

**SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

**B E T W E E N :**

**X Y**

**Appellant  
(Appellant in appeal)**

**and**

**DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM**

**Respondent  
(Respondent in appeal)**

---

**FACTUM OF THE APPELLANT**

---

Income Security Advocacy Centre  
425 Adelaide Street West, 5<sup>th</sup> Floor  
Toronto, Ontario  
M5V 3C1

**Marie Chen** (LSUC 31780G)

Tel: 416-597-5820 (Ext. 5152)

Fax: 416-597-5821

Email: [chenmel@lao.on.ca](mailto:chenmel@lao.on.ca)

Grey-Bruce Community Legal Clinic  
945 3<sup>rd</sup> Avenue East, Suite 2  
Owen Sound, Ontario  
N4K 2K8

**Seana Moorhead** (LSUC 45110V)

Tel: 519-370-2200

Fax: 519-370-2110

Email: [moorhes@lao.on.ca](mailto:moorhes@lao.on.ca)

**Lawyers for the Appellant**

TO: Ministry of Community and Social Services  
Legal Services Branch  
56 Wellesley Street West, 17<sup>th</sup> Floor  
Toronto, Ontario  
M7A 1E9

**Mimi Singh** (LSUC 27105P)

Tel: 416-327-9731

Fax: 416-327-0568

Email: [mimi.n.singh@ontario.ca](mailto:mimi.n.singh@ontario.ca)

**Lawyer for the Respondent**

## INDEX

	<b>Page</b>
<b>PART I – IDENTIFYING STATEMENT</b>	1
<b>PART II – OVERVIEW STATEMENT</b>	1
<b>PART III – STATEMENT OF FACTS</b>	2
A. The Ontario Disability Support Program Application	3
B. The Social Benefits Tribunal Appeal	5
C. The Tribunal’s Decision	9
<b>PART IV – ISSUES AND LAW</b>	10
A. Standard of Review	11
B. Disability under the <i>Ontario Disability Support Program Act</i>	12
C. The Tribunal misinterpreted ODSP Regulation section 64(1)(a) and thereby misapprehended and ignored crucial medical evidence	13
<b>PART V – ORDER SOUGHT</b>	20
<b>CERTIFICATE</b>	22
<b>SCHEDULE A - List of Authorities</b>	Tab A
<b>SCHEDULE B – Legislation</b>	Tab B

**PART I: IDENTIFYING STATEMENT**

1. This is an appeal by X Y from a decision of the Social Benefits Tribunal (“the Tribunal”) that he was not a “person with a disability” pursuant to the *Ontario Disability Support Program Act* (“ODSPA”) and therefore not eligible for income support.

**PART II: OVERVIEW STATEMENT**

2. Mr. Y is a 55 year-old man from Meaford, Ontario. Due to multiple injuries and surgeries resulting from a series of traumatic accidents over a thirty-five year period, Mr. Y suffers from chronic pain and loss of movement in his shoulders, his left foot and right knee. His mobility is seriously affected. He is in receipt of Ontario Works benefits but because of his condition had been medically excused from OW employment requirements.
3. Mr. Y applied to the Ontario Disability Support Program (ODSP) for benefits. When his application was denied by the Respondent Director, he appealed to the Social Benefits Tribunal.
4. The Tribunal denied his appeal finding that Mr. Y’ impairments were not substantial at the time of the Director’s decision and that he was therefore not a person with a disability under section 4(1) of the ODSPA. The Tribunal rejected medical reports from Mr. Y’ family doctor and treating specialist that were dated after the Director’s decision, finding that post-dated medical reports are to be given minimum weight. This finding is a

misinterpretation of the requirement to consider new medical evidence in section 64(1)(a) of the ODSP Regulation.

5. The Tribunal also found that the medical reports demonstrated a deterioration of Mr. Y's condition since the Director's decision. However, both reports related to Mr. Y's condition at the time of the Director's decision and did not refer to a deterioration of his condition afterwards. In particular, the treating specialist did not treat Mr. Y in the time between the Director's decision and the writing of his report. Any "deterioration" documented in the reports would have occurred prior to the Director's decision having been made. As a result, the Tribunal erred in law by misapprehending medical evidence that was directly relevant to the central issue on appeal; that is, whether Mr. Y was a "person with a disability" under section 4(1) of the ODSPA.

