



FSCO A12-004216

**BETWEEN:**

**SAMANTHA BATUZSKIN**

**Applicant**

**and**

**TD GENERAL INSURANCE COMPANY**

**Insurer**

### **REASONS FOR DECISION**

*\*Minor errors on pgs. 3, 4, 10, and Order corrected on December 16, 2014 in accordance with the Dispute Resolution Practice Code and section 21.1 of the Statutory Powers Procedure Act.*

**Before:** Stuart Mutch

**Heard:** June 3, 4, 5, 6, 2014 at Brant Legal Reporting Services,  
Brantford, Ontario

**Appearances:** Mr. Luke Hamer for Ms. Batuzskin  
Mr. Geoffrey Keating for TD General Insurance Company

The Applicant, Samantha Batuzskin was injured as the result of a motor vehicle accident that took place on September 12, 2008. She applied for benefits from TD General Insurance Company (“TD”), payable under the *Schedule*.<sup>1</sup> Disputes arose as to Ms. Batuzskin’s claims. The parties were unable to resolve their disputes through mediation, and Ms. Batuzskin applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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<sup>1</sup>The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.

**Issues:**

**The parties identified the following issues:**

1. Is Ms. Batuzskin entitled to receive a weekly income replacement benefit at the rate of \$198.83 per week from September 20, 2008 to April 30, 2009 and in varying amounts thereafter, to date and ongoing, pursuant to the *Schedule*?
2. Is Ms. Batuzskin entitled to attendant care benefits pursuant to the *Schedule*, at the following rates:
  - \$440.73 per month from September 12, 2008 to March 12, 2009, and
  - \$150.55 from March 13, 2009 to September 12, 2010?
3. Is Ms. Batuzskin entitled to payments for housekeeping and home maintenance services at the rate of \$100.00 per week from September 12, 2008 to September 12, 2010, pursuant to the *Schedules*?
4. Is Ms. Batuzskin entitled to receive medical benefits as follows:
  - a. Prescription medications in the amount of \$228.63?
  - b. OCF-18 by Shannon Ewing of Great Lakes Physiotherapy, dated May 22, 2009, in the amount of \$1,707.72?
  - c. OCF-18 by Dr. Daniel Wilhelmus, for chiropractic treatment, dated June 22, 2009, in the amount of \$843.75?
  - d. OCF-18 by Jeff Scott of Great Lakes Physiotherapy, dated February 24, 2010, in the amount of \$2,338.80 and the OCF-18 by the same provider, dated March 22, 2010, in the amount of \$788.92?
  - e. OCF-18 by Shauna Smith of Rehab First, dated March 9, 2011 for Occupational Therapy sessions, in the amount of \$3,262.45 less \$447.00 approved, for a remainder of \$2,815.45?
  - f. OCF-18s by Kofi Wudom and Christina Harrington of Social Work Solutions, for social work treatment for mental health therapy, dated September 1, 2011, in the amount of \$1,072.40 and October 8, 2011 in the amount of \$7,013.80.
  - g. OCF-18 by Kofi Wudom & Christina Harrington dated April 11, 2012 for social work counselling and transportation in the amount of \$4,449.40 less \$1,885.00 paid for a remainder of \$2,564.00?

- h. OCF-6 dated October 22, 2012 for mattress, mattress pad, foam pillow, Differin Gel-acne, Banazclin pump-acne, Ranitidine-ulcers, Advil, in the amount of \$2,375.48, \$2,026.06 of which is in dispute.
5. Is Ms. Batuzskin entitled to payments for the cost of examinations as follows:
  - a. the OCF-22 of Dr. Kevin Rod for Chronic Pain Assessment, dated May 18, 2010 denied January 19, 2010 for \$1,812.53?
  - b. the OCF-18 by Dr. Oren Gozlan dated November 11, 2011 for a post-104 psychological assessment in the amount of \$3,850.00?
  - c. the OCF-18 by Mark Friedlander dated November 11, 2011 for a post-104 chronic pain assessment in the amount of \$3,657.50?
6. Is Ms. Batuzskin entitled to payment in the amount of \$2,102.93 for an accounting report by Davis Martindale Advisory Services Inc., pursuant to the *Schedules*?
7. Is TD General liable to pay a special award because it unreasonably withheld or delayed payments to Ms. Batuzskin?
8. Is TD General liable to pay Ms. Batuzskin's expenses in respect of the arbitration?
9. Is Ms. Batuzskin liable to pay TD General's expenses in respect of the arbitration?
10. Is Ms. Batuzskin entitled to interest for the overdue payment of benefits?

**Result:**

1. Ms. Batuzskin is entitled to weekly income replacement benefits in the amount of \$198.83 from September 12, 2008 to April 30, 2009, and in the amount of \$63.76 for the period October 16, 2009 to December 31, 2009 and in the amount of \$68.75 from January 1, 2010 to September 12, 2010. Ms. Batuzskin is not entitled to weekly income replacement benefits in the post-104 week period.
2. Ms. Batuzskin is entitled to attendant care benefits in the amount of \$440.73 per month from September 12, 2008 to March 12, 2009 and in the amount of \$150.55 from March 13, 2009 to September 12, 2009.
3. Ms. Batuzskin is entitled to housekeeping and home maintenance benefits in the amount of \$100.00 per week from September 12, 2008 to March 12, 2009 and \$50.00 per week from March 13, 2009 to September 12, 2009.

4. Medical benefits:
  - a. Ms. Batuzskin is not entitled to her claim for prescription medications in the amount of \$228.63.
  - b. Ms. Batuzskin is entitled to the cost of physiotherapy as set out in the OCF-18 dated May 22, 2009, in the amount of \$1,707.72.
  - c. Ms. Batuzskin is entitled to the costs of chiropractic treatment as set out in an OCF-18 dated June 22, 2009, in the amount of \$843.75.
  - d. Ms. Batuzskin is entitled to the costs of Occupational Therapy sessions as set out in an OCF-18, dated February 24, 2010, in the amount of \$2,338.80 and in the OCF-18, dated March 22, 2010, in the amount of \$788.92.
  - e. Ms. Batuzskin is not entitled to the costs of Occupational Therapy sessions, as set out in the OCF-18 by Shauna Smith of Rehab First, dated March 9, 2011 in the amount of \$2,815.45.
  - f. Ms. Batuzskin is not entitled to the cost of social work treatment for mental health therapy as set out in the OCF-18s dated September 1, 2011 and October 8, 2011.
  - g. Ms. Batuzskin is not entitled to the remainder owing on the OCF-18 dated April 11, 2012, for transportation costs.
  - h. Ms. Batuzskin is not entitled to the cost of a mattress, mattress pad, foam pillow, Differin Gel-acne, Banazclin pump-acne, Ranitidine-ulcers, Advil, in the amount of \$2,026.06 as set out in the OCF-6 dated October 22, 2012.
5. For the cost of examinations:
  - a. Ms. Batuzskin is entitled the cost of an examination, specifically the OCF-22 of Dr. Kevin Rod for Chronic Pain Assessment, dated May 18, 2010 for \$1,812.53.
  - b. Ms. Batuzskin is entitled to the costs as set out in an OCF-18 dated November 11, 2011 for a psychological assessment by Dr. Oren Gozlan.
  - c. Ms. Batuzskin is not entitled to the costs as set out in as OCF-18 dated November 11, 2011 for a post-104 chronic pain assessment by Dr. Friedlander.
6. Ms. Batuzskin is not entitled to a Special Award.
7. If the parties cannot agree on entitlement to, or the amount of expenses of the proceeding they may request an appointment to determine expenses in accordance with Rule 79.1 of the *Dispute Resolution Practice Code*.

