



Citation: Lanzon v. Economical Insurance Company, 2023 ONLAT 20-005424/AABS

Licence Appeal Tribunal File Number: 20-005424/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:

Ronald Lanzon

Applicant

and

Economical Insurance Company

Respondent

DECISION

VICE-CHAIR:

E. Louise Logan

APPEARANCES:

For the Applicant:

Satwant Merwar, Counsel

For the Respondent:

Martin Forget, Counsel

Heard in writing

OVERVIEW

- [1] Ronald Lanzon, the applicant, was involved in an automobile accident on October 4, 2012, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “*Schedule*”). The applicant was denied benefits by the respondent, Insurer, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.
- [2] At the time of the accident, the applicant was a belted driver attempting to turn left at an intersection when his car was struck on the passenger’s side by another car. The airbags did not deploy. The applicant reports he lost consciousness, but there is no indication of any reduction of his Glasgow Coma Scale. He exited the vehicle unassisted. He did not go to the emergency room. He was driven home by his brother. On the evening of the accident, he was taken to the North York General Hospital Emergency by his brother due to an increase in his pre-existing back pain, as well as headache and dizziness. The applicant was diagnosed with soft tissue injuries to his neck and back, and with a minor head injury, which is referred to in subsequent medical reports as a concussion. He saw his family physician, Dr. Dunraj, on October 9, 2012. On October 10, 2012, a CT of his head was found to be “normal.”
- [3] The applicant has not had treatment for any accident-related injuries since 2014. However, since 2016, he has undergone numerous assessments for physical and psychological issues. On April 13, 2017, the applicant applied to be designated catastrophically impaired.
- [4] The Tribunal held a videoconference hearing in this matter on October 26-28, 2022, and issued its decision on May 16, 2023. At the hearing, the Tribunal heard testimony from the applicant and his life partner Mr. Kenneth Deviney. The Tribunal also heard from Ms. Nikita D’Souza, occupational therapist, and Dr. Lara Davidson, neuropsychologist, who testified on behalf of the applicant. Mr. Dan Gauthier, occupational therapist, and Dr. Joel Eisen, psychiatrist, both testified on behalf of the respondent.
- [5] In its May 16, 2023 decision, the Tribunal found the applicant was not catastrophically impaired on the basis that the applicant’s multidisciplinary catastrophic assessment was not done in compliance with section 45(2)1 of the *Schedule*.
- [6] On June 6, 2023, the applicant requested a reconsideration of the Tribunal’s May 16, 2023 catastrophic impairment decision. In a reconsideration decision dated

August 8, 2023, the Tribunal granted the applicant's reconsideration request and cancelled the decision related to catastrophic impairment. It ordered a rehearing of the issue of whether the applicant sustained a catastrophic impairment. The Tribunal ordered that the rehearing be based on the case record and the transcript/recording of the initial hearing. The parties were invited to make submissions on the requirements of section 45(2)1 and their application to the multidisciplinary assessment report of Dr. Lisa Becker and Dr. Harold Becker.

- [7] I have conducted this rehearing based on the record and the transcript of the initial hearing. I have also considered the parties' submissions on section 45(2)1, as set out below.

ISSUES

- [8] The issue in dispute is whether the applicant sustained a catastrophic impairment as defined by the *Schedule*.

RESULT

- [9] I find that the applicant did not sustain a catastrophic impairment.

PROCEDURAL ISSUES

- [10] Following the release of the reconsideration decision, the applicant and the respondent both filed submissions on the requirements of section 45(2)1. On October 24, 2023, the applicant filed a Notice of Motion to extend the time for filing his reply, which he filed six days after the deadline. In his Notice of Motion, the applicant does not indicate why his reply was late filed, only that there will be significant prejudice to the applicant if the reply was not accepted, and no prejudice to the respondent. Although invited to do so, the respondent chose not to make submissions on the applicant's motion.
- [11] However, in its responding submissions, the respondent did object to the applicant filing evidence with his September 25, 2023 submissions. The submissions were accompanied by a letter from Drs. Lisa and Harold Becker. The respondent indicated the letter was not "written submissions" filed in compliance with the procedural orders in the Tribunal's reconsideration decision.
- [12] I am allowing the applicant's reply submissions and the evidence he submitted with his initial submission in relation to section 45(2)1 for the following reasons.
- [13] While the applicant did not file his reply in keeping with the Tribunal's order, the respondent has not objected to the late filed submissions or made submissions

with respect to prejudice. With respect to the applicant's filing of additional evidence, I find that the reference in the Tribunal's procedural order to "written submissions, exclusive of evidence and authorities" is a reference to the page limits only applying to written submissions, not that the parties may not submit evidence and authorities with their submissions. Given that the reconsideration was granted on the basis that the parties had not had the opportunity to make submissions on section 45(2)1, it does not make sense that the Tribunal would then make a procedural order that disallowed evidence on this very point.

