Citation: Trottier-Plante v. Economical Insurance, 2023 ONLAT 21-002437/AABS

Licence Appeal Tribunal File Number: 21-002437/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:

Claire Trottier-Plante

Applicant

and

Economical Insurance

Respondent

DECISION

VICE-CHAIR: **Tyler Moore**

APPEARANCES:

For the Applicant:	Claire Trottier-Plante, Applicant Michael Switzer, Counsel Jess Hennessey, Paralegal
For the Respondent:	Natasha Richards, AB Specialist Martin Forget, Counsel Suhasha Hewagama, Co-counsel
Observer:	Joseph Obagi, Counsel Chantelle Colangelo, Articling Student
Court Reporters:	Vincent Tran-Luong, Sergio Oliveira

HEARD: by Videoconference: April 17- 21 and 24-26, 2023

OVERVIEW

[1] Claire Trottier-Plante, the applicant, was involved in an automobile accident on May 30, 2019, 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, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] Specifically, Economical denied that the applicant's accident-related impairments met the definition of catastrophic ("CAT") impairment based on a mental and behavioural disorder under the *Schedule*. The applicant submits that as a result of the accident she suffers from poor balance that results in regular falls and necessitates constant supervision, chronic pain, cognitive deficits including poor memory, and psychological trauma including post-traumatic stress disorder, major depression, and anxiety.

PROCEDURAL ISSUES

[3] The case conference report and order ("CCRO") issued by the Tribunal on July 23, 2021 set down a 20-day videoconference hearing for this matter to be heard in conjunction with file 21-002254/AABS, the applicant's daughter's claim. The CCRO, however, specified at paragraph 15 that the orders made were subject to the hearing adjudicator's discretion. At the outset of the hearing, and in accordance with section 25.0.1 of the *Statutory Powers Procedure Act*, a procedural order was made to separate the files so that they be heard consecutively and not concurrently.

[4] The applicant's representative submitted that the applicant had serious mental health and physical issues that would render her unable to testify at both hearings. She was also limited to testifying for only one to two hours at a time, which is why she was to be the only witness testifying during the first five days of the 20-day hearing scheduled. I note that the applicant provided her testimony over the course of two days and was accommodated with breaks as needed. She was able to participate fully in examination in chief, cross-examination, and re-direct. I also accommodated the applicant by permitting her to testify only once with respect to both her case and her daughter's case. The applicant's representative declined to submit a formal accommodation request to Tribunals Ontario.

[5] The applicant also submitted that hearing the cases one after the other would give the respondent a strategic advantage and prejudice the applicant, and that I

should recuse myself from the hearing because I was biased and denying the applicant procedural fairness. The applicant submitted that her testimony needed to be accommodated, that she had prepared for the hearing based on hearing two cases together, that I was inept as an adjudicator if I could not separate the details of the two hearings to be heard together, that my employment background as an assessor rendered me biased, and as a result the applicant would not have a fair hearing. The applicant also submitted that she would be denied procedural fairness by altering the length of the hearing because one of her witnesses, Ms. Tasha Sweitzer, case manager, was away on vacation and was unavailable.

[6] The respondent submitted that it agreed that the two matters should be heard separately. The claims were separate, as were the experts and treating physicians. The respondent agreed that there was significant risk of being able to dissect the issues between the two cases, should they be heard together. With respect to the allegation of bias, the respondent submitted that there was no bias, and no appearance of bias. The respondent also submitted that the applicant would not be denied procedural fairness because there had never been an agreed upon schedule of witnesses, despite being requested by the respondent.

[7] I set this matter down for an 8-day hearing, commencing April 17, 2023. The hearing for file 21-002254 was set down for 5-days, commencing May 1, 2023. The hearing timelines were established with the Tribunal's mandate to ensure fair and proportionate hearings relative to the issues in dispute in mind. The applicant submitted that a 20-day hearing was required to accommodate the applicant, but there was no mention in the CCRO about setting down a 20-day hearing to accommodate the applicant, or that the applicant had followed the Tribunals Ontario accommodation process. The applicant was allowed over four days to present her case and had that time to call witnesses as she sought fit. The parties knew about the hearing for several months.

[8] With respect to the allegation of bias or the appearance of bias, everyone comes into a hearing with previous life and work experience. The last assessment I conducted was over 10 years ago, so I don't find that to be an issue. I did not know, and had not worked with, any of the potential witnesses listed on the parties' finalized witness lists. I also have no interest in the outcome of either case. For these reasons, I do not find any bias and therefore did not recuse myself.

[9] The respondent also sought to introduce supplemental brief #5 for consideration. The document contained a total of 358 pages and included the respondent's CAT

reports as well as various clinical notes and records. The respondent submitted that the brief was not filed until April 6, 2023, because CAT was not added as an issue in dispute until March 24, 2023. The clinical notes and records contained in the brief were not received until February 2023.

[10] The applicant submitted that she prepared for the hearing based on the hearing briefs that were previously filed. That did not include the respondent's supplemental brief #5. The applicant did not have the opportunity to have her own experts review and comment on the respondent's CAT reports.

[11] I allowed the respondent's supplemental brief #5 into evidence. I found that the documents were relevant in order to respond to the recently added CAT issue, and I accepted the respondent's explanation for the delay in filing the documents. These documents entered as exhibits from the respondent's supplemental brief #5 have gone to weight.

