

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Tribunal File Number: 17-006710/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act, RSO 1990, c 1.8.*, in relation to statutory accident benefits.

Between:

A.M.F.

Applicant

and

The Dominion of Canada General Insurance Company

Respondent

DECISION

ADJUDICATORS: Paul Gosio & Kimberly Parish

APPEARANCES:

Counsel For the Applicant: Nick de Koning

Counsel for the Respondent: Sharon Dagan

**HEARD: In Person: September 24, 25, 26, 27, 28, 2018
and by Written Submissions: August 16, September 10, October 5,
and October 12, 2018**

INTRODUCTION

[1] The applicant was injured in an automobile accident (“subject accident”) on March 13, 2009, and sought benefits from the respondent pursuant to *Ontario Regulation 403/96*, known as the *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*¹ (the “*Schedule*”). The applicant submitted an application for catastrophic impairment determination (“OCF-19”) dated April 10, 2015 to the respondent. The applicant seeks a determination that she suffered from a catastrophic impairment as a result of the subject accident. She also seeks a determination that the medical benefits in dispute are reasonable and necessary.

ISSUES

[2] The disputed claims in this hearing are:

- i. Did the applicant sustain a catastrophic impairment as defined under the *Schedule*?
- ii. Is the applicant entitled to a medical benefit in the amount of \$3,855.78 for chiropractic services as recommended by Central Health Care in a treatment plan dated March 31, 2017 and denied on April 5, 2017?
- iii. Is the applicant entitled to a medical benefit in the amount of \$2,183.40 for massage therapy as recommended by Dr. D’Urzo in a treatment plan dated September 28, 2017, and denied on November 2, 2017?
- iv. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

1. The applicant did sustain a catastrophic impairment as defined under the *Schedule*.
2. The applicant is entitled to a medical benefit in the amount of \$3,855.78 for chiropractic services as recommended by Central Health Care in a treatment plan dated March 31, 2017 and denied on April 5, 2017.
3. The applicant is entitled to a medical benefit in the amount of \$2,183.40 for massage therapy as recommended by Dr. D’Urzo in a treatment plan dated September 28, 2017 and denied on November 2, 2017.
4. The applicant is entitled to interest on any overdue payment of benefits to be paid in accordance with the *Schedule*.

¹ *Ontario Regulation 403/96 - Statutory Accident Benefits Schedule for Accidents on or After November 1, 1996*

OVERVIEW

- [3] The respondent disputes that the applicant sustained a catastrophic impairment as a result of the accident. The respondent submits that the applicant's physical and psychological complaints pre-date the subject accident and stem from four previous more serious motor vehicle accidents, a slip and fall, and a sexual assault. The respondent also maintains the medical benefits in dispute are not reasonable and necessary.

Causation Relating to the March 13, 2009 Accident

- [4] The respondent has raised a causation issue with respect to the applicant's injuries and maintains that the applicant's level of functioning is similar, or somewhat better than it was prior to the subject accident.
- [5] The applicant disputes causation as a defence and submits that causation has been established through either the application of the "material contribution" or the "but for" test.

The Law

- [6] It is the respondent's submission that the "but for" test is the applicable test for determining causation in this case and relies on the Ontario Court of Appeal case involving statutory accident benefits in the case of *Blake v. Dominion of Canada General Insurance*² and as followed by the Supreme Court of Canada in the case of *Clements v. Clements*³. The applicant relies on the Ontario Court of Appeal Case, *Monks v. ING Insurance Co. of Canada*⁴ to support their position that the onus remains with the respondent to pay the applicant for accident benefits as set out within the *Schedule* regardless of which causation test resulted from the accident.
- [7] *Clements* confirms that the primary test to use when determining causation is the "but for" test". Only in rare and exceptional circumstances, where it is impossible to determine the cause of the applicant's injuries using the "but for" test, can an applicant prove causation by indicating that the respondent's conduct "materially contributed" to the risk of the injury. This is not one of those cases.

ANALYSIS

- [8] The Tribunal finds the applicant has established that she meets the test for causation under the "but for" test and that the applicant's current impairments are as a result of the subject accident. The Tribunal relies on the Supreme Court of Canada case of *Clements v. Clements* in support of its conclusion. In reaching this conclusion an analysis of the applicant's pre-existing impairments is

² *Blake s. Dominion of Canada General Insurance*, 2015 ONCA 165 (CanLII)

³ *Clements v. Clements*, 2012 SCC 32.

⁴ *Monks v. ING Insurance Co. of Canada*, 2008 ONCA 269 (CanLII), para 95, 96

necessary to determine her current levels of impairment arising from the subject accident.

Applicant's Pre-accident History

- [9] The applicant's hospital records from 1992 noted jaw pain, and radiating neck pain⁵. Further hospital records up to January 8, 2009⁶ noted insomnia, chronic shoulder and neck pain accompanied by headaches arising from motor vehicle accidents since 2001. It was noted that the applicant suffered from Generalized Anxiety Syndrome in 1998, and she was searching for alternate employment in 2001 as her job was causing her to experience stress.⁷ Following the January 29, 2007 accident, the applicant experienced difficulties with concentration, chronic pain, sleep disturbance, headaches, and dizziness and is unable to work.⁸
- [10] The applicant does not dispute that she suffered from pre-existing impairments. The following medical evidence supports the position that the applicant was experiencing ongoing psychological and physical impairments prior to the subject accident. In January 2008, the applicant was diagnosed with Pain Disorder associated with both Psychological Factors and a General Medical Condition, Adjustment Disorder with Mixed Anxiety and Depressed Mood, aggravated by the three prior motor vehicle accidents⁹. It was noted that chronic pain pre-dated the January 29, 2007 accident but that accident aggravated the applicant's pre-existing neck and back pain.¹⁰ The applicant's family doctor noted that since the January 29, 2007 accident she is totally disabled as she showed minimal improvement, feels worse, and she cannot sleep due to chronic neck and back pain.¹¹ The applicant was experiencing Temporomandibular Joint Dysfunction ("TMJ") in May 2008, and her concentration and short-term memory had worsened. The applicant's own rebuttal report dated May 28, 2008, provided the same diagnosis as a result of the January 29, 2007 accident: Chronic Pain Disorder associated with both Psychological Factors and a General Medical Condition and Adjustment Disorder with Mixed Anxiety and Depressed Mood.¹²
- [11] On February 9, 2009, the applicant slipped and fell backwards on black ice sustaining injuries to her back, neck, left knee, and a scrape to her hand. The applicant stated that the injury to her left knee has now resolved but she still experiences ongoing pain in her neck and back and a settlement was reached in relation to this slip and fall.

⁵ Exhibit 1 - Joint Document Brief, volume 1, tab 1, at 2

⁶ *Ibid*, hospital records, tabs 1, 2, 3, 5, 6

⁷ *Ibid*, Tab 7, at 141 – 143, 161-169

⁸ OCF-3, dated October 26, 2007, Exhibit 2 – Joint Document Brief, volume 2, tab 18 I, at 153-157

⁹ Insurer's Examination ("IE") Report of Dr. C. Pierce, psychologist, dated January 15, 2008, *Ibid*, tab 18 J, at 162

¹⁰ IE Report of Dr. J. Israel, orthopedic surgeon, dated January 16, 2008, *Ibid*, tab 18 K, at 174

¹¹ Letter from Dr. G.T. Fiorini, the applicant's family doctor dated April 4, 2008, *Supra*, note 6, tab 9, at 244

¹² Rebuttal report of Dr. P.H. Waxer, dated May 28, 2008, *Supra*, note 8, tab 18 P

[12] To summarize, prior to the subject accident of March 13, 2009, the applicant had chronic pain in the areas of her back and neck, TMJ, difficulty sleeping, and suffered from psychological impairments but was still able to function as evidenced that she was not totally dependent on her parents, continued to do some limited modeling, continued participating in an annual fundraising event which she started in 2001, and undertook training and pursued becoming a private investigator.

