



Citation: Shahin v. Intact Insurance Company, 2023 ONLAT 21-002418/AABS

Tribunal File Number: 21-002418/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:

Nahed Shahin

Applicant

and

Intact Insurance Company

Respondent

DECISION

ADJUDICATORS: Derek Grant and Julia Fogarty

APPEARANCES:

For the Applicant: Nahed Shahin, Applicant
Kristy Kerwin, Counsel
Angel Leung, Counsel

For the Respondent: Suzanne Clarke, Counsel
Kyle Bedford, Counsel
Lauren Kolarek, Counsel

Court Reporters: Guido Riccioni and Prashanth Thambipillar

HEARD: **By way of Videoconference on June 20-28, 2022,
followed by
Written Submissions and Written Closing
Submissions on August 12, 2022**

BACKGROUND

- [1] The applicant was injured in an automobile accident on July 5, 2013 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “*Schedule*”) from Intact Insurance Company, the respondent.
- [2] The applicant submitted an Application for Determination of Catastrophic Impairment form (OCF-19) dated June 22, 2020 to the respondent because she alleged that she sustained a catastrophic impairment as a result of the accident. Specifically, the applicant submits that she suffered a marked impairment, or a level 4 impairment, under adaptation pursuant to criterion 8 or s.3(2)(f) of the *Schedule*. The respondent denied the catastrophic determination.
- [3] The respondent also denied the applicant’s claims for attendant care benefits, an attendant care assessment and housekeeping services.
- [4] The applicant disagreed with the respondent’s position and, as a result, submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the Tribunal).
- [5] This hearing proceeded on June 20, 2022, but was interrupted by the unavailability of a witness to return to complete his testimony. The matter was then scheduled for a case conference resumption before us where it was then ordered that the parties provide their submissions as to the weight of the incomplete testimony, and their closing submissions in writing. The deadline for the written submissions was later also, at the request of the parties, given a brief extension.

ISSUES

- [6] The substantive issues decided in the hearing are:
 - a. Did the applicant sustain a catastrophic impairment under criterion 8 or s.3(2)(f) of the *Schedule*?
 - b. Is the applicant entitled to attendant care benefits in the amount of \$1,438.95 per month proposed by Joanne Romas & Associates from June 4, 2021 to date and ongoing?
 - c. Is the applicant entitled to \$100.00 per week for housekeeping services from July 5, 2013 to date and ongoing?

- d. Is the applicant entitled to \$2,000.00 proposed by Joanne Romas for an attendant care assessment submitted April 22, 2020, and denied on July 30, 2020?
- e. Is the applicant entitled to interest on any overdue payment of benefits?

[7] The procedural issue decided in the hearing is:

- a. How much weight should be given to the oral evidence of Dr. C. West?

RESULT

- [8] This was a lengthy and complex hearing. We thank both counsel for their comprehensive and helpful opening and closing submissions.
- [9] We find that the applicant does not meet the definition of a catastrophic impairment under criterion 8 or s.3(2)(f) of the *Schedule*.
- [10] The applicant is not entitled to an attendant care assessment or attendant care benefits as she was not deemed to be catastrophically impaired, and her claim for these benefits was made outside the timeline to claim these benefits set out in section 20(2) of the *Statutory Accident Benefits Schedule*.
- [11] The applicant is not entitled to housekeeping services as she was not determined to be catastrophically impaired.
- [12] As the applicant is not entitled to the disputed treatment plans and benefits, there is no interest payable on those treatment plans or benefits.

PROCEDURAL ISSUE – TESTIMONY OF DR. CURT WEST

- [13] On the final day of the videoconference hearing, an issue arose when Dr. Curt West, expert witness of the respondent, did not complete his testimony, and failed to make himself available for cross-examination of his oral evidence despite prior agreement to appear. To address this, the Tribunal set this matter for a case conference resumption.
- [14] At the case conference resumption, it was ordered that the parties provide written submissions as to the weight to be given to Dr. West's testimony, since it was not subject to the scrutiny of cross-examination by the applicant. In written submissions, the parties provided their position on the consideration to be given to oral evidence given by Dr. West.

[15] We remind ourselves that the applicant has the burden of proving on a balance of probabilities that she is catastrophically impaired as a result of the accident. Where the applicant fails to meet her burden, the respondent does not have any burden to disprove her claim to be catastrophically impaired. In assessing her evidence including expert opinions and her testimony, we found that she failed to meet her burden. Consequently, there is no reason to consider the testimony of Dr. West to determine the applicant's entitlement to the treatment plans in dispute, or if the applicant should be determined to be catastrophically impaired.

ANALYSIS

[16] The applicant and her counsel relied specifically on the heading of adaptation, to make their legal arguments that the applicant should be deemed catastrophically impaired. Failing this, they advanced a claim that her whole person impairment rating would rise to the level of catastrophically impairment. We found that under both tests the applicant did not meet her burden to establish that she should be determined to be catastrophically impaired.

[17] In our analysis we first looked at causation. Specifically, we asked ourselves, but for the accident, would the applicant have experienced the mental issues in this application?

[18] We then considered the definitions to be met for the legal test set out at s. 3(2)(e-f) of the *Schedule*, and what the ratings provided by the applicant's expert were during the hearing.

[19] To evaluate the evidence as it relates to the legal test, we looked at the impact her condition would have on several aspects of her life – travel, work, social interactions, etc. to determine, based on the records and testimony, the severity of the applicant's impairment, if any.

[20] In conjunction with our review of the evidence and testimony of the parties and their expert witnesses, we determined whether the applicant meets the legal test under either s.3(2)(e) or s.3(2)(f) of the *SABS*.

[21] We also determined whether the submitted expenses for an attendant care assessment, attendant care services and housekeeping services are reasonable, as well as necessary, and if any interest is payable on these items.

