



Citation: Russell v. Dumfries Mutual Insurance Company, 2023 ONLAT 20-004264/AABS

Licence Appeal Tribunal File Number: 20-004264/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:

Cynthia Russell

Applicant

and

Dumfries Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR: Rebecca Hines

APPEARANCES:

For the Applicant: Cynthia Russell, Applicant
Matthew Sutton, Counsel
Daniel Klein, Co-Counsel

For the Respondent: Shelly Henhoeffter, Adjuster
Neil Colville-Reeves, Counsel
Jessica Meyerovich, Co-Counsel

Court Reporter: Breanna Clancy, Network Court Reporting

Heard by Videoconference: July 18, 19, 20, 21, 22, 25 and 26, 2022

OVERVIEW

- [1] Cynthia Russell, (“applicant”) was involved in an automobile accident on **June 29, 2014**, and sought benefits from Dumfries Mutual Insurance Company (“respondent”) pursuant to the *Statutory Accident Benefits Schedule –Effective September 1, 2010* (“*Schedule*”). In November 2018, the applicant applied to the respondent for a determination that her accident-related impairments met the definition of catastrophic (“CAT”) impairment under the *Schedule*. The respondent conducted insurer examinations (“IEs”) and determined that the applicant’s accident-related impairments did not meet the definition of CAT. The respondent also denied the applicant’s entitlement to attendant care benefits (“ACBs”) and various medical benefits and cost of examination expenses.
- [2] The applicant disagreed with the respondent’s decision and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (“Tribunal”). The matter proceeded to a case conference but the parties were unable to resolve the dispute.
- [3] A videoconference hearing took place. On behalf of the applicant, I heard the testimony of the applicant, three members of her Church, Gord Risdale, Andrew Van Horn, and Kurt Van Dyken, as well as Matthew McCarthy, her manager. I also heard the testimony of Dr. Muniz-Rodrigues, treating physiatrist; Dr. Mehdiratta, neurologist; Dr. Lad, neuropsychologist; Jennifer Berg-Carnegie, occupational therapist (“OT”); and, Lydia Horton, rehabilitation support worker (“RSW”). On behalf of the respondent, I heard the testimony of Dr. Peterkin, psychiatrist; Joseph Moore, OT; and, Shelly Henhoeffter, the adjuster.

ISSUES IN DISPUTE

- [4] I have been asked to decide the following issues¹:
 1. Has the applicant sustained a CAT impairment as defined by the *Schedule*?
 2. Is the applicant entitled to ACBs in the amount of \$6,000.00 per month from April 2, 2018 to date and ongoing?

¹ The respondent had approved an OCF-18 in the amount of \$4,200.00 for occupational therapy recommended by Sheila Don which was listed as an issue in dispute in the Tribunal’s case conference report and order dated. The Tribunal’s order also provided incorrect details for OCF-18s referred to in issues 3, 4, 5, 6 and 8. These have been corrected according to the OCF-18s submitted as evidence.

3. Is the applicant entitled to \$2,200.00 for an attendant care assessment, recommended by Brenda Lebron in a treatment plan ("OCF-18") dated March 12, 2018?
4. Is the applicant entitled to \$4,229.86 for occupational therapy recommended by Brenda Lebron in an OCF-18 dated March 12, 2018²?
5. Is the applicant entitled to \$2,200.00 for audiometric and speech-language pathology assessment, recommended by Jennifer Horton in an OCF-18 dated March 22, 2018?
6. Is the applicant entitled to \$4,000.00 (\$8,200.00 less \$4,200.00 approved) for CAT assessments, recommended by Dr. Hiten Lad in an OCF-18 dated June 14, 2018?
7. Is the applicant entitled to \$1,057.00 for a social work assessment recommended by Alyssa Mitchell in an OCF-18 dated April 27, 2018?
8. Is the applicant entitled to \$5,207.37 for RSW services, recommended by Jennifer Berg-Carnegie in an OCF-18 denied September 27, 2018?
9. Is the applicant entitled to interest on any overdue payment of benefits?
10. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

RESULT

[5] After considering the testimony of all witnesses and reviewing all of the evidence I find:

1. The applicant sustained a marked impairment in adaptation under Criterion 8 and therefore sustained a CAT impairment.
2. The applicant is not entitled to an ACB in the amount of \$6,000.00 per month from April 2, 2018 to date and ongoing. The applicant is entitled to \$1,561.89 per month from today's date and ongoing, upon proof that the benefit has been incurred.
3. The applicant is entitled to the following OCF-18s:

² This was incorrectly classified as speech language therapy in the Tribunal's case conference report and order.

- a) \$2,200.00 for an attendant care assessment, recommended by Brenda Lebron in a treatment plan ("OCF-18") dated March 12, 2018;
 - b) \$4,229.86 for occupational therapy recommended by Brenda Lebron in an OCF-18 dated March 12, 2018;
 - c) \$2,200.00 for audiometric and speech-language pathology assessment, recommended by Jennifer Horton in an OCF-18 dated March 22, 2018?
 - d) \$1,057.00 for a social work assessment recommended by Alyssa Mitchell in an OCF-18 dated April 27, 2018?
 - e) \$5,207.37 for RSW services, recommended by Jennifer Berg-Carnegie in an OCF-18 denied September 27, 2018.
- 4. The applicant is entitled to interest on any overdue payment of benefits
 - 5. The applicant is not entitled to \$4,000.00 (\$8,200.00 less \$4,200.00 approved) for CAT assessments, recommended by Dr. Hiten Lad in an OCF-18 dated June 14, 2018.
 - 6. The respondent is not liable to pay an award.

BACKGROUND

- [6] On June 29, 2014, the applicant was involved in an accident when her vehicle hit a guardrail on a ramp on the 401 and hydroplaned. Police attended the scene. The applicant attended the hospital later that evening and was discharged. She followed up with her family doctor and attended the hospital within a few weeks complaining of pain and concussion related symptoms. The applicant submits that she sustained a concussion as a result of the accident which resulted in chronic headaches, dizziness, problems with vision and memory and cognition. This impairment has developed into a psychological impairment. Following the accident, her family doctor has referred her for psychological treatment, to a neurologist and an acquired brain injury program.

Did the accident cause the applicant's impairments?

- [7] The respondent argues that the applicant's pre-accident medical history is significant and that the accident did not cause the applicant's impairments. It submits she had a history of psychological issues. Further, she experienced

several tragic life events post-accident such as the death of both of her parents, her brother, and her dog. The applicant argues the opposite and submits that despite her medical history she was functioning at a higher-level pre-accident. She did not have any psychological or cognitive issues that prevented her ability to function.

- [8] It is well established law that the appropriate test to determine causation in accident benefit cases is the “but for” test, which was confirmed by the Divisional Court in *Sabadash v. State Farm et al.*, 2019 ONSC 1121CanLII (*Sabadash*). To satisfy this test, the applicant must prove on a balance of probabilities that “but for” the accident she would not have suffered the impairments which form the basis for her application for CAT status. The court in *Sabadash* sets out that the existence of pre-existing medical issues does not negate an insurer’s liability. Further, that the accident need not be the only cause of the impairment but a necessary cause. As per my reasons below, I find that the accident was a necessary cause of the applicant’s mild traumatic brain injury (TBI) and psychological impairment.
- [9] In analyzing causation, it is necessary to compare the applicant’s pre- and post-accident life to determine to what extent any accident-related impairment affected her ability to function. The applicant provided the following testimony regarding her pre-accident life and activities:
- a) She worked full time as an administrative assistant for 13 years which required excellent communication, organization skills and the ability to multi-task. She worked 50 to 60 hours per week. There was no evidence of any performance issues.
 - b) She volunteered at St. John’s Ambulance (SJA) as an emergency first-aid responder for 13 years and would attend festivals, conferences and events on weekends. This was an important aspect of her life.
 - c) She was heavily involved with her Church as she attended weekly bible study, and two masses on Sunday. She regularly volunteered to organize Church events.
 - d) She was independent with her daily activities including self care, housekeeping, grocery shopping and meal preparation.
 - e) She hosted international high school students.
 - f) She had an active social life.

