairments or injuries or that she was prescribed any medication for any psychological condition prior to the accident.

[15] Written Hearing Submissions on Behalf of the Applicant, tab 7.
[16] *Ibid*. at page 4.
[17] *Ibid*.

[39] J.R.'s first documented psychological complaints post-accident are recorded in the December 4, 2015 OCF-3 completed by Mr. Suleman, J.R.'s treating physiotherapist. Mr. Suleman listed the following injuries under the injury and sequelae information section: dizziness, other symptoms and signs involving cognitive functions and awareness – decreased concentration; other sleep disorders – sleep disturbances; symptoms and signs involving emotional state – anxious feelings; nervousness; demoralization and apathy; and irritability and anger.

[40] On April 4, 2016, J.R. submitted an OCF-18 for a psychological assessment that was completed by Dr. Maneet Bhatia, psychologist. In the additional comments section, it is noted that J.R. was interviewed by Muhammad Ali, psychotherapist, on March 30, 2016 under the supervision of Dr. Bhatia. J.R. was referred for a psychological assessment by her physiotherapist, as she was reporting the following problems post-accident: disrupted sleep; nightmares; low appetite; low energy and fatigue; nervousness and anxiety symptoms; lack of concentration; negative thoughts; hopelessness; headaches; sadness, anger and crying; and fear of driving as a passenger. The report stated that J.R. was administered both the Beck Anxiety Inventory and the Beck Depression Inventory II questionnaires and her scores indicated that she suffered from severe anxiety and severe depression.

[41] Aviva submitted a psychology report by Dr. John Lee, psychologist, that was produced following an April 12, 2016 assessment of J.R.[18] During the assessment, J.R. reported that she had not experienced any significant change in her overall mood since the accident and that she's generally a happy person.[19] J.R. reported sleep disturbances due to numbness in her shoulders and occasional nightmares following watching television programs with accidents. J.R. denied any flashbacks and intrusive thoughts about the accident, but confirmed that she stopped driving since the accident due to numbness in her right leg and as a result of "some residual anxiety."[20] As part of his assessment, Dr. Lee administered the Pain Patient Profile (P-3), the Trauma Symptom Inventory (TSI-2-A) and the Millon Clinical Mutiaxial Inventory – III (MCMI-III) questionnaires and noted that J.R.'s scores were above average on the anxiety, depression and somatization subscales on the P-3 test which suggested, "that she is experiencing an expected level of anxiety but a heightened degree of low mood and somatic focus/pre-occupation."[21] Dr. Lee noted that on the TSI-2-A test, J.R.'s responses were invalid and on the MCMI-III, her responses were valid but showed not significant elevations. Dr. Lee concluded that her psychological testing was inconsistent between measures and "may have reflected cultural/linguistic confounds."[22] Dr. Lee then stated, "regardless, she firmly reported that she did not require any psychological services and no such services have been proposed."[23] Dr.

[18] Document Brief of Aviva Insurance Canada, tab 6.
[19] *Ibid*. at page 4.
[20] *Ibid*.
[21] *Ibid*. at page 6.
[22] *Ibid*. at page 7.
[23] *Ibid*.

Lee ultimately opined that J.R. did not suffer a psychological impairment as a result of the accident and made no psychological diagnosis.[24]

[42] In considering both expert reports, I prefer the findings of Dr. Bhatia over those of Dr. Lee because it appears as though the discrepancies in J.R.'s testing with Dr. Lee would have been resolved with the involvement of an interpreter.[25] Additionally, Dr. Lee attempts to downplay J.R.'s scores simply because she reported that she does not need psychological services. J.R. is not an expert in psychology and Dr. Lee's overall opinion should not rest on J.R.'s opinion. Furthermore, Dr. Lee did not administer the same tests that Dr. Bhatia did and Dr. Lee did not address Dr. Bhatia's Beck Inventory results, or why he chose other questionnaires over the Beck Inventories in his report. Additionally, while I agree with Aviva that there were no psychological complaints in Dr. Mahendira's CNRs, Dr. Mahendira does refer J.R. for a psychological assessment as a result of her multiple "psychological yellow flags" including anxious and depressive feelings, feelings of panic, flashback/nightmares albeit in May 2018. Dr. Mahendira's referral supports a finding that J.R.'s psychological symptoms were present post-accident and continued into 2018.

