LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

Tribunal File Number: 17-001681/AABS

In the matter of an Application pursuant to subsection 280(2) of the Insurance Act, R.S.O. 1990, c. I.8, in relation to statutory accident benefits.

Between:

Shane Minty

Applicant

and

Motor Vehicle Accident Claims Fund

Respondent

DECISION

ADJUDICATOR: **Rebecca Hines**

APPEARANCES:

For the Applicant: Stephen Birman, Counsel

For the Respondent: Robert Kerkmann, Counsel

HEARD: In person on October 16, 17, 18 & 19, 2017 and February 7, 2018

OVERVIEW/BACKGROUND:

[1] On May 1, 2015, SM, the applicant, was driving a motorcycle when it travelled across the oncoming traffic lane, struck a curb, went over the grass boulevard and hit an electrical box sending the applicant head first into a tree. Paramedics noted a Glasgow Coma Score (GCS) of 6/15. He was diagnosed with a traumatic brain injury (TBI) and sustained injuries to his lungs, neck and back. He was deemed catastrophic based on his GCS score and remained in the hospital for two weeks.

[2] Since the motorcycle did not have insurance he applied for accident benefits to the Motor Vehicle Accident Claims Fund (the "respondent") under the *Statutory Accident Benefit Schedule – Effective September 1, 2010* (the "*Schedule*"). The respondent provides payment of benefits to injured people who do not have automobile insurance. The respondent denied several benefits and the applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefit Services (the "Tribunal"). The parties were unable to resolve this dispute at a case conference and the matter proceeded to an in-person hearing.

ISSUES:

[3] I have been asked to decide the following issues:

(i) Is the applicant excluded from making a claim for a non-earner benefit (NEB) because he did not have a valid driver's licence at the time of the accident pursuant to s.31(1)(a)(ii) of the *Schedule*;

(ii) If the answer to the first issue is no, is the applicant entitled to receive payment of a NEB in the amount of $185 per week, from November 1, 2015 to date and ongoing;

(iii) Is the applicant entitled to an attendant care benefit (ACB) in the amount of $6,000.00 per month from June 22, 2015 to date and ongoing;

(iv) Is the applicant entitled to a rehabilitation benefit in the amount of $40,140.88 for a treatment plan ("OFC-18") for rehabilitation support worker (RSW) services recommended by Jean Turgeon, of Prof. Corp. denied by the respondent on March 15, 2017;

(v) Is the applicant entitled to a rehabilitation benefit in the amount of $401,215.00 for an OCF-18 for home modifications recommended by Jean Turgeon, of Prof. Corp. denied by the respondent on February 15, 2017;

(vi) Is the applicant entitled to interest on the overdue payment of benefits;

(vii) Is the applicant entitled to an award under *Ontario Regulation 664, R.R.O. 1990;* and

(viii) Is the applicant entitled to costs on the limited issue of ACBs pursuant to Rule 19 of *LAT's Rules of Practice and Procedure ("LAT Rules")*?

RESULT:

[4] After reviewing and considering all of the evidence, I find that:

(i) The applicant is not excluded from claiming a NEB as he had a valid driver's licence at the time of the accident pursuant to s.31 (a)(ii) of the *Schedule.*

(ii) The applicant is entitled to a NEB in the amount of $185.00 per week, from November 1, 2015 to date and ongoing.

(iii) The applicant is entitled to past deemed incurred ACBs in the amount of $6,000.00 per month from September 27, 2017 to date, less amounts paid. The applicant is entitled to ongoing ACB in the amount of $6,000.00 per month, upon proof that the expense has been incurred.

(iv) The applicant is entitled to a rehabilitation benefit in the amount of $40,140.88 for the OCF-18 for RSW services recommended by Jean Turgeon of Prof. Corp.

(v) The applicant is entitled to interest on incurred ACBs and NEBS in accordance with the *Schedule.*

(vi) The applicant is not entitled to interest on the OCF-18 for RSW services as it has not been incurred.

(vii) The applicant is entitled to an award under Ontario Regulation 664, R.R.O. 1990 on the issue of ACBs at the rate of 40% and 50% on the OCF-18 for RSW services.

(viii) The applicant is not entitled to costs pursuant to *LAT Rule 19.*

[5] The applicant is not entitled to a rehabilitation benefit in the amount of $401,215.00 for the OCF-18 for home modifications recommended by Jean Turgeon, of Prof. Corp.

Is the applicant excluded from receiving a NEB for not having a valid driver's licence at the time of the accident pursuant to s.31(1)(a)(ii) of the *Schedule*?

[6] I find the applicant is not excluded from claiming a NEB because he had a valid driver's licence at the time of the accident pursuant to the *Schedule.*

[7] Section 31 (1)(a) (ii) of the *Schedule* states that an insurer is not required to pay a NEB in respect of a person who was the driver of an automobile at the time of the accident, if the driver was driving the automobile without a valid driver's licence.

[8] The respondent argues that the applicant did not have a valid driver's licence as he did not have a class M licence to drive a motorcycle, therefore the exclusion applies. The applicant contends that he had a valid driver's licence as he had a G1 licence at the time of the accident.

[9] The *Schedule* does not provide a definition for what constitutes a valid driver's licence. Where there is ambiguity, the modern approach to statutory interpretation requires that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act,* the object of the *Act,* and the intention of parliament."1 This approach involves consideration of three factors: a) the language of the provision; b) the context in which the language is used; and c) the purpose of the legislation or statutory scheme in which the language is found.

[10] First, I find the language in s. 31 (1) (a) (ii) is pretty clear. Both the applicant and respondent agree that the applicant had a valid G1 licence at the time of the accident. The parties submitted the applicant's driving record with the Ministry of Transportation. Other than sections of the *Highway Traffic Act* (*HTA*) and regulations, no additional evidence was submitted to confirm what the legal requirements or conditions of a G1 licence are or that the applicant was aware of those conditions.

[11] The applicant relied on the Divisional Court's decision of *Gipson v. Pilot Insurance Company* as authority.2 In *Gipson* the judge adopted the definition of valid driver's licence from the *HTA* which defines a valid driver's licence as one "that is not expired, cancelled or under suspension."[3] I agree that this is a reasonable interpretation of what a valid driver's licence means. I adopt *Gipson* and when applied to the facts of this case I find that the applicant had a valid driver's licence that was not expired, cancelled or under suspension at the time of the accident.

[12] The respondent asks that I broaden the definition of "valid driver's licence" to incorporate *Ontario Regulation 340/94* of the *HTA*, which regulates different

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[1] *Rizzo & Rizzo Shoes Ltd*. (Re), [1998] 1 S.C.R. 27 (3rd ed. 1994), at page 87.

[2] *Gipson v. Pilot Insurance Company*, Divisional Court File No.03-0856.

[3] *Ontario Regulation* 340/94, section 1

classes of licences to drive different vehicles. The respondent argues that a valid driver's licence to drive a G/G1/G2 automobile is different from a valid licence to drive an M/M1/M2 motorcycle.[4] The respondent relied on the York Regional Police report that confirmed the applicant did not have a M class driver's licence to drive the motorcycle and was charged with driving a motor vehicle with an improper class licence contrary to section 32 (1) of the *HTA*.[5] While I recognize that the *HTA* contains many requirements including that certain class licences are required to drive certain class vehicles, I do not agree that this section of the *HTA* or its requirements are incorporated into the *Schedule* for the purpose of exclusions from accident benefits. In addition, I have no evidence before me of a conviction and in any event, "driving a motor vehicle with an improper class licence" is not, in my opinion, the same as driving without a valid licence for the purpose of s. 31 (a)(ii).

