Citation: Abou-Gabal v. Economical Insurance Company, 2024 ONLAT 23-000939/AABS

Licence Appeal Tribunal File Number: 23-000939/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:

Baraah Abou-Gabal

Applicant

and

Economical Insurance Company

Respondent

DECISION

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

APPEARANCES:

For the Applicant: Baraah Abou-Gabal, Applicant
Mohamed Elbassiouni, Counsel

For the Respondent: Martin Forget, Counsel
Stephen Whibbs, Counsel

HEARD: by Videoconference: May 6 to 10 & 13, 2024

OVERVIEW

[1] Baraah Abou-Gabal, the applicant, was involved in an automobile accident July 6, 2018, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (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.

PRELIMINARY ISSUES

[2] The preliminary issue to be decided is:

i. Is the applicant barred from seeking a catastrophic impairment determination for failing to attend a section 44 insurer's examination, pursuant to section 55 of the *Schedule*?

[3] The respondent argued that the applicant should be barred from seeking a catastrophic impairment determination because she failed to participate in the s. 44 examinations. Despite multiple attempts, it argued that during each assessment the applicant did not communicate with the assessors and often remained in bed. This was in contrast, it argued, with evidence in the records that show the applicant speaking with medical professionals while in hospital.

[4] The applicant argued that she participated in the assessments to the best of her abilities, given that she has been diagnosed with autism spectrum disorder ("autism"). She argued that she often does not speak as a result of her autism and other impairments. In fact, she argued that she did not speak to either the s. 44 or s. 25 assessors. She argued that she should not be discriminated against as a result of her disability.

[5] After hearing arguments from both parties at the start of the hearing, I reserved my decision and invited the parties to present further evidence throughout the hearing to support their case.

[6] Upon consideration of the evidence and arguments from both parties, I find that the applicant is not barred from seeking a catastrophic impairment determination. Despite the respondent's evidence that the applicant has spoken to medical professionals in the past (i.e., to hospital staff during her hospitalizations in 2019 and 2020), I find that this is not sufficient to convince me that she was able to speak with all medical professionals at any time. Clearly, her non-communication

with both her own assessors as well as the insurer's suggests that the issue is more related to her autism and not a deliberate attempt to thwart assessors, which is what s. 55 is meant to protect against. Section 55(2) of the *Schedule* provides that the Tribunal may permit an insured person to proceed with their appeal despite not having complied with an insurer's request for a s. 44 assessment. In my view, the current circumstances warrant the exercise of the Tribunal's discretion and I order that the applicant be allowed to proceed with this appeal. All of the assessors produced reports, albeit with different conclusions, which were introduced in as evidence for the Tribunal to consider.

ISSUES

[7] The issues in dispute are:

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

ii. Is the applicant entitled to attendant care benefits ("ACBs") in the amount of $3,000.00 per month from August 20, 2019 to date?

iii. Is the applicant entitled to $1,695.00 for occupational therapy ("OT") services, proposed by Seksek Chiropractic Professional Corporation in a treatment plan/OCF-18 ("plan") dated April 4, 2019?

iv. Is the applicant entitled to $5,408.12 for social rehab counselling, proposed by Seksek Chiropractic Professional Corporation in a treatment plan dated August 12, 2019?

v. Is the applicant entitled to $2,020.00 for social rehab counselling, proposed by Seksek Chiropractic Professional Corporation in a treatment plan dated July 7, 2021?

vi. Is the applicant entitled to $8,399.00 ($18,587.00 less $10,188.00 approved) for catastrophic determination assessments, proposed by Biomedix Impairment and Diagnostic Centre Inc. in a treatment plan dated October 16, 2021?

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

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

RESULT

[8] The applicant is deemed catastrophically impaired.

[9] The applicant is entitled to ACBs in the amount of $1,920.67 from August 20, 2019 to present.

[10] The applicant is partially entitled to the proposed OT treatment plan in the amount of $1,170.00 dated April 4, 2019.

[11] The applicant is not entitled to the proposed social rehab counselling treatment plan dated August 12, 2019.

[12] The applicant is not entitled to the proposed social rehab counselling treatment plan dated June 22, 2021.

[13] The applicant is not entitled to the disputed amount for the catastrophic impairment assessment.

[14] The applicant is entitled to interest on the proposed OT treatment dated April 4, 2019.

[15] The applicant is not entitled to an award.

PROCEDURAL ISSUES

Applicant is not barred from testifying

[16] The respondent argued that the applicant should be barred from testifying because she did not participate in any of the assessments, meaning that the respondent did not know what evidence she would be presenting. The applicant argued that it would be prejudicial to not allow an applicant to testify at her own hearing.