Causation

[22] The respondent raised the issue throughout the hearing that the applicant's psychological issues did not arise as a result of the accident, but, were pre-

existing as a result of the unique circumstances surrounding the applicant's past health issues.

- [23] The applicant bears the onus of establishing, on a balance of probabilities, that she sustained a catastrophic impairment as a result of the accident as defined by the *Schedule* prior to the 2016 amendments. The applicant must show that but for¹ the accident she would not have suffered from her psychological issues. Moreover, the accident is not required to have been “the cause” – that is, the accident need not be the sole cause or have been sufficient in itself to have caused the impairments at issue. Rather, the accident need only to have been a “necessary cause”².
- [24] We are satisfied that the applicant's anxiety was a pre-existing condition associated with previous health issues for which she has continued to be treated using prescription medication, up to, and following the accident at issue over a long period of time. Regardless of the accident in 2013, the applicant would have continued to have and receive treatment for her long-standing mental health issues, which have not seen an exacerbation as a result of the accident.
- [25] The applicant relayed during her testimony that she currently suffers from stress, moodiness, sleep disruptions, racing thoughts and severe anxiety. In addition, she continues to experience lower back pain, the severity of which impacts her mood.
- [26] Historically, leading up to the accident, the applicant had two serious health crises in her life that paint the picture of a very anxious woman over a long period of time. First, in 1970 when tests revealed a growth in her intestines and then again in 2009 when she suffered a heart attack. These conditions are noted in the letter³ of Dr. Sidney G. Kremer when the applicant attended her office for follow up care after her heart attack. This letter summarizes the applicant's condition on April 18, 2012, just over a year prior to the car accident at issue, to be as follows:

...Suffers from anxiety. Was unable to have her echocardiogram without being on the telephone with her daughter in New York. Also was unable to come for a stress test and walk on a treadmill, having exercised for no more than about 2 minutes. We had to re-book the test when her

¹ *Sabadash v. State Farm et al.*, 2019 ONSC 1121 (CanLII).

² *Sabadash v. State Farm et al.*, 2019 ONSC 1121 (CanLII) at para 39.

³ *Applicant's Hearing Brief* dated May 19, 2022, page 149.

daughter was in town so that her daughter could be with her. She suffers from severe anxiety when having medical tests and does much better when her daughter is around....

Other: She does suffer from some anxiety. Apparently in 1970 she was found to have a growth on her intestines. She has had breast reduction surgery in 1999.

- [27] During her follow up care visit for post heart attack care, on July 22, 2010, Dr. Kremer also notes that the applicant “had a little bit of an anxiety attack, which she gets when she is by herself and does not have close family members with her.”⁴ This is illustrative of a person with a history of anxiety-related mental health struggles.
- [28] It was the testimony of the applicant that all of her mental health issues had resolved fully prior to her car accident on July 5, 2013. This statement is directly contradicted by records of pharmacological treatments provided in the applicant’s own hearing brief. The applicant’s hearing brief provides prescription records that show the applicant refilled a prescription by her family doctor providing her with 60-pills, noted to be a 30-day supply of clonazepam on both June 7, 2013 and July 3, 2013.⁵ The accident at issue took place two days later on July 5, 2013.
- [29] Clonazepam is an anti-anxiety medication.⁶ This indicates that contrary to her testimony, she was taking in or around 2 doses each day as part of a pharmacological treatment for her pre-existing mental health issues at the time of the accident. This is further corroborated by the records provided by the applicant showing that she continued to get prescriptions filled for anti-anxiety medication two months after her accident in September 2013.⁷
- [30] The amount of anxiety medication has, according to the self-reporting of the applicant, reduced over time. In 2013 and even three years later in 2016, the applicant was taking anywhere from 1-2 pills each day⁸ but during her testimony before the Tribunal she advised that she now takes 1-2 pills each week. This is a significant reduction in her reliance on pharmacological treatment. If the

⁴ *Applicant’s Hearing Brief* dated May 19, 2022, pages 176.

⁵ *Applicant’s Hearing Brief* dated May 19, 2022, pages 137 and 141.

⁶ *Hearing transcript of Dr. C. West* dated June 27, 2022, pages 67-68.

⁷ *Applicant’s Hearing Brief* dated May 19, 2022, pages 136.

⁸ *Applicant’s Hearing Brief* dated May 19, 2022, page 94.

applicant's condition had worsened, she would not have reduced her use of anti-anxiety medication.

- [31] The applicant claims that she did not receive any treatment for her mental health issues due to stigma around the treatment of mental health disorders in her culture. We found this not to be credible, and was in fact directly contradicted by her family physician's records as well as the prescriptions⁹ she filled many times for anxiety medications given to her by her family doctor. To have gotten these prescriptions, the applicant would have needed to disclose the need for medical treatment to her prescribing physician. Since the prescribing physician was her family doctor, it is not credible that the applicant did not receive further treatment due to her inability to discuss mental health issues with her doctor, since she had already historically discussed these issues with her family doctor in the past.
- [32] In 2015, the applicant confirmed to Dr. Louise Koepfler, a psychologist, that her anxiety stemmed from her heart attack. Dr. Koepfler describes the applicant as "an anxious person by nature who is particularly anxious about health matters since her heart attack six years ago."¹⁰ But that there was, at that time, "no indication that she currently suffers from a psychological impairment directly related to her motor vehicle accident."¹¹ The applicant further confirmed that she "concurred that she has no accident-related emotional difficulties" and at that time her prognosis was excellent.¹²
- [33] In her occupational therapy report dated December 14, 2020, Leslie Hisey notes that among the records she reviewed in coming to her determination was a summary of the May 29, 2017 psychiatry assessment report linking the applicant's mental health symptoms to her car accident.¹³ This note alleged that it was the opinion of Ms. Kogut and Dr. Seif that the link between the mental health issues and her car accident are valid "because she was functioning well prior to the subject MVA and she had never experienced any significant psychological distress prior to the MVA."¹⁴ We place very little weight on this opinion by Ms. Kogut and Dr. Seif because this statement is not in line with the applicant's medical history, nor the applicant's own testimony, whereby she relayed that she experienced significant psychological distress prior to her accident due to a heart attack in 2009.