### **PART III: STATEMENT OF FACTS**

6. Mr. Y is a 55 year-old man who lives in Meaford, Ontario. After completing high school, he worked as a carpenter. Since 1975, he has had a series of traumatic accidents resulting in multiple injuries, surgeries and conditions. Mr. Y is in receipt of social assistance through the Ontario Works program. As a result of his conditions and injuries, he was medically excused between 2009 and 2012 from participating in Ontario Works employment-related requirements on the basis that he was deemed "temporarily unemployable for medical reasons". Mr. Y was last employed in 2006 when he worked part time for 3 months cutting knots out of hardwood flooring.

Appeal Book, Tab 10, pp. 54-55: Report of Dr. McCall (January 16, 2013)  
Appeal Book, Tab 5, p. 23: Tribunal Record of Hearing (May 4, 2013)  
Appeal Book, Tab 11, pp.76-85: Limitations to Participation Forms (19 December 2009,  
8 September 2010, 30 November 2011, 18 November 2011, 26 February 2012)

#### **A. The Ontario Disability Support Program Application**

7. On November 26, 2011, Mr. Y applied to the Ontario Disability Support Program for benefits as a disabled person.

Appeal Book, Tab 6, pp. 28-41: Health Status Report and Activities of Daily Living Index (November 26, 2011)  
Appeal Book, Tab 7, pp. 42-49: Self Report Form (November 15, 2011)

8. Dr. James Wong, Mr. Y' family doctor since 1995, completed the ODSP application forms. Dr. Wong confirmed that Mr. Y suffers from osteoarthritis in the right knee, fracture dislocation of the right shoulder (repaired in 2004), fracture in the left humerus and dislocated left shoulder (repaired in 2010), and a crush injury to the left foot. Dr. Wong indicated that Mr. Y suffers from chronic pain and decreased range of movement.

Appeal Book, Tab 6, p. 54: Health Status Report (November 26, 2011)

9. Dr. Wong identified Mr. Y' restrictions as "difficulty with walking" because of his knee and foot conditions, and "difficulty with above shoulder activity" associated with his shoulder and arm injuries. He has been prescribed Percocet to control his pain. All conditions were expected to last a year or more and be continuous. The prognosis was that the conditions would "remain the same". Dr. Wong noted that surgery was scheduled for the right knee and left foot in November 2011.

Appeal Book, Tab 6, pp. 55-57: Health Status Report (November 26, 2011)

10. Dr. Wong confirmed that Mr. Y has limitations with respect to walking three blocks on level ground, climbing stairs, doing housekeeping and grocery shopping.

Appeal Book, Tab 6, p. 39: Activities of Daily Living Index (November 26, 2011)

11. On his Self Report Form, Mr. Y reported that his disability has caused him physical, emotional and psychological difficulties; that he generally experiences “a lot of pain” as a result of his disability which has stopped him “a lot” from completing his daily activities. With respect to the effect of his disability on his ability to take care of his personal needs, to participate in the community or to work, Mr. Y reported that because of his injuries, his body was in “arthritic pain constantly”, his “balance is affected” and he stumbles into things, he has “trouble reaching things” above his shoulders, is afraid of falling in the shower, and has a “very hard time” concentrating because of the pain and fear.

Appeal Book, Tab 7, pp. 45, 48: Self Report Form (November 15, 2011)

12. Mr. Y’ ODSP application was denied on May 1, 2012 by the Respondent Director who concluded that he was not a person with a disability pursuant to s. 4(1) of the ODSPA.

Appeal Book, Tab 3, pp. 14-15: Disability Adjudication Unit Decision (May 1, 2012)

13. The Director’s decision was confirmed on June 1, 2012, further to an internal review request.

Tribunal’s Record of Proceedings, p. 30: Disability Adjudication Unit Internal Review Decision (June 1, 2012)

## **B. The Social Benefits Tribunal Appeal**

14. Mr. Y appealed the Director's decision to the Social Benefits Tribunal and his appeal was heard on March 13, 2013.

Appeal Book, Tab 4, pp. 16-17: Appeal Form (June 4, 2012)  
 Appeal Book, Tab 5, p. 18: Tribunal Record of Hearing (May 4, 2013)

15. Mr. Y submitted additional medical evidence in support of his appeal. These included a medical report from Dr. Wong dated August 25, 2012; a medical report with attachments from Dr. John McCall, a specialist in orthopaedic surgery and sports injuries, dated January 16, 2013; and Ontario Works Limitation to Participation forms.

