



Citation: Nanthakumar v. Unifund Assurance Company, 2023 ONLAT 19-002406/AABS

Licence Appeal Tribunal File Number: 19-002406/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:

Kalaiyarasi Nanthakumar

Applicant

and

Unifund Assurance Company

Respondent

DECISION

ADJUDICATOR: Rebecca Hines

APPEARANCES:

For the Applicant: Kalaiyarasi Nanthakumar, Applicant
David S. Wilson, Counsel

For the Respondent: Bob Lovewell, Adjuster
Jonathan Schrieder, Counsel

Interpreter: Ignasious Selliah, Tamil Language

Court Reporters: Corey Salazar and Devin Max, Victory Verbatim

HEARD: by Videoconference: March 28, 29, 30, 31 and April 4, 2023

OVERVIEW

- [1] Kalaiyarasi Nanthakumar, the applicant, was involved in an automobile accident on September 16, 2012, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “*Schedule*”). The applicant was denied benefits by the respondent, Unifund Assurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.
- [2] Specifically, it denied that the applicant’s accident-related impairments met the definition of catastrophic (“CAT”) impairment. If it is determined that the applicant has suffered a CAT impairment, she is entitled to the extended tier of benefits that accompanies this designation. The respondent also denied the applicant’s entitlement to numerous treatment plans (“OCF-18s”) for medical benefits and cost of examination expenses. There is also a dispute regarding the applicant’s entitlement to attendant care benefits (“ACBs”) and whether it has been incurred.

ISSUES

- [3] I have been asked to decide the following issues:
1. Did the applicant sustain a catastrophic impairment as defined under the *Schedule*?
 2. Is the applicant entitled to attendant care benefits in the following amounts for the following time periods:
 - i) \$802.81 per month from September 16, 2012 to May 23, 2015?
 - ii) \$917.52 per month from May 24, 2015 to July 20, 2015?
 - iii) \$1,120.27 per month from July 21, 2015 to May 31, 2017?
 - iv) \$1,120.27 per month from June 1, 2017 to May 18, 2021?
 - v) \$1,874.48 per month from May 19, 2021 to date and ongoing?
 3. Is the applicant entitled to a reimbursement of \$57,228.63 incurred towards the attendant care services for the period June 1, 2017 until January 25, 2021 submitted to the respondent on an Expense Claim Form (OCF-6) on January 18, 2021?
 4. Is the applicant entitled to housekeeping and home maintenance services of \$100 per week from January 19, 2021 to date and ongoing?

5. Is the applicant entitled to a reimbursement of \$43,500 incurred towards the housekeeping and home maintenance services for the period September 17,2012 until January 18,2021 submitted to the respondent on an Expense Claim Form (OCF-6) on January 18, 2021?
6. Is the applicant entitled to a medical benefits and cost of examination expenses recommended by Gibson Wellness Centre in the following treatment plans/OCF-18s:
 - i) \$4,820 for massage, physiotherapy and chiropractic treatment submitted December 23, 2016;
 - ii) \$4,903.80 for services of a registered nurse submitted on June 7, 2017;
 - iii) \$10,823.94 for recreational activities, physiotherapy and provider travel time submitted on May 9, 2017;
 - iv) \$12,904.76 for physiotherapy and recreational activities submitted on December 4, 2017;
 - v) \$6,543.88 for pharmacotherapy submitted on October 2, 2017;
 - vi) \$2,011.90 for an attendant care assessment submitted on August 1, 2017;
 - vii) \$6,755.16 for services of a registered nurse and physiotherapy in a plan dated October 3, 2019?
 - viii) \$7,420.78 for services of a registered nurse in a plan dated February 13,2020?
 - ix) \$8,693.40 (less approved amount of \$3,729.30) for physiotherapy and services of a registered nurse in a plan dated September 15, 2020?
 - x) \$4,741.80 for physiotherapy in a plan dated September 29, 2020?
 - xi) \$2,193.61 for an attendant care assessment recommended by Gibson Wellness in a plan dated September 29, 2020?
 - xii) \$10,655.29 for services of a registered nurse recommended in a plan dated October 1, 2020?

