



Citation: Majerczyk v. Economical Mutual Insurance Company, 2022 ONLAT 20-004327/AABS

Licence Appeal Tribunal File Number: 20-004327/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:

Lisa Majerczyk

Applicant

and

Economical Mutual Insurance Company

Respondent

DECISION AND ORDER

VICE-CHAIR:

Sandeep Johal

APPEARANCES:

For the Applicant:

Lisa Majerczyk, Applicant
Doug Wright, Counsel

For the Respondent:

Kelly Boettcher and Chris Metcalf, Adjusters
Martin Forget, Counsel

Court Reporter:

Guido Riccioni

HEARD:

By Videoconference and written submissions

BACKGROUND

- [1] The applicant was injured in an automobile accident on January 10, 2017 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the "*Schedule*").
- [2] The issues in dispute were originally listed as a catastrophic impairment designation, a treatment plan for medical marijuana, physiotherapy treatment, a repayment of an income replacement benefit ("IRB") and interest. Several motions were filed before the hearing and additional benefits were added to the issues in dispute, as noted below. The IRB repayment is no longer an issue as the respondent reduced the applicant's IRB payments in accordance with the *Schedule* until the overpayment was rectified.
- [3] The applicant's position is that she is catastrophically impaired as a result of the accident and is entitled to the benefits claimed. The respondent's position is that the applicant has mischaracterized her true physical and mental state to the medical assessors and therefore she is not catastrophically impaired and not entitled to the issues in dispute. The respondent also relies upon surveillance evidence in support of its position.

ISSUES TO BE DECIDED

- [4] The following are the issues to be decided:
 - i. Has the applicant sustained a catastrophic impairment as defined by the *Schedule*?
 - ii. Is the applicant entitled to receive an income replacement benefit in the amount of \$382.16 per week for the period of April 26, 2021 to date and ongoing?
 - iii. Is the applicant entitled to an attendant care benefit in the amount of \$6,000.00 per month from January 10, 2017 to date and ongoing?
 - iv. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$11,804.28 for medical marijuana recommended by Dr. Matthew Cooper in a treatment plan (OCF-18) submitted on November 17, 2017 and denied on April 30, 2018?

¹ O. Reg. 34/10 as amended.

- v. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$789.06 for physiotherapy treatment recommended by Scott Turner in a treatment plan (OCF-18) submitted on April 3, 2019 and denied on April 11, 2019?
- vi. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$2,835.99 for assistive devices recommended by Okell Rehabilitation Services Inc. in a treatment plan (OCF-18) submitted on November 6, 2020?
- vii. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$3,791.00 for occupational therapy recommended by Okell Rehabilitation Services Inc. in a treatment plan (OCF-18) submitted on November 13, 2020?
- viii. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$700.00 for lidocaine injections recommended by Okell Rehabilitation Services Inc. in a treatment plan (OCF-18) submitted on December 22, 2020?
- ix. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$2,200.00 for a psychological assessment recommended by Sarvin Sabet Ghadam. in a treatment plan (OCF-18) submitted on June 14, 2021?
- x. Is the applicant entitled to a medical and rehabilitation benefit in the amount of \$5,407.87 for a psychological treatment recommended by Sarvin Sabet Ghadam. in a treatment plan (OCF-18) submitted on June 14, 2021?
- xi. Is the respondent liable to pay an award under Regulation 664 for unreasonably withheld or delayed payments to the applicant?
- xii. Is the applicant entitled to interest on any overdue payment of benefits?

[5] Issues [4] v. to viii. above were listed as issues in dispute; however, the parties did not make submissions either in writing or orally at the videoconference on whether the issues still remain as issues in dispute. For the sake of completeness and as a result of the treatment plans being submitted as part of the document briefs, these issues will be addressed as part of this decision.

RESULT

- [6] The applicant does not meet the definition of a catastrophic impairment.
- [7] As the applicant is not deemed to be catastrophically impaired, she is not entitled to an attendant care benefit in the amount of \$6,000 per month.
- [8] The applicant is entitled to an IRB in the amount of \$382.16 from April 26, 2021 to date.
- [9] The treatment plans in the amount of \$11,804.28, \$789.06, \$700.00 and \$2,200.00 (issues [4] iv, v, viii, and ix) are reasonable and necessary.
- [10] The treatment plans in the amount of \$2,835.99, \$3,791.00 and \$5,407.87 (issues [4] vi, vii, and x) are not reasonable and necessary.
- [11] The applicant is not entitled to an award.
- [12] The applicant is entitled to interest in accordance with the *Schedule* on any overdue payment of benefits.