[43] Therefore, I find that J.R. has proven on a balance of probabilities that but for the accident, her psychological impairment would not have arisen.

2. Income Replacement Benefits ("IRBs")

[44] J.R. is seeking IRBs for the following two periods: 1) from May 31, 2016 to November 4, 2017 (up to 104 weeks post-accident); and 2) from November 5, 2017 (post-104 weeks) to date and ongoing.

[45] Based on the evidence before me, I find that J.R. is not entitled to IRBs for any period.

a) Entitlement to IRBs within 104 Weeks of the Accident

[46] An insured person is eligible to receive IRBs if, as a result of the accident, he or she suffers a substantial inability to perform the essential tasks of his or her pre-accident employment within 104 weeks after the accident, as set out in s. 5(1) of the *Schedule*.

[47] As J.R. is seeking IRBs within 104 weeks of the accident, she must prove on a balance of probabilities that she is entitled to IRBs for the period from May 31, 2016 to November 4, 2017 (104 weeks post-accident). In order for J.R. to meet her evidentiary burden, J.R. must provide evidence of the following:

(i) The essential tasks of her pre-accident employment;

(ii) Which of those tasks she is (or was) unable to perform; and

[24] *Ibid*.

[25] The OCF-18 in dispute for a neurological assessment included a request for funding for a Tamil interpreter.

(iii) To what extent she is (or was) unable to perform those tasks.[26]

Essential tasks of J.R.'s Pre-accident Employment

[48] There is no dispute that J.R. was employed full-time as a cashier/clerk at TW Variety Store at the time of the accident.

[49] The only information submitted by J.R. about the tasks of her pre-accident employment is contained in her submissions without any supporting evidence. As such, I do not give weight to the occupational duties listed in J.R.'s submissions when determining the essential tasks of her pre-accident employment. J.R. did, however, report to Dr. Finkelstein that she stocks shelves. She also reported to Dr. Lee that in addition to stocking shelves, she mopped and operated the register.

[50] In his IE Functional Abilities Evaluation,[27] Dr. Paul Kominek, chiropractor, classified J.R.'s position as "cashier II (clerical)." Dr. Kominek's report lists the duties involved with this position, which are extremely outdated, but generally include receiving payment from customers, operating a register, making change and issuing receipts. Dr. Kominek classified this position as one of light strength.[28]

[51] Therefore, I find that the essential tasks of J.R.'s pre-accident position as a cashier/clerk are as follows: receiving payment from customers, operating a register, making change, issuing receipts, mopping and stocking shelves.

Which tasks J.R. was unable to perform (and the extent that she was unable to perform them)

[52] The only evidence submitted by J.R. regarding her inability to perform the essential tasks of her pre-accident employment is a note from her family physician dated February 11, 2017, which states that she is "unfit for physical work" as a result of her right shoulder and back pain.

[53] As I have found that J.R. failed to prove on a balance of probabilities that her physical impairments were caused by the accident, I place no weight on Dr. Mahendira's February 11, 2017 note in determining whether or not J.R. was unable to perform the essential tasks of her employment as her note only speaks to J.R.'s physical abilities.

[54] J.R. also submitted an OCF-3 dated December 4, 2015 which answered "yes" to whether J.R. was substantially unable to perform the essential tasks of her employment at the time of the accident and that the anticipated duration of her inability was 9 to 12 weeks. This OCF-3, however, is of no assistance in determining J.R.'s entitlement to IRBs as it was created well before the period for which J.R. is seeking IRBs and the anticipated duration listed had expired.

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[26] *17-002651 v Aviva General Insurance,* 2018 CanLII 13150 (ON LAT) at para. 5.