Appeal Book, Tab 8, pp. 50-51: Letter from Seana Moorhead (February 4, 2013)  
 Appeal Book, Tab 9, pp. 52-53: Report of Dr. James Wong (August 25, 2012)  
 Appeal Book, Tab 10, pp. 54-75: Report of Dr. John McCall (January 16, 2013)

16. Dr. Wong's and Dr. McCall's reports and supporting evidence documented Mr. Y's multiple injuries, conditions, and treatment. Dr. McCall who has treated Mr. Y since 1980, stated in his report that he had last reviewed Mr. Y on December 14, 2011, that is, prior to the date of the Director's decision. The reports confirmed the following injuries and restrictions:

Appeal Book, Tab 9, pp. 52-53: Report of Dr. James Wong (August 25, 2012)  
 Appeal Book, Tab 10, pp. 54-55: Report of Dr. John McCall

- (i) Left foot: In 1980, Mr. Y suffered a "severe crush injury" to his left foot in a snow machine accident, which required multiple surgeries. Further surgeries were carried out on the foot in 1995 for a bone infection (osteomyelitis) and in December 2011 to remove a bone outgrowth (exostosis) from the fracture. Dr.

McCall confirmed in his report that Mr. Y has loss of movement and chronic pain in his left foot.

Appeal Book, Tab 10, pp. 54-55: Report of Dr. John McCall (January 16, 2013)  
 Appeal Book, Tab 10, p. 74: Operative Note by Dr. McCall (December 7, 2011)  
 Appeal Book, Tab 9, p. 52: Report of Dr. James Wong (August 25, 2012)

- (ii) Right shoulder: Mr. Y suffered a fracture dislocation in January 2004, which required surgery in July 2004. Further surgery was carried out in January 2005 for “frozen shoulder” and a bicep tendon tear. Dr. McCall stated in his report that this injury left Mr. Y with permanent disability, loss of movement and chronic pain.

Appeal Book, Tab 10, pp.54-55: Report of Dr. John McCall (January 16, 2013)  
 Appeal Book, Tab 10, pp.60-61: Operative Note by Dr. McCall (July 12, 2004)  
 Appeal Book, Tab 10, p. 63: Operative Note by Dr. McCall (January 10, 2005)  
 Appeal Book, Tab 9, p. 52: Report of Dr. James Wong (August 25, 2012)

- (iii) Left shoulder: Mr. Y suffered a dislocation (AC separation) in a fall in 2009 or 2010, followed by a fracture of his left humerus after another fall in June 2010. Surgery was performed on both injuries in June 2010. In December 2010, a plate and screws were removed and his contracted shoulder released by surgery. Dr. Wong stated that despite the repair, the fracture and AC separation has resulted in chronic pain and stiffness. Dr. McCall reported that Mr. Y was left with permanent disability in his left shoulder, loss of movement and chronic pain.

Appeal Book, Tab 10, pp. 54-55: Report of Dr. John McCall (January 16, 2013)  
 Appeal Book, Tab 10, p. 67: Consultation note, Dr. McCall (June 7, 2010)  
 Appeal Book, Tab 10, p. 68: Operative Note by Dr. McCall (June 9, 2010)  
 Appeal Book, Tab 10, p. 72: Operative Note by Dr. McCall (December 8, 2010)  
 Appeal Book, Tab 9, pp. 52-53: Report of Dr. James Wong (August 25, 2012)

- (iv) Right knee: Mr. Y fractured his right femur when he was 17 years old in a motor vehicle accident, resulting in chronic pain in his right knee. In December 2011,

surgery on the right knee (arthroscopy) for post traumatic osteoarthritis (and on the left foot referred to above) was carried out. Dr. McCall confirmed that Mr. Y has osteoarthritis of his right knee with loss of movement and chronic pain.

Appeal Book, Tab 10, pp. 54-55: Report of Dr. John McCall (January 16, 2013)  
Appeal Book, Tab 10, p. 74: Operative Note by Dr. McCall (December 7, 2011)  
Appeal Book, Tab 9, p. 52: Report of Dr. James Wong (August 25, 2012)

17. Dr. McCall confirmed that Mr. Y has “multiple physical disabilities” affecting his upper and lower limbs; “significant chronic pain” in his shoulders, left foot and right knee; is “disabled” in regard to walking, standing, climbing, kneeling, bending, lifting, pushing, pulling and reaching overhead; and will have increasing disability with time. In his opinion, Mr. Y would “very easily qualify” for ODSP benefits.

Appeal Book, Tab 10, p. 55: Report of Dr. John McCall (January 16, 2013)

18. Dr. Wong’s report described Mr. Y as having “multiple orthopaedic conditions” that cause “significant disability” with poor prognosis. Dr. Wong stated the chronic pain and stiffness in both Mr. Y’ shoulders” compounded with the progressive degeneration of his right knee made him “totally disabled and unemployable”.

