



**Citation: Walton v. Economical Insurance Company, 2023 ONLAT 21-007873/AABS**

**Licence Appeal Tribunal File Number: 21-007873/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:

**Jerome Whittaker Walton**

**Applicant**

and

**Economical Insurance Company**

**Respondent**

**DECISION**

**ADJUDICATOR: Harry Adamidis**

**APPEARANCES:**

For the Applicant: Jerome Whittaker Walton, Applicant  
Aron Zaltz, Counsel

For the Respondent: Fiona Von Kannen, Adjuster  
Martin Forget, Counsel  
Ainsley Shannon, Counsel  
Caylin MacPherson, Law Clerk

Court Reporter: Prashanth Thambipillai

**Heard by Videoconference: October 19-21, 2022 and October 24-26, 2022**

## OVERVIEW

- [1] The applicant was involved in an automobile accident on June 29, 2017, and sought benefits pursuant to the Statutory Accident Benefits Schedule – *Effective September 1, 2010 (including amendments effective June 1, 2016)* (“Schedule”). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”) for resolution of the dispute.

## ISSUES

- [2] The issues to be decided are:
1. Has the applicant sustained a catastrophic impairment as defined by the Schedule?
  2. Is the applicant entitled to attendant care benefits of \$1,212.39 per month from June 29, 2018 to date and ongoing?
  3. Is the applicant entitled to \$2,480.36 for an attendant care assessment recommended by Q Medical in a plan submitted on May 26, 2020 and denied on June 5, 2020?
  4. Is the applicant entitled to \$5,577.11 for psychological services recommended by Scarborough Medical Centre in a plan submitted on July 10, 2020 and denied on July 24, 2020?
  5. Is the applicant entitled to \$4,326.14 for chiropractic services recommended by Scarborough Medical Centre in a plan submitted on August 5, 2020 and denied on August 13, 2020?
  6. Is the applicant entitled to \$1,200.00 for psychological services recommended by Scarborough Medical Centre in a plan submitted on April 22, 2021 and denied on May 6, 2021?
  7. Is the applicant entitled to \$2,396.80 for psychological services recommended by Scarborough Medical Centre in a plan submitted on April 22, 2021 and denied on May 6, 2021?
  8. Is the applicant entitled to \$11,417.16 for psychological services recommended by Scarborough Medical Centre in a plan submitted on May 21, 2021 and denied on June 22, 2021?

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

[3] The applicant withdrew the issues listed as 2(c), (d), and (e) on the Case Conference Order.

## RESULTS

[4] The applicant is not catastrophically impaired.

[5] The applicant is not entitled to attendant care benefits, an attendant care assessment, five treatment plans, or interest.

## ANALYSIS

### Issue 1: Has the applicant sustained a catastrophic impairment?

[6] An insured person is deemed to be catastrophically impaired when an accident causes them to sustain a marked impairment (class 4), in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*), 4th edition, 1993 in three or more areas of function due to a mental or behavioural disorder. The four areas of function are: activities of daily living; social functioning; concentration, persistence, and pace; and adaptation.

[7] To determine whether an insured person is catastrophically impaired under Criterion 8, the Tribunal considers whether the accident caused a mental or behavioural disorder, the impact of the disorder on the person's life, and the level of impairment as described in section 3.1(1)8 of the *Schedule*. The onus is on the applicant to demonstrate that he sustained a catastrophic impairment as defined by section 3.1(1)8 of the *Schedule* (Criterion 8).

[8] The applicant submits that he has a marked impairment in all four areas function caused by mental disorders that he sustained in the motor vehicle accident (MVA).

[9] The respondent submits that the applicant has a marked impairment in adaptation. The other three areas of function are moderately impaired.

[10] I find that the applicant is not catastrophically impaired because he has not sustained a marked impairment in two areas of function, these being the activities of daily living and social functioning domains. Therefore, he cannot be found to have marked impairments in three or more areas of function

*Mental or Behavioural Disorder*

[11] Dr. Alfonso Marino, psychologist, assessed the applicant for an insurer’s examination on May 28, 2019. He diagnosed the applicant with post-traumatic stress disorder and major depressive disorder. Dr. Konstantine Zakzanis, psychologist, completed a catastrophic impairment determination report on Criterion 8 for the applicant. He also diagnosed the applicant with a post-traumatic stress disorder and major depressive disorder. Both psychologists attributed these disorders to the accident after reviewing the applicant’s pre-accident medical history and noting the development of these disorders post-MVA. The evidentiary value of the reports is sufficient for me to accept that the applicant sustained the mental disorders of major depressive disorder and post-traumatic stress disorder as a result of the accident.

