Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Yevdokymova v. Economical Insurance Company, 2021 ONLAT 19-013140/AABS

Release date: 08/19/2021
File Number: 19-013140/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:

Inna Yevdokymova

Applicant

and

Economical Insurance Company

Respondent

DECISION

ADJUDICATOR: **Deborah Neilson**

APPEARANCES:

For the Applicant:	Michael R. Switzer, Counsel James Horn, Paralegal
For the Respondent:	Chelsea Gilder, Counsel Nadine Rizk, Counsel
Court Reporter:	Andrea Kovats Barbara Doucette

HEARD: by Teleconference: **July 13-17 and 27, 2020**

OVERVIEW

[1] The applicant was involved in an automobile accident on **January 13, 2017** and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010, O. Reg.* 34/10 as amended (the *"Schedule"*). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal ("Tribunal").

[2] The applicant is seeking entitlement to non-earner benefits. She sustained soft tissue injuries when she was a passenger in a taxi that was struck by a transport truck. The applicant submits that she also sustained a mild traumatic brain injury and cognitive impairments as a result of the accident. Although she has an extensive pre-accident medical history, the applicant submits that she was on the road to recovery and, as a result of the pain from her accident injuries, she now has a complete inability to engage in a normal life.

[3] The respondent submits that the applicant has not proven she is entitled to non-earner benefits. It submits that the applicant is not credible. Her testimony about how her pain complaints prevent her from engaging in substantially all of her ordinary pre-accident activities is not born out by the medical evidence.

[4] I find that the applicant's testimony is not reliable and that she has failed to prove that she is entitled to the non-earner benefits claimed.

PROCEDURAL ISSUES

[5] Three procedural issues arose at the outset of the hearing as follows:

a. The respondent sought the exclusion of a multidisciplinary report prepared by health practitioners from Omega Medical Associates;

b. The parties could not agree on who was responsible for ensuring a copy of the respondent's brief was before the applicant for the purposes of cross-examination; and

c. The applicant sought to call a witness to testify who was not listed in the case conference order.

Exclusion of the Medical Report

[6] The respondent objected to the applicant relying on a multidisciplinary report prepared by a number of health practitioners from Omega Medical Associates dated January 31, 2020, that was served on the respondent on February 3, 2020.

The respondent submitted that it is prejudiced because it did not have an opportunity for its assessors to review the report. The respondent submitted that insurer's examinations ("IEs") on catastrophic impairment were scheduled to be conducted at some point in the future. Those IE assessments were not going to be conducted by the IE assessors who assessed the applicant's entitlement to non-earner benefits ("NEBs"). The IE assessors who addressed NEBs are Dan Gauthier, occupational therapist; Dr. Osama Gharsaa, orthopaedic surgeon; Dr. Christopher Hope, psychologist; and Dr. Jason Lazarou, neurologist.

[7] The respondent submits that the Omega report is not relevant to the issues in dispute because the Omega assessors did not provide opinions on whether the applicant is entitled to non-earner benefits. The respondent did not send the Omega report to Mr. Gauthier, Dr. Gharsaa, Dr. Hope or Dr. Lazarou for comment because it was prepared a year after the period of entitlement to NEBs and it did not address NEBs. The Omega report addresses whether the applicant sustained a catastrophic impairment. The respondent submitted that the IE assessors who are going to comment on the Omega report are assessing the applicant for entitlement to catastrophic impairment only. However, catastrophic impairment is not an issue before me.

[8] The applicant submits that the Omega report is relevant with respect to the facts of the observations and diagnosis that were made by the Omega assessors. I agree.

[9] There is no allegation that the Omega report was served out of time or contrary to the *LAT Rules*[1] or an order. I do not accept the respondent's submission that it is prejudiced because it did not have an opportunity for its assessors to review the report. In fact, I find that the respondent had no intention of having its NEB IE assessors ever review the reports. It had the Omega report since February 3, 2020, and could have easily sent it to Mr. Gauthier, Dr. Gharsaa, Dr. Hope or Dr. Lazarou for comment, but chose not to. The IE assessments that were scheduled to take place after the hearing had nothing to with the non-earner benefits. Accordingly, I am unable to find any prejudice.

[10] The respondent's concerns about the timing of the reports go to the weight to be given to them. For these reasons the respondent's request that the Omega report be excluded was denied.

Copies of the Respondent's Brief

[1] *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)* [the "*LAT Rules*"]

[11] The parties could not agree on who should provide the applicant with copies of the respondent's documents brief. The applicant submitted that she does not have the capacity to receive and read electronic files. Nor does she have the finances to print a copy of the respondent's brief, which is almost a thousand pages. This information was not provided to the respondent at the case conference. The respondent had sent an electronic copy of the documents it intended to rely on at the hearing to the applicant's counsel. In an abundance of caution, it followed up with the applicant's counsel's office on June 8, 2020, to confirm that the applicant would have a copy of its brief before her for her cross-examination. The applicant's counsel's office advised it would not have an opportunity to provide a copy of the brief to the applicant prior to the hearing because she lives in a rural area in which overnight courier services are not available. I heard submissions from the parties and ultimately did not need to make a determination because the respondent undertook to provide the applicant with a copy of its brief.