- [14] For the reasons set out above, I am allowing the applicant's reply submissions and additional evidence.

ANALYSIS

- [15] The applicant initially sought a catastrophic impairment designation under Criteria 7 and 8. However, the applicant's submissions and evidence only address Criterion 8, and the parties confirmed at the initial hearing that only a determination under section 3(1)(8) of the *Schedule* ("Criterion 8") is at issue.
- [16] I find that the applicant has not established, on a balance of probabilities, that he is catastrophically impaired under Criterion 8. The applicant has not established that he has a marked (class 4) or extreme (class 5) impairment in any of the areas of function.
- [17] These impairments are assessed under Chapter 14 of the 4th Edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (the "Guides"). 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 levels of impairment represented in the chart below.

| 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 | | | | | |
| Adaptation (Deterioration in a work-like setting) | | | | | |

- [18] An insured person is catastrophically impaired under Criterion 8 when an accident causes them to sustain a marked (Class 4) or extreme (Class 5) impairment in an area of function due to mental or behavioural disorders.
- [19] 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](#).
- [20] In this case, the area of disagreement between the parties is whether the applicant has a marked impairment as a result of the accident in the area of Adaptation. Accordingly, this is the focus of my analysis in this decision. While the issue in dispute is narrow, the evidence is extensive. I have reviewed the case record, including the transcript of the hearing. In my reasons that follow, I only refer to the evidence and submissions I find most relevant to my decision.
- [21] In support of his Criterion 8 argument, the applicant relies on the 2016 and 2017 reports of Dr. John Gilman, neuropsychologist, and the 2019 Omega Medical Associates Multidisciplinary Catastrophic Impairment Evaluation Report (“Omega Report”). The Omega Report is authored by Dr. Lisa Becker and Dr. Harold Becker. The multidisciplinary examinations of direct relevance are those of Dr. Lara Davidson, neuropsychologist, and Ms. Nikita D’Souza, occupational therapist. The Omega Report concludes that the applicant “meets the

catastrophic threshold for mental and behavioural impairments under Criterion 8 with Marked (Class 4) impairment in Adaptation”. Dr. Gilman’s report addressed Criterion 7 rather than Criterion 8 and therefore has limited relevance to the Criterion 8 analysis.

- [22] The respondent relies on the psychological report of Dr. Rick Lindal dated January 2014, the Soma IE Multidisciplinary Assessment Report (“Soma Report”) dated October 2017, and the May 2022 Addendum Report by Dr. Joel Eisen. The 2017 Soma Report is authored by Dr. C. B. Paitich, orthopedic surgeon. The Insurer’s Examinations (IEs) of direct relevance to the question of Adaptation are those by Dr. Douglas Chute, neuropsychologist, and Mr. Dan Gauthier, occupational therapist. In addition, Dr. Eisen examined the applicant in May 2022 and provided an IE Addendum Report as Dr. Chute had unfortunately passed away by that time.
- [23] The Soma Report found that the applicant does not meet the threshold for catastrophic impairment under criterion 8, and that the rating for Adaptation was a Mild (Class 2) impairment. The IE Addendum Report concluded the applicant likely had Class 3 (moderate) impairment in Adaptation prior to the accident, and post-accident the applicant demonstrates “no more than a Class 3 impairment” as a result of the accident.

Section 45(2)1 and the Omega Report

- [24] I find that the Omega Multidisciplinary Catastrophic Impairment Evaluation was conducted in compliance with section 45(2)1 of the *Schedule*.
- [25] Section 45(2)1 provides that an assessment or examination in connection with a determination of catastrophic impairment must be conducted only by a physician, but that the physician may be assisted by such other regulated health professionals as he or she may reasonably require.
- [26] The applicant submits that section 45(2)1 does not contemplate that the physician must complete the physical assessment. He submits the meaning of “conduct” in section 45(2)1 encompasses the role Drs. Lisa and Harold Becker played in reviewing the medical brief; determining if a CAT evaluation was warranted; identifying the most appropriate team to complete the comprehensive assessment based on the identified impairments and injuries; selecting the experts; preparing an executive summary which included a case synopsis and review of each individual assessors’ findings; and ultimately determining if the applicant met the CAT requirements. The applicant submits this is in keeping with the definition of “conduct” which Black’s Law Dictionary defines as “to

manage; direct; lead”, and that section 45 contemplates the role of the physician as similar to a quarterback on a football team, or a conductor in an orchestra.

