



FSCO A14-001178

BETWEEN:

SHOBA KOLAPULLY

Applicant

and

TORONTO TRANSIT COMMISSION LIMITED

Insurer

REASONS FOR DECISION

- Before:** Louise Barrington
- Heard:** In person at the offices of ADR Chambers, December 4 to 7, 2017
Post-hearing submissions completed on December 19, 2017
- Appearances:** Ms. Mireille Dahab for Applicant
Mr. Chad Townsend and Ms. Nathalie Groen for Insurer

The Applicant, Mrs. Shoba Kolapully, was injured on March 6, 2012 in an accident with a TTC bus while she was a pedestrian walking across the street at a corner crossway. She sought accident benefits under the *SABS*¹ from the Toronto Transit Commission (“TTC”). The parties were unable to resolve their disputes through mediation, and Mrs. Kolapully, through her representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

¹ The *Statutory Accident Benefits Schedule Ontario Regulation 34/10*—Effective September 1, 2010

ISSUES TO BE DECIDED IN THIS ARBITRATION

According to the report of Arbitrator Benjamin Drory dated May 9, 2017, a number of preliminary issues were clarified and the remaining issues set out as follows:

1. Is Mrs. Kolapully entitled to receive a non-earner benefit at a rate of \$185.00 per week for the period from November 20, 2012 to date and ongoing?
2. Is Mrs. Kolapully entitled to receive a medical benefit in the amount of \$4090.61 for a treatment plan provided by Scarborough Physio dated June 21, 2012?
3. Is Mrs. Kolapully entitled to payments for the cost of examinations for neuropsychological assessments provided by Dr. Gilman of Oshawa Physio in the total amount of \$6827.76, broken down as follows:
 - i) \$2275.92 for an assessment dated October 24, 2012,
 - ii) \$2275.92 for an assessment dated October 24, 2012, and
 - iii) \$2275.92 for an assessment dated October 24, 2012?
4. Is TTC liable to pay Mrs. Kolapully's expenses in respect of the arbitration?
5. Is Mrs. Kolapully liable to pay TTC's expenses in respect of the arbitration?
6. Is Mrs. Kolapully entitled to interest for the overdue payment of benefits?
7. Is Mrs. Kolapully entitled to a special award? (A special award was requested by Counsel for the Applicant in the course of the Hearing).

RESULT

1. Mrs. Kolapully is entitled to receive a non-earner benefit at the rate of \$185.00 per week for the period from November 20, 2012 to date, and ongoing.
2. Mrs. Kolapully is entitled to receive a medical benefit in the amount of \$4090.61 for a treatment plan provided by Scarborough Physio dated June 21, 2012, less any sum already paid by TTC with respect to that treatment plan.

3. Mrs. Kolapully is entitled to payment for the cost of neuropsychological assessments provided by Dr. Gilman of Oshawa Physio in the total amount of \$6827.76, broken down as follows:
 - i) \$2275.92 for an assessment dated October 24, 2012,
 - ii) \$2275.92 for an assessment dated October 24, 2012, and
 - iii) \$2275.92 for an assessment dated October 24, 2012.
- 4 and 5. TTC is liable to pay Mrs. Kolapully's reasonable expenses given her degree of success. In the event that the parties are unable to agree on the quantum of the expenses of this matter, pursuant to section 282(1) of the *Insurance Act*, the parties or one of them may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.
6. Mrs. Kolapully is entitled to interest for the overdue payment of benefits, calculated from the date each fell due until September 6, 2016.
7. The claim for a special award is denied.

PROCEDURAL BACKGROUND

On April 26, 2017, at the beginning of the Hearing before Arbitrator Drory, a number of preliminary issues were dealt with. At the request of the Applicant, and over the objections of TTC, the main action was adjourned. As the parties could not agree on a date, Arbitrator Drory fixed December 4 to 7, 2017 for the Hearing of the matter. A further adjournment was requested by the Applicant on November 29, 2017 as the License Appeal Tribunal was expected to release its decision following a six-day Hearing on the issue of whether the Applicant had suffered a catastrophic impairment. Arbitrator Kim Parish, after hearing submissions from both parties, denied the adjournment. As Arbitrator Drory was not available, this case was assigned to me for the Hearing on the merits.

POST HEARING REQUEST TO INCLUDE OMITTED ISSUE

The Applicant, in post-hearing submissions, advanced a claim for a medical benefit of \$2415.00 plus HST for physiotherapy² which had originally been included in the Report of Mediator

² Applicant's post-hearing submission, p. 2.

Laidlaw dated November 28, 2013. This claim was, however, not included in the list of disputed issues as reported by Arbitrator Drory on May 9, 2017 following a hearing of preliminary issues, and the Applicant has not objected to that list. I have therefore decided only the issues as set out in Arbitrator Drory's Report, plus the new claim for a special award.

THE POSITIONS OF THE PARTIES

There is no argument as to the circumstances of the accident. Mrs. Kolapully claims that when she, a pedestrian crossing the road at a corner, was hit by a turning TTC bus, she sustained both orthopaedic injuries and a traumatic brain injury. She alleges that as a result of the accident she suffers from post-concussive symptoms, severe depression, anxiety and a pain disorder. She claims that the trauma of the accident has provoked ongoing cognitive and memory impairments, lack of motivation, frustration, irritability, sadness, anxiety and chronic pain. She claims non-earner benefits and medical benefits for assessment and treatment.

TTC's submission is that the Applicant does not meet the test for a non-earner benefit under section 12 of the *SABS*, and that she has failed to discharge her burden of proving that the injuries and their sequelae "continuously prevent[s] her from engaging in substantially all of the activities in which [she] ordinarily engaged before the accident."³ TTC's position is that the medical benefits were properly denied. TTC also argues that the Applicant is untruthful and prone to exaggeration, over-reporting her impairments to the medical assessors. TTC denies that the Applicant is entitled to a special award.

I now turn to the substantive issues in this arbitration.

1. Is Mrs. Kolapully entitled to receive a non-earner benefit at a rate of \$185.00 per week for the period from November 20, 2012 to date and ongoing?

The Law

³ Quoting *SABS*, s. 3(7)(a).

Section 12(1) of the *SABS* provides that an insurer shall pay a non-earner benefit to an insured person who sustains an impairment as a result of an accident if the insured person satisfies any of the following conditions:

- a. The insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and does not qualify for an income replacement benefit.

This provision of the law has been the subject of much discussion. Counsel for both parties referred me to the guidance offered by the Ontario Court Appeal decision in *Heath v. Economical Mutual Insurance Company*.⁴ In determining whether a claimant suffers from a complete inability to carry on a normal life, the claimant's activities and circumstances before the accident are compared to those after the accident. This is not a mere snapshot of her life immediately prior to the accident, but involves an assessment of the claimant's activities and circumstances over a reasonable period of time prior to the accident. "Complete inability" is an impairment that continuously prevents a person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.