7. Is the applicant entitled to a medical benefit in the amount of \$7,644.68 for psychological treatment recommended by Dr. Pillai in a treatment plan (OCF-18) submitted on May 1, 2018?
8. Is the respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?
9. Is the applicant entitled to interest on any overdue payment of benefits?

[4] Of note, most of the OCF-18s in dispute were incorrectly listed in the Tribunal's case conference report and orders as being for physiotherapy, when they were for services of a registered nurse, attendant care assessments, recreational activities or counselling service. I will address this further below in my analysis.

RESULT

[5] After considering the testimony of all witnesses and reviewing all the evidence I find:

- i) The applicant did not sustain a CAT impairment.
- ii) The applicant is not entitled to any of the disputed OCF-18s.
- iii) The applicant is not entitled to an ACB in any of the amounts claimed for any of the disputed time periods.
- iv) The applicant is not entitled to a housekeeping and home maintenance benefit.
- v) The applicant is not entitled to interest or an award.

PROCEDURAL ISSUES

Document Briefs Filed by the Parties

[6] This matter has a lengthy history of adjournment requests which resulted in a significant delay. Neither party complied with the Tribunal's case conference report and order which ordered them to file one document brief. Instead, both parties confirmed that they each filed seven volumes of various medical and document briefs consisting of thousands of pages – each split up into separate parts. Both parties confirmed that it was their intention to rely on various documents included in the multiple versions of these briefs. Since this would result in timely delays, an inefficient hearing and timely completion of the decision, I ordered both parties to file one brief each consisting of only the

evidence they intended to rely upon for this hearing. I requested that both parties refer to the specific pages relied upon in the index of their briefs and that these briefs be filed prior to closing submissions. The parties complied with this request. However, I note that the applicant did not refer to specific page numbers in the index.

Motions brought by the Applicant

- [7] The applicant opposed the respondent's reliance on a surveillance brief served on her in October 2021. Ultimately, the applicant relied on the surveillance evidence. Therefore, I find that I do not need to address this further.
- [8] The applicant opposed the respondent's submission of a Divisional Court decision in *Yan v Nadarajah*, 2015 ONSC 7614, on the basis that it is not relevant to the applicant's claim for accident benefits. The respondent submits that the decision was served on the applicant well in advance of the hearing. Further, it is relevant because it speaks to the applicant's credibility which is crucial to proving that she sustained a CAT impairment as a result of the accident. It submits that this decision speaks to the applicant's history of making false statements under oath. Therefore, it calls into question the reliability of her self-reports to psychological assessors and her testimony at this hearing.
- [9] I decline to exclude this decision because it was served on the applicant in advance of the hearing. Therefore, she was aware of the respondent's intention to rely upon same and was not taken by surprise. Further, I do not find the same rules apply to case law as it does to other documentary evidence.
- [10] The applicant requested an order from the Tribunal requesting the respondent to produce a copy of a surveillance video referred to in a report dated May 24, 2022. I asked the respondent to make inquiries about the surveillance video referred to in the report. The respondent was not able to obtain a copy of it. Since this issue was not raised by the applicant in advance of the hearing, I declined to make any further order regarding it as it would result in a delay of the hearing. Further, I find the applicant had ample time in advance of the hearing to address this production issue.

Motion brought by the Respondent

- [11] The respondent opposed the applicant's submission of the Divisional Court's decision in *Addy v. Goulet et al.*, 2023 ONSC 1265 because it was not served on it until the second day of the hearing. The applicant submits that this decision is relevant to the weight the insurer examination report of Dr. Hope should be given

because the judge questioned the doctor's impartiality. Consequently, the decision is relevant. The respondent submits that the parties exchanged witness lists some time ago and originally it had listed Dr. Hope on its witness list. However, after the applicant confirmed that she would not be calling any experts it advised that it would no longer be calling Dr. Hope. It submits that the applicant should have summoned Dr. Hope as a witness and served this decision in advance if she wanted to rely on it. I decline to exclude this decision. I agree with the respondent that this decision should have been served in advance of the hearing and as a result less weight may be given. Further, as highlighted above, I do not find the same rules apply to case law that apply to other documentary evidence.