- [27] The applicant submits both Drs. Becker reviewed all the medical evidence and concluded, based on the findings of all the assessors, that the applicant did not meet the requirements of Criterion 7 but did meet Criterion 8. He argues that it was Drs. Becker’s opinion that the applicant is catastrophically impaired. In support of his submission, the applicant has provided a letter from Drs. Becker outlining their role in conducting the assessment.
- [28] The respondent argues that the Omega Report was not conducted in compliance with section 45(2)1. It argues that it is clear from the opening statement at the hearing that the applicant was relying on “Dr. Davidson’s findings”, not those of the conducting physicians, Drs. Lisa and Harold Becker. The respondent submits that when Dr. Davidson was called as a witness, she stated she conducted a CAT assessment under Criterion 8. It argues it was Dr. Davidson, not Drs. Becker who considered the occupational therapy situational assessment to provide an impairment rating under the Guides. It further argues that Drs. Becker only provided an executive summary which repeated verbatim the conclusions of Dr. Davidson.
- [29] In support of its position that the Omega Report was not done in compliance with section 45(2)1, the respondent cites *Abdi v. TD General Insurance Company*, 2021 CanLII 127474 (ON LAT) (“*Abdi*”), in which the Tribunal considered the language of section 45(2) as it relates to a GOS-E assessment prepared by an occupational therapist. The Tribunal found that making a judgment or opinion on causation was outside the scope of an occupational therapist’s qualifications and therefore the assessment was not in compliance with section 45(2). The respondent also cites *Anwar v. Travelers Insurance*, 2023 CanLII 50606 (ON LAT) (“*Anwar*”) where the applicant also relied on an assessment conducted by an occupational therapist, which was endorsed by a physician in a separate report. The Tribunal found the fact that an occupational therapist conducted the assessment and the neuropsychologist only “vetted the report” to be “contrary to the spirit of section 45(2)”.
- [30] These cases are not binding on me. Furthermore, I find they do not consider the question of compliance with section 45(2)1, but rather section 45(2)2. Section 45(2)2 relates to situations where there is a traumatic brain injury only, in which case the assessment may be undertaken by a neuropsychologist who may be assisted by other regulated health professionals.

- [31] I am also not convinced the reasoning in *Abdi*, upon which *Anwar* relies, is applicable to section 45(2)1. In *Abdi*, the Tribunal was concerned that the GOS-E Guidelines require consideration of the effect of a head injury versus the effects of other injuries. It noted that this requires an opinion on causation, which an occupational therapist is not qualified to provide. In the case before me, a multidisciplinary assessment was undertaken in connection with a determination of catastrophic determination under section 45(2)1. The evaluators included an occupational therapist, but also a neurologist and a neuropsychologist, who are both qualified to render an opinion on causation.
- [32] I agree with the applicant that section 45(2)1 requires a physician to “conduct” the assessment. I also agree with the applicant that the meaning of “conduct” in section 45(2)1 encompasses the role Drs. Becker played in the assessment. The *Schedule* does not require the physician to carry out each element of the assessment. In fact, it specifically contemplates that the physician may be assisted by other regulated health professionals.
- [33] In my view, the *Schedule* does not require the conducting physician to provide an analysis that is independent of those who have the relevant expertise, and whose assistance is reasonably required. The expertise of other regulated health professionals forms part of the overall assessment. This is necessary and appropriate. The legislation reflects the fact that multidisciplinary expertise is required to assess catastrophic impairments, which can span both physical and psychological injuries.
- [34] While managing or “quarterbacking” the assessments of others is not, in my view, sufficient to meet the language and intent of section 45(2)1, I find that Drs. Becker did not just manage the investigations and assessments of others. They reviewed the applicant’s medical brief to identify injuries and impairments and determine whether a CAT evaluation was warranted. They then identified the regulated health professionals whose assistance they required in order to come to their own opinion on catastrophic impairment in keeping with the Guides. In their Report, Drs. Lisa and Harold Becker state that they arrived at their professional opinion with respect to the applicant’s catastrophic impairment status “based on a review of the medical brief and analysis of Mr. Lanzon’s clinical presentation at the time of the medical brief and analysis of the clinical presentation at the time of these evaluations”. This is what is contemplated by the language of the section.
- [35] While the respondent argues the fact that the applicant called Dr. Davidson to testify and referred to her opinion and assessment in his submissions means the

