



**Citation: Efthyvoulou v. Aviva General Insurance Company, 2023 ONLAT  
19-008218/AABS**

**Licence Appeal Tribunal File Number: 19-008218/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:

**Phoulis Efthyvoulou**

**Applicant**

and

**Aviva General Insurance Company**

**Respondent**

**DECISION**

**ADJUDICATOR: Rebecca Hines**

**APPEARANCES:**

For the Applicant: Phoulis Efthyvoulou, Applicant  
Purva Vaidya, Counsel

For the Respondent: Almeda Lucas, Adjuster  
Geoffrey Keating, Counsel

Court Reporter: Michelle Gordon, Professional Court Reporter

**Heard by Videoconference: January 9, 10, 11, 12, 13 and 16, 2023**

## OVERVIEW

[1] Phoulis Efthymoulou (the applicant) was involved in an automobile accident on May 3, 2019, and sought benefits pursuant to the Statutory Accident Benefits Schedule - *Effective September 1, 2010 (including amendments effective June 1, 2016)*. The applicant was denied certain benefits by Aviva General Insurance Company (the respondent) and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”). Specifically, it denied that the applicant’s accident-related impairments met the definition of catastrophic (“CAT”) impairment. If it is determined that the applicant has suffered a CAT impairment, he is entitled to the extended tier of benefits that accompanies this designation. The respondent also denied the applicant’s entitlement to an income replacement benefit (“IRB”) and various treatment plans (“OCF-18s”) for medical benefits and cost of examination expenses.

## ISSUES

- [2] I have been asked to decide the following issues:
1. Has the applicant sustained a CAT impairment as defined by the *Schedule*?
  2. Is the applicant entitled to an IRB in the amount of \$400.00 per week from December 15, 2019 to date and ongoing?
  3. Is the applicant entitled to payment of \$2,000.00 for an accounting report recommended by Gurlal Gill, Chartered Accountant, in an OCF-18 dated June 3, 2019?
  4. Is the applicant entitled to a cost of examination in the amount of \$9,400.00 (\$21,800.00 less \$12,400.00 approved) for catastrophic impairment assessments, proposed by Meditecs Independent Medical Examinations (“Meditecs”) in OCF-18 dated July 12, 2021?
  5. Is the applicant entitled to a medical benefit in the amount of \$1,457.63 (\$5,059.51 less \$3,601.88 approved) for social worker treatment, proposed by Meditecs in an OCF-18 dated May 13, 2021?
  6. Is the applicant entitled to a medical benefit in the amount of \$5,472.96 for chiropractic, massage, and acupuncture services, proposed by Spinetec Healthcare Solutions (“Spinetec”) in an OCF-18 dated July 12, 2021?

7. Is the applicant entitled to a medical benefit in the amount of \$1,293.85 for assistive devices recommended by Independent Medical Examinations in an OCF-18 dated November 1, 2019?
8. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?
9. Is the applicant entitled to interest on any overdue payment of benefits?

**RESULT:**

[3] After considering both parties submissions and all of the evidence I find:

1. The applicant did not sustain a CAT impairment as defined by the *Schedule*.
2. The applicant is not entitled to the following:
  - a. an IRB in the amount of \$400.00 per week from December 15, 2019 to date and ongoing.
  - b. \$2,000.00 for an accounting report recommended by Gurlal Gill, Chartered Accountant, in an OCF-18 dated June 3, 2019.
  - c. \$9,400.00 (\$21,800.00 less \$12,400.00 approved) for catastrophic impairment assessments, proposed by Meditecs in an OCF-18 dated July 12, 2021.
  - d. \$1,457.63 (\$5,059.51 less \$3,601.88 approved) for social worker treatment, proposed by Meditecs in an OCF-18 dated May 13, 2021.
  - e. The applicant is precluded from disputing the respondent's denial of the OCF-18 for chiropractic, massage, and acupuncture services, proposed by Spineteq for failing to attend a s. 44 insurer examination ("IE") pursuant to s. 55 of the *Schedule*.
  - f. Interest on any of the above benefits.
  - g. An award under s. 10 of Regulation 664 as I do not find that the respondent unreasonably withheld or delayed payments to the applicant.

3. The applicant is entitled to the OCF-18 in the amount of \$1,293.85 for assistive devices recommended by Independent Medical Examinations in an OCF-18 dated November 1, 2019, plus interest.

## PROCEDURAL ISSUE

- [4] The respondent brought a motion requesting to add its request for repayment of past IRBs as an issue in dispute. The applicant did not consent to this request. Since this was not on consent, I decline to add the repayment issue as an issue in dispute as it was not added in advance of the hearing and would not be procedurally fair to the applicant.

## BACKGROUND

- [5] On May 3, 2019, the applicant was involved in an accident when his vehicle entered a roundabout and was hit by another vehicle which had cut him off. He did not hit his head or lose consciousness. His vehicle was deemed a total loss. His wife took him to the hospital as there were concerns about internal bleeding from a recent surgical procedure. He left prior to being seen because he had been waiting too long. He followed up with his family doctor 20 days later, where he complained of pain in his neck and right shoulder. This developed into chronic pain and a psychological impairment.
- [6] On September 27, 2021, the applicant submitted an application for a CAT determination under paragraphs 7 and 8 of section 3.1 (1) of the *Schedule*, referred to as Criterion 7 and Criterion 8, respectively. I will first address whether the applicant qualifies for CAT status under Criterion 7.

