



**Citation: EI-Dayeh v. Aviva General Insurance, 2023 ONLAT
19-006713/AABS**

Licence Appeal Tribunal File Number: 19-006713/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:

Milad EI-Dayeh

Applicant

and

Aviva General Insurance

Respondent

AMENDED DECISION

ADJUDICATOR: Lyndra Griffith

APPEARANCES:

For the Applicant: Mohamed Elbassiouni, Counsel; **Ms. Michelle Velvet,
Co-Counsel**

For the Respondent: Geoffrey Keating, Counsel

Heard by Videoconference: June 6-10, 2022

OVERVIEW

- [1] The applicant, Milad El-Dayeh, was catastrophically injured in an automobile accident on July 16, 2017 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “Schedule”) from Aviva General Insurance, the respondent.
- [2] The applicant was found to be catastrophically impaired in 2021 as he has an impairment that resulted in a class 4 impairment (marked impairment) in three areas of function that precludes useful functioning, in accordance with Criterion 8 of the American Medical *Guides to the Evaluation of Permanent Impairment, 4th edition, 1993* (the “Guides”). The applicant has a marked/class 4 impairment in his activities of daily living, social functioning and adaptation.
- [3] The respondent denied the applicant’s claim for orthotics and partially denied the applicant’s claim for attendant care benefits (ACBs). As a result, the applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.
- [4] After numerous case conferences, the matter proceeded by way of a five-day oral hearing June 6-10, 2022, followed by written closing submissions.

PRELIMINARY ISSUES

- [5] The parties raised the following preliminary issues:
- [6] **Hearing Adjournment:** On June 3, 2022, the applicant requested a 2-to-3-month adjournment of the hearing. The issue was considered before me at the commencement of the hearing. The applicant’s counsel submitted that the applicant was recently hospitalized on May 27, 2022, and that his condition was deteriorating. He was unable to attend the hearing. The respondent objected to the adjournment arguing that the issue in dispute is narrow and the hearing pertains to the quantum of ACB and only one treatment plan. The respondent’s counsel further submitted that he would be unavailable in 2 to 3 months due to other prior scheduled hearings. The applicant’s counsel replied that the applicant was required to attend the hearing to provide his oral evidence. After hearing from the parties, I advised the applicant that since it was only the quantum at issue for ACB, I did not need to hear from him and that he may be excused from the hearing if he found participation difficult. I declined to grant the adjournment on the basis that in this particular case, entitlement to ACBs was not at issue. Given that it was only the quantum of ACBs in dispute, the evidence from the relevant authorized professionals who completed the Form 1s in dispute would

suffice. The applicant ultimately ended up attending a portion of the hearing and providing oral evidence.

- [7] **Additional Issue in Dispute:** The applicant requested to add an award pursuant to *Regulation 664* as an issue in dispute. Section 10 of *Regulation 664* states that if the Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Tribunal may award a lump sum up to 50 percent of the amount to which the person was entitled to at the time of the award together with interest. The Tribunal has the discretion to add the issue of an award at any point in the hearing process.
- [8] Given that the threshold for adding the issue of an award is low and that the Tribunal routinely adds it as an issue in the course of its hearings, I will consider an award as an issue in dispute for this written hearing. I allowed the applicant until the end of June 8, 2022 to provide the respondent with particulars for the award.
- [9] **Admission of Evidence:** Both parties requested to include into evidence supplementary briefs submitted after the deadline imposed by the Tribunal. On consent the parties agreed that all the documents should be admitted, except for the records in relation to the applicant's most recent hospital admission from May 26, 2022 to present. The respondent objected to the inclusion of these documents because it had not had the opportunity to send this new information to its insurer examination (IE) assessor as it usually would. The respondent submitted that the situation would result in a trial by ambush, and the hospital records are not anything that the IE assessors have contemplated. The applicant submitted that the same argument can be made for some of the documents contained in the respondent's supplementary brief as some of the documents were created after the Tribunal's document deadline and the applicant's assessors have not had an opportunity to review them. After considering both positions, I allowed all the evidence submitted after the deadline into evidence, including the applicant's most recent medical documentation dated May 26, 2022. The respondent agreed that this most recent medical information could be put to the assessors at the hearing.
- [10] **Adjuster's Log Notes:** On the first day of the hearing, the applicant amended his previous Motion request for adjuster's log notes, requesting the adjuster's log notes limited to attendant care from the date the adjuster received the Form 1 in 2021 to present. The respondent objected, arguing that there was already a prior Tribunal decision on this issue and that it would not be appropriate to produce them at this stage. The applicant submitted that the case conference adjudicator

