

## RECENT APPLICATION OF THE VIOLI TEST TO REHABILITATION BENEFITS ASSESSMENTS

Under the Statutory Accident Benefits Schedule (SABS), auto insurers are required to pay for all “reasonable and necessary” rehabilitation expenses for an insured who has suffered an impairment in a car accident. The intended purpose of these benefits is to reduce or eliminate the effects of any resulting disability or to facilitate the insured’s reintegration into the family, society and the labour market.

Frequently, however, the insurer will deny rehab Treatment Plans on the grounds that the requested services are not “reasonable and necessary”.

In *Federico v. State Farm Mutual Automobile Insurance Company*, released January 6, 2015, Arbitrator Huberman provided an extended discussion of these terms. Lynda Federico, the applicant, had been injured in a 2007 collision. State Farm, her insurer, refused to fund treatment plans for a 2010 Occupational Therapy assessment and proposed OT services. The parties were unable to settle the matter at mediation, which led to this arbitration.

State Farm argued that the Applicant had no need for further rehabilitation, as there were no objective findings of ongoing impairment to support her pain complaints and she had returned to her activities of daily living, including her employment. Based on these factors, it claimed that the stated goals of the disputed Treatment Plans – pain reduction and a return to activities of normal living - had been achieved. As well, it argued that any ongoing pain complaints were not causally connected to the soft tissue injuries she suffered 3 years before the Treatment Plans were submitted. In support of this position, State Farm relied upon an Independent Psychological Examination from March 25, 2008 and a Functional Capacity Evaluation Report from January 26, 2009, as well as the clinical records of the Applicant’s Family Physician.

The Applicant claimed that the proposed treatment plans were reasonable and necessary because, contrary to State Farm’s claim, the vast majority of the medical records supported the position that she had never returned to pre-accident status, and certainly not by the time of the disputed Plans. Specifically, she rejected the insurer’s submission that she had returned to her pre-accident employment status. While she had resumed part-time work both at the Toronto District School Board and with the family plumbing business, the records consistently documented her struggles with ongoing work-related impairments. Similarly, she had not resumed her pre-accident household or leisure activities.

Regarding State Farm’s causation challenge, the Applicant countered that the only evidence tendered concerning causation was that of Dr. MacKinnon, her treating psychologist, which was not challenged by State Farm under cross-examination. Since it was not inherently improbable, she proposed that Dr. MacKinnon’s opinion should be accepted. Additionally, she pointed out that there was nothing in her pre- or post-accident history that would account for her ongoing impairments.

Arbitrator Huberman performed a detailed review of the governing principles. He highlighted that the interpretation of reasonableness and necessity is a contextual exercise, and that pain relief in and of itself can be a legitimate medical and rehabilitative goal, even if it does not promote recovery. Following this, he set out the test established in *General Accident Assurance Co. of Canada v. Violi* (FSCO Appeal P99-00047):

1. The treatment goals, as identified, are reasonable.
2. These goals are being met to a reasonable degree. And
3. The overall costs [not just financial, but also investment of time, etc.] of achieving these goals is reasonable taking into consideration both the degree of success and the availability of other treatment alternatives.

Based on these principles, Arbitrator Huberman found that the proposed Treatment Plans were reasonable and necessary as they would advance the goals of pain reduction and a return to normal activities. Despite credibility concerns raised by State Farm, he found that the Applicant testified in a straightforward manner and her demeanor carried the conviction of truth. He also found that her evidence accorded with the facts and circumstances of the case. In doing so, the arbitrator made it clear that he did not accept State Farm's characterization of the evidence.

These issues were again in dispute in *F.J. v. Intact Insurance Company* (2020 CanLII 34495), a hearing in writing before the Licence Appeal Tribunal (LAT) that was released April 16, 2020. In it, the Applicant had been deemed catastrophically impaired (CAT) following a collision on March 15, 2015. She was deemed CAT for mental and behavioral disorders including a Somatic Symptom Disorder with Predominant Pain and Major Depression. Following the collision, she received intensive physical rehabilitation for more than 3 years before Intact denied a treatment plan for ongoing physiotherapy and massage treatment. The parties failed to resolve the dispute at a case conference which led to this hearing in writing.

