Count: -2

Wang and TTC
Decision Date: **2018-05-01**, Adjudicator: **Anne Morris**, Regulation: **34/10**, Decision: **Arbitration, Final Decision, FSCO 5564**.
Cases cited: Persofsky and Liberty Mutual - Appeal 1 Persofsky and Liberty Mutual - Appeal 2 Persofsky and Liberty Mutual - Appeal 3 Persofsky and Liberty Mutual - Appeal 4
Considered in: Xiao Ying Want and TTC Insurance Company Limited

FSCO A16-001903

BETWEEN:

XIAO YING WANG

Applicant

and

TTC INSURANCE COMPANY LIMITED

Insurer

DECISION

Before: Arbitrator Anne Morris

Heard:	In person at ADR Chambers on October 31, November 1, 2017; by teleconference on November 2, 2017; in person on December 18, 19, 20, 21, 2017 and February 8 and 9, 2018; submissions by teleconference on February 23, 2018 with completion of submissions on February 28, 2018
Appearances:	Ms. Ashu Ismail, legal counsel, for the Applicant Mr. Daniel Himelfarb, legal counsel, for the Insurer, at Hearing (Mr. Justin Lim, legal counsel, for the Insurer on preliminary motions on October 31 and November 1, 2, 2017)

Issues:

The Applicant, Ms. Xiao Ying Wang (the "Applicant"), was injured in a motor vehicle accident on November 9, 2014 and sought accident benefits from TTC Insurance Company Limited (the "Insurer" or "TTC"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and the Applicant, through her representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

The issues in this arbitration are:

1. Is the Applicant entitled to receive weekly income replacement benefits ("IRBs") at the rate of $400.00 per week from November 16, 2014 to date and ongoing less amounts paid by the Insurer, and less income earned? (The Insurer stopped payment of IRBs effective September 19, 2015,[2] and the Applicant returned to work on November 7, 2016, stopping again on May 21, 2017. She has not returned to work.)

2. Is the Applicant entitled to receive medical benefits for the following:

(i) physical treatment by Viva Wellness and Rehab in the amount of $3,562.52 pursuant to an assessment and treatment plan (OCF-18) dated July 8, 2015;

(ii) cognitive therapy by Chaolun Medical Services in the amount of $2,793.60 pursuant to an OCF-18 dated November 30, 2015;

(iii) psychological counselling by Chaolun Medical Services in the amount of $3,491.48 pursuant to an OCF-18 dated September 22, 2015?

3. Is the Applicant entitled to receive attendant care benefits ("ACBs") at the rate of $551.28 for the period August 2, 2015 and ongoing?

4. Is the Insurer liable to pay a special award because it unreasonably withheld or delayed payments to the Applicant?

5. Is the Applicant entitled to interest for the overdue payment of benefits?

6. Is either party entitled to its expenses of the arbitration?

Result:

1. The Applicant is entitled to IRBs at the rate of $400.00 per week from September 20, 2015 to November 6, 2016, and from May 22, 2017 to date and ongoing.

2. The Applicant is entitled to receive medical benefits for the following:

(i) physical treatment by Viva Wellness and Rehab in the amount of $3,562.52 pursuant to an assessment and treatment plan (OCF-18) dated July 8, 2015;

(ii) cognitive therapy by Chaolun Medical Services in the amount of $2,793.60 pursuant to an OCF-18 dated November 30, 2015;

(iii) psychological counselling by Chaolun Medical Services in the amount of $3,491.48 pursuant to an OCF-18 dated September 22, 2015.

3. The Applicant is not entitled to ACBs beyond those already paid by the Insurer.

4. The Insurer liable to pay a special award in the amount of $6,500.00.

5. The Applicant entitled to interest for the overdue payment of benefits in accordance with the provision in the *Schedule*.

6. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Decision on a Preliminary Motion

At the outset of the Hearing, the Applicant brought an oral motion for the removal of TTC Legal Department as representatives for the Insurer on the basis of conflict of interest. I requested submissions in writing on that motion which I heard next day, November 1, 2017. I reserved my decision briefly, advising the parties later that day by email that I had decided that TTC Legal Department should be removed as representatives of record. The Hearing resumed by teleconference on November 2, 2017 at which time it was adjourned to December 18, 2017 to provide the Insurer an opportunity to retain other counsel which it did.

I provided reasons for my decision to remove TTC Legal Department by letter dated November 2, 2017. I have reproduced those reasons at the conclusion of the decision on the arbitration. (See p. 20 below).[3]

EVIDENCE AND ANALYSIS:

Background

Employment

The Applicant was 54 years old at the time of the accident on November 9, 2014. She worked as a personal support worker (PSW) at a care institution beginning in 2004. She worked on a part-time basis as a PSW for the same care institution for which she was working at the time of the accident since 2006.[4] Her hours at the institution varied but often approximated full-time hours as indicated in the pay periods from June 1, 2014 to November 16, 2014 (the pay period ending just after the accident).[5] She had been on a voluntary leave of absence from the institution from January 2, 2014 to May 20, 2014 so that she could concentrate on completing her schooling to become a registered practical nurse (RPN).[6] She received her RPN certificate on November 11, 2014, shortly after the accident. Her plan had been to obtain RPN work at the institution where she already worked as a PSW. She stopped work as a PSW at the time of the accident. The Insurer paid IRBs until September 19, 2015. The Applicant remained off work until November 7, 2016 at which time she returned to her previous work as a PSW. She obtained the position of RPN at the same institution on December 22, 2016. She went off work again on May 21, 2017.

Accident and Immediate Injuries

The Applicant was a passenger on a TTC bus on November 9, 2014, when a car went through a red light and struck the bus, causing the bus to mount the curb, strike a pole, a fire hydrant, a third vehicle parked in a parking lot, two more curbs, and a building.[7] It is not disputed that the occupant of the car which went through the light died as a result of the accident although the Applicant was not aware of that or other details of the accident until later.