Appeal Book, Tab 9, pp. 52-53: Report of Dr. James Wong (August 25, 2012)

19. Mr. Y also submitted five “Limitations to Participation” forms completed by Dr. Wong or Dr. McCall between December 2009 and February 2012. These forms are used by Ontario Works caseworkers in order to establish whether a recipient has health limitations that prevent them from engaging in work-related activities. The doctors

certified Mr. Y to be temporarily unemployable for medical reasons and identified Mr. Y' medical limitations and prognosis respectively as follows:

- heavy lifting; AC separation in the left shoulder; good prognosis (Dr. Wong, December 19, 2009)
- heavy lifting and light lifting; recovering from left shoulder surgery, decreased use of left arm; fair prognosis (Dr. McCall, September 8, 2010)
- heavy lifting and operating machinery; frozen left shoulder and left humerus fracture; fair prognosis (Dr. Wong, March 30, 2011)
- heavy lifting and walking; loose bodies in the right knee, right knee pain and difficulty with ambulation; fair prognosis (Dr. Wong, November 18, 2011)
- heavy lifting, walking, bending, operating machinery; old injury to right knee, now osteoarthritic resulting in difficulty with ambulation; guarded prognosis (Dr. Wong, February 26, 2012).

Appeal Book, Tab 11, pp. 76-85: Limitations to Participation Forms (19 December 2009, 8 September 2010, 30 November 2011, 18 November 2011, 26 February 2012)

20. Mr. Y testified at his appeal. He described having constant pain in his knee and right shoulder and pain in his left foot which continued after surgery in December 2011.

Appeal Book, Tab 5, pp. 20, 21: Tribunal Record of Hearing (May 4, 2013)

21. Mr. Y explained that he feels sorer the further he walks. The furthest he can walk without resting is 3 to 3 ½ blocks. He can bend to reach his boots but his back is “pretty sore”. He does not do a “major shop” and usually carries one bag of groceries home. He cannot stand for more than 15 to 20 minutes. Lifting feels like “lightning” in his shoulder. He

cannot lift more than 15 – 20 lbs. Reaching overhead is painful and his right arm jolts with pain. After the surgery on his right shoulder in 2005, his range of motion improved but not fully. His left shoulder has more range of motion but has worse pain. He was taking Percocet 3 times a day which helps take away 50 to 60% of the pain. His Percocet prescription was reduced to twice a day, but supplemented with a morphine dose. He can climb stairs with the help of a rail or wall but balancing is hard, as if he has a “clubfoot”. He also has balance problems when walking. He is uncomfortable getting into the shower because of his balance problems. He cannot climb a ladder. He cannot put pressure on the right knee. He cannot work because of the need to stand.

Appeal Book, Tab 5, pp. 20-24: Tribunal Record of Hearing (May 4, 2013)

### **C. The Tribunal’s Decision**

22. The Tribunal found that Mr. Y’ conditions of “right knee osteoarthritis, right shoulder repair, left repairs and crush injury to left foot” resulted in the verified impairments of pain and decreased range of motion in the left leg, which were continuous or recurrent and expected to last a year or more. The Tribunal was also satisfied that Mr. Y had verified restrictions of walking and above shoulder activity.

Appeal Book, Tab 2, p. 7: Decision of the Tribunal (May 6, 2013)

23. However, the Tribunal concluded that Mr. Y’ impairments were not substantial at the time of the Director’s decision. It stated that the medical letters from Dr. Wong and Dr. McCall were to be given minimum weight because the letters post-dated the Director’s decision. The Tribunal was of the view that the reports were a “marked deviation” from

the ODSP application forms; were unreliable, inconsistent and demonstrated a deterioration of Mr. Y' condition not present at the time of the Director's decision. Having rejected the medical reports, the Tribunal relied on the ODSP application forms and Mr. Y' testimony to find that Mr. Y did not have substantial impairments at the time of the Director's decision.

Appeal Book, Tab 2, pp. 8-12: Decision of the Tribunal (May 6, 2013)

24. Mr. Y' application for reconsideration was denied by the Tribunal on July 11, 2013.

Tribunal's Record of Proceedings, p. 141: Decision of Vice Chair, Social Benefits Tribunal (July 11, 2013)

#### **PART IV: ISSUES AND LAW**

25. The issue to be determined on this appeal is whether the Tribunal misinterpreted and misapplied the requirement to consider new medical evidence in section 64(1)(a) of the ODSP Regulation and, as a result, misapprehended and ignored medical evidence relevant and crucial to the determination of "disability" under section 4(1) of the ODSPA.