- g) She enjoyed hobbies such as wood working, knitting and macramé.
- h) She was independent in accessing the community and she had no limitations walking or driving.

[10] I find the above testimony to be consistent with what the applicant reported to assessors. She testified that post-accident:

- a) She has not been able to return to work in the same capacity or occupation. More about her post-accident employment will be discussed later.
- b) She no longer volunteers as a first-aid responder for SJA.
- c) She is able to carry out her self-care and grooming tasks, yet at a slower pace.
- d) She is able to carry out some housekeeping and home maintenance tasks, yet at a slower and inefficient manner. She has required prompting and assistance to carry out tasks such as yard work and vehicle maintenance.
- e) Her ability to cook meals has been impacted as she has forgotten to turn off the stove resulting in burning pans and a house fire.
- f) She has been unable to manage her own finances, complete her income taxes or fill out simple paperwork.
- g) Her social life has been impacted due to her frequent headaches and an inability to efficiently communicate. She is no longer motivated to initiate social activities and withdraws from large social gatherings.
- h) She has not hosted international students in the same capacity.
- i) She is still involved with her Church but no longer volunteers for special events.

[11] I find the applicant to be a credible witness in describing her pre- and post-accident activities as her testimony was consistent with what she reported to assessors. There were a few discrepancies in the applicant's evidence such as her reporting to assessors that she was let go from her pre-accident employment because of her accident-related impairments. The evidence supports that she was laid off due to company downsizing four months post-accident. There were

also inconsistencies in the applicant's reports about sustaining a head injury in the month following the accident as the head injury was not always reported. The applicant also reported to some assessors that she lost consciousness as a result of the accident. I do not place much weight on these discrepancies because I find that she described everything else in a straightforward manner. I also find that she believes that there was a correlation in her being let go from her employment to her accident-related impairments. Finally, I find the evidence supports that she sustained a concussion and a mild TBI as a result of the accident which would impact the consistency of her reporting. I will discuss this in greater detail below.

- [12] I do not find the pre-accident medical records relied on by the respondent to challenge causation supports that the applicant had any disabling cognitive or psychological impairments that impacted her ability to function in the years prior to the accident. The respondent also argues that the applicant experienced many tragic life events post-accident which likely contributed to her disability.
- [13] I reject the respondent's argument on causation. I find the applicant's cognitive and psychological issues were reflected in the medical records prior to the death of her mother and other relatives. Although I am certain that these events did not assist with her recovery, I do not accept these incidents were the cause of her impairments. Further, both parties' assessors (who were aware of the pre- and post-accident history), still rendered opinions regarding the accident being the cause (or a cause) of some of the applicant's impairments. Therefore, I find the test for causation has been met.

Did the applicant sustain a CAT impairment as a result of the accident?

- [14] On November 29, 2018, the applicant submitted an application to the respondent seeking a CAT determination under s. 3(2)(d)(ii) (Criterion 6) and s.3(2)(f) (Criterion 8) of the *Schedule*. I will address first whether the applicant meets CAT status under Criteria 6.

CAT Status Under Criterion 6

- [15] The applicant submits she meets the test under Criterion 6 because she sustained a brain impairment that results in a score of 3 (severe disability) on the Glasgow Outcome Scale ("GOS")³ according to a test administered more than six months after the accident by a person trained for that purpose.

³ The GOS is defined in an article by Jennett B. and Bond M. *Assessment of Outcome After Severe Brain Damage*, *Lancet* i:480, 1975,

- [16] In support of Criterion 6, the applicant relies on the CAT assessment report of Dr. Mehdiratta dated August 17, 2021. Dr. Mehdiratta diagnosed the applicant with a TBI and post-concussion syndrome. She also relies on the OT CAT report of Ms. Berg- Carnegie and Dr. Lad who jointly determined that the applicant has a severe disability as a result of her accident related mild TBI.
- [17] The respondent relies on the multi-disciplinary insurer examination (IE) CAT reports completed by Dr. Meloff, neurologist, Dr. Watson, neuropsychologist, and Joseph Morgan, OT, who determined that the applicant did not meet the test for Criterion 6.
- [18] In order to prove she meets Criterion 6, the applicant must first prove that she sustained a brain injury as a result of the accident. There is a disagreement between the parties that the applicant sustained a concussion resulting in a mild TBI as a result of the accident. The respondent maintains that the medical evidence regarding the concussion diagnosis is weak as the applicant was not officially diagnosed with a concussion or mild TBI until four years post-accident. It contends that there are contradictory references in the hospital's and family doctor's clinical notes and records about a head injury and reference is made to concussion but with a question mark beside it. The respondent submits that this is not a diagnosis. Further, there was no diagnostic imaging to confirm that she sustained a brain injury.
- [19] Although I agree with the respondent that there were a few inconsistencies in the records regarding whether the applicant sustained a concussion, I find that since the accident, she has consistently reported concussion-related symptoms such as headaches, dizziness, nausea, light and sound sensitivity as well as problems with concentration and memory. Further, I find the report of Dr. Giles, neurologist, dated September 22, 2015 supports a concussion as the doctor states that the applicant "most certainly sustained a mild TBI as a result of the accident". Dr. Giles' opinion was also shared by Dr. Muniz Rodrigues and Dr. Mehdiratta who both diagnosed the applicant with a mild TBI and post-concussion syndrome as a result of the accident.
- [20] Dr. Muniz Rodrigues testified that there is no medical test to confirm a concussion and the fact that the CT scan did not reveal any abnormalities does not mean that the applicant did not sustain a concussion/mild TBI. In addition, it is not surprising that the applicant's self reports were inconsistent as she complained of poor memory and cognitive issues post-accident. Based on the totality of the evidence, I find that the applicant has proven on a balance of probabilities that she sustained a concussion/mild TBI as a result of the accident.

Now, I must determine whether the mild TBI sustained by the applicant results in a severe disability under the GOS.

[21] The GOS is a five-point scale which describes levels of disability which includes 1) death; 2) persistent vegetative state; 3) severe disability; 4) moderate disability; and 5) good recovery. Based on the facts and evidence before me, I do not find that Levels 1, 2 or 5 apply to the applicant's case so I will focus on 3 and 4. The GOS provides the following descriptions to distinguish between severe and moderate disability.

- (i) *Severe disability (conscious but disabled)* — This is used to describe patients who are dependent for daily support by reason of mental or physical disability, usually a combination of both. Many will be in institutions, but this should not be a criterion, because exceptional family efforts may enable such patients to be looked after at home. It is important to recognise that severe mental disability may occasionally justify this classification in a patient with little or no physical disability.
- (ii) *Moderate disability (disabled but independent)* — Such patients can travel by public transport and can work in a sheltered environment, and are therefore independent in so far as daily life is concerned. The disabilities found include varying degrees of dysphasia, hemiparesis, or ataxia, as well as intellectual and memory deficits and personality change. These may produce considerable family disruption. Notice that independence is of a greater degree than that commonly described by geriatric physicians and others under the title "activities of daily living", which usually refer only to ability to maintain self-care within the patient's room or house; those able to do only that would be judged as severely disabled on the present scale.