BACKGROUND

- [12] On September 16, 2012, the applicant was involved in an automobile accident when the vehicle she was a passenger in was rear-ended by another vehicle. Emergency services were not called and there was minor damage to the vehicle. The accident was reported at a collision reporting centre the next day. The applicant attended a walk-in clinic a few days later complaining of neck, back, right shoulder pain and headaches. She was referred by her family doctor to attend a clinic for physiotherapy.
- [13] Prior to the accident, she was employed as a mail sorter for Canada Post. She has not returned to work since the accident.
- [14] An MRI revealed a partial thickness tear of the applicant's right shoulder. She underwent arthroscopic surgery on May 24, 2015.
- [15] The applicant was involved in a subsequent automobile accident in November 2015. Very little information was submitted regarding whether she sustained any impairments as a result of this accident.
- [16] On January 26, 2017, the applicant submitted an application for a CAT determination under sections 3(2)(e) and (f) of the *Schedule*, referred to as Criterion 7 and Criterion 8, respectively.

ANALYSIS

The applicant did not sustain a CAT impairment under Criterion 7 or 8

- [17] In order to qualify under Criterion 7, the applicant must prove that she has a combination of physical and psychological impairment ratings from medical professionals that meet the 55% whole person impairment ("WPI") threshold.

Chapters 3 and 14 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 (the "*Guides*") are used by assessors in assigning the appropriate WPI% rating.

- [18] The applicant relies on the CAT assessments completed by Dr. Lisa Becker, physiatrist, an in-home CAT assessment of Priya Nair, occupational therapist ("OT") and psychological assessment completed by Dr. Dory Becker dated March 9, 2017. Dr. L. Becker assigned a rating of 1-3% WPI for medications; 5% WPI for the cervical spine; 5% WPI for the lumbosacral spine; 9% WPI for the upper extremity; 3-5% WPI for headaches and 1% WPI for skin impairment. Dr. L. Becker then picked the highest ratings and combined the ratings according to the combined values chart in the *Guides* [3+5+5+9+5+1] which totaled a 25% WPI rating for the applicant's physical impairments.
- [19] Dr. D. Becker diagnosed the applicant with Pain Disorder with psychological factors and a general medical condition, Major Depressive Disorder, single episode, moderate, chronic and vehicular anxiety. She assigned a 40% WPI rating for the applicant's psychological impairment. When the applicant's physical and psychological impairments are combined using the chart in the *Guides* the applicant's total WPI equals 55% and she meets the CAT threshold. Dr. D. Becker determined that the applicant did not meet CAT status under Criterion 8 as she determined she had moderate impairments under the four spheres of functioning. A second CAT assessment was done in 2022 under Criterion 8 which I will address below.
- [20] The respondent relies on the CAT assessments completed by Dr. Lee, orthopedic surgeon, Susan Javarsky, OT and Dr. Hope, psychologist. Dr. Lee assigned a 11% WPI for the applicant's right shoulder; 10% WPI for the cervical spine and 1% for the skin (scar). When these numbers are added using the combined values chart in the *Guides*, Dr. Lee's total WPI% rating for the applicant's physical impairment was 21%. Ultimately, there is a small difference of opinion between the parties' assessors on the applicant's physical impairment. Dr. Lee did not assign a rating for the lumbosacral spine, medication, or headaches. However, there is a significant difference of opinion between the parties' psychological assessors as Dr. Hope determined that there was no psychological impairment and assigned a WPI% of zero. Important to Dr. Hope's opinion was that he encountered validity issues with the applicant's psychometric test results. For the following reasons, I prefer the IE report of Dr. Hope.
- [21] As a starting point, I find the 40 WPI% rating assigned by Dr. D. Becker inflated and the report provided very little rationale to justify this number. Moreover, I find

the rating inconsistent with the doctor's opinion that the applicant had four moderate impairments under the four spheres of functioning under Criterion 8. Dr. D. Becker acknowledged that she used Table 3, under Chapter Four of the *Guides* to assign her rating. Under Table 3, the WPI% range for a moderate impairment is 15 to 29% and for a severe impairment it is 30 to 49%. In explaining why she gave such a high rating, Dr. D. Becker states, "while I am mindful that her impairment ratings fall within the moderate range in Chapter 14, I believe the synergistic effect of her psychological symptoms result in a more severe than a moderate impairment." I do not find this explanation helpful and give Dr. Becker's opinion little weight. Further, I do not find Dr. Becker's psychological diagnosis or 40% WPI rating was supported by the medical record at the time the assessment was completed which I will address now.