[17] I considered submissions and agreed with the applicant. It would be extremely unfair and unusual for an applicant to be denied the opportunity to testify at her own hearing if she elects to. I did not find any prejudice to the respondent in allowing the applicant to testify and be cross-examined.

[18] Of note, when the applicant was given the opportunity to testify, she did not speak and therefore the testimony did not proceed.

Applicant's mother and brother are barred from testifying

[19] The respondent argued that the applicant's mother and brother should be barred from testifying given that their names were added to the witness list well after the Case Conference Report and Order ("CCRO") deadline, meaning that it did not have time to prepare for their testimonies. The applicant argued that given the applicant's difficulties communicating, their testimony would be necessary and relevant.

[20] I ordered that neither the applicant's mother nor brother be allowed to testify. The amended witness list from the applicant which included their names was submitted on May 1, 2024, well after the CCRO deadline of April 6, 2023. Moreover, their testimony would be repetitious as we already had two lay witnesses providing testimony on behalf of the applicant (her father and a family friend).

Dr. Shamalack Report of April 29, 2024 and OT Starr Robinson Report of March 18, 2024 were not admitted as evidence

[21] The respondent argued that the report of Dr. Shamalack dated April 29, 2024 should not be allowed as evidence because it was submitted after the CCRO production deadline, meaning it was not able to properly prepare for this evidence. The applicant argued that this report was relevant to the issues in dispute and was needed to respond to a respondent's report from OT Starr Robinson dated March 18, 2024, also received after the CCRO deadline.

[22] I ordered that neither the April 2024 report of Dr. Shamalack nor the March 2024 Report of OT Robinson would be admitted as evidence, given that both reports were received well after the CCRO production deadline of January 19, 2024. Pursuant to Rule 9.3 of the *Licence Appeal Tribunal Rules, 2023 ("LAT Rules")* I was not satisfied by the submissions from the parties that they had sufficient reasons for their non-compliance with the CCRO and therefore find that neither party may rely on these reports.

Adjusters were barred from testifying

[23] The respondent argued that the two adjusters listed in the applicant's witness list should not be required to testify as a result of the applicant failing to provide any particulars for the award claim, which was the basis for requiring their testimony in the first place. The respondent argued that it would be procedurally unfair for it not to know the case before it prior to having its adjusters testify. The applicant

argued that their testimony was required to speak to the issue of an award and the adjusting decisions made on the file.

[24] I considered submissions and ordered that the adjusters not be permitted to testify in order to ensure an efficient and timely resolution to this matter. Per the CCRO, all orders made regarding witnesses were subject to the hearing adjudicator's discretion. Using my authority under s. 25.0.1 of the *Statutory Powers Procedure Act ("SPPA"),* I made this order to streamline the hearing on the issues in dispute. I find that without particulars for an award claim there is little basis for calling the adjusters and calling them would unduly delay the timely resolution of this matter.

Section 44 Report of Dr. Joseph is not barred from being entered as evidence

[25] The applicant argued that the s. 44 insurer's examination report of psychologist Dr. Anil Joseph should be barred from being entered as evidence as the respondent failed to fulfill its requirements under s. 45 of the *Schedule*. Specifically, the applicant argued that the respondent provided deficient notice of its intention to schedule a s. 44 insurer examination within 10 days, which means that the respondent should be precluded from relying on this report.

[26] The respondent argued that prior to the hearing it had received no notice of this request or issue. It argued that the applicant attended the assessment and the report was produced within the CCRO production deadlines, meaning that there is no prejudice to the applicant in responding to this report.

[27] I ordered that this report be permitted to be entered as evidence. It was submitted within the production deadlines, and I do not see any prejudice to the applicant as she participated in this assessment and has had ample time to consider and respond to the report. I invited the applicant to make submissions in her closing regarding what weight this report should be given vis-à-vis her s. 45 concerns.

The applicant was not permitted to ask OT Robinson about her hourly rates

[28] During the cross-examination of OT Robinson, the respondent objected to the applicant asking the witness questions regarding her hourly rates, arguing that it was irrelevant to the issues in dispute. The applicant argued that it was relevant because she suspected that the respondent had breached its responsibilities under s. 25(5)(a) of the *Schedule,* which mandates that the total amount of an insurer's examination cannot exceed $2,000.00. She further argued that this was relevant to her claim for an award.

[29] Using my authority under s. 23(1) of the *SPPA* I ordered that the applicant move on from this line of questioning. Firstly, I did not find these questions to be relevant to the issues in dispute, nor to the issue of an award (which is based on whether an insurer unreasonably withheld or delayed payments). Secondly, on the issue of a s. 25(5)(a) violation, I found that this line of questioning appeared to be an unnecessary fishing expedition which was not based on tangible evidence and could have been raised prior to the hearing. The applicant was invited to make submissions on what weight the testimony and evidence of OT Robinson should be given in her closing submissions.