[13] The respondent maintains that the *Gipson* case is distinguishable in that the insured in that case had a G2 licence and was driving a G2 class motor vehicle. I disagree. I find that *Gipson* stands for the principle that exclusions in the *Schedule* are to be read narrowly and even a breach of a condition of a licence does not invalidate a licence for the purposes of excluding accident benefits under the *Schedule*.

[14] The respondent submitted the appeal decision of the Financial Services Commission of Ontario ("FSCO") in *Mazeneres and Pembridge.*6 In that case, the insured breached a condition of his graduated licence by not being accompanied by a licensed driver. Director Draper allowed the appeal finding that the insured had a driver's licence that was not expired, cancelled or under suspension that authorized him to drive the vehicle he was driving at the time of the accident.[7]

[15] The purpose of Section 31 of the *Schedule* in providing exclusions is to promote road safety and deter people from breaking the law by imposing penalties, which in this case, is the denial of specified accident benefits. [8] Exclusions for the purpose of accident benefits are to be interpreted narrowly as supported in the *Gipson* case. The *Schedule* has been recognized as consumer protection legislation. [9] Ontario's no fault automobile accident benefit system is designed to provide accident victims with a safety net of benefits in exchange for mandatory insurance coverage.

[16] In *Gipson*, the insured had a G2 licence and was found to have a blood alcohol limit above zero, which was a restriction of a condition of his licence. The insurer argued that the exclusion applied. The judge disagreed. In the analysis, the

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[4] *Ontario Regulation* 340/94
[5] Highway Traffic Act, s. 32(1)
[6] *Manzeneres and Pembridge Insurance Co*. P03-00025 (April 11, 2005, Director Draper)
[7] Manzeneres, pg 12.
[8] Manzeneres, pg 12.
[9] *Smith v. Cooperators General Insurance Co*, 2001 SCC 30 (CanLII) [2002] 2 S.C.R. 129

judge did a comparison of the language of the pre and post November 1, 1996 *Schedules*, and found that the previous *Schedule* provided for a broader exclusion. The wording of the exclusion changed from "if the driver was not authorized by law to drive the automobile" to "driving the automobile without a valid driver's licence." I agree with the analysis in *Gipson* that since the language of the previous *Schedule* was more restrictive, that the legislature meant for the exclusion to be applied less strictly. I interpret the previous version of the *Schedule* to mean that the exclusion applied if the driver was not authorized to drive the vehicle they were driving. Now, a driver simply requires a valid driver's licence.

[17] I find s.31 of the *Schedule* very specific about the various scenarios in which the exclusion applies. For example driving without insurance, driving without the owner's consent, fraud or driving while committing a criminal offence. In my view, if the intent of the legislature was for individuals to be excluded for not holding the proper class of licence to operate the vehicle it would be included as its own section in the *Schedule*.

[18] I find that the evidence showed that the applicant had a valid licence and that this licence was not suspended when the accident occurred. In narrowly interpreting the exclusion clause and keeping with the spirit of consumer protection and the case law, I find the applicant had a valid licence for the purpose of s.31(a)(ii) of the *Schedule* and is therefore entitled to claim all of the benefits that are available to him under the *Schedule* including a NEB.

Is the applicant entitled to payment of a NEB?

[19] I find that the applicant is entitled to payment of a NEB pursuant to the *Schedule.*

[20] To determine whether a person qualifies for a NEB, section 12 of the *Schedule* provides that he or she must suffer a complete inability to carry on a normal life as a result of and within 104 weeks after the accident.

[21] The leading case with respect to proving entitlement to a NEB establishes that a claimant must prove that he or she has been continuously prevented from engaging in "substantially all" activities in which they engaged in before the accident. In order to do this, one must look at the applicant's pre and post-accident life and activities over a reasonable period of time before and after the accident[10]

[22] While the respondent has accepted that the applicant sustained a catastrophic impairment based on his GSC score and that he suffered from a brain injury, it denies that the applicant's functional limitations were as a result of his accident related impairments. The respondent argues that the applicant was significantly limited in his pre-accident life as a result of numerous pre-existing medical

[10] *Heath v. Economical*, 95 O.R. (3d) 785.

issues, substance abuse and he had serious behavioral issues as he spent half of his adult life living in correctional institutions.

[23] The applicant argued that the appropriate test to determine causation is the "material contribution" test set out by the Court of Appeal in *Monks v. ING Insurance Company of Canada*.[11] The applicant contends all he must prove is that the accident "materially contributed" to the risk of the injury. The respondent submits the default test is the "but for" test. I agree. In the FSCO appeal decision of *State Farm Mutual Automobile Insurance Co. and Sabadash*[12] Director's Delegate Evans analyzes the history of the case law and concludes that the default test for determining causation in accident benefit cases is the "but for" test. It is only appropriate to apply the material contribution test in rare situations, where it is impossible to provide the cause of the applicant's injuries using the "but for" test. As per my reasons below, I find that the applicant meets causation whether I apply the "but for" or "material contribution" test.

[24] Thus, in order to determine the applicant's entitlement to a NEB in this case, I must decide:

(a) What were the applicant's life circumstances and activities prior to the accident?

(b) Post-accident, was the applicant continuously prevented from engaging in substantially all of the activities he ordinarily engaged in before the accident?

[25] In my opinion, after comparing the applicant's pre and post-accident activities I find he would meet the requirement of either the "but for" or "material contribution" test.

Pre accident: What were the applicant's life circumstances and activities he engaged in prior to the accident?

[26] Significant to this case are the applicant's pre-existing health conditions that inhibited his ability to engage in various activities, including his ability to work.

[27] The respondent maintains that the only reliable source of information with respect to the applicant's pre-accident health is in the Ontario Disability Support Program ("ODSP") records. Since 2004, the applicant has received ODSP because he has: a learning disability, dyslexia, low cognitive functioning, anxiety, emotions management problems and a psychopathic personality disorder.

[28] In addition, the pre-accident evidence showed the following:

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[11] *Monks v. ING Insurance Co. of Canada*, (2008) 235 O.A.C.1(CA)

[12] *State Farm Mutual Automobile Insurance Co. and Sabadash* (FSCO Appeal P16-00029)

(i) The applicant has had two heart attacks and a stroke in 2009;[13]

(ii) He suffered from chronic back pain dating back to 2002;[14]

(iii) He has been in 3 to 4 car accidents, has been hit on the head with a baseball bat twice, a two by four about 3 to 4 times, and by a tire iron twice.[15]

(iv) He reported having cognitive difficulties, including having poor short-term memory; [16]

(v) He has a history of substance abuse and an addiction to Percocet; [17]

(vi) He had surgery on his right foot in 2008 in which a steel plate was inserted;[18]

(vii) He spent approximately 24 years of his adult life incarcerated.[19]

[29] The applicant acknowledges that he had significant pre-existing medical issues, however he contends that pre-accident he was able to independently manage his daily activities to meet his basic needs.