According to the emergency department record of November 9, 2014,[8] the pole was flattened and the building which the bus hit was 200 metres from the road. The same record indicates that the Applicant was supine on the floor of the bus and complained of "subjective SOB" or shortness of breath.[9] The record is difficult to read but the word "anxiety" appears on this page, as well as "spine tenderness" and "bruises about right side of face." X-rays of the chest and both knees were taken.[10]

The emergency department "adult patient care record"[11] from the date of the accident indicates that the Applicant's chief complaint was "lower extremity pain". Progress notes from the same record[12] refer to "knee pain", "fell on her knees," and to "bruises on the face right cheek and on the right nose." She "denied neck and back pain", complained of "facial pain" and "blood in the right nostril." "Right knee pain" was "7/10 Advil given". When she came back from X-rays, she "still" complained of "pain and soreness to both shoulders, right facial area and right-knee". She was discharged home "ambulatory steady gait".

The Applicant's evidence was that she was sitting facing forward in a single seat behind a row of three seats facing to the side. She struck her face on the pole. She also hit her knees and was thrown to the floor.

Post Accident

The disability certificate dated November 20, 2014,[13] completed by Dr. Leung, the Applicant's family doctor, indicated that her injuries were "contusion of face with cellulitis, contusion of nose with [illegible], contusion of knees, contusion of spine with whiplash [illegible]."

Dr. Leung initially provided the Applicant with physical therapy personally before referring her to a clinic closer to home.[14] His notes are largely illegible but he testified at the Hearing to clarify them. He had been the Applicant's doctor since 2003. He saw the Applicant a day after the accident on November 10, 2014. She had fallen, had pain in her knees, cheek, some spinal pain in the neck and back. She had

decreased range of movement in her neck and back and tenderness. Her knees were swollen. He did not specify which knee on that date

for a period of time. He testified that he did not believe in strong pain killers because of the risk of addiction. He believed in physical therapy.

He testified that he had not seen the Applicant for a problem with her knees prior to the accident. He saw her for back pain on and off, three or four times in 2007 and 2008, "once in a while" in 2009. He saw her once in 2010. 2010 was the last time he had seen her for back pain prior to the accident. Prior to the accident, her health had been "average" for a woman of her age, with a few minor illnesses. Prior to the accident, he had not provided notes for her to be off work according to the record.

He continued to see the Applicant after the accident for her knees and neck and back pain. Her condition did not improve and he ordered investigations. X-rays of the back and knees and a bilateral knee ultrasound were unremarkable.[15] He ordered MRIs. The MRI of the right knee dated May 2, 2015[16] showed a small popliteal cyst and mild osteoarthritis of the patellofemoral joint with no other significant abnormality. The MRI of the left knee of June 8, 2015[17] showed no ligamentous or meniscal injury. It showed severe chondromalacia with underlying degenerative change.

The Applicant's then lawyer sent a copy of the MRI of the left knee to the Insurer by letter dated July 8, 2015.[18]

In the meantime, the Applicant underwent physical therapy including for her knees, back, neck and shoulders. She also had psychological and occupational therapy. The Insurer paid for treatment following the accident in the approximate amount of $30,000.00 according to evidence at the Hearing. The Insurer also paid IRBs and ACBs.

On July 31, 2015,[19] the then insurance adjuster on the Applicant's claim wrote to the Applicant's then lawyer, denying the OCF-18 dated July 8, 2015 for further physical therapy in the amount of $3,526.52. The adjuster indicated that previous OCF-18s on file showed no barriers to recovery but that the Applicant's ongoing regions of complaint remained essentially unchanged, despite that the Applicant had undergone appropriate and lengthy physiotherapy since the accident. The adjuster required insurer examinations to be set up to assist in determining whether to pay for these goods and services.

The adjuster further required additional insurer examinations given the time "elapsed since the accident, the medical documentation on file, the amount already consumed and **the fact it would appear that Ms. Wang's accident related injuries were of an uncomplicated**

status". The emphasis is mine. The injuries being of an uncomplicated status do not appear to me to be consistent with the MRI, sent to [illegible] eligibility for IRBs and ACBs.

Following the completion of the various insurer examinations, the Insurer terminated IRBs and ACBs effective September 19, 2015 by letters dated September 14, 2015.[20] The Insurer also denied, by letter dated September 29, 2015,[21] the treatment plan for psychological services dated September 22, 2015 in the amount of $3,491.48. The treatment plan for cognitive therapy services in the amount of $2,793.60 dated November 16, 2015 was denied by letter dated November 30, 2015.[22]

IRBs

The Applicant's claim for IRBs is for the period September 20, 2015 to November 6, 2016 following her return to work, and from May 21, 2017 when she stopped work as a RPN to date and ongoing. The test for disability for the period to November 6, 2016 is "substantial inability to perform the essential tasks"[23] of the employment engaged in at the time of the accident and I will deal with that period first. I am persuaded that the Applicant meets that test.

The job of PSW required "lifting, standing, walking, pushing, carrying, reaching, sitting etc." according to the Employer's Confirmation Form dated November 12, 2014.[24] The Insurer pointed out the institution's zero lift policy with lifting to be done with the aid of equipment.[25] The Applicant's evidence was that PSWs were not supposed to lift but that the policy was impossible to follow. This has the ring of truth. The Insurer noted that the Applicant did not call an employer to attest to the job demands but in addition to the Employer Confirmation Form, there is an extensive employment file, the Applicant's evidence, and a physical demands analysis[26] commissioned by the Insurer which confirms lifting as an aspect of the PSW job. In addition, the tasks of a PSW, variable as they may be, are within the realm of common knowledge, particularly among those engaged in disability claims and claims for attendant care. The physical demands analysis classified the job in the medium strength category.[27] I am satisfied that the Applicant's work as a PSW was quite physically demanding.