did not have all the facts before her at the time. On the first day of the hearing, I determined that this issue was *res judicata* as it had already been dealt with by the Tribunal in a Motion Order. However, on the fourth day of the hearing, more information came to light. The applicant's counsel brought to my attention that the second page of the Summons to a Witness addressed to adjuster Christine Mansbridge, signed by the Tribunal on June 3, 2022, indicated that she was required to bring and produce the adjuster log notes from the date of loss to June 5, 2022. Therefore, I revisited my previous decision as it was now clear that the adjuster had to produce her log notes according to the Summons to a Witness. The respondent was ordered to provide the applicant with the relevant log notes relating to attendant care from June 1, 2021 to date, redacted for privilege and reserves.

- [11] **Summons to a Witness**. On the first day of the hearing, the respondent's counsel advised that it was not calling any witnesses. Though the applicant was expecting to cross-examine psychiatrist Dr. Gottfield, he did not confirm with the respondent's counsel prior to the hearing whether the doctor would be called as a witness. The applicant's counsel therefore requested that I sign the Summons to Witness (Summons) for Dr. Gottfield. I declined to sign the Summons as the hearing adjudicator because the hearing had already started, and the applicant's counsel had plenty of time to file a Summons prior to the hearing. I reminded the parties that there is no property in a witness.
- [12] **New Arguments on Reply**. The respondent contacted the Tribunal by email on July 18, 2022 and alleged that the applicant's reply submission contained numerous violations. The respondent stated that the applicant raised new arguments on reply and incorrectly summarized the evidence. The respondent requested that the applicant's reply submissions be disregarded or to be allowed to file a sur-reply. The respondent further submitted that the applicant made arguments that the hourly rates on the Form 1 are unconstitutional because the hourly rates are below minimum hourly rates. The respondent submits that no notice of constitutional question was raised in accordance with section 109(2) and 109(6) of the *Courts of Justice Act*.
- [13] The parties were allowed to deliver their closing submissions in writing following the hearing because there was insufficient time for the parties to complete them orally in the time allotted for the hearing. The purpose of closing submissions is to allow the parties the opportunity to summarize the evidence presented at the hearing, it is not an opportunity for both sides to make new arguments. I did not consider the parts of the evidence that were inaccurately summarized in the

applicant's submissions, nor did I consider the new arguments raised by the applicant for the first time in reply.

- [14] **New Evidence Post-Hearing**: On September 25, 2022, over four months after the hearing ended, the applicant filed a Notice of Motion requesting that I consider recently obtained medical documents as part of the evidence in this hearing. The respondent did not make submissions in response to the Notice of Motion. I find that in this case the hearing has concluded, and it would be improper for me to consider new evidence that was created after the date of the hearing. Pursuant to Rule 9.4 of the Licence Appeal Tribunal (LAT) *Common Rules of Practice and Procedure*, I will not include the documentation as part of the evidence, and it will not be considered.
- [15] Lastly, On December 1 and 2, 2022, the parties also contacted the Tribunal to confirm that on consent they agreed to narrow the ACB quantum issue to the period between June 14, 2021 and August 23, 2022. I amended the time period for this issue in dispute accordingly.

SUBSTANTIVE ISSUES IN DISPUTE

- [16] The following issues are to be decided:
- (i) Is the applicant entitled to \$750.00 for orthotics proposed by Activa Kitchener in a treatment plan/OCF-18 ("plan") dated January 21, 2019?
 - (ii) Is the applicant entitled to ACBs of \$6,000.00 per month from June 14, 2021 (less amounts paid) to August 23, 2022?
 - (iii) Is the respondent liable to pay an award under *Regulation 664* because it unreasonably withheld or delayed payments to the applicant?
 - (iv) Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [17] I find that the applicant:
- (i) Is entitled to \$750.00 in the plan for orthotics;
 - (ii) Is entitled to ACBs in the amount of \$3,121.57 (less amounts paid) from June 14, 2021 to August 23, 2022;
 - (iii) Is not entitled to an award under *Regulation 664*; and

- (iv) Is entitled to interest.