##### **A. Standard of Review**

26. The ODSPA provides a statutory right of appeal from a decision of the Tribunal to the Divisional Court on a question of law.

*Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B, s. 31(1)

27. The standard of review for appeals of Tribunal decisions on a question of law is correctness.

*Siegel v. Ontario (Director, Disability Support Program)*, [2011] O.J. No. 5385, 2011 ONSC 5916, at para 7

*Jemiolo v. Ontario Disability Support Program*, 2009 CanLII 9420 (ON SCDC), 248 OAC 77, at para. 3

*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, at para. 31.

28. The Tribunal must be correct in both its interpretation of the law and in the manner in which it approaches the evidence. A Tribunal makes a reviewable error of law if it interprets a statutory provision incorrectly or applies the wrong test, addresses the wrong question, misapprehends the evidence, ignores relevant factors or relies on irrelevant factors. A misapprehension of evidence amounting to a palpable and overriding error is not insulated from interference by this Court.

*R. v. J.M.H.*, 2011 SCC 45, at paras. 24-32

*Sampson v. Ontario (Director, Disability Support Program)*, [2002] O.J. No. 838 (Div.Ct.), at para. 3

*Siegel v. Ontario (Director, Disability Support Program)*, *supra*, at paras. 8, 11

*Crane v. Ontario (Director, Disability Support Program)*, [2006] O.J. No. 4546 (C.A.), at para. 36

*Jemiolo v. Ontario Disability Support Program*, *supra*, at para. 2

## **B. Disability under the *Ontario Disability Support Program Act***

29. The ODSPA is remedial legislation that “should be interpreted broadly and liberally and in accordance with its purpose of providing support for people with disabilities”. Any ambiguity in its interpretation should be resolved in the claimant’s favour.

*Gray v. Director of the Ontario Disability Support Program*, 2002 CanLII 7805 (ON C.A.), at paras. 9-10  
*Benoit v. Ontario (Director, Disability Support Program)*, [2002] O.J. No. 1007 (ONSC), at para. 7

30. A “person with a disability” is eligible for income support under the ODSPA and is defined in section 4(1) as follows:

4. (1) A person is a person with a disability for the purposes of this Part if,

(a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;

(b) the direct and cumulative effect of the impairment on the person’s ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and

(c) the impairment and its likely duration and the restriction in the person’s activities of daily living have been verified by a person with the prescribed qualifications.

*Ontario Disability Support Program Act*, s. 4(1)

31. This requires an applicant to meet three separate factors in order to receive income support: substantial impairment, substantial restriction in certain activities, and verification by a prescribed health professional, although the evidence relevant to the first two factors may overlap.

*Crane v. Ontario (Director, Disability Support Program)*, *supra*, at paras. 19, 20, 25

32. Section 4(1) is intended to include persons with significant, but not necessarily severe long-term functional barriers. While the core of the concept of impairment is medical, the consideration of whether it is substantial requires a consideration of the applicant in the context of her own situation. The word “substantial” is to be given a flexible meaning related to the varying circumstances of each individual case. The test therefore is not whether the impairments or restrictions are substantial for any person, but whether they are substantial for the particular applicant before the tribunal.

*Gray v. Ontario (Director, Disability Support Program)*, *supra*, at paras. 8, 15-16  
*Ontario (Director, Disability Support Program) v. Gallier*, [2000] O.J. No. 4541, at para. 12  
*Crane v. Ontario (Director, Disability Support Program)*, *supra*, at paras. 18, 21-24

**C. The Tribunal misinterpreted ODSP Regulation section 64(1)(a) and thereby misapprehended and ignored crucial medical evidence**

33. Section 64(1) of the ODSP Regulation requires the Tribunal to consider new medical reports, even if they were not part of the original application, if the reports relate to the applicant’s condition at the date of the Director’s decision.

64. (1) On an appeal to the Tribunal from a decision that a person is not a person with a disability, a report described in paragraph 5 of subsection 14

(2) that was not provided to the Director before the decision was made shall be considered by the Tribunal if,

(a) it relates to the appellant’s condition at the effective date of the Director’s decision; and

(b) it is submitted to the Tribunal and the Director for a review by the Disability Adjudication Unit at least 30 days before the date of the hearing.

34. In *Benoit*, this Court characterized section 64 as a “mandatory inclusion” which obligates the Tribunal to consider new medical evidence that met the prescribed conditions. Where an applicant submits a supplementary medical report on an appeal, the Tribunal is mandated by subsection 64(1)(a) to consider first whether the report was submitted within the statutory deadline; and secondly whether the report relates to the appellant’s condition at the time of the Director’s decision. If the answer to both questions is yes, the Tribunal must consider the medical report in the appeal.