Level of Impairment Since the Subject Accident - Applicant's Position

[13] The applicant asserts the following impairments have been caused, or exacerbated by the subject accident:

- (i) **Increased Suicidal Thoughts** - In the year prior to the subject accident, the applicant reported to her assessing psychologist, Dr. J. Gouws, that she had no thoughts of self-harm.¹³ This is in contrast to Dr. Gouws later assessment in July 2017 in which she expressed thoughts of suicidal acts and it was noted she should follow-up with her psychiatrist.¹⁴ Passive suicidal ideation was also noted during an insurer's examination ("IE") conducted in 2010.¹⁵ At the hearing, the applicant stated she has suicidal thoughts which were corroborated at the hearing by her husband.

- (ii) **Cognitive Decline** - The evidence supports cognitive decline since the subject accident as her prior treating psychologist, Dr. A. Nashef found the applicant had the ability to track and follow a conversation with no evidence of tangential thinking.¹⁶ Dr. Nashef noted in a progress report in 2012 that prior to the subject car accident, her physical and psychological progress was slow, but steady to begin re-establishing a career.¹⁷ No issues with validity testing, or symptom magnification had been noted in either of Dr. Nashef's reports. The applicant starting seeing Dr. S. Jett, treating psychologist from 2014 - 2018 and saw him approximately 40-50 times. His testimony was that the applicant exhibited tangential thinking as her thoughts would shift from the topic of discussion and she would over-process things. Dr. Jett stated her presentation was consistent throughout her course of treatment and he did not perceive that she exaggerated her problems. Dr. Jett stated that treatment stopped when the respondent would no longer fund treatment as the policy limits were exhausted. The applicant stated she has not been able to assist her

¹³ Psychological assessment report of Dr. J. Gouws, dated June 21, 2008, *Supra*, note 8, tab 18R

¹⁴ Psychological assessment report of Dr. J. Gouws, dated July 21, 2007, Exhibit 5 – Joint Document Brief, volume 5, tab 43

¹⁵ Psychological IE assessment report of Dr. A. Marino, psychologist, dated September 13, 2010, Exhibit 7 – Joint Document Brief, volume 7, tab 73

¹⁶ Psychological Assessment Report of Dr. Nashef, dated September 13, 2009, *ibid*, tab 66, at 68

¹⁷ Treatment Progress Report of Dr. A. Nashef, dated August 14, 2012, *ibid*, tab 86, at 141

husband with filing the paperwork for his business for the past 3 - 4 years as she is too forgetful, which was corroborated by her husband.

- (iii) **Discontinued Employment and Volunteer Activities** - The applicant has not worked on a consistent basis since 2006 but testified she did some limited work as a model in 2009 - 2010 but discontinued it as she stated she “lost her self-esteem”. From 2000 - 2011, the applicant was involved in organizing a local annual fundraising event. Her role involved obtaining sponsors, prizes, distributing flyers, and speaking with the media. She discontinued her participation in 2011 due to pain.
- (iv) **Increased Dependency and Social Withdrawal** - There has been an increase in the applicant’s dependency on her elderly parents and her husband since the subject accident. Dr. Nashef noted despite her pain, she tried to remain active with assisting her parents, and maintaining good relationships with them and her boyfriend (currently her spouse), and other relatives and friends. Dr. Nashef further noted a decrease in her social/recreational involvement.¹⁸ At the hearing, the applicant stated the only people she spends time with are her parents and her husband, who corroborated this. Her husband is on the road traveling for business often. He also stated he primarily does the grocery shopping and the cooking, or they will order take-out as grocery shopping and cooking are too much for his wife to organize.

Level of Impairment Since the Subject Accident - Respondent’s Position

[14] The respondent maintains that the applicant is in the same, or in a somewhat better position since the subject accident and relies on the following in support of their position:

- (i) The applicant lived with her parents prior to the subject accident. In July 2010, the applicant got married to the man she had been dating since 1999-2000 and subsequently moved out of her parents’ home and into her own home with her husband.
- (ii) The applicant spends time with her family and has maintained a close relationship with her parents. Dr. Gouws noted within his July 2017 report that the applicant described her relationship with her husband as being a positive one.
- (iii) The applicant independently manages her self-care and performs shopping, manages finances, and banking as evidenced within the Psychiatric IE Catastrophic Impairment Determination report of Dr. H. Rosenblatt dated September 15, 2016 and surveillance evidence obtained by the respondent.

¹⁸ *Supra*, note 16, at 65, 71, 73

- (iv) The applicant is capable of driving both short and long distances. It was not disputed at the hearing that the applicant drove with her husband to and from Florida in 2015. As her husband had tickets and could not be insured to drive her car the applicant drove the entire distance. Surveillance evidence also showed the applicant driving locally to various businesses.
- (v) The applicant travelled with her husband by airplane to Winnipeg 1- 2 years ago and also to the United Kingdom in June 2016.
- (vi) The applicant can participate in a regular exercise routine which includes exercising at a gym and bicycling outdoors.
- (vii) The applicant regularly attends services at her church and assists with liturgical duties which include performing roles as an extraordinary minister and a lector. The duties she performs within these roles include: reading aloud in front of the congregation and handing out the communion.
- (viii) Involvement in activities to support her local community which included: being interviewed by a local newspaper regarding her advocacy for a speed limit change for enhancing safety on her street, volunteering on a political campaign and canvassing door to door, writing a letter to the editor to commend the work of two city councillors, and assisting a local family in need by canvassing businesses for gift certificates.

[15] The applicant did not dispute the occurrence of any of the activities noted above. The Tribunal disagrees with the respondent's submission that the activities the applicant has engaged in since the subject accident suggests that she is in the same, or a somewhat better position since the subject accident for the following reasons:

- (i) **Increased Dependence** - The applicant no longer physically lives in the same house as her parents but is heavily dependent on them. This occurs when her husband is away traveling on business and she becomes distressed. Grocery shopping and evening meals are done by the applicant's husband and he testified that now she is she is 60% dependant on her parents.
- (ii) **Increased Anger** - The applicant's husband testified that she often gets angry and will yell at him and her parents, which is worse when she is riding as a passenger in a vehicle. He further stated it will often take a couple days for her to calm down and she has become worse since the subject accident.
- (iii) **Difficulty with Travel** - Her husband confirmed that she drove the car on their trip to Florida however, they had to frequently stop and take breaks and they have never driven on a long trip since then. The applicant

testified that she drives locally and her parents drive her to assessments which are not local. The applicant did travel to Winnipeg by plane with her husband for business but her husband testified she required a wheelchair after they arrived at the Winnipeg airport as a result of sitting on the three hour flight. When the applicant travelled to the United Kingdom in June 2016 it was to attend a funeral with her husband as his father had passed away. Her husband testified that she utilized a wheelchair while waiting in airport line-ups and got angry with the security guard.