The Applicant, an older woman with a physical job, was involved in a significant accident in which the bus she was travelling in was hit by a car with enough force to kill the driver of that car, jump the curb and strike some more obstacles before hitting a building 200 metres away. The Insurer submitted that the car involved was small and that the Applicant would not have witnessed the accident in the circumstances, and that this somehow made the impact less severe. I'm not persuaded that "witnessing" the accident from the floor of an out of control bus, to which the Applicant had just fallen after hitting her face on a pole, is less dramatic or impactful than actually seeing what was happening to the bus.

The significance of an accident is not determinative of the nature of the injuries suffered in the accident. People have walked away from [illegible] have probative value in determining the nature and causation of injuries. I am satisfied that the physical forces involved in this accident were significant. The Applicant struck her knees before she fell to the floor and when she fell to the floor. She complained about her knees immediately. She complained of spinal and shoulder pain as well as of the bruise to her cheek. The day after the accident she complained to her doctor about neck and back pain as well. There is ongoing evidence that she continued to complain about pain, particularly about knee pain, and more recently particularly about her back. These areas of complaint are quite consistent with the mechanics of the accident. The Applicant had not complained to her doctor about knee problems prior to the accident. She had not seen her doctor about back problems since 2010. There is no evidence of periods of disability because of back pain prior to the accident. Her doctor had not provided her with notes that she be off work because of disability prior to the accident.

The Insurer provided significant physical therapy but the Applicant's condition did not significantly improve. She continued to complain of various areas of pain, her knees being her primary area of complaint for most of this period. An objective explanation for at least some of her pain was provided in the form of the MRI of June 8, 2015 which showed severe chondromalacia of the left knee. Dr. Leung referred the Applicant to a rheumatologist, Dr. M. T. Wong. He provided a note dated February 2, 2016[28] which indicated that the Applicant was suffering from "severe patellofemoral syndrome of left knee and osteoarthritis (MRI). Right knee patellofemoral osteoarthritis". He indicated that she could "not perform her usual duties as personal support worker that require a lot of standing and lifting weights."

Dr. Wong also provided a report to Dr. Leung dated November 25, 2015.[29] In that report he indicated, as pointed out by the Insurer, that she "recalled that she started to have a pain in the knees prior to the motor vehicle." The Applicant denied this on cross-examination. Be that as it may, her family doctor confirmed that she had not complained to him about knee problems prior to the accident. There is no evidence of complaint to any doctor, request for treatment, or evidence of disability, in relation to the knees prior to the accident.

Dr. Leung referred the Applicant to an orthopaedic surgeon, Dr. Yee, when she went off work for the second time in May 2017. Dr. Yee gave evidence at the Hearing. He saw the Applicant once in October 2017. He confirmed the diagnosis of chondromalacia patella, indicating that she had lost cartilage underneath the knee cap. He rated the condition as severe. He confirmed that he had examined the knees. He recommended non-surgical treatments including physiotherapy, injections, anti-inflammatories, orthotics, and a brace. He indicated that there was no great surgical treatment for chondromalacia. He indicated that there were no restrictions other than pain tolerance. He confirmed that it was painful to engage in activities such as lifting, carrying, walking and climbing stairs. Overdoing things could lead to an inflammatory response. He thought that a patient should not try to push through limits. It could make matters worse. He typically encouraged physiotherapy.

The Insurer referred the Applicant to an orthopaedic surgeon, Dr. Fielden, for an assessment. He assessed her once on July 27, 2015.[30] [31] the second addendum being dated December 14, 2015,[32] the third addendum being dated January 11, 2016,[33] and a fourth being dated February 19, 2016.[34]

The initial assessment has a document review section[35] which lists various diagnostic reports with findings. The MRI of June 8, 2015 with its finding of severe chondromalacia patella is set out in this section but is mis-identified as an X-ray. Chondromalacia patella is otherwise not referred to in the body of the report nor is the MRI with its finding of loss of cartilage specifically referred to in the body of the report. Dr. Fielden did note[36] internal femoral torsion and secondary external tibial torsion which from later reports is something which may be associated with chondromalacia patella. He noted a full range of flexion and extension of the tibia and femur with no patellar crepitus and no instability. He also noted later in the report:[37]

> There is also a feeling she walks differently, but she does have internal femoral torsion and external tibial torsion, which give on times rotational malalignment of both knees. Usually in cases such as this, when they are about 20 years old and try more activity such as running they start to have problems of patella femoral stress, but she is not even showing any patellar crepitus at this age.

He found that she had some contusion of the knees but there were no residual findings in the knees to suggest any ongoing internal problem with the knee joints. When asked about aggravation of a pre-existing condition he indicated[38] that there was no residual diagnosis except for the pre-existing rotational malalignment of the knees for which he did not find any specific evidence that these were increased or aggravated beyond the contusion to the knee which had no residual effect. He described the malalignment as "developmental" at "Response 2" on the same page.

There are no further specific additional comments with respect to the knees in the addendum reports until the addendum report of February 26, 2016. At that time Dr. Fielden was asked to specifically comment on Dr. Wong's diagnosis of chondromalacia patella discussed above. He indicated[39] that at his examination in July 2015, the Applicant did not have any true evidence of chondromalacia patella although she had some minor rotational malalignment which often leads to extra stress in the lateral aspect of the patella and can create some chondromalacia changes. He indicated that post traumatic chondromalacia patella is usually global, associated with significant contusion of the knees and resultant persistent changes often with underlying cartilage fracture damage. None of that was apparent on his examination. To say she has severe chondromalacia, one has to also demonstrate it on clinical examination.