8. TD shall pay interest as set out in the *Schedule* from the dates specified in this decision.

## **EVIDENCE AND ANALYSIS**

### **Background**

Ms. Batuzskin is 30 years old. At the time of the accident she was 24. About five months before the accident she had started a landscaping business. She and her then common-law husband, Karl Tucker, lived in a two storey house in Simcoe, Ontario. Mr. Tucker is a long distance truck driver. At the time of the accident he was intending to join Ms. Batuzskin in the landscaping business.

The circumstances of the accident are undisputed. The accident occurred on September 12, 2008 at about 8 p.m. Ms. Batuzskin was returning home, travelling on Highway 6 in Norfolk County. She noticed a vehicle ahead of her being driven erratically. She passed the vehicle and tried to put as much distance as possible between herself and the other vehicle. She slowed to make a turn. At that point the vehicle struck her from behind at a speed Ms. Batuzskin estimated to be at least 100 km/hr. She testified that her vehicle spun around several times and ended up in a corn field. Ms. Batuzskin testified that she immediately developed a splitting headache and was angry. The other vehicle did not stop. Almost immediately she drove out of the corn field and pursued the other driver. She followed him to his residence. At that point she called police who arrived and apprehended the other driver. She then returned to the accident scene, in her vehicle to look for a spare tire that had been dislodged in the accident. She was unable to find it. She then drove home.

### **Post-accident medical history**

By all accounts Ms. Batuzskin was in excellent health prior to the accident. She was physically active, both in her vocational and personal life.

***Six month period following the accident***

Ms. Batuzskin testified that about 24 hours after the accident she began to experience “excruciating” pain. Her neck became swollen such that she had trouble turning her head. She described her back as being “on fire”. On the second day after the accident she went to the hospital. She was given medication and was told that she had mononucleosis. The next day she went to see Dr. Wudom, her family doctor, in Brampton. In his notes, Dr. Wudom assessed Type II whiplash as the result of a motor vehicle accident and noted complaints of headache and back and neck pain. He gave her a prescription for chiropractic treatment.

Ms. Batuzskin described herself as “useless” for six months after the accident. She required extensive assistance with her personal care and housekeeping tasks. She never returned to her work as a landscaper. She returned to cleaning houses on a limited basis in May 2009.

Ms. Batuzskin began seeing a chiropractor shortly after the accident. She took chiropractic treatment for approximately one year after the accident. In late September she started physiotherapy at Great Lakes Physiotherapy. She continued with that treatment until sometime in mid-2009.

A progress note from Jeff Scott of Great Lakes Physiotherapy, dated January 19, 2009 indicates that Ms. Batuszkin suffered from significant amounts of pain and tenderness, has “considerable back and neck discomfort” and low back pain and could not do her regular activities.

Some of the documentary evidence suggests that Ms. Batuzskin may have been more active in the six-month period following the accident than her evidence would indicate. There is a note in Dr. Wudom’s records dated November 5, 2008 that indicates that she is working “half days”. When asked about this, Ms. Batuzskin was adamant that she did not return to any form of work for the first six or seven months after the accident. On January 29, 2009 Dr. Wudom noted that she had been shoveling snow “which has aggravated her back problem”. On March 9, 2009 he noted that her low back had been aggravated by raking and lifting. Shannon Ewing of Great Lakes made a similar note on March 12, 2009, commenting that Ms. Batuzskin found lifting painful, as well as raking. I find it more likely than not that Ms. Batuzskin was attempting more physical tasks, both inside and outside the home, than she indicated in her testimony.

***6 to 12 months after the accident***

Ms. Batuzskin testified that she had better control of her pain after six months. She credits physiotherapy for increasing her mobility. She was able to do more tasks around the house. She indicated that she was still unable to do any yard work and that Karl attended to that (or she sought hired help). She testified that in May 2009 she returned to paid employment in the form of housecleaning on a limited basis. She stated that she was still in pain but felt compelled to contribute to household expenses. Her testimony was that, in contrast to the “deep” cleaning she performed before, she only did light cleaning, one day per week and she gradually increased her workload to about three to four days per week for four to six hours per day.

In June 2009 Ms. Batuzskin fell from a boat that was stored in her backyard. She broke a bone in her foot and wore an air cast for two months.

In July 2009 TD stopped funding physiotherapy. Ms. Batuskin stopped this treatment. Ms. Batuzskin noted deterioration in her condition and increasing pain.

Dr. Almas, a chiropractor conducted an Insurer’s Examination of Ms. Batuzskin in August 2009. He found that Ms. Batuzskin suffered from mild lumbosacral facet irritation. He found that “she did not evidence a physical impairment”.

***12 months after the accident and beyond***

There is a paucity of medical evidence covering the period of September 2009 to February 2010.

Ms. Batuzskin indicated, as does the documentation, that she resumed physiotherapy in February 2010, funding it herself, but was unable to continue for financial reasons. In August 2010 she was diagnosed with Chronic Pain Syndrome by Dr. Kevin Rod, a family physician with a practice in chronic pain management. In May 2011 she complained to her family doctor of a flare up of neck and back pain. In October 2011 she was complaining of severe back pain. In December 2011 Dr. Wudom’s notes indicate that Ms. Batuzskin started to suffer significant emotional distress. She was exhausted, sleeping poorly and very frustrated with ongoing neck

and back pain. On December 2, she saw Dr. Gozlan, a clinical psychologist, who diagnosed Ms. Batuzskin as suffering from a major depressive disorder and generalized anxiety disorder. On December 14, 2011 she saw Dr. Friedlander, a specialist in anesthesiology and a consultant in acute and chronic pain management. Dr. Friedlander diagnosed chronic pain syndrome, specifically headaches, musculoskeletal neck pain, musculoskeletal upper and lower back pain.

By April 2012 Ms. Batuzskin reported to her doctor that her life was “out of control”, that her relationship with her common law husband had broken down and that she couldn’t cope. Dr. Wudom prescribed Cymbalta, which Ms. Batuzskin described in her testimony as very helpful. By May she had begun to improve. She continued to work about four days per week. In April 2013 she settled her tort claim. In September 2013 she stopped cleaning houses all together. She testified that one of her customers had moved to a home that was too large for her to manage.

I will now consider the claims made by Ms. Batuzskin.

### **Attendant Care**

The *Schedule* provides that the insurer shall pay to a person who suffers a benefit as a result of an accident, all reasonable and necessary expenses for services provided by an aide or attendant.

Ms. Batuzskin is claiming Attendant Care Benefits in the following amounts:

- \$440.73 per month from September 12, 2008 to March 12, 2009
- \$150.55 per month from March 13, 2009 to September 12, 2010

As stated earlier, Ms. Batuzskin described the first six months of the accident as being the most acute in terms of her physical injuries. She stated that she hurt “all the time”, that she had difficulty sleeping and that she couldn’t care for herself and indeed, had trouble doing most tasks. Mr. Tucker took one month off his job to assist her. She stated that Mr. Tucker assisted her with her hair, nails and helped her out of the tub. They moved their bed to the main floor so that



she didn't have to climb stairs. She stated that she was mostly independent after one year, although "some things I gave up". She did not specify what was given up.

