Citation: Jamali v. Economical Insurance Company, 2024 ONLAT 18-008443/AABS

Licence Appeal Tribunal File Number: 18-008443/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:

Rogiar Jamali

Applicant

and

Economical Insurance Company

Respondent

DECISION

VICE-CHAIR: **Jeremy A. Roberts**

APPEARANCES:

For the Applicant: Rogiar Jamali, Applicant
Ashu Ismail, Counsel

For the Respondent: Economical Insurance Company
Martin Forget, Counsel

Heard by Videoconference: **February 12-21, 2024**

OVERVIEW

[1] Rogiar Jamali, the applicant, was involved in an automobile accident on May 8, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*"). The applicant was denied benefits by the respondent, Economical Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

i. Has the applicant sustained a catastrophic impairment as defined by the *Schedule* under criterion 8?

ii. Is the applicant entitled to an income replacement benefit ("IRB") of $325.47 per week from January 15, 2019 to date and ongoing?

iii. Is the applicant entitled to $2,972.72 for chiropractic services, proposed by Chiro-Med Rehab Centre in a treatment plan/OCF-18 ("plan") dated August 15, 2016?

iv. Is the respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?

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

vi. Is the applicant entitled to costs pursuant to Rule 19 of the Licence Appeal Tribunal Rules (2023) ("LAT Rules")?

RESULT

[3] The applicant is not catastrophically impaired.

[4] The applicant is not entitled to IRB, the proposed chiropractic treatment plan, interest, an award, or costs.

PROCEDURAL ISSUES

[5] Throughout the hearing there were multiple procedural issues that were raised or arose which required me to issue orders. Orders were issued through my authority under section 25.0.1 of the *Statutory Powers Procedure Act,* 1990 ("SPPA"), which states: "A tribunal has the power to determine its own

procedures and practices and may for that purpose: (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and (b) establish rules under s. 25.1. I have summarized them here:

Testimonies of OT Kassam & Dr. Keightley

[6] At the start of the hearing, the respondent objected to allowing the testimony of occupational therapist ("OT") Kassam and Dr. Keightley, arguing that they were not listed in the Case Conference Report and Order ("CCRO") of July 21, 2022. It also argued that the Tribunal was not in possession of any clinical notes and records from OT Kassam, only progress reports, which made the testimony of little value. Further, it argued that Dr. Keightley participated in a CAT assessment in 2018 which has since been superseded by a more recent CAT assessment.

[7] The applicant argued that the CCRO provided flexibility for the applicant to call up to 4 additional witnesses on the issues of CAT and IRB and that the testimony was relevant to the issues in dispute.

[8] I considered submissions and agreed with the applicant that she was provided flexibility to call further witnesses. OT Kassam and Dr. Keightley, whose evidence I found to be relevant to the issues in dispute, were permitted to testify and both parties were given the chance to make submissions in their closings on how much weight the testimonies should be given.

Testimony of Lay Witnesses

[9] The respondent objected to allowing the testimony of both the applicant's mother and daughter, arguing that the CCRO only provided for the testimony of one lay witness. The applicant argued that both of their testimonies were relevant to the issues in dispute.

[10] I considered submissions and ordered that the applicant choose one lay witness, either the mother or daughter, per the CCRO. In my view the evidence of both would be overly repetitious and would not significantly assist me in making a determination on the issues in dispute.

Testimony of Adjuster

[11] The respondent objected to allowing the testimony of Rosemarie Jones, an adjuster with the respondent, arguing that she was not listed as a witness in the CCRO. The applicant argued that her testimony was relevant to the issue of an award claim.

[12] I considered submissions and found that the applicant would not be able to call Ms. Jones given that she was not a witness identified in the CCRO.

Lack of Independence of Adjudicator Complaint

[13] Prior to commencing the hearing, the applicant raised a concern regarding the lack of independence of the adjudicator assigned to this hearing. She alleged that the fact that some adjudicators are not legally trained and may require legal advice diminishes their adjudicative independence. The respondent argued that this was a baseless allegation and that there was no evidence to suggest that the adjudicator in this matter would be biased.

[14] The test for bias is a legal test that is well-established: what would an informed person, viewing the matter realistically and practically and having thought the matter through, conclude? Would she think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly.

[15] Based on this test, I did not find this to be a proper basis for raising a claim of bias. The hearing on the substantive issues had not yet started and there was no reason to think that I would not decide this matter fairly.

