Citation: Chaffey v. Wawanesa Mutual Insurance Company, 2023 ONLAT 22-001049/AABS

Licence Appeal Tribunal File Number: 22-001049/AABS

In the matter of an application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

Robert Chaffey

Applicant

and

Wawanesa Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR: **Rebecca Hines**

APPEARANCES:

For the Applicant:	Robert Chaffey, Applicant Robert Ben, Counsel Chris Lazaris, Counsel
For the Respondent:	Ken Yip, Counsel
Court Reporter:	Alyssa Scott, Professional Court Reporters

Heard by Videoconference: **February 6, 7, 8, 9, 10 and 13, 2023**

OVERVIEW

[1] Robert Chaffey, (the applicant), was involved in a serious automobile accident on July 7, 2018, when his motorcycle hit a moose on a highway. He was thrown several feet, lost consciousness and a pedestrian administered CPR while waiting for the ambulance to arrive. He was admitted to the hospital for six days and was diagnosed with a concussion, several fractured ribs and various soft tissue injuries. He sought benefits from Wawanesa Insurance Company (the respondent) pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). In particular, he submitted an application for a catastrophic ("CAT") impairment determination under the *Schedule.* The respondent conducted insurer examinations ("IEs") and denied that he sustained a CAT impairment. The applicant submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") for resolution of the dispute.

[2] If it is determined that the applicant sustained a CAT impairment, he will be entitled to enhanced accident benefits. The applicant has exhausted the $65,000 non-CAT monetary limits for medical and rehabilitation benefits. A designation of CAT means that the policy limits are increased from $65,000 for five years for medical, rehabilitation and attendant care benefits to $1,000,000.

ISSUES

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

1. Has the applicant sustained a CAT impairment as defined by the Schedule?

2. Is the applicant entitled to attendant care benefits (ACBs) of $6,000.00 per month, less amounts paid, from July 7, 2018 to date and ongoing?

3. Is the applicant entitled to a medical benefit in the amount of $422.62 for social rehab counselling, proposed by Anchor Rehab in a treatment plan/OCF-18 submitted on February 7, 2020?

4. Is the applicant entitled to a medical benefit in the amount of $698.75 for physiotherapy services, proposed by Erin Mills Physio in a treatment plan/OCF-18 submitted on January 28, 2020?

5. Is the applicant entitled to a medical benefit in the amount of $402.51 for physical therapy, proposed by Complex Injury Rehab in a treatment plan/OCF-18 submitted on January 30, 2020?

6. Is the applicant entitled to a medical benefit in the amount of $58.00 for social rehab counselling, proposed by Anchor Rehab in a treatment plan/OCF-18 submitted on December 8, 2020?

7. Is the applicant entitled to medical benefits proposed by Innovative Occupational Therapy Services, as follows:

   (i) $1,596.53 for occupational therapy services, in a treatment plan submitted on February 5, 2020;

   (ii) $2,744.07 for a Mac Book, in a treatment plan submitted on August 10, 2020;

   (iii) $3,791.10 for occupational therapy services, in a treatment plan submitted on November 30, 2021;

   (iv) $3,422.01 for occupational therapy services, in a treatment plan submitted on April 12, 2022; and

   (v) $1,900.00 for a Comprehensive Functional Cognitive Assessment, in a treatment plan submitted on April 29, 2022?

8. Is the applicant entitled to medical benefits proposed by Encompass Neuropsychological Services, as follows:

   (i) $1,122.06 for psychological services, in a treatment plan submitted on August 14, 2020; and

   (ii) $5,011.90 for psychological services, in a treatment plan submitted on January 27, 2021?

9. Is the applicant entitled to a medical benefit in the amount of $1,312.22 for audiometric services proposed by Michelle Cohen and Associates in a plan submitted on December 24, 2021?

10. Is the applicant entitled to cost of examinations proposed by Omega Medical Associates, as follows:

    (i) $9,492.00 for CAT Assessments, in a treatment plan submitted on May 2, 2022; and

    (ii) $3,277.00 for a CAT Assessment, in a treatment plan submitted on June 3, 2022?

11. Is the respondent liable to pay an award under s. 10 of Ontario Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

RESULT

[4] After considering the testimony of all witnesses and considering all of the evidence, I find the applicant:

1. Sustained a CAT impairment as I find he sustained a lower moderate disability one-year after the accident.

2. Is entitled to a monthly ACB in the amount $854.56 per month from May 10, 2022, to date and ongoing, upon proof that the benefit has been incurred.

3. Is entitled to the medical benefits proposed by Innovative Occupational Therapy Services in the following OCF-18s:

   (i) $2,744.07 for a Mac Book submitted on August 10, 2020;

   (ii) $3,791.10 for occupational therapy services submitted on November 30, 2021;

   (iii) $3,422.01 for occupational therapy services submitted on April 12, 2022; and

   (iv) $1,900.00 for a comprehensive functional cognitive assessment submitted on April 29, 2022.

4. Is entitled to $5,011.90 for psychological services, proposed by Encompass Neuropsychological Services in an OCF-18 submitted on January 27, 2021.

5. Is entitled to $1,312.22 for audiometric services proposed by Michelle Cohen and Associates in an OCF-18 submitted on December 24, 2021.

6. Is entitled to payment of interest on the above-noted OCF-18s.

7. Is not entitled to the medical benefits or examination expenses listed in issues 3,4, 5, 6, 7 i) 8(i), 10 i) and ii).

8. Is not entitled to an award under s. 10 of Ontario Regulation 664.

PROCEDURAL ISSUES

[5] The applicant submits that the issue to be decided at this hearing is whether he sustained a CAT impairment pursuant to s. 3.1 (1) 4 of the *Schedule* (Criterion 4). This Criterion will be further defined below. The applicant submits that his application for a CAT determination (OCF-19) submitted to the respondent sought a CAT determination under Criterion 4. In response, the respondent completed CAT assessments addressing both Criteria 4 and 8. The applicant submits that the Tribunal does not have jurisdiction to determine whether he meets CAT status under Criterion 8 because the OCF-19 did not apply for CAT status under this criterion. Therefore, Criterion 8 is not an issue in dispute for the purpose of this hearing.