## ANALYSIS

### ***The applicant does not meet the CAT threshold under Criterion 7***

- [7] In order to qualify under Criterion 7, the applicant must prove that he has a combination of physical and psychological impairment ratings from medical professionals that meet the 55% whole person impairment (“WPI”) threshold. Chapters 3 and 14 of the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 (the “*Guides*”) is used by assessors in assigning the appropriate WPI%.
- [8] There is a significant difference of opinion between both parties’ assessors regarding the applicant’s impairment ratings under Criterion 7. The applicant’s CAT assessors determined that his combined physical and psychological

impairments equal 55% WPI, whereas the respondent's CAT assessors assigned a rating of 13% WPI.

- [9] The applicant relies on the CAT assessments completed by Dr. Kwok, orthopaedic surgeon, Julian Amchislavsky, occupational therapist ("OT"), and Dr. Gavett-Liu, psychiatrist. The applicant's assessors determined that his total physical impairment is 35% WPI and his psychological impairment is 30% WPI, which when added using the combined values chart in the Guide equals 55%. The following summarizes the ratings assigned by the applicant's assessors:

<b>IMPAIRMENT RATING</b>	<b>TOTAL WPI%</b>
5% WPI each for the cervical, thoracic and lumbar spine:	Total Spine WPI: 15%
10% for the right shoulder and 7% for the left shoulder:	Total Upper Extremity Impairment: 16%
3% WPI each for the left and right hips	Total Lower Extremity Impairment: 6%
3% Adjustment for effects of medication	Total: 3%
<i>Total Physical Impairments</i>	<i>35% WPI</i>
<i>Total Psychological Impairment</i>	<i>30% WPI</i>
<b>TOTAL</b>	<b>55%</b>

- [10] The respondent relies on the CAT IE assessments of Dr. Sekyi-Otu, orthopaedic surgeon, Vinita Tandon, OT, and Dr. Sivasubramanian, psychiatrist, which determined that the applicant's total physical impairment was 3%, assigned for medication, and the total psychological impairment was 10%, which when combined equals 13% WPI. If I do not accept one of the impairment ratings assigned by Dr. Kwok the applicant does not meet the CAT threshold under Criterion 7. I prefer the WPI% ratings assigned by Dr. Sekyi-Otu for the following reasons.
- [11] First, I find Dr. Kwok's report to be vague and lacking in detail as far as explaining his rationale for the WPI% ratings assigned for the various impairments and how he used the *Guides* in rendering his opinion. For example, Dr. Kwok classified all of the applicant's impairment ratings under the Diagnostic Related Estimates ("DRE") Category II model with a WPI rating of 5%, versus a DRE Category I which carries an impairment rating of zero. The *Guides* specify that when assigning impairment ratings under Category DRE II there should be evidence of one of the following: radiculopathy, muscle spasm and guarding and/or evidence of structural abnormality. I find Dr. Kwok's detection of muscle spasm and guarding in the applicant's cervical, thoracic and lumbar spine is inconsistent with the medical record. Further, there was no evidence of

radiculopathy or structural abnormality. Because Dr. Kwok did not adequately explain his rationale in his report for his impairment ratings, I have given his report less weight. Further, Dr. Kwok's testimony was unhelpful in justifying why he assigned the various ratings under the *Guides*.

- [12] Second, following the accident, the applicant's main complaints were neck and right shoulder pain which developed into bilateral shoulder pain. Ultrasounds taken of the right and left shoulders support tendinosis and degenerative disc disease, which is not uncommon for a person of the applicant's age. An ultrasound of the applicant's left shoulder dated September 12, 2020 revealed a partial thickness tear which showed a deterioration from the prior ultrasound. In his report Dr. Kwok opined that the tear in the left shoulder was as a result of the accident and assigned a 7% WPI rating. During cross-examination, Dr. Kwok acknowledged that the tear could also be as a result of age and normal wear and tear. I do not find Dr. Kwok's explanation persuasive. Consequently, I do not accept the 7% WPI allocated by Dr. Kwok for the impairment of the applicant's left shoulder.
- [13] Third, I do not find the medical record before me supports the WPI% impairment ratings assigned by Dr. Kwok for the applicant's thoracic and lumbar spine or the right and left hips. As highlighted above, the applicant's main physical complaints following the accident was neck and right shoulder pain. There are some references in the records of the applicant's treating rehabilitation clinic that refer to thoracic or mechanical low back pain but none of these records referred to radiculopathy, muscle spasm or guarding. Therefore, I do not find there was enough objective evidence for the WPI% rating assigned by Dr. Kwok. Further, there was only one reference to hip pain in the report of an occupational therapist dated August 1, 2019. Other than this one occurrence, the applicant did not report hip pain to his family doctor or to the treating practitioners at the clinic he attended for physical therapy. In my view, I find Dr. Kwok's WPI% impairment rating for the hips to be unsupported. This is another reason why I assign his report less weight. Since I do not accept the 7% assigned for the left shoulder, the 5% each assigned for the thoracic or lumbar spine or the 6% assigned for the left and right hips, the applicant does not meet the threshold for CAT status under Criterion 7.
- [14] Finally, I prefer the opinion of Dr. Sekyi Otu as I find it more consistent with the medical record. Further, Dr. Sekyi Otu explained the rationale for his impairment rating of zero under the *Guides* and why he classified the impairments under DRE I versus DRE II. For example, his physical examination of the applicant found inconsistencies between the active and passive range of motion of the