[16] The applicant again raised this issue on day 6 of the hearing. Having dealt with this already, I found there was no basis to raise it a second time and I moved on.

Length of the Cross-examination of the Applicant

[17] While canvassing for how much time the parties would require with various witnesses, the applicant objected to the respondent's request to have 4.5 hours for their cross examination of the applicant, arguing that this was excessive. The respondent argued that this was not inconsistent with the length of some cross-examinations, particularly given the variety of issues in dispute and the multitude of assessments conducted.

[18] I considered submissions and determined that 4.5 hours was an excessive amount of time for a cross examination. In order to ensure an efficient and timely resolution of the proceeding, I constrained the respondent to 3.5 hours for their cross examination of the applicant.

Applicant's Objection to the Respondent's Case

[19] On day 2 of the hearing the applicant raised a concern that the respondent was not providing the applicant with clear reasons for their benefit denials, thereby preventing them from knowing the case against them. The respondent argued

that this was a baseless allegation and was unclear on what remedy the applicant was seeking.

[20] I did not find that the applicant had grounds to raise this procedural issue and indicated that the applicant could make submissions on the respondent's conduct as part of their closing submissions.

Cross-Examination of the Applicant

[21] The cross examination of the applicant commenced on day 2 of the hearing. After proceeding for roughly 1 hour, the applicant requested we break for the day in order to give her time to rest as the questioning was causing anxiety and affecting the quality of her answers. Although I had already accommodated several breaks prior to this request (including a 30-minute break), I granted this request and the hearing concluded for that day. On day 3, less than an hour into the resumption of the cross examination, the applicant argued that the questions of the respondent were aggressive, too fast, and that she did not feel she could proceed. Although I did not find the respondent to be acting in an overly aggressive manner, I did instruct the respondent to slow their pace and offered the applicant a break once we had completed an hour of testimony. The cross examination proceeded briefly, before the same concerns were raised by the applicant. She did not feel she could continue with the cross examination.

[22] At this time, I offered the parties two options: (1) proceed with the cross-examination with a 15-minute break after one hour; or (2) end the cross examination and allow parties to make submissions on how much weight the applicant's testimony should be given in closing submissions. The applicant argued that neither option was acceptable and that she would continue the cross examination provided she could take a break whenever she wished and provided the respondent adopt a less aggressive tone. The respondent argued that the cross examination should be concluded as it could not proceed in a reasonable fashion.

[23] I considered submissions and exercised my authority under s.23(2) of the *SPPA* to order that the cross examination be concluded. The applicant indicated that she could not proceed with the accommodations I offered, which I considered reasonable. I did not find the respondent's manner of cross examination to have been unreasonable to that point and I found that unduly restricting the respondent's method of questioning would be unreasonable. Both parties were invited to make submissions on what weight should be given to the testimony of the applicant in their closing submissions.

[24] After issuing my order, the applicant changed her position and suggested she would proceed with the cross examination under the accommodations I offered (which she maintained were insufficient). While I initially considered this possibility, the respondent objected, arguing I had made a decision and we should move on. At this time, I reiterated my decision and the cross examination concluded.

Testimony of the Applicant's Daughter

[25] Following the conclusion of the applicant's cross-examination, the respondent objected to allowing the applicant's daughter to testify, arguing that it would be improper for the applicant to make her case through the daughter given that it had been denied the opportunity to properly cross examine the applicant. The applicant argued that the Tribunal already ordered that she could call a lay witness and that the order should stand.

[26] I ordered that the daughter be allowed to testify, per my earlier decision. Both parties were given the opportunity to make submissions as to what weight her testimony should be given in closing submissions.

Length of OT Burnett Testimony

[27] On day 4 of our hearing after our agreed upon schedule became untenable due to excessive and disruptive objections, I issued an order to ensure the efficient and timely resolution of the hearing. With my authority under s. 23(2) of the *SPPA* I ordered that the applicant be given 15 minutes for their examination-in-chief of OT Burnett to clarify anything in her report, which was already an exhibit before the Tribunal. The respondent was limited to 45 minutes for its cross examination.

Excessive Objections on Day 5

[28] On day 5 of the hearing there were excessive objections which affected the efficient and timely progression of the hearing. This had also happened the day before. After addressing both parties regarding the excessiveness of the objections, I instructed them to consider whether or not their objections could be better addressed in their cross-examination, their reply, or in closing submissions. This instruction was disregarded. As such, with my authority under s. 23(1) of the *SPPA* I issued an order that objections would now be heard following the testimony of the witness in order to prevent an abuse of process. Each party would be given up to 5 minutes to summarize their objections and I would make any orders required subject to my findings on those objections.