ANALYSIS

- [13] I will start by discussing the applicant's claim that she meets the definition of a catastrophic impairment, and if she does, then whether she is entitled to an attendant care benefit ("ACB"). In accordance with the *Schedule*, if the applicant does not meet the definition of a catastrophic impairment, then she would not be entitled to claim an ACB in the amount of \$6,000 per month.
- [14] I will then turn to discuss whether the applicant is entitled to a post 104-week IRB, whether the medical and rehabilitation benefits being claimed are reasonable and necessary and lastly, the issue of an award and interest.

Issue I: The Applicant does not meet the definition of a catastrophic impairment

- [15] I find that the applicant is not catastrophically impaired as defined in the *Schedule* for the following reasons.
- [16] The applicant bears the onus to prove on a balance of probabilities that she is catastrophically impaired. Of particular relevance to the applicant, she must prove that, as a result of the accident, she has a combination of physical and psychological impairment ratings that result in a whole person impairment (WPI)

of 55% or more,² when rated in accordance with the American Medical Association's *Guide to the Evaluation of Permanent Impairment* ("the *Guides*");³ or Marked or Class 4 impairments⁴ in at least three of the four domains as outlined in the *Guides* due to a mental or behavioural disorder. The test to determine whether the applicant has sustained a catastrophic impairment is a legal test and not a medical one.⁵ I find that based on the testimony of the applicant, her family members and the medical evidence, that the applicant does not meet the test as set out in the *Schedule*.

- [17] What is clear to me is that the applicant has suffered impairments as a result of the accident. She is no longer the same person she was prior to the accident and has limitations and restrictions to her daily life that she did not previously have. However, showing that you are restricted and limited in what you can do is not sufficient to meet the *Schedule*'s catastrophic impairment test.
- [18] The applicant's own evidence is that she does not meet the 55% WPI rating under criterion 7 as the medical report of Dr. Kiraly dated January 9, 2021 notes her criterion 7 rating to be at 40%. As a result, she does not meet the threshold under criterion 7 and I will turn to discuss whether she has Marked or Class 4 impairments in three of the four domains of activities of daily living; social functioning; concentration, persistence and pace; and adaptation--together referred to as criterion 8.

Activities of Daily Living

- [19] For this domain, the *Guides* specify what needs to be considered.

Activities of daily living include such activities as self-care, personal hygiene, communication, ambulation, travel, sexual function, sleep, social and recreational activities...in the context of the individual's overall situation, the quality of these activities is judged by their independence, appropriateness, effectiveness and sustainability. It is necessary to define the extent to which the individual is capable or initiating and participating in these activities independent of supervision or direction. What is

² Section 3.1(1)7. of the *Schedule* ("Criterion 7")

³ 4th Edition, 1993 at Chapter 14

⁴ Section 3.1(1)8 of the *Schedule* where the applicant has three marked (Class 4) that affects useful function in three of the four functional domains, or an extreme (Class 5) impairment in any one of the four functional domains. The four functional domains are (1) activities of daily living; (2) social functioning; (3) concentration, persistence and pace and (4) deterioration or decomposition in work or work like settings (also referred to as adaptation) ("Criterion 8").

⁵ See *Liu v. 1226071 Ontario Inc. (Canadian Zhorong Trading Ltd.)*, 2009 ONCA 571 at paras 29-30.

assessed is not simply the number of activities that are restricted, but the overall degree of restriction or combination of restrictions.⁶

- [20] Taking into account the above considerations, Dr. Kiraly, in his report dated January 9, 2021, finds the applicant to have a Class 3 level of impairment under activities of daily living. According to the *Schedule*, a Class 3 is not a Marked impairment. Based on the testimony of the applicant, I would agree with Dr. Kiraly that the applicant does not have a Class 4 or a Marked impairment in activities of daily living. I find that the applicant is capable of initiating in activities of self-care, personal hygiene, communication ambulation, travel, and social and recreational activities without supervision or direction.

