



Citation: Harbin v. Echelon General Insurance Company, 2024 ONLAT 22-013930/AABS

Licence Appeal Tribunal File Number: 22-013930/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:

Janna Harbin

Applicant

and

Echelon General Insurance Company

Respondent

DECISION

VICE-CHAIR:

Jeremy A. Roberts

APPEARANCES:

For the Applicant:

Janna Harbin, Applicant
Nick de Koning, Counsel

For the Respondent:

Jamie Pollack, Counsel

HEARD: by Videoconference: Jan 15 to 18, 2024

OVERVIEW

[1] Janna Harbin, the applicant, was involved in an automobile accident on December 2, 2017, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”). The applicant was denied benefits by the respondent, Echelon General Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

1. Has the applicant sustained a catastrophic impairment as defined by the *Schedule*?
2. Is the applicant entitled to the following treatment plans, proposed by Laura McPherson:
 - a. \$1,049.00 for case management services, in a treatment plan dated May 28, 2018?
 - b. \$9,404.49 for case management services, in a treatment plan dated November 19, 2018?
 - c. \$3,842.58 for case management services, in a treatment plan dated July 21, 2020?
 - d. \$10,746.89 for case management services, in a treatment plan dated September 10, 2021?
 - e. \$10,746.89 for case management services, in a treatment plan dated November 30, 2021?
 - f. \$10,746.89 for case management services, in a treatment plan dated June 15, 2022?
3. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[3] The applicant has sustained a catastrophic impairment as defined by the *Schedule* under criterion 8.

- [4] The applicant is entitled to the proposed case management treatment plans and interest on these plans.

ANALYSIS

Background

- [5] The applicant is seeking to be deemed catastrophically impaired under criterion 8.
- [6] In order prove her case, the applicant must demonstrate that she has suffered accident-related impairments that result in a marked (class 4) impairment in three or more areas of function or an extreme (class 5) impairment in one or more areas of function according to the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (the "Guides") 4th Edition due to a mental or behavioural disorder. Mental and behavioural impairments are rated according to how seriously they affect a person's useful daily functioning. The Guides set out the four spheres of functioning and the relative levels of impairment. The test to determine whether the applicant has sustained a catastrophic impairment is a legal one and not a medical one. See: *Liu v. 1226071 Ontario Inc. (Canadian Zhorong Trading Ltd.)*, 2009 ONCA 571 at paras 29-30.
- [7] Here is a chart demonstrating the areas of functioning and the description of the levels of impairment as set out in the *Guides*:

Area 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 & Pace					

Adaptation					
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[8] The applicant’s assessor, Dr. Levitt, found the applicant to have a marked impairment in all four areas of function. The respondent’s assessor, Dr. West, found the applicant to have a mild impairment in the areas of activities of daily living, social functioning, and concentration, persistence & pace, and a moderate impairment in the area of adaptation.

The applicant is catastrophically impaired under criterion 8

[9] I find that the applicant is catastrophically impaired under criterion 8 as a result of having at least three marked impairments in the domains of activities of daily living, concentration, persistence, & pace, and adaptation.

A. Activities of Daily Living

[10] I find that the applicant has sustained a marked impairment in the domain of activities of daily living as a result of symptomology related to somatic symptom disorder, post-traumatic stress disorder (PTSD) (with dissociative features) and persistent depressive disorder.

[11] The applicant argued that she sustained a marked impairment in the activities of daily living as a result of symptoms of her various accident-related diagnoses of post-traumatic dissociation, somatic symptom disorder, and major depressive disorder, along with exacerbated symptoms of her pre-accident obsessive compulsive disorder (OCD), impacting her daily functioning. Dr. Levitt, the assessing psychologist, based his conclusion of marked impairment on self-reporting of the applicant, valid psychological testing, and corroborating medical records from the social worker, OTs, and other psychologists. He opined that the applicant’s mental and behavioural diagnoses cause her to be impaired in her useful functioning across a range of activities of daily living, including needing significant time to recover after bouts of OCD-related cleaning, avoiding going out or socializing to prevent dissociative episodes, leaving the stove on when cooking, and becoming overwhelmed when shopping. Beyond the medical records, these functional impairments were corroborated by the applicant’s own testimony, as well as the testimony of her father and friend.

[12] The respondent argued that the applicant had not met her onus of proving that she sustained a marked impairment in the activities of daily living as a result of her proven ability to engage in certain activities and her invalid psychological test results. It pointed to the applicant’s own admission that she can get groceries,

start and sustain a romantic relationship, socialize with her partner's friends, take trips to New Brunswick and Jamaica, and drive a car as evidence that she is not significantly impeded in her useful functioning. It also relied on the evidence and testimony of Dr. West, the insurer examination psychologist, who received invalid test results in his psychological testing which suggested that the applicant may be exaggerating her symptomology. It argued that these invalid results, combined with the fact that the applicant is a poor historian, call into question the higher impairment ratings provided by Dr. Levitt.