CAT Addendum Report of Dr. Eisen of Jan 19, 2024

[29] The applicant objected to admitting the rebuttal report of Dr. Eisen dated Jan 19, 2024, arguing that it was not received within the 60-days pre-hearing as outlined in the initial CCRO. The respondent argued that the deadline was altered in a Tribunal Order dated May 8, 2023 to allow responsive productions such as this up to December 1, 2023, and that the resulting delay was the result of the applicant delaying the process. I pressed the respondent to confirm when the report was served on the applicant and it was confirmed that it was provided as part of the respondent's addendum brief on February 2, 2024, one week prior to the hearing. Given that this fell well outside the deadline imposed in the Order of May 8, 2023 and given that it would be prejudicial for the applicant to respond to a report it had had for only one week prior to the hearing, I did not allow this evidence to be made an exhibit.

Objections to Respondent's Witnesses

[30] The applicant argued against allowing the testimony of all of the respondent's witnesses, alleging that the respondent had not followed the requirements outlined in LAT Rules 10.2 and 10.3 which require parties to provide notice regarding the witnesses' anticipated testimony at least 45 days before the hearing.

[31] The respondent argued that this was a delay tactic employed by the applicant and that the applicant had been aware of the respondent's witnesses for some time and had access to their reports, which included their qualifications and acknowledgement of duty statements.

[32] I agreed with the respondent. The applicant had knowledge of the witnesses and their reports well in advance of the hearing. Moreover, expert testimony is generally confined to the contents of reports. Since the reports were served before the 45-day deadline, I find that the reports satisfy Rules 10.2 and 10.3. I do not find prejudice to the applicant in allowing their testimony to proceed. The witnesses' testimonies were permitted to proceed.

Testimony of Dr. Khaled

[33] Early in the hearing the parties made brief submissions regarding whether the applicant should conduct the examination-in-chief or the cross examination of Dr. Khaled. The applicant argued that because the doctor was an insurer's examination assessor, she should be entitled to conduct the cross examination.

The respondent argued that because it was the applicant calling the witness, that the applicant should conduct the examination in chief.

[34] Initially, on day 6 of the hearing, I ordered that the respondent conduct the exam-in-chief and the applicant conduct the cross examination, given that the report was generated as a result of a s. 44 assessment. However, the respondent then indicated that it did not intend to enter the report of Dr. Khaled as evidence and was unsure as to how to proceed given this. The applicant then also indicated that she did not intend to enter the report of Dr. Khaled as evidence and instead intended to question the doctor as an expert regarding the definition of "saccadic" and the proper interpretation of the *AMA Guides 4th Edition* (the "Guides"). This changed the nature of the procedural question facing me.

[35] With the benefit of this additional information, I decided that the Tribunal would not hear from Dr. Khaled. Given that neither party intended to make the doctor's report an exhibit in this hearing, I saw little value to the Tribunal hearing his testimony. The Tribunal had heard extensively from various doctors on the interpretation of the *Guides*. Moreover, securing a definition from a doctor was not a sufficient reason to call him to testify. I invited the applicant to present a definition to the Tribunal and offered to take submissions from the parties if there was disagreement over that definition. The doctor's testimony did not proceed.

[36] Of note, immediately following this decision the applicant reversed her previous statement and made Dr. Khaled's report an exhibit. This did not change my decision.

Objecting to Adding Additional Reports of January 19, 2024

[37] At the conclusion of witness testimonies but prior to closing submissions, I gave both parties an opportunity to enter as exhibits any further pieces of evidence they intended to rely upon in their closings. The respondent attempted to add two reports dated January 19, 2024. The applicant objected, arguing that these reports had been served on the applicant outside the window provided in the Tribunal Order of May 8, 2023. The respondent argued that these reports were submitted late because applicant's counsel thwarted the respondent's ability to complete the rebuttal reports in a timely manner by interfering with the s. 44 assessment process.

[38] I considered submissions and ordered that these reports not be admitted for the same reason as my previous decision with regards to the Report of Dr. Eisen. These reports were not provided to the applicant until February 1, 2024, one week prior to the start of this hearing. It would be prejudicial to her to respond to

such a late-filed report. Had the respondent felt the applicant was unfairly delaying the assessment process, it could have raised the matter with the Tribunal by way of an adjournment request or motion prior to the hearing.