[12] Normally, the respondent should expect that an applicant would have a hard copy of any documents it has provided to the applicant over time or that are set out in an applicant's brief of documents. If there are other documents that the respondent wishes to cross-examine an applicant on that are not in the applicant's brief, then the respondent should ensure that the applicant has a copy. However, as in this case, if there are complications that arise because of impecuniosity or the format the documents are to be in, then it is incumbent upon the applicant's legal representative to advise the respondent and the case conference adjudicator at the case conference and not leave it until the last minute as in this case.

New Witness

[13] The applicant advised she intended to call a lay witness whose name was not listed on the case conference order. The respondent objected on the basis the witness was not listed on the order, no motion was brought by the applicant to allow her to call the witness, and the applicant had already listed two lay witnesses.

[14] The applicant submitted she was allowed to call another witness who was not listed in the Order because paragraph 9 of the case conference Adjudicator's Order allowed the parties to exchange and file a final witness list by June 15, 2020. The applicant submitted that it complied with paragraph 9 of the Order and notified the respondent that she was calling a new witness. The applicant submitted that the new lay witness was necessary to corroborate the applicant's evidence.

[15] The respondent submitted that the purpose of paragraph 9 of the Order was to narrow the witnesses and not expand the number of witnesses to be called. I agree with the respondent. Paragraph 8 of the Order stated that the hearing was limited to the testimony of the witnesses listed in the Order. I find that if the case conference Adjudicator had meant for the hearing to also include the testimony of witnesses to be identified at a later date, the Order would have stated that. If the applicant determined at a later date that she required another witness, she had recourse to do so by bringing a motion prior to the hearing but did not do so.

[16] I find that there was no prejudice to the applicant in not being able to call a third lay witness as the applicant was already calling two lay witnesses who could corroborate her evidence. For these reasons, the applicant's request was denied. Ultimately, the applicant chose not to have two of her three lay witnesses testify.

ISSUES

[17] The issues for me to determine are as follows:

a. Is the applicant entitled to receive a non-earner benefit ("NEB") in the amount of $185.00 per week for the period of February 10, 2017 to January 13, 2019?[2]

b. Is the applicant entitled to an award under Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?

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

d. Is the applicant entitled to her costs of the proceeding?

[18] To be entitled to NEBs, the applicant must show on a balance of probabilities that she has a complete inability to engage in a normal life. A complete inability to engage in a normal life means the applicant must have sustained an impairment as a result of the accident that continuously prevents her from engaging in substantially all of the activities in which she ordinarily engaged before accident. To make that determination, I must determine whether the applicant is credible and, if so, whether the accident is the cause of her impairments.[3]

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[2] The parties advised that they resolved the issue set out in the Order of the case conference Adjudicator of the cost of an occupational therapy assessment in the amount of $4,520.00 recommended by Omega Medical Associates in a treatment plan submitted on August 2, 2019.

[3] After hearing oral submissions, I requested that the parties file written submissions on the application of ss. 36(5) and (6) of the *Schedule* and *F.C. v Aviva Insurance Canada*, 2020 CanLII 63586. The applicant declined to file any submissions and I am satisfied by the respondent's submissions that there are no other reasons that the applicant may be entitled to NEBs.

ANALYSIS

Entitlement to Non-earner Benefits

[19] There is no dispute that the governing case is the 2009 Court of Appeal decision of *Heath v. Economical Mutual Insurance Company* ("*Heath*").[4] The following principles from *Heath* apply to the applicant's circumstances:

a. The starting point for the analysis will be to compare the claimant's activities and life circumstances before the accident to her activities and life circumstances after the accident;

b. All of the pre-accident activities in which the applicant ordinarily engaged should be considered. However, greater weight may be assigned to those activities which the claimant identifies as being important to her pre-accident life;

c. It is not sufficient for a claimant to demonstrate that there were changes in his or her post-accident life. Rather, it is incumbent on a claimant to establish that those changes amounted to her being continuously prevented from engaging in substantially all of her pre-accident activities;

d. The phrase "continuously prevents" means that a claimant must prove "disability or incapacity of the requisite nature, extent or degree which is and remains uninterrupted";

e. The phrase "engaging in" should be interpreted from a qualitative perspective and as meaning more than isolated post-accident attempts to perform activities that a claimant was able to perform before the accident. The activity must be viewed as a whole, and a claimant who merely goes through the motions cannot be said to be "engaging in" an activity. Moreover, the manner in which an activity is performed and the quality of performance post-accident must also be considered. If the degree to which a claimant can perform an activity is sufficiently restricted, it cannot be said that he or she is truly "engaging in" the activity.

f. In cases where pain is a primary factor that allegedly prevents the insured from engaging in his or her former activities, the question is not whether the insured can physically do these activities, but whether the degree of pain experienced, either at the time or subsequent to the

[4] *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391 (CanLII)

activity, is such that the individual is practically prevented from engaging in those activities.

g. Consideration of a claimant's activities and life circumstances prior to the accident requires more than taking a snapshot of a claimant's life in the time frame immediately preceding the accident. It involves an assessment of the appellant's activities and circumstances over a reasonable period prior to the accident, the duration of which will depend on the facts of the case.

[20] The applicant submits that I am to look at a reasonable period of time before the accident to determine what her pre-accident activities were - a month to a year before the accident - and that I should look at a trajectory of her activities. She submits that she was on the road to recovery from her disabilities that had placed her on Ontario Disability Support payments ("ODSP") when the accident occurred.

