Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A09-001538

BETWEEN:

PARALOGANATHAN NADESU

Applicant

and

ZURICH INSURANCE COMPANY LTD.

Insurer

REASONS FOR DECISION

Before: Arbitrator Jeffrey Rogers

Heard: For 16 days, between June 21, 2010 and June 7, 2012, at the offices of the Financial Services Commission of Ontario in Toronto and by written submissions, completed on February 3, 2015

Appearances: Mr. Alexander Voudouris and Mr. David S. Wilson, solicitors for Mr. Nadesu;
Mr. William M. Sproull, solicitor for Zurich Insurance Company Ltd.

Issues:

The Applicant, Paraloganathan Nadesu, was injured in a motor vehicle accident on September 7, 2003. He applied for and received statutory accident benefits from Zurich Insurance Company Ltd.(Commercial Business) ("Zurich"), payable under the *Schedule.*[1] Disputes arose regarding Mr. Nadesu's entitlement to further claimed benefits. The parties were unable to resolve their disputes through mediation, and Mr. Nadesu applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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[1] The *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

The issues in this hearing are:

1. **Catastrophic Impairment:** Mr. Nadesu claims that he sustained a catastrophic impairment as a result of the accident, within the meaning of section 2(1.1)(g) of the *Schedule.*
2. **Attendant Care Benefits:** Mr. Nadesu claims monthly attendant care benefits at the rate of $850.37, from September 7, 2003 to February 12, 2007 and $5,210.40 from February 13, 2007 to present and ongoing.
3. **Medical/Rehabilitation Benefits:** Mr. Nadesu claims $7,200 for Botox injections.
4. **Special Award:** Mr. Nadesu claims a special award based on Zurich's failure to pay for the Botox injections.
5. **Interest:** Mr. Nadesu claims interest on payments found to be overdue.
6. **Expenses:** Both parties claim their expenses of the arbitration.

Result:

1. Mr. Nadesu sustained a catastrophic impairment as a result of the accident, within the meaning of section 2(1.1)(g) of the *Schedule.*
2. Zurich shall pay Mr. Nadesu monthly attendant care benefits as follows:
   - $230.50: from April 4, 2006 to February 13, 2007; from April 1, 2007 to May 4, 2007; from May 17, 2007 to January 8, 2008; and from January 22, 2008 to October 30, 2009;
   - $296.45: from November 1, 2009 to present and ongoing.
3. Mr. Nadesu's claim for payment for Botox injections is dismissed.
4. Mr. Nadesu's claim for a special award is dismissed.
5. Zurich shall pay Mr. Nadesu interest on attendant care benefits owing, pursuant to section 46 of the *Schedule,* as amended.
6. I remain seized of the issue of the amount of interest payable, if the parties are unable to resolve the question on their own.

7. If they are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code.*

EVIDENCE AND ANALYSIS:

History of proceedings

The hearing in this matter was first conducted before a different Arbitrator over the course of 16 days, between June 21, 2010 and June 7, 2012. The relationship between the Commission and the Arbitrator was terminated before the Arbitrator rendered a decision. The parties and the Commission then engaged in extensive discussions about how the arbitration would be resolved. Those discussions resulted in an agreement that the matter would be reheard based on the record before the first Arbitrator and a transcript of the proceedings. The parties agreed that, subject to appeal, the in-hearing rulings of the first Arbitrator would stand. I was assigned the rehearing.

Overview

Mr. Nadesu was born in Sri Lanka in 1968. He was 34 years old at the time of the accident. He immigrated to Canada in 1988. He has a Grade 10 education. He was married in 2000. At the time of the accident he lived in a one bedroom apartment with his wife who was pregnant with their first child.

Mr. Nadesu was employed at two jobs at the time of the accident. He worked full time at a factory called Exco Technologies Limited ("Exco"). He also worked evenings and weekends as a furniture mover for Fontana Design ("Fontana"). After the accident, he returned to his job at the factory and continued working there until February 2004. He did not return to Fontana. He has not worked since February 2004. Zurich continues to pay him income replacement benefits.

Mr. Nadesu's health and function gradually declined after the accident. His functional limitations are now rooted in his mental status, and not in physical impairments. The question of what caused the decline in Mr. Nadesu's mental health is central to the dispute in this arbitration. His position is that his mental disorder was caused by the physical injuries he sustained in the

accident. Zurich agrees that Mr. Nadesu suffers from a mental disorder but argues that Mr. Nadesu's mental disorder was incorrectly diagnosed and that he actually suffers from a genetically based mental disorder which the accident could not have caused. Zurich further argues that, in any event, Mr. Nadesu functions at a level that is not consistent with being catastrophically impaired.

For the reasons that follow, I find that the accident caused Mr. Nadesu's mental disorders. I further find that his ability to function is markedly impaired as a result of his mental disorders, within the meaning of section 2(1.1)(g) of the *Schedule.* He therefore sustained a catastrophic impairment as a result of the accident. I find that he is entitled to monthly attendant care benefits, but he does not require round-the-clock care, as he claims. I find that he is not entitled to the claimed Botox injections.

Credibility

The accident in which Mr. Nadesu was injured was not particularly violent. His physical injuries did not appear serious. He was a front seat passenger in a car that was rear-ended. He was not taken to the hospital. He attended at his family doctor a few days after the accident, reporting pain and stiffness in his neck, lower back, and right shoulder. The family doctor diagnosed a Grade II, Whiplash Associated Disorder (WAD II).[2] He imposed limitations with regard to prolonged standing and bending.

The Guideline issued by the Superintendent of Insurance for treatment of WAD II injuries anticipates that Mr. Nadesu would have achieved functional recovery after a maximum of eight weeks of treatment.[3] The Guideline incorporates the experience of the vast majority of persons with similar injuries.

Mr. Nadesu position is that he has never recovered from his injuries. Instead, he reported increasing pain, deterioration of his mental health, and consequential loss of function. There is

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[2] Exhibit 1, Tab 1, Disability Certificate by Dr. Edmond Lo, September 11, 2003

[3] Superintendent's Guideline No. 06/07, Pre-approved Framework Guideline for Grade I and II Whiplash Associated Disorders

no objective evidence supporting Mr. Nadesu's claim of ongoing pain. The decision in this arbitration therefore turns on the credibility of Mr. Nadesu's reports.

