



Citation: Bishara v. Sonnet Insurance Company, 2024 ONLAT 22-004828/AABS

Licence Appeal Tribunal File Number: 22-012840/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:

Demiana Bishara

Applicant

and

Sonnet Insurance Company

Respondent

DECISION

ADJUDICATOR: Clive Forbes

APPEARANCES:

For the Applicant: Demiana Bishara, Applicant
Gregory Gilhooly, Counsel

For the Respondent: Stephen Whibbs, Counsel
Ainsley Shannon, Counsel
Kamal Sidhu, Adjuster

Court Reporter: Michelle Gordon

Heard by Videoconference: December 18 to 22, 2023

OVERVIEW

- [1] Demiana Bishara, the applicant, was involved in an automobile accident on September 28, 2018, and sought benefits from the respondent, Sonnet Insurance Company, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (“*Schedule*”).
- [2] The issues in dispute are a catastrophic impairment (“CAT”) designation, attendant care benefits (“ACB”) and interest. The applicant’s position is that she is CAT as a result of the accident and is entitled to the ACB and interest claimed. The respondent’s position is that the applicant mischaracterized her true mental and physical state to the medical assessors and, therefore, she is not CAT. The parties agree that the applicant’s maximum amount for medical and rehabilitation benefits for non-CAT under the *Schedule* has been exhausted.

ISSUES

- [3] The following issues are in dispute:
1. Has the applicant sustained a catastrophic impairment as defined by the *Schedule*?
 2. Is the applicant entitled to ACB in the amount of \$3,271.28 per month from November 22, 2021, to date and ongoing?
 3. Is the applicant entitled to interest on any overdue payment of benefits?
 4. Is the applicant entitled to costs?

RESULT

- [4] I find that:
- i. The applicant does not meet the definition for a catastrophic impairment.
 - ii. The applicant is not entitled to the ACB claimed.
 - iii. No interest is payable.
 - iv. The applicant is not entitled to costs.

PROCEDURAL ISSUES

I admitted the respondent's supplementary document brief into evidence and denied the inclusion of additional social media posts

- [5] At the commencement of the hearing, the applicant requested that the respondent's supplementary document brief be excluded as evidence because it was served on December 12, 2023, after the production timeline of October 18, 2023, and was not included in the respondent's document brief. The applicant also submits that the social media posts that are contained therein are irrelevant because this hearing is about CAT under criterion 7 and the applicant's level of function is completely irrelevant. The respondent disagrees that function is irrelevant with CAT under criterion 7 and argues that it would be useful for the Tribunal to hear about the applicant's function as part of its process in rendering a decision on CAT. The respondent further submits its supplementary document brief would not prejudice the applicant because it's all about her social media posts from November 8, 2023, to December 1, 2023.
- [6] Also, on the fourth day of the hearing the respondent requested to have additional social media posts from November 25, 2023, to December 14, 2023, be entered as evidence. The respondent submits that it became aware of these additional social media posts during the applicant's testimony and that the probative value of these posts outweighs any prejudice to the applicant. The applicant objected to any additional social media posts being admitted into evidence and argues that the respondent should have included in its supplementary document brief these additional social media posts that were available if it intended to rely on same. The applicant also submits that it would be procedurally unfair to her to admit at this time the additional social media posts as evidence.
- [7] Rule 3.1 of the *Licence Appeal Tribunal Rules* ("Rules") requires the Tribunal to:
- (a) facilitate a fair, open and accessible process and to allow effective participation by all parties, whether they are self-represented or have a representative;
 - (b) Ensure efficient, proportional and timely resolution of the merits of the proceedings before the Tribunal; and
 - (c) Ensure consistency with governing legislation and regulations.

[8] In addition, s. 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (*SPPA*) allows for the admission of any evidence relevant to the subject-matter of the proceeding that is not otherwise privileged or statutorily inadmissible. I do not agree with the applicant that because this hearing is about CAT under criterion 7, the social media information contained within the respondent's supplementary document brief that speaks to her function is irrelevant. In addition, I find that the applicant would not be significantly prejudiced because these are all her social media posts that she is familiar with. Therefore, the applicant's request to exclude the late filed respondent's supplementary document brief was dismissed and I admitted this supplementary brief into evidence. However, and by contrast, I agree with the applicant that it would be procedurally unfair on the fourth day of the hearing to admit additional social media posts that the respondent had access to prior to the hearing and did not include as part of its late filed supplementary document brief. Furthermore, I am not convinced that the respondent only learned about the social media posts during the course of the applicant's testimony because these posts from November 25, 2023, to December 14, 2023, covers part of the time period for the other social media posts from November 8, 2023, to December 1, 2023, that were included in its supplementary brief. The respondent's request to include as evidence the additional social media posts apart from the supplementary brief from the applicant is dismissed.