ISSUES

[12] The issues in dispute are:

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

ii. Is the applicant entitled to an attendant care benefit in the amount of $7,631.88 per month from August 6, 2020 to date and ongoing?

iii. Is the applicant entitled to $987.16 for other goods and services of a medical nature, proposed by Vitality Assessments Group in a treatment plan/OCF-18 ("plan") dated October 18, 2019?

iv. Is the applicant entitled to $1,000.00 ($1,299.25 less $299.25 approved) for occupational therapy services, proposed by OT Ontario East in a plan dated March 18, 2020?

v. Is the applicant entitled to $350.00 for physiotherapy services, proposed by Maple Care Physiotherapy Clinic in a plan dated July 8, 2020?

vi. Is the applicant entitled to $23,850.63 for occupational therapy services, proposed by OT Ontario East in a plan dated July 19, 2020?

vii. Is the applicant entitled to $252,413.75 for home modifications and home devices, proposed by Puddicombe Access Solutions Inc., in a plan dated July 13, 2020?

viii. Is the applicant entitled to $5,294.05 for home accessibility report, proposed by Puddicombe Access Solutions Inc., in a plan dated April 17, 2020?

ix. Is the applicant entitled to $36,200.00 for one year of rent, proposed by OT Ontario East in a plan dated September 30, 2020?

x. Is the applicant entitled to $4,520.00 ($20,803.30 less $16,283.30 approved) for CAT impairment assessments, proposed by Omega Medical Associates in a plan that was partially approved on March 26, 2021?

xi. Is the applicant entitled to $90,570.87 for a wheelchair accessible van and motorized scooter, proposed by OT Ontario East in a plan that was denied by the respondent on July 14, 2021?

xii. Is the applicant entitled to $4,389.00 ($11,870.96 less $7,481.96 approved) for occupational therapy services, proposed by OT Ontario East in a plan that was partially approved on June 24, 2021?

xiii. Is the applicant entitled to $1,118.64 ($1,280.45 less $161.81 approved) for travel expenses that were partially approved by the respondent on June 3, 2021?

xiv. Is the applicant entitled to $7,971.00 for portable storage expenses that were denied by the respondent on June 7, 2021?

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

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

RESULT

[13] The applicant has not sustained a CAT impairment under criterion 8 as a result of the accident.

[14] The applicant is not entitled to attendant care benefits in the amount of $7631.88 per month from August 6, 2020 to date and ongoing.

[15] The applicant is not entitled to any of the OCF-18s in dispute.

[16] The applicant is not entitled to interest on any overdue payment of benefits as none of the benefits in dispute are payable.

[17] The claim for an award is dismissed.

ANALYSIS

Witness Reliability and Credibility

[18] I found that the applicant was not a reliable or credible witness. For that reason, I have given limited weight to her oral testimony and self-report that was provided to her assessors. Instead, I have put more weight on the medical evidence which was based on direct examination, observation, and assessment.

[19] The applicant has been in receipt of CPP disability benefits consistently since 2010. To be eligible for CPP disability benefits, an individual must be incapable regularly of pursuing any substantially gainful employment. Their disability must also be prolonged, in that it is expected to last for an indeterminate amount of time. According to the applicant, when she applied for CPP disability benefits she was in crisis due to anxiety and depression. The applicant testified that her symptoms improved after she applied for CPP disability benefits, but she could not recall when.

[20] According to the applicant, she lived and worked 60 to 80 hours per week at Pinerest Residence, a group home for adults with mental disabilities, up until the time she had a slip and fall accident at work in August 2015. She was reportedly doing fine mentally and physically right before that incident. If that was the case, I find it is unlikely then the applicant would have met the criteria for ongoing entitlement to CPP disability benefits.

[21] The applicant testified that just before the car accident in May 2019 she was 70 to 80% recovered from her slip and fall injuries. She testified that she was doing fine physically and did not require any assistive devices for walking. She still had some back problems, but they were getting better each day. However, in February 2019, just three months before the car accident, the applicant completed a questionnaire for Dr. Gordon Ko, pain specialist, in which she noted that she felt no improvement symptomatically or functionally since her slip and fall accident in 2015. She indicated that she continued to have pain in her left hand after fracturing it and undergoing surgery, she could not work and felt useless, she had low self-esteem, constant headaches, and nausea. The applicant also noted that she felt worse than ever in terms of how her slip and fall recovery was going.

[22] The applicant submitted that there is no documentation on file specifically related to her health/functional status in the month leading up to the car accident. For

that reason, and in the absence of contradictory evidence, the applicant submitted that the only evidence to consider is the applicant's testimony. That is contradictory to what the applicant's representative submitted in his closing argument. In closing, he submitted that it was unrealistic for any IE assessor to expect to get a detailed and accurate history from the applicant, who had memory problems and was psychologically compromised. If that is the case, then I question how I could put any weight on the applicant's testimony. Regardless, I found that the applicant was not a reliable or forthcoming witness and gave her testimony limited weight.

[23] The applicant submitted that the testimony of Jaden Bailey, social worker/case manager and Kayla Brunet, personal support worker should be given significant weight. Based on their inconsistencies, however, I have given their testimony limited weight as well.

[24] Ms. Bailey testified that she has worked with the applicant a few times per week since September 2019. According to Ms. Bailey's clinical notes, however, she was only in contact with the applicant once every two weeks. Ms. Bailey also testified that she was not aware of many aspects of the applicant's pre-accident level of care needs, medical follow-up, or the extent of her symptoms and functional deficits leading up to the May 2019 accident. These facts lead me to question the reliability of her testimony and her ability to comment on changes between the applicant's pre- and post-accident limitations.

[25] My concern with Ms. Brunet stems from her advocacy with the applicant, inconsistencies in her testimony, and the fact that she has a vested financial interest she has in the outcome of the hearing.

[26] Ms. Brunet is close with the applicant and her daughter, as they are her first and only personal support work clients. According to Ms. Brunet, she is owed over $10,000.00 by the applicant for support services rendered to date. She testified that she has a financial agreement with the applicant's representative that will be honoured when the applicant has the funds to pay her. In terms of inconsistency, Ms. Brunet initially testified that the applicant did not go out into the community independently at all and had no life enjoyment. The surveillance, though, showed her going out for dinner independently on multiple occasions with her daughter between 2020 and 2022.