[22] There is very little evidence of psychological complaints in the medical record from the date of the accident to the date of the applicant's first CAT assessment (approximately four and a half years). The clinical notes and records (CNRs) of Dr. Kirubaharan, the applicant's family doctor, between September 17, 2012 to May 20, 2014, were not helpful as they were not legible. Furthermore, the CNRs of Dr. Gnanendrajah, the new family doctor, between September 9, 2015 to February 2017, contain two references to psychological complaints from December 2015. The first reference is in a consult note of Dr. Kachooie, psychiatrist which suggested the applicant suffers from depression and PTSD, and a recommendation that the applicant be prescribed Cymbalta. The applicant was then seen by Dr. Srinivasin, psychologist who provided a consult note indicating that she was suffering from mild depression or "reactive depression." I do not give these consult reports much weight because as a psychiatrist, it is not within Dr. Kachooie's scope of practice to make a psychological diagnosis. Further, Dr. Srinivasin's consult report noted mild depression. Moreover, the family doctor's note states that Cymbalta was not prescribed at that time.

[23] In addition, a review of the prescription summaries between 2012 and 2018 support that the applicant was prescribed a variety of medications for pain relief. There was little reference to any medications prescribed to treat depression or anxiety. The applicant also submitted hundreds of pages of CNRs from the four treating clinics she attended between 2012 and 2022. Other than the OCF-18s recommending psychological assessments or treatment there are no legible references to any psychological issues in these records. The applicant argues that she does not have this evidence because the respondent denied three OCF-18s for psychological assessments – one by Dr. Sharma dated November 19, 2012, a second by Dr. Bernstein dated 2014 and a third by Dr. Pillai dated May 2, 2016. The applicant submits that all three psychologists referred to pre-screen

interviews with her that document ongoing psychological symptoms and distress. I find these pre-screening reports of limited value because they are not full assessments and rely primarily on the applicant's self-reports, which I do not find credible and will be addressed further below.

- [24] The only psychological reports completed prior to the CAT assessments were two IE reports completed by Dr. Mandel, psychologist, dated January 4, 2013 and March 27, 2014. In the first IE, the applicant reported problems with pain, sleep and being more easily irritated with her fiancé. However, she indicated she was mainly a happy person, denied any feelings of worthlessness, hopelessness or issues with concentration and memory. She did not have any nightmares or flashbacks. Psychometric tests administered by Dr. Mandel revealed the applicant's score was three times above the acceptable standard and may suggest magnification or malingering. Dr. Mandel opined that there was no consistent objective information that she suffers from any significant psychological symptoms and offered no psychological diagnosis. The results of Dr. Mandel's 2014 IE are very similar. I find Dr. Mandel's findings consistent with the opinion of Dr. Hope and the medical evidence for that time period.
- [25] Dr. Hope's CAT IE determined that there was no valid evidence of any accident-related psychological diagnosis. The doctor acknowledged that the applicant may have genuine symptoms of psychological distress. However, because of the validity issues encountered and the minor nature of the collision there is no psychological impairment. Dr. Hope further concluded that the functional limitations highlighted in Ms. Javasky's assessment are not attributed to any psychological impairment.
- [26] The applicant submits that Dr. Hope's opinion should be given no weight because, in *Addy v. Goulet et al.*, 2023 ONSC 1265, the Divisional Court questioned whether the doctor complied with his obligation to provide evidence that was fair, objective and non-partisan. I place little weight on this decision because in this case, I have determined that Dr. Hope's opinion is consistent with the medical record and Dr. D. Becker's opinion is not.
- [27] In addition, much was made by Dr. D. Becker that Dr. Hope should not have placed so much weight on the psychometric test results because they are designed for the North American population. Factors such as culture, language barriers and the need for interpreters should be given proper consideration in interpreting the results. While I agree with Dr. D. Becker that these things should be considered in analysing the relevance of test data, I did not find the applicant

to be a credible witness, which is consistent with the validity issues encountered by both IE psychological assessors which I will address now.