Mr. Nadesu testified at the hearing. I find his testimony to be of no use in determining his credibility. He displayed a very poor memory. For instance, he could not recall his upbringing in Sri Lanka, the date he immigrated to Canada, the places he went with his wife before the accident, how often he went to his temple, the dates of birth of his children, whether his mother's death caused him emotional upset and whether he ever returned to work after the accident.

The record suggests that Mr. Nadesu's poor memory is not a strategic construct. His poor memory was not selective. He failed to remember facts both favourable and unfavourable to his claims. His memory failed both in examination-in-chief and cross-examination. He had displayed a poor memory for some time before the hearing in interviews with his treatment providers and with assessors on both sides of this dispute. His failing memory was documented in an insurer assessment, as early as October 2005[4].

His poor memory makes Mr. Nadesu's testimony unreliable. With no reliable testimony from Mr. Nadesu himself, the viability of his claims rests on the history noted in the voluminous medical records and reports, and on the testimony of his wife.

Zurich argues that Mr. Nadesu's subjective complaints should be discounted because he has provided misinformation about other matters. Zurich claims that it was not told about Mr. Nadesu's return to work at Exco after the accident. It also claims that Mr. Nadesu inflated his account of the severity of the accident over the course of retelling.

As noted above, Mr. Nadesu had two jobs at the time of the accident. He worked full-time as a factory worker at Exco Technologies Limited ("Exco"). He also worked as a furniture mover for Fontana Design ("Fontana"). On weekdays, he would leave home in the morning, complete his shift at Exco and then go to his job at Fontana, returning home around 11:00 p.m. On weekends, he worked at Fontana from around 5:00 p.m. to around 10:00 p.m. He sometimes worked seven

[4] Exhibit 5, Part 2, Tab 1d, Insurer Examinations

days a week. This information comes from the records and from forthright testimony of Mr. Nadesu's wife.

The records show that for some time after the accident, Mr. Nadesu consistently disclosed his inability to return to his job as a furniture mover, but he did not mention that he continued to work at Exco. I conclude from this pattern that he intended to mislead. However, I find that this misinformation does not adversely impact Mr. Nadesu's credibility on the relevant issues in this proceeding. There are several reasons for this finding.

First, everyone who examined Mr. Nadesu in the immediate aftermath of the accident found that his accident-related injuries caused him to be unable to resume his job as a furniture mover.[5] Second, the physical demands of the job at Exco were very light,[6] while the job at Fontana was heavy work. Therefore, return to work at Exco does not mean that Mr. Nadesu could have continued to work at Fontana. Third, nothing in the record suggests that Mr. Nadesu ever resumed strenuous physical activity after the accident.

I give no weight to Zurich's suggestion that Mr. Nadesu was terminated from his position at Exco and did not stop working there because of his injuries. The only evidence in that regard is a report to Zurich by its investigator, regarding a conversation with someone in management at Exco.[7] The reasons the manager allegedly gave for termination are contradictory. The report states that Mr. Nadesu was let go because Exco decided before the accident that he did not fit into its plans. The report also says that Mr. Nadesu was dismissed for poor performance. Although hearsay evidence is admissible in this forum, I find this self-contradictory, third-hand information to be unreliable.

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[5] See for example: Disability Certificate, September 11, 2003, Exhibit 1, Tab 1; Disability Certificate January 8, 2004, Exhibit 1, Tab 2; Impairment Assessment July 27, 2004, Exhibit 1, Tab 3; Multidisciplinary IE December 2003, Exhibit 5, Part 2, Tab 1a

[6] Exhibit 4, Binder 2, Internal: Memo from McClarens to Zurich, March 9, 2007

[7] See Exhibit 5 above.

I now turn to Mr. Nadesu's reports of the accident. Mr. Nadesu gave a statement to Zurich on October 17, 2003.[8] He told Zurich that upon impact, his head hit the windshield and his glasses fell off. He said that his head was not cut, but he felt dizzy. Mr. Nadesu subsequently gave a similar account to health professionals involved in his care and assessment. However, there is no mention of impact to the head in Mr. Nadesu's earliest report, found in the Disability Certificate of Dr. Edmond Lo, his family doctor, dated September 11, 2003.[9] This report simply says "Body was thrown fore & aft".

Zurich suggests that the later accounts are exaggeration. I disagree. The Disability Certificate provides little space for describing the accident. Dr. Lo may well have edited Mr. Nadesu's account. Mr. Nadesu did not report any head injury to Dr. Lo. Therefore, it was not important for Dr. Lo to note impact to the head. In any event, nothing turns on the changing report. Mr. Nadesu did not subsequently claim that he sustained a head injury and that fact is not critical to any of the opinions upon which he relies.

One further issue remains regarding Mr. Nadesu's credibility. From early on, the records contain many references to symptom magnification, pain magnification and pain-focussed behaviour. The terms are not used to suggest that there is conscious exaggeration or malingering, as Zurich suggested. Rather, they are used to indicate that Mr. Nadesu's perception of his pain and functional limitations are not explained by his physical injuries. They must therefore be psychological in origin.