Mr. Tucker's testimony corroborated this. He stated that he assisted Ms. Batuzskin with dressing, meals and grooming. When asked how long it took for her to do all of her self-care he stated "one year, I guess".

As stated earlier, some of the documentary evidence suggests that Ms. Batuzskin may have been more active in the six month period following the accident than her evidence would indicate. However her reports as to her functioning, as recorded by Great Lakes Physiotherapy in their reports<sup>2</sup> and by Shauna Smith, Occupational Therapist, in her report of March 2011<sup>3</sup>, are consistent with her and Mr. Tucker's testimony. The documentary evidence is also consistent with Ms. Batuzskin's testimony to the effect that she had better control of her pain after six months. As stated earlier, her evidence was that she gradually performed more of her self-care tasks. On August 14, 2009 at the Independent Chiropractic Evaluation she told Dr. Almas that she carried out all self-care tasks independently.<sup>4</sup>

Two Form 1s were prepared by Shauna Smith, Occupational Therapist.<sup>5</sup> Both are dated March 8, 2011 and are based on Ms. Smith's interview and assessment of Ms. Batuzskin. The Form 1 at Tab 102 covers September 12, 2008 to March 12, 2009. The Form 1 at Tab 103 covers March 13, 2009 to March 8, 2011. Ms. Smith's estimates are retrospective rather than contemporaneous. However they appear to outline a reasonable amount of attendant care that, in my opinion, is consistent with Ms. Batuzskin's and Mr. Tucker's descriptions of her level of impairment.

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<sup>2</sup>Exhibit "A", Tabs 113 through 122

<sup>3</sup>Exhibit 11

<sup>4</sup>Exhibit 9 (Tab 105 of Exhibit "A")

<sup>5</sup>Exhibit "A" Tabs 102 and 103

TD takes the position that no Attendant Care benefits are payable prior to the submission of the Form 1. In a letter dated December 5, 2012, TD claims it has not received a Form 1.<sup>6</sup> However in a letter dated March 21, 2011<sup>7</sup> TD acknowledges receipt of the Form 1. It relies on section 39(3) of the *Schedule* which states that an insurer may, but is not required to, pay an expense incurred before an assessment of attendant needs by a member of a health profession who is authorized by law to treat the person's impairment.

In *T.N. and Personal Insurance Company of Canada*<sup>8</sup> Arbitrator Bayefsky dealt with a similar situation. In commenting on section 39(3) he stated:

This does not, in my view, mean that an insured forfeits their right to attendant care benefits, or that an insurer is released of any obligation to pay attendant care benefits, prior to the Form 1 being submitted. In my view, significantly stronger statutory language would be required to effect this purpose. The section as it now reads simply ensures the orderly determination of a person's need for attendant care (in accordance with a proper attendant care assessment), and protects an insurer from having to determine what it should pay in the absence of a specific and legitimate attendant care needs assessment.

I share Arbitrator Bayefsky's view. Ms. Batuzskin's tardy submission of the Form 1 does not take away from credible evidence that she required attendant care, to varying degrees in the year following the accident.

In a statement signed November 6, 2012 Mr. Tucker indicated that he performed 3,914 hours of attendant care tasks over the two year period following the accident, for which he claimed \$5,354.28.<sup>9</sup> This works out to 163 hours per week at about \$1.37 per hour. I find the number of hours claimed by Mr. Tucker to be exaggerated.

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<sup>6</sup>Exhibit "A", Tab 95

<sup>7</sup>Exhibit "A" Tab 62

<sup>8</sup>(FSCO A06-000399, July 26, 2012)

<sup>9</sup>Exhibit 8 (Exhibit "A" Tab 29)

I prefer the assessment of Ms. Smith as a more reliable estimate of Ms. Batuzskin's needs. I find that, in the first six months following the accident, Ms. Batuzskin required attendant care in the amount claimed, \$440.73, or about 40 hours per month. I also accept that she continued to require a reduced level of care for the following six months up until one year after the accident and that her limitations over that period were not exclusively due to her June 2009 foot injury. I find that \$150.55 per month, or about 14 hours per month is a reasonable amount of assistance. Shortly before the one year mark Ms. Batuzskin admitted that she was performing most of her self-care tasks independently both in her testimony and her in comments to Dr. Almas. Mr. Tucker's testimony corroborated this. I find that, as of one year after the accident, Ms. Batuzskin was able to perform most of her personal care independently and no longer required attendant care assistance.

### **Housekeeping and Home Maintenance Benefits**

Section 22 of the *Schedule* provides that the insurer shall pay for reasonable and necessary additional expenses incurred by or on behalf of the insured person for housekeeping and home maintenance services if the insured person sustains an impairment that results in a substantial inability to perform the housekeeping and home maintenance services that he or she normally performed before the accident.

Ms. Batuzskin described herself as "the perfect wife" prior to the accident. She stated that she did virtually all of the housekeeping work, including cleaning, cooking, and laundry. Occasionally Mr. Tucker, her common law husband, would barbeque. She enjoyed doing the gardening and outside maintenance of the home. In his testimony, Mr. Tucker mostly corroborated this stating that Ms. Batuzskin did "the majority" of the household tasks, including pet care and, at the same time, worked five to six days per week as a landscaper.

As stated earlier, this changed substantially after the accident. Mr. Tucker testified that he took over all of the housekeeping tasks after the accident. Later in his testimony he stated that he was doing 80% of the housekeeping.

Despite some suggestion that Ms. Batuzskin was doing, or attempting to do some housekeeping and home maintenance tasks in the first six or seven months following the accident, I am satisfied, based on her testimony, Karl Tucker's testimony, and the records of her doctor, that she was substantially unable to perform her housekeeping and home maintenance tasks for six months, or 26 weeks following the accident.

Ms. Batuzskin's return to housekeeping as a vocation in May 2009 calls into question her inability to perform housekeeping tasks. Ms. Batuzskin testified that she was doing light cleaning only, for four to six hours at a time and that she would require a day or two to recover after a working day.

As mentioned above, in June 2009, she fell and fractured a bone in her left foot. In an independent physiotherapy assessment, conducted by Sheri Corriero, Registered Physiotherapist (Tab 104) and dated June 26, 2009, Ms. Corriero reported that "she was managing her household chores until her foot fracture but reported it was not as thorough and some things were left undone. She can't do a lot now because of her foot, not the accident". However, in a rebuttal report from Shannon Ewing (of Great Lakes Physiotherapy, July 23, 2009), she reported that while Ms. Batuzskin could complete tidying, dishwashing and dusting tasks she was unable to complete vacuuming or sweeping and she was completely unable to wash floors, walls and high shelves.<sup>10</sup>

In the Independent Chiropractic Evaluation of August 2009 referred to earlier, Dr. Almas attributed Ms. Batuzskin's subjective complaints to her fall from the boat. He reported that Ms. Batuzskin told him she was sharing household tasks with her common law husband, including laundry, cooking and cleaning but that she was performing these tasks with pain. She was unable to vacuum, wash floors or dust high shelves.

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<sup>10</sup>Exhibit "A", Tab 121

There is no doubt that some of Ms. Batuzskin's limitations at the time Ms. Corriero assessed her were due to the fall from the boat. However, it is noteworthy that both Ms. Corriero and Dr. Almas assessed her with a view to the need for further chiropractic treatment and physiotherapy. It is not within their purview to comment on causation.