ANALYSIS

The applicant is not deemed catastrophically impaired under criterion 8

[39] I find that the applicant is not deemed catastrophically impaired under criterion 8 as a result of not meeting her onus of proving that her impairments would not have been present "but for" the subject motor vehicle accident and do not rise to the level of "marked" impairment.

[40] The applicant is seeking to be deemed catastrophically impaired under criterion 8. In order to prove her case, the applicant must demonstrate that she has suffered accident-related impairments that result in a marked (class 4) or extreme (class 5) impairment in one or more areas of function according to the *Guides* 4th Edition due to a mental or behavioural disorder. Mental and behavioural impairments are rated according to how seriously they affect a person's useful daily functioning. The Guides set out the four spheres of functioning and the relative levels of impairment. The test to determine whether the applicant has sustained a catastrophic impairment is a legal one and not a medical one. See: *Liu v. 1226071 Ontario Inc. (Canadian Zhorong Trading Ltd.)*, 2009 ONCA 571 at paras 29-30.

[41] Here is a chart demonstrating the areas of functioning and the description of the levels of impairment:

Area 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	Impairment levels are compatible with some, but not all	Impairment levels significantly impede	Impairment levels preclude useful functioning
Social Functioning					

Concentration, Persistence & Pace		useful functioning.	useful functioning	useful functioning	
Adaptation					

[42] The onus is on the applicant to prove her case. To establish causation, pursuant to *Sabadash vs. State Farm et al.,* 2019 ONSC 1121, the applicant must establish 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 the benefits claimed. 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.

[43] The applicant argued that she has sustained at least one marked impairment in one of the four spheres of functioning and is therefore deemed catastrophically impaired. In making her case, she relies on the reports of psychologist Dr. Keightley (who assessed the applicant in 2018) and psychiatrist Dr. Kiraly (who assessed the applicant in 2023).

i. Dr. Keightley found the applicant to have a marked level of impairment in the spheres of concentration, persistence and pace and in adaptation as a result of mental/behavioural diagnoses of (1) major depressive disorder; (2) moderate pain disorder; and (3) posttraumatic stress disorder. She opined based on her interview with the applicant, her testing results, and based on her review of the medical evidence, that the applicant is forgetful, has difficulty concentrating, and requires assistance from others to complete tasks. Further, she opined that the applicant has diminished ability to cope with stressors and demonstrates avoidance behaviours.

ii. Dr. Kiraly found the applicant to have a marked impairment in all four spheres of function as a result of mental/behavioural diagnoses of (1) major depressive episode with anxious distress; (2) somatic symptom disorder; (3) posttraumatic stress disorder; and (4) mild neurocognitive disorder due to a traumatic brain injury. He opined based on his interview with the applicant, his testing results, and based on his review of the medical evidence, that the applicant neglects personal hygiene, cannot perform heavier housekeeping activities, is dependent on others, avoids interactions with others, has significant anxiety driving, has almost no

interest in sex, is unable to engage in pre-accident recreational activities, is socially withdrawn and isolated, has difficulty concentrating and sustaining tasks, is forgetful, and decompensates frequently.

iii. The applicant relied on the records of OT Kassam and OT Burnett to support these various functional impairments.

[44] The applicant also argued that there is no question of causation here given the continuum of symptoms post-accident to the present. Based on the applicant's own testimony and self-reporting, as well as the testimony of her daughter, the applicant submits she did not suffer these functional impairments pre-accident, with the motor vehicle accident being the only differentiating factor. The applicant further relies on *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers Compensation Board) v. Laseur,* 2003 SCC 54 (CanLII) [2003] 2 SCR 504 to argue that while many of the applicant's symptoms and associated impairments are based on subjective reporting, this should not discount the validity of these symptoms given that "chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, [and have] often been subjected to persistent suspicions of malingering on the part of employers, compensation officials, and even physicians" (Para I). The applicant argued that her self-reporting, as confirmed by her daughter, shows a consistent level of impairment across many years and does not suggest a person who is malingering or exaggerating.