For example, Dr. Tommy K. Chan, an orthopaedic surgeon, twice examined Mr. Nadesu on Zurich's behalf. After the first examination in December 2003, he recommended that Mr. Nadesu engage in a work hardening program.[10] Dr. Chan examined Mr. Nadesu again on November 12, 2004, after the work hardening program had failed. Dr. Chan could not find objective evidence to explain Mr. Nadesu's ongoing complaints. He reported as follows, suggesting investigation of Mr. Nadesu's emotional status:

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[8] Exhibit 4, Part 1, Tab Liability 4.
[9] Exhibit 1, Tab 1
[10] Multidisciplinary IE December 2003, Exhibit 5, Part 2, Tab 1a

> Based on examination of Mr. Nadesu's musculoskeletal system today, I find no objective evidence of derangement that would render him disabled from returning to his pre-accident activities of daily living, housekeeping and home maintenance chores.
>
> Mr. Nadesu's employment duty is described as very heavy industrial strength requirement and I did suggest a work hardening program, which he apparently undertook in July 2004. The [discharge summary from the program] reported that he was pain focussed and did not demonstrate the physical demands for his job, based on his avoidance of activities and his self-perceived disability status.
>
> **Mr. Nadesu's current reported inability to return to the work force, therefore, is not based on musculoskeletal factors. I suggest assessment of his emotional status to determine whether there are other barriers to recovery or conditions that could be treated.**[11] (Emphasis added)

Further to Dr. Chan's recommendation that Mr. Nadesu's emotional status should be investigated, Zurich had him examined on January 7, 2005 by Dr. David G. Prendergast, a psychologist.[12] Dr. Prendergast conducted psychological tests designed to detect exaggeration. Mr. Nadesu's responses on the Pain Symptom Rating Scale were found to be "reflective of symptom amplification and magnification". Dr. Prendergast explained that persons with Mr. Nadesu's test results typically have a large gap between demonstrable organic pathology and their perception of pain and that this was not unusual in persons who are extremely pain-focussed. He concluded that the results were consistent with a diagnosable Somatoform Disorder, namely Pain Disorder Associated With Psychological Factors. Mr. Nadesu produced valid results on the test designed specifically to detect malingering.

Dr. Prendergast examined Mr. Nadesu again, about 10 months later. The psychological test results were similar to those obtained earlier, with one exception. The new results showed "significant exaggeration of cognitive difficulties...".[13] The results on the Pain Symptom Rating Scale again showed no evidence of malingering. Dr. Prendergast became concerned about Mr. Nadesu's credibility. He nevertheless concluded that "Overall, Mr. Nadesu's test results

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[11] Exhibit 5, Part 2, Tab Medical IEs, 1b
[12] Exhibit 5, Part 2, Tab Medical IEs, 1c
[13] Exhibit 5, Part 2, Tab 1d, Insurer Examinations

indicated some exaggeration/embellishment within an associated Pain Disorder with Psychological Factors."

This conclusion is very similar to the one Dr. Prendergast made earlier. It recognises that some apparent exaggeration is not inconsistent with Mr. Nadesu's condition. It does not support Zurich's argument that Dr. Prendergast's second opinion impugns Mr. Nadesu's overall credibility. Zurich's theory is also undermined by the fact that Dr. Prendergast had no concerns about Mr. Nadesu's credibility until his second assessment. Had Mr. Nadesu intended to manipulate Dr. Prendergast's opinion, one would have expected him to do so from their first meeting.

I conclude that the relevant history upon which Mr. Nadesu's treatment providers and assessors based their opinions is reliable. I now turn to the validity of the opinions upon which the parties rely and to determining entitlement to the accident benefits claimed.

Mr. Nadesu sustained a catastrophic impairment

Mr. Nadesu claims that the accident caused him to sustain a marked impairment due to mental or behavioural disorder. He claims that he therefore meets the definition of catastrophic impairment as set out in s. 2(1.1)(g) of the *Schedule.* Zurich argues that the accident did not cause Mr. Nadesu's mental or behavioural disorder and that even if it did, his function is not markedly impaired.

The Court of Appeal summarized the three-stage process required for deciding the issue of catastrophic impairment due to mental or behavioural disorder as follows:[14]

> An assessment under s. 2(1.1)(g) is carried out by reference to the American Medical Association's Guides to the Evaluation of Permanent Impairment (the *Guides*). Chapter 14 of the Guides sets out a three-stage process for evaluating catastrophic impairment based on mental disorder using four categories of functional limitation and five levels of dysfunction. The first stage is diagnosis of any mental disorders, followed by the second stage where the impact on daily life is identified. The third stage is assessing the severity of limitations by assigning

[14] *Pastore* v. *Aviva Canada Inc.,* 2102 ONCA 642, at page 4 (the number of the section is changed because of the date of the accident, but the definition is the same)

> them into the four categories and determining their levels of impairment. The Guides direct the assessment in the following "four categories of functional limitation…"

Thus, the dispute in this case is resolved by answering the following three questions:

1. Did the accident cause Mr. Nadesu to suffer a mental or behavioural disorder?
2. If it did, what is the impact of mental or behavioural disorders on his daily life?
3. In view of the impact, what is the level of impairment?

These questions are addressed below.

The accident caused Mr. Nadesu's mental disorders

Mr. Nadesu was admitted to the Ajax and Pickering Health Centre in February 2007 with a history of auditory hallucinations. He had become acutely paranoid and he had assaulted his wife and children. He remained hospitalized for 45 days. His treatment included various psychotropic medications and anti-depressants. He also received a course of electroconvulsive therapy. The diagnosis was Major Depressive Disorder with Psychotic Features and Chronic Pain Syndrome. There were two subsequent admissions for relapses in this condition. There is no evidence that Mr. Nadesu has ever returned to full mental health. Thus there can be no doubt that Mr. Nadesu has suffered from a mental disorder since at least February of 2007.

On October 30, 2008, psychiatrist Dr. Serge Shapiro assessed Mr. Nadesu on Zurich's behalf for the purpose of giving an opinion on whether the accident caused him to sustain a catastrophic impairment. With no explanation of his diagnostic process, Dr. Shapiro concluded that Mr. Nadesu suffered from a Schizo Affective Disorder, "a major psychiatric syndrome which has familial and psychobiological roots".[15] In Dr. Shapiro's opinion, this condition emerged in 2007, following a "brief history of progressive paranoia".

There is no dispute that the condition that Dr. Shapiro diagnosed has genetic or psychobiological roots. It cannot be caused by a motor vehicle accident. Therefore, accepting his opinion means that Mr. Nadesu's theory that the accident caused his mental disorders must fail. However, I reject Dr. Shapiro's opinion.