ANALYSIS

The applicant is entitled to orthotics

- [18] Sections 14 and 15 of the *Schedule* provide that the insurer shall pay medical benefits to, or on behalf of, an applicant so long as the applicant sustains an impairment as a result of an accident and the medical benefit is a reasonable and necessary expense incurred by the applicant as a result of the accident.
- [19] The applicant bears the onus of proving entitlement to the proposed treatment plan by proving that the plan is reasonable and necessary on a balance of probabilities.
- [20] Chiropractor Michael Rumeo completed a plan for custom orthotics on January 21, 2019. The total cost of the plan was \$750.00. Mr. Rumeo listed the goals of the plan as the following: improve biomechanics, improve gait, and stabilize feet improve/reduce pain.
- [21] The applicant submits that it is settled law that when an insurance company fails to provide a notice in compliance with s. 38(8) of the *Schedule* in responding to a treatment plan, s. 38(11) will apply. That is, the insurer will be obligated to pay for the goods and services irrespective of whether the benefits sought are reasonable and necessary.
- [22] The applicant submits that the respondent's s. 38(8) notice dated February 28, 2019 failed to comply with its obligations in that it failed to: a) identify the goods, services, assessments and examinations described in the treatment and assessment plan that the insurer agrees to pay for; b) identify what the insurer does not agree to pay for; and, c) identify the medical reasons and all of the other reasons why the insurer considers any goods, services, assessments and examinations, or the proposed costs of them, not to be reasonable and necessary.
- [23] The applicant submits that the respondent refused to pay for and only identified one item (Orthotics). The applicant further submits the notice simply relied on its s. 44 assessor's report which was requested to determine whether another treatment plan proposing a chronic pain assessment was reasonable and necessary. The applicant submits that the respondent noted that the assessor had not made any specific recommendation for Orthotics.

- [24] The respondent submits that no evidence has been submitted to support the reasonableness and necessity of the proposed orthotics nor to suggest that the orthotics were recommended to treat back pain, and therefore, the applicant is not entitled to this portion of the plan. The respondent did not take a position on s. 38.
- [25] The presence of objective supporting evidence to justify treatment is key to determining whether the medical benefit is reasonable and necessary. A treatment plan without more, is not enough to establish this. The respondent advised the applicant that upon review of the file, there was a lack of evidence of any impairment relating to his feet and as such orthotics were not reasonable and necessary. I therefore find that the notice provided by the respondent was proper.
- [26] Based on the medical evidence, the applicant has been diagnosed with chronic pain. In an attendant care assessment dated September 5, 2018, completed by occupational therapist Remik Zakrzewski, it was noted that the applicant had limited standing and walking tolerance due to his back pain and right leg weakness, numbness, and leg instability. The listed goals of this plan are to improve biomechanics, improve gait, and to stabilize feet improve/reduce pain.
- [27] I find that there is sufficient, objective supporting evidence in support of the plan for orthotics. As a result, I find that the applicant has met his burden to prove on a balance of probabilities that this plan is reasonable and necessary.

The applicant's entitlement to \$6,000.00 of ACBs from June 14, 2021 to August 23, 2022

- [28] The parties agree that the applicant is entitled to an ACB but disagree with respect to the quantum of the benefit. The applicant bears the onus of establishing, on a balance of probabilities, that he is entitled to the quantum of ACB as claimed.
- [29] Since the accident occurred prior to the June 3, 2019 amendment of s. 19 of the *Schedule*, the maximum ACB payable to the applicant is inclusive of HST.
- [30] The Form 1 outlines three different types or levels of personal care that qualify for ACBs. The levels are differentiated by the skill required to perform the care and each has a different hourly rate. Level 1 describes routine personal care such as help with dressing, grooming and feeding. Level 2 is for basic supervisory functions such as hygiene and self-sufficiency in emergency

situations. Level 3 is for complex hygiene/health care functions and assisting with prescribed exercise programmes.

- [31] The parties presented two drastically different Form 1s. The applicant submitted a Form 1 completed by registered nurse, Ms. Donyanaz Afgo Ahmadi, dated May 25, 2021 in the amount of \$6,340.42 per month. The respondent's assessor, occupational therapist Robert Campos, completed a Form 1 dated August 6, 2021 in the amount of \$759.15 per month, as part of an IE multidisciplinary assessment completed on October 22, 2021. The applicant submitted a second Form 1 dated March 11, 2022 and completed by Donyanaz Afgo Ahmadi, less than 52 weeks after the first Form 1, as a result of a subsequent fall.

The Form 1 dated March 11, 2022 is inadmissible

- [32] As it had not been at least 52 weeks since the last s. 44 IE regarding ACBs, the applicant was not allowed to submit a new Form 1, even if there is evidence that would affect the amount of the benefits. Section 42(12) of the *Schedule* states that:

If more than 104 weeks have elapsed since the accident, the insurer shall not require an examination under section 44 to determine the insured person's entitlement to attendant care benefits and the insured person shall not submit nor be required to submit an assessment of attendant care needs to the insurer unless at least 52 weeks have elapsed since the last examination under section 44 relating to entitlement to attendant care benefits.