Request to produce an email was denied

[30] During the cross examination of OT Robinson, the applicant requested that the OT produce an email referenced in her report which was not previously part of the evidentiary briefs of either party.

[31] I did not allow this document to be produced. We were already four days into the hearing and it would be prejudicial to both parties to allow new evidence to be produced without the benefit of reviewing it earlier. Moreover, I was not satisfied that this evidence was relevant to the issues in dispute.

Length of OT Robinson's cross-examination was shortened

[32] At the start of the hearing, the applicant had been allocated up to two hours to ask questions of OT Robinson during cross-examination. However, the cross-examination was delayed because the applicant attempted to raise an argument regarding a s. 25(5)(a) violation, which I found to be unreasonable. This delay meant that it would be impossible to keep on schedule for the remainder of the day.

[33] As such, I utilized my authority under s. 23(2) of the *SPPA* to restrict the applicant to 90 minutes for her cross-examination in order to ensure a timely and efficient resolution to the hearing.

The second report of Dr. Shamalack was permitted as evidence

[34] The applicant objected to the introduction of a second report from Dr. Shamalack based on the fact that the doctor was not asked any questions during his testimony about this second report and it was therefore irrelevant. The respondent argued that this report was part of the applicant's own brief, therefore there was no prejudice to the applicant in admitting it as evidence.

[35] I agreed with the respondent and allowed the report to be entered in as evidence. The applicant was invited to make submissions as to what weight the report should be given based on the fact that it was not canvassed during the witness' testimony.

Right of reply granted during closing submissions

[36] Following the respondent's closing submissions, the applicant requested a right of reply, which had not been discussed prior to the closing submissions. Per the CCRO, both parties were given 30 minutes for closing submissions, which I increased to 45 minutes each given the complexity of the issues. The applicant argued that a right of reply fulfilled the requirements of procedural fairness by giving the applicant the ability to respond to new arguments raised by the respondent in its closing. The respondent argued that it would be unfair for the applicant to receive additional time that was not previously responded to.

[37] While it is not my standard practice to offer a right of reply in closing submissions, it is also not uncommon. Given that the applicant requested a right of reply and given the principles of procedural fairness, I granted a brief reply of no more than 15 minutes. I reminded the applicant that the reply was limited only to new evidence and arguments raised during the respondent's closing.

ANALYSIS

Background

[38] Ms. Abou-Gabal, the applicant, has a complex medical history. It is important to provide this context prior to my analysis.

i. In 2014, Ms. Abou-Gabal was diagnosed with autism, a neurocognitive disorder that affects her communication and social skills. She applied for and began receiving Ontario Disability Support Program ("ODSP") payments in 2018, prior to the subject motor vehicle accident ("MVA").

ii. In July 2018, she was involved in a collision with an automobile while riding her bike (i.e., the subject MVA).

iii. In 2019, she was hospitalized and diagnosed with bipolar disorder.

iv. In 2020, she was hospitalized twice and diagnosed with autoimmune hepatitis.

[39] Given this medical history, much of the disagreement over the issues in dispute relates to the issue of causation (i.e., whether or not the subject MVA caused the applicant's impairments).

The applicant is deemed catastrophically impaired under criterion 8

[40] I find that the applicant is deemed catastrophically impaired under criterion 8 because she has suffered an extreme impairment in the area of adaptation.

[41] 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) impairment in three or more categories or an extreme (class 5) impairment in one or more areas of function according to the *AMA Guides to the Evaluation of Permanent Impairment* ("***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 test and not a medical one. See: *Liu v. 1226071 Ontario Inc. (Canadian Zhorong Trading Ltd.)*, 2009 ONCA 571 at paras 29-30.

[42] Below is a chart demonstrating the areas of functioning and the description of the levels of impairment according to the *Guides*:

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 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 & Pace					

Adaptation					

The onus is on the applicant to prove her case. To establish causation, pursuant to the Ontario Divisional Court's decision in *Sabadash vs. State Farm et al.,* 2019 ONSC 1121 ("*Sabadash*")*,* 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 and that the accident need not be the only cause of the impairment but must be a necessary cause.

[43] 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" in three or more areas of functioning or "extreme" in one or more area.

Causation

[44] In considering question (1) on causation, I find that the subject MVA was a necessary cause of the applicant's psychological impairments based largely on the evidence of the applicant's father and that of Dr. Shamalack regarding her functioning pre- and post-accident.