⁹ *Applicant's Hearing Brief*, dated May 19, 2022, pages 94, 136, 137, 141, 191.

¹⁰ *Respondent's Hearing Brief*, dated May 4, 2022, page 105.

¹¹ *Respondent's Hearing Brief*, dated May 4, 2022, page 105.

¹² *Respondent's Hearing Brief*, dated May 4, 2022, page 105.

¹³ *Respondent's Hearing Brief*, dated May 4, 2022, page 106.

¹⁴ *Respondent's Hearing Brief*, dated May 4, 2022, page 106.

[34] The applicant expressed to Ms. Hisey on October 13, 2020 that her heart-related anxiety was still so prevalent that she still attended the emergency room several times because she thought she might be having another heart attack but she was told by the treating professionals at the emergency room she was only suffering from anxiety.¹⁵ The applicant gave the recent example during their conversation that three weeks prior to the assessment with Ms. Hisey, the applicant woke up at 5:00 am and thought she was having another heart attack, but she was able to return to bed and go back to sleep without taking any medication.¹⁶ This is demonstrative that the applicant was able to self-soothe her anxiety issues without the need for any treatment, which is in line with an improvement in her condition over time that coincides with a reduction in her pharmacological treatments for anxiety.

[35] While we do not find that the applicant was intentionally misrepresenting her pre- and post-accident health, we place more weight on the contemporaneous notes taken by treating professionals as well as prescription records as they do not rely upon the applicant or her family to be accurate historians in or around 9 years after the accident. As a result of this, we do not find that the applicant's car accident was the necessary cause of the applicant's mental health issues. We also do not find that but for the accident, the applicant would not have suffered or continued to suffer from mental health issues. We also note that according to the records as well as the applicant's testimony regarding the frequency of her pharmacological treatment, her condition seems to have improved, or her ability to cope with her condition has improved over the years since her accident, due to her reduced reliance on anxiety medications.

Catastrophic Impairment

[36] Catastrophic impairment is not a medical determination, rather, a legal one which defines a point along the medical spectrum of impairment severity¹⁷. For the purposes of this analysis, the definition to be met by the applicant to be determined as catastrophically impaired, is as follows:

(e) ...subject to subsections (4), (5) and (6), an impairment or combination of impairments that... results in 55 per cent or more impairment of the whole person; or

¹⁵ *Respondent's Hearing Brief*, dated May 4, 2022, page 78.

¹⁶ *Respondent's Hearing Brief* dated May 4, 2022, page 92.

¹⁷ *Liu v. 1226071 Ontario Inc. (Canadian Zhorong Trading Ltd.)*, 2009 ONCA 571 at para. 27

(f) ... subject to subsections (4), (5) and (6), an impairment that... results in a class 4 impairment (marked impairment) or a class 5 impairment (extreme impairment) due to mental or behavioural disorder.¹⁸

[37] During the hearing, the applicant relied on the reports and testimony of Dr. Zohar Waisman. This psychiatrist provided the following diagnoses for the applicant following her assessment:

- a. Post-Traumatic Stress Disorder;
- b. Somatic Symptom Disorder with Predominant Pain, severe and persistent;
- c. Major Depressive Disorder, moderate and non-psychotic.

[38] We first discuss whole person impairment, followed by the four spheres of activity, as they apply to the applicant.

Whole Person Impairment – section 3(2)(e)

[39] Relevant to this case, under Criterion 7, enshrined in s. 3(2)(e) of the applicable *Schedule*, the applicant may be catastrophically impaired if she can prove on a balance of probabilities that she has a combination of physical and psychological impairment ratings from medical professionals that meet the 55% whole person impairment (“WPI”) threshold as outlined in Chapter 4 of the American Medical Association’s *Guides to the Evaluation of Permanent Impairment* (the “*Guides*”).

[40] The whole person impairment (WPI) is a guideline for determining the degree/rating of an insured party’s permanent impairments resulting from an accident.

[41] On page 15 and again on page 16 of his report¹⁹, the applicant’s expert, Dr. Waisman notes that the applicant does not meet the test for whole person impairment. Applying Table 3 located at Chapter 4 of the *Guides*, the applicant has a 40% impairment. Dr. Waisman further states that if using the California Schedule, the GAF score, she continues to only have a 40% whole person impairment. To meet the legal test for catastrophic impairment the applicant must have a 55% whole person impairment rating. The respondent agreed with Dr. Waisman that the applicant does not meet the test for whole person

¹⁸ *Statutory Accident Benefits Schedule - Effective September 1, 2010*, O. Reg. 34/10, s.3(2)(e-f).

¹⁹ *Applicant’s Hearing Brief* dated May 19, 2022, pages 265-266.

impairment. We therefore find that the applicant is not catastrophically impaired under s. 3(2)(f).

- [42] That said, the applicant is only required to show that she sustained a catastrophic impairment as a result of her accident under one of the two definitions and not both. We now turn to adaptation.