- (iv) **Gym Attendance** - The applicant stated working out at the gym helps alleviate depression for short periods of time, and exercise assists with managing her pain. She participates at the gym by herself; on a treadmill, stationary bike, or pool therapy. She further stated she will occasionally ride her bike short distances outside which was encouraged by Dr. Jett, who conceded this.
- (v) **Church Activity** - The applicant testified that she is a very spiritual person and that the church and God are very important to her. Her role as a lector and an extraordinary minister involve performing very short readings from a written passage and handing out the communion to other attendees at the church. She stated it provides her with a sense of purpose and this was encouraged by Dr. Jett who conceded this.
- (vi) **Re-Training as a Private Investigator** - The applicant testified that in 2008 she underwent training to become a private investigator and obtained her private investigator's license. Her husband testified that in the months prior to the subject accident she was looking to start a new career as a private investigator. This evidence is corroborated by reports done by Dr. Waxer¹⁹ and Dr. Gouws²⁰ in 2008. It was Dr. Gouws recommendation that the applicant explore the vocation of private investigation, but did note her ongoing pain interfered with her general functioning and he noted her prognosis for returning to competitive, sustainable employment was "extremely guarded".²¹ This was also evidenced in a report done by Dr. G. Ko, physiatrist.²² Dr. A. Nashef was the applicant's treating psychologist from 2001 - 2007. His report dated September 13, 2009 noted the applicant underwent training to become a private investigator and that she was "adamant about not letting her physical pains and aches hinder her personal life and occupational pursuits".²³ This contrasted Dr. Marino's IE report dated September 13, 2010 which noted the applicant was no longer pursuing a career in private investigation due to her ongoing pain from the subject accident. Symptom magnification during the assessment was noted by Dr. Marino but he also

¹⁹ *Supra*, note 12

²⁰ *Supra*, note 13

²¹ *Ibid*, at 299

²² Report of Dr. G. Ko, dated July 8, 2008, *Supra*, note 8, tab 18U

²³ *Supra*, note 16, at 65, 74

noted the subject accident as being relatively minor but the applicant's current emotional reaction was more severe which he attributed to her pre-existing emotional issues aggravated by the subject accident.

- (vii) **Reduced Community Activity** - The applicant's husband stated the applicant worked on a political campaign once in 2015 which involved about two hours at night and he stated she has never worked on a campaign before or since then.

[16] Surveillance of the applicant was taken in the summer of 2015 and 2016.²⁴ The surveillance evidence generally supports the applicant's and her husband's testimony provided in conjunction with the information contained within the medical records and assessment reports. The applicant testified that the gym provides the applicant with some relief from pain and depression, and attending church gives her a sense of purpose. She was encouraged to participate in these activities by her therapists. Further, she spends a significant amount of time with her parents. The applicant was observed on August 27, 2015 lying down in the back seat of her parents' car just prior to being dropped off to attend an assessment in Toronto. The applicant attended her local gym later that afternoon and the surveillance showed the applicant walking on a treadmill for 45 to 50 minutes by herself. She was observed to rotate her neck while using the treadmill. The applicant testified the respondent funded her gym membership which the respondent did not refute. On the evening of August 27, 2015, she attended a service at her church. The medical records pre and post subject accident reference the applicant attending the gym to assist with pain relief. Surveillance evidence of June 13, 2016 showed the applicant going for a short bike ride for 25 minutes. The applicant often attempts to relieve discomfort in her neck as she is seen rotating her neck on various surveillance clips and twitching her neck on one occasion. Other than attending services at church, the surveillance showed the applicant spending time with her parents and spouse. This aligns with the testimony provided by the applicant and corroborated by her spouse.

The Tribunal's finding on Causation and the Applicant's Post-accident Level of Impairment

[17] The Tribunal does not find the applicant to be in a better position following the subject accident and agrees with the applicant's submission that her level of impairment has declined since the subject accident. The Tribunal accepts that the applicant was genuinely on a path towards trying to establish a new career as a private investigator and the applicant's focus on doing this changed as a result of an exacerbation of her pain resulting from the subject accident. The applicant was treated by Dr. Nashef for six years, and by Dr. Jett for four years. Neither of these psychologists made any reference to symptom magnification, or

²⁴ Dates of surveillance: June 15, 16, 18, 24, July 23, 29, August 1, 3, 4, 11, 27, 2015, June 13, July 13, 2016

exaggerating her presentation. They were involved with treating the applicant for several years. The applicant was also able to continue her participation in the event “Angela’s Spring Stroll” for eleven years and she did not cease from participating in this event until 2011. The Tribunal finds the testimony provided at the hearing by the applicant and her husband to be credible. Their testimony supporting an increase in suicidal thoughts since the subject accident was also supported in the July 2017 report of Dr. Gouws. Evidence supporting the applicant’s cognitive decline is supported by her husband’s testimony and that of Dr. Jett’s, and was noted within Dr. Nashef’s 2009 and 2012 reports.

- [18] The Tribunal finds the applicant has established that she meets the test for causation under the “but for” test. The Tribunal rules out the February 2009 slip and fall and the August 2009 sexual assault as causes of the applicant’s current impairments. The applicant testified the injury to her left knee from the slip and fall had resolved. The medical records support this and the applicant’s pre-existing pain in the neck, back, and shoulder have not resolved to date. References within the medical records are made to nightmares of the subject accident and an increase in headaches which the applicant testified are different since the subject accident. The applicant stated the sexual assault is something which affected her separately from the subject accident and she has moved past the sexual assault. Dr. A. Hanick, psychiatrist, confirmed in a letter dated June 20, 2017²⁵ that the applicant no longer dwelled on the sexual assault but continued to dwell on impairments he attributed to the subject accident including ongoing pain, poor sleep, and driving anxiety. The applicant undertook the steps necessary to train for a career in private investigation and obtained a private investigation licence. The evidence supports she was also taking steps to search for employment within this field in the months prior to the subject accident. In 2010, the applicant was no longer pursuing a career in private investigation. Although there have been changes in the applicant’s life which have occurred following the subject accident, these changes do not negate the impact it has had on her level of functioning which the Tribunal finds have declined following the subject accident. Therefore, it is the Tribunal’s finding on a balance of probabilities that “but for” the accident the applicant would not be suffering from the current level of impairment.

Did the Applicant Sustain a Catastrophic Impairment as a result of the Motor Vehicle Accident on March 13, 2009?

- [19] The applicant claims that she meets the test of catastrophic impairment both on the basis of a marked (class 4) impairment due to a mental or behavioral disorder and also on the basis that she sustained a whole person impairment rating of 55% or greater as a result of the subject accident.

Mental and Behavioural Impairment

²⁵ *Supra*, note 15, tab 104, at 296

[20] Under the *Schedule* a person is eligible for increased benefits if their impairment falls within the definition of catastrophic impairment which is defined in clause 2 (1.2) of the *Schedule* as:

(f) subject to subsections (1.4), (2.1) and (3), an impairment or combination of impairments that in accordance with the *American Medical Associations Guides to the Evaluation of Permanent Impairment, 4th edition, 1993* ("Guides") results in 55 per cent or more impairment of the whole person; or

(g) subject to subsections (1.4), (2.1) and (3), an impairment that, in accordance with the *Guides* results in a Class 4 marked impairment or Class 5 extreme impairment due to mental or behavioural disorder.

[21] The *Guides* deal with the assessment of mental and behavioral impairment in Chapter 14 and assign a class of impairment to four areas of functioning which are noted as:

- 1) Activities of Daily Living;
- 2) Social Functioning;
- 3) Concentration, Persistence and Pace; and
- 4) Deterioration or Decompensation in Work or Work-like Settings (Adaptation).

[22] The burden of proof rests with the applicant. She must prove on the balance of probabilities that, as a result of the subject accident, she sustained a "catastrophic impairment" as defined in clause 2 (1.2) of the *Schedule*.

[23] The following Table from Chapter 14 of the *Guides* describes the four functional domains, the classes of impairment and the verbal rating criteria for each class:

Area or aspect of functioning	Class 1: No impairment	Class 2: Mild impairment	Class 3: Moderate impairment	Class 4: Marked impairment	Class 5: Extreme impairment
Activities of daily living	No impairment is noted	Impairment levels are compatible with most useful functioning	Impairment levels are compatible with some, but not all, useful functioning	Impairment levels significantly impede useful functioning	Impairment levels preclude useful functioning
Social functioning					
Concentration, Persistence, and Pace					
Decompensation in Work /Work-like Settings					

[24] The Ontario Court of Appeal in *Pastore v. Aviva Canada Inc.*²⁶ confirmed that the word "a" in clause (g) of the *Schedule* only requires a single function from the Guides to be at the marked impairment (Class 4) level in order to qualify as catastrophic impairment. Therefore, a single marked impairment in any one of the four functional domains is required in order for a person to be catastrophically impaired.

