



**Citation: Chevalier-Wara v. Economical Mutual Insurance Company, 2023 ONLAT  
21-004455/AABS**

**Licence Appeal Tribunal File Number: 21-004455/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:

**Kyle Chevalier-Wara**

**Applicant**

and

**Economical Mutual Insurance Company**

**Respondent**

**DECISION AND ORDER**

**ADJUDICATOR: Julia Fogarty**

**APPEARANCES:**

For the Applicant: Kyle Chevalier-Wara, Applicant  
Gregory C Gilhooly, Counsel

For the Respondent: Fiona Von Kannen, Claims Representative  
Martin Forget, Counsel  
Stephen Whibbs, Counsel

Court Reporter: Alyssa Scott  
Jason Nebelung  
Ashley Currie (Observer)

**HEARD by Videoconference:** January 30 to February 3, 2023

**In writing:** February 14 and 17, 2023

## **BACKGROUND**

- [1] The applicant was involved in an automobile accident on June 25, 2017 and sought benefits pursuant to the Statutory Accident Benefits Schedule *Effective September 1, 2010 (including amendments effective June 1, 2016)*. The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).
- [2] On June 25, 2017 the applicant was in a car accident. The damage to the car was severe, including the roof being torn off. The applicant was unconscious and unresponsive. He was rushed to the hospital where he would start a lengthy stay and recovery period.
- [3] As a result of the accident the applicant suffered a grade 2 diffuse axonal injury to the brain. It is accepted by the respondent that the applicant suffered a traumatic brain injury, but the parties dispute the extent to which that injury impacts the applicant’s ability to gain and maintain competitive employment. The parties’ disagreement over whether the applicant is catastrophically impaired hinges on whether the applicant is able to return to work and to what extent he’s able to work compared to his pre-accident employment.

## **PROCEDURAL ISSUE**

- [4] On the first day of the hearing the respondent unsuccessfully brought a motion to adjourn the videoconference hearing to convert it to an in-person hearing. The basis of the respondent’s motion was to advance an accommodation request for the applicant that was opposed by the applicant.
- [5] The respondent sought to rely on correspondence with applicant’s counsel that the applicant has an “aversion to technology” which would allegedly compromise his testimony and the respondent claimed this was corroborated by a medical letter from the applicant’s treating psychologist.
- [6] The applicant relayed that the letter from his treating psychologist did not state that he “will” have an issue, only that he “may” have an issue. The applicant wanted to testify and based on the position of his treating psychologist, felt that he could successfully do so.
- [7] I found that the speculative nature of the possible accommodation issue raised by the respondent was not enough to warrant an adjournment. The applicant stated that he was both ready and able to proceed and he would not be prejudiced by his attempt to testify.

## ISSUES

- [8] Has the applicant sustained a **catastrophic impairment** under criteria 4 as defined by the *Schedule* due to his restrictions with work described by section 5b of the GOS-E Guideline?
- [9] Is the applicant entitled to **attendant care benefits** of \$1,671.62 per month from April 19, 2019 to date and ongoing?
- [10] Is the applicant entitled to **interest** on any overdue payment of benefits?

## RESULT

- [11] The applicant is not catastrophically impaired.
- [12] I find that the applicant is not entitled to attendant care benefits; it follows that no interest is payable.

## ANALYSIS

- [13] Since the applicant is not a minor, to be determined to be catastrophically impaired the applicant must show the following:
- a. Using diagnostic technology the applicant must show intracranial pathology-results demonstrative of brain injury;
  - b. The injury shown must be caused by the accident at issue; and
  - c. Using the Glasgow Outcome Scale and the Extended Glasgow Outcome Scale (together, "GOS-E") test the applicant must reach a certain level of disability.
- [14] The presence of a brain injury caused by the accident is admitted by the insurer.
- [15] The parties disagree as to the extent of the disability under the GOS-E. The GOS-E is a structured interview which seeks to determine where an injured party falls on a scale that ranges from "upper good recovery" at level 8 to "death" at level 1. The scale reflects disability and handicaps versus impairments and then focuses on how the injury has affected function rather than particular deficits and symptoms caused by the injury.
- [16] The parties are seeking to settle whether the applicant should be rated a level 5 with lower moderate disability (one year or more after the accident) or a level 6

with upper moderate disability. If found to be a level 5 the applicant would be entitled to a catastrophic impairment determination by the Tribunal.

[17] I did not find that the applicant is catastrophically impaired.