- [28] During her in-chief testimony the applicant was able to recall details about her pre-accident employment, leisure activities and the changes to her functioning post-accident. However, during cross-examination she had a complete lack of recall to almost every question asked. Moreover, when she did answer questions, her answers raised doubt about her credibility. For example, she disputed the contents of some of the entries in her pre-accident medical record when there was no reason to. She stated that a pre-accident hospital record about her injuring her back after falling down the stairs was a lie. She even disputed some of the statements in the post-accident medical reports of her own assessors.
- [29] Although I acknowledge that a person's memory is not perfect, I find the applicant's memory selective. Further, I find her reports of having poor memory following the accident to be unsupported by any accident-related impairment as there is no evidence that she sustained a concussion or a brain injury. In addition, she was also inconsistent in her reports about her post-accident functioning to assessors. For example, she reported that she did not drive following the accident as a result of driving anxiety to the majority of assessors and to another she claimed she had not driven since 2010 because she did not need to. To some assessors she reported being independent with self-care and to others she was completely incapable of doing anything.
- [30] Another challenge to the applicant's credibility was her evidence about receiving ACBs from a company called JNS Attendant Care Services from September 23, 2012 to December 31, 2015 (a period of almost three years). No evidence was submitted to support that she applied for ACBs or submitted any invoices to the respondent despite the fact that she allegedly incurred \$62,738.00 in services. The evidence supports that these PSW records and invoices surfaced at the same time the applicant had a retroactive attendant care assessment completed in 2021. The respondent sent JNS a letter requesting a statutory declaration about the services received and the PSWs who provided services and JNS never responded to this correspondence.
- [31] During her in-chief testimony the applicant claimed that multiple PSWs attended her home during that time period and assisted her with bathing, dressing, meal prep and some housekeeping services. Further, she paid for these services in cash. She did not have any receipts for these payments and could vaguely recall the name of one of the PSWs who assisted her. Of significance, the applicant's daughter testified that there were only two PSWs who provided services and they

were both Tamil speaking women. I find it perplexing that the applicant could not recall the names of the women who assisted her several times a week with such intimate tasks such as bathing and dressing for a period of three years.

Furthermore, she did not report that she was receiving PSW services to any of the assessors on this file (including her own CAT assessors) until 2021. She reported to all assessors that the only help she was receiving with personal care and daily activities was from her daughter who would wash her hair once a week and help with meal prep and some housekeeping tasks. When asked why she did not report receiving PSW services she said she was not asked. I did not find this explanation convincing. I also do not find the applicant's partner's testimony helpful as he indicated that he was not there when the PSWs would come. For these reasons, I am not convinced on a balance of probabilities that these PSW services were ever received.

[32] The applicant maintains that her evidence is credible because she sustained objective impairments as a result of the accident and consistently reported having right shoulder, back and neck pain and functional limitations as a result. The respondent submits that credibility is critical because the accuracy and reliability of self-reports are heavily relied on by psychological assessors in determining whether there is a psychological diagnosis.

[33] Although I acknowledge that the applicant did consistently report having neck, back and right shoulder pain, I agree with the respondent that her reports about her psychological impairments are not reliable. Further, the evidence has also called into question her reports about her functional limitations. This is another reason why I place little weight on Dr. Becker's CAT psychological assessment and do not accept the doctor's psychological diagnosis or the WPI% rating assigned for the accident-related psychological impairment. Since I do not accept Dr. Becker's WPI% rating the applicant does not meet the CAT threshold under Criterion 7.

The applicant did not sustain a CAT impairment under Criterion 8

[34] In order to meet the threshold for a CAT impairment under Criterion 8, an individual must have sustained a marked (class 4) or extreme (class 5) impairment as a result of the accident in one of the four spheres of functioning due to a mental and behavioural disorder. These impairments are assessed under Chapter 14 of the *Guides*. Mental and behavioural impairments are rated according to how seriously they affect a person's useful daily functioning. The *Guides* sets out the four spheres of functioning and the levels of impairment as outlined in the chart below.