[30] Although a 2004 psychological report completed by correctional services sheds light on the applicant's pre-accident health and intellectual capabilities it does not speak to the applicant's functioning and was completed almost fifteen years prior to the accident. As a result, I find it of little evidentiary value in terms of portraying what the applicant's life was pre-accident. In addition, with respect to the other references to heart attacks, stroke and chronic back pain, I find the respondent is asking me to make inferences about the impact of these conditions on the applicant rather than providing actual evidence regarding the applicant's functioning and/or lack of independence pre-accident.

[31] The applicant argues that when compared to his pre-accident life, the impairments he sustained as a result of the accident show a rapid disintegration in his ability to live independently and manage his basic everyday needs and activities with respect to food, clothing and shelter.

[32] According to the applicant's testimony, which I found credible as it was consistent with what was reported to assessors and supported by other witnesses his life circumstances and activities before the accident were as follows:

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[13] Exhibit 20, Sunnybrook Hospital Records, pg 161.
[14] Exhibit 19, ODSP Brief, pg. 42.
[15] Exhibit 29, ODSP Brief, pg. 19, Psychological Report of Dr. Wilson dated September 22, 2004.
[16] Exhibit 19, ODSP Brief, pgs. 4,7 & 8, Psychological report of Dr. Sardoni dated September 16, 2003.
[17] This was referenced in multiple reports and CNRs.
[18] Exhibit 16, Sunnybrook Hospital Records, pg 365.
[19] Exhibit 23, Amy Fisher's report dated September 6, 2016, pg. 11.

(i) Lived in boarding house for 6 months prior to the accident. He received a reduction to his rent in exchange for doing home repairs;

(ii) Always had food in the fridge and was independent with daily activities such as going grocery shopping and could navigate within the community;

(iii) He enjoyed socializing;

(iv) He enjoyed cooking;

(v) His work history has been unusual and sporadic;

(vi) Enjoyed working on cars and motorcycles.

[33] Much was submitted by the respondent regarding the applicant's inability to work prior to the accident and that he was not above lying for personal gain. The respondent argues that the applicant's criminal record is evidence of this. The respondent referred to a few notes in the ODSP Log Notes to challenge the applicant's depiction of his pre-accident life. A note dated April 11, 2013 states that "he deals with a lot of pain and is not interested in working at all, either now or in the future." Another one refers to an eviction notice he received from a landlord in 2007.

[34] The respondent contends this is proof that the applicant's living arrangements were unstable prior to the accident. I disagree. I do not find that these two references deplete the applicant's credibility in this proceeding in a way that impact his entitlement to a NEB. It is not unreasonable that the applicant, due to his background and medical conditions faced social and economic barriers that led him to seek alternative and non-traditional employment and living arrangements such as receiving rent reductions in exchange for doing repairs. In addition, I do not find evidence of an eviction over ten years ago relevant as the time period significantly predates the accident. Nor do I find it is evidence relevant to an entitlement to a NEB.

[35] The applicant maintains that despite being the recipient of ODSP he has always worked in some capacity. The applicant provided an overview of his work history. While the applicant did not submit any employment or tax records and when it came to timelines about his work the applicant's memory was not clear, I was convinced that the applicant did home repairs in exchange for reduced rent. This fact was consistently reported to the various assessors and aligned with other evidence such as the testimony of the applicant's daughter and his friend, which I found to be credible.

[36] Despite the applicant's health and physical limitations prior to the accident, I find he was able to live independently and manage his basic everyday needs and activities with respect to food, clothing and shelter.

[37] I must next determine to what extent the accident has changed his life circumstances and his ability to engage in these activities.

Post-accident, was the applicant continuously prevented from engaging in substantially all of the activities he ordinarily engaged in before the accident?

[38] I find that the applicant has a complete inability to carry on a normal life as a result of his accident related impairments. The applicant has been prohibited from engaging in substantially all of his daily activities including his ability to live independently, maintain shelter, manage his finances, buy food and clothing, navigate in the community and he is no longer able to socialize as he did before the accident.

[39] I found the evidence of the applicant, his daughter, Richard Kilmury("RSW"), Jean Turgeon ("OT") and Dr. Hitten Lad ("neuropsychologist") credible and consistent and it established that the applicant has a complete inability to engage in substantially all of his pre-accident activities.

[40] The applicant provided the following testimony with respect to life post-accident:

(i) He has not been able to maintain a stable living environment since the accident and is currently homeless;

(ii) He cannot go grocery shopping. Does not have money for food and relies on RSW to take him to food banks. He cannot navigate in the community because of poor memory;

(iii) He socializes at times but has been isolated because of moving around so much to shelters in the GTA where he does not have friends;

(iv) He can no longer cook because he will leave the stove on;

(v) He cannot remember how to put a motor together or the simplest tasks.

[41] With respect to his ability to maintain shelter and feed himself the evidence demonstrates that the applicant can no longer provide himself with these basic necessities. Following the accident, he lived in the boarding house for a few months but had to move because he could no longer work for reduced rent as a result of his accident related impairments. He was incarcerated for a period of time and then participated in a 27 day acquired brain injury program. Following his discharge he moved into another boarding house, where he lived for two to three months. The respondent paid a portion of his rent as a medical benefit while he lived at this location. The applicant was kicked out because he did not pay his rent on time and for breaking the non-smoking policy. The applicant's eviction coincided with the respondent's termination of his RSW services and a delay in the payment of his rent. Since his eviction the applicant's living environment has been very unstable.

[42] The applicant testified that since then he has been living at friend's houses, various shelters and sleeping on park benches. It has been difficult moving around so much and staying at shelters in locations like Oshawa has been a challenge as he does not know anyone and cannot find his way around the community due to his poor memory. The applicant described a typical day of his life post-accident. He wakes up at the shelter at 7:00 a.m. and will accompany a friend to the river and return for lunch. He would not venture off on his own as he does not think he will make it back due to poor memory. The applicant testified that he is frustrated because he cannot remember how to do the simplest things. He will go to the store to buy cigarettes two to three times and come back empty handed.

[43] Mr. Kilmury and Mr. Turgeon testified that they have had to contact shelters on behalf of the applicant to seek accommodations as the applicant cannot handle the intake process on his own as a result of his TBI. Further, both service providers contend that they have witnessed the applicant's cognitive impairments on community outings and at assessments as he forgets things easily, cannot maintain appointments or safely administer medication and acts out inappropriately in public.

[44] With respect to activities related to his finances, Mr. Kilmury and Mr. Turgeon testified that they have had to take the applicant to food banks and Value Village to purchase clothing on several occasions. The applicant has not been able to manage his own money post-accident and often spends his ODSP cheque within a week. Since this hearing commenced, the applicant was declared mentally incapable of managing his finances and was appointed a guardian of personal property by the office of the Public Guardian and Trustee as a result of his accident related injury. In my view, the fact that this happened post-accident further highlights the impact of the applicant's accident related impairments on his inability to function at the most basic level.

[45] With respect to socialization the respondent argues that the RSW log notes prove the applicant's daily activities did not change post-accident. The respondent pointed out several entries in the log notes in which RSWs refer to the applicant as being a social butterfly, hanging out with friends and engaging in romantic relationships. Mr. Kilmury testified that the applicant could be described as a social butterfly but contends the applicant does not realize that a lot of people are not his friends and he could easily be taken advantage of. While some of the notes refer to the applicant meeting up with friends and socializing a high volume of the records confirm that the applicant had lost his independence. For example, his service providers took him to food banks, grocery shopping, to Value Village, refilled his prescriptions, finding him housing and a new family doctor, and reminding him and taking him to medical appointments.