[15] Exhibit 5, Part 2, Tab 4d, at page 8

Dr. Shapiro emphasises the usual outcome for the injuries Mr. Nadesu sustained and presumes a similar outcome. Dr. Shapiro focusses on the period immediately before Mr. Nadesu's first hospitalization, while ignoring the preceding history and earlier diagnoses of mental disorders. Critical to Dr. Shapiro's diagnosis is a requirement that "delusions and hallucinations must be present for at least 2 weeks in the absence of prominent mood symptoms."[16] He expresses no opinion on how he concluded this to be the case. He was not in a position to determine this fact. In expressing his opinion, Dr. Shapiro cites the concerns Dr. Prendergast raised about Mr. Nadesu's credibility, while ignoring the mental disorder Dr. Prendergast himself diagnosed. Dr. Shapiro expresses no opinion on whether the earlier diagnoses were incorrect or on whether, by May 2007, Mr. Nadesu had somehow recovered from the earlier diagnosed conditions.

A review of the history discloses that from as early as July 2004, Mr. Nadesu's perception of pain had started to have adverse effect on his mental status. At that time, his treating physiotherapist noted "increased pain-focussed behaviour".[17] Similar observations by Dr. Chan in November 2004 led Zurich to have Mr. Nadesu examined by Dr. Prendergast. Dr. Prendergast was the first to conclude that the accident caused Mr. Nadesu to suffer from a mental disorder. He diagnosed a Pain Disorder Associated With Psychological Factors. As I noted above, Dr. Prendergast did not retreat from that diagnosis when he again assessed Mr. Nadesu, 10 months later.

Dr. Prendergast's first assessment also provides an explanation for any perceived lack of early complaints by Mr. Nadesu about his mental status, an apparent cornerstone of Dr. Shapiro's opinion that Mr. Nadesu's mental disorder first appeared in 2007. Dr. Prendergast notes that Mr. Nadesu sees his problems as "being of a physical nature" and that he is "genuinely limited in his psychological understanding and psychological mindedness".[18] With this perspective, it is not surprising that Mr. Nadesu focussed his recovery efforts on treatment for perceived physical injuries.

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[16] Diagnostic and Statistical Manual of Mental Disorders, 4th edition, text revision, page 322.
[17] Exhibit 1, Tab 3, Page 3
[18] Exhibit 5, Part 2, Tab 1c, Page 7

On the issue of catastrophic impairment, Mr. Nadesu relies heavily on the opinion of Dr. Rickey Miller, his treating psychologist. Mr. Nadesu's lawyer referred him to Dr. Miller to be assessed in February 2006. The purpose of the assessment was to determine Mr. Nadesu's need for psychological treatment. Dr. Miller concluded that Mr. Nadesu required psychological treatment. She believed that the best results would be achieved if Mr. Nadesu received treatment from someone who spoke his first language. She therefore referred him to a Tamil-speaking social worker for counselling. When Mr. Nadesu became dissatisfied with that arrangement, he returned to Dr. Miller seeking treatment. At the time of the hearing, Dr. Miller had completed 60 sessions with Mr. Nadesu.

When she first saw him, Dr. Miller noted Mr. Nadesu's lack of understanding of the connection between his pain and his emotions, echoing Dr. Prendergast.[19] Her initial diagnosis was Major Depressive Disorder and Pain Disorder Associated with Both Psychological Factors and a General Medical Condition.[20] Dr. Miller's diagnosis was remarkably similar to the one Dr. Prendergast made earlier.

Dr. Miller's diagnosis of Depressive Disorder was consistent with Dr. Prendergast's observations on his first assessment. Dr. Miller differs from Dr. Prendergast's view on his second assessment when he saw no evidence of depression.

Several months elapsed between Dr. Prendergast's two assessments and between his second assessment and the first assessment by Dr. Miller. I find that fluctuation in Mr. Nadesu's presentation provides the best explanation for the divergence in their opinions.

Dr. Miller suggested that the divergence could have been caused by Dr. Prendergast's use of an interpreter and both parties focussed on the issue, with Mr. Nadesu suggesting that an interpreter confounds the information provided and Zurich arguing that an interpreter was necessary for clear communication. I find this issue to be of no consequence. The first interpreter at the hearing

[19] Exhibit 1, Tab 11, Page 7
[20] Exhibit 1, Tab 11, Page 10

was dismissed because Mr. Nadesu expressed dissatisfaction with the accuracy of translation. In my view, this shows that Mr. Nadesu has enough fluency in English to be able to accurately communicate in English and also to be attuned to any inaccuracy, when an interpreter is used.

Returning to Dr. Miller's opinion: Dr. Miller's diagnosis of Pain Disorder was similar to Dr. Prendergast's. However, Dr. Miller found the Pain Disorder to be associated with both psychological factors and a general medical condition, while Dr. Prendergast linked the disorder to psychological factors only. This difference is based on Dr. Miller's view that Mr. Nadesu's condition was rooted in the physical injuries he sustained in the accident, while Dr. Prendergast gave greater weight to Mr. Nadesu's subsequent focus on pain. In this regard, I accept Dr. Miller's logic that the diagnosis must be associated with Mr. Nadesu's physical injuries, since Mr. Nadesu had no history of limitations due to pain before the accident.

I find that, from her first assessment Dr. Miller formed a clear and accurate opinion regarding Mr. Nadesu's mental health. As noted above, Dr. Miller's diagnoses were made long before Dr. Shapiro formed his opinion and there is no evidence that Mr. Nadesu ever recovered.

Mr. Nadesu's condition had worsened by the time Dr. Miller was asked to render an opinion on whether he sustained a catastrophic impairment as a result of the accident. In January 2007 Dr. Miller contacted the Children's' Aid Society after Mr. Nadesu told her that he had hit his wife and children. As a result, he was removed from his home. As noted above, he was admitted to the Ajax and Pickering Health Centre on February 13, 2007 and stayed there for 45 days. He reported increased paranoia and irritability. The diagnosis was Major Depressive Disorder with Psychotic Features and Chronic Pain Syndrome.[21] He was again hospitalized, for treatment for relapses in these conditions, for 13 days in May 2007, and for 16 days in January 2008.