- [33] In light of the applicant's fall in February 2022, the applicant's case manager, Kanita Pasanbegovic, recommended that he complete another Form 1. He told her that he got dizzy and had a blackout moment. Considering the additional evidence, Ms. Pasanbegovic thought that the new Form 1 was warranted due to the applicant's fall and increased use of alcohol and cannabis. According to s. 42(12) of the *Schedule*, at the time Ms. Afgo Ahmadi completed her second Form 1, neither party was permitted to submit a further Form 1, as less than 52 weeks had passed since a Form 1 for each party had been submitted and therefore the applicant was not entitled to submit a new Form 1 until a year after completing the ACBs IE.

Issues raised by both parties concerning the reliability of the Form 1s

- [34] The parties submit that both assessors' reports are unreliable for a variety of different reasons. The parties' main concerns are as follows.

- [35] The respondent submits that Ms. Afgo Ahmadi's report is deficient, as she has never met the applicant in person, nor has she ever been to his home and therefore her opinions are moot. The respondent submits that Ms. Afgo Ahmadi did not ask the applicant to perform any attendant care tasks or any demonstrations of function. The applicant indicated independence with respect to upper/lower body dressing/undressing post-accident (first assessment) and with respect to grooming post-accident, including bathing (first assessment).
- [36] Ms. Afgo Ahmadi testified that the first assessment was conducted virtually because her college prohibited in person attendance at the time the assessment was carried out. With respect her second assessment, Ms. Afgo Ahmadi gave evidence that this assessment proceeded virtually as a member of her household had contracted COVID-19. I am satisfied with Ms. Afgo Ahmadi's reasons for conducting virtual attendant care.
- [37] The respondent also submits that both of Ms. Afgo Ahmadi's reports are riddled with spelling and grammatical errors, suggesting a rushed assessment process. Further, Ms. Afgo Ahmadi indicated that she had reviewed and relied heavily on all catastrophic impairment reports as part of her assessments but failed to make any mention whatsoever of these documents in her May 2021 report. The respondent submits that Ms. Afgo Ahmadi admitted to omitting any mention of Dr. Fikry's notes from her reports, despite having reviewed and relied upon those records. The respondent submits that it is likely that she did not review either the catastrophic impairment reports or Dr. Fikry's clinical notes and records as part of either assessment process. The respondent submits that her reports are so deficient as to render them meaningless.
- [38] The respondent submits that Ms. Afgo Ahmadi admitted to significant errors and that she only became aware of the errors and omissions the previous day. She says she would have amended her reports to note the errors had she become aware of them sooner.
- [39] The respondent submits that the Tribunal should not entertain the oral evidence of Ms. Afgo Ahmadi and should consider her reports on their own merits.
- [40] The applicant submits that the quality of Mr. Campos' in-home assessment report (part of multidisciplinary assessment) dated October 22, 2021 was compromised because the applicant's face was covered during the in-person assessment, which affected the assessor's observations of the applicant's facial expression. The applicant submits that Mr. Campos' evaluation was only limited to 85 minutes which is insufficient time to meaningfully observe physical tolerance. The applicant further submits that Mr. Campos did not conduct any collateral

interviews with anyone who could have assisted the assessor to reach a more reliable opinion.

- [41] The applicant submits that from a cognitive/psychosocial tolerance, Mr. Campos did not conduct any formal cognitive testing and no cognitive deficits were noted during the interview. The applicant submits that he did not meaningfully consider the cognitive deficits noted throughout the reports that he quoted. He did not review or consider the treating psychiatrist's or family physician's clinical notes and records and he did not consider the full extent of the applicant's mental and behavioral impairment.
- [42] My analysis below is based on both Form 1s (in dispute), the assessors' attendant care assessment and the oral testimony at the hearing.

Part 1/Level 1 - Routine Personal Care

- [43] *Dressing and Undressing:* Ms. Afgo Ahmadi's Form 1 recommended 20 minutes per day to dress the applicant's upper and lower body and 20 minutes a day to undress the upper and lower body. Both Ms. Ahmadi and Mr. Campos indicated in their reports that the applicant was independent with respect to dressing and undressing. Ms. Afgo Ahmadi noted that the applicant reported that he stopped wearing clothing that are difficult to put on, such as jeans, and that he took his time to dress. Mr. Campos did not recommend any assistance for dressing and undressing, noting, "physical and functional observations of strength, balance, and range of motion support his ability to perform these tasks independently while using principles of energy conservation techniques, proper body mechanics, and left one-handed techniques as needed."
- [44] The applicant submits that because of his physical limitations and the resulting pain he experiences by exceeding his post-accident limitations, he has changed his manner of dress to wear loose-fitting clothing. Also because of the weight of his perceived post-accident losses (physical & psychological limitations, loss of family, ability to work and provide for himself and his family financially), he lacks the motivation to get dressed and does not always change his clothes every day.
- [45] The applicant submits that the change in his manner of dressing after the accident and his lack of motivation to change his clothes daily, was documented in the reports of Dr. Sujay Patel and Dr. Henry Rosenblat. The applicant submits that Mr. Campos failed to give sufficient weight to the fact that based on criterion 8, and due to his psychological impairments, he was found to be catastrophically impaired with a marked impairment in the sphere of activities of daily living. The applicant submits that Mr. Campos did not consider the applicant's well