Social Functioning

- [21] The factors to consider under this domain are:

An individual's capacity to interact appropriately and communicate effectively with other individuals. It includes the ability to get along with others such as family members, friends, neighbours, grocery clerks, lenders, etc. Impaired social functioning may be demonstrated by history of altercations, evictions, firings, fear of strangers, avoidance of interpersonal relationships, social isolation, or similar events or characteristics. Strengths in social functioning may be documented by an individual's ability to initiate social contact with others, communicate clearly with others and interact and actively participate in group activities, cooperative behaviour, consideration for others, awareness of others' sensitivities and social maturity also need to be considered.⁷

- [22] Dr. Kiraly finds that the applicant has a Class 4 or a Marked impairment under this domain as, according to Dr. Kiraly, she is withdrawn and isolated, she is in severe pain and does not venture out. She stays home most of the time; she tends to keep to herself to avoid confrontational situations; has lost interest in all leisurely activities and does not feel like going out or talking to other people and interacting with others or starting any new conversations.

⁶ This AMA Guide passage is quoted in Curtis Wong's, Occupational Therapist Report dated December 4, 2020 at pgs., 161-162 of the applicant's Document Brief.

⁷ See note 6.

- [23] I do not agree with Dr. Kiraly's assessment. The applicant's own testimony and the evidence does not suggest or point to the applicant being withdrawn or isolated or that she is unable to appropriately interact or get along with others. There is no history of altercations, evictions, firings, or a fear of strangers, or evidence to suggest the applicant avoids interpersonal relationships or social isolation.
- [24] The applicant's own testimony is that she does not feel like doing certain things like she used to before the accident; however, I am not persuaded she meets the test to show a Class 4 or a Marked impairment under this domain to such a degree that her impairment levels "significantly impede useful functioning" (to use the phrase employed in the AMA Guides to describe a Class 4 impairment). The applicant has been in a relationship with her boyfriend for over a year and testified herself that she visits him several times per week. The applicant also testified, as did her sister and mother, that she travelled to Cuba for 6 or 7 days on a family trip with her cousins, aunt and uncle and went to the pool, the bar and dinner with all of them. I place greater weight on this evidence, and I am not persuaded that she has an impairment under the domain of social functioning that can be considered a significant impediment of useful functioning.
- [25] The surveillance evidence relied upon by the insurer also shows the applicant to be able leave her house on her own and drive to her boyfriend's house or to meet with her relatives and engage in social activities. The surveillance also shows her being able to socially interact with her family members and others within the community. I was not pointed to any evidence of an inability to get along with family members to a significant degree, or arguments and being short tempered with family members to a significant degree that the applicant avoids interactions with her family members. While I appreciate that surveillance is a snapshot in time, I place greater weight on this evidence because it demonstrates the applicant's post-accident abilities in the context of her claim to be catastrophically impaired. In my view, as a result of the above, she does not meet the Class 4 or Marked impairment score under this category. Having found that the applicant does not have a class 4 impairment in at least two of the four domains, this is enough to find her not to be catastrophically impaired under criterion 8; however, for completeness, I shall continue with the last two domains.

Concentration, Persistence and Pace

- [26] The factors to consider under this domain are:

Concentration, persistence and pace needed to perform many activities of daily living, including task completion. Task

completion refers to the ability to sustain focussed attention long enough to permit the timely completion of tasks commonly found in activities of daily living or work settings...Strengths and weaknesses in mental concentration may be described in terms of frequency of errors, the time it takes to complete the task and the extent to which assistance is required to complete the task.⁸

- [27] Dr. Kiraly finds the applicant to have a Class 4 or a Marked impairment under this domain as she remains preoccupied with pain symptoms, mood problems, cognitive difficulties and that she cannot focus on the subject at hand. Dr. Kiraly administered the Mini Mental Status Examination and Montreal Cognitive Assessment Test. The applicant was able to complete the test in the given time of 10 minutes with scores within the normal range for both tests, which suggests that the applicant is able to manage tasks. Dr. Kiraly goes on to state that the applicant can manage short tasks, but anything that goes beyond 10-12 minutes is difficult for her to handle, but he does not provide any examples or testing that was done to justify this opinion. Dr. Kiraly states that she was able to return to work but could not handle even a modified capacity due to cognitive difficulties and ongoing pain.
- [28] In my view, the evidence and Dr. Kiraly's own testing does not support his opinion that the applicant has an impairment under this domain that significantly impedes useful functioning. The applicant's own testimony is that she is able to take her own medications without reminders. The surveillance evidence shows that she is able to drive to the grocery store, pick up items that are needed, put them into her cart, pay for the items, find her vehicle and put the groceries away in the trunk. There was no evidence that I was directed to that would suggest that she does not have the attention span to timely complete tasks or that her mental concentration is weak to the point where she has a frequency of errors or that she requires assistance to complete tasks. She may be slower in completing certain tasks like reading or making a meal for herself, but I am not persuaded that she has an impairment level that significantly impedes useful functioning.
- [29] As result, I find that the applicant does not have a Class 4 or Marked impairment under the concentration, persistence and pace domain.