[45] The respondent argued that the applicant has not sustained a catastrophic impairment under criterion 8 as a result of having failed to establish a causal link between the accident and her noted impairments. Specifically, it argued that without her subjective testimony and self-reports to assessors, the applicant could not establish that her impairments would not be present "but for" the accident. On that subjective evidence, it argued that the applicant cannot be considered credible because: (1) the applicant is a poor historian; (2) the functional impairments she describes do not match her history; (3) she received invalid tests results on psychometric testing; and (4) objective findings did not support her impairments.

i. **Poor historian:** The respondent argued that the applicant made several inconsistent or false statements to the Tribunal which were not borne out in the evidence. For example, she told the Tribunal that she had never been treated for acne, never saw a dietician, and did not date anyone after the accident. These three statements were contrary to the testimony and evidence of her family doctor and daughter. This calls into question her

credibility as a poor historian. It also argued that when it attempted to press the applicant on these inconsistencies during cross-examination, the applicant became distressed and was unable to proceed with the cross-examination despite numerous accommodations. The respondent argues this further damages her credibility as an accurate historian.

ii. **Functional impairments not matching history:** The respondent argued that the functional impairments identified by the OTs and Drs. Keightley and Kiraly should be given little weight because they did not match the applicant's history. Specifically, it argued that the applicant drove home after the accident, did not see a doctor for five days, traveled extensively during the intervening years, started a new relationship, seemingly went for years without treatment or medication, and was able to move to a foreign country for a period of time. Given that this history does not match the functional impairments listed by the assessors (particularly Dr. Kiraly's four marked impairment ratings), the respondent further argues that it weakens the applicant's credibility.

iii. **Invalid test results:** Dr. Hope, a neuropsychologist, administered several psychometric tests in 2023 and found that her results demonstrated a high likelihood of symptom over-reporting and made her results non-credible. He noted that Dr. Bodenstein, another psychologist, also noted invalid psychological test results. Dr. Keightley also noted an M-FAST score which "fell above the cut-off, suggesting that she may have been intentionally feigning psychiatric symptoms on this measure".

iv. **Objective findings:** Dr. Hope further opined that the evidence before the Tribunal does not support the applicant's claim of cognitive difficulties as a result of a mild-traumatic brain injury, given that such injuries normally resolve within 3 months except in patients with evidence of brain bleeding (which the applicant did not present with). As such, he opined that the applicant was not suffering any accident-related neurocognitive difficulties.

Because on these facts, the respondent argues that the applicant has not met her onus of demonstrating that her impairments would not have been present "but for" the subject motor vehicle accident.

[46] In order to be satisfied that the applicant has met her onus in proving that she is catastrophically impaired under criterion 8, in this particular case I must be satisfied that: (1) the functional impairments associated to her psychological diagnoses are accident-related; and (2) the functional impairments rise to the level of "marked" impairment in one of the four areas of functioning. I find that the

applicant has not met her onus on either of these questions due to suspected malingering or over-exaggeration of symptoms by the applicant.

[47] The definition for malingering and exaggeration of symptoms in the *Guides* reads as follows: “malingering or exaggeration of symptoms may be suspected when the individual’s symptoms are vague, ill-defined, over-dramatized, inconsistent, or not in conformity with signs and symptoms known to occur.” I find that the applicant meets several of these criteria.

[48] When considering question (1) on the causal link between the accident and her functional impairments, I find that the evidence presented by the applicant is inconsistent with her patient history and not in conformity with the signs and symptoms known to occur, making it impossible to make a “but for” finding.

i. I am persuaded by the respondent’s argument that the impairments outlined by the OTs and doctors are based largely on the subjective self-reporting of the applicant. The respondent pointed out numerous inconsistencies in the applicant’s functional history, including instances during the hearing of her being a poor historian and instances where her self-reported impairments did not match her history. These issues severely call into question the reliability of the applicant’s self-reporting. I am equally skeptical of the applicant’s continuum of symptoms argument, given the significant multi-year gap in medical records after 2017 without prescription history or treating clinical records. Faced with a difficulty placing any weight into her self-reports, I place little to no weight in the applicant’s subjective evidence that these impairments arose immediately following and because of the accident.

ii. Compounding this problem is the fact that the objective findings available do not support her levels of self-reported levels of impairment. For example, I found the evidence of Dr. Hope persuasive in this regard. If the applicant were still functionally impaired to the degree she alleges as a result of a mild neurocognitive disorder brought about by a mild traumatic brain injury, she would have likely presented with brain bleeding as a result of trauma to the head following the accident, which she did not. Moreover, as the respondent noted, several assessors received invalid test results on psychometric tests, suggesting possible over-exaggeration or feigning of symptoms. These two objective findings suggest that the applicant’s symptoms are not in conformity with what is known to occur and therefore make it hard to make a causation finding based on objective evidence.