applicant's left and right shoulders which supported evidence of self-limiting behaviour. In addition, the ultrasounds revealed degenerative disc disease which is not evidence of an objective accident-related impairment because it is commonly found in people of the applicant's age. Further, Dr. Sekyi-Otu did not find any evidence to support any accident-related impairment to the applicant's hips or Dr. Kwok's diagnosis of greater trochanteric bursitis. I did not find evidence of this either. I also agree with Dr. Sekyi-Otu that there was no evidence of radiculopathy or guarding or muscle spasms throughout the medical record.

- [15] For the above reasons, the applicant has not met his onus in proving on a balance of probabilities that he sustained a CAT impairment under Criterion 7. I will now address whether the applicant qualifies for CAT status under Criterion 8.

***The applicant does not meet CAT threshold under Criterion 8***

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

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

- [17] The applicant relies on the CAT reports of Mr. Amchislavsky and Dr. Gavett-Liu who determined that he suffers a marked impairment in Activities of Daily Living, Concentration, Persistence and Pace and Adaptation. Dr. Gavett-Liu diagnosed him with Generalized Anxiety Disorder as a result of the accident.
- [18] The respondent relies on the CAT reports of Ms. Tandon and Dr. Sivasubramanian who diagnosed the applicant with a mild adjustment disorder, with anxious and depressed mood and specific phobia (passenger anxiety). Dr. Sivasubramanian determined that the applicant had a mild impairment in Activities of Daily Living and Concentration, Persistence and Pace and no impairment in Adaptation. I prefer the reports and opinions of the respondent's assessors for the following reasons and do not find that the applicant sustained a marked impairment under any of the three spheres of function.
- [19] Overall, I find the reports of both Mr. Amchislavsky and Dr. Gavett-Liu to be internally inconsistent and contradictory. Further, the impairment ratings are not supported by the medical record before me. In addition, Dr. Gavett-Liu's impairment ratings are not supported by her analysis under the different spheres of functioning in her report. It is the applicant's onus to prove that he sustained a marked impairment. I find the reports relied upon by the applicant fell far short of meeting this onus. I will now address how I came to this conclusion under the different spheres of functioning.

### **ACTIVITIES OF DAILY LIVING (ADL)**

- [20] The *Guides* specify that activities of daily living include self-care, personal hygiene, communication, ambulation, travel, sexual function, sleep, and social and recreational activities. Any limitation in these activities should be related to the person's mental disorder. The quality of these activities is judged by their independence, appropriateness, effectiveness, and sustainability given the context of the individual's overall situation. What is assessed is not simply the number of activities that are restricted, but the overall degree of restriction or combination of restrictions.
- [21] In her report, Dr. Gavett-Liu notes that post-accident the applicant needs help but regularly performs tasks such as bathing, self-grooming, dressing, feeding and toileting. The doctor does not explain what help the applicant needs and whether this help is required on a daily or weekly basis. I find the applicant's self-reports about his limitations with self-care to be inconsistently reported to the various assessors throughout this claim. To some, he reports being fully dependent and



to others he has serious limitations. Further, the applicant's limitations with regard to self-care seem to relate to a physical rather than a psychological impairment.

- [22] The report then states that the applicant is able to walk independently, that he can use the phone, computer and handles bill payments using online methods. Further, that he is independent in taking his medication. The doctor concludes by stating that there was no anxiety, amotivation, cognitive difficulties or anergia limiting the applicant's ability to carry out his daily activities.
- [23] In describing the applicant's limitations under this sphere following the accident, Dr. Gavett-Liu notes that the applicant performs housekeeping and home maintenance tasks slowly and needs help with certain tasks. In addition, he experiences passenger and driving anxiety but still drives. He also experiences sexual dysfunction; however, this was also as a result of his cancer diagnosis and treatment. The report states the applicant has problems sleeping due to pain, but he does not experience nightmares or flashbacks. Post-accident he does not engage in the same leisure activities, such as repairing watches, and is socially withdrawn, which the doctor partly attributes to COVID-19. Finally, the applicant still maintains a positive relationship with his family and friends.
- [24] Dr. Gavett-Liu then concludes that the applicant has a marked impairment in ADL. When I consider Dr. Liu's description of the applicant's function in his ADL post-accident, I do not find that it supports that he has a marked impairment in ADL as a result of a psychological impairment. I find that any of the applicant's limitations in this sphere are as a result of physical pain and limitations as opposed to psychological symptoms. As highlighted above, Dr. Gavett-Liu acknowledges in her report that no anxiety, amotivation, cognitive difficulties or anergia limit the applicant's ability to carry out his daily activities. I find this statement contradicts her opinion in assigning a marked impairment rating under this sphere. Further, with the exception of driving anxiety, the applicant's limitations in carrying out housekeeping and home maintenance tasks and problems with sleep are due to physical pain versus psychological impairment. Finally, I do not find that the evidence supports that the applicant's sexual dysfunction is accident related as he was experiencing these problems prior to the accident as a result of the bladder removal surgery and chemotherapy to treat his cancer.
- [25] I find Dr. Gavett-Liu's description of the applicant's limitations in ADLs more consistent with the mild impairment rating assigned by Dr. Sivasubramanian in that his impairment levels are compatible with most useful functioning. The