Adaptation

- [30] The factors to consider under this domain are:

⁸ See note 6.

Deterioration or decompensation in work or work like settings refers to repeated failure to adapt to stressful circumstances. In the face of such circumstances the individual may withdraw from the situation or experience exacerbation signs and symptoms...He or she may decompensate and have difficulty maintaining activities of daily living, continuing social relationships and completing tasks. Stressors common to the environment include attendance, making decisions, scheduling, completing tasks and interacting with others.⁹

- [31] Dr. Kiraly opines that the applicant has a Class 4 or a Marked impairment under this domain because the applicant could not continue to go to work due to pain and cognitive difficulties; she has severe mood problems; disturbed sleep appetite and libido. Dr. Kiraly states her personal hygiene functions are affected that she needs cueing and encouragement.
- [32] I am not persuaded by Dr. Kiraly's opinion under this domain. I would agree that the evidence suggests she has difficulty sleeping and possibly mood and pain issues, but I am not persuaded by the evidence that she requires cueing and encouragement to complete her personal hygiene tasks. She may require assistance, but I am not of the view, based on the testimony of the applicant and the other evidence, that when faced with stressful circumstances the applicant withdraws from the situation or that she has attendance issues, has issues with making decisions, scheduling or interacting with others. Even if I were to agree with Dr. Kiraly because of her sleep issues and she has a Class 4 or a Marked impairment under this domain, she would still not meet the definition or the requirement under the *Schedule* as she would not have three Class 4 or Marked impairments.
- [33] As a result of the above, I find that the applicant has not met the test under criterion 8 that she has three Class 4 or Marked impairments and therefore I find that the applicant is not catastrophically impaired as defined under the *Schedule*.

Issue II: Applicant is not entitled to an Attendant Care Benefit

- [34] Both parties submit that the issue of whether the applicant is entitled to an attendant care benefit is moot unless the applicant is determined to have a catastrophic impairment.

⁹ See Note 6.

[35] As a result of finding that the applicant does not have a catastrophic impairment, she is not entitled to \$6,000 per month in attendant care benefits and there is no need to consider the reasonableness and the necessity of the applicant's Assessment of Attendant Care Needs (Form 1).

Issue III: Applicant is entitled to an Income Replacement Benefit.

[36] I find that the applicant is entitled to a post 104-week IRB for the following reasons.

[37] The applicant's claim for an IRB is from April 2021, which is past the 104-week mark of her accident. In accordance with s. 6(2)(b) of the *Schedule*, in order to claim an IRB after the 104-week mark, the applicant must show that as a result of the accident, she suffers a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience.

[38] The applicant relies upon the Orthopaedic Surgeon report of Dr. Ahn dated December 22, 2020 in support of her position that she meets the test for a post 104-week IRB as well as her family doctor and her own testimony.

[39] The applicant's family doctor, Dr. Qureshi, testified that he signed the OCF-3 (disability certificate) recommending that the applicant not work until her symptoms resolve. I place more weight on Dr. Qureshi's testimony as he has been the applicant's family doctor for several years prior to the accident as well as after the accident. He has been able to see the applicant's impairments as a result of the accident and the impact that has had on the applicant and her ability to work.

[40] Dr. Qureshi testified that the applicant has chronic pain and the medication she is on makes her drowsy to the point where he does not believe she able to work at all, even on modified duties. He has prescribed several different types of pain medications, which the applicant has taken, such as nerve block injections and strong opioids to help provide some pain relief to try to lessen her reliance on Tylenol because he was concerned about Tylenol toxicity.

[41] Dr. Ahn opines that the applicant's injuries and physical impairments are severe ongoing mechanical back pain, bilateral radiating leg pain, and bilateral shoulder pain which has resulted in her being unable to perform any occupation or employment for which she is reasonably suited by her education, training or experience.

[42] Furthermore, Dr. Ahn opines that the applicant's mechanical back pain worsens with sitting and her neck pain worsens with looking at a screen or reading looking down. Her radiating leg pain also worsens with sitting or standing; her shoulder pain worsens with reaching and using her arms including activities such as making phone calls. Dr. Ahn also opines that focus and concentration is also required during work activities and her pain affects her ability to do that for work activities.