[45] The applicant argued that the subject MVA was not the sole cause of the applicant's impairments, but it was a necessary cause and that she would not be as impaired today "but for" the accident. She argued that prior to the subject MVA she was a resilient young woman who, while dealing with her diagnosis of autism, was able to function with assistance. As examples, the applicant argued that prior to the accident she could dress and undress herself with cueing and supervision, she could eat independently except with sharp objects, and she could ride her bike with some supervision. After the accident, she argued that she developed psychological symptoms which prevented her from functioning to the same degree consistently and often left her mute and isolated in her room for prolonged periods.

[46] In making this case on causation, the applicant relied on the testimony of s. 25 psychiatric assessor Dr. Shamalack and her father. Dr. Shamalack opined that as a result of the subject MVA the applicant developed: (1) major depressive

disorder; (2) worsened autism; and (3) bipolar disorder. He stated that since the subject MVA, the applicant "experiences persistent preoccupation with physical symptoms which has led to depressive and anxiety symptoms" which have "compounded Ms. Abou-Gabal's psychiatric impairments." He further opined that her function "has decreased significantly following the accident" and that "it is possible that the injury to the head as well as the stress and pain following the accident have contributed to the onset of her bipolar disorder". All of this evidence was supported by the testimony of the father, who is the primary caregiver of the applicant and serves as the main source of information regarding her condition.

[47] The respondent argued that the applicant's functional impairments associated with her psychological diagnoses are not accident-related because: (i) her current level of functioning matches her functional presentation pre-accident, meaning there has been no change; (ii) the testimony of the father, which also forms the basis of Dr. Shamalack's report, is unreliable because he is biased towards his daughter; and (iii) the conclusion of Dr. Shamalack regarding bipolar disorder is improper.

i. On its first argument regarding pre- and post- functioning, the respondent relied heavily on the 2014 report of Holland Bloorview Kids Rehabilitation Hospital and on the 2018 application for ODSP filled out by family physician Dr. Shaw. In the 2014 report, which provided the applicant's autism diagnosis, it is noted that the applicant is often mute and isolated for days, cannot sustain school, often has a catatonic-like state, has psychomotor retardation, and is dependent on her parents. Furthermore, the ODSP application listed a number of areas of function (i.e., impulse control, selecting clothes, housekeeping, etc.) as "severe or complete limitations on most occasions to completion of the task". These two documents, it argues, demonstrate that the applicant's post-accident functional impairments, as observed by the various assessors, mirror her pre-accident function. As such, it is the applicant's pre-existing autism and not any accident-related impairments that impact her functioning.

ii. On its second argument regarding the reliability of the father's testimony, the respondent argued that the father was an unreliable source of information because, as a parent, he had a vested interest in securing additional support for his daughter. It argued that basing the entire case for causation on the evidence that the father gave to Dr. Shamalack, some of which is contradicted by the medical records, is not a solid foundation.

iii. On its third argument regarding an improper bipolar disorder causality finding, the respondent argued that per the evidence of Dr. Joseph, Dr. Shamalack's finding that the applicant's bipolar disorder was triggered by accident-related depression is not supported by the literature. Instead, he suggested that the bipolar disorder was more likely precipitated by the applicant's autism diagnosis, meaning it was not accident related. Moreover, it argued that Dr. Shamalack erred in providing both a bipolar disorder and major depressive disorder diagnosis, as the DSM criteria indicates that major depressive disorder cannot be diagnosed when there is the presence of a psychotic episode.

[48] In considering the submissions of the parties, I agree with the applicant and find that the applicant's functional impairments associated with psychological diagnoses would not have been present "but for" the subject MVA. Ultimately, this issue comes down to whether or not the evidence of the father is believed. All of the assessors commented on the fact that because the applicant couldn't speak and was nonresponsive during assessments, they relied heavily on the collateral interview of the father. While it is undoubtedly true that parents can be biased towards supporting their children's cases, this does necessarily mean that a parent's evidence is unreliable and I cannot wholly disregard collateral testimony where doing so would leave the applicant with no way to advocate for herself. I am satisfied that the applicant did not willfully thwart assessments through her non-communication and believe that this is more likely due to her autism. This leaves us with the father's evidence as the primary source of her case.

[49] In considering the evidence of the father, which Dr. Shamalack relied on in reaching his conclusion on causation, there are limited options available to corroborate or disprove his evidence. While I appreciate the respondent's argument that the pre-accident medicals (namely the Holland Bloorview Report and the ODSP application) suggest a level of functional impairment more severe than the father's testimony, I am not satisfied that either of these records damage the father's credibility. Firstly, the Holland Bloorview Report was completed four years prior to the accident and could present an entirely different picture of the applicant's functionality compared to immediately prior to the accident. It in no way disproves the father's evidence that after her diagnosis her condition improved based on a better understanding of her complications. And with regards to the ODSP report, this is a snapshot in time, which the father claims was based more upon the family doctor's review of the 2014 report and less on his daughter's actual functionality. Beyond checkmarks on an application, it provides little value regarding the applicant's individual case, which is important

given the unique presentation of individuals with autism. Moreover, I found the father to be a credible witness. I found no evidence of the father being dishonest or exaggerating the impact of the accident. He struck me as an honest advocate for his daughter's well-being.