[6] The respondent argues that although the OCF-19 did not seek CAT status under Criterion 8, the issue should be decided because its IE assessors addressed it in their reports. Further, the applicant's assessors responded to it in their responding reports. I agree with the applicant and find that the issue to be decided in this hearing is whether he sustained a CAT impairment pursuant to Criterion 4. The applicant did not apply for a CAT determination under Criterion 8 and so this issue is not properly in dispute. The Tribunal does not have jurisdiction to decide it.

ANALYSIS

The applicant sustained a CAT impairment as defined by the Schedule.

[7] The applicant seeks a CAT determination under section 3.1 (1) 4 of the *Schedule* (Criterion 4), which sets out the following two-prong test, both which need to be satisfied in order to qualify:

a) There must be diagnostic evidence of brain trauma; and

b) He must have at least an Upper Severe Disability (Upper SD or Upper SD*) or Lower Severe Disability (Lower SD or Lower SD*), six months or more after the accident or a Lower Moderate Disability (Lower MD or Lower MD*) one year or more after the accident under the Extended Glasgow Outcome Scale ("GOS-E") when assessed in accordance with the article by Wilson, J., Pettigrew, and Teasdale, G., *Structured Interviews for the Glasgow Outcome Scale and the Extended Glasgow Outcome Scale: Guidelines for Their Use*, Journal of Neurotrauma, Volume 15, Number 8, 1998 (the "GOS-E Guidelines ").

[8] Experts by both parties opined that the first prong of the test has been met because an MRI dated March 12, 2019, showed that the applicant sustained a traumatic axonal brain injury. Of significance, the respondent raised causation issues at the hearing because the applicant was involved in a subsequent motorcycle accident in February 2019. However, other than an email from the applicant to one of his treating practitioners reporting that he reinjured his ribs, I find there is insufficient medical evidence before me to conclude that the subsequent accident was the cause of the applicant's traumatic brain injury (TBI). Based on the details of the subject accident and the medical record before me, I conclude that the subject accident is what caused the applicant's TBI.

[9] There is also a difference of opinion between the parties' neuropsychological experts regarding the extent of the applicant's TBI and its impact on his function. The applicant's experts diagnosed him with a moderate to severe TBI, whereas the respondent's assessor diagnosed him with a mild complicated TBI.

[10] Before addressing whether the applicant satisfies the second prong of the test it is important to outline the purpose of the GOS-E and how it works.

Purpose of the GOS-E

[11] The purpose of the GOS-E is to determine the level of disability following a head injury. The Guideline provides a structured interview which is broken down into eight categories of function including 1) consciousness; 2) independence in the home; 3) independence outside the home; 4) restrictions in travel; 5) restrictions with work; 6) restrictions in social and leisure activities; 7) disruptions to relationships with family and friends; and 8) return to normal life. An appendix in the Guideline provides guidance for assessors in administering the structured interview and applying disability ratings under the different categories of function. It also sets out the following four rules for conducting the assessment:

1. Disability due to head injury is identified by a change from pre-injury status. The scale is designed to assess changes and restrictions that have taken place as a result of head injury.

2. Only pre-injury status and current status should be considered. Current status includes problems and capabilities evident over the past week or so.

3. Disability must be as a result of mental and physical impairment. If an injured person is capable of performing the activity but does not do it for some reason they are not considered disabled. You might need to ask a

hypothetical question: what exactly is the injured person capable of even though they do not actually do it. You might need to probe with more questions, if the answer to a particular question indicates some difficulty in a particular area.

4. Use the best source of information available. In some cases, an injured person may lack insight and whenever possible interview a relative or close friend. Judgment/caution should be used when interviewing, as the injured person may deny psychological changes and the collateral interviews may overreport post-injury problems. The Guidelines recommend the complete GOS-E questionnaire be administered because answers to later questions may indicate a need to re-evaluate the significance of earlier answers. An injured person may be considered capable of activities even if they have some difficulties with them.

[12] The GOS-E structured interview is meant to take a snapshot of a person's current status in the past week and does not consider past impairment or future prognosis. The person's score depends on the lowest outcome category within eight scales which range from 1: death, to 8: good recovery. In the present case, there is a difference of opinion between the parties' assessors as to whether the applicant's disability falls between scale 5 and 6 which is defined in the chart below.

- Low Moderate Disability (MD-) **(CAT**)	Unable to return to work in their previous capacity and able to only work in a sheltered workshop or non-competitive job. Unable to participate or rarely, if ever take part in previous social or leisure activities. Showing a daily and intolerable disruption in relationships with family and friends as a result of psychological changes.
- Upper Moderate Disability (MD+) **(NOT CAT)**	Able to return to work in a reduced work capacity. Participating in social and leisure activities, but less than half as often as prior to the accident. Showing a disruption in relationships with family and friends, as a result of psychological changes, but occurring once per week but tolerable.

The Parties Positions

[13] The applicant relies on the CAT assessments of treating practitioners Jennifer Moore, occupational therapist (OT), dated September 11, 2020, and Dr. McKinnon, neuropsychologist, dated October 14, 2020. Ms. Moore administered the GOS-E and determined that his TBI resulted in a rating of Lower Severe Disability, 6 months or more after the accident. Ms. Moore also provided the following disability ratings for the different categories of function: Independence in the Home: lower severe disability; Independence Outside of the Home: upper severe disability; Work: lower moderate disability; Social and Leisure Activities: lower moderate disability; Family and Friendships: upper moderate disability; and Return to Normal Life: lower good recovery. Dr. McKinnon agreed with Ms. Moore's ratings. These assessors determined that he has a low moderate disability, which as noted in the chart above, qualifies for CAT status.