ANALYSIS

- [9] I find that based on the evidence and the testimonies, although the accident has had a profound effect on the applicant's life, the applicant did not sustain a catastrophic impairment as defined by the *Schedule* for the following reasons.
- [10] The applicant bears the onus to prove on a balance of probabilities that she is CAT. The test to determine whether the applicant is CAT is a legal test and not a medical one. The criteria to establish CAT are found under s. 3.1(1) of the *Schedule*. In this case the applicant claims she sustained a catastrophic impairment under Criterion 7 because she suffered a whole person impairment ("WPI") of 55% or more from the combined score of her mental or behavioural impairment with her physical impairments.
- [11] To qualify under Criterion 7, the applicant must prove that she has a combination of physical and psychological impairment ratings from medical professionals that meet the 55% WPI threshold. The psychological impairment rating is determined in accordance with the methodology in Chapter 14, Section 14.6 of the American Medical Association's Guides to the *Evaluation of Permanent Impairment*, 6th

Edition, 2008, and is combined with the physical WPI rating from American Medical Association's *Guides to the Evaluation of Permanent Impairment* 4th Edition, 1993 ("*Guides*") using the Combined Values Table. An impairment percentage derived by means of the *Guides* is intended to represent an informed estimate of the degree to which an individual's capacity to carry out daily activities has been diminished.

- [12] The applicant relies on the multi-disciplinary CAT reports of her s. 25 assessors Dr. Christopher Gallimore, orthopaedic surgeon, Dr. Michael Rathbone, neurologist, Dr. Bobbie Ross, psychiatrist, Ms. Deanne Evans, occupational therapist and Dr. Darrin Milne, chiropractor and clinical coordinator of Capital Vocational Specialist ("CVS") who assigned the applicant's WPI% ratings under Criterion 7. Dr. Milne provided the executive summary and concluded that she sustained a WPI of 55% and therefore meets the CAT threshold.
- [13] The respondent disagreed and relied on the multidisciplinary CAT reports of its s. 44 assessors who conducted insurer's examinations ("IEs") of the applicant: Dr. David Simon, orthopaedic surgeon, Dr. Tilak Mendes, neurologist, Dr. Calvin Breslin, ophthalmologist, Dr. Kim Payne, neuropsychologist, Dr. Anil Joseph, psychiatrist, Mr. Dan Gauthier, occupational therapist and Dr. Howard Platnick, general practitioner of Direct IME, who assigned the applicant's WPI% ratings under Criterion 7. Dr. Platnick provided the executive summary and concluded that she sustained a WPI of 50% and therefore does not meet the CAT threshold.
- [14] The chart below provides a summary of both parties' assessors' ratings and the Tribunal's findings in regard to Criterion 7. My analysis will focus on those impairment ratings where there is dispute between the parties.

Impairment	Applicant's CAT Summary	Respondent's CAT Summary	Tribunal's Finding
Right Eye Vision Loss	24%	24%	24%
Eye Prosthesis	10%	10%	10%
Lumbar Spine	10%	5%	5%
Cervical Spine	5%	5%	5%
Headaches	8%	5%	0%
Mental Status	8%	0%	0%
Medication	3%	0%	0%
Total Physical WPI	52%	41%	38%
Mental & Behavioural	10%	15%	10%
Total Combined Ratings			
Total WPI	57%	50%	44%