Dr. Fielden testified at the Hearing. He opined that the Applicant had no restrictions besides pain which she should essentially work through. He denied a diagnosis of chondromalacia patella, indicating that the MRI simply showed the absence of hydrocarbons which was

diagnosed as showing the absence of cartilage. In his opinion, the ultrasound did not show the absence of cartilage and his physical clinical

Applicant's age and not chondromalacia. When told that other doctors had found crepitus in the knees, he indicated that there was crepitus consistent with age but a different feeling (as I understood it) from crepitus associated with chondromalacia. This opinion seems rather finely sliced to me, and I note that Dr. Fielden acknowledged that 90% of his insurance assessment work was for insurers, and 100% of his accident benefit work was for insurers. Taking everything into consideration, I prefer the diagnosis of chondromalacia patella offered by the Applicant's treating doctors, Drs. Wong and Yee, made with reference to the MRI showing the same.

Dr. Yee opined that the Applicant's chondromalacia was likely degenerative in nature but acknowledged that it could be caused by trauma. Dr. Leung also felt that it was degenerative in nature and also that trauma could accelerate the degeneration. He did not think it had done so in this case without stating why. Dr. Fielden, as noted earlier, suggested in his report that the malalignment of the knees was "developmental".

It is not clear to me what the difference is between "developmental" and "degenerative" or if the two are related. What is clear to me is that the Applicant was involved in a significant accident, as a result of which she had contusions to the knees, and immediate and ongoing knee pain which culminated in investigation by way of an MRI which showed severe chondromalacia patella, a condition which causes pain and inflammation, as confirmed by two specialists. If the physical trauma of the accident did not cause the condition, and it may very well have, it almost certainly aggravated the condition such that it went from non-symptomatic to very symptomatic. If the condition was degenerative in nature, it is more likely than not on all of the evidence, including the medical evidence, that the accident accelerated the degeneration. I am persuaded on the preponderance of the evidence that there is a causal relationship between the accident and the Applicant's ongoing painful knee condition, with objective underlying evidence of a basis for the pain. I am also persuaded that the Applicant's knee pain, together with her other areas of pain, substantially disabled her from performing the essential tasks of her employment as a PSW. She is entitled to IRBs at the rate of $400.00 per week from September 20, 2015 to November 6, 2016.

The Applicant returned to work on the cusp of 104 weeks after the accident. The disability test for IRBs changes after 104 weeks of disability. To be eligible for IRBs from May 22, 2017 and onwards, the Applicant must show that as a result of the accident, she has a "complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience".[40]

There is no succinct description of the physical demands of a RPN job similar to that set out in the Employer's Confirmation Form for a PSW and there is not a physical demands analysis. The job description/job routine of a RPN[41] found in the employment file describes the tasks and routines of a RPN. It includes handing out supplies, making rounds, supervisory tasks in relation to PSW responsibilities, handing out medication, checking blood sugar, supervising dining rooms, ordering medication, doing treatment for assigned residents, tidying and

restocking medication carts, and documentation. While this work seems less physically demanding than PSW work, it clearly involves [illegible] work.

Dr. Leung confirmed in his evidence that the Applicant stopped work in May 2017 because of her back and knees. He referred her to specialists for both her back and her knees. I note that by the time the Applicant stopped in May 2017, she had worked for about six months, working initially for a few weeks as a PSW before obtaining a RPN position. I also note, however, the Applicant's history of hard work and ambition. She worked as a computer programmer in China before coming to Canada in 2001 but was unable to obtain similar employment here. She worked as an assembler for two years and then as a PSW. She took an accounting course in 2006 but was unable to find work. Her only experience in this area is work in co-operative programs undertaken as part of the course. That experience was 12 years ago. After working as a PSW with the same employer from 2006, she took a two-year programme to become a RPN, a realistic goal in the context of the type of caregiving which her employer provided. She testified that the same union represented PSWs and RPNs at the institution where she worked. She obtained the RPN position because of seniority. The Insurer speculated that she had not returned to work after the accident because she was waiting for a RPN position but there is no evidence to support this.

Not only did the Applicant take the RPN course, she took about five months off work in the first part of 2014, undoubtedly at a cost to her, to devote herself full-time to her studies. The accident happened days before she received her nursing certificate. She returned to work after she had been without IRBs for more than a year. After a few weeks she obtained the RPN position for which the evidence shows she worked very hard. I am persuaded on all of the evidence that although the RPN job seems physically less demanding than the PSW job, the Applicant worked at the RPN job for as long as she could. In my view of the evidence, had she been able to continue to work as a RPN, she would have.

It is not at all clear in the absence of a vocational assessment or other assistance, what job, if any, the Applicant can do which is commensurate with her education and training. She stopped work a few months before the beginning of the Hearing and had been undergoing further medical investigation in the meantime. Her computer experience is not Canadian and is old. Her accounting experience such as it is, is old. Her age does not assist her prospects. In the meantime, I am persuaded on all of the evidence that notwithstanding her return to work for a period of time, the Applicant at this time suffers from a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience. She is entitled to IRBs at the rate of $400.00 per week from May 22, 2017 to date and ongoing.

Medical Benefits

The Insurer denied the treatment plan for physical therapy at about the time of the MRI which showed chondromalacia patella. I note the [illegible] unresolved pain in other areas of the body. I note that she testified that she paid for physical treatment on her own after the denial of benefits until she could no longer afford to do so. I consider this also to be an indication of the benefit which she felt from physical treatment.

I therefore find that the Applicant is entitled to a medical benefit for physical treatment by Viva Wellness and Rehab in the amount of $3,562.52 pursuant to an assessment and treatment plan (OCF-18) dated July 8, 2015.