[21] The respondent submits that just because the applicant may have had residual pain, or impairments, that does not mean she is entitled to NEBs. She has an onus on a balance of probabilities to show that her pain is functionally disabling within the principles of *Heath.* It submits that she has not satisfied her onus based on the medical evidence and she has no evidence to corroborate her testimony. The respondent submits that the applicant's testimony is not reliable and that, without evidence to corroborate her testimony, she has failed to satisfy her onus.

[22] The parties agree that the applicant was born December 5th, 1965, in the Ukraine. She immigrated with her family to Canada in 1999. She and her family initially settled in Richmond Hill and relocated to Coe Hill in 2006/2007. She was receiving ODSP at the time of the accident and had been since 2015. There is no dispute that the applicant sustained soft tissue injuries in the accident.[5] She was a passenger in a four-door sedan that was struck on the rear passenger side by a transport truck.

[23] The applicant testified that the following are the activities she engaged in prior to the accident and those that she can no longer do:

Pre-accident Activity	**Post-accident Activity**
Playing piano every day	No longer plays piano because her muscle memory in her hands is lost; it is as if her brain does not send the proper

[5] Exhibit 10: report of Dr. Eugene Chang, physiatrist, dated October 24, 2019 p.195 of 253; Exhibit 19: IE report of Dr. Osama Gharsaa, orthopaedic surgeon, dated June 8, 2017, page 437

	signals to her fingers, and she cannot see music due to blurred vision.
Tutoring her granddaughter in math and English	She no longer tutors her granddaughter.
Volunteering at her granddaughter's school 2 times per week, which required her to walk to 30 minutes to the school and 30 minutes back home while carrying a keyboard, throughout the warm weather and the winter.	She does not volunteer at the school because she cannot play the piano or walk to the school.
Gardening for 2 to 3 hours per day in her backyard with her granddaughter and, when it was not raining, watering the garden with a watering bucket that the applicant tried to fill and for which she was helped by her granddaughter.	Can only supervise her granddaughter gardening in a couple of container planters.
Teaching her granddaughter how to cook and bake.	No longer does it because she does not have the energy, she cannot concentrate, she cannot stand for long and she gets irritated.
Canning produce picked by her and her granddaughter from the garden, sometimes with her granddaughter's help.	Cannot cut vegetables properly.
Shovel snow in a small area sometimes.	*The applicant did not testify about her post-accident capability.*
Care for her granddaughter after school every day and watch her daily in the summer.	No longer does.
Walk every day an average of 2 hours to the grocery store, post office, park (almost every day), and cemetery and walk with her granddaughter.	She no longer walks.
Attend counselling in Bancroft and stop at the grocery store and Shoppers for her prescriptions every week.	Does it every two weeks and now needs help loading and unloading groceries.
Housekeeping	She does housekeeping but not the same level or with the same ease. Her house is now messy.
Cooking for herself, her granddaughter, her son and his friends, and his girlfriend	She no longer cooks for others and her son brings meals when her

including bread, borscht, cakes, natchynka, and cabbage rolls (all of which are labour intensive) 2 to 3 times per day.	granddaughter is at the applicant's house. She no longer cooks meals from scratch because she cannot coordinate her hands. She cooks simple meals or microwave meals for herself.
Tried to do seasonal decorating of her house.	She has not decorated because of no energy, her pain and no interest.
Crafts with her granddaughter.	No longer does crafting with her granddaughter.
Teach her granddaughter piano every day.	No longer teaches her granddaughter piano.
Small repairs and maintenance of her home.	She has not done any.
Shower every day.	Can no longer shower as she cannot get out of the bathtub, only has sponge baths.
Read and watch television.	Cannot read or watch television because of an inability to concentrate.
Socializing with friends	Does not want to see anyone.
Videoconference visits with her mother	Still does.

[24] To satisfy her onus to prove, on a balance of probabilities, that the applicant sustained an impairment as a result of the accident that continuously prevents her from engaging in substantially all her pre-accident activities in which she ordinarily engaged, I must be satisfied that:

a. Her testimony about the frequency and the manner in which she engaged in the activities listed above both before and after the accident is reliable; and

b. Accident impairments prevent her from engaging in those activities.

Reliability of the Applicant's Testimony

[25] Where the applicant's testimony varied from the medical evidence, I gave more weight to the medical evidence because I found the applicant's evidence was not reliable for the following reasons.

[26] A great deal of the applicant's testimony during her examination-in-chief was in answer to leading questions. Her testimony was inconsistent with the medical evidence. She would recall new self-serving information, or her answers would change when confronted with inconsistencies between her testimony and the

evidence. For example, the applicant has a history of swelling in her ankles that she initially did not recall. She then stated she did not tell her physicians of it, and then when asked about it being recorded in her medical records, she testified that it must have been noticed by her social worker because the swelling was normal for her. However, the clinical notes and records disclose that it was of concern to her. [6]

[27] Another example is the applicant testified that she was not able to do the pre-accident activities that she did with her granddaughter as a result of her accident injuries. When confronted with medical records that stated that after the accident, she attended a fair with her granddaughter and had an enjoyable time, the applicant claimed that she did not. She testified that the reason for such inconsistencies between her medical records and her testimony was that her treating practitioners must have misunderstood her.

[28] The applicant submitted that her testimony was inconsistent with the medical evidence because she is a simple unsophisticated woman. The evidence does not support this submission. She testified that she went to music college in the Ukraine for 5 years, then obtained a post-graduate education in the Ukraine equivalent to a degree halfway between a master's degree and a PHD in Canada.