*Activities of Daily Living*

[12] Where I find that the accident was the cause of the applicant’s disorders, I then consider how the disorders impact the applicant’s four areas of functioning, beginning with the activities of daily living. The *Guides* provide a list of the activities of daily living, which includes self care, personal hygiene, communication, ambulation, travel, sexual function, sleep, and social and recreational activities.

[13] The *Guides* set out the levels of impairment as represented in the chart below:

<b>Area or Aspect of Functioning</b>	<b>Class 1: NO Impairment</b>	<b>Class 2: MILD Impairment</b>	<b>Class 3: MODERATE Impairment</b>	<b>Class 4: MARKED Impairment</b>	<b>Class 5: EXTREME Impairment</b>
Activities of Daily Living	No impairment is noted	Impairment levels are compatible with most useful functioning	Impairment levels are compatible with some, but no all useful functioning	Impairment levels significantly impede useful functioning	Impairment levels preclude useful functioning
Social Functioning					
Concentration, Persistence and Pace					
Adaption (in a work-life setting)					

- [14] There is a clear distinction between a Class 3 moderate and a Class 4 marked impairment. Moderate impairments are compatible with some useful functioning. Marked impairments significantly impede useful functioning.
- [15] In my view, the evidence shows that the applicant's accident-related psychological disorders have resulted in a moderate impairment with regard to the activities of daily living. This is because his psychological impairments are compatible with some useful functioning.
- [16] The applicant testified that his lack of motivation compromises his personal hygiene. He showers, brushes his teeth, and puts on clean clothes, but not "all the time." This testimony is consistent with the information the applicant provided to Mr. Dan Gauthier, an occupational therapist, who assessed the applicant on March 29, 2021. The applicant advised Mr. Gauthier that he showers three times per week, brushes his teeth daily but may go a day without brushing, and wears the same clothes for a couple of days. Lack of motivation has decreased his functional ability, but in my view, the frequency of his task completion is not indicative of a significant impediment of useful function.
- [17] The applicant does yoga, tai chi, and physical workouts to strengthen the parts of his body that feel pain. He testified that he has been consistent with his exercise routines. During Covid he continued to participate in sessions online. He also receives chiropractic treatment and massages. As such, the applicant's self care is unaffected by his psychological impairments
- [18] The applicant's functional ability to communicate also appears unimpeded by his accident-related psychological disorders. He effectively communicated when he testified before the Tribunal over a three day period. This is not consistent with how the applicant characterizes himself. He feels "frozen in fear." Anxiety prevents him from being around people. He spends much of his time alone in his room hiding from the world. However, that fear and anxiety was not evident in his demeanour or in the way he communicated when put in the highly stressful situation of testifying in front of strangers for a lengthy period of time.
- [19] As noted by Dr. Zakzanis, the applicant's ambulation is normal.
- [20] The applicant testified that anxiety affects his sleep. He drinks alcohol, smokes cannabis, and takes an anti-depressant to calm his nerves in order to sleep. However, the applicant's prescription summary shows that he only received 60 tablets of the anti-depressant amitriptyline during the one year period between October 2017 to October 2018. The applicant submits that a negative inference

should not be made because of his decision to rely on prescription summaries to establish his case.

- [21] In my view, it is appropriate to draw a negative inference based on the prescription summary provided by the applicant. The summary shows that he utilized a modest amount of anti-depressants in the year following the accident. There is no further documentary evidence of the applicant using anti-depressants. Consequently, I do not accept that the applicant needs to be medicated or sedated in order to sleep.
- [22] The applicant uses a rideshare program to visit his girlfriend who is studying in London, Ontario. The applicant testified that he becomes nervous in vehicles and requires a muscle relaxant in order to endure this journey. The applicant's prescription summary shows that he received 30 tablets of the muscle relaxant cyclobenzaprine in June 2019. There is no other documentary evidence of him receiving muscle relaxants.
- [23] Again, I make a negative inference based on his prescription summaries. If he relied on a muscle relaxant to endure the psychologically difficult journey to London from his home in Scarborough, then this would be reflected in his prescription history. I find it is more likely that he has overstated his level of anxiety in regard to travelling.
- [24] I further note that the applicant portrayed himself as living in a constant state of fear and anxiety. These feelings are so severe that it is difficult for him to even leave his house. He testified on his use of medication to cope with his day to day life. In particular, he relies on amitriptyline and cyclobenzaprine to calm his nerves and relax his muscles. As noted above, the documentary records provided by the applicant show a very limited use of these medications, or any other prescribed medication. The limited use of medication is not consistent with the high level of psychological impairment the applicant claims to have.
- [25] The applicant testified with regard to his vehicular anxiety. He does not drive unless it is absolutely necessary because of anxiety. However, he drives to run errands for his mother and helps his grandmother with grocery shopping. The applicant submits that his mother and grandmother do not understand that he has psychological impediments. Thus, he must drive or risk upsetting them.
- [26] This is not consistent with having a significant impairment. In my view, the pressure the applicant feels from his mother and grandmother does not sufficiently explain his functional ability to accommodate normal, routine requests

for driving. It is more likely that his ability to accommodate these requests demonstrates proficiency in the activities of daily living.