*Benoit v. Ontario (Director, Disability Support Program)*, *supra*, at para. 4

35. This Court in *Jemiolo* and *Peplinski* confirmed that section 64(1)(a) requires a Tribunal to consider new medical evidence if it relates to the appellant’s condition at the time of the Director’s decision. In *Jemiolo* the Court had before it medical reports which were dated after the Director’s decision and which contained evidence relating to a deterioration of the appellant’s condition since the Director’s decision. The Court found that the reports “are presumed to outline the Appellant’s condition at the date on which they are written unless there is specific indication to the contrary.”

*Jemiolo v. Ontario Disability Support Program*, *supra*, at paras. 19-24

*Peplinski v. Ontario (Director, Disability Support Program)*, 2012 ONSC 2972, at paras. 12, 15

36. In *Peplinski*, this Court referred to factors which could be considered as “specific indication to the contrary”. These include reference in a medical report to the circumstances of the doctor’s initial relationship with the appellant; and indications that the doctor/patient relationship related to a period prior to the director’s decision, to the appellant’s conditions in ODSP application, and to the issue of whether the impairments and restrictions were substantial.

*Peplinski v. Ontario (Director, Disability Support Program)*, *supra*, at para. 15

37. Thus, even if a medical report post-dates the Director's decision, a Tribunal is required to consider it to determine whether it is relevant to an appellant's condition at the time of the Director's decision and whether the report contains "specific indication" of its relevance. The Tribunal's analysis does not end by simply reading a report's date.

38. In his appeal, Mr. Y submitted two supplementary reports, from his family doctor Dr. Wong and his treating specialist Dr. McCall, verifying his impairments and restrictions. It is submitted that the Tribunal misinterpreted and misapplied section 64(1) and *Jemiolo* in its approach to these reports, and misapprehended the medical evidence which amounted to a palpable and overriding error.

39. The Tribunal relied upon *Jemiolo* for the principle that a medical report is presumed to apply on the date it is written unless there is a specific indication to the contrary. It found that based on this principle "the weight to be given to the more recent reporting ... was minimal". This statement is a clear misinterpretation of *Jemiolo*, which requires a Tribunal to examine a report for specific indication that it relates to an appellant's condition at the time of the Director's decision, not to automatically discount at the outset the weight of a report simply because it post dates the Director's decision.

Appeal Book, Tab 2, p. 9: Decision of the Tribunal (May 6, 2013)

40. As a consequence of this misinterpretation, the Tribunal erred in its consideration and interpretation of the evidence. The Tribunal failed to adopt the proper analysis of looking beyond the dates of the reports for evidence relevant to, and specific indication that the

medical evidence related to, Mr. Y' condition at the time of the Director's decision. It failed to consider the clear indications within the body of the reports themselves that confirmed that they related to Mr. Y's medical condition at the time of the Director's decision.

41. The Tribunal's error is particularly egregious in its assessment of Dr. McCall's report. Dr. McCall stated in his report that he last reviewed Mr. Y on December 14, 2011. This was four and a half months before the Director's decision on May 1, 2012. The report summarizes Mr. Y medical history, conditions and difficulties, and describes Dr. McCall's involvement in Mr. Y's medical treatment over the course of a thirty year period between 1980 and December 2011. As pointed out in *Peplinski*, these factors may constitute "specific indication" that a report is not presumed to refer to an appellant's condition on the date of the report. It is evident that Dr. McCall's report relates to Mr. Y' condition at the time the Director's decision was made, since Dr. McCall did not see Mr. Y after the date of the Director's decision.

Appeal Book, Tab 10, pp. 54-55: Report of Dr. John McCall (January 16, 2013)  
*Peplinski v. Ontario (Director, Disability Support Program)*, *supra*, at para. 15

42. The Tribunal failed to consider this evidence. Instead it compared two operative and clinic notes by Dr. McCall which referred to the success of Mr. Y' surgery, to Dr. McCall's post-dated report having been "written in the present tense" to find that the report documented "a further deterioration which was not present at the time of the Director's decision." On this basis, the Tribunal refused to consider the report.

Appeal Book, Tab 2, pp. 9-10: Decision of the Tribunal (May 6, 2013)

43. Dr. McCall did not see Mr. Y after the Director's decision. All the information in his report, which included the operative notes referred to by the Tribunal, pre-dates the Director's decision. There is no information in the report about Mr. Y' condition after the Director's decision. There was therefore no factual basis for the Tribunal to find that Dr. McCall's report documented a deterioration in Mr. Y' condition occurring after the Director's decision.