The Insurer denied a treatment plan dated November 30, 2015 for cognitive therapy by Chaolun Medical Services in the amount of $2,793.60. The Insurer referred the treatment plan for "paper review" by Ms. Danielle Reich who had earlier conducted an occupational therapy in-home assessment on August 4, 2015.[42] In the paper review of February 22, 2016,[43] Ms. Reich opined that the treatment plan was not reasonable or necessary. I note[44] that she relies on Dr. Fielden's opinion that the Applicant had no residual findings of impairment in the knees, whose opinion in this regard I disagree with for the reasons stated. She does not appear to have had access to the February 2, 2016 opinion of Dr. Wong, discussed above. In concluding that further occupational therapy education "would only perpetuate her perceived disabilities at this time and re-enforce her pain focused behaviour…", the assumption appears to be that there is no objective basis for the Applicant's pain and fear of pain. As discussed above, there is objective and persuasive evidence that the Applicant suffers from severe chondromalacia patella, a painful knee condition made worse, not better, by pushing through the limits of pain. I therefore do not accept Ms. Reich's conclusions with respect to this treatment plan which I find on all of the evidence to be reasonable and necessary.

The Insurer denied the treatment plan dated September 22, 2015 for psychological counselling by Chaolun Medical Services in the amount of $3,491.48. The Insurer did so on the basis that the Applicant had been found by the Insurer's psychiatric assessor, Dr. Hines,[45] to have no psychiatric diagnosis. The preponderance of the evidence showed that counselling had been beneficial to the Applicant who had been involved in a traumatic accident, which had produced emotions such as anxiety and sleeplessness around issues including pain and an inability to work. I do not see that counselling in these circumstances is unnecessary or unreasonable in the absence of a specific psychiatric diagnosis. I therefore find the treatment plan for psychological counselling to be reasonable and necessary.

ACBs

As noted above, the Insurer terminated ACBs effective September 19, 2015. It appears on the evidence that no further claims or invoices were submitted to the Insurer after that date. The Applicant testified to services being provided from time to time by a personal support worker friend but the evidence as to when and where was not at all precise. No records, formal or informal, were provided with respect to

the services. The Applicant did not call as witnesses the service provider or providers to provide further details. She did not call as a [46]

I have found that the Applicant was disabled from working during the time periods in question during which attendant care benefits might be payable, to the two-year mark. I differentiate, however, between the functional abilities required for sustained employment and the functional abilities required to provide self care. I am persuaded by Ms. Reich's in-home assessment report of August 4, 2015 referred to, and by her evidence, that as of the date of this assessment, the Applicant no longer required attendant care services. At the very least the Applicant has not proven her case that she did require ongoing attendant care services.

In addition, the legislative changes made in 2010 make quite clear that attendant care services, to be payable, must be incurred by which is meant either provided in a professional capacity or provided by a family member or friend who has incurred an economic loss by providing the services.[47] In this case, the Applicant has not proven that ACBs were incurred beyond what has been paid by the Insurer. The Applicant submitted that ACBs expenses should be deemed to have been incurred pursuant to s. 3(8) of the *Schedule*, that is that the expenses would have been incurred had they not been unreasonably withheld by the Insurer. The evidence does not support such a finding on the facts of this case.

Special Award

I have found that denied medical benefits are payable and that IRBs are payable from May 2017 and ongoing, after the Applicant stopped work for the second time more than two years after the accident. While I have found the Insurer to be wrong in its denials in this regard, I do not find the Insurer's conduct to be so unreasonable as to attract the special award provisions of the *Insurance Act*, as amended. As regards medical benefits, the Insurer had paid a significant amount of benefits prior to the denial, and the view that the treatments had not significantly improved the Applicant's condition was not entirely unreasonable. Payment of IRBs which had been stopped before the two-year mark, and after a period of return to work, is not an easy judgment call, and I do not find the Insurer's continued denial in the circumstances to be so unreasonable as to attract the special award provisions.

My view of the stoppage of IRBs effective September 19, 2015 is different. Stopping an insured's only source of income following an accident is a serious matter with significant financial repercussions for the insured. It is one thing to question ongoing entitlement to treatment because there appears to be no significant improvement in an insured's condition. It is quite another to question ongoing IRBs for the same reason. No significant improvement in an underlying condition does not imply recovery and an ability to work. In this case, the adjuster required additional insurer examinations because, as discussed earlier, of the "uncomplicated" status of the Applicant's accident related injuries. The adjuster appears to have done this after having just received an MRI showing severe chondromalacia patella in the left

knee which suggests on my view of the evidence that the Applicant's injuries were not uncomplicated. It is not clear what the adjuster's [illegible] not require log notes according to the evidence.

I also note that Dr. Fielden's subsequent report of July 2015 did not deal specifically or in detail with the issue of chondromalacia patella, although the MRI, misidentified as an X-ray, is mentioned in the document review of the report. In my view, a reasonably prudent adjuster would and should have been more inquisitive as to the meaning and impact of this finding on the MRI. Dr. Fielden did not deal with the issue of chondromalacia patella in the body of any report from him until February 2016 when asked specifically to deal with Dr. Wong's medical note on the condition. Dr. Fielden's response in essence was to deny the conclusions on the MRI based on his clinical examination some months before. In my view, given the conclusions on the MRI, a prudent adjuster would have paid careful attention to all of the medical evidence before continuing to deny IRBs to an insured who was not working. The adjuster who gave evidence at the Hearing referred to the Applicant's pain focussed behaviour, having regard to Dr. Fielden's comments about pain. More attention in my view should have been paid to the potential source of the Applicant's pain.

In addition, from the evidence at the Hearing, it appears that no action was taken, either in re-instating treatment or benefits, given Dr. Fielden's findings in his addendum report of December 14, 2015[48] in which he commented on a FCE[49] which in his view showed deconditioning. This would be a further reason why a prudent adjuster would have and should have paid careful attention to all of the medical documentation and information available.