Adaptation – section 3(2)(f)

- [43] In Chapter 14 of the *American Medical Association (AMA) Guides*, 4th Edition (*Guides*), impairments are classified according to how seriously they affect a person’s useful daily functioning in the following four functional domains: activities of daily living (ADLs); social functioning (SF); concentration, pace, and persistence (CPP); and adaptation (AD).²⁰ Further, impairments are also classified using the word descriptors in Chapter 14 of the *Guides* on a five-category scale that ranges from no impairment to extreme impairment. These word descriptors are important because they assign meaning to each category. Therefore, it is not the category label itself (e.g., mild, moderate, marked, extreme) that must be carefully assessed and analyzed, but the language that the *Guides* use – the verbal rating criteria – describing these classifications.
- [44] Pursuant to s. 3(2)(f) of the applicable *Schedule*, prior to the 2016 amendments, a person is catastrophically impaired if they are found to have one class 4 “marked” impairment or one class 5 “extreme” impairment that affects useful functioning in any one of the four functional domains due to mental or behavioural issues.²¹ This is referred to as “Criterion 8,” which is the criterion that the applicant is relying upon for a designation of catastrophic impairment. The onus is on the applicant to prove, on a balance of probabilities, that she sustained a catastrophic impairment.
- [45] The following chart sets out the functional areas and describes the criteria for assigning an individual to each class of impairment. We have added emphasis to Class 4 and Class 5 since they will remain the focus in determining if the applicant has met the legal test to be deemed catastrophically impaired.

Guides at chapter 14, page 294. The full name for “Adaptation” is actually, “Deterioration or decomposition in work or work life setting.”

²¹ S. 2(1.2)(g) of the *Schedule* and *Pastore v. Aviva Canada Inc.*, 2012 ONCA 642 (CanLII) (“*Pastore*”).

Area or aspect of functioning: ²²	Class 1: No impairment	Class 2: Mild impairment	Class 3: Moderate impairment	Class 4: <u>Marked impairment</u>	Class 5: <u>Extreme impairment</u>
Activities of daily living	No impairment is noted.	Impairment levels are compatible with <i>most</i> useful functioning.	Impairment levels are compatible with some, but not all, useful functioning.	<u>Impairment levels <i>significantly impede</i> useful functioning.</u>	<u>Impairment levels <i>preclude</i> useful functioning.</u>
Social functioning					
Concentration					
Adaptation					

[46] For the purposes of this hearing, the applicant argued that she met the test for catastrophic impairment by establishing one marked impairment in ‘adaptation’.

[47] Adaptation issues are illustrated according to the *Guides* as follows:

...repeated failure to adapt to stressful circumstances. In the face of such circumstances the individual may withdraw from the situation or experience exacerbation of signs and symptoms of a mental disorder; that is, decompensate and have difficulty maintaining activities of daily living, continuing social relationships, and completing tasks. Stressors common to work environment include attendance, making decisions, scheduling, completing tasks, and interacting with supervisors and peers...²³

²² *Guides*, Chapter 14, page 301, Table. Classification of Impairments Due to Mental and Behavioural Disorders.

²³ *Guides* at p. 294.

[48] The narrow issue before us to determine whether the applicant sustained a catastrophic impairment is whether she sustained a class 3 moderate impairment, or a class 4, marked impairment, in the domain of adaptation.

[49] Dr. Waisman opined²⁴ commencing on page 14 of his report that, as a result of her inability to tolerate pain, the applicant experiences:

...increased irritability and the combination of low energy, fatigue, poor sleep and low motivation, she would have difficulty sustaining consistent attendance or completion of pre-accident tasks. Certainly, her ability to deal with worklike tasks has been significantly impaired. She is not able to persist in complex tasks such as those she has been used to perform prior to the subject accident. Ms. Shahin appears to have evidence of class 4 marked impairments under the adaptation parameter at the present time.

[50] Dr. Waisman provides the following summary chart of Ms. Shahin’s psychological impairments²⁵:

Sphere / Impairment Level	CLASS 1 NONE	CLASS 2 MILD	CLASS 3 MODERATE	CLASS 4 MARKED	CLASS 5 EXTREME
ACTIVITIES OF DAILY LIVING			X		
SOCIAL FUNCTIONING			X		

²⁴ Applicant’s Hearing Brief dated May 19, 2022, page 264.

²⁵ Applicant’s Hearing Brief dated May 19, 2022, page 266.

CONCENTRATION PERSISTENCE / PACE			X		
ADAPTATION				X	

- [51] As such the report of Dr. Waisman provides evidence that under criterion 8 the applicant meets the test for catastrophically impaired. Through the reliance on the occupational therapist's interview and Ms. Shahin's self-reporting, he felt she met the test for catastrophic impairment.
- [52] For the reasons that follow, we are not persuaded by the applicant's evidence that she sustained a class 4 (marked) impairment in adaptation.
- [53] When the applicant appeared to testify her appearance was neat, well-coiffed and she was able to articulate herself clearly. We did not find the applicant to be persuasive in providing testimony as to her pre-and-post accident condition, how that was impacted by the accident, and how she was unable to adapt to her life thereafter, due to the inconsistencies in her testimony that contrasted with her medical records. The same inconsistencies were apparent in the testimony of her loved ones when contrasted with the applicant's medical records in this matter. We now turn to highlighting several aspects of the applicant's life and the impact, if any, she has experienced due to the accident.

Travel not significantly impaired

- [54] The lifestyle of the applicant was not impacted significantly following the accident at issue. By her own admission she continued to travel to New York every few months, albeit by flying instead of driving due to back pain, not anxiety, which exemplified the applicant's ability to adapt to her situation. To accommodate for her back pain, she changed her mode of travel from vehicle to airplane for visits to see her daughter. She also participated in several family trips and even travelled to Palestine two months after her accident, which is anywhere from a 10-hour flight to over two days of travel.
- [55] The applicant testified that she took a family holiday during the pandemic where she highlighted that after having suffered from a previous cardiac event, the applicant would have been placed in a higher risk group for COVID-19 complications. Despite this, she travelled to the Dominican Republic. She

reported no issues regarding anxiety, to any treating physician leading up to or during her travel.