[29] The applicant also submitted that her inconsistencies were due to misunderstandings because of language barriers. However, this is inconsistent with her testimony that her English skills were excellent, having taken English since grade school and having taught English as a Second Language for three years after arriving in Canada.

[30] The applicant also submitted that her inconsistencies and memory issues are due to a concussion she sustained in the accident. [7] She testified that she recalled seeing the wheels of the transport truck come toward her, but she could not recall if she lost consciousness. She recalled the taxi driver got out of his vehicle and came over to her door. Based on the applicant's report that she felt foggy after the accident, Dr. Dale Robinson, neurologist, diagnosed her with a possible mild traumatic brain injury.[8] Dr. Ken Reesor, neuropsychologist, diagnosed the applicant with a mild neurocognitive disorder. [9]

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[6] Exhibit 15: notes of January 22, 2016, February 2, 2016, March 22, 2016
[7] She was diagnosed with a concussion by a physiotherapist in Exhibit 1: an OCF-3 disability certificate of Melanie Dalley, physiotherapist, dated March 20th, 2017. However, physiotherapists are not qualified to make such a diagnosis and, therefore, I give no weight to the diagnosis.
[8] Exhibit 11: Report of Dr. Dale Robinson dated January 31st, 2020
[9] Exhibit 7: Report of Dr. Ken Reesor dated July 21st, 2019

[31] I do not accept that the possible concussion is reason for the inconsistencies in the applicant's testimony. Dr. Reesor did not administer neuropsychological testing because he determined that it would not assist in clarifying her clinical picture. He stated that the applicant's language, culture, and persistent emotional dysfunction would have interfered with obtaining valid, interpretable clinical data. Accordingly, there is no neuropsychological testing to support a diagnosis of mild traumatic brain injury. If the applicant sustained a concussion, which is only a possibility, it was mild. The mild nature is supported by the fact that the applicant was driven home from the accident scene in the same sedan that was involved in the accident. The police report does not mention the applicant has having been injured in the accident.[10] In fact, she reported to her family doctor, Dr. Alexander Ferreira, on January 19, 2017, that she did not lose consciousness and that she had full recall of the accident.[11]

[32] Dr. Christopher Hope, neuropsychologist, conducted an IE of the applicant at the respondent's request on May 23, 2017. The results of the applicant's psychometric tests were deemed invalid because of probable negative response bias and symptom over-reporting. Thus, despite the symptoms described by the applicant, Dr. Hope could not offer a diagnosis. He stated that in the context of the observed psychometric inconsistencies, it is not reasonable to accept her self-report as valid. This does not rule out the possibility that the applicant is experiencing genuine symptoms of distress, nor does it necessary invalidate prior reports of distress. Dr. Hope found that the extent of any cognitive impairment is unknown and most likely exaggerated.[12]

[33] The applicant submits that little weight should be given to Dr. Hope's opinion because, unlike Dr. Reesor, he did not factor in the applicant's culture or language as reasons why the applicant provided invalid results. Dr. Reesor reported that he did not administer any neuropsychological testing because the available information suggested that such an evaluation would not help clarify her clinical picture at that point in time. Language, culture, and persistent emotional dysfunction would have interfered with obtaining valid, interpretable clinical data. However, neuropsychological evaluation may be indicated in future if the applicant's psychological symptoms stabilized and/or her neurocognitive symptoms persist. His recommendation implies that language or cultural issues were minor and/or would resolve over time. No explanation of how culture would affect the validity measures was provided by Dr. Reesor. Given my findings on the applicant's language, without any explanation of how culture affects test validity, I

[10] Exhibit 30: Motor Vehicle Collision Report dated January 13, 2017
[11] Exhibit 15: clinical notes and records of Dr. Alexander Ferreira, January 19, 2017 note
[12] Exhibit 20: IE report of Dr. Christopher Hope, neuropsychologist, dated June 8, 2017

am unable to accept the applicant's submissions about the weight to be given to Dr. Hope's opinion.

[34] The applicant could not recall many of her pre-accident complaints or health concerns recorded in her medical records, but she could clearly recall some of the questions that were asked of her on neuropsychological testing. She told Dr. Ken Reesor that she saw her family doctor a few days after the accident. However, the evidence is that the applicant first obtained medical attention from her family doctor six days after the accident. On cross-examination she had no recollection of a health concern but would then state that the complaint did not last long, implying that she did remember. Her testimony was inconsistent with the medical records and her explanations for the inconsistencies did not make sense and were not cohesive with the evidence.

[35] The applicant submits that there is no evidence to contradict her testimony and, therefore, I must accept her testimony as to the truth of the facts. However, I find that her medical records contradict the applicant's testimony. Further, if the applicant's memory has been affected by her depression or by the accident to the extent submitted, then I am unable to accept her testimony as reliable.

Accident Impairments

[36] The applicant initially reported the following:

a. difficulty focusing, difficulty sleeping, having nightmares regarding a truck that almost hit her;

b. was having headache - pressure from inside her;

c. dizziness - feels unsteady on her feet at times;

d. ringing in her ears;

e. photophobia, wearing sunglasses in the house;

f. loss of bladder [control] - since accident only; and

g. neck, shoulders and left leg painful after accident.[13]

[37] The applicant testified that as a result of the accident she injured her right side including her shoulder, neck and legs, her arm and the back of her head. She could not recall what happened to her body upon impact or that she struck any

[13] Exhibit 15: clinical notes and records of Dr. Alexander Ferreira, January 19, 2017 note

part of her body on the interior of the vehicle. She testified that she has lost control of her fingers, she cannot focus, cannot concentrate as it causes headaches and neck pain, she has anxiety, anger, irritation, poor memory, cannot sit for too long, cannot stand for long, cannot bend her knees due to pain, she has blurred vision, pain in her entire body, upper, lower and mid back pain, right shoulder and elbow pain, and has blackouts from which she has sustained a number of falls.