[27] Document Brief of Aviva Insurance Canada, tab 11.

[28] *Ibid*. at page 6.

[55] J.R. failed to submit any evidence that opined that she was substantially unable to perform the essential tasks of her pre-accident employment as a result of her *psychological impairments* which I have found were attributable to the accident. As a result, I find that J.R. has failed to prove on a balance of probabilities that she suffered a substantial inability to perform the essential tasks of her pre-accident employment as a result of the accident for the period of May 31, 2016 to November 4, 2017.

b) Entitlement to IRBs beyond 104 Weeks of the Accident

[56] Having determined that J.R. did not suffer a substantial inability to perform the essential tasks of her pre-accident employment within 104 weeks post-accident, I also find that she does not qualify for IRBs after November 5, 2017, which is 104-weeks post-accident.[29]

[57] Even if I am incorrect that one's entitlement to an IRB in the post-104 week period is predicated on his or her eligibility for an IRB in the period before, I find that J.R. has failed to prove on a balance of probabilities that she was completely unable to engage in any employment for which she is reasonably suited by education, training or experience for the period of November 5, 2017 to date and ongoing. J.R. failed to submit any evidence demonstrating that she would meet the stricter post-104 week IRB eligibility test, as I have no information on her education, training or work experience. I also accept, regardless of her reasons for doing so, that J.R. was observed working at TW Variety Store on three out of five days of surveillance conducted in mid-November 2017. While working, J.R. was observed to operate a debit machine, stand, bend at the waist, carry bags into the store, close the store and carry an advertising board.[30]

2. The Treatment Plans

[58] Sections 14 and 15 of the *Schedule* provide that the insurer shall pay medical benefits to, or on behalf of, an applicant so long as the applicant:

(i) sustains an impairment as a result of an accident; and

(ii) the medical benefit is a reasonable and necessary expense incurred by the applicant as a result of the accident.

[59] J.R. bears the onus of proving her entitlement to the claimed treatment and assessments by proving they are reasonable and necessary on a balance of probabilities.[31]

[60] I find that J.R. is entitled to the psychological assessment and for funding to complete the treatment plan as set out in the OCF-18 submitted on April 4, 2016, but she is not

[29] See *D.W. v. The Co-operators*, 2018 CanLII 8092 (ON LAT) at para. 17.

[30] Xpera Investigations Investigation Report dated December 4, 2017, Document Brief of Aviva Insurance Canada, tab 10, page 2.

[31] *Supra* note 2.

entitled to the amount sought on this OCF-18 for the 30 minute in-person psychology screening. I also find that J.R. is not entitled to the neurological assessment.

Psychological Assessment and In-Person Psychology Screening

[61] This OCF-18 was completed by Dr. Maneet Bhatia, psychologist, and sought funding for a psychological assessment, completion of the OCF-18 and a 30 minute in-person psychology screening. The goals of the treatment plan were to relieve psychological disorders and to return J.R. to activities of normal living. As a result of J.R.'s scores on certain psychological questionnaires, Dr. Bhatia concluded that a psychological assessment "is deemed reasonable and necessary to clarify [J.R.'s] situation, to formulate a final diagnosis…and to establish and carry through a treatment program is deemed needed."

[62] On May 25, 2016, Aviva advised J.R. of its denial of this treatment plan as it relied upon Dr. Lee's psychology report following his April 12, 2016 assessment of J.R. Aviva advised that Dr. Lee determined that the OCF-18 was not reasonable and necessary from the injuries sustained in the accident and, as a result, Aviva would not fund any treatment incurred relating to this OCF-18.

[63] As discussed above, I prefer the findings of Dr. Bhatia regarding J.R.'s psychological injuries sustained as a result of the accident over Dr. Lee's findings. Therefore, I agree with Dr. Bhatia's recommendation that a psychological assessment is reasonable and necessary especially given J.R.'s ongoing psychological complaints to Dr. Mahendira in 2018.