Under cross-examination, Ms. Batuzskin stated that she returned to mopping and dusting and folding laundry about six to seven months after the accident and a few months later she resumed wiping down the bathroom. She was able to resume changing the bed linens within one year following the accident and by then she had returned to making meals.

An in-home assessment was conducted on March 7, 2011 by Shauna Smith, Occupational Therapist.<sup>11</sup> Ms. Smith reviewed housekeeping tasks item by item with Ms. Batuzskin and then looked at three different time periods: before the accident, six months after the accident and contemporaneously (two and one-half years after the accident). Consistent with her testimony, Ms. Batuzskin reported needing assistance with virtually all tasks for the first six months post-accident. After that, Ms. Batuzskin indicated that she could complete many tasks on a modified basis and/or with the aid of assistive devices such as a shop vacuum, dishwasher and microfiber mop. Some tasks such as reaching, scrubbing floors, cooking dinner, lifting heavy loads, including carrying laundry upstairs, she did with the assistance of Mr. Tucker. For outdoor property maintenance she relied on a riding mower for cutting grass, and a plow for shoveling the driveway. She was able to rake using pacing and proper body mechanics. She was capable of some handyman tasks. She purchased a new furnace in 2009 to avoid having to haul wood.

I prefer the evidence of Ms. Batuzskin and Mr. Tucker to that of Dr. Almas and Ms. Corriero. Ms. Batuzskin gave a consistent account of her limitations to the various individuals who assessed her.

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<sup>11</sup>Exhibit 11, (Tab 127, Exhibit "A")

There is an OCF-6<sup>12</sup> outlining housekeeping expenses for the period September 12, 2008 to November 13, 2008 in the amount of \$900.00. It is unsigned and there is no indication as to the identity of the service provider. I give this document no weight.

Mr. Tucker testified that he never kept records of the hours he spent doing housekeeping tasks on Ms. Batuzskin's behalf. There is an OCF-6<sup>13</sup> dated November 6, 2012 claiming \$10,400 in housekeeping expenses for the period September 12, 2008 to September 12, 2010 and identifying Mr. Tucker as the service provider. A certain number of hours are assigned to ten different tasks.

I find that Ms. Batuzskin was substantially unable to perform her housekeeping tasks for the 26 weeks after the accident and that she is entitled to the maximum weekly amount claimable for this period.

Ms. Batuzskin's testimony and the documentary evidence provided indicates a gradual, although not complete, return to her housekeeping activities from six months post-accident onward. It is difficult to say at what point her inability to perform housekeeping and home maintenance tasks ceased to be "substantial", the word used in the *Schedule*. Her attendant care needs began to decline at the six-month mark. The report of Ms. Smith indicates she was able to do many housekeeping tasks on a modified basis beginning six months after the accident. She was able to clean others' homes on a modified and limited basis, starting in May 2009. On the basis of the foregoing, I find that Ms. Batuzskin required housekeeping assistance on a reduced basis for a further six months to the first anniversary of the accident. I award her \$50 per week for housekeeping assistance over this 26-week period. While she continues to have some limitations in performing household and home maintenance tasks, I find that as of September 12, 2009 she was no longer substantially disabled from performing her housekeeping and home maintenance duties.

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<sup>12</sup>Exhibit 6 (Tab 33 of Exhibit "A")

<sup>13</sup>Exhibit 8 (Tab 29 of Exhibit "A")

## **Income Replacement Benefits**

The *Schedule* provides that an insurer shall pay to an insured person an income replacement benefit if the insured person suffers a substantial inability to perform the essential tasks of his or her employment within 104 weeks of the accident.

Ms. Batuzskin claimed Income Replacement Benefits in varying amounts (see Appendix), from the date of the accident and ongoing.

### ***Entitlement for the first 104 weeks***

At the time of the accident Ms. Batuzskin was a self-employed landscaper. She had started her landscaping business the previous May. She was also a house cleaner on a part-time basis.

I have found that, for the first 26 weeks following the accident, Ms. Batuzskin was substantially unable to perform housekeeping and home maintenance tasks. As well she needed assistance with much of her self-care. In the report of Fred Winch, Vocational Rehabilitation and Disability Consultant<sup>14</sup>, he identified the occupation of landscaper as one requiring medium-level strength and postures including bending, stooping, kneeling and crouching as well as sitting, standing and walking. It therefore follows that she was substantially unable to perform the equally, if not more strenuous, essential tasks of her pre-accident employment, namely, landscaping for 26 weeks following the accident.

The question becomes whether Ms. Batuzskin was substantially unable to perform the essential tasks of this occupation for the remaining 18 months of the two year post accident period when the test is the occupation of the insured person at the time of the accident. As stated earlier, there is a paucity of medical follow-up and documentation over this period.

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<sup>14</sup>Exhibit 21

Dr. Almas, a chiropractor who examined Ms. Batuzskin in August 2009, found that Ms. Batuzskin suffered from mild lumbosacral facet irritation. He found that “she did not evidence a physical impairment”. However the focus of Dr. Almas’ examination, as stated at the beginning of his report, was to determine whether a chiropractic treatment plan was reasonable and necessary. He admitted he did not enquire as to whether she was taking analgesics. He did not avail himself of any other medical information regarding Ms. Batuzskin. He noted that she did not display any physical discomfort while seated.

In my view Ms. Batuzskin’s ability to sit for a period of less than one hour without visible discomfort has very little bearing on her ability to do physical labour for ten hours per day, five to six days per week.

Ms. Batuzskin underwent a Chronic Pain Assessment by Dr. Kevin Rod on August 10, 2010, close to the end of the two-year period following the accident. Dr. Rod noted that Ms. Batuzskin returned to “both positions”, which he identified as landscaping and housekeeping, as of May 2010. Ms. Batuzskin testified, at least twice, that she never returned to landscaping and most of the documentary evidence reflects this. I am inclined to believe this was a misunderstanding on Dr. Rod’s part. He found Ms. Batuzskin to be moderately to significantly limited with respect to her pre-accident vocational responsibilities.

Ms. Batuzskin, in both her testimony and her reports to assessors, stressed that she enjoyed physical work. Most of her work has been physical in nature. She stated that she loved doing the yard work at her residence. She evidently made some attempts at raking and shoveling snow but was unable to do so on a sustained basis. I believe that if Ms. Batuzskin had been capable of returning to her work as a landscaper, she would have. In considering all of the evidence, I am satisfied that she was substantially unable to do the essential tasks of that employment for the 104-week period following the accident.



## ***Quantum***

TD argues that Ms. Batuzskin did not provide a completed OCF-2 (Employer's Confirmation form) within 30 days of being provided with same. The only reference in the evidence to TD requesting an OCF-2 from Ms. Batuszkin is a letter dated March 15, 2011 from its claims analyst. The same letter acknowledged the receipt of a report by Davis Martindale LLP, Chartered Accountants, dated March 2, 2011, which provides extensive information regarding Ms. Batuzskin's pre-accident earnings.

TD also argues that the income information supplied by Ms. Batuzskin is inadequate and the method used to arrive at her income replacement benefit is flawed.