In all of the circumstances of this case, I find that the Insurer is liable to pay a special award in relation to the IRBs denied for the period from September 20, 2015 to November 6, 2016 which is 59 weeks at $400.00 per week for a total of $23,600.00 owing. The formula expressed in the leading case of *Liberty Mutual Insurance Company and Molly R. Persofsky et al.**[50]* is as follows: special award % x (benefits that were unreasonably withheld or delayed + interest on these benefits calculated under the *Schedule* + compound interest calculated according to s. 282(10)). I consider 25% to be an appropriate percentage in light of all of the circumstances discussed. 25% x ($23,600.00 + $311.65 – *compound interest of 1%* - + $627.15 – *compound interest of 2%*) = $6,134.70. I have roughly calculated interest, both under the *Schedule* and under the special award provisions of s. 282 (10) of the *Insurance Act*, as amended, to be payable from November 6, 2016 to February 28, 2018. I recognize that payments for IRBs would have accrued from the date of stoppage, with interest also accruing, a complex calculation. I therefore round the special award up to $6,500.00 which in my view, while perhaps not exact, is an approximate and appropriate penalty for the conduct of the Insurer in this case which attracted the special award.

INTEREST

The Applicant is entitled to interest on all overdue benefits found payable in accordance with the *Schedule*.

Reasons for Decision on Preliminary Issue removing TTC Legal Department as representative of record for TTC.

Background

TTC is the Applicant's accident benefits insurer as she was a transit passenger at the time of the accident and presumably had no other insurance policy under which to claim statutory accident benefits. The Applicant also has a tort claim arising from the accident. TTC is both the accident benefits insurer and tortfeasor insurer. TTC also has an in-house legal department which handles both accident benefit claims and tort claims. This is not in dispute.

On the eve of the accident benefits Hearing, Applicant's counsel advised of an intention to challenge the Insurer's witnesses on the basis of alleged violations of the *Dispute Resolution Practice Code* ("*Code*"). The Insurer hastily prepared written materials in response to the Applicant's position on witnesses and in support of a counter motion, alleging violations of the *Code* by the Applicant. The written materials included the affidavit of Chad Townsend, who is acknowledged to be the lawyer in the TTC legal department handling the Applicant's tort claim on behalf of TTC.

Mr. Townsend's affidavit, sworn on October 30, 2017,[51] is based on his personal knowledge as Litigation Counsel, upon information and belief, and upon his review of the accident benefits file. He states as follows for example with respect to review of the file at paragraph 5 of the affidavit:

I verily believe from review of the file that on or about July 5, 2017, the Insurer notified its witnesses – Dr. Fielden, Danielle Reich and Dr. Hines – of its intention to call each to give evidence at the hearing. These three witnesses are all experts upon whom the Insurer relied in denying or terminating the benefits in dispute in this arbitration. I verily believe from review of the file that throughout the course of the claim, the Applicant and her counsel were provided with the reports and addendums of Dr. Fielden, Daniel [sic] Reich and Dr. Hines with the timelines in the Statutory Accident Benefits Schedule – Effective September 1, 2010, O Reg 34/10. Applicant's counsel was also provided with these reports with the Arbitration Brief on July 19, 2017.

The Applicant then moved to have counsel and his legal department removed as solicitors of record for TTC in this arbitration, for having breached a mandatory firewall erected between accident benefits and tort departments, creating a conflict of interest for counsel to act in

this matter.

Analysis

Mr. Townsend's affidavit is quite clear evidence on its face that any firewall erected between accident benefits and tort in the TTC legal department was breached. The affidavit refers to a review of the accident benefits file by the tort lawyer including references to medical witnesses and reports.

- Necessity of Firewall.

The first question is whether or not a firewall is required. The starting point is a 1997 Insurance Bureau of Canada general bulletin, also known as bulletin 184, which states as follows:

INTERNAL TRANSFER OF INFORMATION FROM ACCIDENT BENEFITS ADJUSTER TO TORT ADJUSTER

IBC has received complaints about the practice of some automobile insurers which in adjusting claims where they insure both the tortfeasor for liability coverage and the plaintiff for accident benefits, have not taken appropriate steps to ensure that health records are not disclosed from the accident benefits file to the tort adjuster.

Members are reminded of Rule 13 of the All Industry Claims Agreement which states:

Insurers agree, as a matter of corporate policy, that they shall not gather medical information from doctors or their employees, without the written consent of the patient, subject only to any right to such information under law or rules of practice.

For Rule 13 to be effective, liability insurers are not to seek this medical information indirectly from the insurer which has received it to adjust the accident benefits claim. Where the same insurer insures both the tortfeasor for liability coverage and the victim for accident benefits, they should set up 'Chinese Walls' so that information gathered by it regarding the accident benefits claim does not become available to the tort adjuster, unless the insured so authorizes. The tort adjuster must rely solely on the rules of civil procedure to obtain the information on the plaintiff's medical condition or on amounts s/he has received as accident benefits.

we encourage members to review their internal procedures to ensure that they are in compliance with these requirements.

This bulletin, while not binding, has been the subject of judicial comment. I have reviewed all of the case law submitted by the parties but will comment only on the two which I find most relevant and significant.

The Divisional Court case of *Klingbeil (Litigation Guardian of) v. Worthington Trucking Inc.*[52] concerned a pedestrian, a minor, who was struck by the trailer of a truck in an accident which occurred in 1995. She claimed accident benefits from the insurer of the trucking company as a deemed insured and she also sued the trucking company in tort. The insurer disputed responsibility for accident benefits in arbitration proceedings concerning a priority dispute. The insurer retained the same law firm for the arbitration proceedings and for the tort proceedings. A lower court, referring to General Bulletin 184, and to the absence of evidence of a "Chinese Wall" (firewall), prohibited the law firm from acting in both the arbitration proceedings and the tort proceedings. The insurer appealed.