Area or Aspect of Functioning	Class 1: No Impairment	Class 2: Mild Impairment	Class 3: Moderate Impairment	Class 4: Marked Impairment	Class 5: Extreme Impairment
Activities of Daily Living	No impairment is noted	Impairment levels are compatible with most useful functioning	Impairment levels are compatible with some, but not all useful functioning	Impairment levels significantly impede useful functioning	Impairment levels preclude useful functioning
Social Functioning					
Concentration, Persistence and Pace					
Adaptation (Deterioration in a work-like setting)					

[35] Dr. Becker completed an updated CAT psychological report dated March 30, 2022 which determined that the applicant had three marked impairments: Activities of Daily Living; Concentration, Persistence and Pace; and Adaptation. The respondent did not respond to this assessment because it did not receive the second OCF-19 seeking CAT status until March 2023, the same month as this hearing. In 2018, the applicant also started regularly seeing Dr. Pillai, psychologist and Dr. Kakar, psychiatrist. Numerous reports of these doctors from 2018 to 2022 were relied on documenting significant psychological symptoms and impairments. I place little weight on this evidence because of the large gap in time in the medical records noting any objective psychological impairment. In addition, as already noted I do not find the applicant to be credible and place little weight on her self-reports about her psychological symptoms to Dr. Pillai, Dr. Kakar or Dr. Becker. For the same reasons, I do not accept any of the marked impairment ratings assigned by Dr. Becker in this report.

[36] For the above-noted reasons, I do not find that the applicant has marked impairment under Criterion 8.

The applicant is not entitled to payment of an ACB for the time period claimed

[37] Section 19 of the *Schedule* states that an insurer shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of an accident for attendant care services (ACBs) provided by an aide or attendant.

Section 20(2) of the *Schedule* states that ACBs are only payable for non-CAT claimants for a period of 104 weeks post-accident.

- [38] Section 31(1) of the *Schedule* provides that a person who intends to apply for a benefit shall notify an insurer of his or her intention no later than the seventh day after the circumstances arose that gave rise to the entitlement to the benefit.
- [39] Section 42 of the *Schedule* details the procedures for claiming ACBs, including the form to be used and timing of its submission. To apply for ACBs, an insured is required to submit an assessment of attendant care needs ("Form 1") on the prescribed form. Section 42(3) states that an insurer has 10 days after the submission of the Form 1 to provide notice of the ACBs it agrees to pay, refuses to pay and the medical and other reasons for the denial. Alternatively, it can provide notice requesting an IE.
- [40] The applicant submits that she is entitled to ACBs for the services provided by JNS because she had difficulties carrying out her personal care and activities of daily living as a result of her accident-related impairments. As already highlighted above, she submits that she incurred the ACB services of JNS, therefore the respondent is obliged to pay for them. Further, when the services of JNS were discontinued her daughter and partner have been providing services. Although she acknowledges that the services of her daughter and partner were not incurred, she submits that I should deem the expenses incurred because the respondent unreasonably withheld the benefit.
- [41] The respondent argues that the applicant did not submit a Form 1 for ACBs until June 1, 2017, which was undisputed by the applicant. As a result, the applicant's argument that the benefit be deemed incurred fails because it cannot be argued that the respondent unreasonably withheld the benefit before it was applied for. I agree with the respondent for several reasons.
- [42] As a starting point, the applicant did not submit a Form 1 to the respondent until June 1, 2017. This date is well beyond the 104-mark for non-CAT claimants.
- [43] Section 42(5) of the *Schedule* states that an insurer may, but is not required to, pay an expense incurred before a Form 1 that complies with this section is submitted to the insurer. The jurisprudence supports that this provision is meant for situations where ACBs are required in emergency situations where a person is admitted to the hospital and cannot apply in a timely manner. The applicant did not provide any explanation for why she did not submit a Form 1 when the services of JNS were allegedly incurred. Nor did the applicant provide a reasonable explanation that there was an emergency situation that prevented her

from applying for the benefit until 2017. Further, as already highlighted above, I am not convinced on a balance of probabilities that these services were ever received by the applicant.

[44] The applicant submitted various decisions of this Tribunal where the adjudicator has deemed a benefit incurred pursuant to s. 3(8) of the *Schedule* because it was determined that the respondent unreasonably withheld the benefit. None of these decisions were helpful to the applicant's case because there is no evidence before me in the present case that the respondent unreasonably withheld ACBs. For these reasons, I do not find it necessary to address the case law further.