The explanation contained in a letter of March 21, 2011 from Ms. Batuzskin's counsel<sup>15</sup> is that as Ms. Batuszkin was self-employed, an OCF-2 was not relevant or required.

I find this to be a reasonable explanation. It seems to me that the purpose of the OCF-2 *is* to provide independent confirmation of an insured's employment circumstances. There is little value in Ms. Batuszkin completing this form when she has already provided information regarding her employment, including income tax returns and other documentation to an accountant who has subsequently provided the insurer with a report. In the letter, TD acknowledged receipt of the first Davis Martindale report. An OCF-2 would be superfluous to the information found in the Davis Martindale report.

Ms. Batuszkin provided two reports by Davis Martindale in support of the quantum of her income replacement benefits claim dated March 2, 2011 and June 24, 2013 respectively.<sup>16</sup> The latter is the source of the amounts claimed, as set out in the Appendix. On cross-examination, Jesse Hawley, who prepared the reports, admitted that the 2011 report had to be adjusted in light of new information regarding Ms. Batuszkin's post-accident income.

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<sup>15</sup>Exhibit "A", Tab 61

<sup>16</sup>Exhibits 13 and 19 (Tabs 36 and 45, Exhibit "A")

In preparing the reports Davis Martindale relied on the following documents:

- Ms. Batuzskin's T1 General Income Tax Returns for the years 2007 through 2012;
- Ms. Batuzskin's T4E Statement of Employment Insurance and other benefits;
- Her Statements of Business Activities for the years 2008, 2009 (specifically the period May 1 to October 16, 2009), 2010 (specifically the period October 16, 2009 to October 15, 2010);
- bank statements covering the period October 2009 to December 31, 2010.

TD retained H & A Forensic Accounting to calculate the income replacement benefit payable. H & A, advised TD that it lacked sufficient objective documentation to make an income replacement benefit estimate. The chief concerns, outlined in their letter of November 9, 2011<sup>17</sup> as follows:

- Ms. Batuzskin's pre-accident income of \$5,520 had not been substantiated by objective documentation, such as copies of invoices or bank statements reflecting revenue deposits.
- There is no documentary substantiation for the income reported in Ms. Batuzskin's 2009 income tax return. Ms. Batuzskin claims to have misplaced the book in which she recorded her sales summaries. As well there is no banking information for the period prior to September 30, 2009. Bank statements were provided commencing on that date to December 31, 2010 however some entries on the statements were blacked out.
- H & A also noted errors in the calculations made by Davis Martindale, however H & A indicated that some errors would increase her income replacement benefits and some would reduce them and therefore conceded that the calculations in the Davis Martindale report may be plausible for the first 104 weeks of disability, subject to verification by objective financial evidence.

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<sup>17</sup>Exhibit "A", Tab 44

The only explanation given for why Ms. Batuzskin did not produce bank statements for the period prior to September 30, 2009 was that it was “problematic” and “costly”. I do not find this to be a satisfactory explanation. Acquiring bank records going back three, or even five years should be neither. It became evident, over the course of testimony, that Ms. Batuzskin’s 2008 income tax return and Statement of Business Activity was prepared on the basis of oral information given to the person who prepared the return. It is also evident that there is no independent verification of Ms. Batuzskin’s post-accident income prior to September 30, 2009.

Having said that, the amount of income Ms. Batuzskin claims to have earned from her landscaping business, \$5,520 over the period of approximately four months, is plausible. This is the amount that was reported on her 2009 tax return. Her claimed income replacement benefit of \$198.83 per week for the first 33 weeks after the accident is based on this figure and on Employment Insurance benefits received in the 52 weeks prior to the accident, a figure that is not disputed. I have found that she was incapable of performing the work required for her landscaping business for 104 weeks after the accident. I have found that she was substantially disabled from performing personal care tasks and housekeeping duties for six months after the accident. I am prepared to accept her evidence that she did not earn any income from the date of the accident until May 2009, when she returned to housecleaning on a limited basis, despite the absence of banking and business records for that period.

Ms. Batuzskin concedes that her entitlement to income replacement benefits is nil for the period May 1, 2009 to October 15, 2009. After that she claims a modest weekly amount to the 104 week mark. While H & A have been unable to verify the amounts it claims are blacked out on her bank statement, Ms. Hawley of Davis Martindale claims these amounts were highlighted and used in their calculations of Ms. Batuzskin’s entitlement. I agree that the items were highlighted and not blacked out, most of the figures are discernible on close inspection. H & A, in their letter of November 9, 2011, conceded that the calculations of the Davis Martindale report may be plausible for the first 104 weeks of Ms. Batuzskin’s disability, subject to verification of same using objective financial evidence. While complete financial documentation would be preferable, its absence does not preclude making calculations based on the available evidence.

I find that Ms. Batuzskin has supplied enough credible evidence both from her oral testimony and from documents provided to accurately calculate her income replacement benefit to a degree of accuracy that satisfies the balance of probabilities test. I find that she is entitled to the amounts claimed for the period October 16, 2009 to September 12, 2010.

### ***Entitlement to Post-104 Week Benefits***

Ms. Batuzskin claims income replacement benefits for the period past 104 weeks, on an ongoing basis. In order to be entitled to benefits beyond the 104-week mark the insured person must suffer a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience.

Ms. Batuzskin continued to clean houses, with difficulty, during the post-104 week period. The documentary evidence is fairly consistent in noting that she commenced working one day per week in May 2009 and gradually increased her workload to 3 to 4 days per week, 4 to 6 hours per day. However she testified that her work tapered off, it was unclear when, and by September 2013 she had quit cleaning houses all together. She testified that one of her clients moved and the new house was too big for her to manage and that she wanted to spend some time on herself.

Dr. Friedlander, a chronic pain specialist, examined Ms. Batuzskin on December 14, 2011, over three years after the accident. He diagnosed chronic pain syndrome, chronic post traumatic headache, chronic musculoskeletal neck pain, chronic muscular upper and lower back pain, possible post-traumatic stress disorder and post-traumatic sleep disorder. He notes “chronic pain syndrome is difficult to treat when it has persisted for more than about three years, with decreasing chances of return to previous ADL and employment.” He recommended a vocational assessment with transferable skills analysis.

Dr. Wudom’s notes indicate the following. In January 2013 he reported that Ms. Batuzskin was working four days per week. On April 24, 2013 he notes “given a settlement for her mva, has quit her job and is now trying to concentrate on her health, hopes to go back to school”.

Dr. Wudom also notes problems with stress and ongoing back pain. In the Disability Certificate dated June 1, 2013 (Tab 101) Dr. Wudom notes: "She may be able to do sedentary work". On January 6, 2014 he notes "Brief counselling regarding returning to school and career for the future. Patient has not decided on what she wants to learn; also scared about failing".

Ms. Batuzskin has a high school education. She has been earning income as a housecleaner since she was teenager. After high school she was employed in a clerical capacity, as a part driver and as a machine operator. As stated earlier she enjoys strenuous physical labour and appears to prefer to be self-employed.

In her testimony, Ms. Batuzskin claims she is not suited for another occupation. She feels she lacks the skills necessary to work in an office setting. Dr. Wudom's notes seem to indicate that she may be capable of doing sedentary work. They also indicate that she has considered some form of retraining.

Fred Winch, in his report, examined three occupational areas that Ms. Batuzskin has had experience, namely landscaping, housekeeping and factory helper/machine food processing operator. He concluded that Ms. Batuzskin's physical impairments would prevent her from doing any of these occupations.