[50] Lastly, when considering the question of whether or not the bipolar disorder was properly diagnosed as accident related, I find that this argument misses the point that the applicant's depressed state following the accident worsened the symptoms of her autism in a way that would not have happened but for the subject MVA. This alone could satisfy the test for causation, regardless of a finding on the causality of the applicant's bipolar disorder.

[51] I accept the findings of Dr. Shamalack that the applicant's functioning has decreased significantly following the accident and that she has lost the ability to cope with stressors. We know from the Holland Bloorview report that prior to the accident in 2014 her function was limited by her autism. We understand from the father that her function improved in the intervening years, to the point that she was acting more independently (albeit with cueing and supervision). Her function then worsened from where it had been prior to the accident and I accept Dr. Shamalack's opinion that this was a result of the applicant suffering a depressed mood as a result of the physical symptom preoccupation and depressive symptoms.

[52] The depressed symptoms appear both before and after the diagnosis of bipolar disorder in 2019. Even Dr. Joseph admitted during cross-examination that the depressed symptoms may have started as a result of the accident. Dr. Shamalack accepts that the bipolar disorder may not be accident related, but even without this certainty he is confident in stating that the other psychological impairments (depression and worsened autism) are accident related. I place particular weight in the conclusion that the accident worsened her autism symptoms in a way that may not have happened but for the subject MVA, as this matches the testimony of the father about what he observed with his daughter during that key time.

[53] Ultimately, I find the conclusion of Dr. Shamalack regarding causation to be reasonable and find that the applicant's functional impairments related to psychological diagnoses would not have been present but for the subject MVA. The MVA was not the sole cause of her impairments, but a necessary cause.

Extreme Impairment

[54] On the question of whether or not the applicant's impairments rise to the level of catastrophic per the *Guides*, I find that the applicant has sustained an extreme impairment in the area of adaptation and is therefore deemed catastrophically impaired.

[55] The applicant argued that she sustained an extreme impairment in the domain of adaptation. She supported this argument with evidence from her father and from Dr. Shamalack. Dr. Shamalack argued that prior to the accident, he believes based on the testimony of the father and the medical records that the applicant was functioning on a moderate to marked impairment level. Since then, he argues, there has been a decreased level of functioning. Bolstered by the observations of OT Amchislavsky, he states in his report that the applicant has "demonstrated severely reduced work adaptation" and that currently "she is not able to even persist to transfer out of the bed". This change leaves the doctor with the conclusion that she now suffers an extreme impairment in this sphere.

[56] The respondent argued that if we accept that the applicant's impairments were caused by the accident, she still cannot be deemed catastrophically impaired under criterion 8 because "if an applicant is deemed to have extreme impairments (or four marked impairments) pre-accident, they cannot be deemed catastrophically impaired as a result of a subject accident, as this legal designator existed prior to the occurrence of the accident." It relied on the opinions of Dr. Joseph, alongside the records of Holland Bloorview and the ODSP application.

[57] I agree with the applicant and find that she has met her onus of demonstrating that she has sustained an extreme impairment in the sphere of adaptation because I accept the findings of Dr. Shamalack who believes she is no longer able to persist through stressors.

[58] I find the respondent's argument in this regard to be unconvincing. By its logic, any individual with a pre-existing functional impairment (such as autism) could never be designated as catastrophically impaired as a result of a MVA if they had severe functional impairments before the accident. This is an absurd conclusion which would rule out vulnerable populations from accessing statutory accident benefits.

[59] I find that the applicant has met her onus in demonstrating that her accident-related depression worsened her autism symptoms, as put forward by Dr. Shamalack. The father was consistent in speaking about the applicant's

functional capabilities prior to the accident. He argued that before the accident she could ride a bike for prolonged periods with supervision, dress herself with cueing, eat independently, and assist with completing tasks around the house with cueing and supervision. To me, this indicates a marked level of functionality pre-accident, as while she was not precluded from useful functioning and still required supervision and cueing in order to adapt to different situations, she was significantly impeded by her autism.