[27] There are inconsistencies between the oral testimony of the applicant and her witnesses and evidence on file. I find that these inconsistencies are quite important given the fact that so much of this matter turns on causation.

Has the applicant sustained a CAT impairment under criterion 8?

[28] I find that the applicant did not sustain a CAT impairment under criterion 8 as a result of the May 2019 car accident.

[29] The test for catastrophic (CAT) impairment is a legal test, not a medical test. In order to be determined CAT under the *Schedule*, the applicant must prove, on a balance of probabilities, that the impairments she suffered as a result of the accident have resulted in a class 4 impairment (marked impairment) or a class 5 impairment (extreme impairment) in any of the four areas of function outlined in Chapter 14 of the American Medical Association's Guides to the Evaluation of Permanent Impairment (the "Guides"), due to a mental or behavioural disorder. If the applicant is deemed to be CAT, then she can apply for a greater tier of benefits that accompanies the designation.

[30] In Chapter 14 of the Guides, impairments are classified according to how much they impair a person's useful functioning in the following four areas of function: activities of daily living ("ADLs"); social functioning ("SF"); concentration, pace and persistence ("CPP"); and adaptation ("AD").

[31] Impairments are classified using the word descriptions in Chapter 14 of the Guides on a five-category scale that ranges from no impairment to extreme impairment. These word descriptions are important because they assign meaning to each category. Therefore, it is not the category label itself (i.e. mild, moderate, marked, extreme) that must be carefully assessed and analyzed, but the language that the Guides use – the verbal rating criteria – describing these classifications.

[32] The Guides make it clear that a diagnosis of a specific psychological impairment is not required for CAT, but instead the focus is on function.

[33] For the purposes of this proceeding, the relevant classes – and the resulting disagreement between the parties – concerns whether the applicant's impairments fall within class 4 (Marked Impairment) on at least three of the four areas of function or are class 5 (extreme impairment) in one area of function. It is important to note that the difference in wording between the classes is subtle, but critical. For example, in Class 3 (Moderate), impairment levels are compatible with some, but not all, useful functioning. In Class 4 (Marked), impairment levels significantly impede useful functioning.

[34] The parties agree that the applicant does not suffer from a class 4, marked impairment in the domain of social functioning. The applicant submits that

according to Dr. Dory Becker, psychologist, the applicant sustained a Class 4 marked impairment in activities of daily living and adaptation, as well as a class 3 moderate to class 4 marked impairment in concentration, persistence, and pace.

[35] The respondent's CAT psychiatric assessor, Dr. Anil Joseph, however, found that the applicant sustained class 3 moderate impairments in activities of daily living and adaptation. He also found that the applicant sustained a class 2 mild to class 3 moderate impairment in concentration, persistence, and pace.

[36] The applicant submits that Dr. Joseph's more cursory interview of the applicant and lack of collateral information could have contributed to some of the differences between assessors. The applicant also submits that Dr. Joseph engaged the applicant in more relevant functional testing compared to Ms. Evans, and Dr. Joseph's report made significant inaccuracies about the applicant's pre-accident functioning.

[37] I will first address the domain of concentration, persistence, and pace. According to the Guides, this area of functioning refers to an individual's capacity to sustain focused attention long enough to permit the timely completion of tasks commonly found in work settings. In activities of daily living, this may be reflected in terms of the ability to complete everyday tasks.

[38] Dr. Becker found that when the applicant's current level of functioning was compared to her pre-accident functioning that she was at times as low as a Class 3, moderate impairment and, at other times, as high as a class 4, marked impairment. He acknowledged that the applicant's baseline functioning at the time of the accident had been poor, and the applicant needed help even before the accident because of pain. Dr. Becker relied on the assessment of Ms. Evans in arriving at his conclusion that the applicant sustained a class 3 to 4 impairment in this domain.

[39] The applicant testified that she continues to drive, both short distances and long distances, and to visit relatives in Quebec. A trip to visit her sister that might have taken one hour and thirty minutes before the accident might now take up to two hours and thirty minutes because she has to stop to take breaks because of pain, but the applicant is still able to complete that task. I find that driving requires a significant level of concentration.

[40] The evidence supports that the applicant has been able to attend and participate in numerous medical assessments since the time of the accident and complete various psychometric testing. The applicant advised Ms. Evans that she pays

her own bills and manages her own finances. She can use a computer and do some very simple meal preparation at home.

[41] Surveillance footage confirmed that the applicant is able to initiate and complete tasks like driving she and her daughter to a restaurant for a meal and engage with waitstaff or go to the grocery store independently.

[42] While I accept the applicant's inability to carry on many day-to-day tasks at home without assistance, I find that her residual level of functioning with respect to concentration, persistence, and pace when compared to her pre- and post-accident functional status is moderately impeded. That is to say that her impairment level in this domain is compatible with some, but not all useful functioning.

[43] Since I have found that the applicant suffers a class 3, moderate impairment in this domain, and it is agreed that the applicant does not suffer a marked impairment in the domain of social functioning, then I do not need to address the other two functional domains. To be deemed CAT impaired under criterion 8, the applicant would require class 4, marked impairments in at least three of the four functional domains.

[44] In the two to three years leading up to the car accident, cognitive and memory issues were consistently reported and documented, but no formal testing was completed. Pre-accident impairments have been documented by the applicant's own assessors, and the parties agree that she has a long psychiatric history, chronic back and neck pain, chronic headaches, poor memory and concentration, and balance issues.

[45] The applicant was diagnosed with fibromyalgia and chronic pain in 2008, and confirmed by Dr. Darell Ogilvie-Harris, orthopedic surgeon, in 2018. She was diagnosed with depression in 2009, had workplace injuries to her shoulder in 2010, and fractured her left and sustained a concussion in 2015. The applicant has been in receipt of a CPP disability pension since 2010. In 2019, she claimed psychological impairment and sought treatment related to the accidental death of her former spouse.