[14] The respondent relies on the CAT IE assessments of Jeff Ford, OT, and Dr. West, neuropsychologist, both dated July 23, 2021. These assessors determined that the applicant did not have any disability with independence in or outside of the home or travel. However, they did determine that he had an upper moderate disability resulting in restrictions in his ability to work, social and leisure activities and relationships with family and friends. As noted in the chart above, this rating does not qualify for CAT status.

[15] Dr. McKinnon authored a rebuttal report dated April 6, 2022, in which the doctor notes that the applicant had made some improvements since the initial CAT assessment. As of April 2022, Dr. McKinnon opined that he has a low moderate disability in work, social and leisure activities and relationships with family and friends. The applicant confirmed at the hearing that the area of disagreement between the parties has been narrowed to these three categories.

[16] The applicant argues that his CAT assessments should be preferred because they were done by his treating OT and neuropsychologist. He submits that his treating practitioners have better insight into his condition and functional status. Further, Ms. Moore conducted collateral interviews, whereas the respondent's assessors did not. In addition, Dr. McKinnon conducted more extensive neurocognitive testing in carrying out her assessment. Therefore, the doctor's diagnosis and opinion should be given more weight. Finally, the findings of his assessors are supported by the clinical notes and records (CNRs) of his treating neuropsychologist, speech language pathologist and his rehabilitation support worker.

[17] The respondent argues that the applicant's CAT assessments should be given little weight because Dr. McKinnon did not administer the GOS-E structured interview and solely relied on the disability ratings assigned by Ms. Moore. It submits that the case law from this Tribunal on the issue supports that it is not within an OT's scope of practice to administer the GOS-E. Further, neither Ms. Moore nor Dr. McKinnon properly administered the GOS-E structured interview in accordance with the Guideline. It further maintains that Dr. McKinnon's rebuttal report is equally unhelpful because she did not re-administer the GOS-E structured interview in preparation of that report in support of her revised ratings. Nor did she conduct another in-person interview with the applicant. Moreover, the applicant's reports were not in compliance with the Guideline because they were done by treating practitioners. The Guideline states that the GOS-E should not be done by practitioners involved in the acute care of the patient. I will first address the respondent's argument regarding whether the GOS-E can be administered by an OT.

Is it within an OT's scope of practice to administer the GOS-E?

[18] In determining whether the TBI meets the designation of catastrophic impairment, section 45 (2) of the *Schedule* states that the assessment or examination shall be conducted by a neuropsychologist. However, the section clarifies that a doctor may be assisted by other regulated health professionals as required. The respondent relies on two decisions of this Tribunal in *Abdi v. TD General Insurance Company*, 2021 CanLII 127474 ("Abdi"), and *Adams v. Federated Insurance Company of Canada*, 2022 Canlii 38859 (ON LAT) ("Adams") in support of its position that the GOS-E should only be administered by a neuropsychologist.

[19] In *Abdi*, the adjudicator determined that it is not within an OT's scope of practice to opine on causation or distinguish between the impact of the head injury versus the affects of other injuries. The clinical judgment of a neuropsychologist is required. Consequently, the adjudicator determined that the insured's CAT assessments did not comply with the *Schedule* or the GOS-E Guideline and gave little weight to the reports. In *Adams*, the Vice Chair agreed with this rationale and concluded that although an OT may assist in determining function and capabilities in administering the GOS-E, this should only be used as an aid.

[20] Although I am not bound by either of these decisions, I find their interpretation of the GOS-E Guideline and s. 45 (2) of the *Schedule* persuasive. I agree with the rationale in these decisions that clinical judgement is required in distinguishing between the impact of the brain injury on function versus other impairments.

Consequently, I also agree that the GOS-E administered by the OT should only be used as an aid and that the GOS-E should be completed by the neuropsychologist. In this case, neither parties' neuropsychologist administered the GOS-E.

[21] I find that the assessments completed on behalf of both parties have their limitations as the applicant's assessors exaggerated his disability ratings in certain categories and the respondent's underestimated them. However, I do prefer the rating assigned by the applicant's assessors in his restrictions with work and find that he has a lower moderate disability. Therefore, I find that he meets the CAT threshold under the GOS-E. I will now provide the rationale for my finding.

Independence In and Outside of the Home and Ability to Travel

[22] I prefer the disability ratings assigned by Mr. Ford under these categories as I find them more consistent with the applicant's post-accident function. Ms. Moore's report indicated that the applicant lacked the ability to be independent in and outside home and could not travel locally without assistance. The evidence supports that the applicant is regularly left on his own for two to three days at a time and although he is inconsistent in carrying out self-care, housekeeping and home maintenance tasks, he is able to complete them. The applicant and his wife testified that he receives regular prompts to take his medication, turn off the stove and carry out his self-care tasks from a digital PSW service. The appendix to the Guideline explains that in order have a lower moderate disability in this category the person needs to be incapable of being left alone for a 24-hour period. Further, the person does not need to carry out tasks to perfection, they just need to be capable of completing them. I find Ms. Moore applied a more stringent test in her analysis in addressing these areas of function and there were inconsistencies in the evidence that did not align with her opinion.

[23] For example, Ms. Moore 's report states that the applicant has significant problems with dizziness and balance which has resulted in falls which supports his need for 24-7 supervision. The applicant testified that he continues to ride his motorcycle and truck post-accident and at times drives for up to three-hour commutes between his Mississauga and Gilmore residences. In my view, the applicant would not be able to drive a motorcycle if his problems with balance were that severe. In addition, he has continued to access the community as he is able to run errands to music venues and to meet with clients to officiate weddings. I do not find Ms. Moore's ratings consistent with someone who lacks

the ability to be independent in or outside of the home. Further, I do not find the applicant has any limitations in travelling locally in accessing the community.