[60] Contrasted against her functioning after the accident, I find that she has moved from a marked impairment to an extreme impairment in the sphere of adaptation. She now requires assistance in almost every area and appears unable to adapt to new situations, leaving her often in her room isolated. OT Starr Robinson testified that during her assessment of the applicant she screamed uncontrollably for many minutes after being greeted by the assessor. Per the father's testimony she is now completely dependent on her parents. The *Guides* are helpful in this regard, as this description mimics the language in the *Guides,* which reads: "a person who cannot tolerate any change at all in routines or in the environment, or one who cannot function and who decompensates when schedules change in an otherwise structured environment, has an extreme limitation of adaptive functioning." Based on this, I am satisfied that this describes the applicant's current condition.

[61] I find that the applicant has sustained a catastrophic impairment under criterion 8 as a result of having an extreme impairment in the area of adaptation caused by the accident.

The applicant is entitled to ACBs in the amount of $1,920.67 per month from present

[62] I find that the applicant is entitled to ACBs in the amount of $1,920.67 per month from present because I accept the recommendations of OT Mari Vitali-Perrier.

[63] Under Section 19(1)(a) of the *Schedule*, an insurer must pay for reasonable and necessary attendant care services incurred by or on behalf of the insured person as a result of the accident. The test to establish that expenses have been incurred is set out in s. 3(7)(e) of the *Schedule*, in which the following criteria need to be satisfied: (i) the insured person has received the goods or services to which the expense relates; (ii) the insured person has paid the expense, has promised to pay the expense, or is otherwise legally obligated to pay the expense; and (iii) the person who provided the goods or services did so in the course of their employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or sustained an economic loss as a result of providing the goods or services to the insured person.

[64] On December 31, 2018, a Form-1 was submitted from OT Vitali-Perrier recommending ACBs in the amount of $1,920.67 per month. This was approved and the applicant was paid ACBs until August 19, 2019. In May 2019, the respondent requested further information from the applicant under s. 33 of the *Schedule*. In August 2019, a s. 44 assessment was completed by OT Saunders which found that ongoing entitlement could not be determined pending receipt of documents requested under s. 33. As such, the respondent cut off payment of the benefit. On June 16, 2021, a new Form-1 was submitted by OT Ramakrishnan recommending ACBs in the amount of $10,040.35 per month. This was denied by the respondent on July 7, 2021 on the grounds that the information provided was insufficient to determine eligibility.

[65] Therefore, the questions facing me are threefold: (1) is the applicant entitled to ACBs?; (2) is the applicant entitled to payment from August 20, 2019 to present?; and (3) what is the quantum owed?

Entitlement to ACBs

[66] When considering question (1) regarding entitlement, I find that the applicant meets the test for entitlement for ACBs because I accept the causation findings of the accident-related impairments and find that these impairments necessitate support from an attendant care provider.

[67] The applicant argued through the reports of OTs Vitali-Perrier and Ramakrishnan that ACBs are reasonable and necessary given her functional limitations. Based on their limited observations and their interviews with the father, both OTs identified that the applicant required assistance post-accident with dressing, grooming, meal preparation, hygiene, genitourinary care, bowel care, medication, bathing and showering, and maintenance of supplies and equipment. OT Ramakrishnan identified a higher level of support needed, expanding to the areas of mobility transfers, laundering, basic supervisory care, coordination of attendant care, skin care, washing dishes, grocery shopping, floor care, vacuuming, dusting, bathroom cleaning, bed making, and garbage removal.

[68] The respondent argued that because it was unable to accurately assess the applicant's pre-accident functionality, it was more likely that her functional impairments were the result of her autism diagnosis rather than accident-related impairments. In other words, the respondent advanced a similar causation argument to what it raised on the issue of catastrophic impairment.

[69] I agree with the applicant. Similar to my findings on the issue of causation as it related to the applicant's catastrophic impairment, I find that the testimony of the father, combined with the observations of the OTs, satisfies me that the applicant's functionality has deteriorated significantly since the accident, which requires the services of an attendant care professional. I believe the services recommended (such as dressing, hygiene, and meal preparation) are reasonable

and necessary given that the applicant appears to have significant difficulties with these activities post-accident. Prior to the accident, for example, she could dress herself, eat, and perform some hygiene tasks independently with cueing and supervision. Since the accident she has required a higher level of intervention and direct assistance in order to perform these basic tasks. Per the testimony of the father and the observations of the OTs, the applicant is largely non-responsive and will remain in bed without dressing, eating or performing hygiene tasks unless someone intervenes to perform these tasks for her. Based on this evidence, I find that the applicant is entitled to ACBs.

Outstanding Amounts Owed

[70] When considering question (2) regarding outstanding amounts owed, I find that the applicant is not entitled to any payments from August 20, 2019 to date because nothing has been incurred and she received a valid s.33 request for further information.