[38] The applicant has an extensive pre-accident medical history. She suffered from depression after the loss of her husband about 5 years before the accident.[14] She had problems with joint, stomach and back pain that limited her mobility and headaches.[15] She hurt her back in April 2015 and was prescribed Tylenol # 3 for back pain in December 2015.[16] She had leg pain and swelling of her face and legs and suffered from a slip and fall in April 2016.[17] She received assistance from Community Care Access Centre in 2016 due to an arterial ulcer to her left mid tibia, at which time she experienced bilateral ankle swelling, electric like stabbing sensation and vague pain in her entire leg.[18] She was prescribed Lyrica for her leg pain. She advised one of the IE assessors that she had stopped taking it a month before the accident.[19] However, according to her family physician's records, she was taking Lyrica up to and including the date of the accident.[20]

[39] The applicant admits that she has an extensive psychological history that stemmed from the loss of her husband 5 years prior to the accident. She received counselling from a social worker, Marilyn Jones, from 2014 on. She submits that she was starting to get her life back when the accident happened. She was on ODSP at the time of the accident, but the evidence bears out that she was planning to start working by teaching piano lessons. She had received some funding to start up her business including having her piano tuned. She had participated in a couple of grief counselling sessions.

[40] The applicant testified that other than depression because of her husband's death, she had hypertension, gallstones, pre-diabetes, but that she was just fine prior to the accident. She did not dispute, but also did not remember her pre-accident

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[14] Exhibit 18: IE report of Dan Gauthier, occupational therapist, of June 8, 2017. Exhibit 1: Disability Certificate (OCF-3) of Melanie Dalley dated March 20th, 2017
[15] Exhibit 17: ODSP file, physician's statement of Dr. Ferreira dated May 1, 2014
[16] Exhibit 15: notes dated April 30, 2015, December 17, 2015, June 21, 2016
[17] Exhibit 15: notes of Marilyn Jones, social worker, dated April 7 and 29, 2016, May 13, 2016
[18] Exhibit 15: note dated June 21, 2016, July 15, 2016, and Peterborough Vascular Lab report of Dr. Justin Clothier dated July 8, 2016
[19] Exhibit 18: IE report of Dan Gauthier, occupational therapist, dated June 8, 2017, p.422
[20] Exhibit15: note dated August 8, 2016 with the prescription ending on February 4, 2017 and Exhibit 28: Shopper's Drug Mart prescription summary dated November 4, 2018 shows that the prescription for Lyrica/Pregabalin was filled on January 11, 2017.

complaints of leg swelling, joint pain and stiffness, chest pain. When cross-examined, she recalled joint swelling, muscle weakness and back pain in 2014 that went away after a few months with medication. She also had muscle cramps and spasm went away after a few months. Her headaches took longer than a few months to go away, but Tylenol #3 helped. She admitted that in 2014 she had medium to moderate limitations in her housekeeping abilities.

[41] The applicant initially denied on cross-examination that she had any issues with her right leg pre-accident and later admitted that she had swelling in her right ankle in 2014, but claimed it was normal for her. She did not remember the swelling in 2016 and testified that it was different in 2016. She denied that she was referred for testing due to her ankles swelling and claimed it was because her family doctor told her that after a certain age, blood needs testing to see how thick it is. The testing was for a lower extremity arterial evaluation for swelling in both ankles accompanied by electric-like stabbing pain and vague pain in the entire leg on July 8, 2016.[21] I find, based on the medical records that swelling in her legs continue to be a problem for the applicant up to the date of the accident.[22]

[42] The applicant denied having numbness and tingling in her legs pre-accident. However, she was referred to a rheumatologist, Dr. Godfrey, for complaints of numbness and tingling over her lower left leg associated at times with lumbar spine pain that was not severe enough to disable her. She had a constant feeling of swelling around her left ankle. He diagnosed her with a left L5-S1 radiculopathy in September 2016 and prescribed physiotherapy.[23] She was diagnosed with multilevel degenerative disc disease, mild bilateral facet osteoarthritis and mild osteoarthritis of the left hip joint.[24] When asked about this, the applicant testified that the left foot numbness was caused by striking an object with her foot and that it only lasted three to seven days. However, the medical records disclose she was complaining of the numbness for six months or so.

[43] Dr. Ferreira reported to ODSP in 2014 that the applicant had decreased concentration, memory, energy levels, pain amplification and headaches with increased risk of stroke. She experienced reduced productivity, interpersonal difficulties, psychomotor retardation and difficultly with complex tasks. Her ability to walk no more than three blocks was expected to deteriorate.[25] Dr. Ferreira reported in April 2015 that the applicant's anxiety, depression, and abnormal grief

[21] Exhibit 15: Lower Extremity Vascular Evaluation report of Dr. Justin Clothier dated July 8, 2016
[22] Exhibit 15: note of January 13, 2017 of Marilyn Jones "had swelling of the legs again, indeed her face is quite swollen today. pt continues to have health issues nyd."
[23] Exhibit 15: Dr. C. Godfrey, rheumatologist. September 2, 2016 note and report
[24] Exhibit 15: Dr. Gambarotta's CT scan report of the lumbar spine dated October 20, 2016
[25] Exhibit 17 ODSP file , report of Dr. Ferreira dated May 1, 2014

reaction functionally prohibited her ability to focus, concentrate or engage in her basic activities of daily living. Her energy and stamina were affected.[26]