When Dr. Miller gave her opinion on catastrophic impairment in April 2010, she drew upon this rich history and upon her many meetings with Mr. Nadesu. She concluded that, in addition to the

[21] Exhibit 1, Tab 14

Pain Disorder she had earlier diagnosed, Mr. Nadesu now met the criteria for a diagnosis of Major Depressive Disorder, single episode, With Psychotic Features.[22]

Dr. Miller's additional diagnosis is consistent with the findings of Dr. Henry Rosenblatt, who assessed Mr. Nadesu in July 2008 and concluded that Mr. Nadesu suffered a catastrophic impairment as a result of the accident.[23] It is also consistent with the diagnosis made by the psychiatrists who treated Mr. Nadesu at the Ajax and Pickering Health Centre.

Dr. Miller specifically disagreed with Dr. Shapiro's diagnosis which required that "delusions and hallucinations must be present for at least two weeks in the absence of prominent mood symptoms."[24] Dr. Miller is the medical professional who was in the best position to observe this fact. Her evidence was that delusions and hallucinations did not appear until 2007 and that depression was always prominent over the course of the 60 times she saw Mr. Nadesu. I accept this evidence.

Dr. Miller and Dr. Rosenblatt described Mr. Nadesu's development of mental illness as a progression, starting with chronic pain, compounded by Mr. Nadesu's lack of insight into the connection between his emotions and his pain, fed by his creeping loss of function and self-esteem, and leading to loss of hope of recovery. I accept their opinions. I find that the accident caused the mental disorders that Dr. Miller and Dr. Rosenblatt diagnosed.

Mr. Nadesu's mental disorders caused a marked impairment of his ability to function

Having determined that the accident caused mental or behavioural disorders, two steps remain in the analysis: what is the impact of mental or behavioural disorders on Mr. Nadesu's daily life and, in view of the impact, what is the level of impairment? The experts who were asked to comment on these issues addressed both questions together. I will adopt their approach.

The *Guides* direct assessment in the following four categories of function:

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[22] Exhibit 1, Tab 28, Page 18
[23] Exhibit 1, Tab 25
[24] Diagnostic and Statistical Manual of Mental Disorders, 4th edition, text revision, page 322.

(1) Activities of daily living (ADL);

(2) Social functioning;

(3) Concentration, persistence and pace; and

(4) Deterioration or decompensation in work or worklike settings.

The *Guides* direct that each category be assessed, based on the following five levels of impairment:

- class 1: no impairment;
- class 2: mild impairment, which "implies that any discerned impairment is compatible with most useful functioning";
- class 3: moderate impairment, which "means that the identified impairments are compatible with some, but not all, useful functioning";
- class 4: marked impairment, which "is a level of impairment that significantly impedes useful functioning"; and
- class 5: extreme impairment, which "preclude(s) useful functioning".

This assessment must be conducted, bearing in mind that the impairment must be as a result of mental or behavioural disorder. A marked impairment in one area of function satisfies the test. Pain due to purely physical injuries should be factored out, if possible. However, there is no absolute requirement to dissect the pain into its constituent parts.[25]

In this case, no one has been able to identify a continuing organic cause of the pain which is at the root of Mr. Nadesu's loss of function. Therefore his impairment is due primarily, if not entirely, to his diagnosed mental disorders. No one has suggested otherwise.

Zurich relies on Dr. Shapiro's opinion that Mr. Nadesu's impairment is moderate. In his report dated September 30, 2009, Dr. Shapiro stated: "...at this time Mr. Nadesu's symptoms are only in partial remission and are of moderate intensity, thus compatible with class 3 of the AMA

[25] See *Pastore v. Aviva Canada Inc.*, footnote 15 above

Guides... "[26] Dr. Shapiro offered no details of his functional analysis and appeared to provide a rating based purely on severity of symptoms, without analysis of their impact on function.

Dr. Shapiro provided a further opinion on May 19, 2010, after reviewing the opinions of Dr. Miller and Dr. Rosenblatt.[27] In this opinion, Dr. Shapiro appears to focus on function when he states that "Mr. Nadesu's impairments of his functioning in the four spheres were of moderate degree and compatible with Class 3..." As examples of Mr. Nadesu's continuing function, Dr. Shapiro cites the following:

- independence with regard to self-care, although he might require cueing;
- fully aware of financial affairs;
- regular contact with siblings;
- occasional attendance at temple;
- appropriate attendance at medical appointments;
- remembers names of healthcare providers, names and frequency of medications;
- remembers bulk of rehabilitative history;
- no bizarre, aggressive, impulsive behaviours throughout the assessment;
- financially competent and able to instruct counsel.

I do not accept Dr. Shapiro's opinion. Dr. Shapiro appears to set a very low standard for unimpeded functioning. For example, the absence of bizarre behaviour during the assessment is hardly an example of competent function. Similarly, the ability to instruct counsel is only required at the time that the instructions are given. Dr. Shapiro does not assign the examples of continuing function to any of the four categories to be assessed. Further, it is not possible to determine from Dr. Shapiro's report whether he found a moderate impairment in each category of function, or whether, after giving an undisclosed score in each category, the combined result is a moderate impairment.

Dr. Rosenblatt gave an opinion on impairment in each category in addition to giving an overall rating of moderate to marked. He found a moderate to marked impairment in the categories of

[26] Exhibit 5, Part 2, Tab 4d
[27] Exhibit 5, part 2, Tab 4f

ADLs and Concentration, persistence and pace. He found a marked impairment in the categories of Social functioning and Deterioration or decompensation in work or worklike settings.[28] Dr. Miller endorsed these findings.

In support of his opinion on Social functioning, Dr. Rosenblatt cited the following:

- loss of all but one friend;
- assaults on wife and children;
- barred from seeing family;
- not allowed to be alone with his children.

In support of his finding with regard to Deterioration or decompensation in work or worklike settings, Dr. Rosenblatt cited Mr. Nadesu's lack of involvement in any significant productive activity, even simple chores.

I accept the opinions of Dr. Miller and Dr. Rosenblatt on Mr. Nadesu's marked impairment. I find that their opinions are supported by the specific issues Dr. Rosenblatt identified and by the record of Mr. Nadesu's inability to meaningfully engage in these areas of function, over time.