[46] It is well settled that the test for causation is the "but-for" test set out in Sabadash v. State Farm et al., 2019 ONSC 1121, or in other words: whether the applicant would have sustained her impairments but for the accident that occurred in May 2019. While the accident does not have to be the sole or only cause of the applicant's impairments, the accident must at least be a "necessary cause" of her impairments.

[47] The respondent submitted that the causation test set out in Monks v. ING Insurance Co. of Canada, 2008 ONCA 269 ("Monks"), as put forward by the applicant, is not the causation test that should be used. Instead, the "but for" test set out in Sabadash is the test that should be applied. I agree with the respondent that the "but for" test is the correct test for causation in statutory accident benefits disputes.

[48] According to the applicant, her condition was improving at the time of the accident. She submitted that she was ambulating independently, she could perform activities of daily living, she had resumed some of her work duties, and she was starting to plan a return to regular work duties at Pinerest Residence over the next year. I do not find support for this, or that that the accident was a "necessary cause" of her impairments. There is limited supportive evidence of this. For example:

i. In 2010, the applicant's CPP disability benefits application indicates that the applicant had a lack of concentration and poor memory, she only slept 3 hours per night, and she needed assistance washing her hair, bathing, dressing, and tying her shoes. She also had bowel control problems, an inability to stand or walk for more than 15 minutes, and only cooked using a microwave.

ii. In 2017, Ms. Katelyn Mills, occupational therapist, reported that the applicant had headaches, low mood with suicidal ideation, anxiety, sleep disorder, fatigue, reduced stamina and balance, and increased risk of falls. She was unable to complete household tasks due to fatigue, pain, amotivation, and reduced stamina, and she could not shower/bathe, groom her hair, toilet, dress/undress, or be mobile on a daily basis. Ms. Mills recommended attendant care for dressing/undressing, self-grooming, bathing, meal preparation, laundry, seeping, cleaning, changing bed linens, and grocery shopping. Constant supervision was recommended because the applicant reported suicidal ideation and a plan.

iii. In January 2018, the applicant's family doctor, Dr. Lise Beaubien, noted that the applicant's diabetes was quite poorly controlled, and that the applicant had muscle wasting and a marked lack of energy. The applicant had hip issues bilaterally and she advised Dr. Beaubien that she had been told that she needed a hip replacement.

iv. In September 2018, Dr. Ogilvie-Harris reported that the applicant continued to have neck pain, headaches, poor concentration and

memory, poor sleep, fatigue, and depression. She had become socially withdrawn and did very little activity. Dr. Ogilvie-Harris found that the applicant had severe pain-related functional limitations due to both physical and psychological issues. She also had moderate to severe disability in mobility, a severe cognitive disability, and severe limitations with self-care and participation in activities. The applicant was diagnosed with chronic pain syndrome or somatic symptom disorder, and her prognosis was poor.

v. In February 2019, Dr. Tammy Ricci, psychologist, diagnosed the applicant with post-traumatic stress disorder symptoms, depression, and suicidal ideation. The applicant's reported symptoms continued to be pain, headaches, depression, nausea, dizziness, sleep difficulties, reduced appetite, and poor concentration. Dr. Ricci indicated that the applicant had significant difficulty meeting even basic needs such as bathing, dressing, eating, and sleeping.

vi. In April 2019, just a month before the accident, Dr. James Brown, pain specialist, noted that the applicant had pain walking up and down stairs, and with standing or sitting too long. He performed joint injections and recommended more.

[49] At the time of the accident the applicant was receiving attendant care for cleaning the bathroom, meal preparation, changing beds, laundry, showering, washing her hair, going for walks, and companionship. Ms. Ellyse Wight, occupational therapist, reported that the applicant had daily headaches to the point of throwing up, sharp left shoulder pain, constant left hip pain, constant left wrist/hand pain, poor memory, suicidal thoughts, and an inability to sleep for more than 3 hours. Ms. Wight noted even at that time that Pinerest Residence was not an ideal home for the applicant.

[50] The respondent's position is that the applicant's pre-accident symptoms and presentation is not dissimilar to after the accident. I have to agree. None of the applicant's witnesses knew her before the accident, so they could not accurately comment on any changes to her functional or health status. That has limited limits the applicant's ability to establish causation.

[51] Just a few days after the accident, the applicant's support worker indicated that the applicant had a sore chest from the accident, but they still played cards and talked. The applicant advised her support worker on June 4, 2019 that she did not want the accident documented because she was waiting to settle her 2015 slip and fall accident claim.

[52] Inconsistencies between the applicant's self-report and evidence are apparent in Ms. Mills' August 2019 report. The applicant reported being independent with all activities of daily living (showering, hair grooming, dressing, toileting, feeding, mobility, and transfers) before the accident, but that was not the case. The applicant reported the same thing to Ms. Lyndsey Dennis, who reported in March 2022 that the applicant advised her that before the accident she was independent in all self-care activities, including dressing, grooming, and showering. Then, in February 2022, the applicant advised Dr. Christian Fortin, psychiatrist, that her headaches had largely resolved at the time of the accident. The applicant also reported to him that since the accident she had constant back pain, neck pain, constant headaches, new onset imbalance, poor attention and concentration, and poor memory. I find that the applicant's complaints are not dissimilar to what she reported prior to the accident.

[53] The evidence also supports that the applicant had balance issues before the accident. What is not clear is whether any worsening of her balance was related to the accident itself, or to her chronic back/hip pain, her uncontrolled diabetes causing neuropathies. The applicant has not met her onus of establishing that the accident was a necessary cause of the impairments from which she is suffering. Unfortunately, many of the applicant's assessors that did address causation relied on the applicant's self-report which I find was neither credible nor reliable.

[54] I do, however, agree with the applicant that her jaw pain and oculo-visual symptoms were not pre-existing, but she has failed to convince me that but-for the accident she would not have her other ongoing impairments.