[24] Two years after her initial assessment Dr. McKinnon authored a rebuttal report, in which she revised her GOS-E ratings. During cross-examination, the doctor acknowledged that she did not conduct a full assessment or re-administer the GOS-E structured interview. The Guideline states that the whole structured interview should be carried out because a person's reports of function in one area may lead to more probing questions under other categories. There may also be inconsistencies that need to be addressed. As already noted, Dr. McKinnon concedes in her rebuttal report that that the applicant had made improvements in independence in and outside of the home and his ability to travel locally – he no longer met the disability test in these areas. Dr. McKinnon then concludes that the applicant still has a low moderate disability in work, social and leisure activities and relationships with family and friends.

Work

[25] Prior to the accident, the applicant had just received a promotion at work to be a Housing Program Analyst with the Region of Peel. His duties included analyzing data and looking for trends, facilitating meetings, collaborating with his colleagues, writing reports and significant computer work. Prior to that, he was employed as an employment service worker where he assisted people on Ontario Works in finding employment. Following the accident, he returned to work on October 1, 2018, on modified hours and duties and eventually returned to working full duties. He worked 35 hours per week and spent 5 days per week in Mississauga and went to his Gilmour residence on weekends. He went on long term disability ("LTD") in October 2019. A note from the LTD insurer indicates that he went off work secondary to traumatic brain injury, post-concussion syndrome, adjustment disorder and depression. Prior to the accident, he also worked part-time as a wedding officiant and did approximately 30 weddings per year. The applicant testified that he did not earn much from this and that it was more of a spiritual activity he enjoyed. Since the accident he only does seven a year.

[26] Both parties' assessors agree that the applicant cannot return to work in his previous capacity as a result of his accident-related TBI. The dispute rests on to what extent is the applicant restricted.

[27] Ms. Moore and Dr. McKinnon opined that the applicant is unable to work except in a sheltered environment or non-competitive job, which is consistent with a lower moderate disability and meets the CAT threshold. The doctor states that

the applicant attempted to return to work in a reduced capacity but could not work and ended up going on long term disability. The appendix in the Guideline defines non-competitive work as “work done voluntarily, jobs that are specifically designated for disabled people, and work in sheltered work-shops. Normally, ability to work is indicative of independence; however, occasionally, someone in the upper severe disability range may be working in a sheltered workshop.”

[28] I prefer the disability ratings of Dr. McKinnon and Ms. Moore under this category as it was more consistent with the medical evidence at the time of their assessment. For example, Dr. Seyone, the applicant’s treating neuropsychologist, opined that the applicant was completely disabled from working as a result of the severity of his TBI and psychological sequalae and its impact on function. The applicant’s family doctor and speech language pathologist also supported that he could not work.

[29] Dr. McKinnon administered neurocognitive tests which revealed that the applicant had significant deficits in information processing speed and motor production. His ability to encode new verbal and auditory information was compromised, he has impaired memory function and inefficiencies in his attention and focus. Further, these deficits have resulted in a psychological impairment which would also interfere with his ability to work in any meaningful capacity. I find the applicant’s cognitive limitations were also consistent with his performance in Ms. Moore and Mr. Ford’s OT assessments as he struggled to carry out simple tasks and showed evidence of cognitive fatigue and deterioration throughout.

[30] By contrast, Mr. Ford and Dr. West opined that the applicant has a reduced capacity to work which is an upper moderate disability and does not meet CAT status. The appendix in the Guideline defines reduced capacity for work as a (a) change in level of skill or responsibility required; (b) change from full-time to part-time work; (c) special allowances made by employer (e.g., increased supervision at work); and (d) change from steady to casual employment (i.e., no longer able to hold steady job). Mr. Ford’s assessment concluded that the applicant could possibly be employed with the Region of Peel with special allowances, a change in skill level or responsibilities, or a change from steady to casual employment. I agree with Dr. McKinnon and Ms. Moore that the applicant was unable to work at the time of their assessment because of his cognitive and psychological limitations. Further, I find Mr. Ford’s assessment inconsistent because, on the one hand, he opines that the applicant has a reduced capacity to work but then, acknowledged the multiple limitations he experienced, during his assessment. For example, the report notes that the applicant’s speech was tangential, he

would lose track of the conversation and he had limited eye contact. Further, he experienced limitations such as decreased problem solving and organization during the meal preparation task and had limitations with integrating and processing information on the second day of testing. I find these limitations would interfere with the applicant's ability to work even a part-time job.

[31] Overall, I find Dr. West's report and opinion inconsistent with the other medical reports completed on this file. For example, the doctor opines that the applicant's neurocognitive impairments are mild. Further, Dr. West's neurocognitive test results revealed that the applicant's scores were average to superior. These findings are inconsistent with the opinion of Dr. Seyone, and the reports of the speech language pathologist which document ongoing significant neurocognitive impairments. Dr. West also encountered validity issues on psychometric test results which he suggests may support evidence of malingering or feigning symptoms. Overall, I find the applicant to be a credible witness and find that he was forthright to assessors about his pre-accident health issues. Further, with the exception of a few inconsistencies about his post-accident function I find him to be a reliable witness.

[32] Finally, I think it is important to acknowledge that despite the severity of the applicant's impairments and limitations he continued to function in other aspects of life. For example, he continued to officiate weddings, he volunteered at a food bank for a period of time, he wrote and recorded new music, he still rides his motorcycle, and he performs at live music venues. He also continued with his university studies part-time with some accommodations. The applicant testified that while he has continued with these activities, they have been at a significantly reduced capacity. I believe him. I find the fact that he could continue with these activities does not support that he could successfully work in a part-time job. For all of the above reasons, I find the applicant has a lower moderate disability. Therefore, I find he meets CAT status.

Social and Leisure Activities

[33] Prior to the accident, the applicant had a busy social life, he was outgoing and did not have any issues with communication or expressing himself. He enjoyed multiple hobbies. He sang in two bands and played gigs once a month, he officiated weddings up to 30 times a year, he enjoyed riding ATVs and his motorcycle and was part of a riding club. And he enjoyed participating in woodworking, painting, photography, and writing.