[45] For the above-noted reasons, I find the applicant is not entitled to any of the ACBs in dispute because she did not apply for the benefit in accordance with s. 42 within the 104-week mark. Further, she is not entitled to the benefit beyond that date because I have determined that she did not sustain a CAT impairment.

The applicant is not entitled to a housekeeping and home maintenance benefit.

[46] Section 23 of the *Schedule* provides that housekeeping and home maintenance benefits are only available to those who have sustained a CAT impairment. Since I have determined that the applicant is not CAT she is not entitled to this benefit.

The applicant is not entitled to the OCF-18s recommended by Gibson Wellness Centre.

[47] To receive payment for a treatment and assessment plan under s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. The onus is on the applicant to prove that all of the OCF-18s are reasonable and necessary. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.

[48] Despite my reminders neither party spent much time addressing the high volume of OCF-18s in dispute. At the outset of the hearing, I confirmed with both parties that with the exception of a few of the OCF-18s the majority in dispute were for physiotherapy. There seemed to be a general lack of organization or awareness about what the OCF-18s in dispute were for. Upon my review of the OCF-18s submitted by the applicant, the characterization of the OCF-18s in the Tribunal's

case conference reports and orders were not accurate, nor did either party clarify when I confirmed the issues in dispute at the beginning of the hearing.

OCF-18s for Physiotherapy

- [49] The applicant submits that all of the OCF-18s (Listed as issues 6 i), iii), iv), v), ix), and x) in dispute are reasonable and necessary because she suffers from ongoing chronic pain in her neck, back and right shoulder. Further, she requires ongoing therapy because the treatment provides temporary relief from pain. Further, she has incurred \$192,910.82 in treatment from Gibson Wellness Centre. The fact that she has incurred all of this treatment demonstrates that she needed it. Further, various experts support that she requires ongoing therapy to manage her chronic pain. Therefore, all of the OCF-18s in dispute are reasonable and necessary.
- [50] The respondent argues that none of the OCF-18s are reasonable and necessary as the applicant has achieved maximum medical recovery from facility-based treatment. It relies on the IE report of Dr. Yee, orthopaedic surgeon, dated November 20, 2020, which determined that the applicant reached maximum medical recovery from facility-based treatment. I agree with the respondent.
- [51] The authors of the OCF-18s varied, but the goals of almost all of the OCF-18s in dispute were identical in that treatment was to reduce the applicant's pain, increase her strength and improve her range of motion in order to return her to her daily activities. Overall, the OCF-18s were not helpful in demonstrating that the OCF-18s are reasonable and necessary. There were numerous mistakes on the forms interchangeably referring to the applicant as male and female. In my view, this supports that the authors of the OCF-18s had a limited understanding of who the patient was that they were recommending all of this treatment for. Further, the OCF-18s do not assist in demonstrating that they were achieving their stated objectives of increasing the applicant's strength or range of motion ("ROM") or that the treatment received to date had assisted in returning the applicant to her activities of daily living. For example, there was no mention on the forms themselves about any improvements in-between the submission of the OCF-18s.
- [52] The CNRs of Gibson Wellness Centre were not helpful in demonstrating that the disputed OCF-18s are reasonable and necessary. These notes were not legible, nor were there any progress reports noting any improvements despite the fact that the applicant had incurred so much treatment. Nor did I find the CNRs of the three clinics the applicant attended before Gibson helpful because they too were not legible and did not include any progress reports.

[53] The applicant testified that she received temporary relief from pain following treatment, however, the pain would come back and her pain symptoms have gotten worse over time. I find the applicant's reports of the benefits from treatment to be inconsistently reported to assessors throughout the medical record. Some reports note that she received little benefit from treatment and others reported that she found treatment temporarily beneficial.

[54] The applicant did not make any submissions regarding the cost of the OCF-18s being reasonable, which is part of the test to establish that they are reasonable and necessary. The amount of the OCF-18s in dispute range from \$4,000 to \$12,000. In my view, in the absence of sufficient submissions or evidence, I find the cost of the OCF-18s excessive, especially in light of the fact that the applicant received at most temporary relief from pain as a benefit. As a result, I do not find the disputed OCF-18s to be reasonable and necessary.