[25] Two applications were filed for determination of catastrophic impairment ("OCF-19"). The first OCF-19 dated April 10, 2015, was completed by Dr. A. D'Urzo, the applicant's family doctor. The second OCF-19 was completed in 2016 by Dr. Z. Waisman, psychiatrist. Both applications noted that criteria 8²⁷ apply to the applicant.

Summary of Opinions of Catastrophic Impairment Assessors Relating to Mental and Behavioural Impairment as Defined within Chapter 14 of the Guides

Activities of Daily Living		Social Functioning		Concentration, Persistence, and Pace		Deterioration or Decompensation in Work or Work-Like Settings (Adaptation)	
<i>Applicant</i>	<i>Respondent</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Applicant</i>	<i>Respondent</i>
Moderate Impairment (Class 3)	Moderate Impairment (Class 3)	Moderate Impairment (Class 3)	Moderate Impairment (Class 3)	Marked Impairment (Class 4)	Moderate Impairment (Class 3)	Marked Impairment (Class 4)	Moderate Impairment (Class 3)
Dr.J.Gouws, psychologist	Dr. M. Watson, Psychologist and Dr. H. Rosenblat, psychiatrist	Dr.J.Gouws, psychologist	Dr. M. Watson, Psychologist and Dr. H. Rosenblat, psychiatrist	Dr.J.Gouws, psychologist	Dr. M. Watson, Psychologist and Dr. H. Rosenblat, psychiatrist	Dr.J.Gouws, psychologist	Dr. M. Watson, Psychologist and Dr. H. Rosenblat, psychiatrist

Applicant's Position - Sustained a Catastrophic Impairment:

[26] The applicant was assessed by Dr. Gouws who concluded the applicant has a marked (class 4) impairment in two domains as well as meets the criterion of at

²⁶ *Pastore v. Aviva Canada Inc.*, 2012 ONCA 642 (CanLII)

²⁷ Criteria 8 is noted under part 4 on the Application for Catastrophic Impairment Determination ("OCF-19") and it notes: an impairment that, in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder".

least 55% Whole Person Impairment.²⁸ Dr. Gouws concluded the applicant has a marked (class 4) impairment in the following two domains: *Concentration, Persistence, and Pace*, and *Deterioration or Decompensation in Work or Work-Like Settings*. Dr. Gouws also noted the applicant would meet the definition of catastrophic impairment as she meets the criterion of at least 55% Whole Person Impairment (“WPI”) in the Mental Behavioural area. If it is the Tribunal’s finding that the applicant suffers from a marked (class 4) impairment in one of the four domains as noted within Chapter 14 of the *Guides*, then the applicant is deemed to have sustained a catastrophic impairment.

[27] The applicant had previously undergone an assessment with Dr. Gouws in June 2008 but did not recall that when she met with him for the assessment in July 2017. There are significant changes worth noting which are contained in both of Dr. Gouw’s reports of; June 21, 2008 and July 21, 2017. These changes are summarized below.

June 21, 2008 Psychological-Vocational Report

- (i) No evidence of lapses in her memory.
- (ii) All tasks were completed in an efficient and focused manner. She was attentive, capable, and motivated during the assessment.
- (iii) Numerous psychometric clinical measures were completed without any expressed difficulties of an emotional nature.
- (iv) Does not appear to feel hopeless and her self-esteem seems largely intact.
- (v) With respect to suicidal ideation, she is not reporting being disturbed by thoughts of self-harm.
- (vi) Expressed interest in vocational retraining. Future vocational exploration would provide therapeutic rehabilitation, but her employability is considered doubtful.
- (vii) Average performance on processing speed abilities.
- (viii) Recurrent Depressive Disorder, current episode moderate to severe.

July 21, 2017 Catastrophic Impairment Determination Psychological Report

²⁸ *Supra* note 14

- (i) Applicant was a poor historian and had difficulty explaining herself on simple questions relating to how she experiences pain.
- (ii) Struggled with comprehension including: understanding questions and following instructions.
- (iii) Frequently asked for questions to be repeated during the assessment.
- (iv) Applicant reported experiencing a different type of head pain since 2009 accident.
- (v) May have problems communicating clearly with other people because of speech which may be tangential or circumstantial.
- (vi) Experiences recurrent thoughts related to a suicidal act. She was advised to follow-up with her treating psychiatrist.
- (vii) Elevated levels of depression and hopelessness indicate considerable distress.
- (viii) Experiencing panic attacks.
- (ix) Major Depressive Disorder, Severe and Somatic Symptom Disorder with Predominant Pain, Persistent, Moderate to Severe (Chronic Intractable Pain).

[28] Dr. Gouws testified that the applicant has deteriorated significantly since the subject accident. During his July 2017 assessment, he noted the applicant often required questions to be repeated, or was unable to recall all the details when answering questions. He noted she is very pain focused but concluded the psychometric tests likely provided a valid presentation of how her pain impairment impacts her daily functioning. His report further noted the applicant has experienced panic attacks since the subject accident and she feels anger in relation to the subject accident and had nightmares.

[29] Although she had a prior diagnosis of depression, Chronic Pain, and post-traumatic stress disorder (“PTSD”) which was addressed by Dr. Gouws in his June 2008 report, Dr. Gouws testified that the level at which the applicant was reporting her depression and the severity of her presentation, led to a diagnosis noting severe depression and somatic symptom disorder which are as a result of the subject accident.

[30] Dr. Gouws found a marked (class 4) impairment in the domain of *Concentration, Persistence and Pace* as he found evidence of elevated fatigue associated with cognitive inefficiency during daily functions. He noted the applicant had difficulty

with concentration and attention during testing and the clinical interview, exacerbated by her depression which impacted a loss of motivation. He also found she had a marked (class 4) impairment in the domain of *Deterioration or Decompensation in Complex Work or Work-Like Settings*. He noted that her function within this domain “*is entirely related to emotionally-based factors as the direct sequelae of the accident exacerbated injuries and related impairments*”. He observed diminished mood with heightened irritability, frustration and sadness and further noted she has difficulty functioning productively in her home environment.

Occupational Therapy Catastrophic Determination Assessment Report

- [31] An Occupational Therapy Catastrophic Determination Report dated February 8, 2016²⁹ was completed on behalf of the applicant by Jennifer Berg Carnegie (“Ms. Berg-Carnegie”), Occupational Therapist (“O.T.”) The assessments were scheduled over two days. Day 1 of the assessment took 3 ½ hours and involved: 1) an assessment to determine the applicant’s pre and post-accident functional abilities as identified by the applicant’s self-reporting and visual assessment by the O.T. and; 2) a community outing to the grocery store to buy items to take home and prepare a meal of Kraft dinner and a salad. The applicant became stressed with having to go to the grocery store and with riding in the passenger seat of the O.T.’s vehicle. The applicant was task focused and wanted to pick up the items from the store and get home. It was noted by the O.T. that the applicant had difficulty making decisions and became frustrated and upset when she could not find the lettuce she was looking for. It took 25 minutes to find 3 items and she needed to rest at the check-out due to reported pain. She rested when they arrived home and asked the O.T. numerous questions when preparing the salad and Kraft dinner. The meal was not edible. When prompted to clean up afterward, the applicant started crying and stated her mother would clean-up as it would cause her to experience too much pain.
- [32] The assessment could not be completed on the second day as the applicant was hysterical and crying before the assessment commenced. She was preoccupied with her pain and adamant that she needed to go to the hospital. The applicant’s presentation was described as genuine by the O.T. but she characterized the applicant’s behaviour as “emotional flooding” as the applicant’s heightened emotional response rose instantly. The applicant became so overwhelmed with having to go to the hospital that it became her primary focus and she could not consider engaging in the activities for the second day of the assessment. The O.T. stated that daily issues are difficult for the applicant to cope with when she is invaded with catastrophic thoughts.
- [33] The applicant’s pre and post-accident functional abilities were noted on pages 14 -17 of the O.T. report. The pre-accident performance is as reported by the applicant. The report also noted that the applicant reported to have made a full