[34] Both parties assessors agree that the applicant has not resumed regular social and leisure activities outside the home. However, they disagree on the extent of

the restriction. Dr. McKinnon and Ms. Moore opined that the applicant rarely, if ever, participates in social and leisure activities which qualifies as a lower moderate disability. Dr. West and Mr. Ford determined that the applicant participates much less than half as often which is equal to an upper moderate disability. I prefer the disability ratings of the respondent's assessors for the following reasons.

[35] In her rebuttal report, Dr. McKinnon states the applicant rarely, if ever participates in social and leisure activities. The report then notes that he occasionally officiates weddings and continues with academic pursuits, however he is slower and receives accommodations. Further, the report notes that he reports fewer pleasurable pursuits and has a tendency to do activities that are sedentary and passive. Ms. Moore's report provides a little more detail and indicates that post-accident the applicant's activities have changed in the following way:

i) He still rides his motorcycle and ATV vehicle but does not do it as often.

ii) He can still play the guitar and perform with two bands but is unable to do so before crowds and has stopped performing shows. He also has difficulty remembering words to songs and fine motor skills and coordination in his right hand are limited when playing guitar. Music was a big part of his life and his participation in music in all forms has been severely limited.

iii) He no longer participates in woodworking, painting, photography because of a problem with his right-hand function. He reported attempting to participate in an online painting class and he gave up after becoming frustrated that he could not get his artwork to resemble that of the instructor's work. He described difficulty "seeing" the correct proportions and angles.

iv) He is limited in participating in social functions and avoids large crowds. When in social situations he becomes increasingly anxious and symptoms are exacerbated. He experiences noise sensitivity and becomes easily overwhelmed. As per the client and his spouse, he reportedly "withdraws" from social interactions. He struggles with communication skills, experiencing word finding difficulties, losing track of the conversation, and forgets details and questions he has already asked. His activity tolerance is limited to approximately 1-2 hours with friends/family due to cognitive and physical fatigue, increased anxiety and irritability, and pain.

[36] Mr. Ford acknowledged in his report that there have been significant changes to the applicant's social function and leisure, however he reported to him that he had continued to play music and perform music gigs, still officiates wedding ceremonies and continues to ride his motorcycle. He noted that the applicant now tends to withdraw from busier, louder situations as he now prefers quieter or small groups for engagement. Finally, he has continued with his education pursuits at a reduced capacity. It is important to note that there is a significant gap in time between the parties' CAT assessments. However, I find Mr. Ford's disability rating under this category more consistent with the applicant's post-accident function.

[37] The respondent referred to various social media links which support that the applicant still writes and records new songs and still plays in bands. A surveillance video conducted around the same date of Ms. Moore's assessment showed the applicant independently performing at a bar in which he sang and played the harmonica and guitar simultaneously. Of significance, the respondent did not put this video to the applicant in cross-examination. Further, the video has no volume, so the quality of the applicant's performance is unknown. Therefore, I give it limited weight. However, the investigation reports and social media records confirm that the applicant has been more active with his music pursuits than as depicted in Ms. Moore's report.

[38] Finally, what I find missing from both parties' assessor's reports is a breakdown of how often the applicant did some of the above-mentioned activities pre- and post-accident. For example, how many painting classes had the applicant taken pre-accident or how often did he paint? How often did he do woodworking? I would ask the same questions regarding photography and writing. Because this information is missing, I am not convinced on a balance of probabilities that he rarely if ever participates in social and recreational activities post-accident. Therefore, I conclude that the applicant has an upper moderate disability under this category.

Family and Friendships

[39] Both parties agree that the applicant's condition has resulted in disruptions to his relationships with both family and friends, but again disagree on the degree of restriction.

[40] In her rebuttal report Dr. McKinnon notes that there is consistent reporting in her sessions with the applicant of strains in his relationship with his children and his wife, with frequent outbursts or withdrawal from situations that come up on a daily and weekly basis. Dr. McKinnon's report notes that the applicant "reported

being unable to manage his children's needs, often turning away from them when they bring stressful situations to him, whereas previously he would have been the problem-solver and peacemaker. The strain that his current state has had on his marriage is particularly noteworthy, with recent reports by both he and his wife that they require more intensive marriage counselling to assist them. Prior to his injury, Mr. Chaffey counted his marriage as one of the most significant sources of support, contributing immensely to his wellbeing."

[41] I prefer the disability rating of the respondent's assessors under this category because the applicant did not provide sufficient evidence that the disruptions to his relationships with family and friends is intolerable. The Oxford dictionary defines intolerable as "so bad or difficult that you cannot tolerate it; completely unacceptable." The facts in this case support that the applicant and his wife live apart during the week because she stays in their Mississauga residence due to the commute, not because of discord in their relationship. However, she returns home on the weekends and works from their Gilmour residence when she can. I find the evidence does not support that they live apart because their relationship is intolerable – they are living apart because of the commute. In addition, since they have been living apart for a large portion of the time, I find it difficult to accept that there are daily disruptions that are intolerable. Consequently, I prefer the ratings of the respondent's assessors under this category.

The applicant is entitled to a monthly ACB in the amount $854.56 per month from May 10, 2022, to date and ongoing, if incurred

[42] Section 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.

[43] No evidence is before me that ACBs were applied for prior to October 2, 2019. Therefore, I do not find the applicant is entitled to an ACB in the amount of $6,000.00 per month from July 7, 2018, to October 2, 2019.

[44] The applicant has been assessed for ACBs twice since the beginning of his claim. The first Form 1 and Assessment of Attendant Care Needs is dated October 2, 2019, and was completed by the applicant's assessor, Christie Kerr, OT and recommended $646.42 in ACBs per month. This report was not

submitted for my consideration at the hearing. The respondent approved the ACBs according to this Form 1.