Lumbar Spine

- [15] I find that the 10% WPI for the applicant's lumbar spine is not consistent with the medical record and the methodology outlined in the *Guides* for assigning ratings. Dr Gallimore testified that he used the range of motion ("ROM") method based on the fact that the applicant sustained compression fractures of L1 and L2 vertebral body end plates and provided her with a 10% WPI for lumbosacral spine impairment. However, both Dr. Rathbone, s. 25 assessor and Dr. Simon, s. 44 assessor, assigned a 5% WPI ratings using the DRE Lumbosacral Category II: Minor Impairment. On physical examination, Dr. Gallimore found that there was no obvious swelling, bruising or deformity of the lumbar spine and ROM was normal in all aspects of flexion, extension, rotation and lateral bending with pain at the end range flexion. Dr. Simon also found that there was generalized myofascial tenderness in the lower lumbar spine region with mild spasm and guarding and there was full ROM of the lumbosacral spine.
- [16] I do not agree with Dr. Gallimore and Dr. Milne that because DRE II ratings discuss structural conclusions of less than 25% compression of one vertebral body and, in this case, there are two compression fractures, the DRE rating methodology is not applicable. As stated on page 112 of chapter 3 of the *Guides*, the ROM model should be used only if the injury model is not applicable or "if more clinical data on the spine are needed to categorize the individual spine

impairment.” However, this is not the case because based on the medical evidence no more clinical data is needed to categorize the applicant’s spine impairment and as such the injury model is applicable. Moreover, on page 110 of chapter 3 of the *Guides*, Table 72 describes DRE II as Minor impairment: “clinical signs of lumbar injury are present without radiculopathy or loss of motion segment integrity equating to a 5% WPI” and this aptly describes the applicant’s lumbar condition. Furthermore, there is no mention in the DRE II description in Table 72 about compression of vertebral bodies. As such, I do not believe it was intended that when the injury model is used, if there are compression fractures of several vertebrae, the DRE II WPI rating should be applied to each vertebral body and combined using the combined values chart. Therefore, I find that Dr. Simon used the correct methodology of the *Guides*, and his findings is consistent with the medical evidence when he assigned a 5% WPI for the applicant’s lumbosacral spine impairment.

Headaches

- [17] I find that Dr. Ross’ analogous rating of 8% WPI for the applicant’s headaches is not consistent with the methodology outlined in the *Guides* for assigning ratings. Both Dr. Ross, s. 25 assessor and Dr. Mendis, s. 44 assessor, rated by analogy the applicant’s headache. Dr. Ross diagnosed the applicant with chronic pain due to central sensitization mechanisms and provided her with 8% WPI using Table 3 on page 142 in chapter 4 of the *Guides*. However, Table 3 deals with Emotional or Behavioural Impairments for illnesses that may include depression, emotional fluctuations, socially unacceptable behaviour and other kinds of central nervous systems responses. Chronic pain due to central sensitization mechanism would not be applicable under Table 3. Furthermore, 8% WPI under Table 3 corresponds to an impairment description of mild limitation of daily social and interpersonal functioning. Moreover, as stated on page 152 of chapter 4 under section 4.5 Pain of the *Guides*, and notwithstanding Dr. Ross’ diagnosis of chronic pain due to central sensitization mechanisms, it is clear that chronic pain, also termed chronic pain syndrome, should be evaluated according to criteria in the chapter on pain.
- [18] Also, I find that Dr. Mendis’ analogous approach using Table 23 on page 152 of chapter 4 of the *Guides* is more consistent with the methodology outlined in the *Guides* for assigning ratings. Table 23 deals with Impairments of Spinal Nerves in the Head and Neck Region. Dr. Mendis diagnosed the applicant with posttraumatic headaches and, using Table 23, assigned an impairment rating of 5% WPI for headaches analogous to greater occipital neuralgia. The applicant also argues that Dr. Mendis’ rating should be corrected to 10% WPI to account

for bilateral involvement of the greater occipital nerve since both sides of her head are implicated. She also testified that she has headaches 24/7 and takes up to 12-16 Tylenol or Advil a day to manage her pain.

- [19] However, this is not supported by the medical records and what the applicant reported to many of the assessors. A review of the medical evidence does not support the applicant's position that she should be assigned 5%, 8% or 10% WPI for headaches. Firstly, the records reveal that only a few times the applicant complained of headaches to her family physician Dr. Dianne Woodend. In fact, most of the applicant's complaints to her various treating health practitioners were psychological and psychiatric complaints. Secondly, it appears from the records that pain in the applicant's right eye seemed to give her headaches. Thirdly, she reported to Dr. Woodend that, since the eye surgery where she got her new eye prosthesis, the headaches are not as bad as before the surgery. Fourthly, there is no notation in the medical and documentary records indicating that the applicant was referred to any chronic pain specialist because of headaches complaints. Therefore, given the medical evidence I find that assigning a WPI rating for headache is not warranted and to do so would be double dipping since WPI ratings have already been assigned for the applicant's vision loss and eye prosthesis. As such, I find that 0% WPI for headaches is appropriate.