- [56] The primary complaint related to travel advanced by the applicant is noted in her medical records and through her testimony to be back pain and due to her continued, albeit modified, travel. Given the entirety of the evidence before us, we find there has not been a significant impairment in her ability to undertake these travel activities.

Social interactions and activities of daily living not significantly impaired

- [57] The applicant described herself as a very social and outgoing person. She enjoyed going out for dinner, dancing at Arabic nightclubs, participating in her ladies' group at her church, participating in her parish council, engaging in charity work or church events like bake sales, Christmas parties or picnics.
- [58] On December 3, 2015, just over two years after her accident, the applicant was still cooking, stretching, doing yoga, and looking after her grandchildren²⁶. She described to her family physician that she was not using oral anti-inflammatory or muscle relaxants, but that she might use Voltaren or arnica gel to help with pain.
- [59] On June 7, 2017, nearly four years following her accident, in the chronic pain assessment of Dr. Igor Wilderman²⁷, he relays that Ms. Shahin told him that at that time she continued to socialize, including dancing, attending dinners and exercising with a personal trainer. At the time the applicant continued to lead an active and full life; her mental health did not significantly impede her from carrying on as she saw fit and while she had pain, she was able to accommodate her routine to adjust for that.²⁸
- [60] The applicant alleged during her testimony, that in more recent years she has withdrawn from social activities and stopped travelling due to mental health issues and back pain. This is not corroborated by the constellation of records in this matter.
- [61] The applicant relayed during her testimony that as a result of her car accident she has lost interest in spousal intimate relations. This is again not corroborated by the records in this matter, which indicates instead that the applicant suffers from a condition unrelated to the car accident, more specifically, uterine issues –

²⁶ Applicant's Hearing Brief dated May 19, 2022, page 289.

²⁷ Respondent's Hearing Brief dated May 4, 2022, page 70.

²⁸ Respondent's Hearing Brief dated May 4, 2022, page 70.

fibroids, and a long history of dysfunctional uterine bleeding²⁹. The applicant is perimenopausal, and has significant bleeding that lasted months, and that there may be the presence of a fibroid or ovarian cyst.³⁰ There were no notes relating a decrease in libido suggested during the testimony of the applicant or her spouse, or records of medical treatment received to improve their sexual interactions elicited by either counsel.

[62] On May 7 or 8, 2019, during her assessment with Ms. Alexa Yegendorf, the applicant reported that they have a backyard with a large below ground pool, patio set, play structure and trampoline because “her grandchildren spend a large amount of time at their home, so her husband created a backyard that they would enjoy.”³¹ During the same interview the applicant detailed that her basement is also set up with a playroom and their main floor contains an additional bed and a crib because “her grandchildren occasionally sleep over or take naps in this room”³². The credibility of the testimony of the applicant and her daughter are put in question when their testimony so directly contradicts the conversations with assessors that illustrate the applicant’s condition at snapshots in time following her accident. The modifications to the applicant’s home for her grandchildren described by the applicant to Ms. Yegendorf, made to the home because they spend a lot of time with the applicant there, is in direct contradiction to the testimony of the applicant and her daughter. The applicant and her daughter both alleged during the hearing, that the applicant is unable to look after the grandchildren and does not do so often, for long periods of time or without significant support from her daughter being on the premises paints a very different picture than the one reflected in her interview with Ms. Yegendorf.

[63] Ms. Yegendorf’s report details that despite pain, in May 2019 in or around 6 years following her car accident, she is still engaging in sustained activities such as cooking or playing with her grandchildren.³³ To increase the time she can stand while cooking she has incorporated a padded mat on her floor.³⁴ She has also taken to avoid going barefoot as wearing slippers or shoes in her home helps with her back pain.³⁵ She’s additionally still grocery shopping independently at this juncture, leaving the heavier items for her husband to take in from their car.³⁶ She also continued to cook all the household meals, host

²⁹ *Applicant’s Hearing Brief* dated May 19, 2022, page 211.

³⁰ *Applicant’s Hearing Brief* dated May 19, 2022, page 222.

³¹ *Applicant’s Hearing Brief* dated May 19, 2022, page 297.

³² *Applicant’s Hearing Brief* dated May 19, 2022, page 297.

³³ *Applicant’s Hearing Brief* dated May 19, 2022, page 299.

³⁴ *Applicant’s Hearing Brief* dated May 19, 2022, page 299.

³⁵ *Applicant’s Hearing Brief* dated May 19, 2022, page 299.

³⁶ *Applicant’s Hearing Brief* dated May 19, 2022, page 310.

large family dinners on Sundays for her children, as well as all her grandchildren.³⁷ Per the applicant's testimony, her husband sometimes assists with chopping vegetables or cleaning dishes. These all evidence the applicant's ability to compensate for her pain so that she is able to continue with the activities she stated she enjoyed during her testimony before the Tribunal.

- [64] We find that the alleged withdrawal, if any, coincided with the COVID-19 pandemic, and it is not supported by the records that the applicant's anxiety prevented her from travelling or participating in social activities. This is supported by the report of Leslie Hisey, wherein it states³⁸:

She used to go out with couples and 'do couple things' and now she has lost 'all interest'. She would go out before COVID-19... ..Now with COVID she is more isolated and rarely leaves the house.