[45] Ms. Moore prepared an updated Form 1 and Assessment of Attendant Care Needs report dated January 3, 2020, in which she recommended $10,283.00 per month in ACBs. On January 16, 2020, the respondent approved ACBs up to the non-CAT limit of $3,000.00 per month. It did not have any IEs completed to address Ms. Moore's Form 1. On March 10, 2022, the respondent sent the applicant a letter indicating that the policy limit had been reached for ACBs and terminated the applicant's entitlement to the benefit.

[46] As already noted above, I do not find Ms. Moore's recommendation that the applicant requires 24-7 supervision to be supported by the facts of this case or the medical evidence before me. For example, Ms. Moore's statement that the applicant needs supervision because he is at risk for falls is inconsistent with his ability to continue riding his motorcycle post-accident. Furthermore, Ms. Moore concluded that from a cognitive perspective the applicant's slow processing speed would prevent him from coping appropriately in an emergency situation. Although there is evidence of slow processing speed and other cognitive issues, I find the applicant capable of responding in an emergency. He receives digital reminders on his phone for prompts to take medication and self-care. I find he is capable of calling 911. I will now address what assistance I find reasonable and necessary based on Ms. Moore's Form 1.

[47] Ms. Moore recommended 3 minutes per day, seven times per week to assist the applicant with dressing and undressing for a total of 42 minutes per week and 5 minutes for grooming. Ms. Moore indicated that the applicant lacks the ability to physically dress and undress himself because of pain and fatigue. Very little evidence was before me at this hearing to support that the applicant has any limitations as a result of a physical impairment. However, the evidence supports that the applicant does not do these things because of lack of initiation or motivation. Therefore, I accept Ms. Moore's recommendation of 47 minutes per week for these tasks.

[48] Ms. Moore recommended 60 minutes per day, seven days a week to assist with meal preparation for a total of 420 minutes per week. I accept this recommendation as reasonable as the evidence supports that applicant will sometimes forget to turn off the stove and struggles to follow a recipe. Ms. Moore also recommended 120 minutes per day, seven days a week to supervise the applicant with walking. As already determined, I do not find the applicant has any limitations with mobility and I find he can independently access the

community. Consequently, I do not accept this recommendation. Out of Ms. Moore's recommendations under Part 1, I find 467 minutes per week for dressing and undressing and feeding to be reasonable and necessary.

[49] Under Part 2 services, Ms. Moore recommended 5 minutes per day seven days a week to ensure hygiene in the bathroom and bedroom for a total of 70 minutes a week. Although I do not accept that the applicant cannot do these things from a physical perspective, I find the time recommended reasonable for prompting him to. Therefore, I accept 70 minutes per week to assist with this task. Ms. Moore recommended 8406 minutes per week for 24-7 supervisory care, which I already determined is not reasonable. I accept the 60 minutes per week for coordination of ACBs as the applicant's cognitive limitations limit his ability to plan and coordinate. Consequently, under Part 2, I find the applicant requires 130 minutes per week.

[50] Under Part 3, Ms. Moore recommends 7 minutes per week for skin care, 80 minutes a week to administer and maintain supply of medication. She also recommended assistance with bathing in the amount of 70 minutes per week. Finally, she recommended 10 minutes per week for maintaining supplies and equipment. Out of these recommendations, I accept 70 minutes to prompt the applicant with bathing, 80 minutes per week to administer and maintain supply of medication. I do not find 7 minutes per week for skin care or 10 minutes to maintain equipment is supported by the evidence. Therefore, under Part 3 services, I accept that the applicant requires 150 minutes per week. The following summarizes my findings regarding the applicant's monthly entitlement to ACBs.

a) Part 1: 467 minutes = 7.78 hours per week x 4.3= 33.45 monthly x $14.90 = $498.33

b) Part 2:130 minutes = 2.16 hours per week x 4.3 = 9.32 monthly x $14.00 = $130.48

c) Part 3: 150 minutes = 2.5 hours per week x 4.3 = 10.75 monthly x $21.00 = $225.75

[51] When the total ACBs are calculated under parts 1, 2 and 3, I find the applicant is entitled to a monthly ACB in the amount $854.56 per month from May 10, 2022, to date and ongoing, if incurred. The applicant is entitled to interest in accordance with the *Schedule* on all overdue payments of ACBs.

The applicant is not entitled to the OCF-21s referenced in Issues 3, 4, 5, 6, 7 (i) and 8(i)

[52] To receive payment for a treatment and assessment plan under s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.

[53] The parties ignored my reminders at the hearing to ensure they address all of the issues in dispute throughout the hearing or in closing submissions. Despite my reminders neither party spent much time addressing any of the medical benefits or costs of examinations in dispute. To address this, the parties submitted a chart, on consent, which reference where to I can locate the OCF-21s/OCF-18s and the respondent's denials.

[54] The applicant submitted invoices (OCF-21s) to the respondent regarding issues 3, 4, 5,6, 7 (i) and 8 (i). The OCF-21s on their own were not helpful in setting out the applicant's arguments in relation to these issues. Nor were any submissions made with respect to same. The respondent sent the applicant explanations of benefits (EOBs) regarding all of the above OCF-21s denying them because it had requested information from the applicant about his extended healthcare benefits and had not received the information. No further submissions were made by either party about whether the information was ever provided to the respondent or what transpired in relation to these issues. As highlighted above, it is the applicant's onus to prove entitlement to the benefits claimed. The applicant fell far short in meeting his onus in proving that these expenses are reasonable and necessary. Therefore, I do not find that he is entitled to them.

The applicant is entitled to issues 7(ii) to (iv): OCF-18s for Mac Book, OT and Cognitive Assessment proposed by Innovative OT

OCF-18 for MacBook $2,744.07

[55] Ms. Moore authored the OCF-18 dated August 10, 2020 in the amount of $2,744.07 recommending the purchase of a Mac Book in the amount of $1699.99; a warranty from geek squad in the amount of $248.99, and Microsoft Office in the amount of $169.99. The balance of the plan was for form completion. The goal of the OCF-18 was to improve engagement in desired activities without exacerbating injuries and return the applicant to his daily activities.