Mental Status

- [20] I find that assigning a mental status 8% or 7% WPI rating for the applicant is not supported by the medical and documentary evidence. Both Dr. Ross, s. 25 assessor and Dr. Payne, s. 44 assessor, diagnosed the applicant with post concussion syndrome and assigned mental status WPI ratings of 8% and 7% respectively. It is also noted that Dr. Platnick who provided the s. 44 executive summary report did not include Dr. Payne's 7% WPI rating as part of the respondent's criterion 7 findings and provided no explanation for doing so.
- [21] A review of the medical records reveals that prior to Dr. Ross' and Dr. Payne's diagnosis of post concussion syndrome, there is no reference in the medical records that the applicant suffered a concussion as a result of the accident. In addition, none of the applicant's treating neurologists found that she displayed any objective neurological deficiencies. Furthermore, the applicant has not demonstrated any objective major difficulties with cognition since the accident. For example: she successfully completed a post-secondary program in health science; passed all her Registered Practical Nursing ("RPN") program at Algonquin College; passed the national RPN

licencing exam and her performance on the Montreal Cognitive Assessment cognitive tests administered by both Dr. Joseph and Mr. Dan Gauthier, s. 44 assessors, was near perfect. In addition, post accident imaging of the applicant's brain/head were all normal. Moreover, over the years and on different occasions the applicant was described by several of her treating health practitioners as expressing herself well and having great insight into her own condition. As such, I find that based on the totality of the medical and documentary evidence a mental status 0% WPI rating is appropriate.

Medication

- [22] On page 9 of the *Guides* under Adjustments for Effects of Treatment or a Lack of Treatment a value between 1% and 3% WPI is permitted for medication use and any reduced symptoms as a result of medication use.
- [23] I find that Dr. Gallimore assigning 3% WPI for adjustments for the effects of medication is not consistent with the medical and documentary record. At the time most of the CAT assessments were conducted, the applicant's medications were Zoloft, Trazadone, Pregabalin, Tylenol and Advil. Shortly after her eye surgery in the summer of 2020, the applicant was prescribed pain medication by her ophthalmologist in relation to the surgery. The applicant also testified that she was never prescribed any other pain medications, and this is supported by her prescription summaries. The records also reveal that she did not start psychotropic medication until February 2021.
- [24] The applicant also argues that because she uses prescription medications for sleep, depression and anxiety; consumes a high amount of Advil and Tylenol and resorts to drugs and alcohol to self-medicate, she should be assigned the 3% WPI for effects of medication. I do not agree with the applicant's position. I find that it would not be appropriate to add an additional rating for medication because the applicant's impairments and the effect of medications on those impairments have been adequately captured under other impairment categories inclusive of mental and behavioural which I will address next. Moreover, the *Guides* is clear that substance abuse problems are not to be rated because they are not generally considered to be permanent impairments. As such, I find that 0% WPI for effects of medication is appropriate.

Mental and Behavioural

- [25] I find that Dr. Ross was very thorough in her psychiatric evaluation of the applicant as part of her determination of mental and behavioural WPI rating. In addition, I find that her 10% WPI rating is consistent with the medical records.

For example, Dr. Ross accurately captured, analyzed and weighed the applicant's pre and post accident psychological history and trauma; in accordance with the *Guides*, Dr. Ross did not factor the applicant's drug and alcohol use in her mental and behavioural analysis; and Dr. Ross accounted for the psychological impact on the applicant from her pre and post accident relationships. Dr. Ross assigned to the applicant a Brief Psychiatric Rating Scale ("BPRS") score of 39, corresponding to 10% BPRS impairment score; Global Assessment of Functioning (GAF) score was 52, corresponding to 10% GAF impairment score and Psychiatric Impairment Rating Scale ("PIRS") score was 2, corresponding to 0% PIRS impairment score. Dr. Ross found that this resulted in a percentage median value of 10% WPI.