The Divisional Court overturned the lower court ruling finding that there had never been a solicitor/client relationship between the insurer law firm and the plaintiffs, who had their own lawyers. There was no legal, disqualifying conflict in the view of the court. The court stated: [53]

There is no rule or obligation of confidentiality that prevents a person who receives information in confidence, from using that information to defend himself against a claim made against him by the same person who gave the confidential information to him. Privilege is waived by the person who gave the confidential information by the very act of suing the recipient of the information on a cause of action to which the confidential is relevant…….

The Divisional Court took up the issue again in the more recent case of *Derivisholli v. Cervenak*.[54] In that case the same insurer happened to be the insurer for both vehicles in an accident which the insurer alleged was staged. In that case, the plaintiff had a contract of insurance directly with the insurer. The insurer retained the same law firm to act for the insurer with respect to the plaintiff's claim for accident benefits, and also to act for the insurer in defending the plaintiff's claims against the other driver. While different lawyers in the law firm handled the different claims, there was no pretence of a firewall and documents were openly shared between the accident benefits file and the tort file.

The lower court granted the plaintiff's request for an order removing the law firm from the record in the tort claim. The lower court was of

insurer. The insurer had a duty of good faith to the plaintiff in the accident benefits claim and this duty conflicted with the insurer's duty to the other driver in defending that driver from the claims of the plaintiff. Leave to appeal was granted with the justice who granted the leave to appeal noting that the decision conflicted with *Klingbeil* and concluding that:

From a fact perspective between the case at bar and *Klingbeil,* little turns on whether the plaintiff is suing her own insurer or the defendant's insurer, as the claim for AB benefits is a statutory claim and identical coverage is provided in either scenario under section 270 of the Insurance Act.[55]

Notwithstanding the conclusion that little turned on whether the plaintiff was suing her own insurer or the defendant's insurer, the Divisional Court upheld the lower court ruling in *Derivisholli*. The Court stated[56] that the insurer was not an ordinary individual. It was an insurance company occupying two unique roles with distinct duties. The first role was to defend the other driver in the tort action and the other was its role as the accident benefit insurer of the plaintiff. In its capacity as accident benefit insurer, it owed the plaintiff a duty of good faith arising out of its fiduciary obligations.

The Court held that much had changed since *Klingbeil* which concerned a 1995 accident. The *Insurance Act* changed in November 1996, requiring that a plaintiff apply for statutory accident benefits prior to the commencement of a tort claim. The Court stated:[57]

The implication of Section 258.3 of the Insurance Act, which requires a tort plaintiff to apply for statutory accident benefits before initiating a tort claim, are far-reaching. By the time the tort action has been initiated the plaintiff will have been obliged to apply for statutory accident benefits, and with that application the plaintiff may also have been obliged to submit to an examination under oath, attend various independent medical examinations and disclose all relevant health information.

The Court went on to state that apart from its fiduciary obligation, the statutory accident benefit insurer also had an obligation to ensure that the information supplied by its insured is kept private. The Court held that it did not matter that the insurer would ultimately come into possession of much of what was contained in the accident benefits file during the course of the tort proceedings. The insurer did not have an automatic right to that information:

The plaintiff has a privacy interest in the confidential health information supplied to State Farm, and it is only with the consent of the plaintiff, or by order of the court, that such information can be communicated to State Farm in its capacity as the statutory third party, or as the insurer obliged to provide coverage to the defendant, Cervenak.[58]

The Court found that the failure to separate the interests of the insurer "on the tort and accident benefit side, by retaining the same law firm and disclosing confidential information to that law firm, resulted in a disqualifying conflict of interest as set forth in *MacDonald Estate v. Martin*, [1990] 3. S.C.R. 1235."

The accident in this case happened in 2014, after the legislative changes discussed in *Derivisholli*. I am bound by that Divisional Court Decision. I find that TTC was required to maintain a firewall between accident benefits and tort. Any firewall was clearly breached, placing the legal department at TTC in a disqualifying legal conflict of interest. There is at least the appearance of impropriety and unfairness. That appearance can only be made worse by permitting the TTC legal department to act for the insurer in this Hearing where the firewall between accident benefits and tort has clearly been breached. The remedy is the removal of the legal department of TTC from the record as lawyers for TTC in the arbitration proceeding.

- Was there Consent?

Mr. Townsend provided a further affidavit dated October 31, 2017 in which he alluded to the fact of ongoing settlement discussions in the accident benefits claim but not the details of the discussions. He indicated that the discussions "turned to a possible global settlement of both the accident benefits and tort file."[59]

Ms. Ismail, counsel for the Applicant, denied that global settlement discussions took place and Mr. Lim acknowledged that they had not.

Mr. Townsend stated as follows at paragraph 7 of the affidavit of October 31, 2017:

7. There was a third FSCO settlement conference scheduled for October 23, 2017. On or around October 23, 2017, Mr. Lim was advised by Mr. Huseynov [a paralegal in the Applicant's law firm] that their office was preparing a tort settlement proposal on behalf of the Applicant. Mr. Huseynov advised if I would be participating in the FSCO settlement conference and set forth his position that he only wanted me to participate if I were going to engage in global settlement discussions. I did not participate in the FSCO settlement conference because I was not available at that time. At the time I was advised that it was agreed by Mr. Huseynov and Mr. Lim, that Mr. Lim would convey offers from the tort at that settlement conference. I did not find any of these arrangements to be unusual.

Ms. Ismail objected to the discussion of privileged settlement discussions and to the hearsay nature of the evidence with respect to the [redacted] show that the Applicant consented to such a breach. The Insurer has not discharged that onus.