iii. While I appreciate the Court's finding in *Nova Scotia (W.C.B.) v. Martin* that diagnoses like chronic pain may not be supported by objective evidence but should not be discounted for that reason, I find that the inconsistencies in her self-reporting combined with the fact that the objective findings were not in conformity with known signs and symptoms is enough for me to question whether these impairments, as she describes them, are accident-related.

iv. I find that because of this suspected malingering or exaggeration of symptoms, the applicant has failed to meet her onus of proving that on a balance of probabilities her impairments would not have been present "but for" the subject motor vehicle accident. In taking a robust and pragmatic approach to the evidence, I cannot conclude that the subject motor vehicle accident was a necessary cause of the impairments she describes because the subjective evidence of causation lacks credibility and the objective evidence does not support the case.

[49] Despite my finding on causation, on question (2) regarding whether the impairments rise to the level of "marked", I would still not have found the applicant to be catastrophically impaired because I find that the applicant's functional impairments do not rise to the level of severity required for a "marked" impairment in any of the four spheres. My finding here, while again pointing to potential malingering or exaggeration of symptoms, is based largely on the inconsistencies in functional impairments reported. For example, when canvassing the various functional impairments in each sphere, many of the examples cited by the applicant do not hold up against the patient history.

i. In the spere of "Activities of Daily Living", I find the applicant's reports of dependence on others and difficulties with self-care and housekeeping to be inconsistent with the fact that she has been living independently for many years in places around the world. While she may be mildly or even moderately impaired, I find that her ability to live independently in various places around the world makes it impossible to believe that she is significantly impeded in useful functioning.

ii. In the sphere of "Social Functioning", I find that the applicant's reports of being withdrawn, isolated, and avoiding interactions were incongruent with the fact that she has travelled with friends, started a new relationship, visited family, and maintained a relationship with various family members. Again, while she may suffer a mild or moderate impairment, I find that she is not significantly impaired in any useful functioning in this domain.

iii. In the sphere of “Concentration, Persistence & Pace”, I find that the applicant’s reports of difficulties driving, concentrating and sustaining tasks, as well as being forgetful, do not match her functional history. After the accident, she was able to rent a car, drive home, and has since been able to navigate around the world on multiple trips and moves. This functional presentation does not match the level that would be expected from someone markedly impaired in this domain.

iv. In the sphere of “Adaptation”, I find that the applicant’s reports of decompensation and inability to maintain work with her father are inconsistent with her functional history. Per her father’s testimony, she was able to work for more than 10 months and would have been able to continue had she wanted to. Moreover, she was able to travel internationally multiple times and also made multiple moves. This suggests a level of functionality in adaption that is far greater than someone who is markedly impaired.

[50] All of these factors do not suggest that the applicant’s functional impairments rise to the level of “significantly impeded” as required by a “marked” impairment rating. Moreover, were these impairments as significant as outlined, I would have expected to see a more extensive treatment and medication history.

[51] Given that I do not find the applicant has met her onus of demonstrating that her impairments would not be present “but for” the subject motor vehicle accident and given that I do not find that she has demonstrated that her impairments rise to the level of marked impairment I do not find that she has established that she is catastrophically impaired as a result of criterion 8.

The applicant is not entitled to an IRB

[52] I find that the applicant is not entitled to a post-104-week IRB after January 15, 2019 because the applicant has not met her onus in demonstrating that she suffers a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training, or experience.

[53] Section 5(1)(1)(ii) of the *Schedule* provides that an insurer shall pay an IRB to an insured person who sustains an impairment as a result of an accident if they were receiving benefits under the *Employment Insurance Act (Canada)* at the time of the accident, were at least 16 years old, and as a result of the accident and within 104 weeks after the accident, suffered a substantial inability to perform the essential tasks of the employment in which they spent the most time during the 52 weeks before the accident. Section 6(1) and (2)(b) provide that the

insured person is entitled to receive an IRB up to 104 weeks after the accident for the period in which they suffered such a substantial inability, and after 104 weeks if they suffered a complete in ability to engage in any employment or self-employment for which they are reasonably suited by education, training, or experience. For the applicant in this case, the post-104 period began on May 8, 2017.

[54] The applicant received IRB payments until January 15, 2019 based on s.44 assessments of Dr. Kiraly, who found the applicant to have suffered both a substantial and complete inability to return to work. Benefits were terminated as result of a subsequent s.44 assessment from Dr. Eisen, who found that she no longer met the "complete inability test". This means that the test to be applied is the post-104 week "complete inability" test.