applicant has not met his onus in proving on a balance of probabilities that he has a marked impairment in ADL as a result of an accident-related psychological impairment.

## **CONCENTRATION, PERSISTENCE AND PACE**

- [26] The *Guides* define this sphere as having the ability to sustain focused attention long enough for the timely completion of tasks commonly found in work settings. Deficiencies in concentration, persistence and pace are best noted from previous work attempts or from observations in work-like settings. The *Guides* specify that psychological tests are useful in assessing intelligence, memory, and concentration. Frequency of errors, the time it takes to complete a task and the extent to which assistance is required to complete a task is also considered.
- [27] I do not find that the applicant has a marked impairment in concentration, persistence, and pace. Dr. Gavett-Liu acknowledges in the report that no cognitive tests were completed in the assessment. The doctor notes that the applicant's recollection of approximate events, timeframes and dates from both long and short-term memory were grossly normal. Further, his concentration was intact during the assessment, and he could fill out all paperwork with ease and respond to questions and commands.
- [28] Dr. Gavett-Liu then purports that the applicant has a marked impairment in concentration, persistence, and pace. The doctor states that the applicant was depressed, irritable and anxious which would lead to poor emotional regulation and result in workplace conflict, amotivation and/or avoidance and withdrawal. Further, the applicant's subjective reports of cognitive difficulties (impaired memory, concentration, attention and multi-tasking) would lead to poor decision making, increased errors and decreased task efficiency.
- [29] I find Dr. Gavett-Liu's impairment rating contradictory and unsupported by any persuasive medical evidence. For example, the above statement conflicts with the doctor's analysis under social functioning as the doctor determines that the applicant denies emotional dysregulation towards family and friends, exhibits appropriate social behaviour, and has no impairment affecting his ability to communicate and maintain social relationships. Further, the doctor fails to discuss the fact that the applicant went back to work full-time following the accident and continued to work until December 2020. There was no evidence of any attendance, performance, or behavioural issues in the applicant's post-accident employment. Further, the evidence supports that the applicant's employment was not terminated as a result of any accident-related impairments. Instead, he was laid off because his employer provided support to Air Canada

and flights had been significantly reduced because of COVID-19. Finally, Dr. Gavett-Liu's reliance on the applicant's self-reports about cognitive complaints conflicts with the findings in the OT CAT assessment report of Mr. Amchislavsky, which was part of the same multi-disciplinary assessment. Dr. Gavett-Liu completely overlooked the findings in Mr. Amchislavsky's report.

- [30] For example, Mr. Amchislavsky conducted cognitive tests including the Test for Everyday Attention ("TEA") and the Rivermead Behavioural Memory Test Third Edition ("RBMT-3") to assess the applicant's attention and memory. With a few very minor exceptions, the applicant's results on these cognitive tests were normal. Dr. Gavett-Liu acknowledges in her assessment that she did not conduct any cognitive tests but fails to reconcile the inconsistencies found in Mr. Amchislavsky's assessment. For all of the above reasons, I give Dr. Gavett-Liu's opinion little weight.
- [31] In the same vein, despite the fact that the applicant's cognitive test results were normal, Mr. Amchislavsky concludes that the applicant may experience difficulties with various activities that involve mostly all attention, concentration and memory despite his average results on the cognitive tests. In my view, the rationale for his conclusion does not make sense. For this reason, I also give Mr. Amchislavsky's OT assessment little weight.
- [32] I agree with the mild impairment rating assigned by Dr. Sivasubramanian. The doctor concluded that the applicant's ability to focus and concentrate was intact. Further, there was no evidence of gross thought disorder or word finding difficulties and he considered the applicant's post-accident employment history in his analysis. Finally, Dr. Sivasubramanian discussed the findings of Ms. Tandon's OT assessment which was consistent with the doctor's opinion and observations. Ms. Tandon's OT report notes that the applicant was able to successfully complete all cognitive tasks within the time allotted with minimal difficulty. I find the applicant's performance in this assessment consistent with a mild impairment. The applicant did not meet his onus in proving on a balance of probabilities that he has a marked impairment in concentration, persistence, and pace.