To succeed in a claim for non-earner benefits an Applicant must establish not only that the accident caused changes impairing some of the activities she enjoyed prior to the accident. Those changes must amount to her being continuously prevented from engaging in substantially all of her pre-accident activities. To determine whether a claimant's ability to "engage in substantially all" of her pre-accident activities, all of the pre-accident activities in which she had ordinarily engaged should be considered, but with greater weight being assigned to those activities which the claimant identifies as being important to her pre-accident life.

The *Heath* court considered that "engaging in" means more than isolated attempts to perform activities that are to be viewed as a whole. In cases where pain is a primary factor that allegedly prevents the insured from engaging in her former activities, the question is not whether the

⁴ *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391.

insured can physically do these activities, but whether the degree of pain experienced, either at the time, or subsequent to the activity, is such that the individual is practically prevented from engaging in those activities. Merely going through the motions cannot be said to be “engaging in” an activity, and the quality of performance must also be considered.⁵

Moreover, the prevention of “substantially all” requires significant impairment of more than a few activities or a goodly number of activities or even a majority of pre-accident activities. The non-earner benefit test is onerous, in that it requires impairment of almost all, although not necessarily 100% of, accident activities.⁶

TTC challenged the veracity of the Applicant both in cross-examining her and in presenting surveillance video evidence. TTC’s Counsel referred to the case of *Watson v. TTC Insurance Co.*, in which the Divisional Court held that an arbitrator is to weigh the issues of credibility in the context of the evidence as a whole, and is entitled to believe all, some or none of what a witness [has] said.⁷

The Evidence on behalf of the Applicant

In support of her claim, Mrs. Kolapully testified at the Hearing, as did her daughter, Shalini Prakash. The Applicant also relied on reports and oral testimony from medical specialists. At the Hearing, we heard testimony from Dr. Gilman, a neuropsychologist, and Dr. Dory Becker, a rehabilitation psychologist who had done an independent examination of the Applicant. Despite TTC’s request to cross-examine him (which was not supported by subpoena), Dr. Getahun, an orthopaedic surgeon who examined the Applicant in December 2013,⁸ was unavailable to attend the Hearing.

The Applicant testified at length and was thoroughly cross-examined on her activities before and since the accident. After stepping off the curb, she has no memory of the accident itself until she

⁵ *Heath*, p. 18-19.

⁶ See also *Galloway and Echelon General Insurance Company*, FSCO A13-006130, p. 35-36.

⁷ *Watson v. TTC Insurance Co.*, Carswell On 5779 [2008] O.U. 3820 in Respondent’s Book of Authorities, Tab 1, para. 19.

⁸ Dr. Getahun’s report, in TTC’s Brief, Vol. 2, Tab 13.

found herself in an ambulance on a stretcher at the hospital. She described her injuries – fractures of both legs and facial injuries requiring some stitches. She also described the various impairments which she alleges were caused by the accident, and their impact on the various activities of her daily life. Her younger daughter, Shalini Prakash, now 21 years of age, also testified in support of her mother. Shalini testified that she had lived with her mother in Dubai immediately before they came to Canada to join her elder sister in 2011. In 2014, according to her testimony and that of her daughter Shalini, Mrs. Kolapully moved to Fort McMurray to join her husband, whose job is there. Both daughters remained in Ontario, although Shalini did spend much of 2016 with her parents while doing a co-operative work assignment for school. Mrs. Kolapully continues to reside in Fort McMurray with her husband.

Following are highlights of the evidence of Mrs. Kolapully and her daughter.

Work and Volunteering

Mrs. Kolapully testified that she had had some experience after graduating, working as a receptionist/clerk for two companies owned by her father during the period between 1991 and 1993. Then she became a full-time homemaker, caring for her two daughters. After some time in Dubai, she came to Canada in 2011 to join her husband and her elder daughter, who was by then a university student. Once in Canada she enrolled in a class with a view to obtaining employment. As a first step she began volunteering at a retirement centre in February of 2012, both for the personal satisfaction and to build confidence for her job search. The accident occurred when she had volunteered on only few occasions; her injuries put an end to her job search at the time. She claims that she continues to suffer pain and psychological problems which make entry into the Canadian workforce impossible.

Housekeeping and Cooking

According to Mrs. Kolapully, prior to the accident, as a stay-at-home homemaker she was solely responsible for household chores. Because of his job, her husband at times lived in other cities including overseas, and she was responsible for keeping the home running, including laundry and ironing, shopping, cleaning and garbage removal and financial management for the family. Her

daughter confirmed her mother's interest in cooking, including trying new recipes, cooking for major feasts, and preparing complicated, labour-intensive traditional meals for the family. Shalini estimated that her mother spent three to five hours in the kitchen daily, as well as going out to the community centre once or twice each week. She also said that other than the few occasions when she would help out, her mother took care of all the other household chores, leaving her free to concentrate on her school and extra-curricular activities.

After the accident, Mrs. Kolapully's movements were inhibited for some months by the casts. The two daughters had to take over all the household chores, under their mother's supervision. Once out of the casts, said her daughter, Mrs. Kolapully began to do a little work around the house, but had great difficulty as she couldn't stand for long, so the two daughters continued to perform the household tasks, with instructions from their mother. Shalini's testimony was that her mother now does some baking, but needs help as she cannot do it alone. Everything takes her mother much more time to accomplish. Her cooking is much simpler and uncomplicated as she cannot stand for extended periods or bend to use the oven and does not have the energy and suffers from pain when she overdoes it. The cognitive problems interfere with her cooking as well, as she forgets things on the stove and burns food.

Mrs. Kolapully tried to resume her chores such as shopping, but her daughters discouraged her from doing so. Shalini's testimony was that the daughters were concerned not only about the pain that their mother suffered when she over-exerted herself, but also because she gets lost. "She was really sharp before the accident", said Shalini, "but now she gets lost."

Since moving to join her husband in Fort McMurray, Mrs. Kolapully has, according to her daughter, resumed housekeeping, but instead of preparing complicated dishes, heats food in the microwave. "She does everything, but a lot slower now.... If she works too hard, she may have to spend the whole next day in bed."

Finances

Mrs. Kolapully testified that, with her husband frequently absent for extended periods of time, her tasks included banking, paying bills and managing family finances. After the accident, her husband had to take over the family finances. Now that she is living with her husband in Fort McMurray, he continues to manage the couple's finances.

Social and Family Relationships

Both Mrs. Kolapully and Shalini testified that mother and her two daughters were very close. When her husband was at home, Mrs. Kolapully considered that the couple had a good relationship. She testified that as a new immigrant she was eager to learn about her new community and to take part in it. With her younger daughter in high school her intention was to find a job. The Enhanced English language class helped her learn about Canadian life and to prepare her to look for work. Volunteering at the seniors' residence was a way to be part of the community and to gain confidence when seeking employment.

Shalini described her mother before the accident as an active, social person, wanting to maintain connections with India and eager to participate in her new community in Canada. Her mother was active in the parent-teacher association at her school and encouraged her to do well at school. Her mother knew all Shalini's friends, frequently inviting them to their home. She was also getting to know other people in their apartment building and meeting other people from the same area of India.