Appeal Book, Tab 10, pp. 54-75: Report of Dr. John McCall and attachments (January 16, 2013)

44. Further, the Tribunal misapprehended the evidence in finding that Dr. McCall's clinical and operative notes showed that Mr. Y was much improved and the treatments generally healed and successful. That Mr. Y was sent to recovery after surgery in "good condition" is not evidence that his conditions and impairment have healed or even improved. Mr. Y has continued to suffer from verified conditions and impairments despite undergoing multiple surgeries over the course of thirty years.

Appeal Book, Tab 2, p. 10: Decision of the Tribunal (May 6, 2013)

Appeal Book, Tab 10, p. 73: Ambulatory Care/Clinic Note by Dr. McCall (21 September 2011)

Appeal Book, Tab 10, pp. 74-75: Operative Note by Dr. McCall (7 December 2011)

45. Similarly, the Tribunal rejected Dr. Wong's report on the basis that it documented a "deterioration" of Mr. Y's condition after the date of the Director's decision. However, it is apparent from reviewing Dr. Wong's report that it relates to Mr. Y' condition at the time of the Director's decision. The report is based on Dr. McCall's treatment and assessment of Mr. Y, which is evidence that predates the Director's decision. The report reviews Mr. Y' conditions, treatment and difficulties with his knee, foot and shoulders for the period between 2004 to December 2011, that is, no later than four months before the

Director's decision. If Mr. Y' condition had deteriorated, the deterioration occurred prior to the Director's decision. Further, the Tribunal was wrong when it found the Health Status Report was dated closer to the Director's decision than Dr. Wong's report when the former was dated more than five months before and the latter less than 3 months after.

Appeal Book, Tab 2, p. 9: Decision of the Tribunal (May 6, 2013)

Appeal Book, Tab 9, pp. 52-53: Report of Dr. James Wong (August 25, 2012)

Appeal Book, Tab 6, p. 37: Health Status Report (November 26, 2011)

46. Thus, it is submitted that the Tribunal erred in finding that the medical reports show a "deterioration" of Mr. Y' condition after the date of the Director's decision. The error is a substantial one because the medical evidence which the Tribunal rejected was relevant to and probative of important aspects of Mr. Y' appeal, that is, the elements of substantial impairment and medical verification under section 4(1) of the ODSPA. The misapprehension of the evidence in this regard constitutes a palpable and overriding error on the part of the Tribunal.

*Ontario (Disability Support Program) v. Crane, supra*, at paras. 30, 36

*Siegel v. Ontario (Director, Disability Support Program), supra*, at paras. 8, 43

47. This Court has considered a treating physician's opinion to be highly relevant to the determination of disability under section 4(1). It is an error for the Tribunal to disregard or fail to appreciate relevant medical evidence.

*Sampson v. Ontario (Director, Disability Support Program), supra*, at paras. 11, 12

*Thomas v. Ontario (Director of the Disability Support Program)*, 2004 CanLII 8505 (ON SCDC), at paras. 2-4

48. The medical evidence in the reports is crucial both as verification of his medical conditions and proof that these conditions resulted in substantial impairment. As stated by the Court in *Crane*, "[t]he core of the concept of impairment is medical". The medical

evidence was crucial to the Tribunal's determination of whether Mr. Y's impairment was substantial, that is, whether his impairment was significant for him considering the context of his own situation and circumstances.

*Gray v. Ontario (Director, Disability Support Program)*, *supra*, at paras. 8, 15-16  
*Ontario (Director, Disability Support Program) v. Gallier*, *supra*, para. 12  
*Crane v. Ontario (Director, Disability Support Program)*, *supra*, at paras. 18, 21-24

49. The medical reports chronicle a thirty-six year history of multiple, severe injuries to Mr. Y's foot, leg and shoulders; multiple surgeries that were required to treat his conditions; and the resulting and continuing disabilities and difficulties he suffers. The reports document loss of movement and significant chronic pain in his left foot; permanent disability, loss of movement and significant chronic pain in his shoulders; and osteoarthritis of his right knee with loss of movement and significant chronic pain. The specialist Dr. McCall stated that Mr. Y was disabled in walking, standing, climbing, kneeling, bending, lifting, pushing, pulling and reaching overhead; and will have increasing disability with time.