[22] To ensure consistency in methodology assessors use a tool called a standardized structured interview questionnaire to determine a score under the GOS (or the Extended GOS). The structured interview requires the assessor to interview the patient and others close to them to determine the extent the brain injury has had on the patient's relationship with family and friends; their ability to independently perform activities of daily living within the home; travel; shop and carry on business transactions outside the home; work; and return to weekly participation in usual pre-accident social and leisure activities outside of the home.

[23] The applicant's assessors argue that her disability is severe. Ms. Berg-Carnegie and Dr. Lad opined that she lacks independence within her home and out in the

community. The following summarizes the findings of the Ms. Berg-Carnegie and Dr. Lad.

- [24] Ms. Berg-Carnegie conducted a CAT situational assessment which took place over two days. Her report notes that on day one the applicant performed okay as she was engaged in her regular routine and had control of the schedule. On day two she struggled to execute simple tasks in an efficient manner, required instructions to be repeated several times and became emotionally overwhelmed when trying to carry out simple tasks. The OT notes that the applicant exhibited problems with attention, concentration, and communication. She struggled to complete the calendar exercise which required planning and had difficulty in the community task which required her to compile a grocery list, go to the grocery store to pick up the ingredients and return home to cook the meal. The applicant needed prompts and reminders to keep her on task, struggled to find things in the grocery store, did not double check that she got the appropriate change from the cashier and had difficulty executing the meal in a timely manner.
- [25] Ms. Berg-Carnegie's report noted that the applicant's cognitive issues would be more prominent in an unpredictable real-life environment requiring multi-tasking and distraction. The OT opined that the applicant lacks the ability to be independent outside her home and is not able to travel locally without assistance. She can drive in familiar areas but would get lost if she had to take an alternative route and lacks problem-solving skills to trouble-shoot. Ms. Berg-Carnegie was also of the opinion that the applicant lacked the ability to be independent in her home. The report notes that the applicant does not require assistance from someone in her home everyday for activities of daily living. However, she requires regular prompts and reminders from her friends to complete tasks. Ms. Berg-Carnegie opined that the applicant needs assistance with shopping, managing finances and planning due to deficits in concentration, attention, memory, planning and processing which is increased with fatigue and emotional response. Further, she is reliant on support for multi-tasking, mental flexibility and problem-solving. Ms. Berg-Carnegie prepared several addendum CAT reports following the applicant's house fire in August 2018, in which she maintained her opinion. Dr. Lad endorsed Ms. Carnegie's opinion that the applicant has a severe disability according to Criterion 6.
- [26] Dr. Meloff and Dr. Watson determined that the applicant did not sustain a mild TBI as a result of the accident. In their opinions, the applicant has gone back to many of her pre-accident activities and is independent within her home and out in the community.

- [27] While the evidence supports that there have been some significant changes in the applicant's function as a result of her mild TBI, I do not find her impairments fit within the severe disability category for the following reasons.
- [28] I find that despite the applicant's limitations, the evidence supports that she has consistently worked since the accident, although not in the same capacity and occupation. Less than a year following the accident, she worked as a cleaner for a hotel (until it went out of business) and worked as a nanny. From 2016 to 2018 she operated a daycare within her home looking after up to six children. She worked 11-hour days six days a week and followed a rigid schedule. I think it is important to acknowledge that the applicant has had to work out of financial necessity. I also agree with the applicant's assessors that this was a highly structured routine environment. However, during this two-year period there were no complaints from any parents or her supervisor about her inability to safely look after these children. In my view, operating the daycare for over two years is not consistent with someone that lacked independence within her home or requires significant daily supervision.
- [29] Much was made by the applicant's assessors about a kitchen fire which occurred in the applicant's home in August 2018, while operating the daycare, which resulted in the loss of her daycare licence. The applicant's assessors maintain that the fact that she had a house fire supports that she cannot function independently within the home without significant safety concerns. I find that despite this troubling incident, the applicant was able to gain part-time employment at FedEx a few months later as a package handler and has been employed there ever since. She works 3 to 4 hours per day up to five days a week.
- [30] The applicant's manager at FedEx testified that the applicant is an excellent employee and is punctual and has regular attendance. I find the fact that the applicant can independently follow a regular schedule, be punctual and have good attendance is not in-line with someone who cannot function independently within the home or out in the community.
- [31] I also find that the applicant is able to be independent in the community as she regularly drives a vehicle for short distances and does not have any physical limitations in walking. In fact, the evidence supports that she drives co-workers and church members to and from church and work on occasion. I find the applicant's ability to do things for others is not compatible with a severe disability. Surveillance evidence depicts the applicant driving, running errands, grocery shopping, going out for coffee with a friend and walking her dog in a conservation

area either independently or with friends. In my view, this is not compatible with someone who lacks independence out in the community.

- [32] The applicant relied on the Tribunal's decision in *R.V. v. Aviva*⁴ in support of her position that surveillance evidence should be given limited weight in situations involving insureds with psychological impairments. While I agree that surveillance is not always helpful in assessing someone's capabilities from a psychological perspective, in this case the surveillance is consistent with the applicant's self-reports about her functional abilities. Further, in *R.V. v. Aviva* surveillance was conducted over 3 days. In this case, there was 15 days of surveillance which showed consistency in the applicant's activities.
- [33] The evidence also supports that the applicant is independent with self-care as she is able to bathe, dress and groom herself on a regular basis. The applicant argues that this aspect of life has been significantly curtailed post-accident. Post accident she showers less frequently and wears baggy clothes. I find she consistently reported to all assessors that she was independent with self care tasks. The applicant's assessors testified that the applicant sees herself in a much more positive light and reports being more independent than she actually is. However, with the exception of one report, the applicant is described as well groomed by assessors throughout the claim. There was no mention of self-neglect in any of the reports. Despite this, I find that her mild TBI has had a significant impact on her ability to carry out certain household tasks such as cooking, doing laundry, and looking after her finances. However, I do not find that her inability to do some of these things efficiently places her in the severe disability category under Criterion 6.
- [34] The applicant relied on the Financial Services Commission of Ontario's decision in *Watters v. State Farm*⁵ which provides guidance on the analysis to apply in determining an insured's impairment under the GOS. In *Watters*, the arbitrator discussed the fact that the insured's disability landed on the border of moderate and severe. In that case the arbitrator determined that the insured was only left alone for a couple of hours a day; that family members would constantly cue the insured by phone or text to keep them on task up to 20 times per day; the insured's husband managed her medication; the insured had several mishaps where she burned herself or her clothing while preparing food; the insured could not use public transportation or shop independently.

⁴ *R.V. v. Aviva Insurance*, 2019 CanLII 22202.

⁵ *Watters v. State Farm Mutual Automobile Insurance Co.*, 2015 CarswellOnt 10846.