Since the accident, according to Shalini's account, she shares less with her mother. "After the accident, it's mostly about her. I don't tell her much about my problems anymore; she just gets stressed out. Dad takes care of things now instead of Mom." Her mother also no longer goes to the community centre and doesn't keep in contact with people she had met there. "After the accident, family and friends came and brought food, but now they think she is okay and she avoids them to avoid their questions." Now in Fort McMurray, Mrs. Kolapully has lost her interest in making new friends and is, in the words of Dr. Becker, "Limited in her ability to interact with friends... due to pain and associated difficulties."⁹

⁹ Exhibit 5, p. 8.

Shalini described the change in her mother after the accident. She said her mother loathed herself. She encouraged her mother to get counselling after a suicide attempt in 2015. “Before that,” she said, “we just thought her bad mood was because of pain.” She testified that she cannot think of her mother enjoying things now. She used to bake for the family or visitors but has stopped baking now and has no more contact with these people. Before the accident, it was Mom who took care of Dad. Now it is the reverse, and the two sisters manage their own affairs.

Personal Care

Prior to the accident, said the Applicant, she had enjoyed styling her hair and wearing makeup and looking smart. Since the accident, she stated that she lacks both motivation and energy to take interest in her personal appearance. She has lost interest in her personal appearance and in shopping for herself, her daughters and her husband.

Exercise and Sleep

Up until the accident, Mrs. Kolapully had no unusual physical limitations or sleep problems. She was an avid walker and practiced yoga regularly, both for exercise and as part of her religious practices. Afterward, her leg injuries limited her mobility and she went from immobility and casts and crutches to walking unaided, but still with pain. The immobility caused by her injuries required CCAC¹⁰ personal support care for two months. Continuing pain still limits her walking. In the years since the accident, her lack of exercise has contributed to weight fluctuations. She is no longer able to take the long walks she previously enjoyed.

Aside from her physical injuries and the impairments they caused, the Applicant testified that she also suffers from disturbed sleep, with nightmares, frequent waking and chronic worrying. This results in chronic fatigue and low morale. She mentioned having wet the bed on one occasion. Her daughter Shalini reported that her mother was often up very late at night, and complained of difficulty sleeping. In the morning she tried to be awake before her daughters left, but sometimes would sleep through the morning or at odd times during the day.

¹⁰ Community Care Access Centre of Ontario

In 2015, roughly a year after moving to Fort McMurray, Mrs. Kolapully overdosed on her anti-depressant medication, was taken to hospital and admitted to the psychiatric ward. Her testimony was ambiguous as to whether this incident was an attempt at suicide or a medication error, but she admitted telling two different versions of the incident, and said that she was referred to a therapist for twelve counselling sessions.

Religious Practices

Mrs. Kolapully testified that practicing her religion was a very important part of her life; she would attend Temple on her own during the week, and with her daughters on weekends. Her daughter Shalini said that her mother attended Temple at least once a week for a daily prayer group. The group's practice included deep bowing and sitting cross-legged on the floor, usually for 45 minutes to an hour at a time. Since the accident, the Applicant testified that she cannot perform the yoga poses or sit on the floor as she did prior to the accident. Her yoga is thus now limited to breathing exercises and chanting.

After the accident, the Applicant returned to Temple on a much less frequent basis. According to Shalini, "Mom doesn't go to Temple as often now. We would walk in and spend five minutes there. She doesn't want to sit on a chair because only old people sit there."

Transportation

Mrs. Kolapully did not drive a car, but prior to the accident would get around the neighbourhood either on foot or by public transit which she used regularly. She testified that she sometimes gets lost or confused due to cognitive difficulties, feels guilty having to take a seat from an elderly or visibly disabled person, and feels "so my anxiety [sic] as a pedestrian."¹¹

Hobbies

¹¹ Exhibit 5, p. 8.

The Applicant testified that prior to the accident she was an avid walker. Her daughter confirmed this, saying that at times she used to struggle to keep pace with her mother. Now her mother walks slowly and carefully.

Mrs. Kolapully also stated that prior to the accident she read a great deal for enjoyment. Her daughter's testimony was that her mother had loved to read all kinds of stories, both fiction and non-fiction, but especially inspirational stories about life changes. She has returned to reading but no longer derives the same pleasure from it, tending to read "dark stories", according to Shalini. She no longer goes to the library on her own, relying on her husband to accompany her. She has no interest in going to the community centre in Fort McMurray.

Cooking and baking have been severely curtailed, as noted above.

Shalini testified that right after the accident her mother seemed to be in shock for about two months. She didn't know what was happening and didn't remember. She described her mother's situation as "starting all over again". But she "never got back" to what she was before.

The demeanour of the Applicant during her testimony merits some comment. During her testimony, which extended over parts of two days, her attitude vacillated between lassitude, to the point of apparent disinterest in the proceedings, and extreme confusion, frustration and irritability when she was pressed to remember details. She provided conflicting answers on many occasions, which made it difficult to assess which of her responses were accurate and which were either unsuccessful attempts at remembering, or simply guesses or fabrications in response to questions by her own counsel or counsel for TTC.

Medical Evidence

The Applicant relied on information from Dr. Mark Gonneau, a chiropractor. Dr. Gonneau's Disability Certificate (OCF-3) to TTC on June 12, 2012, outlined the Applicant's injuries, including an open fracture of the lower end of the left tibia and fibula and a concussion with moderate loss of consciousness without an interactive cranial wound.¹² In October 2012, Dr.

¹² Exhibit 13, R. Brief, Tab 10B, p. 274-277.

Errol Sue-A-Quan confirmed the diagnosis of a left medial malleolar fracture requiring surgery and internal fixation, soft tissue injuries to the right leg and strain of the left knee. He noted limited strength and mobility due to residual symptoms of her injuries.¹³

Following the removal of her casts in June 2012, the notes of her family doctor, Dr. Robin Pinto, indicate that Mrs. Kolapully's fractures were healing well, but she continued to experience pain in the left leg, where her injuries were more serious, according to one clinical record dated June 21, 2012.¹⁴ Dr. Pinto observed in November 2012 that Mrs. Kolapully suffered from severe bilateral knee pain, aggravated by standing.¹⁵ In September and October 2013, despite generally good recovery, Mrs. Kolapully continued to experience pain in her left knee, and underwent surgery for a meniscal tear. Medical records from Dr. Pinto¹⁶ and her orthopaedic surgeon, Dr. Jason Smith, in November 2013 and January 2014,¹⁷ record that the Applicant was still suffering from pain including arthritis; various treatment alternatives were considered.

Dr. Gilman, the neuropsychologist who provided the three assessments of October 24, 2012 which are in issue in this Arbitration, presented his evidence at the Hearing in part via a video presentation. He noted that the accident's impact caused facial injuries, the Applicant suffered from an interrupted degree of awareness following the accident, was in hospital for nine days, and required a blood transfusion. Mrs. Kolapully presented symptoms of headache, fatigue, weakness, and attention and memory deficits when Dr. Gilman saw her in January 2013. He classified her on the Glasgow scale as 13-15. A score of 15 is fully conscious whereas score of 1.5 is comatose. Thus, there was a mild impairment to the Applicant's awareness.