[13] I agree with the applicant and find that she has suffered a marked impairment in the sphere of activities of daily living. I found the testimony of Dr. Levitt to be well-reasoned and effectively articulated. While the applicant did testify that she could do many of the things the respondent outlined as examples of her not being significantly impaired, Dr. Levitt effectively demonstrated how the toll of those activities often outweighs their usefulness. For example, Dr. Levitt testified that the applicant found socializing with her partner's friends to be exhausting and challenging and required her to take breaks. Likewise, testimony from her father suggested that while driving, the applicant gets easily flustered by events like rain or windshield wipers, which does not suggest a high degree of useful functioning. Dr. Levitt consistently returned to the point that the applicant's dissociative episodes, which often include diarrhea, vomiting, dizziness, fatigue, and headaches, often occur following attempts to complete activities of daily living and result in days of isolation afterwards. I am also not satisfied by the invalid test results of Dr. West, given that Drs. Levitt, Gouws, and Fulton all received valid test results with different findings. While the applicant may be a poor historian due to memory issues, the preponderance of evidence from the records and testimonies points towards a consistent picture of a woman who is significantly impeded in useful functioning across a broad range of activities of daily living.

[14] I find that the applicant has sustained a class 4 marked impairment in the domain of activities of daily living.

B. Concentration, Persistence & Pace

[15] I find that the applicant has sustained a marked impairment in the domain of concentration, persistence & pace as a result of symptomology related to mental health diagnoses of somatic symptom disorder, PTSD (with dissociative features) and persistent depressive disorder.

[16] The applicant argued that she sustained a marked impairment in the area of concentration, persistence & pace as a result of symptoms of her various

accident-related diagnoses of post-traumatic dissociation, somatic symptom disorder, and major depressive disorder, along with exacerbated symptoms of pre-accident OCD. Dr. Levitt based his conclusion on the self-reporting of the applicant, valid psychological testing, and corroborating medical records from the social worker, OTs, and other psychologists. He opined that the applicant's mental and behavioural diagnoses cause her to be impaired in her concentration, persistence & pace, including by losing concentration easily during periods of dissociation following stressful triggers, forgetting things like leaving the stove on while cooking, and often needing several day-long periods of isolation following dissociative events as a result of attempting too much activity or being unable to persist to completion. Beyond the medical records, these impairments were corroborated by the applicant and her father's testimony. Both of them described the applicant's difficulty concentrating and persisting through tasks, such as when it took her multiple months to complete a small cabinet construction project which should have taken several days.

- [17] The respondent argued that the applicant had not met her onus of proving that she sustained a marked impairment in concentration, persistence & pace as a result of a mental or behavioural impairment and her ability to engage in some activities that required sustained concentration. It relied on the testimony of Dr. West, who concluded that the applicant's difficulty concentrating was more likely related to her physical impairments and pain as opposed to a mental diagnosis. As a result of invalid psychological testing data, Dr. West only diagnosed the applicant with an adjustment disorder and argued that many of the impairments were a result of pain as opposed to this diagnosis. Furthermore, it argued that the applicant's admission of being able to drive long-distance demonstrated her ability to maintain sustained concentration in a complex task.
- [18] I agree with the applicant and find that she has suffered a marked impairment in the sphere of concentration, persistence & pace. Once again, I found the testimony of Dr. Levitt to be well-reasoned and effectively articulated. It is clear that the applicant's dissociative episodes demonstrate consistent impairments in concentration and persistence. Moreover, I find that the applicant's OCD, which while not initially caused by the accident was exacerbated by the accident, often causes the applicant to take on too much activity (e.g. spending time colour coding all of her closet and ensuring that items appear in even numbers), which suggests a significantly impeded useful functioning in the area of pacing. I am satisfied that Dr. Levitt's psychological diagnoses are founded in sound methods and reject Dr. West's minor diagnosis of adjustment disorder as not matching the applicant's more severe symptom presentation. I also found Dr. Levitt's response under questioning regarding the applicant's ability to drive to be convincing. Dr.

Levitt opined that while driving does require executive function, it can also be a skill that is “overlearned”, resulting in people driving on “autopilot”. Moreover, testimony from the applicant and her father suggest that the applicant is easily distracted while undertaking this activity, leading me to find that her ability to concentrate is significantly impeded.

- [19] I find that the applicant has sustained a class 4 marked impairment in the domain of concentration, persistence & pace.