[71] The applicant argued that she was improperly cut off from ACBs on August 20, 2019 as a result of the respondent's deficient requests for further information under s. 33 of the *Schedule*. She argues that the respondent ended her attendant care benefit because she failed to respond to s. 33 requests on May 6 and May 29, 2019 asking for additional clinical notes and records for the prescribed time period. However, she argued that this s. 33 request was deficient because it did not specifically identify entitlement to ACBs as the reason for requesting additional records, therefore making the termination of benefits improper.

[72] The respondent argued that no benefits were payable because nothing was incurred after August 19, 2019. It argued that s. 3(7)(e) of the *Schedule* is clear in indicating that ACBs are only payable for services received which were incurred. Further, it argued that the s. 33 argument raised by the applicant was without merit because the letters requesting more information were proper in that they listed the specific information required in order to determine eligibility for statutory accident benefits and followed a s.44 assessment which concluded that entitlement to ACBs could not be established without this further information.

[73] I agree with the respondent and find that there are no ACBs payable for the period of August 20, 2019 to present. There is no evidence before me that any attendant care costs have been incurred, as the invoices cease after August 19, 2019, and no evidence of any other services rendered. There is no evidence before me to demonstrate that the applicant incurred any costs that would satisfy the requirements under s.3(7)(e) of the *Schedule.* Moreover, I am not satisfied by the applicant's argument that the s. 33 requests of the insurer were deficient as they clearly outlined the information requested in order to determine eligibility. As such, although I find the applicant entitled to ACBs as of present, nothing is

payable for the period before today as nothing was incurred and the applicant failed to present evidence to demonstrate that the requirements of s. 3(7)(e) were met.

Quantum of ACBs

[74] Lastly, on question (3) regarding quantum, I find that the applicant is entitled to $1,920.67 per month in attendant care, given that I accept the findings of OT Vitali-Perrier as reasonable and necessary.

[75] The applicant argued that she was entitled to the higher amount recommended by OT Ramakrishnan based on the OT's more recent assessment of her attendant care needs. OT Ramakrishnan argued that the applicant's needs have become more severe over time, necessitating a larger amount of attendant care support.

[76] The respondent made no submissions on quantum as it believed that the applicant was not entitled to benefits.

[77] I prefer the recommendations of OT Vitali-Perrier and find that the applicant is entitled to ACBs in the amount of $1,920.76 per month from present. While I have accepted that the applicant suffers from extreme accident-related impairments, that does not mean that we should not consider her functional impairments prior to the accident as a result of her autism. In doing so, I find that the report of OT Vitali-Perrier better aligns with the areas in which she had some function which was then decreased following the accident. For example, as it relates to dressing, the evidence of the father is that the applicant could dress herself independently prior to the accident with cueing and supervision. Since the accident, she requires a higher level of intervention. This matches what OT Vitali-Perrier recommended.

[78] Conversely, OT Ramakrishnan has identified vastly more areas of functional assistance required and has suggested that the applicant was partially able to conduct certain tasks before the accident. I am not convinced by many of these areas. For example, the report identifies a need for floor care and vacuuming assistance from attendant care. I do not recall any consistent evidence from the applicant suggesting that she was partially participating in this activity prior to the accident. It is far more likely that this activity was completed by her parents prior to the accident given her autism diagnosis. As such, I prefer the findings of OT Vitali-Perrier, who appears to have done a better job separating what was required as a result of accident-related impairments in her report of December 2018.

[79] In conclusion, I find that the applicant is entitled to ACBs in the amount of $1,920.67 per month from present. However, no ACBs are payable for the period

of August 20, 2019 to present because the A has not provided evidence that services were incurred or should be deemed incurred.

The applicant is partially entitled to the proposed OT treatment plan

[80] I find that the applicant is partially entitled to the proposed OT treatment plan because the assistive devices recommended are reasonable and necessary.

[81] 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.

[82] 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.

[83] The applicant argued that the proposed assistive devices were reasonable and necessary to assist with her functional requirements. Specifically, the treatment plan recommended a weighted blanket, a two wheeled walker, a bath chair, a raised toilet seat with arms, and a Play Station console.

[84] The respondent argued that these assistive devices were not needed because: (1) the applicant had been able to function without these devices for some time before the accident; and (2) assessors were unable to conclude whether the applicant's functional impairments were a result of the subject MVA.

[85] I find that the applicant is entitled to some of the items proposed in the disputed treatment plan. I have already made a finding regarding causation when I found that the subject MVA was a necessary cause of the applicant's impairments. I find that many of the proposed assistive devices would reasonably assist the applicant in improving her functionality. For example, a bath chair may assist the applicant in her bathing routine, a weighted blanket may assist with her disturbed sleep, a walker may assist in her ambulation around the house, and a raised toilet seat can assist in ensuring her toileting is more accessible. However, I find that the applicant has not made a case as to why a Play Station console is reasonable and necessary. As such, I am not approving that proposed cost ($525.00).