[44] The applicant testified that she was no longer suffering from depression at the time of the accident. It lifted at the conclusion of participating for about a year in a grief counselling group. The applicant testified that she stopped the group counselling which she attended with other widows about one year before the accident. However, the first reference to the applicant attending the grief group was on November 24, 2016 [27], or less than two months before the accident. The medical records disclose that the applicant continued with the grief group in February 2017 up until April 6, 2018.[28]. This would mean that the applicant's depression from the death of her husband lifted about a year after the accident. When questioned further about it, she then denied testifying that her depression lifted at the conclusion of the grief group. However, when asked by her social worker just before the accident if the grief group was helping, the applicant shrugged and stated it was good and bad.[29] I find that her reaction was not consistent with someone whose depression had lifted and that she was still experiencing depression from the loss of her husband at the time of and after the accident.

[45] The applicant testified that she walked up to two hours per day prior to the accident. However, her cardiologist, Dr. William Hughes, reported on March 12, 2015 that her exercise tolerance was perhaps three blocks at a slow pace. She got short of breath on exertion and Dr. Ferreira thought that her ability to walk would deteriorate. The applicant testified that she started walking to improve her health after physiotherapy was recommended for her. She also claimed that she started walking before physiotherapy was recommended. However, I have difficulty accepting that she was as active as she testified to because of her shortness of breath diagnosed in 2015 coupled with her ulceration of her leg in 2016,[30] her L5 radiculopathy that affected her left foot and her mobility and her continued smoking.[31] She was also experiencing pain in the thighs that was triggered by walking short distances and relieved after sitting down for a few minutes. Dr. Lazarou, a neurologist who assessed the applicant at the respondent's request in September 2017, opined that the thigh complaints were caused by moderate to severe spinal stenosis at L3-4. It is degenerative in nature and not a consequence

[26] Exhibit 15: Limits to Participation report of Dr. Ferreira dated April 5, 2015
[27] Exhibit 15: note of Marilyn Jones, social worker, of November 24, 2016
[28] Exhibit 15: note of Marilyn Jones, social worker, of February 16, 2017 and April 6, 2018
[29] Exhibit15: note of Marilyn Jones dated January 13, 2017
[30] Exhibit 15: nursing note of January 23, 2017 states the second reason for the visit was to recheck the left arterial ulcer.
[31] Exhibit15: note of January 19, 2017 "heavily smoked stained fingers" and February 2, 2016 "many years of smoking."

of trauma. That, together with the recommendation in October 2016 that the applicant receive physiotherapy, means it was unlikely that within 3 months the applicant was able to improve physically to the point that she could walk for two hours a day. Accordingly, I am unable to find that walking two hours per day was one of the applicant's ordinary activities.

[46] The applicant testified that her granddaughter sometimes stayed with her after school for 3 to 4 days normally and up to seven days per week at the most. She came to her house every day after school for 3 to 5 hours and stopped coming when she moved schools in the fall of 2017. The applicant at one point testified that her granddaughter did not live with her, then later testified that her granddaughter lived with her over the summer. She initially testified that her granddaughter moved schools because her mother thought the new school offered a better program. She later claimed that it was because the applicant could not provide the same care for her.

[47] Although the granddaughter may no longer have come to the applicant's house after school, according to the applicant's testimony, she still visited her. The granddaughter planted container pots under the applicant's supervision. When she came to the applicant's house, she would go to an upstairs bedroom instead of working on crafts with the applicant, which made the applicant sad. There was no evidence that the applicant's granddaughter avoided doing crafts with the applicant because of her accident injuries. Accordingly, I am unable to find that the applicant has proven this was an activity she could no do due to her accident-related impairments.

[48] I do not find the applicant's testimony about the difference between her pre-accident and post-accident gardening reliable. The applicant could not or would not describe how big her garden was. She testified that prior to the accident, she did not have a lot of physical problems gardening, but that it made her tired. She testified that she did not have any problem bending at the knees to plant. I accept that gardening was important to the applicant as it took her mind off the death of her husband. However, given the ulceration of her leg in the summer of 2016, I am unable to accept that there was as much of a difference between the applicant's post-accident and pre-accident gardening as she testified to.

[49] The applicant submits that her headaches, back pain, and other pre-accident issues were exacerbated by the accident. She was assessed by Dr. Jason Lazarou, neurologist, at the request of the respondent. Dr. Lazarou reported that the applicant's headaches may be post-whiplash or post-concussion related. He stated that they are undoubtedly being magnified by a substantial amount of

medication overuse given the amount of Tylenol #3 she was using. The respondent submits that she was using Tylenol #3 at the same rate pre-accident as she was post-accident. The evidence supports this from December 2015 to August 2016 when she was prescribed 90 tablets of 30 mg per tablet every month. However, she was not prescribed any Tylenol #3 after August 2016 until January 19, 2017. She was taking Lyrica during that period. She was prescribed 90 tablets of 30 mg per tablet of Tylenol #3 on January 19, 2017, May 31, 2017, October 27, 2017, December 4, 2017, and February 26, 2018. After that, she was prescribed the same amount roughly every month or at the same rate as she was taking it from December 2015 to August 2016.