## ADAPTION

- [33] The *Guides* define impairment in adaptation as the repeated failure to adapt to stressful circumstances, in the face of which "the individual may withdraw from the situation or experience exacerbation of signs and symptoms of a mental disorder; that is, decompensate or having difficulty maintaining activities of daily

living, continuing social relationships, and completing tasks.” By definition, impairment in adaptation affects the ability to function across all activity areas. Regarding activities of daily living, their quality is judged by their independence, appropriateness, effectiveness, and sustainability.

- [34] I do not find the applicant has a marked impairment in adaptation. I was equally perplexed by Dr. Gavett-Liu’s analysis under this sphere as I was for the other spheres, as it was also wholly inconsistent. The report states that the applicant’s “poor emotional regulation would likely result in workplace conflict (with co-workers or customers), amotivation, and/or avoidance/withdrawal. His subjective reports of cognitive difficulties (impaired memory, concentration and attention, as well as impaired multi-tasking) and anergia would likely lead to poor decision-making, increased errors, and decreased task efficiency at his workplace. Further, his mild stress intolerance, as stress (especially work-like stress) seems to cause either withdrawal or relapse in emotional symptoms.”
- [35] Dr. Gavett-Liu’s report then states that the applicant’s mental state was, “calm and organized. He was able to follow simple instructions and had no difficulties maintaining his attention. There were no noted difficulties with memory retrieval when recalling past details and events. He was able to respond to questioning within normal timeframes. He demonstrated the capacity to maintain work-appropriate engagement and emotional demeanour during the catastrophic impairment examinations, and there was no evidence of impairment in social functioning that would interfere with his capacity to maintain work-like relationships with peers or supervisors. He reportedly remains capable of driving safely, and this task requires management of stress and decision-making.” This analysis contradicts the doctor’s previous statement and does not support that the applicant has a marked impairment in adaptation.
- [36] Other than the OT report of Mr. Amchislavsky, which notes some challenges (but which I do not accept to be a proper reflection of the applicant’s abilities), there is little evidence to support that he has had a repeated failure to adapt to stressful situations as a result of any accident-related psychological impairment. Further, there is nothing in the record to support that he has had any conflicts with anyone. The evidence supports that the applicant returned to work following the accident and continued to work for a year and a half until he was laid off for reasons that were unrelated to the accident. The applicant acknowledged during cross-examination that he did not have any issues with attendance, punctuality or performance but he would sometimes take work home because he was slower.

- [37] Finally, I prefer the CAT reports of Dr. Sivasubramanian and Ms. Tandon as they were internally consistent and more reliable when compared to the medical record. For example, the report of Dr. Okwonkwo, the applicant's treating psychiatrist dated September 19, 2020, noted that there had been improvements to the applicant's mood, he was more relaxed but still had some anxiety. Moreover, as highlighted above, the applicant was able to carry out all of the functional tasks in Ms. Tandon's OT CAT assessment.
- [38] For the above-noted reasons, the applicant has not met his onus in proving on a balance of probabilities that he has a marked impairment under this sphere.

**The applicant is not entitled to an IRB in the amount of \$400.00 per week from December 15, 2019 to date and ongoing.**

- [39] Section 5(1) of the *Schedule* provides that an insurer shall pay an IRB if the insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential duties of their pre-accident employment. After the 104-week mark, the test for ongoing entitlement to IRBs becomes more stringent. At this point post-accident, the insured must prove that they suffer a complete inability to engage in any employment or self-employment for which they are reasonably suited by education, training or experience.
- [40] I do not find that the applicant meets either the pre- or post-104 test for entitlement to IRBS. Prior to the accident, the applicant was employed since 2014 as a computer programmer at Katlyn International. When the accident happened, the applicant was working modified duties as he had undergone bladder removal surgery and chemotherapy to treat cancer. Following the accident, he returned to work on modified duties due to cancer treatment and was back to regular duties in April 2019. He continued to work regular hours and duties until December 31, 2020 when he was laid off due to a "shortage of work". The applicant's employer provided services to Air Canada and the business was affected due to COVID-19. As noted above, the applicant testified that he did not have any attendance or performance issues. Further, no employment file was submitted to support that there were any issues. There are a few references in the family doctor's clinical notes and records that the applicant was finding work harder and was exhausted. However, there was no reference in the family doctor's CNRs to support that he was unable to work because of any accident-related impairments.

- [41] The applicant relies on the opinions of Dr. Kwok and Dr. Gavett-Liu in support of his claim for an IRB. For the reasons already noted, I give these reports and opinions little weight. I do not find the applicant has met his onus in proving that he meets the test for entitlement to pre- or post-104 IRBS.
- [42] Much was made by the applicant about his inability to carry on his self-employed business repairing watches. The applicant testified that prior to the accident one of his passions was repairing watches. Post-accident he has not been able to continue doing this because he experiences weakness and numbness in his arms and lacks fine motor skills which he attributes to the accident. In support of his claim, the applicant relied on a statement of a client, a jewellery/watch collector, indicating that they had been referring watch repairs to the applicant since 2018. I do not find this evidence persuasive in demonstrating what income the applicant earned from this business pre- or post-accident.
- [43] During cross-examination the applicant was asked if he reported his income from the watch repair business to Revenue Canada and he indicated that he did not. Instead, he claims to have reported this income on his wife's income tax statements as she made less money. From a review of the applicant's and his wife's income tax records, it was not possible for me to ascertain what, if any, income reported related to this watch repair business. Nor did the applicant make any submissions connecting the dots to support his position. Further, no invoices or business statements were submitted to confirm what income was earned by the applicant in relation to this business. As highlighted by the respondent, section 4(5) of the *Schedule* prohibits income not reported by an insured to Revenue Canada from being included in calculating an insured's IRB.
- [44] The applicant has not met his onus in proving on a balance of probabilities that he is entitled to an IRB and he has not proven that he sustained an income loss from self-employment as a result of any accident-related impairment.