[86] I find that the applicant is entitled to $1,170.00 ($1,695.00 less $525.00) for the proposed OT treatment plan for assistive devices.

The applicant is not entitled to the proposed social rehab counselling treatment plan dated August 12, 2019

[87] I find that the applicant is not entitled to the proposed social rehab counselling treatment plan because I find that the applicant has not met her onus in demonstrating that the proposed treatment plan is reasonable and necessary.

[88] The test for entitlement is as stated above.

[89] The applicant made no submissions during the hearing regarding the reasonableness and necessity of this treatment plan. The OCF-18 stated that she was entitled to the proposed treatment in order to assist in “education, promoting health, and preventing disease”, “training, social skills”, “planning, service”, “instruction, promoting health, and preventing disease”, and “documentation, support activity”.

[90] The respondent argued that this treatment was unnecessary because its assessors had failed to establish a causal link between the applicant’s impairments and the subject MVA.

[91] While I reject the respondent’s argument on causation, the applicant has failed to meet her onus in demonstrating why the proposed treatment plan and the services enumerated are reasonable and necessary. I was not presented with evidence as to why these services would reasonably assist the applicant, nor as to why the costs were reasonable. As such, I find that the applicant has not met her onus in demonstrating that the proposed treatment plan is reasonable and necessary.

The applicant is not entitled to the proposed social rehab counselling treatment plan dated June 22, 2021

[92] I find that the applicant is not entitled to the proposed social rehab counselling treatment plan dated June 22, 2021 because the treatment provider no longer believed the treatment plan was reasonable.

[93] The test for entitlement is stated above.

[94] The applicant made no submissions on this particular treatment plan beyond entering into evidence the OCF-18.

[95] The respondent argued that this treatment was unnecessary because the social worker “requested that we withdrew this plan on her behalf” based on the fact that the applicant moved to Sturgeon Falls, meaning that “it would not be

reasonable for her to complete the assessment and treat [her] given the distance".

[96] Given the information in the denial letter, I find that the applicant is not entitled to the proposed treatment plan because the services are not reasonable, as per the treatment provider.

The applicant is not entitled to the proposed catastrophic impairment assessment

[97] I find that the applicant is not entitled to the $8,399.00 disputed amount remaining outstanding for the proposed $18,587.00 catastrophic impairment assessment.

[98] The test for entitlement is as stated above. Section 25(1) of the *Schedule* further elaborates the costs for an examination which are considered reasonable.

[99] The applicant made no submissions regarding the disputed amount.

[100] The respondent argued that the $8,399.00 denied as part of the catastrophic impairment assessment was denied because several assessments were duplications which exceeded the $2,000.00 per assessment statutory limit and that the $399.00 travel fee was also excessive and should have been included within the $2,000.00 assessor fee.

[101] I find that the applicant is not entitled to the disputed amount remaining outstanding for the proposed catastrophic impairment assessment. I do not have sufficient information before me to make a finding on whether the proposed costs were reasonable and necessary. I do not know which reports were incurred and why there may have been a duplication in reports. As such, I find that the applicant has failed to meet her onus in demonstrating that the proposed costs are reasonable and necessary.

Interest

[102] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule.* Interest applies on the approved OT treatment plan dated April 4, 2019.

Award

[103] I find that the applicant has not met her onus in proving that an award claim is owed.

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

[105] Neither party made submissions during closings regarding whether an award claim was payable.

[106] I find that the applicant has not met her onus in demonstrating that an award claim is owed.

ORDER

[107] I order the following:

i. The applicant is deemed catastrophically impaired.

ii. The applicant is entitled to ACBs in the amount of $1,920.67 from present.

iii. The applicant is not entitled to ACBs for the period of August 20, 2019 to present.

iv. The applicant is partially entitled to the proposed OT treatment plan dated April 4, 2019 in the amount of $1,170.00.

v. The applicant is not entitled to the proposed social rehab counselling treatment plan dated August 12, 2019 in the amount of $5,408.12.

vi. The applicant is not entitled to the proposed social rehab counselling treatment plan dated June 22, 2021.

vii. The applicant is not entitled to the disputed amount for the catastrophic impairment assessment.

viii. The applicant is entitled to interest on the proposed OT treatment plan dated April 4, 2019.

ix. The applicant is not entitled to an award.

Released: August 9, 2024

_____

Jeremy A. Roberts
Vice-Chair