[26] Alternatively, I find that because of the significant difference in the applicant's self-reporting to Dr. Joseph, s. 44 assessor, and her self-assessment scores used, Dr. Joseph's mental and behavioural ratings were inflated and not consistent with the totality of medical and documentary record. For example: she overstated her substance abuse to Dr. Joseph and it is not clear if this was included as part of the overall scoring contrary to the guidance from the *Guides*; she provided very limited information about her pre-accident psychological and relationship traumas and contrary to what was reported to Dr. Ross; she reported developing an eating disorder since the accident when the records reveal that her eating disorder predates the accident; and she inflated many of her post accident psychological symptoms. Dr. Joseph assigned to the applicant a BPRS score of 48, corresponding to 20% BPRS impairment score; GAF score was estimated to be 50, corresponding to 15% GAF impairment score and her PIRS score was 4, translating to 10% PIRS impairment. Dr. Joseph found that this resulted in a percentage median value of 15% WPI from a mental and behavioural perspective.

[27] For the reasons stated above, I assign more weight to Dr. Ross' findings and less weight to Dr. Joseph's findings. Therefore, I find that 10% WPI for mental and behavioural impairment is warranted.

Tribunal's Criterion 7 Findings Based on the Evidence

[28] As shown in the table above, when the Tribunal's physical ratings for vision loss 24%; eye prosthesis 10%; lumbar spine 5%; cervical spine 5%; headache 0%; mental status 0%; and medication 0% are combined using the combining charts on page 322 of the *Guides*, this gives a total physical rating of 38% WPI. When the total physical rating 38% WPI is combined with the mental and behavioural rating of 10% WPI using the combined values chart it results in 44% WPI and

rounded up or down to the nearest 0 or 5 it becomes 45% WPI. This value of 45% WPI does not meet the 55% WPI threshold for CAT under criterion 7.

[29] Accordingly, I find that the applicant has failed to establish on a balance of probabilities that she sustained a CAT impairment. Having found that the applicant is not CAT, and the parties have agreed that the non-CAT limits have been exhausted, there is no need for me to do an analysis for the ACB claimed and neither is the applicant entitled to same. In addition, there is no need for a causation analysis because the 55% WPI threshold for CAT under criterion 7 was not met.

Interest

[30] Interest is payable on the overdue payment of benefits in accordance with s. 51 of the *Schedule* on any overdue payment of benefits. As there were no overdue payments found, no interest is payable under s. 51.

Cost

[31] Pursuant to Rule 19.1, costs may be requested where a party believes another party has acted unreasonably, frivolously, vexatiously, or in bad faith. Rule 19.5 gives the Tribunal the authority to deny or grant the request for costs or award a different amount. Pursuant to Rule 19.6, the amount of costs shall not exceed \$1,000.00 for each full day of attendance at a motion, case conference, or hearing. The applicant sought costs in this matter.

[32] As stated by the Tribunal in *16-000075 v Wawanesa Mutual Insurance Company*, 2017 CanLII 35323 (ON LAT), “costs are to deter conduct that threatens the orderly and civil resolution of an application, and to ensure that the Tribunal’s process and the other participants are respected.”

[33] The applicant asked that costs be awarded. She submits that the respondent’s closing submission was akin to a character assassination of her. She further submits that the respondent acted in bad faith by changing strategies midway through the hearing by not calling Dr. Payne and Dr. Joseph, their CAT assessors to testify who were initially scheduled to do so. The respondent submits that there is no basis for awarding costs and its conduct during the hearing was not threatening nor disrespectful. The respondent also denied the character assassination allegation and submits that the applicant’s credibility is an issue that was necessary to be highlighted in its closing. I do not find that the respondent’s conduct during the hearing or in its closing submission threatened the orderly and civil resolution of the matter before the Tribunal. Also, the fact

that the respondent chose not to call some of their experts does not mean that it acted in bad faith. Therefore, the applicant's request for costs is denied.

ORDER

[34] I find that:

- i. The applicant does not meet the definition for a catastrophic impairment.
- ii. The applicant is not entitled to the ACB claimed.
- iii. No interest is payable.
- iv. The applicant is not entitled to costs.

[35] The application is dismissed.

Released: January 24, 2024



**Clive Forbes
Adjudicator**