assessment was conducted by Dr. Davidson, I do not agree. Dr. Davidson's expertise is highly relevant to the multidisciplinary catastrophic assessment generally, and specifically to the assessment of the applicant's mental and behavioural impairment under Criterion 8. In fact, both parties rely heavily on such expertise in making their case. In this regard, the applicant relies on Dr. Davidson and the respondent relies on Dr. Chute and Dr. Eisen. Both parties cite the opinions of these experts, and both Dr. Davidson and Dr. Eisen were called on to testify at the hearing. Of note, neither party called on the "conducting" physicians to testify at the hearing.

- [36] For the reasons set out above, I find the Omega Multidisciplinary Catastrophic Impairment Evaluation was conducted in compliance with section 45(2)1.

Criterion 8

- [37] I find that the applicant is not catastrophically injured as a result of the accident for the following reasons.
- [38] The applicant argues that he sustained a Marked impairment in the domain of Adaptation. He argues that he has consistently been diagnosed with somatic disorders by the insurer's examiners and his own assessors. He argues that while the respondent's assessors rely on alleged pre-existing issues to account for post-accident impairment, they present little to no evidence in support of their findings. He argues that prior to the accident, he had a job, friends and extensive extracurricular activities. Immediately following the accident, he had none of these. He has not returned to employment, or sport. He has disassociated from his social circle. His day consists of watching TV and internet use, and he only eats once a day. He rarely goes out and talks to his family infrequently.
- [39] The applicant argues that the *Schedule* does not provide for a discount for apportionment of causation due to pre-existing injuries. Relying on *Sabadash*, he argues the "but for" test need not be the only cause, or even major cause, but a necessary cause. He argues that the evidence supports a determination, on a balance of probabilities, that the applicant's impairments are caused by the accident.
- [40] The respondent argues that the applicant did not sustain a Marked impairment in Adaptation because of the accident. It argues that at most, the applicant sustained an exacerbation of his pre-accident chronic pain and mild psychiatric conditions which resolved to their pre-accident level by 2014.

- [41] It further submits that the cause of the applicant's limitation is almost entirely his physical back pain and headaches. It argues that that pain presenting only as a physical symptom is rare, and that while chronic pain can cause psychological issues, it is not a psychiatric disorder. The respondent argues that the applicant's testimony lacks credibility and reliability. It points to the fact he denied pre-accident psychological or physical limitations despite documentary evidence to the contrary. It argues he may have been working for his father in 2019, and that whether he is found to have been working or not, his self-reporting is repeatedly unreliable and self-serving. It further argues the medical records shows that by 2020 he was "doing well" and despite ongoing back problems was "doing well otherwise".
- [42] I find the evidence does not support a finding that the applicant meets the threshold of a Marked impairment in Adaptation.
- [43] Dr. Chute's 2017 IE Report noted that the applicant performed with very poor effort during the examination, and quite possibly with symptom exaggeration. Dr. Chute concluded that there is no valid objective evidence of any neuropsychological impairment. He opined that there is no neuropsychological impairment that could be associated with the October 4, 2012 accident. Dr. Chute found that the lack of a valid response assessment indicated by a number of measures made the self-report evaluative components suspect. Dr. Chute provided a Mild impairment rating across all four domains including Adaptation, Dr. Eisen, who assessed the applicant five years after Dr. Chute, gave the applicant the "benefit of the doubt" and found he had a class 3, or Moderate, impairment.
- [44] In 2019, Dr. Davidson assessed the applicant. In her report, she noted that she had additional "data points" to those considered by Dr. Chute. She also noted that she assessed the applicant two years after Dr. Chute. She acknowledged Dr. Chute's validity concerns but noted that she administered a range of tests and had no validity concerns. She found the applicant to have a Marked impairment in Adaptation.
- [45] I give little weight to Dr Davidson's opinion because I find she relied on the applicant's self-reporting in key areas, and the evidence shows that the applicant is not a reliable historian. The applicant's self-reporting and recollection of his life pre- and post-accident condition and activities are inconsistent with the evidence in areas that are key to the assessment of Adaptation, including the applicant's work, social relationships, and medical condition.