At the Hearing, Dr. Gilman explained that the impact to the Applicant's head had caused microscopic injuries, vascular contusions in the brain. These injuries are so tiny as to be invisible by x-ray or CT scans, but are nevertheless real. He stated that in 85% of cases the situation resolves but 15% of patients have residual impairments which can be disabling. Neuro-

¹³ R. Brief, Vol. 1, Tab 10C, p. 282.

¹⁴ Exhibit 7, R. Brief, p. 109.

¹⁵ R. Brief, Vol. 1, Tab 5B, p. 51.

¹⁶ R. Brief, Vol. 1, Tab 5C, p. 62.

¹⁷ R. Brief, Vol. 1, Tab 7B, p 97-102.

psychological evaluations can identify a Total Brain Injury Score (“TBIS”) to see if there is cerebral compromise. Dr. Gilman found the Applicant’s TBIS to be 43, equivalent to moderate brain injury. According to Dr. Gilman, Mrs. Kolapully is unlucky to be among the “miserable minority”, the 15% of patients who have residual effects and ongoing symptoms long after they would expect to have healed. He noted in his oral testimony that Dr. Ladowsky-Brooks got the same results regarding working memory and divided attention, but did not use a TBIS. When questioned about Mrs. Kolapully’s memory problems, Dr. Gilman referred to the psychometric report¹⁸ which disclosed losses in both visual working memory and perceptive reasoning. He also explained that some people may appear to exaggerate their symptoms while in fact the honest exaggeration may be the result of a visceral response, where fear and anxiety produce an autonomic reaction. It can be difficult to tell whether a person who appears to be malingering is feigning symptoms or is having a visceral reaction. Dr. Gilman also testified that the Applicant has a language disorder, a difficulty in naming things. Testing showed that she knew certain words but could not retrieve them. Her score on this test was -2, where a score of -1.5 is impaired and a score of -3 is very impaired. The only practically available treatments in Canada are speech therapy and occupational therapy.

In March 2013, one year post-accident, Dr. Pinto again saw the Applicant for knee pain, prescribed Advil, and sent a message to a colleague requesting an early orthopaedic appointment.¹⁹ In the same month, Dr. Gilman noted a mild to moderate neurocognitive impairment in neuropsychological functioning, which he said would prevent Mrs. Kolapully from seeking employment. He also found reduced stress tolerance which would augment her accident-related pain complaints and related levels of anxiety and depression.²⁰

In November 2013, Dr. Pinto saw the Applicant, and observed that the operation incision had healed without swelling or tenderness. The Applicant had a full range of motion and good tone

¹⁸ Exhibit 20, R. Brief, Vol. 1, Tab 12A.

¹⁹ R. Brief, Vol. 1, Tab5B, p. 50.

²⁰ Exhibit 40, p. 533.

and resistance. The knee pain continued, however, and he ordered blood work and recommended physiotherapy.²¹

In December of 2013, Dr. Getahun, in his orthopaedic evaluation, agreed that the Applicant's injuries significantly restricted her competitiveness in the workforce, noting that there was a significant risk of future surgical intervention and the development of posttraumatic osteoarthritis in the left knee. Under "Impression and Opinion", he noted that the Applicant's injuries also render her substantially unable to perform the essential tasks of her pre-accident housekeeping. He also noted anxiety, depression and sleep deprivation post-accident.²²

Dr. Pinto saw the Applicant again on March 15, 2014. The reason for her visit was listed as "anxiety." Dr. Pinto noted that the Applicant had a pending appointment with an orthopaedist for a possible cortisone shot. She complained of anxiety, feeling useless, and decreased energy, but said she was not depressed.²³

In August of 2014, over two years post-accident, Dr. Pinto's clinical notes report that Mrs. Kolapully appeared fatigued and in a low mood, and indicated that she felt hopeless. Dr. Pinto diagnosed the Applicant with chronic pain and depression.

The following month, in September 2014, Dr. Grace Gronkowska, a psychologist specialising in rehabilitation and cognitive behaviour, reported a score on the Beck Depression Inventory of 43, corresponding to the 98th percentile of perceived disability scores of individuals with persistent pain conditions. She referred to the Applicant's inability to recall the accident, feelings of estrangement from others and restricted range of affect, as well as a sense of foreshortened future. Also noted were irregular sleep, irritability, difficulty concentrating, hypervigilance, and exaggerated startle response. In the view of Dr. Gronkowska, these disturbances cause clinically significant distress and impairment to her functioning level. She diagnosed a major depressive disorder of moderate severity, and a pain disorder associated with psychological factor and a

²¹ R. Brief, Vol. 1, Tab 5C, p. 62.

²² R. Brief, Vol. 2, Tab 13, p. 533.

²³ R. Brief, Vol. 1, Tab 5C, p. 62.

general medical condition, concluding that the Applicant's significant distress and impairment in social and occupational functioning were inhibiting her rehabilitation and adjustment, noting that pain focus and fear of reinjury have been shown to be associated with poor rehabilitation outcome. She recommended treatment including psychotherapy, sleep techniques, and pain management to reduce pain or pain experience.²⁴

In October 2014, Dr. Sangha, a physiatrist, did an evaluation and also noted hypertonicity in the right upper trapezius, with guarding to the right lumbosacral paraspinals, with asymmetric motion loss. He concluded that the Applicant had a whole person physical impairment of between 7 and 20%.²⁵ Also in October 2014, Dr. Becker diagnosed the Applicant with Major Depressive Disorder, Pain Disorder and Generalized Anxiety. In her opinion, the accident materially contributed to Mrs. Kolapully's impaired function. Dr. Becker reported that the Applicant's ability and willingness to engage in self-care, housework, work, social and recreational activities is compromised by accident-related pain, anxiety, depressive symptomology, and cognitive difficulties. She also related the Applicant's diminished libido to psychological factors. Dr. Becker also reported that psychological factors were affecting Mrs. Kolapully's ability to sustain focus attention and persist with tasks.²⁶ She elaborated further under cross-examination, stating that the pain disorder combines both the physical pain and maladaptive thoughts about that pain, which in turn would trigger more pain, fear of re-injuring herself and avoidance of activity. These fears impact her functioning and contribute to her withdrawal behaviours. Dr. Becker endorsed the findings of other specialists whose reports she had read prior to reaching her own conclusions. In particular, she mentioned Dr. Paitich's observation that the Applicant had withdrawn from activities of daily living, even though she is physically capable of performing these activities. She also referred to Dr. Ladowsky-Brooks' note that the Applicant had told her, "If I hurt myself again the doctors can't fix it." Dr. Becker said that she agreed with other assessors who had reported that the Applicant's family is responsible for heavy household chores such as grocery shopping, laundry, and major cleaning, and that Mrs. Kolapully is not interested in making friends, her relationship with her husband has deteriorated, and that psychological symptoms were having an

²⁴ R. Brief, Vol. 2, Tab 14, p. 543.

²⁵ A. Brief, Vol. 1, Tab 18, p. 5.