documented lack of motivation to attend to changing his clothing daily due to his low mood and feelings of hopelessness.

[46] I find that Ms. Afgo Ahmadi's recommendations for attendant care assistance with dressing and undressing in her Form 1 is both reasonable and necessary. It is more consistent with the totality of the medical evidence and is more consistent with the applicant's reported physical and psychological limitations. Interestingly, a Form 1 completed by Remik Zakrzewski on September 5, 2018, which was approved by the respondent, recommended a total of 20 minutes, 7 times per week for dressing and undressing. Given the evidence, it would appear that the applicant is relatively independent with dressing and undressing but may require assistance with more difficult articles of clothing. Therefore, I find 10 minutes per day to dress and 10 minutes per day to undress is reasonable in the circumstances.

[47] Grooming:

- (i) *Face:* Ms. Afgo Ahmadi recommended 5 minutes per day to assist the applicant with washing his face. The applicant submits that Ms. Afgo Ahmadi's recommendation for facial grooming is reasonable and necessary for the following reasons: a) due to his pain and lack of motivation he does not brush his teeth every day; b) he is right-handed but because of his post-accident shoulder impairments is relegated to using his non-dominant left hand to perform most personal care tasks which would result in slower and less thorough execution of his oral hygiene were he to brush his teeth himself; c) due to low mood and a lack of motivation, it is reasonable and necessary to provide assistance for encouragement. Ms. Afgo Ahmadi did not provide an explanation as to why 5 minutes per day would be necessary. Given that she indicated that the applicant was independent with his personal grooming, I find that it is unreasonable in the circumstances.
- (ii) *Shaving:* Ms. Afgo Ahmadi recommended 15 minutes for assisting the applicant with shaving three times per week. The applicant submits that 15 minutes of assistance is a very conservative estimate of the amount of care that is reasonable and necessary to assist him 3 days a week, which would be less than what is required to keep him completely clean shaven. He adds that there is evidence that he has difficulty using his right shoulder and that he lacks focus. The applicant submits that Mr. Campos failed to comment on the applicant's ability to shave independently. I find it is reasonable that the applicant may require assistance shaving, given

that he is right-handed. I find that 10 minutes 3 times a week would be reasonable in the circumstances.

- (iii) *Hair*: Ms. Afgo Ahmadi recommended 40 minutes a day to brush, wash and style the applicant's hair. No explanation was provided why this was necessary. Ms. Afgo Ahmadi rated the applicant as independent with these tasks in 2021. The applicant submits that it is not unreasonable for his hair to be styled at least 1-2 times daily, once in the morning, and once when going out in the community. I find that 40 minutes per day grooming the applicant's hair is not reasonable in the circumstances, especially since the applicant's hair is very short. The Form 1 completed by Remik Zakrzewski in 2018 only allocated 5 minutes per day 7 days per week to shampoo and blow/towel dry his hair. It is unclear why the applicant would require 35 more minutes a day to groom his hair in 2021. I find that 5 minutes per day, 7 days a week would be reasonable and necessary to assist the applicant with his daily hair grooming.
- (iv) *Fingernails/Toenails*: Ms. Afgo Ahmadi recommended 7 minutes once a week for maintaining the applicant's fingernails and 10 minutes once a week for his toenails. Ms. Afgo Ahmadi did not provide an explanation as to why this is necessary. The applicant submits that assistance with fingernail grooming is reasonable and necessary because in addition to needing encouragement to perform the tasks, the applicant would have difficulty using his non-dominant left hand to clean and cut his nails using sharp tools. It is not uncommon to use your non-dominant hand to cut your dominant hand's fingernails. Given that Ms. Afgo Ahmadi indicated that the applicant was independent with his personal grooming, and Remik Zakrzewski only allocated 10 minutes per week to grooming his fingernail and toenails in 2018, I find that 17 minutes per week for assistance with these tasks is not reasonable and necessary in the circumstances. I find that 2 minutes once a week would be reasonable and necessary to prompt or remind the applicant to groom his fingernails and toenails.