[56] Under the additional comments section Ms. Moore notes that the applicant's ongoing TBI impacts cognition, attention, memory, processing, and executive functioning skills. Further, the applicant's laptop is 6 years old and is no longer functioning which causes him stress. He will use the new computer to participate in programs that improve cognitive functioning using brain training apps. Further, his current computer does not support accessibility functions such as text speech or the ability to limit blue light levels. The new laptop will also assist him to participate in leisure activities such as garage band. Ms. Moore authored a report dated September 24, 2020 explaining her rationale for why the new laptop was reasonable and necessary. The purchase of this device was also supported by Dr. McKinnon and the applicant's treating speech pathologist.

[57] The respondent sent the applicant an EOB dated August 22, 2020 denying the OCF-18 on the basis that it is not reasonable and necessary. It relied on the neuropsychological report of Dr. Seyone dated January 27, 2020, which indicated that the applicant was suffering from severe depression, poor concentration, and motivation and that he is unable to interpret information easily. Further, given the extent of his current cognitive behavioural impairment the computer is not appropriate for his current level of impairment.

[58] I find the OCF-18 for the MacBook and software reasonable and necessary as I find the applicant's cognitive issues were well documented throughout the claim and interfered with his ability to carry out his daily activities and leisure activities. Therefore, I agree with the applicant that he would benefit from brain training apps and a computer with improved accessibility technology. I find the reasons for the respondent's denial of the OCF-18 to be contradictory because on the one hand it acknowledges the severity of the applicant's impairment but then uses it as the rationale to deny the OCF-18. I find this rationale flawed because the purpose of the OCF-18 is to assist in the applicant's rehabilitation in order to improve his cognitive deficits. The applicant has met his onus in proving that the OCF-18 for the MacBook and software is reasonable and necessary.

Two OCF-18 for OT Treatment in the amount of $3,791.10 and $3,422.01

[59] Ms. Moore authored two OCF-18s dated November 30, 2021, and April 12, 2022, which recommended OT sessions along with costs associated for planning sessions and form completion. The amounts of the two OCF-18s vary slightly as far as the number of sessions recommended. The first recommended 10 sessions of OT and the second 8 sessions. The goal of the first OCF-18 was to improve the applicant's routine and structure for engagement in daily activities. The plan notes that the applicant has problems with initiation and follow through

as a result of cognitive issues. The goal of the second OCF-18 was to improve the applicant's ability to cope with persisting cognitive and psycho-emotional symptoms, to develop routines, and engagement.

[60] The respondent sent the applicant EOBs dated December 20, 2021, and May 12, 2022, advising the that the OCF-18s were not reasonable and necessary because the $65,000.00 policy limit for medical and rehabilitation benefits had been exhausted.

[61] As already highlighted above, I find the applicant's cognitive impairments are well documented in the medical record. It is also documented that he has functional limitations as a result of his cognitive deficits and struggles to carry out a consistent daily routine as he has problems with task initiation and completion. Therefore, I find the goal of improving routine and structure for engagement in daily activities to be a reasonable objective. Ms. Moore's OT report dated May 18, 2021, outlines the nature of the OT interventions that had been provided to date which were assisting in utilizing compensatory strategies to address his cognitive deficits. Examples of these strategies include improving organization, implementing techniques to improve memory by organizing a calendar with set goals and meditation to decrease stress. I find that the goals of the OCF-18s were being achieved. Further, there are no IE reports refuting it. The applicant has met his onus in proving on a balance of probabilities that the OCF-18s for OT is reasonable and necessary.

OCF-18 for a Comprehensive Functional Cognitive Assessment in the amount of $1,900.00

[62] Ms. Moore authored an OCF-18 dated April 29, 2022, recommending a comprehensive functional cognitive assessment in the amount of $1,900.00. Under the additional comments section on the form she indicated that the applicant has functional cognitive impairments which alter his participation in normal daily activities such as self-care and vocation. The purpose of the assessment was to support his cognitive rehabilitation treatment.

[63] On May 13, 2022, the respondent denied the assessment because its assessors determined that the applicant did not meet the CAT threshold and the non-CAT limits had been exhausted.

[64] Since I have determined that the applicant requires ongoing OT, I find that a cognitive functional assessment is reasonable and necessary in order to provide an update on the applicant's function, challenges and need for additional therapy.

The applicant has met his onus in proving on a balance of probabilities that the OCF-18 for a cognitive functional assessment is reasonable and necessary.

The applicant is entitled to issue 8: OCF-18 for psychological treatment in the amount $5,011.90 proposed by Encompass Neuropsychological Services

[65] This OCF-18 is dated January 27, 2021, and was authored by Dr. McKinnon and recommended 16 sessions of psychological treatment in the amount of $2,992.16, plus learning sessions to facilitate cognition and leaning for a cost of $897.66 plus fees for planning and documentation for a total cost of $5,011.90. The goal of the OCF-18 was to return the applicant to his normal activities of daily living.

[66] The respondent sent the applicant an EOB indicating that the OCF-18 was not reasonable and necessary because the $65,000.00 non-CAT policy limit had been reached.

[67] I find the OCF-18 reasonable and necessary because the applicant has been diagnosed with a psychological impairment as a result of the accident including major depressive disorder. I also find that the applicant's psychological issues are well documented throughout the medical record. As a result, I find psychological treatment to be reasonable and necessary to address these impairments. The applicant has met his onus in proving on a balance of probabilities that the OCF-18 is reasonable and necessary.

The applicant is entitled to issue 9: OCF-18 for audiometric services in the amount of $1,312.22

[68] This OCF-18 authored by Leah Davidson, speech language pathologist, notes that the applicant has cognitive communication issues and problems with auditory comprehension. Further, he has problems with verbal expression – word finding, reading and executive functioning. The OCF-18 recommended that he participate in a 9-week mindfulness cognitive communication group. The goal of the OCF-18 was to improve high level auditory comprehension, verbal expression, attention, memory, and executive functioning to return the applicant to his activities of daily living.