[43] The respondent's insurer examination ("IE") assessor Dr. Marchuk in his report dated November 3, 2020 notes that the applicant has sustained the following list of injuries as a result of the accident:

- a. Lumbar musculoligamentous dysfunction (superimposed over L4-L5 level symmetrical disc bulge with a broad-based posterior disc protrusion effacing and indenting the anterior aspect of thecal sac likely affecting the L5 nerve roots; T11-12 mild degenerative changes with small left central disc herniation abutting the cord. There may be minimal impingement on the exiting left-sided nerve root. T12-L1 mild degenerative changes and small left central disc herniation without cord or nerve root impingement. L4-5 mild degenerative changes, including MRI findings of disc space narrowing, disc degeneration, marginal osteophyte formation and facet and ligamentum flavum hypertrophy. Small central disc herniation without nerve root impingement or stenosis.
- b. Whiplash Associated Disorder (WAD2).
- c. Cervicogenic headaches.
- d. Cervicothoracic bilateral shoulder myofascial dysfunction.
- e. Bilateral iliotibial band dysfunction.
- f. Bilateral sacroiliac joint dysfunction.
- g. Bilateral trochanter bursitis.
- h. Bilateral lumbar radiculopathy.

[44] Dr. Marchuk also notes that the applicant's lumbar condition involving a disc bulge effacing and indenting the anterior thecal sac of the L5 nerve root may be delaying the applicant's recovery or preventing her from achieving a full recovery from symptoms related to the accident.

[45] However, despite the impairments and injuries noted, Dr. Marchuk opines that the applicant does not meet the test for a post 104-week IRB and that there are no limitations or restrictions from a physical medicine perspective for jobs identified in the vocational assessment report.

Vocational Assessment Report

[46] Bruno Rositano completed a vocational assessment report for the respondent dated November 3, 2020. He notes the current barriers to employment for the applicant are her symptoms, as they may hinder her ability to return to work and/or her job performance. Also, since she has not worked since November 2017, this lengthy time away from employment may negatively affect her return to work functions. However, Mr. Rositano's report notes that the applicant can work as a collector, a dispatcher, or other customer and information service representative.

[47] For all three types of jobs, Mr. Rositano notes that these jobs require mainly sitting with alternative standing and walking when needed. His conclusion is that there are alternative employment opportunities for which the applicant would be suited by education, training and experience. I would agree that she has the education, training and experience to work in the jobs listed in the report; however, the question is whether she has a complete inability to engage in any employment or self-employment based on the types of jobs and their requirements. I find that Mr. Rositano's report misses the point for the post-104 IRB eligibility – *can* she do any such type of job?

[48] The onus is on the applicant to prove on a balance of probabilities that she is entitled to the post-104-week IRB, and I find that she has.

[49] The applicant is clearly in pain and the medical evidence and testimony establishes that. The issue is to what extent does that impact her ability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience.

[50] I am not persuaded that the applicant has the ability for any of the jobs listed in the vocational assessment that requires her to complete jobs by mainly sitting with occasional standing. According to Dr. Qureshi, Dr. Ahn, and even the respondent's assessor, Dr. Marchuk, the applicant has mechanical back pain, radiating leg pain, not to mention all the other impairments mentioned above and the amount of medications she is on. As a result, I am persuaded that she has a complete inability to engage in any employment or self-employment as listed in the vocational assessment report.

- [51] I place more weight on Dr. Qureshi and Dr. Ahn in support of the applicant's claim for an IRB. Her family doctor has seen her for a number of years and has recommended referrals to others and prescribed different medications including nerve block injections just to be able provide relief to the applicant to allow her to function.
- [52] I am aware of the surveillance the respondent relies upon, and as the applicant testified to, she was able to do most of the activities noted in the surveillance as a result of being highly medicated. Some of the video and reports show the applicant entering and exiting the place where she receives injections which she says allows her to function and be able to drive and so forth. However, she is also observed with noticeable limping. To be clear, I am not persuaded that this behaviour represents that she had a catastrophic impairment based on, at minimum, "significantly impedes useful functioning" in any of the four domains as discussed above; however, I am persuaded that as a result of all the medication she is taking including opioids for the pain that she is in, that she would not be able to work and without the medication the applicant is also unable to function. I am not persuaded by the respondent that the applicant is able to sit or alternate standing all day for the jobs listed in the vocational assessment. As a result, I find that she has a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience.
- [53] Furthermore, I place less weight on the IE report of the respondent's assessor, Dr. Sivasubramanian, psychiatrist, as he concluded that her testimony is extremely unreliable based on the surveillance. However, during Dr. Sivasubramanian's testimony and cross-examination, the doctor testified he did not discuss the surveillance with the applicant and did not provide her with an opportunity to address it. Considering the IE report put considerable weight on the surveillance to discredit the applicant and his assessment of her, she should have been provided an opportunity to address the doctor's concerns and questions and to see if that would have changed his opinion in any way.
- [54] As a result of the above, I find that the applicant is entitled to an IRB. In the amount of \$382.16 which is 70% of her gross weekly income,¹⁰ from the date the respondent stopped paying her an IRB,¹¹ being April 26, 2021 to date.