[46] The respondent submitted a surveillance video taken a month before the hearing which it believes supports that the applicant carried on with his regular daily activities post-accident. To the contrary, I find the surveillance establishes that

the applicant has a complete inability to carry on a normal life. The applicant is seen leaving a shelter which proves that he is homeless. He can be observed walking with a slight limp and hanging out in a park with what the investigator describes as other "homeless people." In my view, the applicant is in the park because of his circumstances - he is homeless and has nowhere else to go. A park would be a practical place for a homeless person to go where socializing is the only thing to do. I do not find it speaks to function as it does not depict the applicant living a normal life in any meaningful way.

[47] The applicant's daughter also testified. Her evidence with respect to her father's pre and post-accident life can be summarized as follows:

Life before the Accident	**Life after the Accident**
He was happy and outgoing	He is like a zombie, cannot remember anything and can be loud and abrasive.[20] He is often emotional and depressed.
He always worked in some capacity. She verified some details regarding his employment history.	He can no longer work.
He has supported her financially throughout her life.	He does not have any money.
He moved around a lot but always had a roof over his head.	He has not had a stable place to live since the accident and is homeless.
He was independent and could look after himself.	He can no longer look after himself and she worries about him.
He was a good cook and made all of the preparations for Christmas meals.	He no longer cooks. He made a pot of tea at her house and left the stove on.
She spent Christmas 2014 with him and trusted him to look after her young son and his infant son while she went shopping with his girlfriend.	Now, she would not trust him to look after her kids and having her father living with her was like having another child.

[48] In my view, the applicant's daughter's evidence confirmed that the applicant has been unable to engage in substantially all of his pre-accident activities as a result of his accident related impairments.

[20] The change in the applicant's behaviour post-accident was also confirmed by the testimony of DC, the applicant's friend. His evidence was not contradicted.

[49] The respondent contends that the applicant's daughter's evidence is not reliable as there are inconsistencies in the records regarding the applicant's relationship with his daughter. For example, the police reports state that "the notified family has little contact with the applicant." Dr. Lad's report indicates the applicant does not have a relationship with his daughter. I found the applicant's daughter to be a credible witness and she is referenced in other reports as being present in her father's life. I did not get the sense that she was not being truthful as she provided a lot of details about her and her father's life and relationship. Further, her statement concerning her father's independence pre-accident was consistent with her other statements such as those made to a social worker that her Dad "lives life fully and is fiercely independent." Significantly, her evidence was not challenged by the respondent as it chose not to cross-examine the applicant's daughter after her testimony in chief.

[50] Generally, I found the applicant's evidence including the evidence of his daughter, Mr. Kilmury and Mr. Turgeon consistent with the medical evidence which also supported his entitlement to a NEB.

[51] The medical evidence of Dr. Lad supports that the applicant's accident related impairment exacerbated his pre-existing medical issues and behavioural and personality traits leading to his inability to function post-accident.

[52] In Dr. Lad's neuropsychological report dated November 25, 2016, he diagnosed the applicant with the following accident related impairment: Major Neurocognitive Disorder due to TBI, Mild, with Behaviour Disturbance (poor impulse control, emotional lability, lack of initiation; Somatic Symptom Disorder, with predominant pain, persistent, severe and Adjustment Disorder with Mixed Anxiety and Depressed Mood.

[53] I accept Dr. Lad's opinion that the applicant sustained a severe TBI as a result of the accident. I found Dr. Lad to be a credible witness as he is an expert in clinical neuropsychology and has extensive experience assessing and treating patients with TBIs. I found his report thorough as he considered the mechanics of the accident, did extensive objective neurological testing and interviewed the applicant along with his OT and case manager. In addition, I found his analysis of the radiological imaging helpful in explaining the severity of the applicant's impairments.

[54] Dr. Lad testified that the frontal lobes, the location of the applicant's injury, are responsible for regulating mood and behaviour and the applicant's behaviour during his assessment was consistent with someone with a TBI. With respect to function, cognition and behaviour Dr. Lad asserts the applicant has a low tolerance for sustained activity and he observed him have limited respect for boundaries and a high level of impulsivity. Dr. Lad maintains that while these behaviours existed prior to the accident the intensity and the level of boundary breaking show an exacerbation of pre-existing behavioural issues.

[55] Dr. Lad also opined the applicant's pre-existing history of a stroke in 2009 made him more vulnerable to a brain injury. Dr. Lad explained that the results of the neurological tests conducted post-accident in October and November 2016 showed a decrease in the applicant's intellectual and cognitive functioning compared to the test results in the 2004 psychological report. Further, post-accident testing of his basic motor functioning, which is housed in the frontal lobes revealed that the right side of his body was weaker than his left which was consistent with his accident related impairment.

[56] With regard to his memory, Dr. Lad agrees that the applicant is not a good historian, which is why he places more weight on neuro imaging and validity testing. Dr. Lad contends his issues with memory are likely a combination of pre-existing cognitive issues, his severe TBI post-accident and ongoing substance abuse. It is likely that all three factors exacerbated his pre-accident personality traits resulting in his current limitations. I find Dr. Lad's opinions corroborate the evidence provided by the applicant, his daughter and service providers that the applicant's accident related impairments resulted in the applicant's complete inability to carry on a normal life.

[57] Every other assessor with the exception of Dr. Margolese, psychiatrist, agreed that the applicant was not a good historian. For example, all of the applicant's assessors agreed with Dr. Lad that the applicant did not have a good memory. Even the other IE assessors: Jonathan Kaine, Heather Seiling and Penny Briggs who completed IEs agreed that the applicant was not good at recollecting information. Further, both Mr. Kaine and Ms. Briggs describe the applicant's behaviour as anxious, easily irritated, difficult to calm down and that his speech was laced with profanities. By contrast, Dr. Margoles came to the opposite conclusion in her IE report dated September 8, 2017. According to Dr. Margolese the applicant was "lively, engaged and quite jovial…" The applicant was calm, pleasant and tolerated the interview."

[58] The respondent relied on the evidence of Dr. Margolese to support its argument that the applicant's functional limitations existed before the accident as it applies to all of the issues in dispute in this application. However, Dr. Margolese's involvement in this case came about from the respondent's request for her to assess the OCF-18s for RSW services and home modifications. Despite that, she opined on causation, ACBs and all of the benefits in dispute. The applicant brought a motion seeking to exclude the evidence of Dr. Margolese with respect to benefits that were beyond the scope of her assessment. In particular, the applicant submitted that I should exclude her evidence related to ACBs for failure to give sufficient notice pursuant to s. 44(5)(a) of the *Schedule.* S.44 (5)(a) provides that an insurer shall set out the medical and other reasons for its assessment in its notice. The notice sent by the respondent to the applicant dated August 8, 2017, indicated that Dr. Margolese would be assessing the two OCF-18s for medical and rehabilitation benefits not ACBs. The respondent argued Dr. Margolese's report and evidence should not be excluded as it is relevant to the issues in dispute.

[59] I agree that the respondent provided the applicant with insufficient notice pursuant to s.44 (5)(a) and limited Dr. Margolese's evidence at the hearing to the OCF-18s for the medical and rehabilitation benefit which she was asked to assess. However, I considered her evidence as it applies to causation and did not find it persuasive.