[64] Therefore, I find that J.R. has proven on a balance of probabilities that a psychological assessment is reasonable and necessary, as well as the funding sought for the completion of the OCF-18. However, I find that J.R. has failed to prove on a balance of probabilities the reasonableness and necessity of the 30 minute in-person psychological screening. In my opinion, this should be part of the psychological assessment and, therefore, J.R. is not entitled to the $74.81 for this portion of the treatment plan.

Neurological Assessment

[65] This OCF-18 was completed by Dr. Kathryn Monaghan, chiropractor, and sought funding for a neurological assessment. The goals of this treatment plan are pain reduction, increase in strength and range of motion and a return to activities of normal living. The OCF-18 also states that the goal of the neurological assessment is to properly identify the cause of the patent's neurological issues to help determine the most appropriate and effective treatment options and to gauge J.R.'s response to interventions in order to facilitate recovery.

[66] On October 26, 2016, Aviva denied this treatment plan based on Dr. Moddel's IE neurological assessment which determined that the treatment recommended was not reasonable and necessary from the injuries sustained in the accident. Therefore, Aviva advised J.R. that it would not fund any treatment incurred relating to this OCF-18.

[67] I find that J.R. is not entitled to a neurological assessment because I have found that J.R. failed to prove on a balance of probabilities that but for the accident, her physical impairments would not have arisen.

[68] Even if I am wrong in finding that J.R. failed to prove that she sustained a physical impairment as a result of the accident, I find that J.R. has failed to prove the reasonableness and necessity of this treatment plan. From 2011 through until at least 2017, J.R. had been seeing Dr. Roussev, a neurologist, and it is unclear to me how continued visits with Dr. Roussev would fail to meet the goals of this treatment plan of properly identifying the cause of J.R.'s alleged neurological issues to help determine a treatment regime for her to facilitate recovery. As a result, J.R. failed to prove why a separate assessment by a different neurologist was reasonable and necessary on a balance of probabilities.

3. Interest

[69] J.R. is entitled to interest in accordance with s. 51 of the *Schedule* for the psychological assessment and for completing the treatment plan as set out in the OCF-18 submitted on April 4, 2016.

4. Costs

[70] As part of its submissions, Aviva requests $500.00 in costs to address J.R.'s failure to exchange Dr. Wilderman's report in accordance with the deadline set out in the Tribunal's September 5, 2018 Order.

[71] The issue of costs was not listed as an issue in dispute between the parties in the Tribunal's September 5, 2018 Order. Rule 19.2 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*"), however, allows for written requests for costs to be made to the Tribunal at a hearing. Therefore, Aviva's requests for costs is properly before me.

[72] I am not granting Aviva's requests for costs in this matter as I already excluded Dr. Wilderman's report as evidence in this hearing and granted the relief sought by Aviva for the late exchange of this report. Further, I find that Aviva failed to prove on a balance of probabilities that J.R. acted unreasonably, frivolously, vexatiously or in bad faith in the proceeding, which is the test for awarding costs in a proceeding. There is no evidence before me of such actions on behalf of J.R. and, as a result, Aviva's request for costs is denied.

CONCLUSION

[73] For all of the above reasons, I find:

(i) J.R. has failed to prove on a balance of probabilities that but for the accident, her physical impairments would not have arisen;

(ii) J.R. has proven on a balance of probabilities that her psychological impairments were directly caused by the accident;

(iii) J.R. is not entitled to IRBs;

(iv) J.R. is entitled to the psychological assessment and funding for the completion of the treatment plan as set out in the OCF-18 submitted on April 4, 2016 plus interest in accordance with s. 51 of the *Schedule*. J.R. is not entitled to the remainder of this treatment plan;

(v) J.R. is not entitled to the neurological assessment; and

(vi) Aviva is not entitled to costs in this matter.

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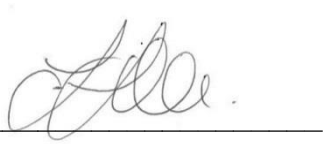

Lindsay Lake
Adjudicator