- [65] In Ms. Yegendorf's report, she notes that prior to the accident, the applicant engaged in yoga multiple times per week and by going on 1 hour walks daily.³⁹ The applicant reported to Ms. Yegendorf that her walks were now shorter, 20 minutes long, and her yoga classes less frequent. During her testimony, the applicant relayed that she is currently engaging in yoga and taking walks comparable to the walks she previously took prior to the accident. There was previously a disruption in her attendance at yoga classes initially following her move to her new home since it took her some time to look for a new yoga studio, not attributed to a withdrawal associated with pain or anxiety.⁴⁰

- [66] On October 7, 2020, during the applicant's assessment with Dr. C. West, the applicant relays that "she is not going to the gym now due to the COVID pandemic but that she does want to resume the gym when she is able to".⁴¹ Despite this restriction, the applicant adapted to this change by "doing yoga at home, she uses the treadmill at home, and she also has a trainer at home."⁴² The applicant is demonstrating that she has continued to engage in her social, health and fitness routine while socially-distancing during the pandemic.

³⁷ *Applicant's Hearing Brief* dated May 19, 2022, page 314.

³⁸ *Respondent's Hearing Brief* dated May 4, 2022, page 72-73.

³⁹ *Applicant's Hearing Brief* dated May 19, 2022, page 300.

⁴⁰ *Applicant's Hearing Brief* dated May 19, 2022, page 300.

⁴¹ *Respondent's Hearing Brief* dated May 4, 2022, page 138.

⁴² *Respondent's Hearing Brief* dated May 4, 2022, page 138.

- [67] In the same report the applicant disclosed that “she has not been attending church due to the COVID pandemic, and she does occasionally watch church online” instead.⁴³ Again adjusting her lifestyle to accommodate for the pandemic, not for anxiety or pain. The report also describes the applicant as having “a decrease in socialization as a result of the COVID pandemic” and that her daughter does not want to bring the children over due to the risk of exposing the applicant to COVID.⁴⁴ This corroborates the respondent’s position that the applicant’s reduced socialization, if any, coincides with the pandemic and not an exacerbation in pain or psychological symptoms.
- [68] Prior to the pandemic, the applicant experienced some restrictions specifically related to her pain. While she notes that she had reduced tolerances as a result of such pain, she still continued to engage in those activities until COVID-19. We do not find that the applicant’s useful functioning has been significantly impeded in her social activities. She was able to adapt to her situation and continued to live a full social life for in or around the 6 years following her accident, until the restrictions surrounding the pandemic were implemented restricting social events, and she did so while managing her pain.
- [69] Subject to some physical restrictions associated with her backpain, in October 2020⁴⁵ the applicant remained independent with dressing, grooming, feeding, mobility, hygiene, basic supervisory care, making/tracking her appointments, taking/tracking her medications, and more.
- [70] In the insurer’s catastrophic impairment report, dated December 14, 2020, the applicant “used adaptive measure to help avoid aggravating her back pain.”⁴⁶ The applicant changed how she styled her hair for example, since holding her arms over her head aggravated her back pain. She may have to modify the means she accomplishes her tasks for her pain, but she is still able to complete them to her pre-accident level.

Non-arms length employer

- [71] Historically the applicant has worked for a non-arms-length employer, her husband, as a receptionist in his company. In this capacity, she was responsible for greeting people when they walked in, answering the phone or emails, ordering some supplies, and making coffee. The applicant had only returned to

⁴³ Respondent’s Hearing Brief dated May 4, 2022, page 138.

⁴⁴ Respondent’s Hearing Brief dated May 4, 2022, page 138.

⁴⁵ Respondent’s Hearing Brief dated May 4, 2022, page 73-74.

⁴⁶ Respondent’s Hearing Brief dated May 4, 2022, page 163.

work recently before the accident after taking a two-to-three-year hiatus to recuperate following her heart attack.

[72] The applicant testified that she attempted to return to work after the accident on two occasions but that the pain got worse from sitting and she felt it was better to leave since the pain made her agitated and that impacted her relationship with her husband. The applicant detailed the following two attempts to return to work during her testimony:

- a. In 2013 the applicant attempted to return to work for two-to-three months immediately following her car accident. She expressed that she found it difficult to sit for long periods of time and that she felt she should leave to get treatment for her pain.
- b. The applicant returned to work a second time in 2018 for an unspecified amount of time which continued until in or around the end of the year. Once again, her pain from sitting for long periods made that difficult. During the second time she returned to work she expressed that she was upset because her husband didn't understand the limitations imposed on her by her back pain. She relayed that as a result of this conflict she had issues getting up in the morning, getting ready and she did not want to see people.

[73] It is noted that on November 4, 2015, two years following the accident, the applicant does not suffer a substantial inability to perform the essential tasks of her pre-accident employment following a job site analysis.⁴⁷ Adaptation refers to a deterioration or decompensation in work or work-like settings whereby the individual may withdraw from the setting, experience an exacerbation of signs or symptoms of a mental disorder⁴⁸. Common stressors in the work environment include attendance, making decisions, scheduling, completing tasks, and interacting with supervisors and peers⁴⁹. Here, in 2015, the assessor specifically noted that she does not have an issue with the essential tasks of her pre-accident employment after a job site analysis. As a result, she is not suffering from an adaptation issue as it relates to her employment in 2015, approximately two years after her accident, that would be considered severe enough to find that she is catastrophically impaired⁵⁰.

⁴⁷ *Respondent's Hearing Brief* dated May 4, 2022, page 70.

⁴⁸ *Sahadeo v. Pafco Insurance Company*, 2022 ONLAT 19-006331/AABS at para 17.

⁴⁹ *Sahadeo v. Pafco Insurance Company*, 2022 ONLAT 19-006331/AABS at para 17.

⁵⁰ *Sahadeo v. Pafco Insurance Company*, 2022 ONLAT 19-006331/AABS at para 18.