**The applicant is not entitled to payment of \$2,000.00 for an accounting report prepared by Gurlal Gill dated June 3, 2019.**

- [45] Section 7(4) of the *Schedule* requires an insurer to fund an accountant's report where three preconditions are satisfied: first, the insured person must be applying for an IRB that is based on the employment or self-employment considered in the report; second, the report must be prepared by a member of a designated body within the meaning of the *Public Accounting Act, 2004*; and, finally, the expense must be reasonable and necessary for the purpose of

determining the insured person's entitlement to an IRB. The applicant bears the onus of proving that the accounting report is reasonable and necessary based on the aforementioned conditions on a balance of probabilities.

- [46] Neither party spent much time addressing this issue at the hearing. In an explanation of benefits ("EOB") dated June 25, 2019, the respondent denied the expense because the disability certificate ("OCF-3") did not support entitlement to an IRB because the applicant had returned to his pre-accident employment. The OCF-3 did reference that the applicant was unable to continue working in his self-employed watch repair business. The respondent had previously requested further information about the watch repair business along with supporting documents to determine whether there had been any income loss. In response, the applicant submitted the disputed accounting report. The respondent submits that the accounting report was premature, and that the calculation of the applicant's IRB was straightforward. Therefore, the accounting report is not reasonable and necessary.
- [47] The applicant relies on the accounting report itself and some e-mail exchanges between Mr. Gill and the adjuster debating whether the expense is payable. The applicant did not make any submissions to explain why this report is reasonable and necessary. In the accounting report, Mr. Gill acknowledged that the applicant was not self-employed at the time of the accident. Therefore, it is unclear why this accounting report was prepared. I agree with the respondent that the calculation of the applicant's IRB outlined in this report was relatively straightforward. In an email exchange between Mr. Gill and the adjuster, the accountant relies on the "shall pay" language in the *Schedule* insisting that the respondent's obligation to pay for the report is mandatory. I find the tone of Mr. Gill's email unprofessional as he called the respondent's reason for denying payment of his invoice "complete nonsense and a pathetic excuse." Further, I find he stepped outside the scope of his expertise as an accountant/third party assessor in debating the intent of the legislation. In my view, Mr. Gill's correspondence lacked neutrality and as a result, I give his opinion little weight.
- [48] The applicant has not met his onus in proving on a balance of probabilities that the accounting report is reasonable and necessary.

**The applicant is not entitled to the OCF-18 in the amount of \$9,400.00 for CAT impairment assessments, proposed by Meditecs.**

- [49] Section 25(1) 5 of the *Schedule* provides that an insurer shall pay for reasonable fees for the determination of whether the insured person has sustained a CAT impairment, including any assessment or examination necessary for that

purpose. This is to be read in combination with s. 25(5)(a), which limits the cost of any one assessment or examination to \$2,000.00. The applicant bears the onus of proving on a balance of probabilities that each item in an OCF-18 is reasonable and necessary for the purpose of applying for a CAT determination under s. 45.

[50] The OCF-18 dated July 12, 2021, was authored by Dr. Allen (formerly known as Dr. Paton) chiropractor, and recommended a multidisciplinary CAT assessment in the amount of \$21,800.00, which can be broken down as follows:

1. \$200.00 for completion of the OCF-18;
2. \$200.00 for completion of the OCF-19;
3. \$2,000.00 for a CAT orthopaedic assessment;
4. \$2,000.00 for a CAT summary and impairment rating;
5. \$2,000.00 for a CAT OT situational assessment;
6. \$2,000.00 for a CAT OT in-home assessment;
7. \$2,000.00 for a CAT OT functional cognitive assessment;
8. \$2,000.00 for file medical review;
9. \$2,000.00 for a functional ability evaluation;
10. \$2,000.00 for a neurological evaluation;
11. \$2,000.00 for a CAT psychiatry assessment;
12. \$2,000.00 for a CAT psychiatric scoring report; and
13. \$1,400.00 for transportation to assessments.

[51] On July 20, 2021, the respondent sent the applicant an EOB partially approving the OCF-18 in the amount of \$12,400.00. It approved items 1 to 6, 11 and 12 referenced above. The respondent denied the balance of the assessments based on the following rationale:

- (a) Item 7: \$2,000.00 for an OT functional cognitive assessment is not a standard component of a catastrophic assessment and does not help



determine to any extent the catastrophic impairment analysis or findings. As such, this assessment is not reasonable or necessary.