[50] The applicant testified that her pain now compared to the two years post-accident is worse. The pharmacy records disclose that the applicant's usage of Tylenol #3 increased over time, which is consistent with the applicant's evidence that her pain complaints have worsened over time. However, the relevant period of time for when the applicant was continuously prevented from engaging in substantially all of her usual pre-accident activities is the 104-week period after the accident.

[51] The applicant was involved in another motor vehicle accident on April 28, 2017. She reported that she did not sustain any injury in the second accident and that there was no real damage to the vehicle.[32] However, she reported to Dr. Ferreira that her back and leg pain had worsened since her recent motor vehicle accident. At that time, she advised she could only play piano for no more than seven minutes.[33]

[52] The applicant testified that she started having blackouts about 2 to 3 days after the subject accident that caused her to fall that have been occurring about twice per month since. However, as of April 28, 2017, when she was assessed at the respondent's request by Dan Gauthier, occupational therapist, she had not fallen. She denied having similar falls prior to the accident despite the medical records that disclosed that she had a couple of falls.[34]

[53] The only corroborating evidence that the applicant submitted that addresses the two-year period after the accident is the report of Dr. Reesor. Dr. Reesor saw the applicant on November 20, 2018. His opinion was that the applicant presented with increased depressive symptomatology, problems with sleep, increased fatigue, reduced concentration/mental focus, and the interfering effects of anxiety and other trauma-related symptoms. He interviewed the applicant's social worker

[32] Exhibit 15: clinical note of Marilyn Jones, social worker, of April 28, 2017
[33] Exhibit 15: clinical note of Dr. Ferreira of November 2, 2017.
[34] Exhibit15: notes of September 26, 2014, April 29, 2016

on January 8, 2019. His opinion was that the applicant's performance was consistent with some degree of psychomotor retardation, consistent with significant depressive disorder overlay. These impairments, while not precluding her ability to manage her personal and financial affairs, were likely to interfere with her being able to undertake these activities in an efficient and timely manner. They limit and restrict her ability to participate in social and leisure involvement and reduce her tolerances for social and leisure activities. He further opined that the applicant had pre-existing conditions that were improving with therapy and the accident and its sequelae, in essence, interfered with and eventually arrested that improvement.

[54] Dr. Reesor's opinion does not assist the applicant because cessation in improvement, a reduced tolerance, reduced efficiency or timeliness or limiting social or leisure activities does not meet the test of being continuously prevented from engaging in substantially all of the activities the applicant ordinarily engaged in prior to the accident.

[55] The clinical notes and records of Dr. Ferreira and Marilyn Jones show that after the accident the applicant was gardening, doing crafts with her granddaughter, playing piano, pursuing her business of teaching piano, and going on social outings. The applicant testified that her gardening after the accident consisted of container gardening rather than in the garden plots in her yard. However, when asked about the size of her garden or her yard, the applicant could not provide an answer. She had no cogent explanation for why sentiments such as joy, enjoyment, excitement, or happiness were used to describe her post-accident activities in her medical records.

[56] The applicant submits that little weight should be given to the IE reports because the assessors did not question her on what her pre-accident activities were and what, of those activities, were the most important to her. The applicant submits that little weight should be given to the report of Dan Gauthier, occupational therapist, who conducted an insurer's examination ("IE") of the applicant. She testified that Mr. Gauthier attended at her house but did not ask her anything about her activities that she engaged in before the accident or about what she did with her granddaughter. She could not recall some of the testing he performed but testified that she recalled very well that she put her knees on a chair. He did not ask her to go up or down the stairs. He did not go to any rooms with the applicant other than her dining room. She claimed he did not ask her about gardening.

[57] Mr. Gauthier reported on the applicant's typical day which included housekeeping, meal preparation, going for a walk and practicing the piano. This information could

not have come from anyone other than the applicant. Accordingly, I am satisfied that Mr. Gauthier asked the applicant about her typical day prior to the accident. He commented that prior to the accident the applicant gardened and planted small plants. I find that she failed to advise him of her caregiving to her granddaughter.

[58] Despite having no knowledge of the applicant's activities with her granddaughter, Mr. Gauthier determined that with pacing, the applicant had the functional ability to wash dishes, dust, make the bed, and grocery shop with proper body mechanics. He found the applicant had limited activity tolerance for gardening, heavy cleaning and low-level cleaning.

[59] The applicant testified that the respondent's orthopaedic IE assessor, Dr. Gharsaa, asked her to walk and took some measurements of her. She stated that it was not true that she could stand on her tiptoes because she needed the support of the wall and Dr. Gharsaa's hand to do it. Dr. Gharsaa reported that she was able to stand on her tiptoes and on her heels with some slight difficulties. She was able to stand on each foot separately only with support.

[60] The applicant agreed that she told Dr. Lazarou, the respondent's neurological IE assessor, that she was doing her housekeeping chores, but they had changed. It was hard since the accident for her to cook and clean. She only cooks simple meals and microwaved meals. She also testified that he asked her about walking, her chores and her gardening. She did not have a discussion with him about the amount of time she spent walking or the activities she did with her granddaughter such as baking.