¹⁰ Document Brief of the Applicant at Tab 18, Income Replacement Benefit Calculation

¹¹ Ibid at Tab 19, Letter from Respondent dated November 12, 2020 with post-104 week reports.

Issue IV: The treatment plan for medical marijuana in the amount of \$11,804.28 is reasonable and necessary

- [55] As a starting point, the onus is on the applicant to prove on a balance of probabilities that each disputed treatment and assessment plan is reasonable and necessary. Factors included in the analysis are the treatment plan's goals, whether the goals are being met to a reasonable degree, the methods to meet such goals, and costs of each treatment plan.
- [56] The treatment plan for medical cannabis is reasonable and necessary for the following reasons.
- [57] The applicant submits she was referred to the clinic for an assessment of whether she would benefit from medical marijuana. The treatment plan is for Nabilone which is the synthetic marijuana which the applicant is unable to afford on her own and she was finding relief from it.
- [58] The goals of the treatment plan are to reduce pain and to help achieve a return to activities of normal living and a goal to improve the applicant's day-to-day functionality and quality of life.
- [59] The respondent's position is that its IE assessors opined that the treatment plan is not reasonable and necessary to treat the applicant's minor soft tissue injuries. Also, the respondent approved synthetic marijuana for the applicant previously, so this treatment plan is duplicative and therefore not reasonable and necessary. However, the other treatment plan the respondent refers to is not an issue before me, nor was I presented with evidence to suggest this disputed treatment plan is duplicative of another one. The respondent's arguments to that effect are not evidence.
- [60] I am not persuaded that the applicant's injuries are within the Minor Injury Guideline or that her injuries are just minor soft tissue injuries. The applicant's family doctor noted the applicant had reduced range of motion in her lower back, sciatica which is pain caused by an irritation of a nerve that goes into the leg. Dr. Qureshi also noted that the applicant was taking too much Tylenol in a day and that can lead to toxicity and as a result, he recommended a referral to the cannabis doctor. The assessment by White Cedar Clinic dated August 4, 2017 opined that the applicant was a candidate for medical marijuana. The applicant testified that she found improvement from the medical marijuana and her family doctor also noted improvement in her condition as a result of the medical marijuana.

- [61] The treatment plan recommends the medical marijuana in oil form for 6 months at a cost of \$7,920.00 and the rest of the treatment plan's cost is for preparation and service; counselling; documentation support; testing; education; and planning. I find the cost to be reasonable.
- [62] As a result, I find that the treatment plan is reasonable and necessary to help relieve the applicant's pain which is reasonable goal of this treatment plan.

Issue V: The treatment plan for \$789.06 for physiotherapy is reasonable and necessary

- [63] The treatment plan dated April 3, 2019 is reasonable and necessary for the following reasons.
- [64] The treatment plan for physical therapy is to treat the applicant's neck, strain and strain of the hip, headaches, nerve root of the thoracic spine, sleep disorder and the nerves at the abdomen, lower back and pelvis. One of the goals of the treatment plan is pain reduction and abolish muscle spasms.
- [65] The respondent denied the treatment plan as being not reasonable and necessary because there does not appear to be a marked improvement despite ongoing therapy.
- [66] The respondent's IE assessor Dr. Osinga, orthopaedic surgeon, in his report dated May 21, 2019 opines that the applicant's impairments appear to be based on chronic pain rather than a specific musculoskeletal impairment and that the applicant appears to have deteriorated since his evaluation from a year earlier. She has reduced range of motion and that her ongoing difficulties appear to be the result of chronic pain.
- [67] The applicant testified that she found the physical therapy to be helpful, it reduced her pain and her family doctor, Dr. Qureshi also recommended physical therapy for the applicant to help relieve her pain. He also referred the applicant to Dr. Razvi, chronic pain doctor. Dr. Razvi, also recommends physical therapy and testified that physiotherapy and massage provided relief for her. Furthermore, the applicant does not need to show a "marked improvement" as noted by the respondent. As long as the treatment provides pain relief to the extent that it allows the applicant to function as a result of the treatment, then in my view, that is a factor to find that the treatment is reasonable and necessary, as well as the recommendations of the applicant's treating practitioners. I further find that the cost of the proposed treatment to be reasonable.