The record shows that Mr. Nadesu has demonstrated antisocial behaviour and avoids almost all social contact. He has played almost no role in raising his children. He may have kept in touch with his siblings, but he seeks isolation at social functions. He has retained one friend, who he sometimes avoids. He reports fear of being watched in public. Despite his gross inactivity, nothing suggests that Mr. Nadesu has any emotional or physical reserves to draw upon. There is nothing in the record to suggest that Mr. Nadesu has any significant ability to tolerate or adapt to the additional stress that would be imposed by work or a worklike setting. These significant impediments persist, despite the treatment and counselling Mr. Nadesu has received and the multiple medications he consumes.

[28] Exhibit 1, Tab 23

Based on the above findings, I conclude that the accident caused Mr. Nadesu to sustain a marked impairment due to mental or behavioural disorder. He therefore meets the definition of catastrophic impairment as set out in s. 2(1.1)(g) of the *Schedule.*

Entitlement to Attendant Care

Section 16 of the *Schedule* requires an insurer to pay an attendant care benefit to an insured person who sustains an impairment as a result of an accident. The benefit includes payment for reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for services provided by an aide or attendant. Pursuant to section 18 of the *Schedule,* a finding that an insured person has sustained a catastrophic impairment qualifies the insured person for payment of expenses incurred for reasonable and necessary attendant care more than 104 weeks after the accident.

Mr. Nadesu did not tell Zurich that he required attendant care until February 2010. Until then, it had been widely reported that he was independent with regard to self-care. Zurich argues that Mr. Nadesu is precluded from entitlement to attendant care benefits because he provided no explanation for the delay of more than six years in notifying Zurich of his need for attendant care. It also argues that Mr. Nadesu does not require the level of care he claims.

I find that Zurich's technical defence fails but that, with a minor exception, the assessment conducted on Zurich's behalf more accurately reflects Mr. Nadesu's true needs than the assessment upon which Mr. Nadesu relies.

The claim for attendant care was added to the arbitration shortly before the hearing started, with Zurich's consent. Zurich did not file an amended Response or otherwise inform Mr. Nadesu that it was relying on his breach of procedural requirements as a technical defense. Zurich revealed this position for the first time during cross-examination of Mr. Nadesu. It then suggested that Mr. Nadesu was precluded from entitlement to attendant care because his delay in notifying Zurich of his claim and his failure to provide a reasonable explanation for the delay breached the obligations imposed upon him by sections 31, 32 and 39 of the *Schedule.* These sections set time limits for notifying an insurer of an intention to apply for a benefit, impose penalties where an

insured person breaches time limits and allow for excusing a breach, upon providing a reasonable explanation for the delay.

Mr. Nadesu offered no explanation for the delay. I find, however, that Zurich' failure to notify Mr. Nadesu of its position means that it cannot rely on Mr. Nadesu's breach of time limits. Procedural fairness requires that Zurich give Mr. Nadesu reasonable notice of the case he has to meet. By raising the issue of delay for the first time during cross-examination, Zurich deprived Mr. Nadesu of the opportunity to provide an explanation. Reasonable notice would have given him the opportunity to decide how to address Zurich's preclusion argument. He might have chosen to do so during his examination-in-chief. However, given his compromised memory, he might have chosen to do so through the testimony of other witnesses who did not testify, through documents he had in his possession, or by documents he could obtain.

I further find that, sections 31, 32 and 39 of the *Schedule* do not operate to preclude entitlement to attendant care benefits in Mr. Nadesu's circumstances. The only penalty is delay in payment. This question was addressed by the Director's Delegate in *Economical Mutual Insurance Company* and *Ms. M.G.*[29] At issue was the apparent preclusion of entitlement found in s. 39(3) which states:

> An insurer may, but is not required to, pay an expense incurred before an assessment of attendant care needs that complies with subsection (1) is submitted to the insurer.

The Director's Delegate ruled that this section refers to timing of payment, rather than denial of entitlement. In other words, the section meant that "the insurer can, but does not have to, pay for attendant care until it receives a Form 1 [assessment of attendant care needs]"[30]. Section 39(1) requires an application for attendant care benefits to be in the form of an assessment of attendant care needs. Applying the logic of *Ms. M.G.,* if failure to submit an application does not result in preclusion of entitlement, breach of the ancillary obligations contained in section 32 cannot have that effect.

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[29] FSCO P13-00001, July 21, 2014
[30] At page 14

Mr. Nadesu's claim for attendant care is based on expenses incurred for services allegedly provided by his wife, as supported by the opinion of Ms. Sophie Bielawski, an occupational therapist, who assessed him at his solicitor's request on January 13, 2012. Ms. Bielawski's opinion was that from the date of the accident until February 12, 2007, the date of Mr. Nadesu's first hospitalization, he required monthly attendant care in the amount of $870.37. From that date forward, Mr. Nadesu's monthly needs increased to $5,201.40, based on a requirement for round-the-clock care, in Ms. Bielawski's opinion.

Following the receipt of Ms. Bielawski's reports, Zurich retained an occupational therapist, Ms. Kim MacDonald, who conducted an assessment on its behalf on April 13, 2010.[31] Her opinion was that Mr. Nadesu needed no attendant care until April 3, 2006, when it became apparent that his mental status was impeding his ability to function. From that date until October 30, 2009, with exclusions for his periods of hospitalization, he needed care in the amount on $165.55 per month. From November 1, 2009, when Dr. Miller saw a further decline in function, his monthly needs increased to $231.50.

As noted above, on the issue of Mr. Nadesu's need for attendant care, with one minor exception, I accept Ms. MacDonald's opinion and I reject Ms. Bielawski's.

When she assessed Mr. Nadesu, Ms. Bielawski was not aware that he had returned to work after the accident. She also accepted Mr. Nadesu's report of the onset of his symptoms that were inconsistent with the record. For example, he reported injuries to his hips, the immediate onset of frequent pounding headaches and of sensitivity to noise and light.