Is the applicant entitled to an attendant care benefit in the amount of $7,631.88 per month from August 6, 2020 to date and ongoing?

[55] I find that an attendant care benefit in the amount of $7,631.88 per month from August 6, 2020 to date and ongoing that was proposed by Ms. Dennis is not reasonable and necessary.

[56] Section 19 of the *Schedule* provides that attendant care benefits shall be paid for all reasonable and necessary expenses incurred by an insured for the services of an attendant or aide. The insured person bears the onus of establishing entitlement to the benefits on a balance of probabilities.

[57] Section 3(7)(e) of the *Schedule* provides that a person has "incurred" an attendant care expense if they have received goods and services to which the expense relates; paid the expense; promised to pay the expense; or otherwise legally obligated to pay the expense.

[58] On August 6, 2020, Ms. Dennis completed a Form 1 indicating that the applicant required attendant care in the amount of $10,269.23 per month. The respondent agreed to continue to pay $2,637.35 per month until it received the section 44 assessment of attendant care needs. That would equate to the difference between the $10,269.23 per month proposed by Ms. Dennis and the $2,637.35 that the respondent agreed to pay without prejudice.

[59] The applicant submitted that she would not be able to exit her home independently in case of an emergency and that she could fall when getting up to use the washroom at night.

[60] I am persuaded by the reports from Ms. Evans and Ms. Robinson who both concluded that the applicant did not require constant, 24/7 attendant care for safety or in case of emergencies. Both Ms. Evans and Ms. Robinson found that the applicant demonstrated the cognitive ability to recognize an emergency and call 911. She was also able to use her own smart phone. The building manager of the apartment building she currently resides in is also aware that she would require emergency response assistance to exit from her ninth-floor apartment in case of an emergency and the elevators were not working. At Pinerest Residence, the applicant was also observed to be able to enter and exit the building and her unit independently.

[61] I also find that the applicant has failed to establish causation, for reasons already outlined, related to her balance and cognitive issues that would necessitate 24/7 attendant care as proposed by Ms. Dennis.

Is the applicant entitled to $987.16 for other goods and services dated October 18, 2019?

[62] I find that the remainder of the partially approved goods and services proposed by Ms. Mills, occupational therapist, on an OCF-18 dated October 18, 2019 are not reasonable and necessary.

[63] The OCF-18 in question proposed by Ms. Mills sought a total amount of $1,335.02. On November 7, 2019 the OCF-18 was denied and then on November 11, 2019 the respondent requested that the applicant attend an IE assessment with Ms. Donna Matheson, occupational therapist, because the respondent had not received any medical records from May 30, 2019 to the time of the request from the applicant's family doctor, hospital, or any specialists involved in the applicant's care. There was no medical documentation to support the need for the proposed equipment and assistive devices.

[64] On November 25, 2019, Ms. Matheson reported after her in-home assessment that some of the proposed goods and services were reasonable and necessary. Ms. Matheson approved a large wall calendar, dressing stick, long-handled bath sponge, TENS machine, a cane, and documentation to support activity for the

claim form. Ms. Matheson found that a bidet toilet seat, transfer frame, delivery/assembly/installation, walking poles, and a piano keyboard were not reasonable and necessary at that time. Ms. Matheson indicated that the approved items would assist the applicant with pain and activities of daily living, including safe mobilizing. Ms. Matheson was of the opinion that walking poles could aggravate the applicant's shoulder and wrist pain, and that instead of a piano keyboard the applicant's therapy should be focused on the engagement in activities of daily living and resuming community-based activities. The applicant also had limited space for a keyboard and Ms. Matheson was concerned that improper positioning could exacerbate the applicant's pain. As far as a bidet toilet seat, Ms. Matheson did not consider it reasonable or necessary because it would not increase the height of the toilet, which is an issue for the applicant. A raised toilet seat and frame could assist with transfers, and a long-handled toileting aid should be trialed first.

[65] The applicant did not provide any submissions specifically related to why the disputed goods and services were reasonable and necessary.

[66] I agree that based on the observed functional limitations around the time of the proposed OCF-18, the assistive devices were only partially reasonable and necessary, as approved by Ms. Matheson. She provided supportive reasoning and legitimate concern for the goods and services that were denied.

Is the applicant entitled to $1,000.00 for occupational therapy services dated March 18, 2020?

[67] I find that the outstanding $1,000.00 as part of an OCF-18 submitted by Ms. Dennis on March 18, 2020 is not reasonable and necessary for the following reasons.

[68] The OCF-18 in dispute submitted by Ms. Dennis was for a total amount of $6,597.81. It proposed a $200.00 claim form fee, a $2,000.00 assessment, six sessions of occupational therapy at $149.62 each, provider travel time in the amount of $1,496.28, $299.28 for planning, $299.28 for documentation, $1,000.00 to complete an attendant care/Form 1, $299.25 for three brokerage services, and $100.00 for items for treatment participation.

[69] The respondent partially approved the OCF-18 in the amount of $5,292.56 on April 21, 2020. On July 8, 2021, the respondent agreed to fund the three brokerage services at a total cost of $299.25, as case management services are included in the applicant's optional benefits. The remaining $1,000.00 was an amount to complete an attendant care assessment/Form 1.

[70] The respondent submitted that the remaining $1,000.00 was not payable because it could be completed within the $2,000.00 occupational therapy assessment fee it approved as part of the same OCF-18.

[71] I agree with the respondent and find that the $1,000.00 proposed fee for an attendant care assessment/Form 1 is not reasonable and necessary. Section 25(5) of the *Schedule* states that an insurer shall not pay more than a total of $2,000.00 in respect to fees and expenses for conducting any one assessment or examination and for preparing reports in connection with it. I find that it is not reasonable for Ms. Dennis to propose separate assessment fees for an occupational therapy assessment and an attendant care/Form 1 which can be captured and carried out by the same assessor and the same assessment time.