In my view, Mr. Winch did not cast a wide enough net. The *Schedule* speaks of any occupation to which the insured is suited by education, training or experience. Mr. Winch notes that while Ms. Batuzskin did not enjoy school, she reported that her marks were above average. She is still in the early stage of her working life. In her testimony Ms. Batuzskin came across as articulate and intelligent. She told her family doctor that she was thinking of returning to school. I believe Ms. Batuzskin is capable of retraining for a sedentary occupation.

In *Burtch v. Aviva Insurance Co. of Canada*<sup>18</sup> the Juriansz J.A. stated:

It is not necessary that the insured person be formally qualified and able to begin work immediately in order for a particular employment to be considered a reasonably suitable alternative. A job for which the insured is not already qualified may be a suitable alternative if substantial upgrading or retraining is not required.

Ms. Batuzskin has demonstrated that she is capable of cleaning homes on a limited basis, albeit with discomfort. I believe that she is capable of performing a physically undemanding job, perhaps in an office setting in addition to, or in place of her cleaning job. I would not hold this view if I did not think she was capable of completing a course in basic office or computer skills in order to make that a realistic option. She does not meet the test for entitlement to post-104 week income replacement benefits.

### **Medical and Rehabilitation Benefits**

Section 14 of the *Schedule* provides that the insurer shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured person for certain medical goods and services. Section 15 of the *Schedule* provides that the insurer shall pay for all reasonable and necessary measures undertaken by an insured person to reduce or eliminate the effects of any disability resulting from the impairment or to facilitate the insured person's reintegration into his family, the rest of society and the labour market.

Ms. Batuzskin claims the following medical and rehabilitation benefits.

**a) Prescription medications in the amount of \$228.63**

The only reference to this claim found in the documentary evidence is a reference in an OCF-9 dated January 19, 2009 indicating that the application form was incomplete. Having no information as to the reasonableness of this claim, I am denying it.

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<sup>18</sup>*Burtch v. Aviva Insurance Company of Canada* 2009 ONCA 479

**b) *Physiotherapy by Shannon Ewing of Great Lakes Physiotherapy in the amount of \$1,707.72 (OCF – 18, May 22, 2009)***

This claim was denied on the basis of a report by Sheri Corriero, physiotherapist, dated June 26, 2009. In Ms. Corriero's opinion, Ms. Batuzskin demonstrated a good range of motion and strength of spine and extremities. She believed a home program would be sufficient.

Ms. Ewing provided a rebuttal report, indicating that, in her opinion, Ms. Corriero's assessment was incomplete, as Ms. Batuzskin had recently injured her foot and was in a cast. As well, Ms. Ewing felt that Ms. Corriero failed to take into account Ms. Batuzskin's complaints of pain, that she was unable to do certain household chores and that she had insufficient strength to return to her landscaping occupation.

Ms. Batuzskin testified that physiotherapy increased her mobility and ability to function. In 2010 she funded her own physiotherapy for a period but had to stop due to financial constraints. Her condition gradually declined and she experienced increased pain and significant emotional issues as recorded in Dr. Wudom's clinical notes.

Ms. Batuzskin was still suffering from pain and an accident-related degree of impairment in the spring and summer 2009, overlaid by limitations from another injury. She had returned to her housekeeping occupation on a limited basis. That effort should have been recognized and supported. On that basis I find that the treatment proposed in the OCF-18 dated May 22, 2009 was reasonable and necessary.

**c) *Chiropractic treatment by Dr. Daniel Wilhelmus in the amount of \$843.75 (OCF-18 dated June 22, 2009)***

This claim was denied on the basis of a report by Dr. Almas, dated August 14, 2009, who found that Ms. Batuszkin demonstrated functional range of motion and strength of spine and extremities.

The information given to Dr. Almas by Ms. Batuszkin was consistent with the statements made to other assessors and with her testimony. She indicated that her symptoms had worsened since she stopped treatment in June or July 2009.

Dr. Almas notes that Ms. Batuszkin did not demonstrate significant yellow flags for pain-focused behavior. He stated that she answered questions in a straightforward way. She was negative for Waddell's test, which tests for malingering and pain behaviour. He admitted he did not have a specific memory of her. He estimated that he spent one hour going over her questionnaire with her. Dr. Almas placed a good deal of weight on the fact that Ms. Batuszkin appeared to be able to sit comfortably throughout this interview. However, as stated earlier, he did not enquire as to whether she had taken analgesics prior to the assessment, although he was aware that she took up to a dozen Tylenol per week. He did not request her family doctor's records.

In his rebuttal report, dated September 23, 2009 Dr. Wilhelmus noted limited range of motion and complaints of pain. Dr. Wilhelmus also noted a decrease in her conditioning.

I prefer the opinion of Dr. Wilhelmus over that of Dr. Almas. Dr. Wilhelmus had been Ms. Batuszkin's treating chiropractor for almost one year at the time he gave his opinion. Dr. Almas saw Ms. Batuszkin for an hour at the most, made assumptions on the basis of her ability to sit for that period, and took no interest in any other information beyond his own observations as he did not want to "soil" his perspective. I attach little weight to Dr. Almas' opinion.

Ms. Batuszkin was attempting to return to her work as a house cleaner. I find that the treatment proposed by Dr. Wilhelmus in June 2009 was reasonable and necessary.



**d) *Physiotherapy by Jeff Scott of Great Lakes Physiotherapy in the amount of \$2,336.80 (OCF – 9, February 24, 2010)<sup>19</sup> amount of \$788.92 (OCF – 9, March 22, 2010)<sup>20</sup>***

TD refused these treatment plans on March 7, 2010 and April 7, 2010 respectively and apparently provided Ms. Batuzskin with a Notice of Examination. I have no further evidence regarding that examination.

The rejection of the March 22, 2010 treatment plan was apparently based on a paper review by Robert McCall, physiotherapist, dated April 14, 2010<sup>21</sup> who stated that “based on a recent examination performed by this examiner and information provided” the treatment was not reasonable or necessary. He recommends treatment “outlined in a previous report” I was unable to locate this previous report anywhere in the documentation provided.

I find the reasons for refusal of this treatment plan to be unclear and therefore inadequate. At the same time, the onus is on the insured person to demonstrate why this treatment is reasonable and necessary. Ms. Batuzskin testified that physiotherapy increased her mobility and decreased her pain, and TD was supplied with the opinion of her physiotherapist indicating that this treatment was reasonable and necessary. She found it sufficiently beneficial to fund it herself, despite having a limited income. I find that she has made a *prima facie* case that the treatment is reasonable and necessary. The insurer has failed to clearly explain why it is not. I therefore find this treatment to be reasonable and necessary.

**e) *Occupational sessions by Shauna Smith of Rehab First in the amount of \$2,815.45 (OCF-18 March 9, 2011)***

In the OCF-18 Ms. Smith recommended the following:

- Education, promoting health and preventing disease – 3-1.5 hour sessions

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<sup>19</sup>Tab 143

<sup>20</sup>Tab 144

- Planning, services – 3 one hour sessions
- Preparation service – 1.5 hours
- Documentation, support activity – 4 hours
- Travel time, mileage, assistive devices

In an Insurer Examination dated May 2, 2011 Himadri Kaul, an Occupational Therapist, found some of the recommended assistive devices to be reasonable and necessary as well as one hour of planning and one hour of documentation support activity. His reasons for doing so were that Ms. Batuzskin reported that she was independent with regard to her personal care and she was able to perform most of her housekeeping tasks by pacing herself and using alternative techniques. The assessor found she had adequate strength and no limitation in her abilities to move.