²⁶ Exhibit 5, p. 8-9.

impact on her ability and willingness to interact with others. According to Dr. Becker's report, the Applicant's ability and willingness to work have been compromised by accident-related pain, fear of pain and sustaining further harm, a perceived inability to cope with pain, anxiety, depressive symptomology, and cognitive difficulties.²⁷

Dr. Becker said that from a psychological perspective (as opposed to a legal one), at the time of the assessment, she thought the Applicant did meet the test for non-earner benefits. She described the Applicant's current symptomology as depression, anxiety, pain, and cognitive difficulties. She acknowledged that in psychometric testing language or cultural factors may have impacted upon the Applicant's performance. Based on the information she gathered herself, including the Applicant's self-reporting, her own clinical observations, psychological test results, a review of the medical brief, and a consultation with Dr. Sangha, Dr. Becker diagnosed a major depressive disorder, a pain disorder associated with both psychological factors and general medical condition, and generalized anxiety disorder. She noted that Mrs. Kolapully is also reporting panic attacks. In her conclusion she wrote:

It appears reasonable to conclude that the subject accident has materially contributed to current psychological symptoms and associated impairments and functioning. It should, however, be noted that reported difficulties integrating into a new community would have made her more vulnerable to the deleterious effects of the subject accident. With respect to mental and behavioural impairments, Mrs. Kolapully's condition may not be stable...

Dr. Becker recommended psychological treatment, noting that Mrs. Kolapully seemed interested in this type of treatment. Dr. Becker spoke of the Applicant's post-accident functioning, noting that she had not returned to volunteering, did not go to work because of fatigue, cognitive difficulties, low self-esteem, etc. She seemed unwilling to engage in household chores, fearing to reinjure herself. In evaluating a person's engagement in the activities of a normal life Dr. Becker emphasized that not only must the person *do* an activity but *be engaged in* it. If a person can only

²⁷ Exhibit 5, p. 8.

do an activity with great pain, that person cannot be seen to be “engaging”. Depression, fear and anxiety, pain disorder, and cognitive problems which became noticeable one year post-accident, impact the quality of the Applicant’s activities, and bring about changes in the quality of her relationships which then brings about decreased stress tolerance. Thus, the Applicant’s impairments showed at the high-end regarding daily living and adaptation. At the Hearing Dr. Becker commented on Dr. Gerber’s report including the suicide attempt of June 2015, noting that his measurements of impairment were higher, which is consistent with the Applicant getting worse, and that there was no indication of any return to activities. In assessing the credibility of a subject, Dr. Becker said that the psychological tests have validity indicators and there were no concerns regarding the Applicant’s credibility, which was consistent over time. Dr. Becker’s report is particularly valuable as she examined the Applicant as an independent assessor at the request of TTC, and appeared to have an excellent grasp of the various evidence and opinions on which she had based her evaluation.

In late October of 2014, Mrs. Kolapully had moved to Fort McMurray, Alberta to join her husband. In November 2014 she visited Dr. Akinjise, her new family doctor, who assessed her with anxiety. He saw her again in January to discuss laboratory results and “empty nest syndrome”. In April she questioned her doctor about fibromyalgia. He prescribed low-dose amitriptyline and in May confirmed the fibromyalgia diagnosis.

In June 2015, the incident of the overdose took place. Hospital records note that the patient denied trying to kill herself and had made a mistake with her medications in the dark. The Applicant returned to the family doctor in July and August again with anxiety and depressed feelings. She saw her family doctor in August and September regarding unrelated complaints but returned in November with persistent anxiety. Other medical records from Fort McMurray appear to be for unrelated complaints.

In April of 2016 Dr. Lionel Gerber, a psychiatrist, assessed the Applicant in connection with her claim of catastrophic impairment. In his view, she met the criteria for a chronic pain disorder associated with psychological factors and a medical condition, a chronic severe major depressive

disorder and a phobia of crossing the street. He also suspected a cognitive disorder and personality changes associated with mild traumatic brain injury. He classified the Applicant as catastrophically impaired, having met the criteria for a Class 4 determination in three of the four categories, with at least moderate and possibly marked impairment in the fourth.²⁸

The Evidence on Behalf of TTC

Unsurprisingly, the evidence presented on behalf of TTC paints a rather different picture. The Respondent argues that the Applicant cannot demonstrate that she is unable to engage in substantially all of the activities she engaged in prior to the accident and that contemporaneous medical records and surveillance do not support her allegations. On behalf of TTC, Ms. Birioukova, occupational therapist, and Dr. Ricki Ladowsky-Brooks, psychologist, testified at the hearing, as did Dr. Bruce Paitich, orthopaedic surgeon. Mr. Vincent Luk, TTC accident benefit adjuster responsible for administering the Applicant's claims, attended, with surveillance video recordings.

Dr. Paitich saw the Applicant and her husband in October 2012. In his physical examination of the Applicant which lasted about an hour, he found her gait normal but reduced stance with no lurch or ataxia. The left leg was slightly atrophied but other than that she looked "pretty normal". As to functional ability, she reported that it takes her longer to do everything than before and that she can do light chores like dishes, but not laundry or cleaning the bathtub.

In his report Dr. Paitich remarked,

In my experience, individuals with these types of fractures will typically show progressive symptom resolution over the course of up to two years. Of the expected symptom improvement subsequent to an ankle fracture 80% will occur during the first six months, a further 15% improvement is then expected between six months and one year after the injury and some incremental (5%) improvement may then occur

²⁸ Exhibit 47, A. Brief, Vol. 1, Tab 21.

between one and two years after the date of the injury. Discomfort that exists beyond two years is unlikely to completely resolve.

Dr. Paitich found that the Applicant's self-reported level of function was not consistent with her diagnosis nor with the duration of the time that has elapsed since the injury. He was of the opinion that the Applicant did not suffer a complete inability to carry on a normal life as a result of the accident.²⁹

Ms. Birioukova, an occupational therapist who assessed the Applicant,³⁰ testified that Mrs. Kolapully complained of lower back and posterior left leg pain and stiffness, right upper arm pain, bilateral knee pain, discomfort and crepitus, left ankle pain at her surgery site, and frustration and irritability. Ms. Birioukova found the Applicant to have a full range of movement, sitting tolerance (with legs raised on the couch) of 60 minutes, sustained standing walking tolerance of 20 minutes, decreased but functional gait and balance, limited ability to squat, inability to kneel, and ability to lift a 3-pound weight. On cross-examination Ms. Birioukova said that lifting a 4-pound weight is enough for 90% of most normal daily tasks. She had no problems with personal care, or medications. Mrs. Kolapully demonstrated good effort during the testing but complained of pain in her arm and back which was aggravated by the end of the assessment. She demonstrated reduced activity tolerance for heavy physical activities such as cleaning the bathtub, and those requiring long walking. Ms. Birioukova acknowledged that not having a pre-accident baseline made it impossible for her to compare pre- and post-accident function, she could not give an opinion as to any change in of the quality of the tasks completed by the Applicant, but could only observe where the Applicant did or did not presently have difficulties.