- [35] I find the facts in this case are distinguishable from the scenario outlined in *Watters* as the applicant is working, she can be left unsupervised, can navigate within the community, can shop independently, and has not received the level of cueing and support as received by the insured in *Watters*. The applicant's RSW testified that the applicant reported forgetting to take her medication, she drank rubbing alcohol once by mistake, she had falls at work due to balance issues and burned pots on a regular basis. Other than prior references to leaving the stove on, the other incidents were not reflected in the RSW's notes, nor were any family doctor's notes submitted supporting that the applicant had any falls or was missing her medication. Nor was there any reference to any falls at work in the employment file. Therefore, I have given this evidence little weight.
- [36] Three members from the applicant's Church testified about the changes in the applicant post-accident and the many challenges she faces.⁶ The following summarizes the testimony of these three lay witnesses. Prior to the accident, she had no problems communicating, she organized themed events for the Church as well as arts and craft activities for socials. Her Church elders describe her as an exuberant, expressive, social, loving and caring person who gave her all to the community and to the Church. Following the accident, she struggles with communication, memory, and processing information. She is also overwhelmed by regular routine tasks that she did not have problems with pre-accident. Post-accident, she is socially withdrawn and has required assistance managing finances, filling out simple paperwork, doing her taxes, driving long distances, maintaining her vehicle, with snow removal, and with yard work. As time has progressed, they have worried about her safety and check in on her to cue and prompt her to remember to do things.
- [37] I find the Church member's testimony consistent with what the applicant reported to assessors about her pre-accident function. Further, I find all three witnesses to be credible and believe that the applicant did not have any of the reported functional limitations pre-accident. However, I find their testimony about how much assistance they provided post-accident (such as cueing and prompting) to be vague and lacking in detail. Mr. van Dixon testified that he would check in with the applicant every six weeks and would help when needed. Mr. Risdale and Pastor van Dyken testified that they would check in with her to cue and prompt regularly but it is still unclear whether this was on a daily basis, more than a few times a day or on a weekly basis. Although I find their testimony helpful as far as confirming some of the applicant's changes post-accident, I do not find their

⁶ Overall, I did not find the testimony of Gord Risdale, Church Elder as helpful as he did not know the applicant prior to the accident.

evidence supports that she lacks independence within her home or the community.

- [38] Although the evidence does support that the applicant's functioning has been compromised, I do not find that she lacks independence in her home or out in the community to qualify under the severe disability category. I find her disability more compatible with the moderate disability category. For these reasons, the applicant has not met her onus in proving on a balance of probabilities that she meets CAT status under Criterion 6.

CAT Status Under Criterion 8

- [39] To qualify as CAT under Criterion 8, an individual must sustain a Class 4 (marked) impairment as a result of the accident in any one of the four spheres of functioning⁷ outlined in Chapter 14 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 ("*Guides*"), due to a mental or behavioural disorder.
- [40] The *Guides* set out that mental and behavioural impairments are rated according to how seriously they affect a person's useful daily functioning. The below chart sets out the four spheres of functioning and the levels of impairment.⁸

Area or Aspect of Functioning	Class 1: No Impairment	Class 2: Mild Impairment	Class 3: Moderate Impairment	Class 4: Marked Impairment	Class 5: Extreme Impairment
Activities of Daily Living	No impairment is noted	Impairment levels are compatible with most useful functioning	Impairment levels are compatible with some, but not all useful functioning	Impairment levels significantly impede useful functioning	Impairment levels preclude useful functioning
Social Functioning					
Concentration, Persistence and Pace					

⁷ The four spheres of functioning in the *Guides* are (1) Activities of Daily Living; (2) Social Functioning; (3) Concentration, Persistence and Pace; (4) and Adaptation.

⁸ *Ibid*, pg. 301, Table 1

Adaptation (Deterioration in a work-like setting)					
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- [41] In support of Criterion 8 the applicant relies on the CAT assessments of Ms. Berg-Carnegie and Dr. Lad who opined that she has a marked impairment under all four spheres of functioning. Dr. Lad diagnosed the applicant with Major Depressive Disorder, Recurrent-Mild with Anxious Distress, Somatic Symptom Disorder, Persistent Moderate, and Mild Neurocognitive Disorder due to mild TBI. The respondent relies on the CAT IEs of Dr. Watson, Dr. Peterkin, and Mr. Morgan. Dr. Peterkin opined that the applicant had no diagnosable psychiatric impairment as a result of the accident. Despite no diagnosis, Dr. Peterkin assigned a mild impairment rating under the spheres of concentration, persistence and pace and adaptation. He assigned no rating under activities of daily living and social functioning.
- [42] Overall, I prefer the assessments of Dr. Lad and Ms. Berg-Carnegie over the respondent's assessors as they are more consistent with the medical evidence. For example, the applicant was also diagnosed with Somatic Symptom Disorder in the neuropsychological report of Dr. Davis dated February 16, 2018, and the psychiatric assessment of Dr. Douglas dated May 18, 2021.
- [43] I also find Dr. Peterkin's lack of diagnosis inconsistent with the CAT psychological IE of Dr. Becal completed as part of the same multidisciplinary assessment. Dr. Becal diagnosed the applicant with Somatic Symptom Disorder and determined the applicant had mild to moderate ratings in the four spheres of functioning. The doctor found the accident was the main precipitant factor to the applicant's psychological condition. Dr. Peterkin attributed blame to the applicant's pre-accident psychological issues. As already noted above, I do not find the applicant had any significant pre-accident issues that was interfering with her ability to function. Dr. Peterkin was asked about these inconsistencies during cross-examination and his explanation was that he and Dr. Becal's opinions align because they both determined the applicant did not have a marked impairment. I did not find this explanation helpful. The respondent did not call Dr. Becal as a witness to address this difference of opinion. I also find Dr. Peterkin's CAT IE to be vague and lacking in detail and analysis in discussing the spheres of function. He also neglected to discuss in his report the findings of Mr. Morgan's report

which revealed several significant functional impairments. Further, Dr. Peterkin's report failed to adhere to the *Guides* which specifies that a diagnosis is required in order for an impairment rating to be provided.

- [44] I also find the respondent's CAT IE reports internally inconsistent as Dr. Meloff, determined that the applicant's issues were more than likely connected to psychological issues. Whereas Dr. Peterkin indicated that she likely sustained a mild neurocognitive disorder. I find these opinions confusing. This was also inconsistent with Dr. Watson's finding that the applicant did not sustain any neurocognitive impairments as a result of the accident. Dr. Watson and Dr. Meloff were also not called to testify at the hearing to explain. Therefore, I have given their reports and opinions little weight. Although I prefer the applicant's CAT assessments, I do find that they overestimated her impairments. Therefore, I will now address my findings regarding the applicant's impairments under the spheres of function.

ACTIVITIES OF DAILY LIVING

- [45] I find that the applicant has a moderate impairment in the sphere of activities of daily living as a result of her accident-related psychological impairment.
- [46] The *Guides* specify that activities of daily living include: self-care, personal hygiene, communication, ambulation, travel, sexual function, sleep, and social and recreational activities. Any limitation in these activities should be related to the person's mental disorder. The quality of these activities is judged by their independence, appropriateness, effectiveness, and sustainability given the context of the individual's overall situation. What is assessed is not simply the number of activities that are restricted, but the overall degree of restriction or combination of restrictions.⁹

Self-Care & Personal Hygiene

- [47] Prior to the accident, the applicant was independent with self-care and personal hygiene. As already highlighted in my analysis under Criterion 6, I find that post-accident, she remains independent with personal care.