***Pursuant to section 5b of the GOS-E test, is the applicant able to work?***

[18] The GOS-E are set out in an article titled “Structured Interviews for the Glasgow Outcome Scale and the Extended Glasgow Outcome Scale: Guidelines for Their Use” (“GOS-E Guideline”) by J.T. Lindsay Wilson, Laura E.L. Pettigrew and Graham M. Teasdale published in the Journal of Neurotrauma, Volume 15, Number 8, 1998. An insured person who suffers a traumatic brain injury with prescribed findings following a prescribed medical diagnostic and, relevant to this particular hearing, whose GOS-E test result is a lower moderate disability (after 1 year or more, post-accident) is a catastrophically impaired individual, pursuant to s.3.1(1)4 of the *Schedule*.

[19] The purpose of the GOS-E is to determine the level of disability following a head injury. The GOS-E Guideline provides a structured interview which is broken down into eight categories of function including:

- a. Consciousness;
- b. Independence in the home;
- c. Independence outside the home;
- d. Restrictions in travel;
- e. Restrictions with work;
- f. Restrictions in social and leisure activities;
- g. Disruptions to relationships with family and friends; and
- h. Return to normal life.

[20] The GOS-E assessment follows four rules in conducting assessments:

- a. Disability due to head injury is identified by a change from pre-injury status. The scale is designed to assess changes and restrictions that have taken place as a result of head injury.

- b. Only pre-injury status and current status should be considered. Current status includes problems and capabilities evident over the past week or so.
- c. Disability must be as a result of mental and physical impairment. If an injured person is capable of performing the activity but does not do it for some reason they are not considered disabled. You might need to ask a hypothetical question: what exactly is the injured person capable of even though they do not actually do it. You might need to probe with more questions, if the answer to a particular question indicates some difficulty in a particular area.
- d. Use the best source of information available. In some cases, an injured person may lack insight and whenever possible interview a relative or close friend. Judgment/caution should be used when interviewing, as the injured person may deny psychological changes and the collateral interviews may overreport post-injury problems. The Guidelines recommend the complete GOS-E questionnaire be administered because answers to later questions may indicate a need to re-evaluate the significance of earlier answers. An injured person may be considered capable of activities even if they have some difficulties with them.

[21] The GOS-E structured interview is meant to take a snapshot of a person's current status in the past week and does not consider past impairment or future prognosis. The person's score depends on the lowest outcome category within eight scales which range from 1: death, to 8: good recovery. In the present case, there is a difference of opinion between the parties' assessors as to whether the applicant's disability falls between scale 5 and 6 which are defined in the chart below.

<p>5 – Low Moderate Disability (MD- ) <b>(CAT)</b></p>	<p>Unable to return to work in their previous capacity and able to only work in a sheltered workshop or non-competitive job. Unable to participate or rarely, if ever, take part in previous social or leisure activities. Showing a daily and intolerable disruption in relationships with family and friends as a result of psychological changes.</p>
<p>6 – Upper Moderate Disability (MD+ ) <b>(NOT CAT)</b></p>	<p>Able to return to work in a reduced work capacity. Participating in social and leisure activities, but less than half as often as prior to the accident.</p>

	Showing a disruption in relationships with family and friends, as a result of psychological changes, but occurring once per week but tolerable.
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[22] The question before me is very narrow: does the Applicant's traumatic brain injury ("TBI") result in his being unable to work, or only being able work in a sheltered environment or non-competitive workplace? If I determine that the applicant is able to work in a reduced work capacity, then the applicant will be rated a 6 in the chart above and not determined to be catastrophically impaired.

[23] To determine the applicant's ability to work, question 5 of the GOS-E Guideline describes work as follows:

- (a) Work refers to jobs that are paid at a reasonable rate and which, in principle at least, are open to others.
  - i. Prior to the accident the applicant worked as a project/contract-based construction worker. Since the accident the applicant describes a variety of jobs, of which at least one is described by the applicant himself to pay a very good rate. These jobs start in or around 8 months after the accident and they are project-based just like his pre-accident employment. As such, he is working on a periodic basis in line with his pre-accident employment in roles that pay a reasonable wage and are open to others.
  - ii. This is illustrated in the following ways using the applicant's records and evidence:
    - 1. As of February 16, 2018, the applicant was engaged in demolition work in his aunt's home;
    - 2. The records of Dr. Pelletier enclose an email chain with the applicant dated October 3, 2018 which describes that the applicant "had an offer for some cash work at a great wage" and that it was "just a lot to miss out on" and so he needed to reschedule his appointment. From this I infer that a great wage is better than a "reasonable rate" and if he's able to pass the job up, it's open in principle to others. The applicant did reschedule this appointment but claimed to not have accepted the job on the stand.