[48] Feeding: Ms. Afgo Ahmadi recommended 4 hours per day for feeding. She testified that 2 hours per day was allocated to COVID-19 precautions. She testified that she took numerous extra steps into consideration, such as sanitizing groceries and utensils, changing clothes after appointments, face washing, etc. Ms. Afgo Ahmadi testified that this recommendation was based on the public health protocols/measures in place at the time and that it was not recommended by her college. Ms. Afgo Ahmadi could not say why 2 hours per day would be required for completing such tasks and did not elaborate further. Her report did

not contain any analysis in this regard, or even mention that any assistance was required as a result of COVID-19. The public health protocols/measures were not tendered as evidence during the hearing. I find that 4 hours per day is unreasonable in the circumstances and allocating 2 hours per day to sanitize groceries and utensils is excessive. Even if there were public health protocols/measures recommending these practices, 2 hours per day just does not seem reasonable or proportionate.

- [49] Mr. Campos noted in his 2021 report that “Based on his overall performance during testing on both days, Mr. El-Dayeh appears to have the physical and cognitive abilities to prepare a simple meal (e.g. no stove use) independently in a safe and prudent manner but not the emotional capabilities to complete more complex meal preparation (e.g. stove use) although this could not be objectively assessed.” Mr. Campos recommended 1 hour a day to assist the applicant with feeding. It is not entirely clear whether Mr. Campos is recommending 1 hour a day to assist the applicant with complex meal preparation only or whether it was for one or more meals. Given that the average person consumes three meals a day, I am not satisfied that 1 hour per day is sufficient in the circumstances.
- [50] There is evidence that the applicant not only has physical limitations with his right shoulder, but he also has a psychological condition that reduces his motivation, concentration and focus. I find that Mr. Campos failed to account for the applicant’s lack of motivation to prepare food and feed himself. Considering the consumer protection objective of the *Schedule*, I have given extra time to the applicant to account for both good and bad days. Therefore, I find that 2 hours per day is a reasonable amount of time to assist the applicant with preparing three meals a day.
- [51] Mobility: Nothing was allocated in this category on Ms. Afgo Ahmadi’s Form 1 and her corresponding attendant care report indicates that the applicant was independent with walking, climbing stairs, sitting and standing and that he was able to ambulate for approximately 15 minutes. Based on the evidence, I do not find that the applicant requires assistance with his mobility.
- [52] Extra Laundering: Ms. Afgo Ahmadi allotted 90 minutes, five times per week to change the applicant’s bedding and clothing as a result of incontinence or spillage. The applicant submits that Ms. Afgo Ahmadi’s testified that he reported her that he frequently eats in bed causing spillage of food on his bedding. There was no other evidence presented at the hearing that the applicant suffers from incontinence or has problems with spillage. I am not persuaded that extra laundering would be reasonable in the circumstances.

Part 2/Level 2 - Basic Supervisory Care

- [53] Hygiene: Bathroom/ Bedroom: Both Ms. Afg Ahamdi and Mr. Campos recommended assistance for cleaning the applicant's bathroom and bedroom and to ensure his comfort, safety and security. Ms. Afgo Ahmadi's Form 1 recommend 30 minutes a day to do each of these activities. Whereas Mr. Campos recommended 15 minutes a day to clean his bathroom, 15 minutes a day to clean his bedroom and 10 minutes a day to ensure his comfort, safety and security in his bedroom. The applicant submits that Mr. Campos' recommendation are insufficient and unreasonable. Neither Ms. Afgo Ahmadi nor Mr. Campos provided a rationale for the allocation of the time needed to complete these tasks. Remik Zakrzewski allocated 20 minutes per day in September 2018 for cleaning the bathroom and bedroom and nothing to ensure his comfort, safety and security in his bedroom.
- [54] I find that 20 minutes is reasonable for assistance in cleaning the bathroom, 20 minutes for the bedroom and 10 minutes for the comfort, safety and security of the bedroom. Without further explanation from Ms. Afgo Amadi as to why the applicant requires this level of service, especially with respect to the comfort, safety and security of the bedroom, I am not persuaded that the amount she recommended is reasonable and necessary. Considering that the applicant did not require this level of service a little over a year following the accident, without providing a sufficient rationale, it is hard to reconcile why he would require such an increase in service roughly two years later in 2021.
- [55] Hygiene: Clothing Care: Ms. Afgo Ahmadi recommended 10 minutes, 7 times per week for assistance with preparing daily wearing apparel and 60 minutes once a week to hang and sort clothes to be laundered/cleaned. Mr. Campos did not recommend any assistance for these tasks. Having found that 10 minutes per day to dress the applicant is reasonable and necessary, an additional 10 minutes to prepare his daily apparel seems excessive and it is not reasonable and necessary. I find that 5 minutes, 7 times per week to assist the applicant hang and sort clothes to be laundered/cleaned is reasonable given his psychological condition.
- [56] Basic Supervisory Care: Neither assessor recommended basic supervisory care.
- [57] Co-ordination of attendant care: Ms. Afgo Ahmadi recommended 60 minutes once a week (the maximum amount available) to co-ordinate/schedule his attendant care and Mr. Campos recommended 30 minutes once per week. Neither Ms. Afgo Ahmadi nor Mr. Campos provided a rationale for the allotment for this task. The applicant submits that co-ordination of attendant care would