[68] As a result of the above, I find this treatment plan to be reasonable and necessary.

Issue VI: The treatment plan for assistive devices for \$2,835.99 is not reasonable and necessary

[69] The treatment plan in the amount of \$2,835.99 for assistive devices is not reasonable and necessary for the following reasons.

[70] The recommendations are for a bath chair, grab bar, long horn shoehorn, long handle reacher, bath sponge, anti-fatigue mat, supportive mattress and bed rail.

[71] I was not directed to any submissions, evidence or any recommendations for assistive devices and as a result, I find that the treatment plan for assistive devices is not reasonable and necessary.

Issue VII: The treatment plan for occupational therapy for \$3,791.00 is not reasonable and necessary

[72] This treatment plan recommends therapy sessions to be completed in-person and virtually, which include therapeutic planning, a review of the applicant's medical files, therapy session planning and communication with the applicant's other healthcare providers, as well as travelling to the applicant's home.

[73] I was not provided with any submissions or pointed to any evidence on why this treatment plan is reasonable and necessary or if it was recommended or supported by compelling evidence by any of the applicant's treating medical practitioners.

[74] As a result, I find that this treatment plan is not reasonable and necessary.

Issue VIII: The treatment plan in the amount of \$700.00 for lidocaine injections is reasonable and necessary

[75] This treatment plan is reasonable and necessary for the following reasons.

[76] The proposed treatment plan is for lidocaine injections from Dr. Razvi. Dr. Razvi has 14 years of medical experience and manages chronic pain. His opinion was that the applicant has chronic pain syndrome and he recommended lidocaine injections as she was on other opioids, and lidocaine is one that had the least addictive qualities. Dr. Razvi testified that the injections provided four days of pain relief which allowed for functional improvements so that the applicant could do things she was previously unable to do. He also testified that

she did feel pain relief and if she no longer benefited from such injections, he would stop this type of treatment.

[77] The respondent denied the treatment plan based on an orthopaedic IE of Dr. Gilbert Yu Ming Yee dated March 5, 2021 where he finds the applicant has residual symptomatology related to myofascial strains/soft tissue injuries affecting the cervical spine, shoulder girdle, thoracolumbar spine and hips and tenderness to palpitation. However, his opinion is that the applicant does not report any overall improvement in her symptomology and as a result, this represents a barrier in achieving full recovery and therefore the treatment plan is not reasonable and necessary.

[78] I agree with Dr. Rizvi and place less weight on the report of Dr. Yee. The applicant was recommended to visit with Dr. Razvi by her family doctor and both Dr. Ravzi and the applicant testified that this treatment provided pain relief for her. The applicant has testified that the injections were helpful and provided relief for 4 or 5 days and Dr. Yee also notes in his report that the treatment has provided relief to her; however, his opinion is that she has not reported an overall improvement and that presents a barrier to a full recovery. Pain relief is a legitimate goal of treatment, and the treatment was providing relief to her which allowed her to function. I also find the cost of the treatment is reasonable and as a result of the above, I find this treatment plan to be reasonable and necessary.

Issues IX and X: The treatment plans for psychological assessment and psychological treatment

[79] I find the treatment plan for a psychological assessment in the amount of \$2,200 is reasonable and necessary; however, the psychological treatment amount of \$5,407.87 is not reasonable and necessary for the following reasons.

The treatment plan for \$2,200 for a psychological assessment is reasonable and necessary

[80] Dr. Ghadam's psychological report dated June 14, 2021 conducts several tests on the applicant and opines that the applicant has features of posttraumatic stress disorders, major depressive disorder, recurrent episode, moderate and somatic symptom disorder with predominant pain. Dr. Kiraly also testified that based on the symptoms the applicant has, that it was not just an adjustment disorder, but a major disorder.