3. Two months later, again in the notes of Dr. Pelletier, the applicant relayed that he was working for cash or assisting with building projects on December 6, 2018.
  4. On September 17, 2021 the applicant reported to Dr. Pelletier that he was still working on renovation projects without difficulty and that doing this work for his friends had given him a sense of purpose. This is just over 3 years post-accident.
- iii. The applicant denied ever working for cash when questioned during his testimony but he did admit that he would be fine if he returned to work. This was in line with what he had expressed to Ms. Evans, where she relays in her April 1, 2020 occupational therapy catastrophic impairment assessment report that he was restricted from “returning to work at full duties” but that he “may do so in a reduced capacity”.
  - iv. The applicants’ denials during his testimony of working for cash are not in line with the documentary evidence of his self-reporting doing so. So it is unclear to what extent he needs accommodations, if any, during his current work.
  - v. Based on these records as well as the testimony of the witnesses, I conclude that not only is the applicant capable of some kind of work but he undertook working for cash on and off for years starting on at least February 16, 2018 – approximately 8 months after his initial injury. During his testimony he explained that when he was helping his friends, he was doing less than he would have done with his normal employment but he did not suggest that he needed help to do the work or that he needed to be supervised.
- (b) Sometimes a change in employment status may be unrelated to a head injury, e.g., due to the end of a contract, retirement or redundancy. Such changes do not indicate a reduced capacity for work.
- i. In the case of the applicant, prior to his accident he would work for the duration of various contracts and then move on to the next job as they came up.

- ii. It appears, based on his testimony and the records of Dr. Pelletier, that he has continued to do that in some capacity once he resumed working.

[24] The GOS-E Guideline describes reduced work capacity as follows:

(a) Change in level of skill or responsibility required;

- i. There is no change in skill or responsibility required expressed, only that he believes he may work more slowly. He's not subjected to supervision, he's not noted to be on probation, he doesn't list any accommodations need to be made so that he can retrain or maintain the skills he had previous to the accident.
- ii. After his accident the applicant also enhanced his education and built up a proficiency in a new area that allowed him to begin to teach jiu-jitsu to children. The applicant stated during his testimony that he was not paid for teaching the children's classes but in my view it is evidence of someone with planning abilities and higher executive function that he was able to undertake the task of teaching a group of children this new skill. Teaching and passing on these skills to children would involve progressive lesson and activity planning, along with monitoring each child's progress to see who needs help and who can advance to the next level on top of general supervisory skills to monitor a small to large group of children. This is also a role that many do receive compensation for in Jiu-jitsu schools. Due to his many denials about receiving compensation for his construction work tasks that were not in line with the documentary evidence in this matter I am not convinced he is not similarly compensated for this role.

(b) Change from full-time to part-time working:

- i. Prior to the accident the applicant was a contract or seasonal worker. He would take on construction projects, finish the project, and then move on to the next project when it became available.
- ii. Following the accident, the applicant continued to take on construction projects – things like demolition, painting, renovations, which he would work until he concluded the project.



- iii. As such, there is no substantial changes to the form and manner in which the applicant has been working.
- (c) Special allowances made by employer (e.g. increased supervision at work):
- i. The applicant testified that he works more slowly and does not do as much as he did prior to his accident but he did not say he needed any supervision, that he does not complete his jobs or that any other measures needed to be instituted for the projects he admits to having done.
  - ii. Additionally he's taken on the unpaid role of teaching children jujitsu, where he acts in a supervisory role to groups of children while they learn from him. This managerial role seems like an increase in responsibility in line with his pre-accident employment where he at times worked in safety on different construction projects in a more managerial role.
- (d) Change from steady to casual employment (i.e. no longer to hold a steady job):
- i. The applicant's work history was project/contract-based construction work or seasonal work, so his approach of working on a construction project until it is completed before moving on to another is in line with his pre-accident employment.
  - ii. He's additionally maintained an unpaid teaching role at a jujitsu school where he works with children.

[25] The GOS-E Guideline describes "non-competitive work" as follows:

- (a) Work done voluntarily:
- i. The applicant does engage in some volunteer work. The applicant admits to teaching children jujitsu classes on an unpaid volunteer basis, in addition to construction projects which are shown through the applicant's messages to Dr. Pelletier were paid.
- (b) Jobs that are specifically designed for disabled people:

- i. The applicant has not provided any information that he has engaged in any jobs of this nature or provided any evidence he has sought out employment of this nature.

(c) Work in a sheltered workplace:

- i. The applicant again has not provided any information that he has engaged in any jobs of this nature or provided any evidence that he has sought out any employment in a sheltered workplace.