²⁹ *Supra*, note 14, tab 42

recovery following the three prior motor vehicle accidents (“MVA”). This is not accurate as reflected in the prior medical records and assessment reports done over the years by numerous assessors. It is not the Tribunal’s finding that this omission was deliberate on the part of the applicant to mislead the assessor. The applicant testified and the hearing documentary evidence confirmed that the applicant believes the accident has made her impairments worse and she perceives her ongoing pain to be a barrier for her recovery. The applicant stated the subject accident has ruined her life. The O.T’s report noted reviewing hospital records from 1995, clinical notes and records from 2003, and other medical documents/reports up to 2015. This documentation would have provided the O.T. with the necessary details to conclude the applicant had not made a full recovery following each of the prior MVA’s. It was put to Ms. Berg-Carnegie at the hearing and she confirmed she was not aware at the time of the assessment that the applicant participated in a political campaign and was actively involved with her church in roles which included: lector, and an extraordinary minister. Ms. Berg-Carnegie confirmed that this information did not change what she had previously noted within her report. She stated they were community roles and she did not know if the role on the political campaign involved cueing, breaks, or parental assistance. She also stated the applicant would be able to perform the stated roles at her church if it involved single tasks being performed over short periods of time.

- [34] Dr. Gouws also produced an addendum report dated September 8, 2017³⁰, however his opinion remain unchanged.

Catastrophic Impairment Psychiatric IE Assessment

- [35] Dr. H. Rosenblat, psychiatrist assessed the applicant³¹ and concluded that the applicant did not sustain a catastrophic impairment due to a mental or behavioural impairment as noted within the *Guides* as he found the applicant sustained a moderate impairment (class 3) impairment rating in all four domains. Dr. Rosenblat noted that the applicant was often difficult to keep on track and at times seemed unable to understand questions, and some questions required repeating. He further noted she repeatedly needed to get up from her seat to turn and twist her neck and would make sudden movements with her head. He also raised validity concerns regarding this assessment because the applicant did not disclose that she had been sexually assaulted by a priest, and had noted a response of “no” on the information questionnaire when asked if she had ever been physically, sexually, or emotionally abused or assaulted. Dr. Rosenblat stated that the applicant may in fact be better than the worst case scenario reflected within his assessment report if there were not the concerns relating to validity, in particular the sexual assault not being disclosed.

³⁰ *Supra*, note 14, tab 44

³¹ Exhibit 3 - Joint Document Brief, volume 3, tab 25

- [36] Dr. Rosenblat confirmed that other than the Rey 15-Item Test, he did not administer any other validity tests during his assessment of the applicant. Subsequently, it was noted by Dr. Rosenblat: *“Due to issues with validity on psychological testing, as well as the claimant lying directly to me about an important issue, it is difficult to be certain about psychiatric diagnoses. Therefore, the below noted psychiatric diagnoses as well as impairments are worst case scenario”*³². She was diagnosed by Dr. Rosenblat with Major Depressive Disorder (single or possibly recurrent), Somatic Symptom Disorder with Predominant Pain, and Other Specified Trauma Related Disorder (as she suffers from symptoms and impairments related to PTSD). He further noted that the index accident played a material role in his diagnosis of Major Depressive Disorder and the presence of the diagnosis of Somatic Symptom Disorder with Predominant Pain and due to the presence of this diagnosis; her pain related impairments are rated as mental and behavioral impairments. Issues pre-dating the accident have *“pre-disposed her to psychiatric difficulties related to the index accident”* and he further noted that *“assuming a worst case scenario, the index accident does play a material role in the psychiatric diagnoses mentioned above”*³³.
- [37] The handwritten notes of Dr. Rosenblatt³⁴ were put to him at the hearing. He was specifically asked about a note he made under the section titled Work or Work-like Settings - repeated failure to adapt to stressful circumstances wherein he wrote **“III R/O IV based on OT”**. When asked what that meant, he stated that he was considering the applicant had sustained a marked (class 4) impairment in the area of Deterioration or Decompensation in Work or Work-like Settings (Adaptation) but ruled it out (“R/O”) based on the occupational therapy I.E. report done by Nina Munir (“Ms. Munir”) on September 2, 2016. After his review of her report and his own findings from his assessment of the applicant, he determined the applicant sustained a moderate (class 3) impairment in this domain. He confirmed he did not speak or correspond with Ms. Munir regarding the results from her assessment of the applicant but confirmed he read her report. He stated that her report contained plenty of evidence of the applicant’s decompensation but his report noted the applicant has means of coping with stress so she doesn’t decompensate.³⁵ He noted that Ms. Munir’s report which formed part of the respondent’s multidisciplinary assessment had limited value as the applicant did not complete the assessment. He noted having reviewed a prior O.T. assessment report done by Ms. Munir in 2015, and the applicant’s O.T. assessment report done in 2016. He further noted the applicant does not plan her own days and asks her husband and parents to remind her of appointments and she does misplace appointments. However, he noted she arrives early or on time for her appointments. As a result, he found that the applicant is capable of scheduling. However, the applicant is often driven to appointments and

³² *Ibid*, at 170

³³ *Ibid*, at 171

³⁴ Exhibit 14 – page 43 of Dr. Rosenblat’s questionnaire including handwritten notes taken during assessment of applicant on September 15, 2016

³⁵ *Supra* note 31, at 174

assessments by her father. This fact supports that her father may be the one ensuring she is arriving on time to her appointments as scheduled.

Community Functional IE Assessment - Occupational Therapist

- [38] A community functional assessment with Ms. Munir, O.T. was conducted on September 2, 2016. Ms. Munir noted in her report that the applicant had a verbal altercation with the receptionist upon her arrival for the assessment after she was advised she could not use the staff bathroom and would have to go upstairs to the public bathroom. Another outburst was noted when she got upset and threw the testing materials towards Ms. Munir. It was also noted that the applicant did not always follow the course of the conversation and would start talking about her “somatic” symptoms and the impact on her daily level of functioning. It was noted that the applicant’s overall emotional and behavioural presentation “*was characterized by agitation, verbal aggression and socially unacceptable behaviours such as shouting, talking over others, without turn taking, throwing items, and using an agitated tone of voice*”. The applicant had been previously assessed by Nina Munir in 2015. The behaviour exhibited at the September 2, 2016 assessment “*...was in contrast to her presentation during the community functional assessment held one year prior whereby she initially presented as frustrated and upset but was able to follow the course of simple to complex conversation...without the need for repetition or simplification of information*”³⁶.
- [39] The applicant’s time management ability was assessed. The results indicated that the applicant did not carry out the three designated tasks at the correct time, despite the task sheet being visible for reference. In regards to the appointment scheduling task, the applicant correctly scheduled 16/20 appointments, which leaves a margin of error of 20% which would likely not be accepted within the workplace. The applicant declined to complete an internet search to source out information due to a headache and pre-terminated the community functional assessment.
- [40] The applicant participated in a community outing in which she searched for a recipe on the internet and was required to list out the ingredients and price them within a set budget at the grocery store. The report noted that the applicant “*appeared easily frustrated and aggravated by the demands of a familiar task in comparison to reports of grocery shopping independently albeit with pain*”³⁷. No emotional outbursts were noted during the community outing. The “telephone task” followed the community outing. The applicant exhibited pain behaviours and an emotional outburst during the task of looking up the telephone numbers in a telephone directory for twenty names provided on the task sheet. It was concluded by Ms. Munir that the applicant did not work constructively in a work-like environment, or adapt well to perceived stressful situations, and showed a decompensation in work-like behaviours with repeated mental stress. The

³⁶ *Supra*, note 31, at 187

³⁷ *Ibid*, at 198

activities of daily living assessment was scheduled to commence the following day, September 3, 2016 at the applicant's home but it was terminated by Ms. Munir as the applicant's display of behaviour was aggressive and socially inappropriate. When Ms. Munir advised the applicant that the activities of daily living assessment was being terminated, the applicant "exploded with a rage like reaction"³⁸.