Communication

- [48] There is no evidence before me to suggest that the applicant had issues with communication pre-accident. I find her pre-accident occupation as an administrative assistant would have required good communication skills as would

⁹ *Guides*, p. 14/294.

her volunteer position as a first-aid responder with SJA. The applicant's pre-accident communication skills were also corroborated in collateral interview of a previous colleague and through the testimony of members from her Church. Her Church Pastor described the applicant as exuberant and expressive pre-accident.

- [49] Post-accident, I find the evidence supports that the applicant's ability to communicate effectively has been significantly affected by her mild TBI and psychological impairment. Many assessors describe the applicant's communication as tangential. She struggles to find words, is easily distracted and forgets her train of thought. Throughout her in-chief and cross-examination, I find the applicant presented as someone with significant challenges with communication. When asked simple questions requiring a yes or no answer, she would answer off topic or provide long winded answers. Further, her tone was flat and at times she spoke with her eyes closed and held her head. A report of Jennifer Horton, speech language pathologist highlighted the applicant's many challenges with cognition and communication. I find the impairments outlined by Ms. Horton consistent with the evidentiary record.

Household Tasks

- [50] Prior to the accident, the applicant was independent with household tasks including cleaning her house, doing laundry, and completing annual home, yard, and vehicle maintenance. Further, she enjoyed cooking and was independent in this domain.
- [51] Post accident, the applicant struggles to complete tasks in a timely and efficient manner. She testified that she forgets laundry in the washing machine and often rewashes clean clothes. It takes her double the time to clean one room. Further, she needs to be prompted and requires assistance when it comes to annual yard work and routine home and vehicle maintenance. She struggles to cook and follow new recipes and regularly burns pots and food. The applicant's history of burning pots was consistently reported to assessors and was reflected in the clinical notes and records of Shelley Restall, social worker. Further, I find her limitations are as a result of her accident-related psychological impairment. The Church members, OT assessors, and her RSW testified that the applicant needs lots of cues and prompts to get things done.

Managing Finances

- [52] Prior to the accident, the applicant was independent in managing her finances. She testified that she has a business degree from community college and has

taken courses in accounting. She did not have problems completing paperwork in her job as an administrative assistant. She also did her own income taxes and managed her own banking.

- [53] Post-accident, she has difficulty managing her finances and requires assistance with filling out basic paperwork. Further, she lacks the planning and organization to ensure these things are completed. I find the applicant's post-accident limitations consistent with what she reported to assessors and that these limitations are as a result of her psychological impairment. The Church member's testimonies also support that the applicant has required lots of assistance in this domain since the accident.

Ambulation/Travel

- [54] Prior to the accident, the applicant was independent with walking and did not have any limitations with driving a vehicle.
- [55] As highlighted under Criterion 6, I do not find that the applicant has any significant limitations when it comes to mobility as she is able to walk and drive independently. Although I do find that she is limited in long distance driving.

Sleep

- [56] The applicant has been diagnosed with sleep apnea post-accident. I do not find this is related to the accident.

Social Activities

- [57] Prior to the accident, the applicant did not have any issues with socialization. She was socially active and would initiate activities and visits with friends. She attended weekly bible study and Church twice on Sundays. She was also heavily involved in her volunteer work with SJA.
- [58] Post accident, the applicant is described as socially withdrawn. She still socializes but not at the same capacity. A collateral interview with Donna Ivy, a former colleague stated that she has had to initiate visits with the applicant post-accident. The change in the applicant was also collaborated by the Church member's testimony. Further, the applicant is no longer involved with SJA which I find was a significant aspect of the applicant's social life pre-accident. Post-accident, she longer attends festivals and events as an emergency first responder.

Recreational Activities Independent

- [59] Prior to the accident the applicant enjoyed arts and crafts such as woodworking, knitting and macramé. I do not find the evidence supports there has been any changes in the applicant's recreational hobbies post-accident.
- [60] When I compare the degree of functional limitations the applicant has under activities of daily living I find she has a moderate impairment. Her impairment levels are compatible with some, but not all useful functioning. I find the applicant's somatic symptom disorder has resulted in these limitations as she has ongoing headaches and cognitive and communication problems which distract, overwhelm and prevent her from completing tasks in a timely and efficient manner. I find the applicant's headaches, perceived problems with memory and cognition and issues with communication cause her anxiety which has resulted in her withdrawing from many social activities.

SOCIAL FUNCTIONING

- [61] I find the applicant has a moderate impairment in social functioning.
- [62] According to the *Guides*, this area of functioning refers to an individual's capacity to interact appropriately and communicate effectively with other individuals. It is not only the number of aspects in which social functioning is impaired that is significant, but also the overall degree of interference with a particular aspect or combination of aspects.¹⁰
- [63] The applicant testified that prior to the accident, she had an active social life. She was more involved with her Church and volunteer work with SJA. Post-accident, she does not initiate social interactions and now relies on other people to make plans with her or withdraws from situations because she is embarrassed about her ability to properly communicate. Although I find the applicant's social life has changed, I find her impairment fits within the moderate category in that it precludes some but not all useful functioning. She has maintained friendships, is still heavily involved in her Church, and has a positive relationship with her son. Further, there is no evidence of any inappropriate social outbursts.

ADAPTATION

- [64] I find the applicant has a marked impairment in adaptation.
- [65] The *Guides* define impairment as the repeated failure to adapt to stressful circumstances, in the face of which "the individual may withdraw from the situation or experience exacerbation of signs and symptoms of a mental disorder;

¹⁰ *Guides*, p. 14/294

that is, decompensate or having difficulty maintaining activities of daily living, continuing social relationships, and completing tasks.”¹¹ By definition, impairment in adaptation affects the ability to function across all activity areas. Regarding activities of daily living, their quality is judged by their independence, appropriateness, effectiveness and sustainability.

- [66] I find the results of both Ms. Berg-Carnegie and Mr. Morgan's CAT OT assessments support that the applicant has a marked impairment in adaption. I find the combination of her limitations in activities of daily living, social functioning and her post-accident vocational pursuits support that she has been unable to adapt to stressful situations. Further, she decompensates when faced with stressors. I find that the evidence supports that her limitations in this sphere are as a result of her psychological impairment. In my view, the findings of both OT CAT assessments are consistent with the medical record. Most of the assessors throughout the claim describe the applicant as becoming overwhelmed and emotionally deteriorating when fulfilling tasks or when tests are administered. Post-accident, she is unable to manage her own finances, plan and problem solve, communicate effectively, and has struggled to carry out household tasks such as cooking and laundry in a timely and efficient manner.
- [67] Although the applicant has continued to work post-accident, I find the nature of the applicant's occupation has drastically changed and that she has worked out of financial necessity. I do not find the evidence supports that she could return to work in her pre-accident capacity as an administrative assistant. Post-accident, she has worked primarily in physical occupations, which do not require the same degree of skill or function. The evidence supports she emotionally deteriorates when given tasks which require planning, organization and the ability to multi-task.
- [68] The respondent argues that the fact the applicant has been able to maintain employment post-accident supports that she has been able to adapt to her post-accident disability. Although I agree with the respondent that running a daycare would be an exhausting job, the applicant's daycare was terminated because of a kitchen fire during which she left children under the age of 5 outside unsupervised. In my view, this is not an example of her adapting to her post-accident disability. The respondent also submits that the applicant was able to adapt post-fire as she obtained a new job at Fed-Ex two months later and has continued to work. Of significance, the applicant was assisted by a community agency in obtaining that job. She works 3 to 4 hour shifts per day as a package

¹¹ Guides, p. 14/294

handler on modified work. I find the demands of this job involve simple sedentary tasks.