Even assuming an intention by counsel to have a global settlement conference, I do not believe that in itself amounts to a grant of permission to a tort lawyer, without further authorization, to freely review the accident benefits file. That would not be the case where separate insurers and separate lawyers handled the accident benefits and tort claims and it should not be the case where the insurer and law firm are the same and where a firewall is required. I find that there is insufficient evidence that the Applicant consented to a review of the accident benefits file by the tort lawyer.

I find that I have jurisdiction to make this order further to an arbitrator's inherent jurisdiction to control the process and prevent an abuse of process. To permit the TTC legal department to continue to act in the arbitration proceedings in these circumstances would be an abuse of process in my view.

The question of costs is deferred to the conclusion of the Hearing.

EXPENSES:

If the parties are unable to agree on the entitlement to, or quantum of, the expenses of both the Hearing and preliminary motion, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

May 1, 2018

Anne Morris

Arbitrator

Date

FSCO A16-001903

BETWEEN:

XIAO YING WANG

Applicant

and

TTC INSURANCE COMPANY LIMITED

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario *Regulation 664*, as amended, it is ordered that:

1. The Applicant is entitled to IRBs at the rate of $400.00 per week from September 20, 2015 to November 6, 2016, and from May 22, 2017 to date and ongoing.

2. The Applicant is entitled to receive medical benefits for the following:

(i) physical treatment by Viva Wellness and Rehab in the amount of $3,562.52 pursuant to an assessment and treatment plan (OCF-18) dated July 8, 2015;

(ii) cognitive therapy by Chaolun Medical Services in the amount of $2,793.60 pursuant to an OCF-18 dated November 30, 2015;

(iii) psychological counselling by Chaolun Medical Services in the amount of $3,491.48 pursuant to an OCF-18 dated September 22, 2015.

3. The Applicant is not entitled to ACBs beyond those already paid by the Insurer.

4. The Insurer liable to pay a special award in the amount of $6,500.00.

5. The Applicant entitled to interest for the overdue payment of benefits in accordance with the provision in the *Schedule*.

6. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

May 1, 2018

Anne Morris

Arbitrator

Date

[1] *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

[2] See letter from TTC dated September 14, 2015, Insurer Brief, Vol 1, Tab C1.

[3] See p. 20 below

[4] Employment File, Vol 1, Tab 9, p. 64 of the Applicant's brief. The evidence was that this was the same institution she worked at from 2004 but under different ownership.

[5] See Record of Employment, Vol 1, Tab 9, p. 107 of the Applicant's brief.

[6] This is described as a medical leave in a letter from the employer dated August 10, 2017, but the Applicant's evidence that it was to complete school is confirmed by a letter from her in the employment file dated January 14, 2014. See employment file, Applicant's brief, Vol 1, Tab 9, pp. 64 and 124.

[7] Motor vehicle accident report, Applicant's brief, Vol 1, Tab 8.

[8] Insurer brief, Vol 1, Tab E1, p. 83.

[9] The paramedic record at p. 82 indicated that there was no SOB.

[10] Insurer brief, Vol 1, Tab E1, p. 93.

[11] *Ibid.*, p. 86.

[12] *Ibid.*, p. 91.

[13] Insurer brief, Vol 1, Tab E10, p. 298.

[14] Letter to Insurer dated January 23, 2015, Insurer brief Vol 1, Tab E2, p. 132.

[15] Applicant's brief, Vol 2, Tab 17, pp. 303 and 304.

[16] *Ibid.*, p. 359.

[17] See Insurer brief, Vol 2, Tab E1, p. 105. The date on this copy is clearer.

[18] Applicant's brief, Vol 1, Tab 12, p. 189.

[19] Insurer's brief, Vol 1, Tab B3, p. 55.

[20] *Ibid.*, Tab C1, p. 69, and Tab D1, p. 74.

[21] *Ibid.*, Tab B2, p. 49.

[22] *Ibid.*, Tab B1, p. 37.

[23] Section 5(1) 1 of *Schedule*.

[24] Employment file, Applicant's brief, Vol 1, Tab 9, p. 11.

[25] Employment file, Insurer's brief, Vol 2, Tab F2, p. 616.

[26] Insurer's brief, Vol 1, Tab E15, p. 415.

[27] *Ibid.*, at p. 422.

[28] *Ibid.*, Tab E9.

[29] Applicant's brief, Vol 2. Tab 17, p. 367.

[30] See reports, Insurer's brief, Tab E11.

[31] *Ibid.* at p. 322.

[32] *Ibid.*, p.335.

[33] *Ibid.*, p. 339.

[34] *Ibid.*, p. 342.

[35] At p. 317.

[36] At p. 316.

[37] At p. 319.

[38] *Ibid.* at p. 331.

[39] At p. 343.

[40] Section 6 (2) (b) of the *Schedule*.

[41] Employment file, Applicant's brief, Vol 1, Tab 9, p. 68.

[42] Insurer brief, Vol 1, Tab E12, p. 348.

[43] *Ibid.* at p. 379.

[44] At p. 384.

[45] See reports at Insurer's brief, Vol 1, Tab E14.

[46] See Insurer brief, Vol 1, Tab E6.

[47] See section 3 (7) (e) of the *Schedule*.

[48] Insurer's brief, Vol 1, Tab E11, p. 335.

[49] At p. 337.

[50] Office of the Director of Arbitrations, Appeal P00-00041 at p. 24.

[51] Preliminary Issue Motion Record of the Insurer, Tab 2.

[52] [1999] O.J. No. 867.

[53] At p. 4.

[54] 2015 ONSC 2286.

[55] See p. 6.

[56] At p. 9.

[57] At p. 9.

[58] At p. 14.

[59] At paragraph 6.