Findings Regarding Catastrophic Impairment Determination

[41] The applicant's pain or her perception of ongoing pain was a significant contributing factor to her ongoing impairment and subsequently claiming a mental behavioural impairment. It is suggested within Chapter 14 of the *Guides*:

"Assessing impairment related to pain is difficult, and the process is not as clearly and precisely defined as with some other kind of impairments. Therefore, determinations about difficult and borderline cases in this category should be made through a multidisciplinary, multispecialty approach, in which physicians who are knowledgeable about the different body systems are involved as needed"³⁹

[42] The Tribunal prefers the findings listed within the multidisciplinary assessment report of Dr. Gouws and Ms. Berg-Carnegie, and the information contained within the reports of Ms. Munir done in 2015 and 2016 to support the applicant sustained a mental behavioural impairment as a result of the subject accident. The Tribunal finds on a balance of probabilities that the applicant sustained a marked (class 4) impairment in the domain of *Decompensation in Work or Work-like Settings (Adaptation)* as a result of the accident. In situations perceived by the applicant to be stressful, she decompensates to a level which significantly impedes useful functioning. This is evidenced by her panic attacks, suicidal thoughts and threats, breaking down during both occupational therapy assessments in 2016, and her feelings of hopelessness and worthlessness. The Tribunal finds the applicant sustained a moderate (class 3) impairment in the area of *Concentration, Persistence, and Pace*. The applicant is able to drive her own vehicle, and in 2015 she was able to drive to Florida which supports she is able to concentrate and remain focused while driving. She regularly attends church and often performs short readings at her church on a regular basis. In addition, she regularly attends the gym and is seen exercising on a treadmill for about 50 minutes.

³⁸ *Ibid*, at 178

³⁹ American Medical Association, *AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition*. Copyright 2015, 1993 by the American Medical Association, at 14/298

- [43] Dr. Gouws concluded in his 2017 report that the applicant had deteriorated further since the subject accident. His report supports the finding that the applicant has difficulty adapting in stressful situations and decompensates as a result. This is evidenced by the applicant's tangential thinking, elevated levels of depression and hopelessness, and the applicant experiencing panic attacks. The applicant was experiencing significant chronic pain prior to the accident and maintains the subject accident has exacerbated her pain. The applicant presents as very pain focused as noted within numerous assessor's reports completed since the subject accident. Dr. Gouws conducted collateral interviews with Dr. Jett, her treating psychologist, her husband, and the O.T. Ms. Berg Carnegie. The insight provided through these interviews was addressed by Dr. Gouws in his addendum report issued September 8, 2017. His findings did not change from what he concluded in his July 21, 2017 report. Evidence of decompensation has been provided with the emotional outbursts exhibited with both O.T. assessors who performed their assessments in 2016. During both assessments, day two of each of the assessments could not be completed.
- [44] The applicant's everyday life is significantly impeded by the panic attacks she experiences, which occur when riding as a passenger in a vehicle, and when the applicant feels alone and isolated by her pain. The applicant relies on her husband to do the grocery shopping and preparation of meals when he is home. She experiences suicidal thoughts when he is away. She is dependent on her parents to assist her with her household tasks and to get her to her medical appointments/assessments on time, including driving her to them. Despite this, the applicant has emotional outbursts and will lash out verbally towards them. The applicant's level of depression has arisen since the subject accident which has resulted in feelings of hopelessness and low self-esteem. The applicant will break down emotionally in situations she perceives are stressful which was demonstrated when trying to cook a meal and clean up afterward during the assessment with Ms. Berg-Carnegie. The applicant had an intense emotional reaction when she felt she needed to go to the hospital when Ms. Berg-Carnegie first showed up for day two of the assessment. The reaction towards the receptionist on the first day of the assessment with Ms. Munir demonstrates an extreme overt reaction to being directed to use the public washroom instead of the staff bathroom. This supports the applicant decompensates in situations she perceives as stressful, and as a result, it significantly impedes her useful functioning.
- [45] Dr. Rosenblat placed a strong emphasis on the validity of the results and attributed this to credibility issues noted within prior assessment reports and credibility with the applicant for not disclosing the 2009 sexual assault at the time of the assessment. Dr. Rosenblat conceded that he chose not to address it with the applicant at the time of the assessment. An explanation at the hearing was provided by the applicant that the questionnaire asked for a yes or no response to the question and noted she did not have to disclose anything she did not wish to. She was also advised by Dr. Rosenblatt that any issues she did not want to

discuss, or questions she did not wish to answer that she was not obliged to do so which the Tribunal finds is a reasonable explanation.

[46] The handwritten notes and testimony of Dr. Rosenblatt support he was contemplating the applicant may have a marked (class 4) impairment in the area of *Decompensation in Work or Work-like Settings* but ruled this out based on Ms. Munir's 2016 O.T. report which he stated had limited value as the assessment was not completed. The assessment was not completed on the second day as it was terminated by Ms. Munir. Dr. Rosenblat stated he never spoke with Ms. Munir regarding her assessment despite Ms. Munir referencing changes from the time she had assessed the applicant in 2015, and then again in 2016. These changes noted within Ms. Munir's 2016 report support that the applicant has deteriorated further. The information contained within both reports should have warranted communication or correspondence between Dr. Rosenblat and Ms. Munir to assist with gaining further insight before ruling-out a marked (class 4) impairment in the area of *Decompensation in Work or Work-like settings*. Further, as suggested within Chapter 14 of the *Guides*, when trying to assess impairment and make a determination related to pain in difficult, or borderline cases, this should be done through a multidisciplinary approach. The applicant's case does seem to fit within this criterion as her pain has significantly impacted her functional and psychological impairment. Although multi-disciplinary IE assessments were done by the respondent, they appear to be done completely independently with no correspondence between Dr. Rosenblat and Ms. Munir regarding their findings.

[47] For the reasons stated, above, the Tribunal finds that the applicant sustained a marked (class 4) impairment in *Decompensation in Work or Work-like Settings (Adaptation)* and therefore sustained a catastrophic impairment as defined under the *Schedule*.

Determination of Catastrophic Impairment Based on Whole Person Impairment (WPI)

[48] If the Tribunal is incorrect about its finding that the applicant sustained a marked (class4) impairment in the area of *Decompensation in Work or Work-like Settings (Adaptation)*, the Tribunal finds the applicant also meets the test for catastrophic impairment determination based on a 55% WPI rating as a result of the subject accident.

[49] Under the current statutory accident benefits scheme in Ontario, descriptive impairment ratings under Chapter 14 of the *Guides* are converted to a numerical WPI range using two tools - the "Global Assessment of Functioning Scale" ("GAF scale")⁴⁰ and/or Table 3 of Chapter 4⁴¹ of the *Guides*.