Is the applicant entitled to $350.00 for physiotherapy services dated July 8, 2020?

[72] I find that the disputed $350.00 for physiotherapy services proposed on July 8, 2020 is not reasonable and necessary.

[73] On August 18, 2020, the respondent responded to the OCF-18 in question that was proposed by MapleCare Physiotherapy Clinic for a total amount of $5,113.50. The OCF-18 was for physiotherapy services, a TENS unit, and a heating pad. The respondent partially approved $4,563.50 on a without prejudice basis pending an IE assessment. On July 8, 2021, upon review of the applicant's file, the respondent agreed to further fund the proposed documentation fee in the amount of $200.00. That leaves $350.00 in dispute.

[74] Dr. Mendis and Dr. Khan found that the proposed OCF-18 was not reasonable or necessary in its entirety based on the recovery stage she was at post-injury, and because the proposed treatment and goods and services were not anticipated to provide the applicant with any long-term benefit for any accident-related soft-tissue sprains/strains. The respondent did, however, agree to still fund the amount that was partially approved earlier.

[75] The remaining $350.00 is not reasonable and necessary. The respondent already approved and provided a TENS machine and heating pads to the applicant as part of the OCF-18 submitted by Ms. Mills on October 18, 2019. Those items are therefore duplicative.

Is the applicant entitled to $23,850.63 for occupational therapy services dated July 19, 2020?

[76] I find that the OCF-18 for occupational therapy services dated July 19, 2020 is partially reasonable and necessary in the amount of $824.69, as approved by the respondent on January 18, 2021.

[77] The respondent denied the OCF-18 because it had not received any clinical notes and records from the applicant's treating family doctor or any specialists involved in the applicant's care from May 30, 2019 to the date of denial on

October 5, 2020. Then, on January 18, 2021, following IE reports dated January 14, 2021, the respondent approved $824.69.

[78] Specifically, Ms. Robinson noted that the proposed recliner chair was not reasonable or necessary as the applicant had a leather recliner in good shape which was used as the applicant's primary seating. The recliner she had did not have heat, but the applicant had been approved for heating pads twice since her claim was initiated, which could be used while sitting in the chair and positioned for the greatest comfort. Next, the proposed heating pad was not reasonable or necessary as it had already been approved on two previous OCF-18s. The request was duplicative.

[79] Ms. Robinson found that the proposed raised toilet seat with arms and a bath bench was reasonable and necessary. A handheld shower was not reasonable as Ms. Robinson observed that the applicant had one at the time of her report. A long-handled bath sponge was not necessary, as again, it was duplicative and previously approved. A long-handled duster with articulating head was partially reasonable at a cost of $19.99. She also found that an adjustable bed with orthopaedic mattress was not reasonable, as the applicant did not present with an orthopaedic or neurological injury that would require a specialty bed. A tempurpedic pillow was partially reasonable in the amount of $67.99, and a gel foam wedge pillow was partially reasonable and necessary in the amount of $49.97. A heated seat for the applicant's car was also found to be partially reasonable and necessary in the amount of $40.99, as was a wheeled grocery/laundry cart in the amount of $53.99.

[80] Ms. Robinson approved the proposed perching stool and long-handled reacher. A washer/dryer combo was not reasonable or necessary as the applicant already owned a front-loading washer and dryer, positioned in a stacked position. A walker/scooter was deemed not reasonable or necessary as the request did not appear to be medically supported for accident-related impairments. Ms. Robinson found the same for an apple phone, laptop, and watch as the request was not medically supported to be an accident-related need. Ms. Robinson determined that a membership for a pool and bathing suit was not reasonable or necessary due to the fact that the applicant had previously been provided with a membership and it was not used. It was duplicative of a previous unsuccessful service.

[81] The provision for "explaining pain applications" on the proposed plan was not reasonable or necessary because the applicant had previously been provided with chronic pain education was waiting for a referral to a pain clinic. An electronic keyboard, however, was partially approved in the amount of $67.72.

[82] I am persuaded by Ms. Robinson's report and concur with her position that only certain items on the OCF-18 in dispute were reasonable and necessary. Other items were duplicative from previous treatment plans, and items such as an

adjustable orthopaedic mattress or apple phone/laptop were not warranted based on the applicant's accident-related injuries.

Is the applicant entitled to $252,413.75 for home modifications and home devices, dated July 13, 2020?

[83] I find that the home modifications and home devices as proposed are not reasonable and necessary for the following reasons.

[84] The applicant submitted that she requires the use of a walker at all times as a result of the accident. Her housing is not accessible and does not support the ability to ambulate safely and freely using a walker. Her housing needs to be modified to accommodate the changes to her mobility needs.

[85] The respondent denied the OCF-18 prepared by Ms. Dennis for home modifications because the report from Puddicombe Access Solutions contains recommendations for future wheelchair reliant needs. The respondent submitted that there was no documentation which supported that the applicant required a wheelchair at the time of the report.

[86] In response to the OCF-18 and housing report, Mr. Daniel Charette, construction manager at BuildAble reported on January 14, 2021 that the applicant's home accessibility report from Mr. Scott Puddicombe of Puddicombe Access Solutions dated June 1, 2020 identified multiple housing modifications of Pinerest Residence, but they all related to wheelchair accessibility. He referenced Mr. Puddicombe's report by reiterating that Ms. Dennis recommended the home modifications for wheelchair accessibility based on the fact that the applicant would likely require the use of a wheelchair earlier in her lifetime than if she had not been in the accident. In other words, Ms. Dennis proposed the home modifications based on her consideration for the applicant's potential future accessibility needs and not based on her current level of function.