[74] Dr. Salva Gideon recommended the following physical limitations or provided updates as to her condition with respect to the applicant in returning to work after her heart attack⁵¹:

- a. August 12, 2010 – she was to return to work in September with no reaching and a maximum of 20 pounds lifting and pushing.⁵²
- b. March 28, 2011 -- the applicant is “not working yet but feels she is ready to work – 2 days per week for 3 months.”⁵³
- c. May 31, 2011 --Dr. Gideon recommended that the applicant is to return to work “in early October 2011 for medical reasons”.⁵⁴
- d. November 23, 2011 --the applicant “is to return to work on modified duties and hours –day shift for 5-6 weeks then full regular duties thereafter”.⁵⁵

[75] It is unclear if these suggestions were followed through by the applicant, or if the applicant returned to work at all at that time. It is unclear if upon her return to work if she was working at full pre-heart attack capacity, or if she was doing modified work due to physical limitations. No records of workplace performance reviews, documentation from her workplace about modified duties, time sheets, or other evidence which could have provided insight into her condition were provided to the Tribunal.

[76] When questioned on why she was not working now, the applicant stated that she did not feel she could manage looking after her home and working. This is again not corroborated by the records since she has the assistance of a housekeeper and her husband in maintaining her home. The applicant has not convincingly shown through testimony or records whether her ability to work was truly impacted.

[77] Additionally, we were able to witness the applicant’s ability to adapt to a stressful situation in a work-like setting first-hand during her testimony. Initially, the applicant became agitated when being questioned by her own lawyer, a friendly figure representing her interests. The applicant’s breaks in composure were later starkly contrasted by her behaviour when being cross-examined, the most stressful point in the questioning, when she was significantly more composed.

⁵¹ *Respondent’s Hearing Brief* dated May 4, 2022, page 157.

⁵² *Respondent’s Hearing Brief* dated May 4, 2022, page 157.

⁵³ *Applicant’s Hearing Brief* dated May 19, 2022, page 170.

⁵⁴ *Applicant’s Hearing Brief* dated May 19, 2022, page 169.

⁵⁵ *Applicant’s Hearing Brief* dated May 19, 2022, page 157.

She gave emotive oral evidence that was clear, concise and without hesitation. Her testimony demonstrated her ability to adapt to a very significant stressor.

- [78] While we agree that she does experience anxiety, this predominantly stems from her heart attack and any driving anxiety is mild since it has not prevented her attendance at appointments or her travel by car. She does experience back pain, but this does not rise to the level of a class 4 impairment since she has been able to adapt to her lifestyle for many years following her accident until a withdrawal, which is certainly associated with the COVID-19 pandemic.
- [79] Since her accident in 2013 the applicant has not sought or received any psychological treatment, she has also stopped all treatments except for massage therapy. She has made no attempt to seek any kind of therapy to address any psychological issues. She is not noted to be receiving any significant treatment for her pain and has stopped all treatment except massage therapy of her own volition.
- [80] For the reasons above we find that the applicant sustained a class 2 “mild” impairment as a result of the accident in the adaptation domain such that the applicant did not suffer a catastrophic impairment as a result of the accident. Additionally, we find that her pain would be considered a class 2 “mild” impairment for the purposes of a combined whole person rating.

Tribunal’s Finding on Catastrophic Impairment

- [81] After a fulsome review of the evidence above, we find that the applicant does not meet the definition of a catastrophic impairment.
- [82] We find that the applicant suffers from impairments ranging from no impairment to mild in all four spheres of useful functioning under the *Guides*, as follows:

Sphere / Impairment Level	CLASS 1 NONE	CLASS 2 MILD	CLASS 3 MODERATE	CLASS 4 MARKED	CLASS 5 EXTREME
ACTIVITIES OF DAILY LIVING		X			

SOCIAL FUNCTIONING	X				
CONCENTRATION PERSISTENCE / PACE		X			
ADAPTATION		X			

[83] The acceptable method of converting the Chapter 14 mental and behavioural ratings into a WPI percentage rating is by utilizing Table 3 from Chapter 4 of the *Guides* to come up with a percentage rating that parallels the descriptive ranges within the percentage rating system. Table 3 from Chapter 4 is as follows⁵⁶:

Impairment Description	% Impairment of Whole Person
Mild Limitation of daily social and interpersonal functioning	0-14%
Moderate Limitation of <i>some</i> but not all social and interpersonal daily living functions	15-29%
Severe Limitation impeding useful functioning in <i>almost all</i> social and interpersonal daily functions	30-49%
Severe Limitation of <i>all daily</i> functions requiring total dependence on another person	50-70%

[84] As a result, when converting our findings at paragraph 82, the applicant suffers from at most a 42% whole person impairment rating and does not meet the 55%

⁵⁶ *A.M. vs. Wawanesa Mutual*, 2020 ONLAT 18-008775/AABS at para 37.

threshold to be considered catastrophically impaired. A 42% combined rating would suggest that the applicant's condition may rise to the level of being severe; however, we find that the applicant falls on the lower end of the scale for mild, such that her impairments do not exceed a combined rating of moderate.

- [85] When also considering the added mild rating for pain 0-14%, this provides for a range of 0-56%. Since we determine her condition to be between a class 1 (no impairment) and a class 2 (mild impairment), we find that each of her ratings fall at the mid-range. As such, we rank the applicant as having 7% for ADL; 0% for Social Functioning; 7% for Concentration; 7% for Adaptation; and an additional 7% for pain. In total, this would result in a whole person impairment rating of 28% which does not meet the 55% threshold to be considered catastrophically impaired.
- [86] We conclude that following a review of the evidence and testimony in the application before the Tribunal, the applicant did not sustain a catastrophic impairment under criteria 7 or 8, i.e., ss.3(2)(e) or (f) of the *Schedule*.