I find that the assessment by Himadri Kaul was thorough. His finding was mostly consistent with the evidence of Ms. Batuzskin. The assessment was performed approximately 2.5 years after accident. At that point Ms. Batuzskin had resumed most of the pre-accident activities of her non-vocational life and was using adaptive techniques to minimize her discomfort. I find that the services recommended, beyond those approved by TD, were not reasonable or necessary.

**f) *Mental health services by Christina Harrington of Social Work Solutions in the amount of \$1072.40 (OCF-18, September 1, 2011) and Mental health services by Christina Harrington of Social Work Solutions in the amount of \$7, 013.80 (OCF-18, October 3, 2011)***

I can find no OCF-18 dated September 1, 2011 in the amount of \$1,072.40 in the materials filed. There is an OCF-18 dated September 16, 2011 for mental health assessment and travel time in the amount of \$947.40. This treatment plans were rejected on the basis of a paper review by Linda Hubar, a social worker, on September 21, 2011.<sup>22</sup> Her task was to review the need for a mental health/social work assessment and attendant costs. Ms. Hubar found this to be unreasonable and unnecessary on the ground that there was no documented symptoms of a

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<sup>22</sup>Exhibit "A", Tab 110

mental health nature, nor was there any evidence of direct contact between Ms. Batuzskin and Ms. Harrington, the person who would be doing the proposed assessment, nor was there any rationale as to why the proposed services were in order.

The treatment plan of October 3, 2011 was rejected on the same basis.

I agree with the observations of Ms. Hubar, in reviewing the OCF-18s there is no reference to Ms. Batuzskin's mental health status. I find that TD's adjuster was justified, with the information before him or her at the time, in rejecting these treatment plans as being neither reasonable nor necessary.

**g) Social Work Counselling by Christina Harrington in the amount of \$4,449.40 less \$1,885.00 paid for a remainder of \$2,564.00 (OCF-18 April 11, 2012)<sup>23</sup>**

This OCF-18 was partly rejected on the basis of an examination conducted on June 6, 2012, Linda Hubar, a social worker. Her task was to review an OCF-18 Treatment and Assessment Plan for 12 counselling sessions and associated costs.

Ms. Hubar found that the cost of twelve mental health therapy sessions at \$130.00 per session plus the cost of documentation support activity and brokerage services for a total of \$1,885.00 were reasonable and necessary. She found the cost of transporting the service provider to Ms. Batuszkin's residence to be unreasonable. She noted that at the time of the assessment Ms. Batuszkin was driving to her client's homes and had driven to Hamilton for counselling sessions in the past and that Ms. Batuszkin was willing to drive to the counselling sessions. I agree with Ms. Hubar's assessment. I find that TD correctly rejected transportation costs of \$2,564.00 as being unreasonable and unnecessary.

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<sup>23</sup>Exhibit "A" Tab 111

- h) A mattress, mattress pad, foam pillow, Differin Gel-acne, Banzaclin pump-acne, Ranitidine-ulcers, Advil in the amount of \$2,026.06 (OCF-6 October 22, 2012)***

TD correctly rejected the above medication as they relate to medical conditions that do not arise out of the accident. The Advil is an over-the-counter medication and does not require a doctor's prescription. I can find no medical recommendation for the mattress, mattress pad and foam pillow.

### **Cost of Examinations**

- a) Chronic Pain Assessment by Dr. Kevin Rod in the amount of \$1,812.53 as set out in an OCF-18 dated May 18, 2010.***

On June 24, 2010 TD denied the claim and stated that the OCF-22 would be reviewed by an assessor chosen by TD. I can find no evidence that such assessment took place. Ultimately Ms. Batuzskin was assessed by Dr. Rod on August 10, 2010. Given that Ms. Batuzskin was reaching the end of the 104-week period following the accident and she was complaining of ongoing pain and discomfort, I find a Chronic Pain Assessment to be a reasonable and necessary expense.

- b) Post-104 Psychological Assessment by Dr. Oren Gozlan in the amount of \$3,850.00 (OCF-18 November 11, 2011)***

The reasons for rejection of this OCF-18 were set out in a letter dated December 5, 2011 (Tab 82). I can find no copy of the OCF-18 in the materials provided. The letter refers to a Social Work Assessment as not applicable. I fail to see what bearing this has on the assessment plan of Dr. Gozlan. The letter also states "it is not reasonable to assess pre-accident employment at this time".

In May 2011, Dr. Wudom's notes indicated that Ms. Batuzskin began to experience a flare-up in neck and back pain and according to his notes, this continued into December 2011, when Ms. Batuzskin began to complain of emotional distress. Given that Ms. Batuzskin had an

ongoing claim for income replacement benefits, and that she was suffering emotionally, I find the psychological assessment by Dr. Gozlan to be reasonable and necessary.

**c) *A Chronic Pain Assessment by Dr. Mark Friedlander in the amount of \$3,657.50 (OCF-18 November 11, 2011)***

This treatment plan was rejected in a letter from TD to Ms. Batuzskin dated December 5, 2011.<sup>24</sup> The reasons for the rejection do not make sense. Regardless of that, Ms. Batuzskin had already had a chronic pain assessment performed by Dr. Rod, some 18 months earlier. I find that this chronic pain assessment was not reasonable and necessary.

### **Interest**

Counsel for Ms. Batuzskin has requested interest on overdue payments. Section 46(2) provides for same.

The question is, when did the amounts awarded above become overdue?

With regard to Attendant Care Benefits Ms. Batuzskin did not submit a Form 1 until March 2011. No verification of the expenses incurred was completed until November 6, 2012. I find that the payment of Attendant Care Benefits became overdue ten days after the date on the expense form.

With regard to Housekeeping and Home Maintenance benefits, Ms. Batuzskin's counsel apparently provided, by way of letter dated November 14, 2008, an OCF-6 that included housekeeping expenses for the period September 12, 2008 to November 13, 2008. TD denied this benefit on January 19, 2009<sup>25</sup> on the basis that the OCF-6 was incomplete and unsigned. Later, a signed OCF-6 was provided, dated November 6, 2012, claiming \$10,400 in expenses.

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<sup>24</sup>Exhibit "A", Tab 82

<sup>25</sup>Exhibit "A" Tab 18

I find that interest is payable on the award for housekeeping and home maintenance commencing November 16, 2012, 10 days after the date of the signed OCF-6.

With regard to income replacement benefits Ms. Batuzskin never provided an OCF-2. As stated earlier, I do not think this hampered TD in adjusting her claim. However, she did not provide any information regarding her pre-accident or post-accident income until March 2011 in the form of a report from Davis Martindale. Despite repeated requests she failed to provide requested information, for example her banking records prior to October 2009. Davis provided a supplemental report in June 2013, which the writer admitted was more accurate. I therefore find that interest runs only from the date of the supplemental report, being June 24, 2013.

## **Expenses**

When assessing expenses, arbitrators at FSCO determine entitlement and quantum by applying criteria dictated by the legislation.<sup>26</sup>

Ms. Batuzskin had a degree of success in this hearing. I will leave it to the parties to work out the issue of expenses.