[87] Ms. Starr Robinson, occupational therapist, concurred with Mr. Charette and testified that Ms. Dennis' recommendations for home modifications were based on potential future requirements. According to Ms. Robinson, it is not within the scope of practice for an occupational therapist to provide a prognostic opinion regarding the use of a wheelchair. Ms. Robinson testified that she reviewed the applicant's records, and she too could not find any medical recommendation for a wheelchair or wheelchair accessibility.

[88] To add additional support, on January 14, 2021, Dr. Takis Mendis, neurologist, found that the proposed home modifications were not reasonable and necessary in the absence of a documented neurological accident-related injury which would require such services. Dr. Abdul Khan, physiatrist, was of the same mindset and he reported on January 14, 2021 that the applicant sustained no accident-related physical diagnosis, impairment, or active structural pathology for which home

modifications for the purpose of accessibility would be considered reasonable and necessary. He concluded that the applicant's accident-related sprain/strain injuries did not warrant any specific home modifications.

[89] Ms. Robinson also reported on January 14, 2021 that Pinerest Residence, where the applicant was residing at the time of the home accessibility assessments, was not able to be considered for renovation as the applicant and her daughter were told that they had to leave by December 2019. According to Ms. Robinson, that alone would render the proposed modifications unreasonable. Ms. Robinson also testified that she found that she observed the applicant's mobility to be functional for ambulation, transfers, sitting, and standing. The applicant could move within her environment and engage in activities within that environment. Ms. Robinson concluded that the applicant did not require a wheelchair because she was ambulatory, and independent with transfers to and from a patio chair and recliner.

[90] I am also persuaded by the fact that the proposed home modifications were to a property that the applicant formerly resided in. She is seeking home modifications to a property in which she no longer resides or has access to. Furthermore, there were no expenses incurred and no modifications to the home were made. The applicant moved from Pinerest Residence to a hotel because the property was condemned, and she was evicted. That was the reason she could no longer live there. The applicant would have to propose a new accessibility plan for a new property.

Is the applicant entitled to $5,294.05 for a home accessibility report, dated April 17, 2020?

[91] I find that the OCF-18 for a home accessibility report dated April 17, 2020 has already been paid in compliance with section 25(5) of the *Schedule*. Section 25(5) sets out that an insurer shall not pay more than a total of $2,000.00 in respect of fees and expenses for conducting any one assessment or examination and for preparing reports in connection with it, whether it is conducted at the instance of the insured person or the insurer, or any amount in respect of fees for preparing a future care plan, a life care plan, or a similar plan or for any assessment or examination conducted in connection with the preparation of the plan.

[92] While the insurer initially denied the proposed OCF-18, on May 4, 2020, the respondent partially approved $2,185.00 plus HST of the proposed $5,294.05 for the applicant's home accessibility report by way of email to the applicant's representative.

Is the applicant entitled to $36,200.00 for one year of rent dated September 30, 2020?

[93] I find that $36,200.00 for one year of rent is not reasonable and necessary for the following reasons.

[94] The applicant submitted that the proposed OCF-18 that was submitted by Ms. Dennis for one year of rent, inclusive of utilities and maintenance, was proposed to cover the applicant's rent while the insurer was considering the home modifications proposal report. The applicant's living environment was unstable, and the applicant was unable to complete the maintenance the home required. The Pinerest Residence home was also inaccessible because it did not have stairs, the hallways were narrow, and the walkways were cluttered. It was also infested by rats. The applicant submitted that at the time the OCF-18 was proposed, the applicant had nowhere to live and had no funding to support relocation.

[95] The respondent submitted on October 15, 2020 that it did not believe that the home modifications, as proposed by Puddicombe Access Solutions were reasonable and necessary as a result of the accident. Once again, the report included recommendations for future wheelchair reliant needs, for which there was no documentation that a wheelchair was required at that time. In addition, the respondent submitted that it had not been provided with information regarding the rent being requested, which could be in the form of a rental agreement, description of a property, or quote. The respondent had also not been provided with any pre-accident accommodation expenses for the applicant. The respondent requested a series of supporting documents from the applicant, or written confirmation of their request, by November 15, 2020.

[96] On January 14, 2021, Mr. Charette and Ms. Starr reported that the proposed home modifications to Pinerest Residence were not reasonable and necessary based on the assumption of potential future wheelchair accessibility needs. That was only 106 days, or just over three months after this OCF-18 for rent was submitted. The applicant was also living at Pinerest residence during that time. She did not move from Pinerest to a hotel until January 2021. According to the applicant's testimony, she was not paying rent while she resided at Pinerest Residence.

[97] The proposal for home modifications was denied in January 2021 by the respondent after IE assessments were conducted. The applicant did not move from Pinerest, where she reported she was not paying rent, to a hotel with her daughter until early 2021, even though Pinerest Residence lost its licence to operate as a group home in 2018. At the time the applicant and her daughter moved to a hotel, they had been the only people living at Pinerest for some time.

[98] I find that Ms. Dennis' proposal for rent while the respondent was considering the home modification report is not reasonable and necessary.

Is the applicant entitled to $4,520.00 for CAT assessments that were partially approved on March 26, 2021?

[99] I find that the applicant is not entitled to $4,520.00 for CAT assessments as the assessment fees have already been approved by the respondent in accordance with the assessment fee cap outlined in the *Schedule*.

[100] On March 16, 2021, Dr. Lisa Becker of Omega Medical Associates, completed an OCF-18 that proposed a multi-disciplinary CAT impairment assessment in the amount of $20,803.30. On March 26, 2021, the respondent partially approved the OCF-18 for $16,283.30.

[101] The respondent submitted that according to section 25 of the *Schedule,* an insurer shall not pay more than a total of $2,000.00 in respect of fees and expenses for conducting any one assessment or examination and for preparing reports in connection with it.