[60] I have assigned Dr. Margolese's report and evidence little weight for the following reasons:

(i) I did not find her assessment neutral. She was selective in the records she referenced in her report. For example, she references evidence that support her conclusions and ignores evidence which conflict. Further, she quotes the ODSP records extensively and frequently refers to the applicant's criminal record and substance abuse;

(ii) She did not address the mechanics of the accident (blunt force trauma to the head), his accident-related injury or refer to important medical records such as the CT scans in analyzing its impact on function;

(iii) She has no specialization in brain injuries;

(iv) She placed significant weight on an OT report done 10 days post-accident, and a comment made by the applicant's daughter that her Dad was close to baseline functioning in reaching her opinion. The applicant's daughter is not a medical professional, nor does she or the OT provide a complete picture of the applicant's functioning. Further, it was too soon after the accident to make this kind of determination;

(v) She shredded the records from the assessment a few months after it was completed even though she was aware that the applicant had filed an application with the Tribunal;

(vi) Finally, she concluded that the applicant would not meet the criteria for a declaration of incapacity with respect to his finances or living situation or for certification under the *Mental Health Act.* After her assessment, the applicant was declared mentally incapable of managing his finances and was appointed a guardian of personal property by the office of the Public Guardian and Trustee as a result of his accident related injury.

[61] I find that the applicant has satisfied that "but for" the accident he would not have sustained a TBI which exacerbated his pre-existing medical condition and functional limitations.

[62] While pre-accident, the applicant was on ODSP, had a history of incarceration and a variety of pre-existing health issues he was able to maintain shelter, manage his finances and ensure he had food to eat and clothing to wear. I found Dr. Lad's opinion with respect to causation and functioning persuasive. I also found the applicant's evidence and witnesses with respect to his pre and post-

accident life credible. I find that the fact that the applicant is now homeless and cannot provide food or clothing for himself satisfies that he suffers a complete inability to carry on a normal life as a result of his accident related impairments.

[63] Therefore, the applicant is entitled to payment of a NEB.

Is the applicant entitled to an ACB in the amount of $6,000.00 per month?

[64] For the reasons that follow, I find the applicant is entitled to an ACB in the amount of $6,000.00 per month. The time period of entitlement will be addressed later.

[65] S.19 of the *Schedule* provides that an insurer is required to pay an ACB for all reasonable and necessary expenses incurred on behalf of an insured person as a result of an accident for services provided by an aid or attendant. A Form 1 prepared by an OT sets out the services and amount of care an individual requires as well as the monthly amount payable. If a person sustains a catastrophic impairment as a result of the accident, the maximum amount of ACBs payable is $6,000.00 per month.

[66] The applicant has been assessed for ACBs approximately six times since the beginning of his claim. Three times by the applicant's OTs: Sharat Charla, Jean Turgeon and Sean Flemming. And twice by the respondent's OTs: Jonathan Kaine and Penny Briggs. The applicant relied on two Form 1s which recommended $7,716.34 and $8,415.77 in ACBs per month and the respondent relied on a Form 1 which recommended zero. The central issue in dispute is 24-7 supervision.

[67] The applicant relies on the report and testimony of Dr. Lad in support of 24-7 supervision. The respondent relies on the report of Dr. Margolese, psychiatrist who found no entitlement to ACBs.

[68] As already discussed above Dr. Lad found that the applicant suffered a severe TBI. In Dr. Lad's opinion, the applicant's impairments are likely to impact his future ability to learn new information and make decisions re: day to day functioning including medication management, safety and judgment. Dr. Lad opined that the applicant requires 24-7 supervision and recommended an acquired brain injury residential program to minimize risk of re-injury, or 24-7 supervision within his own home to prevent the applicant from being taken advantage of and engaging in self-injurious behaviour and repeated incarceration.

[69] Dr. Lad testified that if the applicant is not given 24-7 supervision something bad is going to happen to him or someone else. I agree with Dr. Lad as the evidence presented by the applicant's daughter, case manager, OT and RSW support that the applicant has been unable to independently carry out his activities of daily living. Post-accident, the applicant has become homeless, and is unable to

independently engage in rehabilitation, manage his medication and ensure that he has the basic necessities of food, clothing and shelter.

[70] The respondent also relied on Dr. Margoles's report. As noted above, her evidence during the hearing with respect to 24-7 supervisory ACBs was excluded based on insufficient notice. However, even if I were to accept her evidence I did not find it convincing for the following reasons:

(i) She did not complete a Form 1;

(ii) She focussed on the psychiatric component and did not consider the impact of the TBI, and the applicant's post-accident challenges with respect to lost independence;

(iii) She attributed all of his post-accident impairments on substance abuse and pre-accident criminal record.

Assessments of Attendant Care Needs/Form 1s

[71] Despite the fact that the last assessments of Dr. Margolese and Penny Briggs completed in July and September 2017 recommended zero ACBS, the respondent has been paying the applicant a monthly ACB, as per the Form 1 and assessment of Jonathan Kaine pending the outcome of the LAT hearing in the amount of $2,088.16 per month. In Mr. Kaine's IE assessment of attendant care needs and Form 1 dated January 2, 2016 he recommended 40.6 hours per week of assistance for meal preparation, basic supervisory care, coordination of attendant care and medication management which is approximately 4 hours of ACBs a day. Mr. Kaine noted the following observations in his report:

(i) The applicant could not remember his street address and was not oriented to month or year despite being told during the consent process;

(ii) During functional observations, the applicant displayed signs of anxious behaviours and reduced frustration tolerance;

(iii) The applicant's speech was laced with profanities and he was easily distractible and forgetful;

(iv) He scored 14/30 on the Montreal Cognitive Assessment (MOCA), which is well below the normal score.

[72] With respect to Level 1 ACBs, Mr. Kaine recommended that the applicant receive 630 minutes of assistance per week with respect to feeding as the applicant reported he consistently burns food, which was backed up by his case manager. Mr. Kaine indicated that the applicant presents with signs of cognitive impairment such as distractibility, decreased short term memory, and poor insight, which would necessitate supervision and assistance with food preparation on a daily basis.

[73] Regarding Level 2 ACBs, Mr. Kaine supported that the applicant receive supervisory care and recommended that the applicant receive 1,680 minutes per week for community outings to the grocery store, bank, and appointments. In his opinion, the applicant required cueing and supervision on an intermittent basis to carry out a daily schedule and engage safely in community outings. He also recommended 113 minutes per week for Level 3 ACBs to administer, monitor and maintain the supply of the applicant's medication.

[74] I find Mr. Kaine's opinion supports that the applicant requires significant supervision in carrying out his daily activities for safety reasons. What Mr. Kaine's report failed to mention was how the 4 hours of attendant care a day would assist in addressing the applicant's safety concerns. For example, at which times during the day would a service provider assist the applicant in feeding, administering medicine and supervision. Mr. Kaine did not testify at the hearing to explain.

[75] The applicant relied on Mr. Turgeon's assessment and Form 1. I found Mr. Turgeon's report and evidence more persuasive. In his report dated February 2, 2016, Mr. Turgeon recommended that the applicant either be admitted into an ABI residential program where he would receive 24-7 supervisory care with 1:1 support; or receive 24-7 supervisory care by a service provider within his living environment. The same recommendation made by Mr. Turgeon was also supported by Dr. Lad, and OTs Sharat Charla, Sean Flemming and Joey Nativ, the applicant's case manager.