- [69] The applicant's employment prior to the accident was stable and she was able to juggle her volunteer work at SJA, her social life, and her activities of daily living. Post-accident, she has had to adapt to her disability in employment, activities of daily living, and social functioning. In addition, the applicant has sought out the help of community resources in order to function at her current level, which I would describe as basic. She has been supported by ODSP counsellors, Traverse Independence, the Canadian Council of Work and Rehabilitation, along with service providers at the Hamilton Health Acquired Brain Injury Program. Without this support, I do not believe the applicant would be functioning at the level she is today.
- [70] Finally, Mr. Morgan's CAT OT assessment supports that the applicant has a marked impairment in adaptation. In the situational assessment, his report states that the applicant's overall independent performance of an unfamiliar complex multi-step task was poor. Further, the applicant presented with a combination of physical symptoms, including pain and fatigue, as well as psycho-emotional distress and cognitive inefficiencies that are collectively imposing a negative impact on her ability to adequately compensate in light of stressors, and contributing to her avoidance of day-to-day activities that she normally took part in pre-loss. She struggled to complete tasks involving three step instructions and completing the task took her much longer than it should have. Mr. Morgan testified that the applicant put in full effort and there were no validity concerns.
- [71] For the above-noted reasons, I find the applicant has a marked impairment in adaptation. Consequently, she meets CAT status under Criterion 8. Therefore, I find it unnecessary to address her limitations in concentration, persistence and pace.

Is the applicant entitled to attendant care benefits of \$6,000.00 per month from April 2, 2018 to date and ongoing?

- [72] The applicant is not entitled to ACBs in the amount of \$6,000.00 per month from April 2, 2018 to date and ongoing.
- [73] 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.

- [74] The applicant relies on the ACB assessments and Form 1s prepared by Ms. Berg-Carnegie dated October 23, 2019, February 25, 2020, and April 12, 2021 in which she recommended benefits in excess of the \$6,000.00 cap in monthly ACBs. Ms. Berg-Carnegie opined that the applicant requires 24-7 supervision in that she lacked the ability to respond in an emergency. Ms. Berg testified that the applicant has a hard time pacing and carrying out tasks. Further, she has difficulty with problem solving when things do not go as planned and it is impossible to predict when assistance would be required. Therefore, the applicant requires ACB support 24-7.
- [75] The respondent relies on the ACB assessments and Form 1 prepared by Mr. Morgan dated July 31, 2020, and December 2, 2020. Mr. Morgan's initial Form 1 recommended \$1,561.89 in monthly ACBs. Mr. Morgan later recanted this opinion in his addendum based on the opinions of Dr. Meloff and Dr. Peterkin. I prefer the recommendations made in Mr. Morgan's initial ACB assessment dated July 31, 2020 over the recommendation made by Ms. Berg-Carnegie that the applicant requires 24-7 supervision.
- [76] As noted earlier in my analysis under Criterion 6, I do not find the applicant lacks the ability to be independent at home or accessing the community from a safety perspective. In my view, the house fire in August 2018 does not support that the applicant requires 24-7 supervision on an ongoing basis. Other than Ms. Carnegie, none of the other assessors agreed that the applicant requires 24-7 supervision. In fact, the report of Dr. Douglas dated May 2021 indicated that there were no acute safety concerns.
- [77] The evidence supports that the applicant is independent with self-care tasks and can carry out some housekeeping and home maintenance tasks, yet at a slower pace. The evidence also supports that she is independent in accessing the community as she regularly drives a vehicle and is able to manage working part-time and running errands.
- [78] I find Mr. Morgan's recommendations in his report dated July 31, 2020 to be reasonable. Mr. Morgan recommended that a wallflower plug be installed on the applicant's stove as a safety precaution and that she be provided with 60 minutes a day for meal preparation. He also proposed that the applicant receive 2 hours of skilled supervisory care per day which would address her limitations with organization and planning or to cue and prompt her to complete tasks. Mr. Morgan opined that the applicant requires supports in place for daily structuring

while going through emotional issues. He suggested that one hour be provided in the morning and one hour be provided in the evening. Based on the evidence before me I find this to be reasonable and necessary on an ongoing basis. Mr. Morgan ultimately reversed his opinion based on the reports of Dr. Peterkin and Dr. Meloff who determined that the applicant does not require ACBs as a result of any accident-related impairments.

- [79] As already noted, I find Dr. Peterkin and Dr. Meloff's opinions contradictory and inconsistent with the rest of the medical evidence before me. For example, in Dr. Peterkin's report dated December 2, 2020 assessing ACBs, he maintained his previous opinion that the applicant did not have any psychiatric impairments as a result of the accident. He attributed the applicant's issues to physical pain, headaches, fatigue and cognitive complaints. For the reasons, already noted, I do not accept Dr. Peterkin's opinion. Additionally, I do not find Dr. Meloff's opinion on the ACB issue persuasive either as he defers to a psychologist.

Have the ACBs been Incurred?

- [80] Although I find that the applicant is entitled to ACBs, I do not find that she is entitled to payment of same as she has not incurred the benefit as required by s.3 (7) (e) of the *Schedule*. Section 3 (7) (e) of the *Schedule* provides that to meet the definition of "incurred" the applicant must satisfy the following three criteria:
- i. The applicant received the service to which the expense relates;
 - ii. The applicant paid the expense or promised to pay the expense or is legally obligated to pay the expense;
 - iii. The person who provided the service did so
 - a) in the course of her employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or
 - b) sustained an economic loss as a result of providing the goods or services to the insured person.
- [81] The applicant has not submitted any evidence to prove that the ACBs have incurred.

- [82] The applicant relies on my decision in *17-001681 v. MVACF* (“17-001681”)¹² in support of her position that the ACBs should be deemed incurred by the Tribunal pursuant to s. 3(8) of the *Schedule* because the respondent unreasonably withheld the benefit. I find this case is distinguishable from *17-001681* for a few reasons. First, the insured in *17-001681* was deemed CAT impaired prior to the denial of ACBs. Second, I also determined that the insured in that case required 24-7 supervision because of his accident-impairment. Third, I also found the IEs assessing the ACBs were flawed. Finally, I do not find that the applicant has established that she is entitled to 24-7 ACBs per month because of safety issues. I find the respondent had a reason to question the applicant’s impairment because there was a large gap in time from when the applicant was diagnosed with a mild TBI and psychological impairment. There were also gaps in time for when the applicant applied for benefits. Further, there were inconsistencies in the medical records which needed to be assessed. Finally, this case is unique in that the applicant has continued to work post-accident and reported independence in self-care and certain activities of daily living. In the present case, the applicant has functioned at a much higher level than the insured in *17-001681* who became homeless as a result of the insurer’s unreasonable denial.
- [83] The applicant has not met her onus in proving on a balance of probabilities that she requires 24-7 supervision as a result of her accident-related impairments. The applicant is entitled an attendant care benefit in the amount of \$1,561.89 per month from today’s date and ongoing, upon proof that the benefit has been incurred.

Is the applicant entitled to \$4,000.00 (\$8,200.00 less \$4,200.00 approved) for CAT assessments¹³, recommended by Dr. Hiten Lad in an OCF-18 dated June 14, 2018?