[102] The OCF-18 in dispute proposes $5,500.00 for a psychology assessment and an additional $500.00 for psychometric testing, plus tax. The OCF-18 amount in dispute reflects the amount exceeding the $2,000.00 cap, according to the *Schedule*, for a CAT psychological assessment. In other words, the OCF-18 in question proposed $3,500.00 more than the $2,000.00 assessment cap as well an additional $500.00 in conjunction with the same assessment, plus taxes.

Is the applicant entitled to $90,570.87 for a wheelchair accessible van and motorized scooter that was denied July 14, 2021?

[103] I find that the OCF-18 proposing a wheelchair accessible van and motorized scooter is not reasonable and necessary for the following reasons.

[104] On June 1, 2021, Ms. Dennis submitted an OCF-18 that proposed $200.00 for documentation, $87,547.00 for an accessible van, and $2,499.00 for a scooter, plus tax. On July 14, 2021, the respondent denied the request because there was no medical opinion provided that supported a prognosis that would require a wheelchair based on the applicant's injuries. The respondent relied on the reports from Dr. Khan, Dr. Mendis, and Ms. Starr who found that there was no accident-related physical diagnosis, impairment, or active structural pathology for which home modifications for the purpose of accessibility would be considered reasonable and necessary. The respondent also submitted that the applicant's change in function was determined by the assessors to be primarily due to self-imposed limitations and subjective reports of pain and other symptoms, rather than any underlying, active, ongoing disease or condition.

[105] Ms. Dennis noted that the treatment plan goals were to implement transportation that is accessible to improve community access and attendance at rehabilitation and medical appointments, as well as a return to activities of normal living.

[106] I do not disagree that the applicant has longstanding balance issues that have worsened over time to the point that she now uses a cane and walker, at least to a degree. The issue, however, comes down to causation and the applicant's level of mobility at the time the goods and services were proposed, not based on any potential future accessibility needs. As previously noted, I do not find a causal link between the applicant's balance issues and the May 2019 accident.

[107] I have also considered the surveillance footage obtained of the applicant. I understand that the footage represents a snapshot in time and is not necessarily representative of the applicant's level of function on a daily basis, but on multiple occasions between 2020 and 2022 the applicant was observed going out and accessing the community independently using only a cane, and in 2020 not using a cane or a walker. She could be seen going to a shopping mall, out to restaurants, to a craft store, to a bank, and to the grocery store. It is also important to consider that the applicant broke her foot in July 2021 and around that time she was observed to be using a walker. On a balance of probabilities, however, I find that the proposed wheelchair accessible van and scooter are not reasonable and necessary.

Is the applicant entitled to $4,389.00 for occupational therapy services that were partially approved on June 24, 2021?

[108] I find that the remaining portion of the OCF-18 for occupational therapy services on June 24, 2021 is not reasonable and necessary for the following reasons.

[109] The amount not approved by the respondent was for four hours to prepare progress reports after each occupational therapy session. The respondent approved four hours for one progress report at the end of the twelve approved occupational therapy sessions, which is reasonable.

[110] There appears to be an error on the OCF-18 itself, because at the end of the plan, under additional comments there is a note indicating "progress report to be completed at end of treatment block". Under part 12 of OCF-18, however, it lists 4 hours of "documentation for each of 12 sessions". Ms Dennis, who prepared the OCF-18 even notes under Part 9 b) of the OCF-18, states that the applicant's housing situation has been in a crisis state since fall of 2020 and the focus of occupational therapy intervention to date has been on maintaining mental health during this time and facilitating a successful relocation to a safe living environment.

[111] As a result, the disputed portion of the proposed treatment plan is not reasonable and necessary.

Is the applicant entitled to $1,118.64 for travel expenses that were partially approved on June 3, 2021?

[112] I find that the remaining portion of the travel expenses that were partially approved on June 3, 2021 are not payable for the following reasons.

[113] As per the FSCO transportation guidelines, the respondent is not liable to pay a medical benefit related to the first 50 km of transportation to and from a treatment session. Treatment beyond that distance is payable at $0.40 per km. Parking expenses from the OCF-6 were paid by respondent in the amount of $74.85 and mileage was paid in amount of $86.96. Approval was for mileage exceeding the first 50km pursuant to s. 268.3 of the *Insurance Act.* The remaining balance of the OCF-6 is not payable.

Is the applicant entitled to $7,971.00 for portable storage expenses that were denied June 7, 2021?

[114] I find that the OCF-6 for portable storage rental expenses is not reasonable and necessary.

[115] The applicant required portable storage rental pods at Pinerest Residence in relation to her eviction and forced move from that home. I find that the requirement for portable storage rental pods was related to having to move out of Pinerest Residence when the building was condemned and the applicant was evicted, and not related to the May 2019 accident.

Interest

[116] As none of the benefits in dispute are payable, interest does not apply.

Award

[117] 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.

[118] The applicant submitted that the respondent has known about all of the hardships the applicant has faced, but it has hidden behind s. 44 reports, which apply the incorrect causation test, to deny all benefits the applicant has sought. The applicant submitted that the respondent has a duty to act in good faith where the applicant is concerned, and it failed to do so.

[119] The respondent submitted that the applicant continues to receive attendant care and some case management and social worker assistance. Some of the proposed benefits have been partially paid, but all claims have been responded to in time.

[120] I do not find that the respondent unreasonably withheld or delayed the payment of benefits. The applicant is not entitled to an award.

ORDER

[121] The applicant has not sustained a CAT impairment under criterion 8 as a result of the accident. She has not established that but for the accident she would not have the psychological impairments she puts forth as the basis for a CAT determination.

[122] The applicant is not entitled to attendant care benefits in the amount of $7,631.88 per month from August 6, 2020 to date and ongoing.

[123] The applicant is not entitled to any of the OCF-18s in dispute as they are not reasonable and necessary.

[124] The applicant is not entitled to interest on any overdue payment of benefits as none of the benefits in dispute are payable.

[125] The claim for an award is dismissed.

Released: July 17, 2023

Tyler Moore
Vice-Chair