[76] The applicant was again assessed by IE assessor Ms. Briggs in August 2017. Ms. Briggs deferred recommending any attendant care to a psychiatrist because she had concerns with respect to causation. I did not find Ms. Brigg's assessment helpful for the following reasons:

(i) She conducted her assessment outside on the applicant's driveway which was obstructed by the contents of the applicant's home. In my view, this is not a realistic setting to conduct an OT assessment to determine a person's functional limitations.

(ii) She had serious concerns with respect to the applicant's functioning and potential need for 24-7 supervision, yet she deferred all recommendations for ACBs to a psychiatrist on the basis that she could not conclude that the applicant's limitations were as a result of his accident related impairment.

(iii) The assessment did not involve any testing or outings into the community other than the applicant's driveway with members of the public walking by.

(iv) She comments that the applicant has done well when he has had 24 hour supervision yet she deferred her opinion to a psychiatrist.

[77] I do not accept Ms. Brigg's recommendation of zero as the evidence supports that the applicant could not look after himself post-accident.

[78] I prefer Mr. Turgeon's assessment, updated reports and Form 1 because it was more thorough in that he interviewed other services providers and conducted functional testing tailored to assess someone with a TBI. For example, the tests he gave the applicant measured his functional abilities with respect to safety and judgment as well as independent living. Based on these test results he concluded that the applicant would not know how to respond in an emergency and his score was in the lowest range with respect to independent living. Mr. Turgeon took the applicant out into the community and gave him a test to get a realistic picture of the functional barriers he faces as well as observing his behaviours in public. In addition, Mr. Turgeon has worked with the applicant since January 2016 and has a better working knowledge of the applicant and his limitations. Mr. Turgeon testified that the applicant presented himself consistently every time. Mr. Turgeon provided the following observations of the applicant's limitations during his assessment:

(i) The applicant could not remember his name despite meeting him on several occasions;

(ii) His medication was not stored properly and he was angry because of a lack of food;

(iii) While out in the community he witnessed the applicant be verbally and behaviourally inappropriate on 4 occasions;

(iv) The applicant spoke loudly using profanities and could barely order his lunch at Mr. Sub. Upon leaving the restaurant the applicant tried to get into two different cars;

(v) Mr. Turgeon had to step in on several occasions to prevent the applicant's behaviour from escalating.

[79] Mr. Turgeon recommended 845 minutes per week for Level 1 ACBs for grooming, feeding and mobility. Mr. Turgeon noted that the applicant was unable to maintain a regular food supply and would require supervision when walking as he gets lost easily. Regarding Level 2 ACBs, he recommended 8936 minutes per week for basic supervisory care as he observed the applicant act inappropriately while interacting with people in the community and his tests revealed that the applicant lacks the mental acuity to respond in an emergency. Finally, with respect to Level 3 ACBs, he proposed 205 minutes per week for administering, storing and maintaining the supply of the applicant's medication. I find the time allotted to each level of service reasonable.

[80] Mr. Turgeon indicated in his report that despite having a criminal history, being a recipient of ODSP and having a significant pre-accident medical history, the applicant was managing his daily activities including paying reduced rent in

exchange for manual labour, buy clothes, feed himself and partake in social activities. Since the accident, the applicant has struggled to meet the three basic needs of food, shelter and clothing due to poor decision making, lack of insight and impulsive purchases.

[81] For the above-noted reasons, I find the applicant is entitled to ACBs in the amount of $6,000.00 per month. I will now address the time period for entitlement.

Have the services for ACBs been incurred or deemed incurred pursuant to S.3(8) of the *Schedule*?

[82] In order for the insured person to receive payment for an ACB, there must be evidence that the expense was incurred as per s. 3(7)(e) of the *Schedule*. To satisfy this requirement the insured person must have received the service to which the expense relates, and paid or promised to pay the expense. In addition, s.3(8) provides that if an adjudicator finds that an expense was not incurred because the insurer unreasonably withheld or delayed payment of a benefit in respect of the expense he or she may deem the expense to have been incurred.

[83] To date, the applicant has not incurred ACBs in the amount of $6,000.00 per month pursuant to s. 3(7)(e) of the *Schedule* as he cannot afford to pay for the services. The applicant argues that I should deem the ACBs incurred pursuant to s.3(8) of the *Schedule* as the respondent has unreasonably withheld and delayed payment of the benefit. The applicant relies on *McMichael v. Belair* as authority.[21] In that decision, the arbitrator found that an insured does not need to receive the service to be entitled to the expense as it would shield the insurer from its obligation to pay the benefit. All that need be established is that the service was reasonable and necessary. While the *McMichael* decision was issued under a previous version of the *Schedule,* I agree with the arbitrator's logic. What incentive would insurance companies have to pay for any benefit if they are not held accountable if it is determined a benefit was unreasonably withheld?

[84] The respondent relied on *MVAC and Veley*[22] in support of its position that in order for ACBs to be payable it has to have been incurred. What I find distinguishable in the decision submitted by the respondent is that Director's Delegate Evans did not conclude that the insurer unreasonably withheld or delayed payment of the benefit. However, in the present case I do find that the respondent unreasonably withheld paying the applicant an ACB.

[85] The respondent has a duty to review all of the medical documentation available. For the reasons already provided I have found the reports of Dr. Margolese and Ms. Briggs to be flawed. In my opinion the respondent did not fulfill its responsibility to review its assessments with a critical eye to ensure that they

[21] *McMichael v. Belair Insurance Company Inc.*, FSCO A02-001081
[22] *MVACF and Veley*, FSCO, P14-00021 and P14-00041

were medically sound and unbiased. No evidence was presented as to why the respondent preferred the reports of its own IE assessors over those of the applicant or why it did not consider other compelling medical documentation in making its decision to deny the applicant's benefits. In this case, relying on flawed medical reports in my view is unreasonable. This conduct has had a major impact on the applicant's life. The applicant has become homeless leaving him vulnerable and unable to get the treatment he needs.

[86] Therefore, I deem the ACBs incurred in the amount of $6,000.00 from the date of Dr. Margolese's report, September 8, 2017 to date, less amounts paid by the respondent. Going forward the applicant is entitled to ongoing incurred ACBs in the amount of $6,000.00 per month.

RSW Services

Is the applicant entitled to a rehabilitation benefit in the amount of $40,140.88 for RSW Services, as per the OCF-18 recommended by Jean Turgeon of Prof. Corp?

[87] I find the applicant is entitled to the OCF-18 for RSW services in the amount of $40,140.88.

[88] S. 16 of the *Schedule* states that the insurer will pay for rehabilitation benefits "for all reasonable and necessary expenses incurred by or on behalf of the insured person…for the purpose of reducing or eliminating the effects of any disability resulting from the impairment or to facilitate the person's reintegration into his or her family, the rest of society and the labour market."

[89] The OCF-18 dated February 26, 2017 proposing RSW services stated that as a result of his accident related impairments the applicant continues to experience disruptions in his daily functioning and his engagement in social/leisure activities has been severely affected. The goals of the treatment plan are "to teach skills and strategies to assist the applicant in increasing his functional independence in his home and within the community." The OCF-18 includes an evaluation, progress reports and communication with the service providers.

[90] I find the OCF-18 for RSW services reasonable and necessary for the following reasons:

[91] As noted throughout the decision, I accept that the applicant's activities of daily life were severely disrupted as a result of his accident related impairments and that he has challenges with social interactions. I agree that the goals of the OCF-18 are reasonable, as are the methods for measuring whether the services will be helpful to the applicant. In doing so, I rely on the evidence of Richard Kilmury.