- [27] The evidence shows that the applicant has useful function in important areas of the activities of daily living such as self care and communication, as well as in the area of ambulation. His psychological disorders have some impact on personal hygiene. I have not accepted the applicant's evidence in regard to the impact of his psychological disorders on sleep, travelling, and driving. I also do not accept that he has a high level of psychological impairment as he claims. Overall, his impairment levels are compatible with some, but not all useful functioning. For these reasons, I find that the applicant is moderately impaired in the area of activities of daily living.

### *Social Functioning*

- [28] According to the *Guides*, social functioning refers to an individual's capacity to interact appropriately and communicate effectively with others. This includes the ability to get along with others.
- [29] The applicant's ability to interact appropriately with others has not been impacted by his psychological impairments. His interactions with various medical assessors and therapists have all been positive. At his hearing, he maintained his composure during three days of testimony, even during some spirited cross-examination.
- [30] In testimony, the applicant showed that he is capable of empathy when communicating with others. In particular, with his mother and girlfriend whose behaviour have caused him to feel frustrated. Under these stressful circumstances, the applicant has conducted himself appropriately. He understands and accepts that his mother is not able to appreciate the fact that he was psychologically impacted by the accident. He tailors his interaction with her based on this understanding.
- [31] There are instances when he comes into conflict with his girlfriend. They argue, but they also talk through their issues in a healthy and constructive manner. This was confirmed by the applicant's girlfriend in her testimony. This further demonstrates his functional ability to communicate effectively and appropriately with others while experiencing the stress of conflict.
- [32] According to the applicant, his ability to socialize has been greatly impacted by the accident. He had an active social life before the accident. He spent time with

family and friends. They would go out to clubs and he enjoyed meeting new people.

- [33] Since the accident, the applicant has become withdrawn and isolated. He does not want to be around people. He does not socialize with others unless they approach him. As well, he does not leave the house unless compelled to do so by others.
- [34] However, it is also true that a few months after the accident, the applicant met his girlfriend at a club. He was confident and even extroverted, enough to start a conversation with her. She perceived him as funny and charming. He developed this initial meeting into a long-term relationship that he maintains to date. He maintains this relationship despite the fact that it is now a long distance relationship. He does this by frequently speaking to her on the phone and visiting her in London. In my view, being able to maintain a relationship under challenging circumstances demonstrates that the applicant's psychological impairments have not impacted his social functioning with the people who are closest to him.
- [35] The applicant's ability to interact appropriately and communicate effectively with others has not been impeded by his accident-related psychological disorders. Moreover, his ability to start and maintain a romantic relationship is consistent with being able to function socially. He is more isolated and he does not go out to socialize as he did before the accident. Instead, he limits his social circle to his family and his girlfriend. In light of this evidence, I find that his impairment levels are compatible with some, but not all useful functioning and that he is moderately impaired in the area of social functioning.
- [36] Having found the applicant to be only moderately impaired in two areas of function, I further find that the applicant is not catastrophically impaired under Criterion 8 because he has failed to demonstrate that he has a marked impairment in at least three domains.

## **Issue 2: Is the applicant entitled to attendant care benefits?**

- [37] An insurer is required to pay for attendant care benefits that are reasonable and necessary and incurred.
- [38] The applicant submitted a Form-1 dated February 16, 2018 which sought \$1,212.39 per month in attendant care benefits. The applicant relies on the attached Assessment of Attendant Care report by Julian Amchislavsky, an



occupational therapist, to establish that attendant care is reasonable and necessary.