Mr. Vincent Luk is a certified kinesiologist who has been working for approximately 12 years with TTC as an accident benefits adjuster. He has been responsible for the administration of the Applicant's claim since receiving a Disability Certificate dated March 16, 2012 from Dr. Thompson. Referring to Dr. Thompson's opinion that the Applicant was not suffering a complete inability to carry on a normal life, Mr. Luk wrote to Applicant's counsel on April 26, 2012 to say

²⁹ Exhibit 14, R. Brief, Vol. 1, Tab 11B, p. 349-350.

³⁰ Exhibit 25, R. Brief, Vol. 1, Tab 11C.

the Applicant was not eligible for non-earner benefits. On June 26, 2012 he partially approved an OCF-18 submitted by Dr. Gonneau for physical rehabilitation and massage. Of the claim for \$5541.20, representing eight weeks of treatment, he approved the amount of \$2965.00 plus tax. At the hearing Mr. Luk testified that he spoke by telephone to Dr. Gonneau and they agreed that the massage would be reduced from 24 to 12 sessions and the rehabilitation sessions from 30 to 15. He testified that his reason for speaking with Dr. Gonneau was that he wanted to make sure the treatment was working, and of benefit to the client before approving more sessions. Mr. Luk did approve more rehabilitation sessions but not until October, and again in January 2013, so it does appear that there may have been a gap in treatment during August and September. Although her orthopaedic surgeon, Dr. Thompson, had not reported a complete inability to carry on activities, Dr. Gonneau made it clear the Applicant was suffering, and this triggered an independent examination in October 2013. Based on the findings of Dr. Paitich, Ms. Birioukova and Dr. Ladowsky-Brooks from Seiden Health, Mr. Luk wrote to the Applicant's counsel that non-earner benefits would be stopped as of November 19, 2012, but did send her the sum of \$2035.00 to cover non-earner benefits from September 4, 2012 (26 weeks post-accident) to November 19, 2012. Mr. Luk said he stopped the non-earner benefits because the independent examination doctor found that the Applicant did not suffer from a complete inability to carry on a normal life.

Mr. Luk also identified several segments of surveillance video including three segments showing the Applicant on three occasions, walking on the street, crossing a road, shopping for grocery items and pulling a wheeled grocery cart. In the first video dated June 30, 2012, nine days after her casts were removed, Mrs. Kolapully was observed leaving her home. She appeared to walk with a limp. The limp was less evident or not evident in subsequent video clips.

Dr. Ladowsky-Brooks, a clinical neuropsychologist, assessed the Applicant on October 24, 2012. She observed in her report that the Applicant when asked about memory difficulties did not report anything specific but stated that her daughter finds her to be confused. The Applicant's husband, who attended the interview, did not report any memory difficulties but said her main problem is anxiety. She did not appear depressed, but was worried that she wouldn't recover; she also

worried about crossing the street, about being reinjured, about leg pain that would get worse and could become a lifelong problem, with arthritis. She also mentioned arm pain and that her back started to hurt after she carried weights in an examination.

At the hearing Dr. Ladowsky-Brooks said that she assessed the Applicant fairly soon after the accident, so did not comment regarding social interactions. She observed that the Applicant performed in the average range of intellectual functioning but one neuropsychological test was below expectation. Having heard from Mrs. Kolapully that a CT scan after the accident was presumably normal, the doctor noted it was unlikely that cognitive deficits resulted from the accident. She formed the opinion that the Applicant, from a neuropsychological perspective, did not suffer from a complete inability to carry on a normal life. Nevertheless Dr. Ladowsky-Brooks recommended that the Applicant return for follow-up testing in six months including a CT or MRI scan, as no radiological investigation was found in the file information. She noted that Mrs. Kolapully showed no sign of depression, but indicated symptoms of depression on a questionnaire and seemed to experience anxiety which might require intervention. She wrote to the Insurer, “this needs to be further investigated with a thorough psychological assessment.”³¹

The Insurer did not send the Applicant back to Seiden Health until 2015, and at that time it was for a new independent examination concerning a new claim. In April of 2015, professionals from Seiden Health re-examined Mrs. Kolapully and her medical records in the context of her catastrophic impairment claim.³² Ms. Hadassah Lebovic, an occupational therapist, was of the opinion that Mrs. Kolapully has the functional capacity to manage her activities of daily living independently and safely. Although the independent examiners acknowledged physical and psychological deficits, the consensus of their opinions was that the Applicant did not meet the *SABS* criteria for catastrophic impairment. Neuropsychologist Dr. Watson said in his report, “[g]iven the amount of time that has passed, a greater degree of recovery would have occurred, which suggests psychological, physical or motivational/validity factors may be a contributing factor in this case.”

³¹ Exhibit 35, R. Brief, Vol. 1, Tab 11D .

³² A. Brief, Vol. 1, Tab11 (unpaginated); Report of the first Seiden examination is at R. Brief, Vol. 1, Tab

Dr. Paitich, the orthopaedic surgeon who had first examined the Applicant in October 2012 at the request of the Insurer, attended the Hearing at the request of the Applicant. In his report after that examination, he confirmed the left leg fractures as well as a right leg undisplaced fracture, noting that instability could develop. In his report, he had noted evidence of impairment in the functioning of the lower left leg. He also commented, "I suspect that this lady's failure to return to her pre-accident activities... is predominantly related to fear that she will aggravate her symptomology or reinjure herself."³³

Dr. Paitich saw the Applicant in July of 2016. He found Mrs. Kolapully's whole person impairment from a purely orthopaedic point of view, well below the *SABS* requirement. He noted that the Applicant's symptomology had appeared one year post-accident, an observation strangely at odds with her medical history which clearly shows persistent continuing pain from the date of the accident.

The catastrophic impairment assessment is of course not the question for this Arbitration and indeed is currently being adjudicated elsewhere at the time of writing this award. The evaluation of an Applicant in an assessment for catastrophic impairment, although connected factually, is a different test, with different criteria from the test for non-earner benefits. Nevertheless, the evidence of the assessments is useful to consider in the present case.

TTC questions the veracity of the Applicant, referring to her complicity in allowing false submissions as to attendant care to be advanced by her former counsel, a claim which was later withdrawn when she retained new counsel. According to TTC, the fact that the Applicant remained silent in the knowledge that her counsel was advancing a fraudulent claim on her behalf raises a serious question as to the credibility of not only the Applicant, but of also of her daughter who supported her mother's evidence.

³³ Exhibit 14, p. 348-350.

TTC set out instances from the transcript of the LAT hearing (on the issue of catastrophic impairment) which took place five or six weeks prior to the Hearing of this Arbitration. From the transcript, according to TTC, the Applicant's testimony was inconsistent and arguably false. TTC did admit that, ostensibly on the instructions of her then counsel, she told the orthopaedic surgeon, Dr. Paitich, in October of 2012 that she continued to get regular assistance from a caregiver three times a week for an hour or two per visit. At the Hearing of this Arbitration she testified that she had a friend who would regularly come once a week, bringing food every time. Counsel for TTC pointed out that in June of 2012, occupational therapist Jeff Wan noted that "The claimant reports that she continues to require assistance with meal preparation and requires supervision for bathing. The claimant reported that a friend provided assistance with meal preparation daily at this time." The Applicant conceded at the Hearing that the friend, "[w]as not coming daily at the time, no. I had friends to give food." Referring to Dr. Paitich's report, when counsel for TTC asked her if she had stated that she continued to receive housekeeping assistance three days per week one or two hours per visit in October 2012, the Applicant responded, "I don't remember now. I don't even remember the doctor." Upon further examination, the Applicant agreed that she did remember meeting Dr. Paitich and telling him that she was receiving housekeeping assistance three times daily per week one or two hours per visit. She said, "Yes, that was the thing that lawyer told me. I said I couldn't say, I won't say it. She said you must. I was trusting her.... I trusted my lawyer."