Housekeeping Benefits, Attendant Care Benefits and Assessment

- [87] To establish entitlement to attendant care benefits, the applicant must show that her expenses are reasonable and necessary as well as provided by a party in the normal course of their employment or if provided by a relative or friend they must show a loss of income as a result of provision of the service to the applicant.⁵⁷ Additionally, under the *Schedule* the claims for these benefits must not be incurred more than 104-weeks following the onset of the disability unless the party is determined to be catastrophically impaired and are thus exempt from this time limit.⁵⁸
- [88] We find that the applicant has not proven, on a balance of probabilities, that she is entitled to attendant care benefits, an attendant care assessment or housekeeping benefits. To support her claims for the specified benefits the applicant relied on the reports and testimony of two occupational therapists -- Lisa Clarke and Alexa Yegendorf.

⁵⁷ 16-001810 v. Aviva Insurance, 2017 CanLII 43883 (ON LAT).

⁵⁸ Statutory Accident Benefits Schedule -Effective September 1, 2010, O. Reg. 34/10, s.20(2).

Housekeeping Services

[89] Under the *Schedule*, housekeeping benefits are payable of up to \$100.00 per week are restricted to injured parties who have either sustained a catastrophic impairment or have purchased this coverage as an optional benefit.⁵⁹

[90] In her testimony, Ms. Clarke suggested that the applicant needs 9.5 hours of weekly homemaking support that includes the following items⁶⁰:

Laundry (for self; 2 hours/week); ironing (0.5 hour/week); sweeping (0.5 hour/week); mopping (0.5 hour/week); vacuuming (0.5 hour/week); grocery shopping (2 hours/week); garbage removal (0.25 hour/week); and dishwashing (0.5 hour/day; 3.5 hours/week).

[91] Pursuit to s.23⁶¹ of the *Schedule* to be entitled to housekeeping benefits, the applicant must meet the criteria set out in the legislation, as follows:

The insurer shall pay up to \$100 per week for reasonable and necessary additional expenses incurred by or on behalf of an insured person as a result of an accident for housekeeping and home maintenance services if, as a result of the accident, the insured person sustains a catastrophic impairment that results in a substantial inability to perform the housekeeping and home maintenance services that he or she normally performed before the accident. O. Reg. 34/10. s. 23.

[92] As the Tribunal has determined that the applicant did not sustain a catastrophic impairment, no further analysis is necessary. The applicant, pursuant to the legislation, is not entitled to housekeeping benefits as we determined she is not catastrophically impaired.

⁵⁹ *Switzer v. Waterloo Insurance*, 2021 ONLAT 19-011403/AABS, at para 49.

⁶⁰ *Applicant's Hearing Brief* dated May 19, 2022, page 1797.

⁶¹ *Statutory Accident Benefits Schedule -Effective September 1, 2010*, O. Reg. 34/10, s.23.

Attendant Care Benefits and Attendant Care Assessment

[93] The occupational therapist for the applicant, Ms. Clarke, outlined during her testimony and in her report that the applicant needs \$1,438.95 in attendant care assistance for the following tasks⁶²:

Cuing and encouragement for dressing/undressing, haircare, cosmetic application, community mobility, clothing care, and maintenance supplies. Hands-on assistance for meal preparation, bathroom hygiene, bedroom hygiene tasks, and coordination of attendant care. Supervision for exercise and bathing, and finally, 1 hour per day of custodial care is recommended as a result of a change in behaviour in order to encourage consistent engagement in Instrumental Activities of Daily Living, cognitive redirection and emotional regulation, above and beyond basic necessities.

[94] Pursuant to section 20(2)⁶³ of the *Schedule*, attendant care benefits are payable to a maximum of 104-weeks following the accident unless the exemption set out at s. 20(3)⁶⁴ applies due to the claimant being determined to be catastrophically impaired.

[95] The accident at issue took place on July 5, 2013, and the claim for attendant care benefits was submitted September 9, 2020. This is approximately 374 weeks and 1 day from the date of the accident, which far exceeds the 104-week stipulation set out in the *Schedule*. The applicant's claim for attendant care benefits would have needed to be made by July 5, 2015, approximately 5 years prior to the claim put forward in this application. As such, since no exception to the time restriction applies, the applicant's claim for attendant care benefits is time-barred.

[96] The accident at issue took place on July 5, 2013, and the claim for an attendant care assessment was submitted April 22, 2020. This is a period of approximately

⁶²Applicant's Hearing Brief dated May 19, 2022, pages 1797-1798.

⁶³ Statutory Accident Benefits Schedule -Effective September 1, 2010, O. Reg. 34/10, s.20(2).

⁶⁴ Statutory Accident Benefits Schedule -Effective September 1, 2010, O. Reg. 403/96, s.20(3).

354 weeks and 6 days. This again exceeds the 104-week stipulation set out in the *Schedule*.

[97] No exception applies since the applicant has not been determined to be, by the Tribunal, catastrophically impaired. As such the applicant's claim for an attendant care assessment is time-barred.

[98] As the applicant has not been deemed to be catastrophically impaired and as her claims falls outside the reasonable timeline set out in the legislation, her claim for attendant care services and for an attendant care assessment are not reasonable and she is not entitled to receive either benefit.

Interest

[99] We have determined that the applicant is not entitled to housekeeping services, attendant care benefits or an attendant care assessment, as such no interest is payable for these expenses.


CONCLUSION

[100] For the reasons outlined above, we find that:


- a. The accident did not cause the applicant's pre-existing psychological conditions;
- b. The accident did not exacerbate the applicant's pre-existing psychological conditions to the extent that it would rise to the level of a class 4 impairment under the *Guides*;
- c. The applicant does not have a class 4 impairment in adaptation under the *Guides*;
- d. The applicant does not meet the 55% threshold to have a whole person impairment;
- e. The applicant is not entitled to attendant care benefits or an attendant care assessment;
- f. The applicant is not entitled to housekeeping benefits; and

g. The applicant is not entitled to any interest.

Released: February 17, 2023



**Derek Grant
Adjudicator**



**Julia Fogarty
Adjudicator**