C. Adaptation

- [20] I find that the applicant has sustained a marked impairment in the domain of adaptation as a result of symptomology related to mental health diagnoses of somatic symptom disorder, PTSD (with dissociative features) and persistent depressive disorder.

- [21] The applicant argued that she sustained a marked impairment in the area of adaptation as a result of symptoms of her various accident-related diagnoses of post-traumatic dissociation, somatic symptom disorder, and major depressive disorder, along with exacerbated symptoms of pre-accident OCD. Dr. Levitt based his conclusion on the self-reporting of the application, valid psychological testing, and corroborating medical records from the social worker, OTs, and other psychologists. He opined that the applicant’s mental and behavioural diagnoses cause her to be impaired in her domain of adaptation, including a demonstrated deterioration in her overall condition despite living a sheltered life with a supportive partner, an inability to return to work, and an inability to maintain treatment gains following sustained treatment at a recovery and wellness centre. Dr. Levitt points to multiple records which demonstrate that the applicant continues to have dissociative episodes and suffer from somatic symptoms disorder despite not working, living at home with her partner, and relying on her dog (which is often referred to as a support dog).

- [22] The respondent argued that the applicant had not met her onus of proving that she sustained a marked impairment in adaptation as a result of her ability to engage in some tasks without deteriorating. It relied on the testimony of Dr. West, who concluded that that while the applicant’s mental and behavioural symptoms may sometimes impede her useful functioning, in other instances she was able to maintain a level of useful functioning. It again pointed to examples of the applicant completing groceries, working on arts and crafts projects, and completing basic housework as examples of her level of functionality.

- [23] I agree with the applicant and find that she has suffered a marked impairment in the sphere of adaptation. I found the testimony of Dr. Levitt to be well-reasoned and effectively articulated. It is clear that the applicant has struggled to adapt to her post-accident life and her situation has deteriorated. The applicant's friend and former co-worker testified to the applicant's strong pre-accident work ethic. It is clear from the applicant's testimony and the medical records that her condition has deteriorated to the point that she could no longer sustain employment due to her dissociative episodes (sudden onset diarrhea, vomiting, dizziness, etc.) and exacerbated OCD (obsessive need to clean and organize spaces to the point of exhaustion, unyielding need for items to be in even numbers, etc.). Dr. Levitt opined that "without current supports she would deteriorate further". Her reduced stress tolerance and need for her social safety net (her partner and dog) demonstrate her deterioration and marked impairment in the realm of adaptation.
- [24] I find that the applicant has sustained a class 4 marked impairment in the domain of adaptation.

The applicant is entitled to the case management treatment plans in dispute

- [25] I find that the applicant is entitled to the case management treatment plans in dispute as a result of them being reasonable and necessary.
- [26] Pursuant to s. 17(1)(b) of the *Schedule*, an insurer shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured as a result of an accident for services provided by a qualified case manager in accordance with a treatment plan under s.38, if the insured purchased optional medical, rehabilitation and attendant care benefits or sustained a catastrophic impairment. The *Schedule* defines "qualified case manager" as "a person who provides services related to the co-ordination of good or services for which payment is provided by a medical, rehabilitation or attendant care benefit."
- [27] In order to prove that a treatment plan is reasonable and necessary, it is well-settled that the applicant must demonstrate that the goals are reasonable, that the goals would be met to a reasonable degree, and whether the costs to achieve those goals are reasonable.
- [28] In its submissions, the respondent indicated that it did not oppose the reasonableness and necessity of the plans themselves but argued that the applicant was not entitled to them because she was not deemed catastrophically impaired. However, even if the respondent had not conceded this point, I would have found the applicant entitled to the disputed treatment plans on the basis of the medical evidence before me. It is clear based on that evidence that the

applicant requires the support of a case manager to assist in the coordination of multiple required treatments, which this case manager is doing. Furthermore, I find that the proposed costs for case management are reasonable based on the services provided.

[29] Given that I have found the applicant to be catastrophically impaired and given that I find these treatment plans to be reasonable and necessary, I find that the applicant is entitled to these treatment plans in dispute.

The applicant is entitled to interest on the case management treatment plans

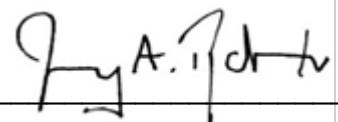
[30] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. Interest applies on the case management treatment plans in dispute.

ORDER

[31] I order the following:

- i. The applicant is deemed catastrophically impaired under criterion 8.
- ii. The applicant is entitled to the proposed case management treatment plans.
- iii. The applicant is owed interest on the proposed case management treatment plans.

Released: March 22, 2024



**Jeremy A. Roberts
Vice-Chair**