[92] I found the evidence of Mr. Kilmury, who has worked with the applicant since September 2016 persuasive. Mr. Kilmury started assisting the applicant for seven days a week for approximately seven hours a day which ended in late

March 2017. He continued to support the applicant and provide services under attendant care services.

[93] Mr. Kilmury testified that the applicant was living life in a meaningful way when RSW services were supported by the respondent. The applicant had stable housing at the boarding house and he was attending rehabilitation and medical appointments. Further, he was able to access community services and obtain a volunteer position at Habitat for Humanity. To do this, a RSW was legally required to attend with the applicant as a result of his behavioural issues. The positive impact of the RSW services was also recognized in the IE report of Ms. Briggs.

[94] The applicant testified that he only went to Habitat for Humanity on a few occasions. While there they would bring him little generators and he would make sure there was gas and oil in them. He would take it apart and put it back together and he was happy to be able to fix things. After the termination of his RSW services he was no longer legally allowed to volunteer and he was evicted from the boarding house which is near the location of Habitat for Humanity.

[95] Mr. Kilmury testified that he noticed the dramatic impact it had on the applicant's life when the RSW services were terminated. The applicant was evicted from the boarding house around the same time his RSW services were cut off and the respondent was delayed in paying his rent. Since then the applicant has been bounced around from living with friends, and sleeping in shelters and park benches throughout Toronto and the GTA.

[96] I found Mr. Kilmury's evidence persuasive as it was consistent with other evidence. In addition, it was supported through the testimony of the applicant, Mr. Turgeon (OT) and Mr. Nativ, the applicant's case manager.

[97] When Mr. Kilmury was cross-examined, the respondent pointed out 11 dates in December 2016 where there were no log notes. Mr. Kilmury confirmed that there were times that RSW services were not provided seven days a week or sessions were cut short by the applicant. However, he indicated that he could only speak to what he observed. While the applicant may have missed some RSW sessions, this is not sufficient for me to find, based on the totality of the evidence the services are not helpful to the applicant or that they are not reasonable and necessary.

[98] The respondent denied the OCF-18 by letter dated March 15, 2017, saying "we need second opinion to address your ongoing need for RSW services." The respondent relied on the report of Dr. Margolese who found that the OCF-18 was not reasonable and necessary. In commenting on the RSW services she concluded that the session notes prove that the applicant is using the workers to meet his own perceived needs rather than engage in community rehabilitation. Dr. Margolese concludes that most sessions focus on meeting the needs of the applicant`s girlfriend. Out of numerous pages of log notes entered as exhibits

only a few refer to incidents which deal with the applicant's girlfriend. For the reasons already mentioned I have given Dr. Margolese's report little weight.

[99] Furthermore, I find Dr. Margolese failed to recognize any benefit the RSW services were providing. For example, she did not consider that the applicant was homeless and the important role of the RSWs in finding him housing, or ensuring that he made it to physiotherapy and doctor's appointments. Instead, she blamed the applicant's substance abuse and criminal record on every functional limitation and asserted that the applicant was using the RSW services for personal gain.

[100] I find that the applicant has proven on a balance of probabilities that the OCF-18 for RSW services is reasonable and necessary as a result of his accident related impairments. Therefore, I find the applicant is entitled to the OCF-18 in the amount of $40,140.88 for RSW services.

Is the applicant entitled to payment of a rehabilitation benefit in the amount of $401,215.00 for home modifications recommended in an OCF-18 dated November 24, 2016 by Jean Turgeon?

[101] The applicant is not entitled to the OCF-18 for home modifications in the amount of $401,215.00.

[102] Section 16(3)(i) provides for home modifications and home devices to accommodate the needs of an injured insured person, or the purchase of a new home if it is more reasonable than to renovate his or her existing home. Should the purchase of a new home be more practical to accommodate the applicant's disability the value cannot exceed the amount of the home modifications that is considered reasonable and necessary.

[103] The main goal of this OCF-18 was to provide proper housing for the applicant so that he can receive 24-7 supervision. The other goals of the OCF-18 are to provide a housing solution to curtail the applicant`s behaviour and prevent decompensation and to allow for an attendant around the clock to provide the applicant with a safe environment. A major barrier to his recovery is the applicant's current living situation as he is homeless and needs access to proper housing to accommodate his extraordinary needs. The applicant relied on the home accessibility report of Mr. Groe who made recommendations with respect to modifications to a three bedroom bungalow the applicant had been renting with a friend for a short period of time.

[104] The parties also disagreed regarding which home should be considered the applicant's "existing home". There is no definition of "existing home" in the *Schedule*. The respondent asks that I apply a narrow interpretation and find that the existing home is the boarding house the applicant lived in at the time of the accident. The applicant contends that I should broaden the scope of an existing home.

[105] Both parties submitted the FSCO decision of *Justin Vanden Berg-Rosentha v. Motor Vehicle Accident Claims Fund* as authority.[23] The respondent relies on the *Vanden Berg-Rosentha* decision as it highlights the test to determine whether home modifications are reasonable and necessary. The decision states that there needs to be a connection between the proposed renovation work and the applicant's accident related impairment.

[106] The applicant relies on this decision as it supports his position that the "existing home" should be given a broad and liberal interpretation to allow the applicant flexibility to choose where to live. The decision highlights an earlier FSCO decision, *Cole and Allstate Insurance Company of Canada,*[24] in which the arbitrator finds that the *Schedule* does not set out a specific time period to define "existing home". It may mean an insured's home at the time of the accident, at the hearing, or some other point in time.

[107] I agree with the applicant that flexibility is required when looking at what could qualify as his existing home as the existing home he lived in at the time of the accident does not exist anymore and it was a temporary arrangement. Therefore, I accept 28 Glengrove Court in Brampton as the applicant's existing home for the purpose of the report prepared by John Groe, of Accessible Daily Living, dated March 3, 2016.

[108] I agree that a significant barrier to the applicant's rehabilitation has been his lack of stable housing. Further, that his inability to find stable housing is because of his accident related TBI as well as the termination of RSW support. While I have determined that the applicant requires 24-7 supervisory ACBS as a result of his accident related impairments, I do not find the OCF-18 for home-modifications to be reasonable and necessary for the following reasons:

[109] I agree with the respondent that the majority of Mr. Groe's recommendations for home modifications would accommodate someone with a severe physical disability as opposed to someone with a TBI. For example, Mr. Groe recommends the construction of an open concept master bedroom, accessible bathroom, private laundry room, exercise room, the construction of a garage to protect the applicant from inclement weather; as well as laying a new cement walkway, new floors and levelling out the backyard.

[110] Mr. Groe refers to the applicant's cognitive issues, balance and mobility as justification for these modifications. What I found lacking was a link from the applicant's accident related impairment to the home modification recommended. I find that there was insufficient evidence to support that the applicant needs ongoing physical therapy to the extent of having an exercise room built into his home. Further, I do not see the connection between the construction of the garage, pouring new cement walkways and levelling out the backyard to his accident related impairment. I found these recommendations excessive and not

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[23] *Justin Vanden Berg-Rosentha v. Motor Vehicle Accident Claims Fund, FSCO A07-000417.*

[24] *Cole and Allstate Insurance Company of Canada,* FSCO A96-000394.

reasonable and necessary as a result of the applicant's accident related impairments.