- (b) Item 8: Medical File Review - \$2,000 for a separate charge for a medical file review is not reasonable or necessary
- (c) Item 9: Functional Ability Evaluation - \$2,000 for a functional abilities evaluation is not a standard component of a catastrophic assessment and does not help determine to any extent the catastrophic impairment analysis or findings. As such, this assessment is not reasonable or necessary.
- (d) Item 10: CAT Neurological Assessment - \$2,000 There is no compelling medical documentation on file to support the need for a neurological assessment. Based on the Section 44 Insurer Examination dated December 6th, 2019, Dr. Khaled determined that there was no valid indicators to support neurological accident-related injury or impairment.
- (e) Item 13: Transportation: We are approving claimant transportation to and from the assessments to be submitted to Aviva directly either from the transportation facility of the claimant's choice or if claimant is utilizing taxi or own vehicle, expenses to be submitted for review of payment subject to the 50 km round trip deductible. Invoicing to be submitted by claimant or direct transportation company.

[52] Despite calling Dr. Allen as a witness, the applicant did not ask the doctor any questions regarding why the above denied CAT assessments are reasonable and necessary. Based upon the OCF-18 itself I find the assessments requested to be excessive. Further, the applicant did not make any submissions or direct me to the evidence in support of his position that the balance of this OCF-18 is reasonable and necessary. Consequently, the applicant has not met his onus in proving on a balance of probabilities that the balance of the OCF-18 is payable.

**The applicant is not entitled to \$1,457.63 (\$5,059.51 less \$3,601.88 approved) for the OCF-18 for social worker treatment, proposed by Meditecs.**

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

The case law is also well established that medical treatment is reasonable and necessary if it results in the temporary relief of pain or restores an individual's function.

- [54] The OCF-18 was also authored by Dr. Allen and recommended psychological treatment to be carried out by Abdullahi Hussein, psychotherapist/social worker. The goal of the plan was to decrease the mental and emotional psychological symptoms and to provide coping mechanism to reduce stress, anxiety and depressive symptoms in order to return the applicant to activities of normal living. It recommended 16 hour and a half sessions of mental health therapy at a cost of \$224.42 per session, which totals \$3,590.72, and was for a duration of 20 weeks for a total cost of \$5,059.51. The rest of the plan was for documentation to support activity and fees for planning and educational materials.
- [55] The respondent sent the applicant an EOB dated May 28, 2021, which partially approved the OCF-18 in the amount of \$3,601.88. The EOB did not indicate what expenses were being denied. The reason for the partial approval was that the rate charged per hour was above what is provided for in the Financial Services Commission of Ontario Superintendent's Guideline No. 03/14, September 2014 (Guideline) which is incorporated into the *Insurance Act*. The Guideline establishes the maximum hourly rate payable by insurers for various healthcare providers. The maximum hourly rate for a psychologist is \$149.61, \$100.00 for a social worker and \$58.19 for a psychotherapist. The respondent requested more information about the qualifications of the service provider providing the treatment.
- [56] This dispute is not about whether the proposed psychological treatment is reasonable and necessary. Instead, it is whether the cost of same was reasonable and in compliance with the Guideline. I find the disputed OCF-18 charged above the maximum payable for a psychologist, psychotherapist, and a social worker. Neither party addressed this issue any further at the hearing. As highlighted above, the onus rests with the applicant to prove entitlement to the benefits claimed and that includes proving that the cost of the OCF-18 is reasonable.
- [57] The applicant has not met his onus in proving on a balance of probabilities that the balance of the OCF-18 is reasonable and necessary.

**The applicant is precluded from disputing the respondent's denial of the OCF-18 in the amount of \$5,472.96 for chiropractic, massage, and acupuncture services, proposed by Spinotec for failing to attend a s.44 IE pursuant to s.56 of the Schedule**

- [58] The disputed OCF-18 was also authored by Dr. Allen and recommended 3 sessions of chiropractic, massage, and acupuncture per week for a duration of 12 weeks.
- [59] The applicant submits that this OCF-18 for physical rehabilitation is reasonable and necessary as he suffers from chronic pain in his neck and shoulder which has resulted in functional impairment. He submits that he has benefited from past treatment as it has provided temporary pain relief which allowed him to function.
- [60] The respondent relies on s. 55 of the *Schedule* in submitting that the applicant is not entitled to proceed with his dispute regarding the respondent's denial of the OCF-18 because he failed to attend an IE pursuant to s. 44 of the *Schedule*. Furthermore, prior to the hearing the applicant's representative confirmed in writing with the respondent that the applicant would not be pursuing this OCF-18.
- [61] Section 44 of the *Schedule* provides that an insurer has the right to conduct IEs for the purpose of assessing an insured's ongoing entitlement to a benefit. Section 55(1)2. of the *Schedule* precludes an insured from proceeding with an application disputing the denial of a benefit if the insured failed to attend an IE.
- [62] No explanation was provided by the applicant for his failure to attend the IE. Moreover, an email from the applicant's representative to the adjuster confirmed that the applicant did not intend to pursue the respondent's denial of the OCF-18 at the hearing. Further, the applicant did not make any reply submissions to explain why this issue is in dispute. Finally, a review of the notice sent to the applicant dated October 15, 2020 confirmed that the respondent complied with its obligations pursuant to s.44(5) of the *Schedule* as it provided the date, time and location of the assessment, specialty of the assessor along with a medical reason. Therefore, I find the applicant is precluded from disputing the respondent's denial of the OCF-18 for failing to attend the s 44 IE pursuant to s.55 of the *Schedule*.