The Applicant argued that the proposed treatment was reasonable and necessary to improve her functional levels, reduce her pain and improve her emotional state. She explained that although the relief was temporary, it did have a positive effect on her physical and emotional well-being. In support, she relied on the *Violi* case and the evidence of her treating psychologists and other treatment providers.

Intact argued that the Applicant had developed a dependency on physiotherapy and massage and that the proposed treatment would have no impact on the Applicant's condition. In support, it also relied upon *Violi*, and a case called *Amoa-Williams v. Allstate* (referred to with approval in *Violi*) which cautioned that, "pain relief measures should not encourage an inappropriate or indefinite dependency or interfere with other aspects of rehabilitation." Intact argued that a home-based exercise regimen was more appropriate. It also submitted independent medical examinations from a psychiatrist, neurologist and orthopedic surgeon in support.

Adjudicator Paluch accepted the principles provided by both parties, agreeing that pain relief was a legitimate treatment goal but that it should not encourage an indefinite or inappropriate dependency. He identified additional factors from *Amoa* including whether the treatment complied with accepted professional protocols and the subjective benefit to the insured person.

The evidence showed that the Applicant's physical improvements had plateaued and that she had suffered additional injuries as a result of ongoing balance issues. She was emaciated and frail. As well, she was convinced that without ongoing treatment she would become bedridden.

The Applicant's treating psychologist, Dr. Waisman opined that her prognosis was poor. He recognized that ongoing physical therapy was not leading to lasting gains, as her chronic pain was multifactorial and rooted in CAT-level psychological impairment. However, he recommended ongoing physiotherapy and massage as part of a multidisciplinary pain management programme. This recommendation was echoed by Dr. Damji, her other treating psychologist.

Intact's experts provided IME opinions that showed no ongoing neurological injury and no physical basis for the Applicant's ongoing pain complaints. Therefore, they collectively concluded that ongoing physiotherapy and massage would not significantly improve her condition. After opining that the Applicant's prognosis was "excellent," Dr. Simon, the orthopedic surgeon concluded that the Applicant had developed a dependency on the treatment and was, "better suited to pursue an independent strength and conditioning program".

Based on the evidence in this case, Adjudicator Paluch found that the proposed treatment was reasonable and necessary in accordance with the three-part *Violi* test. He placed far greater weight on the Applicant's expert reports, labelling the IMEs "cursory", and noting that they did not accord with the facts of the case. He accepted that further physical treatment might produce diminishing returns but insisted that pain reduction was still a necessary goal in a complex case where pain, anxiety and mood were all intertwined. He noted that while an insurer should not be expected to fund ineffective treatment, effectiveness need not be determined with scientific certainty. There was evidence, including the Applicant's credible self-report, that the treatment provided some relief. In contrast, there was no evidence presented that the Applicant's dependence on clinic-based treatment was inappropriate, given her balance issues, fragile physical state and psychological impairment. Although the proposed treatment was expensive compared to a home exercise programme, it was a reasonable expense, and no other reasonable alternative was proposed.

Finally, Adjudicator Paluch observed that the Applicant expressed a strong preference for ongoing clinic-based treatment and that the LAT has accepted that, "the choice of modality of treatment is that of the insured person and of his or her health practitioner". He saw no valid reason to challenge this choice and therefore, approved the treatment plan.

Impact: In order (hopefully) to minimize unnecessary delay and disputes over whether and OCF-18 should be approved, care providers should set out their proposed treatment plans in terms that will satisfy the three elements of the *Violi* test – the treatment is reasonable, it meets the medical or rehabilitative goals, and the costs associated with it are reasonable. This is true in all cases, but it is especially important when submitting on behalf of chronic pain clients or patients. Despite numerous cases decided in favour of Applicants, insurance companies still routinely refuse to fund ongoing treatment in chronic pain cases. An OCF-18 should describe the proposed treatment through the lens of the *Violi* test and provide a rationale for the insured person's preference and/or her treatment providers' recommendations. This will give the claimant a strong foundation to challenge a denial and potentially avoid an extended dispute.