[111] The medical evidence pertaining to the physical impairments does not support that the applicant has ongoing physical impairments that would justify such home modifications. While Dr. Lad comments on right sided weakness and there are references to applicant's self-reports regarding pain, balance and mobility in the RSW and OT reports, there was no opinion or diagnosis with respect to these impairments or future prognosis. As highlighted in the case law there has to be a link between the applicant's accident related impairments to the home modifications being recommended. Mr. Groe relied on the attendant care assessment of Mr. Charla dated June 22, 2015. Mr. Charla Form 1 focussed on the applicant's need for 24-7 supervision as a result of his TBI. Although he allocated time for assistance with dressing, bathing, grooming and hygiene, the services that accommodate the applicant's physical impairments accounted for a very small portion of the Form 1. At the hearing, I heard evidence that the applicant is now independent with respect to these tasks.

[112] For the above-noted reasons, the applicant has not met his onus in demonstrating on a balance of probabilities that the OCF-18 for home modifications is reasonable and necessary as a result of his accident related impairments.

Is the applicant entitled to an award because the respondent unreasonably withheld or delayed payment of benefits?

[113] *Ontario Regulation 664, R.R.O. 1990* (*O. Reg. 664*) states that if the Tribunal finds that an insurer had unreasonably withheld or delayed payments, the Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled, may award a lump sum of up to 50 percent of the amount to which the person was entitled at the time of the award with interest.

[114] I do not find that the applicant is entitled to an award on the OCF-18 for home modifications as I have determined that it is not reasonable or necessary.

[115] I do not find that the applicant is entitled to an award on the NEB. While I did not find that the exclusion applied to the applicant's case I do not find that the benefit was unreasonably withheld.

[116] I find the applicant is entitled to an award on the ACB and the OCF-18 for RSW services as I find the respondent unreasonably withheld paying the benefits. As already noted, I did not find the respondent critically assessed its own reports and evaluated all of the medical evidence fairly. I have found the IE reports assessing both attendant care and the OCF-18 for RSW services flawed.

[117] It is clear from the adjusters log notes and the testimony of Lori Gillespie, claims administrator that the adjuster handling the file had limited decision making authority. The MVACF has a multi-layered system for approvals which resulted in

delays and the mishandling of the applicant's file. MVACF employs Claimspro, a brokerage firm responsible for adjusting its files. If a benefit is over a certain monetary value, the adjuster at Claimspro first needs to seek approval from an examiner at their office, who then requests approval from a claims administrator at MVACF. The claims administrator at MVACF had very little knowledge of the applicant's file and had not reviewed any of the medical assessments, yet she held overriding decision making power with respect to approval of benefits.

[118] The log notes support that the adjuster at times was advocating on behalf of the applicant only to have the claims assessor at MVACF ignore his recommendations. In November 2016 both the adjuster and the examiner from Claimspro were advocating on behalf of the applicant to MVACF to pay the applicant's rent. Ms. Gillespie was delayed in her response and directed Claimspro to conduct surveillance for no particular reason.

[119] In December 2016, the adjuster once again pleads for MVACF to pay the applicant's rent. In order to justify the cost he states that if they do not approve rent they could be subjected to pay for an ABI program like Neurologic Rehabilitation Institute of Ontario at a cost of $20,000.00 per month.

[120] The log notes and correspondence demonstrate that the adjuster wanted to implement the recommendations of Dr. Lad. In support of RSW services for the applicant, the adjuster states the following to Ms. Gillespie:

> "I understand that our argument has been that we don't have to approve babysitting services so that the claimant does not get into trouble, but please understand that the claimant has sustained objective brain injury resulting from the accident and has been deemed catastrophic."

Despite the fact that the adjuster supported approving the OCF-18 for RSW services the respondent denied the benefit anyway. I find this conduct unreasonable.

[121] In addition, there were several occasions in which the respondent was non-compliant with the *Schedule* whether that be providing the applicant with insufficient notice of s.44 IEs or not responding to the applicant's claims for benefits within the 10 day time frame as per the *Schedule*. The respondent was also delayed in scheduling IEs to assess the applicant's entitlement to benefits. For example, the OCF-18 for RSW services submitted on February 26, 2017, was not responded to until March 15, 2017. Further, it was not assessed by Ms. Briggs or Dr. Margolese until August 2017. I agree with the applicant that these delays are unreasonable as he has been designated as catastrophically impaired and should not have to wait half a year to receive notice that important benefits are denied.

[122] The respondent's conduct has had a serious impact on the applicant. When the applicant's RSW services were terminated the applicant was not able to independently carry out his daily activities which rendered him homeless and vulnerable to further deterioration and injury. In addition, he was not able to get treatment. For all of the above reasons I find an award under *O.Reg 664* is warranted.

[123] According to *O. Reg. 664*, the adjudicator has discretion to award up to 50% of the disputed amount, including interest, for amounts unreasonably withheld or delayed. For the OCF-18 for RSW services I award 50%. With respect to ACBs I have taken the following factors into consideration in awarding 40%:

(a) The applicant's vulnerability and the impact of the respondent's conduct;

(b) Vulnerable people should not be treated in this fashion in the future.

(c) The respondent paid ACBs in the amount of $2,088.16 per month pending the outcome of this hearing.

[124] Therefore, the applicant is entitled to an award at the rate of 50% for unreasonably withholding the OCF-18 for RSW services and 40% for unreasonably withholding ACBs pursuant to the *Schedule.*

COSTS:

[125] The applicant requests costs under Rule 19 of LAT's *Rules of Practice and Procedure* on the limited issue of attendant care as all of the assessments took place after the commencement of this proceeding. Further, the respondent continued to pay the benefit pending the outcome of the hearing. The Tribunal may make an award of costs, where a party has proven that the other has acted unreasonably, frivolously, vexatiously or in bad faith during the course of the hearing. I found the applicant's submissions with respect to costs insufficient as he did not explain how the respondent's behavior during this proceeding met the threshold for unreasonable conduct in this process.

[126] Therefore, I do not find an order for costs is appropriate.

ORDER:

The applicant is entitled to as follows:

(1) The applicant is entitled to a NEB in the amount of $185.00 per week, from November 1, 2015 to date and ongoing.

(2) The applicant is entitled to past ACBs in the amount of $6,000.00 per month from September 27, 2017 to date, less amounts paid. The applicant is entitled to ongoing ACBs in the amount of $6,000.00 per month upon proof that the expense has been incurred.

(3) The applicant is entitled to a rehabilitation benefit in the amount of $40,140.88 for the OCF-18 for RSW services recommended by Jean Turgeon of Prof. Corp.

(4) The applicant is entitled to interest on incurred ACBs and NEBS in accordance with the *Schedule.*

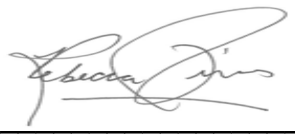
(5) The applicant is not entitled to interest on the OCF-18 for RSW services as it was not incurred.

(6) The applicant is entitled to an award under Ontario Regulation 664, R.R.O. 1990 on the issue of ACBs at the rate of 40% and 50% on the OCF-18 for RSW services.

(7) The applicant is not entitled to costs pursuant to *LAT Rule 19.*

(8) The applicant is not entitled to a rehabilitation benefit in the amount of $401,215.00 for the OCF-18 for home modifications recommended by Jean Turgeon, OT of Prof. Corp.

Released: August 10, 2018



Rebecca Hines, Adjudicator