[55] The applicant argued that she is entitled to this IRB because: (1) it was inappropriate to schedule a subsequent s. 44 report on the topic of post-104 eligibility when the insurer already had results of Dr. Kiraly's report; and (2) Dr. Kiraly's report, which found the applicant to have suffered a complete inability to engage in any employment for which she is reasonably suited better matches the applicant's current condition.

i. On point (1), the applicant argued that the respondent purposefully sought out a different opinion because it disagreed with the independent finding of Dr. Kiraly. She argued that this was inappropriate and that the s. 44 report of Dr. Kiraly should have been sufficient.

ii. On point (2), the applicant argued that Dr. Kiraly's report, which diagnosed her with major depressive disorder, PTSD, chronic pain associated disorder due to psychological factors, and post-concussion syndrome should be preferred over the findings of Dr. Eisen because it better reflected the applicant's current condition. In the report, Dr. Kiraly noted that "due to severe symptoms of depression, Ms. Jamali has poor attention, concentration, and memory. She has become forgetful. She has difficulty finding words and maintaining her appointments. She cannot establish new social contracts and relationships due to the fear that she is not well-articulated", all of which mean she meets the complete inability test. This, the applicant argues, mimics her own testimony. The applicant testified that her pre-accident work was at Investor's Group, finding customers and clients and doing courses to become a financial advisor. She was also educated as a paralegal. She testified that after the accident she was unable to return to this work due to her impairments. She also

indicated that her main return to work post-accident, a period of time spent working for her father, ended badly because she was not able to adapt to the stressors of the new work environment and frequently lashed out at customers and co-workers due to her accident-related impairments.

[56] The respondent argued that the applicant is not entitled to an ongoing post-104-week IRB because she (1) failed to establish her pre-accident employment history; and (2) demonstrated an ability to work post-accident. It pointed to the applicant's 2014 Canada Revenue Agency Notice of Assessment (NOA) which suggested an annual income of around $14,000, which does not suggest full-time employment. It argued that it is far more likely the applicant was living off investments, especially given the applicant testified to living off the funds from a home flip. It also argued that the applicant's testimony on her pre-accident employment history should be given no weight given that she could not complete a cross-examination despite accommodations. Furthermore, it argued that the applicant returned to work twice after the accident, once at a law firm and once for her father. Per the father's testimony, the applicant returned to work after the accident and worked for him for 10 to 11 months and was never fired. The respondent argues the catalyst to the applicant's departure from this job was her and her father having a fight over her being rude to customers, which it argues is more related to the rocky relationship between the two and less to accident-related impairments. It argues that someone being able to work for 10 to 11 months is not congruent with someone who suffers a complete inability to return to work.

[57] First, I find that the applicant's argument regarding a second schedule s.44 assessment is not relevant to whether or not the applicant satisfies the statutory test. Regardless, I am satisfied that the insurer had a good basis for requesting a subsequent s.44 assessment, given that the initial post-104-week assessment completed by Dr. Kiraly did not conclude an indefinite inability to return to work and suggested that, at that time, an additional "9-12 months" of treatment and time off work would be required before a re-assessment. The subsequent re-assessment came after that 9-12 months had elapsed. Therefore, for the purpose of determining entitlement I am considering the evidence on whether she meets the post-104 "complete inability" test.

[58] Despite hearing testimony from the applicant and reviewing documentation, I find that I am not entirely clear on what work the applicant is reasonably suited for. She appears to have held multiple conflicting jobs while not earning a substantial amount of money, as per CRA records, and may have been living off money or

assets provided by her ex-husband or father. This makes it difficult to make a finding on what employment the applicant is reasonably suited to.

[59] However, even if I accept a broad and vague definition of the applicant being able to work in an office-like setting, the fact that she was able to work for 10 to 11 months for her father's company undermines the applicant's claim that she suffers a complete inability to work in this type of employment. Her father testified that he would have kept her employed if she wished to continue working there. Moreover, I place little weight in the testimony of Dr. Kiraly, whose conclusions were based largely on the self-reporting of the applicant. I find that the applicant's reliability in this regard is questionable, given that she herself provided conflicting information regarding her employment history pre- and post-accident. Beyond being able to work for her father for a prolonged period, the applicant also managed planning multiple trips and international moves, which suggests that she is capable to a degree of completing the sort of logistical tasks that might be required in an office-like setting. She also reported enjoying to read in her past time, also suggesting she possessed the skills necessary to complete such a job.