**The applicant is entitled to the OCF-18 in the amount of \$1,293.85 for assistive devices recommended by Independent Medical Examinations.**

- [63] This OCF-18 was also authored by Dr. Allen and recommended various assistive devices with a goal of assisting the applicant in carrying out his housekeeping

and home maintenance tasks. In setting out the applicant's activity limitations the OCF-18 states the applicant is limited with: reaching overhead, reaching behind him, all cervical ranges (mild-moderately), prolonged sitting, computer use, repetitive tasks with his upper extremities. These limitations affect the applicant's abilities to carry out his housekeeping and home maintenance tasks. The OCF-18 recommended a long handled shoe-horn, broom and lobby dustpan, telescopic duster, swiffer mop, cushion for lumbar support, anti-fatigue kitchen mat and heat pad plus fees for form completion for a total cost of \$1,293.85. Dr. Allen recommended the OCF-18 based on the recommendations made in the OT report of Remik Zakrzewski dated August 1, 2019.

- [64] The respondent sent the applicant an EOB dated December 10, 2019 denying the OCF-18. In support of its denial the respondent relies on the OT IE report of Himadri Kaul dated December 10, 2019 who determined that the OCF-18 for assistive devices is not reasonable and necessary. I find the OCF-18 for assistive devices is reasonable and necessary for the following reasons.
- [65] I find the applicant consistently reported to assessors that he was limited in carrying out his housekeeping and home maintenance tasks post-accident as a result of neck and right shoulder pain. Although the ultrasounds confirm that the applicant's complaints were likely the result of degenerative disc disease/osteoarthritis, I find that the applicant was asymptomatic pre-accident as there were no pain complaints in the pre-accident medical records. However, post-accident, the applicant made regular complaints about ongoing pain in his neck and right shoulder to both his family doctor and the treating practitioners at his rehabilitation clinic. Therefore, I find the goal of the OCF-18 in assisting the applicant gaining independence in carrying out his housekeeping and home maintenance tasks to be a reasonable objective. Neither party made submissions that the cost of the OCF-18 was excessive, so I accept the cost of same to be reasonable.
- [66] The applicant has met his onus on a balance of probabilities that the OCF-18 is reasonable and necessary.

### **Interest**

- [67] Section 51(1) states that an amount payable in respect of a benefit is overdue if the insurer fails to pay a benefit within the time required under this regulation. The applicant is entitled to interest on the OCF-18 for assistive devices as I have determined that it is reasonable and necessary. The applicant is not entitled to interest on the remaining benefits in dispute as I have not determined that they are owing or overdue.

**The applicant is not entitled an award pursuant to s.10 of Regulation 664.**

- [68] Regulation 664, R.R.O. 1990 (Regulation 664) states that if the Tribunal finds that an insurer had unreasonably withheld or delayed payments, the Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled, may award a lump sum of up to 50 percent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*. The onus is on the applicant to prove that the respondent's conduct meets the threshold for an award.
- [69] The applicant did not submit any evidence or make any submissions in support of his claim for an award. In light of my decision in this matter I do not find an award is appropriate. The applicant has not met his onus in proving on a balance of probabilities that the respondent unreasonably withheld or delayed payment of benefits.

**ORDER**

- [70] For all of the above-noted reasons, I find:
1. The applicant did not sustain a CAT impairment as defined by the *Schedule*.
  2. The applicant is not entitled to the following:
    - a. an IRB in the amount of \$400.00 per week from December 15, 2019 to date and ongoing.
    - b. \$2,000.00 for an accounting report recommended by Gurlal Gill, Chartered Accountant, in an OCF-18 dated June 3, 2019.
    - c. \$9,400.00 (\$21,800.00 less \$12,400.00 approved) for catastrophic impairment assessments, proposed by Meditecs in an OCF-18 dated July 12, 2021.
    - d. \$1,457.63 (\$5,059.51 less \$3,601.88 approved) for social worker treatment, proposed by Meditecs in an OCF-18 dated May 13, 2021.
    - e. The applicant is precluded from disputing the respondent's denial of the OCF-18 for chiropractic, massage, and acupuncture services,

proposed by Spinetec for failing to attend a s. 44 insurer examination ("IE") pursuant to s. 55 of the Schedule.

- f. Interest on any of the above benefits.
  - g. An award under s. 10 of Regulation 664 as I do not find that the respondent unreasonably withheld or delayed payments to the applicant.
3. The applicant is entitled to the OCF-18 in the amount of \$1,293.85 for assistive devices recommended by Independent Medical Examinations in an OCF-18 dated November 1, 2019, plus interest.

**Released: April 17, 2023**

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**Rebecca Hines  
Adjudicator**