Appeal Book, Tab 10, pp. 54-75: Report of Dr. John McCall and attachments (January 16, 2013)  
 Appeal Book, Tab 9, pp. 52-53: Report of Dr. James Wong  
*Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, at para. 1

50. It is significant that while the Tribunal wrongly concluded that the evidence showed a deterioration in Mr. Y's condition after the Director's decision, it did not make a ruling in respect of whether the deteriorated condition would have met the test for substantial impairment. Had the Tribunal considered this evidence as relevant to the time of the Director's decision as it ought to have, it may well have reached a different conclusion on whether Mr. Y's impairments were substantial.

51. Mr. Y is entitled to have his appeal assessed on the basis of an accurate understanding by the Tribunal of the crucial aspects of his application including the nature and degree of his medical impairments. However, Mr. Y was deprived of this because the Tribunal misapprehended and rejected relevant medical evidence. As a result, the Tribunal did not have a full and proper evidentiary basis upon which to determine if Mr. Y was a person with a disability as defined under s.4(1) of the ODSPA.

*Crane v. Ontario (Director, Disability Support Program), supra, at para. 36*

#### **PART V: ORDER SOUGHT**

52. It is therefore respectfully requested that this appeal be allowed, the Tribunal's order be set aside and an order be granted as follows:

- a. An Order referring the appeal back to the Tribunal for a new hearing before a different Tribunal member with specific directions.

**Date: February 13, 2014**

---

**Marie Chen, LSUC #31780G**

**INCOME SECURITY ADVOCACY CENTRE**

425 Adelaide Street West, 5<sup>th</sup> Floor

Toronto, ON M5V 3C1

Tel: 416-597-5820, ext. 5152

Fax: 416-697-5821

E-mail: chenmel@lao.on.ca

**Lawyer for the Appellant**

**Court File No. DC-13-97-00**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

**BETWEEN:**

**X Y**

**Appellant**

**and**

**DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM**

**Respondent**

**CERTIFICATE**

1. An order under subrule 61.09(2) is not required.
2. The Appellant estimates that 1.5 hours will be required for oral argument.

DATED THIS 13<sup>th</sup> day of February, 2014

---

**Marie Chen**

**Income Security Advocacy Centre**

425 Adelaide St. W., 5th Flr.

Toronto, ON M5V 3C1

Tel: 416-597-5820, ext. 5152

Fax: 416-597-5821

Email: chenmel@lao.on.ca

**Lawyer for the Appellant**

**SCHEDULE A: List of Authorities**

1. *Siegel v. Ontario (Director, Disability Support Program)*, [2011] O.J. No. 5385, 2011 ONSC 5916
2. *Jemiolo v. Ontario Disability Support Program*, 2009 CanLII 9420 (ON SCDC), 248 OAC 77
3. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53
4. *R. v. J.M.H.*, 2011 SCC 45
5. *Sampson v. Ontario (Director, Disability Support Program)*, [2002] O.J. No. 838 (Div.Ct.)
6. *Crane v. Ontario (Director, Disability Support Program)*, [2006] O.J. No. 4546 (C.A.)
7. *Gray v. Director of the Ontario Disability Support Program*, 2002 CanLII 7805 (ON C.A.)
8. *Benoit v. Ontario (Director, Disability Support Program)*, [2002] O.J. No. 1007 (ONSC)
9. *Ontario (Director, Disability Support Program) v. Gallier*, [2000] O.J. No. 4541
10. *Peplinski v. Ontario (Director, Disability Support Program)*, 2012 ONSC 2972
11. *Thomas v. Ontario (Director of the Disability Support Program)*, 2004 CanLII 8505 (ON SCDC)
12. *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504

## **SCHEDULE B: Legislation**

### **Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25, Sched. B,**

#### **Person with a disability**

- 4.** (1) A person is a person with a disability for the purposes of this Part if,
- (a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;
  - (b) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and
  - (c) the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications. 1997, c. 25, Sched. B, s. 4 (1).

#### **Appeal to Court**

- 31.** (1) Any party to a hearing before the Tribunal may appeal the Tribunal's decision to the Divisional Court on a question of law.

### **ODSPR, O. Reg. 222/98**

#### **New Medical Evidence**

- 64.** (1) On an appeal to the Tribunal from a decision that a person is not a person with a disability, a report described in paragraph 5 of subsection 14 (2) that was not provided to the Director before the decision was made shall be considered by the Tribunal if,
- (a) it relates to the appellant's condition at the effective date of the Director's decision; and
  - (b) it is submitted to the Tribunal and the Director for a review by the Disability Adjudication Unit at least 30 days before the date of the hearing. O. Reg. 222/98, s. 64 (1); O. Reg. 394/04, s. 17.