As Ms. MacDonald testified, in doing a retroactive assessment of attendant care needs, particular attention should be paid to the record of what the client actually did, in order to test the validity of the assessor's recommendations. In recommending attendant care from the date of the accident, Ms. Bielawski ignored Mr. Nadesu's many declarations that he was independent with regard to self-care. She also ignored the assessments that confirmed Mr. Nadesu's declarations.

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[31] Ms. MacDonald was married before the hearing and changed her name to "Teggelove". I will continue to refer to her as "MacDonald" for the purpose of this decision.

For example, on September 16, 2003, Cecelia Chong, an occupational therapist, assessed Mr. Nadesu at the request of his legal representative at the time. She concluded that Mr. Nadesu demonstrated the ability to be independent with regard to self-care[32]. Ms. Bonnie Koreen, an occupational therapist who assessed Mr. Nadesu on Zurich's behalf on December 9, 2003, confirmed Ms. Chong's opinion. In his report of January 7, 2005, Dr. Prendergast noted Mr. Nadesu's declaration of independence with regard to self-care[33]. Mr. Atila Balaban, an exercise physiologist who assessed Mr. Nadesu on January 26, 2006, reported the same.[34] On April 4, 2006, at the time that she first diagnosed depression, Dr. Miller reported that Mr. Nadesu could dress and bathe himself but he was receiving assistance with regard to housekeeping. [35]

Although Mr. Nadesu might not have known everything that is assessed in attendant care when he declared independence, a colloquial understanding of self-care encompasses most pertinent items. Further, the health care professionals reporting his independence would have been attuned to the details of an assessment. I find that there is nothing in the record from which it can reasonably be inferred that Mr. Nadesu needed attendant care immediately after the accident.

Ms. Bielawski's opinion on the need for round-the-clock care was based on Mr. Nadesu's mental status. She testified that "My biggest concern was his psychiatric hospitalizations and how that has affected his function."[36] Dr. Miller was asked to comment on Mr. Nadesu's need for attendant care and she specifically disagreed with Ms. Bielawski opinion on the need for 24-hour care. In her report of April 5, 2010, Dr. Miller stated as follows:

> Ms. Bielawski also recommends that Mr. Nadesu receive full time…Attendant Care due to "severe pain, dizziness, depression, anxiety" and his previous hospitalizations for violent behaviour and suicidal impulses. She states that in her view Mr. Nadesu "requires monitoring and supervision 24 x 7 for safety"…Based

[32] Exhibit 5, Part 1, Tab 1a, Medicals-Claimant's Assessments
[33] Exhibit 5, Part 2, Tab 1c, at page 6
[34] Exhibit 5, Part 1, Tab 4a, Medicals-Claimant's Assessments
[35] Exhibit 1, Tab 11, at page 2
[36] Transcript, June 29 2010, at page 150

> on Mr. Nadesu's self-report and presentation in his sessions at this point in time, it does not appear that Mr. Nadesu requires 24 x 7 supervision.[37]

Dr. Miller was the person most qualified and in the best position to assess Mr. Nadesu's need for supervisory attendant care, based on his mental status. I prefer her opinion to Ms. Bielawski's.

In contrast to Ms. Bielawski, Ms. MacDonald took an objective, balanced and nuanced approach to her assessment. She recognised that the record showed that Mr. Nadesu did not require any attendant care as a result of physical limitations. She recognized that Mr. Nadesu's needs were centred around his lack of motivation as a result of his mental status. She chose a reasonable and appropriate time for commencement of his entitlement. The record supports her finding of increased need in November 2009. She did not simply provide an opinion favourable to Zurich. Although she disagreed with the amount of time Ms. Bielawski assigned for some services, she also assigned time for services where Ms. Bielawski assigned none, and she increased the time Ms. Bielawski assigned, in some instances.

Ms. MacDonald assessed Mr. Nadesu's ongoing need to be less than the amount Ms. Bielawski recommended for three principal reasons. First, Ms. MacDonald did not find a need for round-the-clock care. As I noted above, I prefer Ms. MacDonald's opinion in this regard, as supported by Dr. Miller.

Second, Ms. MacDonald did not assign time for services that Mr. Nadesu did not perform before the accident since the need for these services did not increase as a result of the accident. I find this approach to be consistent with the language of s. 16(2) of the *Schedule* which requires payment for expenses "incurred...as a result of the accident". The expenses for services for activities in which Mr. Nadesu did not engage before the accident do not satisfy this requirement, unless his needs increased after the accident. I see no difference between claims for activities that the insured person voluntarily did not perform before the accident, and claims for activities that the insured person could not have performed before the accident, because of pre-existing limitations.

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[37] Exhibit 1, Tab 28, at page 21

Third, Ms. MacDonald did not assign time for services during Mr. Nadesu's hospitalizations. Here again, I accept MacDonald's approach. Although "attendant care services" may not be provided in hospitals, I take notice of the fact that many of the services Mr. Nadesu requires are part of the ordinary care provided to a hospitalized individual. There is no evidence that Mr. Nadesu needed additional care while hospitalized, or that his wife or any other person provided additional care during those periods.

In disagreeing with Ms. Bielawski's opinion on the need for care, Dr. Miller wrote:

> Ms. Bielawski reports that Mr. Nadesu currently receives many attendant care-type services from his wife. This is consistent with his report to me. These tasks include: monitoring his medication; reminding him to take care of personal hygiene and grooming tasks; and providing him with meals. She reports that Mr. Nadesu requires assistance with cleaning the bathtub and toilet; with bathing; making his bed; changing the bed linen; and with clothing care…In his sessions, Mr. Nadesu has reported that his wife assists him with these tasks…Thus, I agree that Mr. Nadesu continues to require attendant care services, although not 24 x 7.[38]

Except for the inclusion of activities in which Mr. Nadesu did not engage before the accident, Dr. Miller's opinion is consistent with Ms. MacDonald's recommendation for attendant care.