include co-ordinating and scheduling attendant care of the providers who assists him as it is unlikely to be the same providers providing services 7 days a week. The applicant also submits that his post-accident physical and psychological impairments are being treated by several health professionals requiring him to attend frequent medical appointments. Although Ms. Afgo Ahmadi did not elaborate on why the applicant required the maximum amount for coordinating his attendant care, given that he requires daily attendant care and he attends frequent medical appointments in the community, I find 60 minutes once a week would be reasonable in the circumstances.

Part 3/Level 3 Complex Health Care and Hygiene Functions

- [58] Exercise: Ms. Afgo Ahmadi recommended 2 hours a day (60 minutes, 14 times per week) of assistance with a prescribed exercise/stretching program in both Form 1s. Ms. Afgo Ahmadi did not provide explanation as to why the applicant would require this amount of assistance and no exercise program was presented as evidence. The applicant submits the physical and psychological therapy that he has been recommended to take for his post-accident impairments involves doing self-directed exercises at home. It has been reported in the medical documentation that the applicant was provided with an exercise ball and a Thera band to use as part of a home program. Mr. Campos found that the applicant had sufficient strength, range of motion and functional mobility to complete at home exercise but he never addressed his lack of motivation due to his psychological condition. There are also reports that the applicant has gained several kilograms since the accident, and he has been advised by his family doctor to lose weight.
- [59] Given his lack of motivation and low mood, I find that 60 minutes, 7 days a week to assist the applicant with a daily exercise routine is reasonable and necessary in the circumstances. Without any reference to specific details of the applicant's home exercise program, 2 hours a day does not seem reasonable.
- [60] Medication Management: Ms. Afgo Ahmadi's indicated that the applicant required 30 minutes to monitor his medication intake for injections and 30 minutes per day to control supply of these injections. Given that the applicant is not taking daily injectable medication, I presume that was an error in Ms. Afgo Ahmadi's Form 1 and that she meant to indicate that this was for orally prescribed medication. Neither party has raised this as an issue or error. Ms. Afgo Ahmadi did not allocate any time for the administration of the medication, but she did allocate 30 minutes per day to monitor their effects and 30 minutes a day to control the medications. Ms. Afgo Ahmadi testified that the applicant has stomach issues with certain pain medications and that is why she recommended supervising the

administration of medication. The applicant testified that he forgets to take his medication and psychiatrist Dr. Ronald Findlay's ADL Functional Assessment report dated December 3, 2020 noted the same. Dr. Findlay also noted that the applicant could not recall the names or dosages of his medications, therefore he requires assistance in administering these different medications at the appropriate time. Mr. Campos testified that he only allotted 5 minutes per day to administer the applicant's medication, but he admitted that he did not look at the dosages and the time of day that they were required. He also said that it was outside his scope of practice to determine whether he needs to observe the effectiveness of the treatment. The applicant takes numerous medications at different times, and I find 5 minutes per day to be insufficient. In light of the evidence, I find that 30 minutes a day to control the applicant's medications and 30 minutes per day to monitor their effects is reasonable and necessary in the circumstances.

- [61] **Bathing**: Ms. Afgo Ahmadi recommended 60 minutes, 7 times a week to bathe the applicant whereas Mr. Campos found that the applicant did not require any assistance for this activity. Mr. Campos testified that he was able to independently and safely perform a tub transfer during the assessment. Ms. Afgo Ahmadi did not provide a rationale for her recommendation. Given that the applicant can move independently, I find that 60 minutes a day is unreasonable in the circumstances. The applicant testified that he does not care to shower, brush his teeth or change his clothes because he "just doesn't care and he has no family". In light of the evidence, from a psychological perspective, I find that 20 minutes, 7 times a week is reasonable and necessary to prompt and encourage the applicant to bathe on a regular basis.