Counsel for TTC also pointed out that the Applicant seemed to have great difficulty in remembering a number of things. For example, she did not remember whether she stopped working after the birth of her first child, or if she had complained of memory problems after the accident, or whether she complained about back or neck pain. Nor did she remember if the physiotherapy in June of 2012 was for complaints only in her legs. Perhaps more surprisingly, neither the Applicant nor her daughter remembered whether she had gone to India alone in the summer of 2012, a few months after the accident. At one point, the Applicant turned to the Arbitrator stating, "The truth is, ma'am, I don't remember anything from past."³⁴ Several of the incidents mentioned by TTC's counsel may well have been due to language difficulties

³⁴ Hearing transcript, p. 90.

experienced by the Applicant. For example, therapist Amy O'Reilly reported that the Applicant believed she had an undiagnosed learning disability in childhood. Counsel for TTC asked the Applicant if that was correct and the Applicant replied,

She asked me about how your childhood was. Did you have any problem in childhood?... So I had to tell, like my parents' expectations were high, so I think like I could have done more. I remember saying that statement to her. I don't know what she wrote over there, because I didn't check what she wrote.... She asked any embarrassment or different, difficult was your childhood. So I think I said my parents were expecting too much from me, like in my studies. And in India it's like every child, every mother thinks, every father thinks every child would get first right? And I was not getting that way, so it made me feel low, I think, I said nowadays they are saying slow learning. Maybe it was that. I never dropped out of the school or failed out of school to prove that statement.³⁵

TTC also takes issue with the Applicant's claim that she avoids crossing the street and is fearful and extremely cautious in crossing the street. Surveillance evidence showed the Applicant crossing the street at mid-block, pulling a shopping cart, as cars passed by.

There is no disagreement regarding the fact that she took flights alone from Toronto to Fort McMurray and back, although her daughter accompanied her to the airport to assist her with luggage. TTC characterized the attitude of the Applicant as defensive and contradictory as she reviewed and commented on surveillance videos.

Speaking about a grocery store which she agreed might be one kilometre from her house, when asked if she could walk there to do grocery shopping, she testified, "I don't know. You think. I don't think.... I don't remember." She did however agree that she had walked to a shop located about 1.3 km from her house, purchased a small amount of groceries and then walked back to the house. When asked to admit that she was capable of walking 3.5 km, she answered that she disagreed; she had pain. The video surveillance appeared to show her walking a total distance of

³⁵ Hearing transcript, p. 69.

approximately 2.6 km (not 3.5 km) and picking up some groceries, in 69 minutes. The time stamp on the video showed her leaving the house at 10:02 and returning at 11:11. When shown the surveillance video, she agreed that she had picked up small quantities of food. She denied however doing major shopping or making complicated meals for her daughters, pointing out that the next part of the video showed her buying cooked food from the store. She agreed with counsel for TTC, under cross-examination, that her daughters were in exams and very busy at this time, that she had asked them to collect the food and they were not ready, so [she] had to go out and get food.

The Applicant's answers at the Hearing with respect to her drug overdose in June 2015 were inconsistent. She apparently took about 15 amitriptyline pills in an attempt to end her life, but agreed that a few days later she might have told a hospital nurse that the overdose was accidental, that she had mistaken the amitriptyline pills for glucosamine. In answer to Counsel's question she said, "Yes. I was embarrassed. I just want to get out of the -- in the ward."³⁶

Analysis

TTC submits that the Applicant is untruthful, prone to exaggeration, or simply does not remember elements critical to her case. TTC characterizes the evidence of the Applicant as "clearly self-serving, unreliable and tainted."³⁷ TTC in its closing argument urged that the Tribunal consider the treatment records as the only truly reliable evidence in this case, and suggests that the Tribunal question her exaggerated accounts of disability reported to assessors since the accident, and consequently the reliance of the experts on her subjective reporting in reaching their diagnoses and conclusions. TTC further urges that the three diagnoses which together would prevent the Applicant from carrying on her pre-accident activities - ongoing neurological deficits, chronic pain and dysfunction, and depression - are not supported by the evidence.

I do not consider the suicide incident a reliable indication of the Applicant's general veracity or lack thereof. It is quite understandable that in an attempt to get out of a psychiatric ward where

³⁶ Hearing transcript, p. 57-58.

³⁷ Written (post-hearing) Submissions of TTC, p. 3. Section 53 of the *SABS* allows an insurer to terminate benefits if the Applicant has wilfully misrepresented material facts with respect to the application; I note that TTC made no attempt to pursue this avenue.

she felt uncomfortable and embarrassed, she would change her story to deny suicidal ideation. However, there are other problems with the Applicant's veracity. Her silence regarding the false claim for attendant care – even accepting that it was advanced by an unscrupulous counsel – does detract from Mrs. Kolapully's credibility, as do her admittedly serious memory problems and difficulty focusing on questions.

She appeared defensive and frustrated under cross-examination when challenged to remember events, feelings, and conversations which took place up to five years ago. It is entirely possible that her memory has faded, because of lapsed time or cognitive degeneration, or both. Even a person with a good memory might well experience difficulty in keeping straight the memories of multiple conversations with more than a dozen doctors over a period of five years. An unsophisticated person such as the Applicant, who is clearly less than comfortable in the English language, and who is mystified and frustrated at her own lack of physical progress, might well blurt out ill considered, exaggerated or incomplete responses or refuse to focus on providing an accurate recollection of the details of her life. This does not necessarily render the evidence of the Applicant false, but it does make it somewhat unreliable, reducing the weight that can be attached to it.

This makes it difficult to compare Mrs. Kolapully's pre-accident and post-accident activities and the quality of her participation in them. I am convinced that she has suffered real impairments which prevent her, to some extent, from enjoying activities in which she engaged before the accident. There is ample evidence of depression, both from medical records on both sides and from the Applicant's aspect at the Hearing. Doctors agree that depression exacerbates her symptoms. The question then is whether the extent of those impairments is sufficient to have resulted in a complete inability to carry on a normal life.

As suggested by counsel for TTC, the most reliable source to seek an answer is in the medical records. TTC cautions that the opinions of the medical examiners, informed at least partially by the Applicant's related symptoms, are open to question. While recognising this, I also note that the doctors did their own testing, including tests which would have revealed over-reporting or

exaggeration of symptoms³⁸ before arriving at their conclusions. Although some medical reports have commented that her complaints do not seem to match her physical condition, no one other than TTC has suggested that the Applicant is feigning or consciously exaggerating her complaints. In coming to a conclusion, I have relied particularly on the medical notes and reports, and the testimony of the medical professionals from both sides, and tended to give weight to the Applicant's testimony where it is supported by either her daughter or the doctors' observations, or both.