[69] The respondent sent the applicant an EOB indicating that the OCF-18 was not reasonable and necessary because the non-CAT policy limit had been reached.

[70] I find the OCF-18 reasonable and necessary because it is well-supported throughout the medical record that the applicant has experienced cognitive

communication issues as a result of his TBI. Therefore, I find the goal of improving auditory comprehension and verbal expression to be reasonable objectives. The applicant has met his onus in proving on a balance of probabilities that the OCF-18 is reasonable and necessary.

The applicant is not entitled to issues 10 (i) and (ii): OCF-18s for CAT assessments proposed by Omega Medical Associates

OCF-18 in the amount of $9,492.00

[71] The OCF-18 dated May 2, 2022, in the amount of $9,492.00 was authored by Dr. Becker, physiatrist, and recommended a variety of CAT assessments in order to assess whether the applicant met CAT status under Criterion 6. The OCF-18 recommended four assessments consisting of a file review, physiatry assessment, neurology assessment and catastrophic impairment summary rating in the amount of $2,000.00 each, plus fees for form preparation.

[72] On May 16, 2022, the respondent sent the applicant an EOB denying the OCF-18 because its assessors determined that the applicant did not meet CAT status under criterion 6.

[73] No submissions were made by the applicant regarding why this OCF-18 is reasonable and necessary. The issues before me in this hearing involve whether the applicant meets CAT status under Criterion 4. As highlighted above, it is the applicant's onus to prove entitlement to the disputed benefits. In the absence of further submissions or evidence in support of the OCF-18, I conclude that he has not met his onus and the OCF-18 is not reasonable and necessary.

OCF-18 in the amount of $3,277.00

[74] The OCF-18 dated May 2, 2022, was also authored by Dr. Becker, and recommended a second OT GOS-E assessment in the amount of $2,500.00 including fees for form completion. No further explanation was provided on the OCF-18 for why a second GOS-E assessment was being requested at this time.

[75] The respondent sent the applicant an EOB dated June 10, 2022, denying the OCF-18 on the basis that the applicant had already had CAT assessments completed under the GOS-E and that this was a duplication of services.

[76] The applicant did not make any submissions regarding why the second GOS-E assessment was reasonable and necessary. Therefore, I conclude he has not met his onus in proving that the OCF-18 is reasonable and necessary.

The applicant is entitled to interest on overdue payments of the benefits I have determined to be reasonable and necessary.

[77] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule.* The applicant is entitled to interest on the OCF-18s that I have determined to be reasonable and necessary.

The applicant is not entitled to an award.

[78] The applicant sought an award under s. 10 of Reg. 664. Under s. 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits.

[79] The case law is well established that in determining whether an insurer's conduct in withholding or denying a benefit warrants an award, an insurer's behaviour must be seen as "excessive, imprudent, stubborn, inflexible, unyielding, or immoderate."

[80] The applicant argues that the respondent is liable to pay an award because it raised causation issues at the hearing for the first time when it has ample medical evidence that the accident caused the applicant's TBI. For example, its own neurological assessor opined that the accident caused the applicant's TBI. In addition, he submits that the respondent unreasonably denied that he sustained a CAT impairment, as well as his entitlement to ACBs and the OCF-18s for the medical and rehabilitation benefits in dispute.

[81] The respondent argues that the applicant has not met his onus in establishing that an award is warranted in this case. It submits that the fact that it raised causation issues at the hearing is not behaviour that would be considered unreasonable. Further, the applicant has not proven that it unreasonably withheld any of the benefits in dispute. The fact that it relied on its own IEs is not grounds for an award.

[82] I agree with the respondent that the applicant has not established that it unreasonably withheld any benefits or that its conduct has met the threshold of being "excessive, imprudent, stubborn, inflexible, unyielding, or immoderate." The applicant spent little time addressing the award issue and did not refer to any evidence in support of his position that an award is appropriate in this case. Further, he waited until after the hearing had commenced to request summons from the Tribunal to compel the testimony of the adjusters. In addition, I was not given a reasonable explanation for why the request for the summons was made at the last minute. I declined the applicant's request because the respondent had

been provided with insufficient notice and it would be procedurally unfair. The applicant has not met his onus in establishing that an award is warranted in this case.

ORDER

[83] For all of the above-noted reasons, I make the following order:

1. The applicant sustained a CAT impairment as I find he sustained a lower moderate disability one-year after the accident.

2. The applicant is entitled to a monthly ACB in the amount $854.56 per month from May 10, 2022, to date and ongoing, upon proof that the benefit has been incurred.

3. The applicant is entitled to the medical benefits proposed by Innovative Occupational Therapy Services in the following OCF-18s:

   (i) $2,744.07 for a Mac Book submitted on August 10, 2020;

   (ii) $3,791.10 for occupational therapy services submitted on November 30, 2021;

   (iii) $3,422.01 for occupational therapy services submitted on April 12, 2022; and

   (iv) $1,900.00 for a comprehensive functional cognitive assessment submitted on April 29, 2022.

4. The applicant is entitled to $5,011.90 for psychological services, proposed by Encompass Neuropsychological Services in an OCF-18 submitted on January 27, 2021.

5. Is entitled to $1,312.22 for audiometric services proposed by Michelle Cohen and Associates in an OCF-18 submitted on December 24, 2021.

6. Is entitled to payment of interest on the above-noted OCF-18s.

7. Is not entitled to the medical benefits or examination expenses listed in issues 3, 4, 5, 6, 7 i), 8(i), 10 i) and ii).

8. Is not entitled to an award under s. 10 of Ontario Regulation 664

Released: **May 18, 2023**

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Rebecca Hines
Adjudicator