[62] **Comparison of the Form 1s and The Tribunals Decision**

Services	Ms. Afgo Ahmadi's Form 1 dated May 25, 2021	Mr. Campos's Form 1 dated August 6, 2021	Tribunal Decision
Part 1			
Dress upper body	10 min 7/week = 70 min/week	0	5 min 7/week= 35min/week
Dress lower body	10 min 7/week = 70 min/week	0	5 min 7/week= 35min/week
Undress upper body	10 min 7/week = 70 min/week	0	5 min 7/week= 35min/week
Undress lower body	10 min 7/week = 70 min/week	0	5 min 7/week= 35min/week
Grooming-face washing	5 min 7/week = 35 min/week	0	0

Grooming-shaving	15 min 3/week = 45 min/week	0	10 min 3/week= 30 min/week
Hair brushing	15 min 7/week = 105 min/week	0	0
Shampoo/dry hair	20min 7/week = 140 min	0	5 min 7/week = 35 min/week
Hair styling	5 min 7/week= 35 min/week	0	0
Fingernails clean/manicure	7 min 1/week 7 min/week	0	1 min 1/week = 1 min/week
Toenails – clean/ trim	10 min 1/week = 10 min/week	0	1 min 1/week = 1 min/week
Feeding	120min 14/week= 1680 min/week	60 min 7/week=420 per week	120 7/week= 840/week
Mobility	0	0	0
Extra laundering	90 min 5/week = 450 min/week	0	0
Part 2			
Hygiene- bathroom- cleaning	30 min 7/week = 210 min/week	15 min 7/week = 105 min/week	20 min 7/week= 105 min/ week
Hygiene- bedroom- cleaning	30 min 7/week = 210 min/week	15 min 7/week = 105/ week	20 min 7/week= 105 min /week
Hygiene- bedroom- safety	30 min 7/week = 210 min/week	10 min 7 min/week = 70 min/week	10 min 7/week = 70 min/week
Clothing care- assists in preparing daily wearing apparel	10 min 7/week = 70 min/week	0	0
Clothing care- hangs/sorts clothing	60 min 1/week = 60 min/week	0	5 min 7/week = 35 min/week
Basic supervisory Care	0	0	0
Co-ordination of attendant care	60 min 1/week = 60 min/week	30 mins 1/week= 30 min	60 min 1/week = 60 min/week
Part 3			
Exercise	60 min 14/week = 840 min/week	0	60 min 7/week = 420 min/week
Medication- oral- administers	0	5min 7/week= 35min/week	5min 7/week = 35 min
Medication- oral monitors intake/effect	0	0	30 min 7/week = 210 min
Medication-oral maintains and controls medication	0	0	30 min 7/week = 210 min/week

Medication -injections-monitors intake/effect	30 min 7/week = 210 min/week	0	0
Medication-injections-maintains and controls medication	30 min 7/week = 210 min/week	0	0
Bathing	60 min 7/week = 420 min/week	0	20 min 7/week= 140 min/week
Total Monthly Amount	\$6,340.42	\$759.15	\$3,121.57

[63] Based on the evidence, I find that the applicant is entitled to the following amount of attendant care services from June 14, 2021 to August 23, 2022:

	Total Minutes Per Week	Total Weekly Hours	Total Monthly Hours	Hourly rate	Monthly Care Benefit
Part 1	1,047	17.45	69.80	\$14.90	\$1,040.02
Part 2	315	5.25	21	\$14.00	\$294.00
Part 3	1,015	16.92	67.67	\$21.11	\$1,428.44
Total for Attendant Care Services					\$2,762.46
Plus 13% HST					\$359.11
Monthly total					\$3,121.57

AWARD

[64] It is well settled that an award should not be ordered simply because an insurer made an incorrect decision. Rather, in order to attract an award under *Regulation 664*, the insurer's conduct must be excessive, imprudent, stubborn, inflexible, unyielding or immoderate.

[65] I find that the applicant is not entitled to an award in this matter because there is no evidence before me that supports a finding that the respondent's actions rose to the level of excessive, imprudent, stubborn, inflexible, unyielding or immoderate.

INTEREST

[66] The applicant is entitled to interest in accordance with s. 51 of the *Schedule* for the issues in dispute.

ORDER

[67] For the reasons outlined above, I find that the applicant:

- (i) Is entitled to \$750.00 for the orthotics plan.
- (ii) Is entitled to ACBs in the amount of \$3,121.57 (less amounts paid) from June 14, 2021 to August 23, 2022;
- (iii) Is not entitled to an award under *Regulation 664* and
- (iv) Is entitled to interest.

Released: May 1, 2023

**Lyndra Griffith
Adjudicator**