[81] The respondent submits that the psychological treatment plans are not reasonable and necessary as they rely entirely on the applicant's self-reporting and the applicant is unreliable because she has exaggerated and embellished her complaints for personal gain and therefore the opinions for psychological treatment cannot be relied upon. Furthermore, the IE assessment done by Dr. Sivasubramanian found that the applicant did not have any psychiatric disorder or condition.

[82] In my view, a request for an assessment does not require proof that the applicant has the condition the assessment is seeking to assess. All that is required is to show that there is a possibility the condition may exist. Dr. Ghadam's report and the testimony of Dr. Kiraly are sufficient to show that there may be the possibility of psychological impairments and that, in my view, would be evidence to show that an assessment is reasonable and necessary.

[83] I will now turn to discuss whether the psychological treatment is reasonable and necessary.

The treatment plan for \$5,407.87 for psychological treatment is not reasonable and necessary

[84] I find the treatment plan for psychological treatment in the amount of \$5,407.87 is not reasonable and necessary for the following reasons.

[85] The applicant submits that the adjuster's log note of a telephone call between the applicant and the previous adjuster on the file from August 8, 2018 shows that the respondent recognized a need for psychological treatment, as the adjuster noted that the applicant's injuries have persisted for more than a year and that counselling may be helpful for dealing with chronic pain. Furthermore, the applicant relies upon the psychological report of Dr. Ghadam as mentioned above.

[86] The respondent takes the same position as it did for denying the psychological assessment as noted above in paragraph 78.

[87] With respect to psychological treatment, I am not persuaded that is reasonable and necessary. I find that the surveillance of the applicant being able to drive to the grocery store, to visit her boyfriend, and to visit and interact with her extended family members shows that she does not have in-vehicular anxiety or major depression that prevents her from leaving her home. The adjuster's log note of the conversation, in my view, is not medical evidence in support of psychological treatment. Furthermore, I am not persuaded based on any

contemporaneous evidence, around the time of the treatment plan's recommendation that psychological treatment is reasonable and necessary. As a result, I find that the treatment plan for psychological treatment is not reasonable and necessary.

[88] I will now turn to discuss whether the applicant is entitled to an award if the respondent unreasonably withheld or delayed the payment of benefits.

Issue XI: AWARD

[89] I find that the applicant is not entitled to an award for the following reasons.

[90] The onus is on the applicant to prove on a balance of probabilities that the respondent unreasonably withheld or delayed the payment of benefits so as to be entitled to an award in accordance with s. 10 of Regulation 664. The applicant submits she should be entitled to an award because the respondent relied on surveillance which was inaccurately reported by the investigators; the fact that the IE assessors accepted the surveillance uncritically; and that the adjuster relied on those IE reports.

[91] The respondent submits that the threshold for an award is high and there needs to be evidence that the insurer was unreasonable.¹²

[92] I agree with the respondent, the threshold for an award is high and simply relying on surveillance evidence which formed an IE assessor's opinion, would not be on its own evidence of unreasonably withholding or delaying the payment of the benefits. There needs to be conduct that can be considered unreasonable on the part of the respondent. This Tribunal has referred to insurer's conduct that is inflexible, stubborn, immoderate or unyielding to warrant an award; as an example, if the insurer clearly went against the recommendations of its assessor that were in favour of the insured, then an award would be warranted.¹³

[93] As a result of the above, I have not been persuaded on a balance of probabilities that the respondent unreasonably withheld or delayed the payment of benefits and I find that the applicant is not entitled to an award.

¹² 18-002994 v Aviva Insurance Canada 2019 CanLII 76837 (ON LAT) ("F.F.")

¹³ F.F. at para 22.

ORDER

- [94] The applicant does not meet the definition of a catastrophic impairment.
- [95] As the applicant is not deemed to be catastrophically impaired, she is not entitled to an attendant care benefit in the amount of \$6,000 per month.
- [96] The applicant is entitled to an IRB in the amount of \$382.16 from April 26, 2021 to date.
- [97] The treatment plans in the amount of \$11,804.28, \$789.06, \$700.00 and \$2,200.00 (issues [4] iv, v, viii, and ix) are reasonable and necessary.
- [98] The treatment plans in the amount of \$2,835.99, \$3,791.00 and \$5,407.87 (issues [4] vi, vii, and x) are not reasonable and necessary.
- [99] The applicant is not entitled to an award.
- [100] The applicant is entitled to interest in accordance with the *Schedule* on any overdue payment of benefits.

Released: November 7, 2022



**Sandeep Johal
Vice-Chair**