If the parties cannot agree on entitlement to, or the amount of expenses of the proceeding either party may request an appointment to determine expenses in accordance with Rule 79.1 of the *Dispute Resolution Practice Code*.

## **Special Award**

Ms. Batuzskin has claimed a Special Award.

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<sup>26</sup>Under subsection 282(11) of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, an arbitrator may award expenses to either party according to criteria prescribed in subsection 12(2) of the *Expense Regulation*, R.R.O. 1990, Regulation 664.

Subsection 282(10) of the *Insurance Act* provides that if the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to an award of benefits and interest, shall award a lump sum of up to 50 per cent of the amount to which the insured person was entitled at the time of the award.

Case law provides some guidance in this regard. Unreasonable conduct does not need to be in the nature of “bad faith” or “willful misconduct”.<sup>27</sup> It is also worth noting that the conduct of both parties should be considered.<sup>28</sup>

TD has paid medical and rehabilitation benefits to Ms. Batuzskin and the cost of examinations. Ms. Batuzskin claimed but was not paid attendant care benefits, housekeeping and home maintenance expenses, income replacement benefits, further medical and rehabilitation benefits and examinations costs. I have found that she is entitled to those benefits on a limited basis. The question is whether TD unreasonably withheld payments.

This is a complex task as the parties have presented a tangled thicket of evidence. Limited medical evidence was provided to TD until three years after the accident. A Form 1 was not provided until March 2011. A signed and dated expense claim form for attendant care and housekeeping assistance was not completed until November 2012. There are gaps in the financial information provided.

The first Disability Certificate, dated September 24, 2008 was provided by her chiropractor, Dr. Wilhelmus. He indicates she is substantially unable to perform the essential tasks of her employment and housekeeping and home maintenance activities for six to eight weeks. There was little provided to TD to indicate Ms. Batuzskin had limitations beyond that until the report of Dr. Kevin Rod dated August 10, 2010 wherein Ms. Batuzskin was found to have chronic pain syndrome. He found her to be moderately to significantly limited with regard to her pre-accident housekeeping, home maintenance and caregiving responsibilities as well as significantly limited with respect to pre-accident social and recreational activities. The chronic

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<sup>27</sup>*Erickson and The Guarantee Company of North America* (OIC A-000560, July 16, 1992)

<sup>28</sup>*Garcia and Liberty Mutual Insurance Company* (FSCO A98-001471, January 27, 2000).

pain diagnosis of Dr. Rod was subsequently confirmed in the report of Dr. Friedlander, dated November 11, 2011.

The first signed confirmation of the amount of attendant care provided, which I have found to be inaccurate was dated November 6, 2012. The same form of the same date, with regard to housekeeping, was never signed.

In a letter dated December 5, 2012, TD rejected Ms. Batuzskin's housekeeping and home maintenance claims in that the expenses were not submitted until two years after the rendered service dates. As well, no expenses were submitted within 30 days from the circumstances that gave rise to the benefit during the eligibility period.

With regard to income replacement benefits, no information was provided until the first Davis Martindale report dated March 9, 2011. By letter dated November 9, 2011 Donna McCleary of H & A Forensic Accounting admitted that the figures in the Davis Martindale report may be plausible for the first 104 weeks of disability, subject to verifying same by objective financial evidence. Ms. Batuzskin never provided verification, either by bank records or by a general ledger of her post-accident income between September 12, 2008 and October 2009. Davis Martindale provided a recalculation of the quantum of Ms. Batuzskin's income replacement benefit in June 2013.

Insurers have an ongoing obligation to re-assess, or adjust claims in light of new information received. Was it unreasonable of TD to continue to withhold benefits in light of information received in 2011, 2012 and 2013?

By late 2011 it was apparent that the accident had a long term impact on Ms. Batuzskin's ability to function at her pre-accident level. There is also consistent evidence that she was substantially unable to perform her pre-accident self-care, housekeeping and vocational tasks for the first six months after the accident. After that, the degree of her functionality is more ambiguous. I find it less than ideal that as of June 2013, when TD had two opinions that Ms. Batuzskin suffers from chronic pain, and a second accountant's report revising the quantum of income replacement benefits, as well as a Form 1 providing for a modest amount of attendant care benefits, that TD



continued to withhold income replacement, housekeeping attendant care benefits for the six month period following the accident. At the same time, throughout this claim TD had a lack of contemporaneous medical information and less than complete financial information owing in large part to either Ms. Batuzskin's conduct or that of her counsel. In light of that it cannot be said that the withholding of benefits was unreasonable. I do not believe this is a case that justifies a Special Award.

\_\_\_\_\_  
Stuart J. Mutch  
Arbitrator

November 24, 2014  
\_\_\_\_\_  
Date



**FSCO A12-004216**

**BETWEEN:**

**SAMANTHA BATUZSKIN**

**Applicant**

**and**

**TD GENERAL INSURANCE COMPANY**

**Insurer**

**ORDER**

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

1. TD pay Ms. Batuzskin Income Replacement Benefits in the amount of \$198.83 per week from September 20, 2008 to April 30, 2009 inclusive and in the amount of \$63.75 per week from October 16, 2009 to December 31, 2009, inclusive and \$68.75 per week for the period January 1, 2010 to September 12, 2010, inclusive.
2. TD pay Ms. Batuzskin Attendant Care Benefits in the amount of \$440.73 per month from September 12, 2008 to March 12, 2009 and in the amount of \$150.55 from March 13, 2009 to September 12, 2009.
3. TD pay Ms. Batuzskin housekeeping and home maintenance services at the rate of \$100.00 per week from September 12, 2008 to March 12, 2009 and \$50.00 per week for the period March 13, 2009 to September 11, 2009.

4. TD pay Ms. Batuzskin the following medical and rehabilitation expenses:
  - a) \$1,707.72 for an OCF-18 dated May 22, 2009
  - b) \$843.75 for an OCF-18 dated June 22, 2009
  - c) \$2,338.80 for an OCF-18 dated February 24, 2010
  - d) \$788.92 for an OCF-18 dated March 22, 2010
  - e) \$3,850.00 for an OCF-18 dated November 11, 2011
  - f) \$1,812.53 for an OCF-22 dated May 18, 2010
  
5. There is no order as to a Special Award
  
6. If the parties cannot agree on entitlement to, or the amount of expenses of the proceeding they may request an appointment to determine expenses in accordance with Rule 79.1 of the *Dispute Resolution Practice Code*.
  
7. TD shall pay Ms. Batuzskin interest in accordance with the *Schedule* from the dates set out in this decision.

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Stuart J. Mutch  
Arbitrator

November 24, 2014  
Date

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## **APPENDIX**

\$198.83 per week for the period September 12, 2008 to April 30, 2009

Nil per week for the period May 1, 2009 to October 15, 2009

\$63.76 for the period October 16, 2009 to December 31, 2009

\$68.75 per week for the period January 1, 2010 to October 15, 2010

\$32.16 per week for the period October 16, 2010 to December 31, 2010

\$31.82 per week for the period January 1, 2011 to March 2, 2011

\$226.92 per week for the period March 3, 2011 to December 31, 2011

\$267.24 per week for the calendar year 2012

\$319.59 per week for the calendar year 2013

\$400.00 per week commencing January 1, 2014, ongoing