OCF-18s for Registered Nurse

[55] The OCF-18s listed as issues 6) ii), viii), part of ix) and xii) were not for physiotherapy but for the services of a registered nurse. These OCF-18s ranged from \$4,000 to \$10,000. During the applicant's in-chief examination she was asked whether she received services from a registered nurse. Confused about the relevance of the questions being asked, I inquired about whether there was an OCF-18 in dispute for this issue. In my view, this would have been the time for the applicant to provide clarification. Instead, my inquiry was left unanswered. There were no submissions regarding why the services of the registered nurse are reasonable and necessary or who recommended these services in the first place. Further, I do not find the session notes of the registered nurse provided much clarity on the issue.

[56] The applicant testified that a registered nurse attended her home and would ask her if she took her medication, if she had eaten or would check to see if she attended doctor's appointments. In my view, this was insufficient evidence to prove that the thousands of dollars recommended for the services of a registered nurse are reasonable and necessary. The applicant has not met her onus in proving on a balance of probabilities that the OCF-18s recommending services of a registered nurse are reasonable and necessary.

OCF-18s for ACB Assessments

[57] The OCF-18s dated August 1, 2017 and September 29, 2020 listed as issues 6 vi) and xi) recommended by Gibson Wellness both sought ACB assessments. Since I have determined that the applicant did not sustain a CAT impairment, she

is only entitled to claim ACBs within 104 weeks of the accident. Since these assessments are requested beyond the 104 mark, I do not find that they are reasonable and necessary.

OCF-18 of Dr. Pillai for Psychological Treatment

- [58] The OCF-18 submitted by Dr. Pillai recommended psychological treatment in the amount of \$7,644.68 dated May 1, 2018, recommending 36 sessions of psychological treatment. Dr. Hope opined in an IE report dated July 9, 2018 that the OCF-18 was not reasonable and necessary because there was no accident-related diagnosis. The doctor noted that there were validity issues on psychometric tests along with non-organic findings of the physical assessors.
- [59] In light of my finding regarding the CAT determination, I do not find the OCF-18 reasonable and necessary because I do not find the applicant credible, which calls into question her self-reports about her psychological symptoms. Further, there was a significant gap between the accident and the reports of Dr. Pillai and Dr. Kakar. For these reasons, I do not accept the psychological diagnoses of these doctors and do not find the psychological treatment recommended by Dr. Pillai to be reasonable and necessary.

Interest

- [60] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. The applicant is not entitled to interest as I do not find any benefits are overdue.

The applicant is not entitled to an award.

- [61] The applicant sought an award under s. 10 of Reg. 664. Under s. 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits.
- [62] The case law is well established that in determining whether an insurer's conduct in withholding or denying a benefit warrants an award, an insurer's behaviour must be seen as "excessive, imprudent, stubborn, inflexible, unyielding, or immoderate."
- [63] The applicant did not spend much attention addressing the award issue and argues that the respondent unreasonably withheld the attendant care and housekeeping benefit and did not respond to the rebuttal report of Dr. D. Becker addressing Dr. Hope's findings. The respondent argues that there is no evidence

that it unreasonably withheld any of the benefits in dispute or that its conduct meets the threshold for an award. I agree.

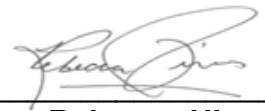
[64] In light of my findings regarding the issues in dispute I do not find an award is warranted in this case as I do not find the respondent unreasonably withheld any of the benefits in dispute. Nor has the applicant proven on a balance of probabilities that the respondent's conduct met the definition of being "excessive, imprudent, stubborn, inflexible, unyielding, or immoderate."

ORDER

[65] For all of the above-reasons I make the following order:

- i) The applicant did not sustain a CAT impairment.
- ii) The applicant is not entitled to any of the disputed OCF-18s.
- iii) The applicant is not entitled to an ACB in any of the amounts claimed for any of the disputed time periods.
- iv) The applicant is not entitled to a housekeeping and home maintenance benefit.
- v) The applicant is not entitled to interest or an award.
- vi) The application is dismissed.

Released: June 8, 2023



**Rebecca Hines
Adjudicator**