[60] Based on the evidence, I find that the applicant has not satisfied me that she suffers a complete inability to engage in any work for which she is reasonably suited. I find that the applicant is not entitled to an IRB of $325.47 per week as of January 15, 2019.

The applicant is not entitled to the treatment plan in dispute

[61] The applicant is not entitled to the proposed chiropractic treatment plan in dispute as a result of not meeting her onus to demonstrate that the proposed treatment plan is reasonable and necessary.

[62] The issue in dispute is a medical and rehabilitation benefit for chiropractic services. Sections 14 and 15 of the *Schedule* state that an insurer shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident. Section 16(1) of the *Schedule* provides that the insurer shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person in undertaking activities and measures described in subsection (3) for the purpose of reducing or eliminating the effects of any disability resulting from the impairment or to facilitate the person's reintegration into her family, the rest of society, or the labour market.

[63] The applicant bears the onus of proving on a balance of probabilities that the claimed medical benefits are reasonable and necessary. In order to do so, an applicant should establish that the treatment goals are reasonable, that the goals

are being met to a reasonable degree, and that the overall cost of achieving the goals is reasonable.

[64] Neither party made submissions on the reasonableness and necessity of this proposed treatment. Given the lack of submissions, I do not find that the applicant has met her onus in demonstrating that this treatment plan is reasonable and necessary.

[65] I find that the applicant is not entitled to the proposed treatment plan.

The applicant is not entitled to interest

[66] As there are no payments owed, the applicant is not entitled to interest.

The applicant is not entitled to an award

[67] Section 10 of Regulation 664 provides that in addition to awarding the benefits and interest to which an insured person is entitled under the *Schedule*, the Tribunal may award a lump sum of up to 50 percent of the amount to which the person was entitled at the time of the award with interest if the insurer unreasonably withheld or delayed payments.

[68] As the applicant is not entitled to the benefits in dispute, she is not entitled to an award.

The applicant is not entitled to costs

[69] Rule 19.1 provides that a party may request costs of the proceeding if they believe that the other party has acted unreasonably, frivolously, vexatiously, or in bad faith during the proceedings. Rule 19.4 further sets out the requirements for that request, which must include the reasons for the request and the particulars of the alleged conduct. The purpose of Rule 19.1 is to deter conduct by parties that is unreasonable, frivolous, vexatious, or in bad faith. This is a high bar for conduct to attract a costs award and is an exceptional remedy. Rule 19.6 sets out the maximum amount of costs, which shall not exceed $1,000.00 for each full day of attendance at a hearing.

[70] In her reply during closing submissions, the applicant argued that costs were appropriate given that the respondent accused the applicant of lying and misrepresenting her impairments. She argued that to accuse another party of lying or faking without providing notice and without a reasonable basis demonstrated bad faith on the part of the respondent. She requested costs to cover the time she spent hearing from the respondent's witnesses.

[71] Given that the respondent had already concluded its closing submissions, there was no opportunity for the respondent to respond. Nor did the respondent request an opportunity to respond.

[72] In considering this request, I look to Rule 19.5 of the *LAT Rules*, which encourages adjudicators to consider the seriousness of the alleged misconduct, whether the conduct was in breach of a direction or order issued by the Tribunal, whether the party's behaviour interfered with the Tribunal's ability to carry out a fair, efficient, and effective process, and the prejudice to other parties. When examining those criteria, I find that costs are not warranted in this circumstance because I do not find that the respondent exhibited the alleged conduct. The respondent made a reasonable case regarding the reliability of the applicant's testimony which was backed up by objective findings from assessors. This was not unreasonable and it did not impede the Tribunal's ability to carry out a fair, efficient, and effective process.

[73] The applicant is not entitled to costs.

ORDER

[74] I order the following:

i. The applicant is not deemed catastrophically impaired.

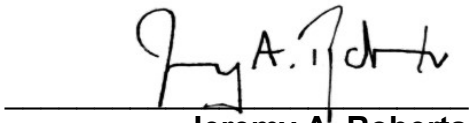
ii. The application is not entitled to IRB.

iii. The applicant is not entitled to the treatment plan for chiropractic services.

iv. The applicant is not entitled to an award or costs.

v. The application is dismissed.

Released: May 15, 2024



Jeremy A. Roberts
Vice-Chair