- [39] Mr. Amchislavsky itemizes 20 minutes per week for grooming (toenail clipping), 420 minutes per week for feeding, 520 minutes per week for hygiene (cleaning the shower and toilet, and change bedding), and 210 minutes per week to complete passive range of motion exercises. The justification for attendant care in the areas of grooming and exercise are range of motion limitations. The justification for hygiene and feeding are pain limitations from the lumbar spine.
- [40] Himadri Kaul, an occupational therapist, conducted an in-home assessment of the applicant to assess attendant care needs on behalf of the respondent on May 28, 2018. She notes that the applicant reported being independent with toenail care. With regard to hygiene, he reported that he has the ability to clean and tidy up after himself in the bathroom. He also reported performing stretching exercises.
- [41] In the same report, the applicant reported that he cannot stand for prolonged periods due to back pain. He also complained of feeling pain in his whole spine during range of motion testing of his lumbar spine.
- [42] Ms. Kaul does not explain how the applicant is able to independently complete his activities of daily living while experiencing pain. In my view, her recommendations to deny attendant care are not properly justified. For this reason, I give no weight to her report.
- [43] Dr. Paul Zalzal, an orthopedic surgeon, assessed the applicant for an insurer's examination on November 13, 2017. The applicant had a full range of motion of his lumbar spine. With regard to low back pain, Dr. Zalzal notes that a small minority of individuals have chronic symptoms from uncomplicated soft tissue injuries, but the physical examination he conducted does not reveal any clinically significant ongoing pathology related to the accident.
- [44] Dr. Osama Gharsaa, an orthopedic surgeon, conducted an insurer's examination of the applicant on May 27, 2019. The applicant's lumbar spine had a good functional range of motion. Dr. Gharsaa concludes that the applicant has a sprain and strain of the lumbar spine.
- [45] The applicant described having debilitating back pain. He manages this pain with exercise and stretching. He also uses cyclobenzaprine, a muscle relaxant, to assist with pain management. As noted above, his documented use of cyclobenzaprine consists of only 30 tablets. This is not consistent with someone

who has spent years living with pain. For this reason, I find, on a balance of probabilities, that the applicant is not experiencing the level of pain he described in testimony.

[46] The Form-1 of Mr. Amchislavsky seeks attendant care because of the applicant's range of motion limitations and pain limitations from the lumbar spine. Two orthopedic surgeons examined the applicant and concluded that he has a normal range of motion and that he has minor sprain and strain injuries. I prefer the opinion of the orthopedic surgeons. Moreover, I have found that the applicant likely does not have the level of pain he described in testimony. As such, I find that the applicant is not entitled to attendant care because this benefit is not reasonable and necessary.

### **Issue 3: Is the applicant entitled to an attendant care assessment?**

[47] Section 25(1)4 of the Schedule requires insurers to pay reasonable fees charged by an occupational therapist or a registered nurse for preparing an assessment of attendant care needs under section 42, including any assessment or examination necessary for that purpose.

[48] The applicant submitted a treatment plan dated May 26, 2020 for an attendant care assessment that was denied by the respondent based on the results of Dr. Gharsaa's report which indicates that the applicant is able to complete his personal care tasks.

[49] The applicant submits that the Schedule does not require the applicant to establish the reasonableness of the assessment. Instead, this is a perfunctory process that requires the insurer to pay for the attendant care assessment once the applicant complies with the statutory requirements in the Schedule.

[50] The respondent submits that the applicant must provide evidence to justify an attendant care assessment. Otherwise, insurers would be required to pay for unreasonable assessments.

[51] In my view, the wording in section 25(1)4 is clear. The insurer is required to pay for an attendant care assessment that is "necessary" for the purpose of submitting a Form 1.

[52] In this case, the OCF-18 states that the attendant care assessment will:

1. determine those activities that the client is not able to do for themselves.

2. extent to which the client can perform the skills and activities identified on the Form-1 safely and functionally.
3. objectively identify what assistance, if any, is needed from the present time into the future until another such re-assessment may identify modified needs.
4. predictability and consistency of a client's performance (physical, cognitive, behavioural) will be considered.
5. screening of physical, psychosocial, behavioural, cognitive/perceptual functions will allow for comprehensive insight into the client's ability to manage daily living skills.
6. further recommendation will be made if necessary.

[53] In my view, this information is necessary for the respondent to properly consider the anticipated Form-1.

[54] Moreover, the concern raised by the respondent with regard to insurers being forced to pay for unnecessary assessments is addressed in 25(2) to 25(5) of the Schedule. These sections set out the circumstances when an insurer does not have to pay for an attendant care assessment. None of these circumstances apply to the applicant's treatment plan.

[55] In this particular case, however, the applicant has reached the funding limit of \$65,000. Consequently, the applicant is not entitled to payment of an attendant care assessment because I have determined that he is not catastrophically impaired and therefore he does not have ongoing access to funding.

**Issues 4 to 8: Is the applicant entitled to five treatment plans?**

[56] As noted above, the applicant has been determined to no be catastrophically impaired and has reached the funding limit of \$65,000.00.

[57] Under these circumstances, he is not entitled to these treatment plans so an analysis of whether they are reasonable and necessary is not required.

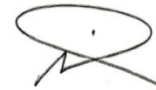
**Issue 9: Is the applicant entitled to interest on any overdue payment of benefits?**

[58] As no benefits are owing, the applicant is not entitled to interest.

**ORDER**

- [59] The applicant is not catastrophically impaired.
- [60] He is not entitled to attendant care benefits.
- [61] He is not entitled to an attendant care assessment.
- [62] He is not entitled to the five treatment plans in dispute.
- [63] He is not entitled to interest.

**Released: May 3, 2023**



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**Harry Adamidis  
Adjudicator**