As I noted earlier, there is one minor exception to my acceptance of Ms. MacDonald's opinion. Ms. MacDonald did not include services for monitoring medication because, at the time of her assessment, Mr. Nadesu was receiving assistance from a mental health nurse and Ms. MacDonald believed that the mental health nurse provided this service. However, Ms. MacDonald reported that the nurse visited Mr. Nadesu once a week to review his blood pressure, check his blood sugar levels, check his medication and monitor his moods.[39] This service does not duplicate the daily monitoring and control of medication that Mr. Nadesu required. I find that Mr. Nadesu's need for medication monitoring and control commenced in April 2006, the time when Ms. MacDonald concluded that his depression began to affect his motivation.

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[38] Exhibit 1, Tab 28, at page 21
[39] Exhibit 5, part 2, Tab 5a, at page 6-7

Ms. Bielawski assessed this need at 60 minutes per week. The monthly cost for this service is $64.95 (1 x 4.3 x $15). I find that Mr. Nadesu's need for this service is ongoing and that the monthly need as assessed by Ms. Bielawski is reasonable.

When the cost of medication control is added to Ms. MacDonald's calculation of Mr. Nadesu's needs for the periods during which she recommended, his monthly entitlement is follows:

- $230.50 from April 4, 2006 to February 13, 2007; from April 1, 2007 to May 4, 2007; from May 17, 2007 to January 8, 2008; and from January 22, 2008 to October 30, 2009;[40]
- $296.45 from November 1, 2009 to present and ongoing.[41]

I have ordered Zurich to pay the above amounts.

Mr. Nadesu is not entitled to Botox injections

Section 15 of the *Schedule* requires an insurer to pay for reasonable and necessary measures undertaken by an insured person to reduce or eliminate the effects of any disability resulting from accident related impairment, or to facilitate the insured person's reintegration into family, the rest of society and the labour market.

Mr. Nadesu seeks payment of $7,200 for Botox injections, to be administered over the course of 48 weeks, as proposed in a treatment plan by Dr. M. Gaid, in a treatment plan dated November 15, 2007.[42] The declared goals were pain reduction, increase in strength and increased range of motion. Dr. Gaid hoped that the treatment would take the edge off Mr. Nadesu's pain so that he would not continue to be pain focussed.

After obtaining an opinion from Dr. Howard Platnick, a general practitioner,[43] Zurich denied Mr. Nadesu's claim on the grounds that the proposed treatment was not reasonable and necessary. Dr. Platnick's evidence was excluded at the hearing. The Arbitrator ruled that he lacked the expertise to comment on the use of Botox. As a result, there is no expert evidence upon which

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[40] $165.55 + $64.95, excluding periods of hospitalization
[41] $230.50 + $64.95
[42] Exhibit 2, Tab 11
[43] Exhibit 5, Part 2, Tab 3d

Zurich can rely in support of its position. Nevertheless, Mr. Nadesu bears the onus of proving that the proposed treatment is reasonable and necessary.

Mr. Nadesu had received Botox injections before the treatment plan was submitted. He testified that they had the effect of reducing his pain for two to three days. He also testified that other medication and pain coping strategies had a similar effect. The record contains some confirmation of Mr. Nadesu's evidence regarding the benefit of Botox. However, the record also supports a finding that the Botox injections Mr. Nadesu received had no effect.

On November 7, 2007, Dr. Lo noted that Mr. Nadesu told him that the "Botox did not help."[44] On the same day Dr. Miller reported that Mr. Nadesu told her that the Botox had not relieved his pain.[45] Dr. Miller's testimony was that Mr. Nadesu told her on some occasions that he gained short-term relief, and on others he said the Botox was not effective. She testified that he told her that, in the long run, the treatment was not of much benefit.[46]

There is no indication in the record that the Botox injections Mr. Nadesu received had any effect on his strength or range of motion. There is no evidence that there would be any cumulative effect, if Mr. Nadesu had the injections over the course of 48 weeks. The reasonableness of the proposed treatment therefore turns on its ability to provide temporary pain relief and increased function. Given Mr. Nadesu's ambivalence regarding the benefit of the treatment, I find that he has not proven that the proposed course of treatment is reasonable and necessary.

Mr. Nadesu's claim for payment for Botox injections is therefore denied.

Interest

Mr. Nadesu is entitled to interest on the overdue payment of the attendant care benefits found to be owing, pursuant to section 46 of the *Schedule,* as amended. I remain seized of the issue of the amount of interest to be paid, if the parties are unable to resolve it on their own.

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[44] Exhibit 5, Part 1, Tab 3d
[45] Exhibit 1, Tab 28, at page 7
[46] See Transcript, September 21, 2010, Page 2

Special award

In his opening remarks, counsel for Mr. Nadesu indicated that his client was seeking a special award based on Zurich's unreasonable denial of attendant care benefits and the Botox injections. In submissions, this claim was limited to the denied Botox injections. The claim for a special award is moot, since Mr. Nadesu is not entitled to payment for Botox injections.

EXPENSES:

The parties made no submissions on expenses. If they are unable to resolve this issue, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers
Arbitrator

May 27, 2015
Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A09-001538

BETWEEN:

PARALOGANATHAN NADESU

Applicant

and

ZURICH INSURANCE COMPANY LTD.(COMMERCIAL BUSINESS)

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. Nadesu sustained a catastrophic impairment as a result of the accident, within the meaning of section 2(1.1)(g) of the *Schedule.*
2. Zurich shall pay Mr. Nadesu monthly attendant care benefits as follows:
   - $230.50: from April 4, 2006 to February 13, 2007; from April 1, 2007 to May 4, 2007; from May 17, 2007 to January 8, 2008; and from January 22, 2008 to October 30, 2009;
   - $296.45: from November 1, 2009 to present and ongoing.
3. Mr. Nadesu's claim for payment for Botox injections is dismissed.
4. Mr. Nadesu's claim for a special award is dismissed.
5. Zurich shall pay Mr. Nadesu interest on attendant care benefits owing, pursuant to section 46 of the *Schedule,* as amended.
6. I remain seized of the issue of the amount of interest payable, if the parties are unable to resolve the question on their own.

7. If they are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

_____ May 27, 2015

Jeffrey Rogers
Arbitrator

Date