- [84] The applicant is not entitled to the balance of this OCF-18.
- [85] Neither party spent much time addressing the OCF-18s in dispute.
- [86] Section 25 (1) of the *Schedule* supports that an insurer shall pay for reasonable and necessary cost of examination expenses arising from an accident-related impairment. Section 25(5)(a) of the *Schedule* limits the cost of any one assessment or examination to \$2,000.00. The applicant bears the onus of

¹² *17-001681 v. MVACF*, 2018 CanLII 112134.

¹³ The Tribunal’s case conference report and order defined this OCF-18 for psychological treatment.

proving on a balance of probabilities that each assessment is reasonable and necessary.

- [87] The OCF-18 dated June 14, 2018, was authored by Dr. Lad, and recommended CAT assessments in the amount of \$8, 200.00.00, which can be broken down as follows:

\$2,000.00 for a neurocognitive assessment

\$2,000.00 for a psychological assessment

\$2,000.00 for file review

\$2,000.00 for catastrophic impairment assessment

\$200.00 for preparation of the OCF-18.

- [88] On June 25, 2018, the respondent sent the applicant an explanation of benefits partially approving the assessment in the amount of \$4,200.00. The respondent advised that it did not agree to pay the \$2,000.00 for the file review as this should be included in the cost for each assessment. In addition, it did not agree to fund the GOS as a separate assessment.
- [89] The applicant failed to make submissions outlining why the balance of the OCF-18 is reasonable and necessary. The applicant has not met her onus in proving that the balance of the OCF-18 for CAT assessments is reasonable and necessary.

Is the applicant entitled to \$2,200.00 for an attendant care assessment, recommended by Brenda Lebron in an OCF-18 dated March 12, 2018?

- [90] The applicant is entitled to the attendant care assessment in the amount of \$2,200.00.
- [91] The OCF-18 was prepared by Brenda Labron, OT, and is dated March 12, 2018. The goal was to conduct a comprehensive occupational therapy assessment to provide recommendations to address the applicant's functional impairments and requirement for attendant care.
- [92] The respondent denied the OCF-18 relying on the IE reports of Mr. Morgan dated June 5, 2018, and Dr. Watson dated June 11, 2018. In addition, the EOB noted that the applicant was not entitled to ACBs as 104 weeks had elapsed and she had not been deemed CAT, as required by the *Schedule*. Mr. Morgan opined

that there were no objective physical or obvious cognitive limitations that would limit the applicant in completing her pre-accident activities and that the attendant care assessment is not reasonable and necessary. Dr. Watson's neuropsychological assessment determined that the applicant had below average scores in verbal recall, processing speed, and working memory amongst other deficits, and that she had above-average scores on other tests. Dr. Watson opined that the applicant did not have any accident-related impairment that would impede her ability to carry out her activities of daily living.

- [93] I place little weight on the IE reports of Mr. Morgan and Dr. Watson. I find Mr. Morgan's assessment dated June 2018 is inconsistent with his CAT assessment done less than a year later, as well as his ACB assessment completed in July 2020 where he recommends that the applicant required monthly ACBs. Further, I find his assessment primarily focussed on the applicant's physical ability to do things. During cross-examination, Mr. Morgan acknowledged that he elicited more information from the applicant during his second assessment. I also find Dr. Watson's assessment inconsistent with the medical record before me. In addition, he failed to interpret the test results in rendering his opinion which noted deficits.
- [94] I find the evidence supports that the applicant had some functional limitations in completing her activities of daily living in a timely and efficient manner such as completing paperwork, looking after her finances, cooking, and doing laundry. Therefore, I find the attendant care assessment reasonable and necessary to assess the applicant's functional limitations in carrying out her activities of daily living. I also do not find Dr. Watson's assessment helpful as the doctor determined there was deficits in neurocognitive testing yet did not explain how this factored into his opinion that the applicant did not have any impairments and did not require ACBs.
- [95] The applicant has met her onus in proving on a balance of probabilities that the attendant care assessment in the amount of \$2, 200.00 is reasonable and necessary.

Is the applicant entitled to \$4,229.86 for occupational therapy, recommended by Brenda Lebron in an OCF-18 dated March 12, 2018?

- [96] The applicant is entitled to the OCF-18 for OT in the amount of \$4,229.86 recommended by Brenda Lebron.
- [97] Section 15 of the *Schedule* provides that an insurer shall pay for all medical benefits that are reasonable and necessary as a result of an accident-related

impairment. The applicant bears the onus of demonstrating on a balance of probabilities that the benefit is reasonable and necessary. 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.

- [98] The OCF-18 was authored by Ms. Labron and the goal of was to provide OT services to maximize functional restoration and address barriers impeding normal daily function. The plan recommends 8 sessions of occupational therapy and included fees for driving, planning and documentation for a total cost of \$4,229.86.
- [99] The respondent denied the OCF-18 relying on the same IE reports of Mr. Morgan and Dr. Watson to deny the attendant care assessment. As highlighted above, I find the findings of Mr. Morgan's assessments inconsistent and Dr. Watson's IE unhelpful.
- [100] I find the applicant's functional limitations are well documented in the evidentiary record before me. Further, her need for OT treatment is supported by various service providers including Dr. Muniz Rodrigues, Rebecca Bond, Dr. Lad, and Ms. Berg-Carnegie.
- [101] The applicant has met her onus in proving on a balance of probabilities that the OCF-18 for OT treatment is reasonable and necessary.

Is the applicant entitled to \$1,057.00 for social work assessment, recommended by Sheila Don and Alyssa Mitchell in an OCF-18 dated April 27, 2018?

- [102] The applicant is entitled to the social work assessment in the amount of \$1,057.00.
- [103] The OCF-18 dated April 10, 2018 was prepared by Ms. Don, and its goal was to complete a social work assessment in order to determine the nature of the applicant's psychological impairments to determine whether treatment is required. The assessment was to be completed by Alyssa Mitchel, social worker.
- [104] The respondent relies on the same IE report of Dr. Watson dated June 11, 2018. As already highlighted, I do not find Dr. Watson's report persuasive as it is inconsistent with the rest of the evidence before me.
- [105] The evidence supports that the applicant sustained a psychological impairment as a result of the accident and that she is struggling to cope from an emotional perspective. Further, the applicant's need for psychological treatment is supported by Dr. Lad, as well as Dr. Davis who recommended that the applicant

receive cognitive behavioural therapy to address these impairments. Therefore, I find a social work assessment to be reasonable and necessary for this purpose, in order to identify treatment needs to return the applicant to her normal activities of daily living.

- [106] The applicant has met her onus in proving on a balance of probabilities that the OCF-18 recommending the social work assessment is reasonable and necessary.

Is the applicant entitled to the OCF-18 dated March 22, 2018 in the amount of \$2,200.00 for audiometric and speech language therapy assessment recommended by Jennifer Horton?

- [107] The applicant is entitled to the OCF-18 in the amount of \$2,200.00 for the speech language therapy assessment recommended by Ms. Horton.
- [108] The OCF-18 dated March 22, 2018 was authored by Jennifer Horton, speech-language pathologist, and recommended the assessment in the amount of \$2,200.00. Under activity limitations, the OCF-18 notes that the applicant has ongoing difficulties with memory, listening comprehension, planning, organizing, word finding, and task management, as well as reading recall and spelling. She modifies her work in terms of demands and has support for paperwork and problem solving when needed. The goal of the OCF-18 was to assess current cognitive-communication skills and determine whether the applicant requires speech language therapy services. Under additional comments the OCF-18 indicates that Rebecca Bond, acquired brain injury coordinator, had raised concerns with the applicant's speech and executive functioning.
- [109] The respondent relied on the same IEs of Mr. Morgan and Dr. Watson to deny this OCF-18. For the reasons already noted, I do not find their opinions persuasive.
- [110] I agree with the applicant and find that she is entitled to the OCF-18 for the speech language therapy assessment. As noted above, I find the evidence consistently supports that the applicant has had problems with cognition and communication since the accident. Multiple assessors have described the applicant's speech as tangential, and notes she is easily distracted and has trouble finding words. Further, the recommendations for speech language therapy are supported by Rebecca Bond, Dr. Muniz Rodrigues and the assessment of Ms. Horton which supports that the applicant required the assessment to analyze her impairments.