⁴⁰ The GAF scale is an assessment tool found in the DSM-IV-TR at p. 34

⁴¹ *Supra*, note 39, at 4/142

- [50] Psychological assessors use the GAF scale to estimate a person's current state of overall psychological, social and occupational functioning on a scale of 0 to 100, the higher the score, the better the function. The score obtained is then converted to a psychological WPI percentage using a tool known as "The California Table," which can then be combined with physical impairments under the *Guides* to get a final WPI for the purpose of determining catastrophic impairment under the *Schedule*.
- [51] The applicant submitted that she meets 55% WPI based upon Dr. Gouws assignment of a global assessment of function ("GAF") score of 38.⁴² His report further noted: "*GAF score = 38, current (moderately severe functional impairment in numerous areas such as work, personal and social relations, mood, mobility, mostly related to complex pain)*".⁴³ The GAF scale produced at the hearing⁴⁴ provides a description regarding the impairment level for a GAF score within the 31- 40 range. The description noted major impairment in several areas, such as work or school, family relations, judgement, thinking, or mood. Dr. Gouws concluded within his July 2017 catastrophic determination report that the applicant would meet the 55% WPI based on her achieving two class 4 (marked impairments) within Chapter 14 of the *Guides*.
- [52] It was also Dr. Gouws finding that the applicant would meet the 55% WPI by utilising the criteria set out within Chapter 15 of the *Guides*, which assesses pain that is not psychogenic in origin. His report referenced the chart contained in Chapter 15 of the *Guides*⁴⁵ and he opined that as a result of her pain-impairment levels worsening over time, this significantly impeded her useful functioning. The impact of the applicant's pain impairment levels has resulted in a marked (class 4) impairment which converts to a WPI of at least 55%.
- [53] The respondent relied on the finding made within Dr. Rosenblatt's psychiatric IE assessment report that the applicant does not meet the definition of catastrophic impairment from a psychiatric point of view as her GAF score of 53-51 corresponds with a WPI rating of 26-29%.⁴⁶ The respondent also relied on Dr. Rosenblatt's findings on the Montreal Cognitive Assessment utilized to screen cognitive impairment. The applicant scored 25/30, a normal score being 26/30, which Dr. Rosenblat noted suggested a mild cognitive impairment.⁴⁷
- [54] The respondent disagreed with Dr. Gouws methodology in converting a marked impairment to a WPI rating. The respondent cited a LAT case in which the Tribunal found that the demonstration of adaptation skills in many areas outside of work led to a finding that the applicant had not sustained a class 4 (marked

⁴² Table converting California GAF to WPI from the Schedule for Rating Permanent Disabilities, January 2009:Psychiatric Impairment GAF to WPI Conversion, Exhibit 15

⁴³ *Supra*, note 14, at 124

⁴⁴ Global Assessment of Functioning (GAF) Scale (From DSM-iv, pg. 34), Exhibit 11

⁴⁵ *Supra*, note 39, at 310

⁴⁶ *Supra*, note 31, at 174.

⁴⁷ *Ibid*, at 168

impairment).⁴⁸ The Tribunal is not persuaded by this decision as the Tribunal does not find the facts analogous to what the Tribunal has found in respect of the applicant in this case. The respondent also relied on further jurisprudence *Jonathan Leduc Moreau and Echelon General Insurance Company*⁴⁹ in which the Arbitrator found the information the applicant had provided to assessors was not always accurate and consistent and this discrepancy undermined their opinions. Regarding adaptation, the Arbitrator in *Moreau* found little evidence which supported the applicant's life was much different following the accident and concluded the applicant's impairments did not significantly impede his ability to function and enjoy aspects of his life. The Tribunal finds the facts of that case distinguishable from the case before this Tribunal. The Tribunal accepted the testimony of Dr. Gouws and Dr. Jett that the information the applicant reported to them was accurate and she was not exaggerating her symptoms. Their testimony also confirmed the applicant cognitively declined and further deteriorated following the subject accident and that her life was not the same as it had been prior to the accident. The Tribunal accepts the explanation produced by the applicant regarding why she did not disclose the sexual assault to Dr. Rosenblat. Further, the Tribunal has found the testimony of the applicant and her spouse to be a credible.

[55] The Tribunal is persuaded by Dr. Gouws GAF score of 38 which converts to a WPI rating of 55%. The evidence supports that since the subject accident: the applicant has declined cognitively, ideas of suicidal ideation have increased, increased social withdrawal, and the dependency on her parents and husband have increased. The evidence of Dr. Jett established that the applicant exhibits tangential thinking since 2014 which both Dr. Nashef and Dr. Gouws noted did not exist prior to the subject accident. The applicant broke down during both 2016 occupational therapy assessments and has frequent panic attacks when riding as a passenger in a vehicle which supports her level of decompensation significantly impedes useful functioning. Therefore the Tribunal does not accept Dr. Rosenblat's finding that she has a mild cognitive impairment due to her score of 25/30 on the Montreal Cognitive Assessment. The applicant can perform some activities which include her roles as a lector, or an extraordinary minister which are within a benevolent environment, and she can perform some physical activities which she maintains reduce her depression and pain. However, the Tribunal finds that the applicant's overall deterioration which has been found to be a result of the subject accident does entitle the applicant to a 55% WPI.

Is the applicant entitled to chiropractic services in the amount of \$3,855.78 as recommended by Central Health Care in a treatment Plan dated March 31, 2017?

[56] The applicant is entitled to chiropractic services in the amount of \$3,855.78 as the Tribunal finds this treatment is reasonable and necessary. It is accepted that the applicant received physiotherapy, massage, and exercised at the gym

⁴⁸ *Applicant and Allstate*, Licence Appeal Tribunal, 16-003415, 2018 CanLII 8071, January 5, 2018

⁴⁹ *Jonathan Leduc Moreau and Echelon General Insurance Company*, FSCO A13-004919, June 30, 2016

following the subject accident. The applicant was referred by Dr. Fiorini, family doctor in 2011 for ongoing neck, back, to Dr. K. Prutis, physiatrist for shoulder pain. The letter from Dr. Prutis, dated September 29, 2011 diagnosed her with an exacerbation of chronic pain in these areas, as well as an exacerbation of her TMJ. It was Dr. Prutis's conclusion this was a result of the subject accident, and noted that since funding for massage therapy was terminated by the respondent, her pain increased. Further sessions of physiotherapy, massage, and an exercise program were recommended. On June 18, 2015 the applicant saw Dr. Prutis and it was noted that the applicant presents with an exacerbation of pain in the areas of her neck, and back with radiating pain to both shoulders. Massage, physiotherapy, acupuncture, hydrotherapy, and core strengthening exercises were recommended.

[57] The applicant underwent an IE assessment with Dr. S. Balsky, chiropractor on August 5, 2015. Dr. Balsky concluded the applicant reached maximum medical recovery from the injuries sustained in the subject accident and noted the treatment plan for chiropractic treatment, dated March 30, 2015 was not reasonable and necessary. On January 13, 2016 the applicant's family doctor, Dr. D'urzo wrote a letter recommending physiotherapy and massage to address her ongoing pain. The respondent relies on Dr. Muhlstock's March 7, 2016⁵⁰ report which opined the applicant likely sustained mild uncomplicated soft tissue injuries to her cervical spine, and less likely to the thoracic and lumbosacral spines, and shoulder girdles. He concluded that the applicant's injuries from the subject accident should have resolved from a physiological perspective, factoring in her pre-existing chronic pain issues. He attributed her current complaints to her pre-existing issues. An MRI done at Guelph General Hospital on September 23, 2016 revealed mild to moderate slight right side C5-6 broad-based osteochondral bar. A further MRI done on January 28, 2017 at Guelph General Hospital found subtle central disc protrusion causing flattening of the anterior margin of the thecal sac. The treatment plan in dispute recommended 20 sessions of spinal decompression therapy and was submitted to the respondent along with a diagnosis from Dr. Prutis of disc herniation. The respondent advised the applicant that the treatment plan was denied by a letter dated April 5, 2017 and provided the following reasons for their denial: *"Upon review of your file, the low impact of the accident, the length of time since the accident, the various assessments and treatment plans, there is no medical documentation in your file to support a disc herniation is related to the MVA of March 13, 2009"*. The applicant submitted the respondent did not schedule an examination to assess if this treatment plan was reasonable and necessary.