[61] The applicant submits that little weight should be given to Dr. Hope's report. The applicant recalled seeing Dr. Hope about four months after the accident. She testified that she had good recall of the assessment it took place in an empty house and the taxi driver assisted her into the house where she had to wait for Dr. Hope to arrive for about 10 to 15 minutes. She testified that she told Dr. Hope that she speaks English as a second language and that some of the questions asked of her on psychometric testing she did not understand. When that occurred, he would explain the meaning and help her. She testified that she told Dr. Hope about how the accident ruined her life, and that they did not have any discussion about her background, her life or what she is going through. She tried to explain what she did before the accident; her music and how she had a business plan.

[62] I am unable to find that little weight should be given to the reports for the reasons sought by the applicant. All of the assessors would have reviewed each others' reports and would have been aware of the activities as described by the applicant. However, even if I were to give little weight to the IE reports, that would not assist

the applicant in proving her claims. Regardless of the IE reports, the applicant bears the onus of proving entitlement to NEBs. I find that she has not done so because I cannot accept her testimony as reliable for the reasons already given.

[63] The applicant submits that the manner in which she performed her ordinary activities, and the quality of the performance post-accident was substantially different from her pre-accident activities. She submits that any of the activities she did after the accident were so limited by her pain complaints or accident-related impairments that when considering the quality of performance, she meets the test for NEBs. However, that submission does not account for the enjoyment she got from the activities that are recorded in her medical records. There are clearly times when the applicant's depression affects her post-accident enjoyment of her activities. However, those times are not continuous as demonstrated in the clinical notes and records.[35] Accordingly, I find that the applicant has not proven that she is entitled to NEBs as claimed.

Regulation 664 Award

[64] Under s.10 of *Regulation 664*, if I find that the respondent unreasonably withheld or delayed payments, I may, in addition to awarding NEBs and interest, award a lump sum of up to 50 per cent of the amount to which the applicant was entitled at the time of the award. As the applicant has not proven her entitlement to NEBs, there is no entitlement to an award.

[65] The applicant submits that the only way she would be able to recoup the cost of proceeding to a hearing is by awarding a *Regulation 664* award. Even if I had determined that the applicant was entitled to NEBs, a *Regulation 664* award is not a mechanism to recoup costs.

[66] The applicant testified that no representative from the respondent interviewed her about what her pre-accident activities were. However, for the reasons discussed above, I find that the applicant was interviewed by the respondent's IE assessors about her pre-accident activities. Further, given that the onus to prove the applicant's pre-accident activities and that that they were affected by the accident remains with the applicant, I would not have found a lack of interview questions amounts to a delay in the absence of the applicant providing evidence of her pre-accident activities. Accordingly, this claim is dismissed.

Costs

[35] Exhibit 15: Clinical notes and records of Dr. Alexander Ferreira from March 12, 2014 to October 2018

[67] Where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs.[36] The applicant seeks her costs from the respondent and submits that the respondent acted unreasonably and bordering on acting in bad faith in relying on IE reports that did not address the test for entitlement to NEBs and in failing to have its IE assessors address Dr. Reesor's report and the Omega Medical CAT reports. The applicant submits that the behaviour that attracts a cost award is not limited to a party's behaviour during a proceeding. The applicant did not provide me with any case law in support of her submissions.

[68] The respondent, however, relies on *16-000075 v Wawanesa*[37] in which the Tribunal determined that the behaviour that attracts costs must take place in the proceeding, which is defined under *LAT Rule* 2.17 as the entire Tribunal process from the start of an appeal to the time a matter is finally resolved. The Tribunal determined that the actions and/or behaviour of a party that occurred prior to the filing of an application with the Tribunal cannot be considered under *LAT Rule* 19.1. I agree with the reasoning in that case.

[69] In the alternative, the applicant submits that because of the respondent's ongoing obligation to adjust the claim, it continued to have an obligation, after she filed her application, to interview her about which of her activities were important to her and which of those pre-accident activities she engaged in that she is no longer able to engage in because of her accident injuries. The respondent submits that a costs award cannot be made for unfair adjusting of the claim and relies on the decision of 16-*002818 v Unifund*.[38] In that case, the applicant sought costs on the basis the respondent did not take him out of the Minor Injury Guideline. Costs were not awarded because the behaviour did not occur during the proceeding.

[70] Cost awards under *LAT Rule* 19 are to maintain civility and order during proceedings, 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. They are not to compensate parties for the cost of bringing or defending claims.[39] In this case, I do not find that the ongoing adjusting of the claim or lack of ongoing adjustment of the claim is the type of behaviour that would be viewed as a disruption of the order or civility of the process. Even if it were, I would find that the respondent's actions do not amount to unreasonable behaviour

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[36] *LAT Rule* 19.1
[37] *16-000075 v Wawanesa Mutual Insurance Company*, 2017 CanLII 35323 (ON LAT) ("*16-000075 v Wawanesa*"). See also *S.S. v Aviva General Insurance Company*, 2019 CanLII 130376 (ON LAT) at para. 101
[38] *16-002818 v Unifund Assurance Company*, 2017 CanLII 39709 (ON LAT) ("*16-002818 v Unifund*")
[39] *16-000075 v Wawanesa* at para.35

as noted above. The applicant has not submitted any other reason to justify an award for costs or any reason listed under *LAT Rule* 19.1. Accordingly, the applicant's claim for costs is dismissed.

CONCLUSION

[71] The applicant's evidence is not reliable and, as there is no evidence to corroborate her testimony, the applicant has failed to prove her entitlement to an NEB. Accordingly her claims for NEBs, a *Regulation 664* award and costs are dismissed.

Date of Issue: August 19, 2021

Deborah Neilson, Adjudicator