[26] To summarize, the applicant did not meet the burden to show he is only able to work in either a non-competitive role or sheltered workplace because he has been engaging in periodic work similar to his pre-accident employment since approximately February 16, 2018. The information to Dr. Pelletier shows at least one of these roles was paid a “very good” wage and was open to the public since he had to rearrange his schedule so as not to miss out on the opportunity. The applicant’s testimony ran contrary to the documentary evidence on the details of his post-accident employment and as such I did not find him to provide reliable testimony on this subject.

[27] As such, the applicant is rated a 6 upper moderate disability under the GOS-E guidelines, and is not determined to be catastrophically impaired under the *Schedule*.

***Is the applicant entitled to attendant care benefits?***

[28] The applicant is disputing the denial of the Form 1 in the amount of \$1,671.62 submitted by Raza Anwar, an occupational therapist, on April 10, 2018.

[29] Section 19 of the *Schedule* states that an insurer shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of an accident for attendant care services (ACBs) provided by an aide or attendant. Section 42(1) of the *Schedule* provides that an application for ACBs must be in the form of, and contain the information required to be provided in, the version of the document entitled Assessment of Attendant Care Needs (“Form-1”).

[30] The applicant’s occupational therapy expert, Ms. V. Wilson, testified that on a physical basis he does not need attendant care. From a physical perspective he is able to do the tasks needed. Ms. Wilson instead stated that he needs help with initiation of tasks, help with making sure he does not binge eat, provide mobility assistance, help with hygiene, and more. Ms. Wilson found that his issues are related to his cognitive function.

- [31] I found the evidence of Ms. Evans, the respondent's assessor, to be persuasive and supported by the applicant's own testimony. Ms. Evans did not find a need for attendant care on the basis that the applicant is highly functional from a physical and cognitive perspective. The applicant described in his testimony how he currently manages his diet, the rigorous self-discipline involved in his training regimen and how he has no issues with hygiene.
- [32] I observed during the course of the applicant's testimony a man that was able to thoughtfully articulate answers in a lengthy and stressful situation where he described to me how he cares for his daughter, how he teaches young children martial arts, how his hygienic practices around his home have actually improved since the accident and how he has maintained a very regimented diet to bulk up with his intensive physical routine. Frankly, despite the TBI, the applicant seems to be thriving, from a personal growth perspective, in comparison to his pre-accident condition.
- [33] The role as a jujitsu instructor really shows how well the applicant is doing. Teaching children a skill requires a great deal of patience, planning, attention to detail and oversight. In my view it shows someone with a great deal of control over their executive functions to be able to accomplish this. He's managing time to ensure lessons run on schedule, he's planning lessons as well as teaching activities, he's showing self-control by maintaining his composure with a group of children, he's paying attention since he's responsible for their wellbeing during the lessons, and more. This responsibilities in this role run contrary to the applicant's experts finding that he's unable to rely on his executive functions due to his cognitive issues because not only is he trusted with his own safety, he's been entrusted with the safety of a bunch of young children as well. Someone who needs supervisory care would not be able to accomplish this task, nor should they be trusted to care for a group of small children.
- [34] The applicant's mother, Mrs Gidget Ovsenek, described the applicant as someone who was fiercely independent and did not want her help around his home. When the applicant was discharged from the hospital on August 28, 2017 she moved her trailer to his yard to stay with him and to help him with tasks around the home while he was recovering. She described her help as not being well-received, the applicant was very difficult and expressed that he did not want her there. She did not stay very long. He felt he did not need her assistance and asked her to leave.
- [35] I do not see any benefit to the applicant receiving attendant care benefits, nor do I believe it to be reasonable or necessary to his recovery. Throughout the

hearing by oral and documentary evidence, I was shown a man with control over his executive functions who has trained himself to the pinnacle of his personal fitness goals. Additionally, he's turned away all the prior attempts by his family to provide him with attendant care services when he was released from the hospital following his accident and I don't see any evidence before me that any have been incurred since.

- [36] The applicant's form 1 and supporting occupational therapy report is inconsistent with the applicant's own evidence as well as the documentary evidence and oral evidence and thus I find that the applicant has not met his burden of proof to show that attendant care benefits are reasonable or necessary for his recovery.

**Is the applicant entitled to interest?**

- [37] The applicant was unsuccessful on his claim for attendant care benefits, as such there is no treatment plan available for which interest would be considered.
- [38] The applicant is not entitled to interest on the overdue payment of benefits.

**ORDER**

- [39] The applicant is not catastrophically impaired.
- [40] I find that the applicant is not entitled to attendant care benefits; it follows that no interest is payable.

**Released:** September 21, 2023



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**Julia Fogarty**  
Adjudicator