- [111] The applicant has met her onus in proving on a balance of probabilities that the OCF-18 for the speech language assessment is reasonable and necessary.

Is the applicant entitled to \$5,207.37 for RSW services, recommended by Jennifer Berg-Carnegie in a treatment plan (OCF-18) denied September 27, 2018?

- [112] The applicant is entitled to the OCF-18 for RSW services in the amount of \$5,207.37.
- [113] The OCF-18 was authored by Ms. Berg-Carnegie and recommended 16 sessions of RSW services for a total cost of \$5,207.37 which included various fees for travel time, documentation, and preparation of forms. The goal of the OCF-18 was to provide the applicant with skilled assistance to complete the goals recommended by the occupational therapist.
- [114] The applicant relies on the RSW notes of Anchor Rehabilitation. The notes reflect that the applicant required assistance with completing paperwork, cues and prompts to sort medication and assistance with planning and organizing weekly tasks. Ms. Horton, the applicant's RSW, testified that she provided the services recommended in the OCF-18.
- [115] The respondent relied on the same IE assessment of Dr. Watson to deny this OCF-18, which for the reasons already noted, I do not find persuasive.
- [116] I find the OCF-18 recommending RSW services reasonable and necessary as I find the applicant requires assistance with the tasks that Ms. Horton assisted her with as a result of her accident related cognitive and psychological impairment. The evidence consistently referred to the applicant's problems with completing paperwork and that she has issues organizing and initiating and tasks.
- [117] The applicant has met her onus in proving on a balance of probabilities that the OCF-18 for RSW services is reasonable and necessary.

Is the applicant entitled to interest on any overdue payment of benefits?

- [118] Section 51(1) states that an amount payable in respect of a benefit is overdue if the insurer fails to pay a benefit within the time required under this regulation. Since I have determined that the applicant is entitled to the various benefits she is entitled to the payment of interest on the amounts overdue pursuant to section 51(2).

- [119] The applicant is entitled to interest on the overdue payment of the OCF-18s that I have determined to be reasonable and necessary pursuant to s.51(1) of the *Schedule*.

Is the applicant entitled to an award under s.10 of Regulation 664 because the respondent unreasonably withheld or delayed payments to the applicant?

- [120] The applicant is not entitled to an award.
- [121] Regulation 664, R.R.O. 1990 (Regulation 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 together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.
- [122] The case law has established that an award should be granted only where there was unreasonable behaviour by an insurer in withholding or delaying payments, which can be seen as excessive, imprudent, stubborn, inflexible, unyielding or immoderate.¹⁴
- [123] The applicant argues that the respondent is liable to pay an award as it unreasonably withheld the various OCF-18s in dispute. The applicant submits that the insurer had sufficient documentation to approve the benefits when they were submitted. She submits that the respondent had the medical records from the Hamilton Health Science acquired brain injury program amongst other records. Rather than approving the benefits, the respondent spent over forty thousand dollars on IE assessments which could have gone towards treatment. Further, the respondent's adjuster entered into settlement discussions with the applicant when they were aware that the applicant had a brain injury and was in the process of retaining counsel.
- [124] The respondent submits that an award is not warranted as this is an unusual case. As a starting point, the applicant continued to work and reported being independent in her daily activities to most assessors. Further, there were inconsistencies in the medical records about whether the applicant sustained a head injury in the accident. There were also inconsistencies about the accident being the cause of her losing her pre-accident employment, which to date has

¹⁴ Applicant v. Portage La Prairie Mutual Insurance Company, 2019 CanLII 101649 (ON LAT), para 72.

not been established. In addition, there were large gaps of inactivity throughout the applicant's claim. When the applicant contacted the respondent about benefits available to her, it requested documentation and requested IEs. Further, the adjuster's log notes make it clear when medical records were received. The respondent submits that based on all of the above factors it was not unreasonable for it to request second opinions from IE assessors to assess whether the disputed OCF-18s were reasonable and necessary. In addition, it cannot be penalized for relying on those reports. Further, it approved many of the OCF-18s submitted and there was no pattern of unreasonable delay in approving OCF-18s.

- [125] I agree with the respondent and do not find that an award is appropriate in this case. I agree that this case is unusual and the fact that I have decided in the applicant's favour does not mean the respondent is liable to pay an award. There were gaps of inactivity in the file when the applicant did not apply for any benefits. I find the respondent had reason to question the applicant's CAT claim and application for other benefits. Further, there were no medical opinions about the applicant's mild TBI or psychological impairments until four years post-accident. Although I preferred the applicant's CAT assessments, the respondent is not liable to paying an award just because it got it wrong. The only conduct of the respondent that I find troubling is the fact that one of its adjusters tried to discuss settlement with the applicant when they were aware of the brain injury, and notified that the applicant was seeking legal representation. Although I find this conduct inappropriate, the applicant failed to tie this conduct to the withholding of any of the benefits in dispute. Therefore, I cannot issue an award for this conduct.
- [126] I do not see anything else in the adjuster's log notes or through the testimony of the adjuster that supports that the respondent's conduct meets the threshold for an award.
- [127] The applicant has not met her onus in proving on a balance of probabilities that the respondent unreasonably withheld or delayed payment of benefits. Therefore, the applicant is not entitled to an award.

ORDER

- [128] For all of the above-noted reasons I find:
1. The applicant sustained a marked impairment in adaptation under Criterion 8 and therefore sustained a CAT impairment.

2. The applicant is not entitled to an ACB in the amount of \$6,000.00 per month from April 2, 2018 to date and ongoing. The applicant is entitled to \$1,561.89 per month from today's date and ongoing, upon proof that the benefit has been incurred.
3. The applicant is entitled to the following OCF-18s:
 - a) \$2,200.00 for an attendant care assessment, recommended by Brenda Lebron in a treatment plan ("OCF-18") dated March 12, 2018;
 - b) \$4,229.86 for occupational therapy recommended by Brenda Lebron in an OCF-18 dated March 12, 2018;
 - c) \$2,200.00 for audiometric and speech-language pathology assessment, recommended by Jennifer Horton in an OCF-18 dated March 22, 2018?
 - d) \$1,057.00 for a social work assessment recommended by Alyssa Mitchell in an OCF-18 dated April 27, 2018?
 - e) \$5,207.37 for RSW services, recommended by Jennifer Berg-Carnegie in an OCF-18 denied September 27, 2018.
4. The applicant is entitled to interest on any overdue payment of benefits
5. The applicant is not entitled to \$4,000.00 (\$8,200.00 less \$4,200.00 approved) for CAT assessments, recommended by Dr. Hiten Lad in an OCF-18 dated June 14, 2018.
6. The respondent is not liable to pay an award.

Released: January 12, 2023

**Rebecca Hines
Adjudicator**