[58] The respondent relied on information from Dr. Balsky and Dr. Muhlstock that the applicant has reached maximum medical recovery from a physiological perspective. However, updated medical information was produced by the applicant, the MRI dated January 28, 2017. Dr. Prutis diagnosed the applicant

⁵⁰ *Supra*, note 31, tab 26, Physiatry Medicolegal Assessment Report by Dr. J. Muhlstock, dated March 7, 2016, at 14, 19

with disc herniation. The respondent did not obtain their own medical opinion in relation to Dr. Prutis's diagnosis based on her review of the MRI results. Further, in a letter dated August 31, 2017, Dr. Prutis diagnosed the applicant with right S1 radiculopathy and referenced the disc protrusion evidenced in the January 28, 2017 MRI. She opined the applicant's chronic low back pain is exacerbated by the subject accident. It is recognized that pain relief is a valid treatment goal⁵¹ and the evidence is clear that ongoing chiropractic treatment can provide pain relief and enhance functional ability⁵². Her treating practitioners and Dr. Prutis recommended ongoing physiotherapy and massage. Dr. Prutis concluded once these treatments stopped, her chronic pain in the reported areas increased. Upon being presented with new medical information; MRI of January 28, 2017 which showed a disc protrusion and a diagnosis of disc herniation, the applicant was not assessed by the respondent to determine if the recommended treatment plan was reasonable and necessary, nor was the treatment plan sent for a paper review. In the absence of a competing medical opinion, I find the opinion of Dr. Prutis is persuasive and I prefer it over the reasons provided by the respondent in their denial letter dated April 5, 2017 which appears to rely on information of their prior assessors Dr. Balsky, and Dr. Muhlstock who saw the applicant in 2015 and 2016.

Is the applicant entitled to massage therapy in the amount of \$2,183.40 as recommended by Dr. D'Urzo in a treatment plan dated September 28, 2017?

[59] The applicant is entitled to massage therapy in the amount of \$2,183.40 as it is the Tribunal's finding that this treatment is both reasonable and necessary. The respondent relied on an IE done by Cheryl Poirier, massage therapist who issued a report dated April 9, 2012.⁵³ She noted although the subject accident may not have been seen as serious, it had a serious impact on the applicant's life. She further noted that it is not general practice to continue treatment three years post-accident but this case was an exception. She recommended 12 sessions of massage therapy to be administered in a tapered fashion as it will be the last course of massage therapy treatment. She further noted it is designed to wean the applicant off of passive treatment and the applicant should continue with her self-directed exercise program. The respondent also relied on Dr. Muhlstock's March 2016 report which noted the applicant's injuries from the subject accident should have resolved. A multi-disciplinary assessment report dated April 20, 2016⁵⁴ was completed by Dr. T. Waters, M.D., and Mr. Derek Spoz, massage therapist. They assessed the applicant to determine if a treatment plan dated

⁵¹ *General Accident Assurance Co. of Canada and Dominic Violi* (FSCO P99-00047, September 27, 2000)

⁵² *E.S. and Unifund Assurance Company* (Licence Appeal Tribunal, 16000691/AABS, January 13, 2017), 2017 CanLII 5853 ONLAT

⁵³ Massage Therapy Assessment Report of Cheryl Poirier, dated April 9, 2012. Contained within Applicant's Written Submissions, dated August 16, 2018

⁵⁴ Multidisciplinary Assessment Report of Dr. T. Waters, and Mr. Derek Spoz, dated April 20, 2016, at 185 – 198. Contained within Insurer's Written Submissions dated September 6, 2018

October 21, 2015 for massage therapy was reasonable and necessary. They performed an in person assessment with the applicant and concluded that further massage therapy was not reasonable and necessary, the treatment proposed was not solely, directly, or causally related to the injury sustained in the subject accident, and maximum therapeutic benefit had been achieved from massage therapy. The respondent also relies on its own surveillance done in 2015 and 2016 which shows the applicant performing various activities without difficulty. These activities included: exercising at the gym, bicycling, dressed up and walking in high heeled shoes, driving, shopping, carrying a backpack, and conversing and eating without difficulty. The surveillance is not compelling that the applicant does not experience pain. She appeared to be walking on the treadmill while rotating her neck up and down and the bike ride was 25 minutes in duration. The applicant testified she was dressed up to go and attend a service at the church which is spiritual and provides her with a sense of purpose. These activities do not provide evidence that the applicant does not suffer from pain, nor does it convey the applicant's activities that are affected by pain i.e. difficulty with sleep, physical intimacy with her husband, and household activities which she relies on assistance from her mother.

[60] The applicant submitted following the subject accident, she received massage therapy and physiotherapy from August 2009 to November 30, 2017. In a letter dated March 8, 2016 from Tina Franchetto, massage therapist, continuous massage therapy was recommended for pain in the applicant's back, neck, shoulders, jaw muscles, and noted it provided relief for her TMJ. She further noted that the insurer's denials for treatment have caused a setback for the applicant and she will require massage therapy for the rest of her life. The applicant referenced an IE report dated March 30, 2015⁵⁵ completed by Dr. A. Ouanounou, dentist who concluded that the applicant had slightly increased inflammatory changes of the temporomandibular joints as a result of the subject accident but found a treatment plan dated January 28, 2015 for massage and exercise to address the applicant's TMJ symptoms was not reasonable and necessary. However, Dr. Ouanounou noted that the effects of massage therapy on relieving TMJ symptoms were marginal. The applicant reported that massage therapy to her neck and shoulders did improve her TMJ symptoms, and Dr. Ouanounou recommended she be assessed by a physiatrist to determine her other injuries and the need for massage therapy. The clinical note and record dated November 30, 2017 from Tina Franchetto noted massage therapy provided a reduction in pain to the applicant's neck, back, and jaws and the applicant feels the effects of not having it on a regular basis. The respondent did not arrange for the applicant to attend an IE with a physiatrist. The respondent issued a letter dated November 2, 2017 which denied the treatment plan in dispute for massage therapy and based their denial on the lapsed time since the subject accident, the extensive treatment already received the mechanism of the accident, her

⁵⁵ Dental Assessment Report of Dr. A. Ouanounou dated March 30, 2015, at 33, 34, Contained within Applicant's Written Submissions, dated August 16, 2018

extensive pre-accident history, and lack of improvement and concluded the treatment plan was not reasonable and necessary.

[61] The applicant did undergo an assessment by her own physiatrist, Dr. Prutis in June 2015 who recommended massage therapy and physiotherapy to address an exacerbation of the applicant's chronic pain to her neck, back, and shoulders. The respondent did not have the applicant assessed by a physiatrist as recommended by Dr. Ouanounou in his March 2015 report. I find the evidence noted within Dr. Ouanounou's March 2015 report to be persuasive in which the applicant reported massage therapy improved her TMJ symptoms. The recommendations made by Tina Franchetto for ongoing massage therapy to assist the applicant with managing her pain and enjoying some quality of life are also persuasive. Dr. D'urzo's letter dated January 13, 2016 recommending further physiotherapy and massage therapy confirms her family doctor supports these treatments to provide relief from her chronic pain. I find the applicant's self-reporting to various assessors that massage therapy provides some temporary relief from her chronic pain experienced in the areas of her neck, back, shoulders, and jaws also persuasive. The Tribunal is persuaded that since the denial of this treatment plan, there has been an exacerbation in the applicant's chronic pain symptoms. The Tribunal affords little weight to the conclusion reached by the IE assessors and Dr. Muhlstock that the applicant has reached maximum medical recovery from the soft tissue injuries sustained as a result of the subject accident. The Director's Delegate case of *Violi* is persuasive and on point.

CONCLUSION

[62] For the reasons stated, above, the Tribunal finds on a balance of probabilities, that the applicant sustained a marked (class 4) impairment in the domain of *Deterioration or Decompensation in Work or Work-like Settings (Adaptation)* as set out within the *Guides* as a result of the subject accident. The Tribunal also finds the applicant meets the test for catastrophic impairment determination with a 55% WPI rating as a result of the subject accident. This constitutes she sustained a catastrophic impairment pursuant to clause 2 (2.1), subsections (1.4), (2.1) and (3) of the *Schedule*.

[63] The applicant is entitled to both medical benefits in dispute as they are reasonable and necessary.

[64] Interest is payable in accordance with the *Schedule*.

Released: June 21, 2019



**Kimberly Parish
Adjudicator**



**Paul Gosio
Adjudicator**