- [46] I find that Dr. Davidson did not have a complete understanding of the applicant's pre-injury psychological condition which included documented episodes of anxiety and depression, and for which he had been prescribed anti-anxiety medications. Both Dr. Chute and Dr. Eisen found the applicant had pre-accident psychological issues.
- [47] I also find that the evidence shows the applicant was not working full time in the period leading up to the accident, and that he had chronic back pain that impacted his ability to work. This is important because Dr. Davidson's opinion on the domain of Adaptation is based on an understanding that the applicant worked full-time before the accident and has not worked since.
- [48] Dr. Davidson's report refers to the applicant's long term romantic partner as his roommate and friend. Dr. Davidson did not seem to know, and the applicant does not seem to have advised her, that he was in a long-term romantic relationship. This may be because he was reluctant to acknowledge a same sex partner, or for some other reason, but regardless, I find that it means Dr. Davidson did not have a complete picture of the applicant's significant relationships when she rendered her opinion.
- [49] I prefer the opinion of Dr. Eisen because it takes into account the applicant's pre-accident psychological condition, his work history, and his long-term relationship with Mr. Deviney. In his testimony, Dr. Eisen noted while applicant had impairments, including problems with organization, following through with tasks, and difficulty with focus, the applicant functioned in the community, had sources of satisfaction and gratification, had good relationships with his family, and recreational activities and interests. In Dr. Eisen's opinion, "he was functioning quite well". This accords with the clinical notes of Dr. Dunraj, who in 2020 notes several times that the applicant continues to have back pain but is otherwise is "doing well".
- [50] I have reviewed Ms. D'Souza's and Mr. Gauthier's occupational therapy reports and agree with the applicant that Ms. D'Souza conducted a more comprehensive assessment. I do not agree, however, that her assessment supports a finding of Marked impairment. I find that the OT assessment shows that while the applicant struggled with some tasks, he was able to do household chores, relate well to others, take an Uber to go shopping, and joke and laugh while he selected and purchased dresses for his nieces. Although the applicant was not able to complete the three-day OT assessment, I find that this was due to his chronic back pain and headaches, not psychological impairment. This is supported by the repeated references to needing a break because of back pain. It is also

supported by Ms. D'Souza report that the applicant's mood was observed to remain "relatively stable" and that he apologized for not being able to complete the tasks. Furthermore, at the hearing, Ms. D'Souza testified it was the applicant's back pain that prevented him from completing the tasks.

- [51] Meeting the definition of a Marked impairment in Adaptation means that the applicant's psychological impairments should significantly impede his function. I find the evidence simply does not support such a finding in this case. The evidence shows that the applicant was independent in his self-care, able to do household chores and cook simple meals. While the applicant has trouble remembering appointments and concentrating on tasks, during the post-accident period he was also able to move three times, including to Penetanguishene, and then back to the Toronto area.
- [52] The applicant had periods of employment and unemployment before the accident. His tax returns show he was not working full time in the two years before the accident. Although the applicant has not worked since the accident, in his testimony he stated he was going to start to work for his father in August 2019 (he does not say in what capacity) but did not do so because it was too far to go back and forth every day. The applicant has his driver's licence and drives himself to appointments which requires driving on three highways. He reports no anxiety related to driving and finds it relaxing. Given this, I find the applicant's testimony indicates he was capable of working for his father after the accident, but he chose not to work because it was too far away.
- [53] I accept the testimony of Mr. Deviney that the applicant has diminished social contact and no longer manages, coaches or plays ball hockey as he did before the accident. I also accept that hockey and socializing within the hockey league were a big part of his pre-accident life. At the same time, I find that the applicant lives with his life partner, with whom he has been in what was described as a "very affectionate" relationship for over 13 years. Since the accident, they have considered having a child together. The evidence also shows that since the accident he has travelled with his mother to Malta for a family funeral. Although the trip was organized by his mother, he was able to accompany her. He maintains his strong interest in sports and enjoys watching movies on Netflix. He is interested in astronomy. He does have diminished social contact but maintains daily contact with his parents. He uses Facebook to keep in touch with his relatives in Malta. He reports he has a close and improving relationship with his partner's parents, despite prior conflict and tension in the relationship.

[54] For the reasons set out above, I find that the applicant has not met his onus to demonstrate, on a balance of probabilities, that he has sustained a Marked impairment in the domain of Adaptation as a result of the accident.

CONCLUSION

[55] I find the applicant has not sustained a catastrophic impairment as defined in the *Schedule*.

Released: December 13, 2023

E. Louise Logan
Vice-Chair