I find that, although residual, her physical pain from the accident should by now be a distant memory. However, her failure to recover normally has provoked a depressive state which in turn results in a severe curtailment of her enjoyment of life. But for a sudden unexpected impact on March 16, 2012, she would most probably have continued with her plans to find a job and build a new life in Canada. The Applicant has lost that normal life, and found herself in a miserable life as a social recluse without hope of anything better.

After careful consideration of the evidence I have reached the conclusion that the Applicant has discharged the burden of proving she is unable to carry on a normal life as a result of impairments flowing from the accident. I therefore find that she meets the requirements of the *SABS* and is entitled to receive non-earner benefits from November 19, 2012 to date, and ongoing.

2. Is Mrs. Kolapully entitled to receive a medical benefit in the amount of \$4090.61 for a treatment plan provided by Scarborough Physio dated June 21, 2012?

It is the Applicant's position that the Insurer is obliged by section 38 of the *SABS* to provide a medical reason for a denial of treatment. With respect, this is not a completely accurate statement, as section 38(14) states, in relevant part:

Within 10 business days after receiving the report, the insurer shall,

- (a) provide the insured person with a notice indicating the goods and services described in the treatment plan that the insurer agrees to pay for, the goods and services the insurer refuses

³⁸ Exhibit 20, Tab 12B, p. 512.

to pay for and the medical and any other reasons (emphasis added) for the insurer's decision...

The Applicant alleges that Mr. Luk, TTC adjuster, confirmed at the Hearing that he had in June 2012 partially denied a claim for massage and rehabilitation treatments without a medical reason, approving only half of the massage and rehabilitation treatments claimed. He did this after consulting with the medical professional who had signed the treatment plan. He explained at the Hearing that he preferred to try a shorter course of treatment initially, to see if it was really benefitting the insured, and for that reason had agreed with Dr. Gonneau to approve half of the massage and rehabilitation sessions, which would appear to reduce their duration from 8 to 4 weeks.

I consider this a valid reason, although it is not wholly medical, but also administrative. Mr. Luk, as a trained kinesiologist, would have wanted to know if the treatment was yielding results before committing to 8 weeks' treatment. This is a reasonable view, both medically and from a business point of view. However, it is unclear from the evidence if other treatments during the remaining four-week period were covered. The next related OCF-18 in the record was a treatment plan, a single rehabilitation assessment and treatment of September 17, 2012 which was denied, but which is not at issue here. The next OCF-18, dated October 1, 2012, also for rehabilitation, in the amount of \$2476.30, was approved in full by Mr. Luk.³⁹ Until the Hearing there was no explanation in the record for the denial. It seems that he was willing to pay for rehabilitation but not for massage and physiotherapy. Given the clear evidence that the Applicant was continuing to suffer pain, she should have had access to relief, and I therefore find that the Applicant is entitled to payment of the full amount, less any amounts which TTC may already have paid to cover similar treatments for the period between the end of August when the initial four weeks would have ended, and October, when the next treatment plan in the record was approved.

3. Is Mrs. Kolapully entitled to payments for the cost of examinations for three neuropsychological examinations, all dated October 24, 2012, provided by Dr. Gilman of Oshawa Physio in the total amount of \$6827.76?

³⁹ A. Brief, Vol. 2, Tab 26.

Section 25(1)(3) of the *SABS* provides that an insurer is to pay for assessments that are deemed payable under the *SABS*, including reasonable fees charged by a health practitioner for reviewing and approving a treatment and assessment plan under Section 38, “including any assessment or examination necessary for that purpose”.⁴⁰ Nevertheless, there is a cap of \$2000.00 net on each plan.

The Insurer’s first reason for denying the three OCF-18s was that Dr. Ladowsky-Brooks had found that the Applicant was “unlikely to have any cognitive deficits as a result of the accident”. This, as we have seen, ignores Dr. Ladowsky-Brooks’ comment that further investigation was necessary. The second reason was that another evaluation was premature, since one had taken place on October 15, 2012. The Applicant’s counsel submits that Dr. Ladowsky-Brooks’ assessment was incomplete, as she did not assess for possible traumatic brain injury, despite cognitive deficits shown by her tests. At the Hearing, Dr. Ladowsky-Brooks agreed that another neuropsychological examination in March 2013, when Dr. Gilman’s assessment took place, was reasonable in the circumstances. In fact, the request was submitted on December 24, two months after the initial assessment, and the actual appointment took place more than two months later. The doctor agreed that six months was a normal interval. The effective interval in this case was five months. One reason which was not included in the denial was the cost of the three assessments. The Respondent takes the position that these three assessments were in fact all part of one assessment. TTC relies on *Breadner v. Co-Operators General Insurance Company*⁴¹ on this point. TTC cited Arbitrator King’s opinion, “when these points are considered as a whole, I find that the nature, content, and language of the documents clearly supports a finding that the work done constituted one assessment.” Although instructive, this decision is not binding.

As to reasonableness of the assessments, Mrs. Kolapully submits that her neuropsychological impairments arose out of the accident. There is no suggestion that she suffered any neuropsychological symptoms or impairment before the accident.

⁴⁰ Exhibit 19, R. Brief, Vol. 3, Tab 92.

⁴¹ [2017] O.F.S.C.D. No. 12.

From the record, Dr. Gilman, a medical practitioner, by submitting the three OCF-18s, has expressed his opinion that the three investigations were reasonable and necessary for the diagnosis and treatment of the Applicant. Dr. Gilman administered what the Applicant submits are three separate reports, in order to determine impairments in three different neurological spheres.

The first, a neuropsychological interview intake screening, is a complete medical file review of existing medical records, taking a clinical history, and a response validity testing, and then scoring the results on the Hamilton Depression inventory. Its purpose is symptom identification and pre-diagnosis. In the neuropsychological review intake screening, Dr. Gilman found that Mrs. Kolapully has a moderate level of depression and that her intellectual functioning is impaired. Dr. Gilman's report noted: "Ms. Kolapully demonstrated good test engagement and degree of effort on all tests of Test Engagement and Degree of Effort."⁴²

The second claim is related to a psychometric examination to determine whether Mrs. Kolapully had sustained cerebral compromise. Both Dr. Gilman and Dr. Watson, who examined her at the request of TTC, found evidence of traumatic brain injury although Dr. Gilman rated it as moderate, while Dr. Watson concluded that it was mild. In the neuropsychological diagnostics and interpretation Dr. Gilman identified impairments to cognitive accuracy and efficiency, stating that these would cause her difficulty in finding employment. He also noted reduced stress tolerance, likely to aggravate her pain complaints, anxiety and depression. He recommended a rehabilitation program, cognitive support and psychological treatment. Dr. Ladowsky-Brooks reported that she considered that more investigation was necessary.

The third claim relates to a diagnostic assessment of the Applicant, taking into account the data obtained in the first two assessments. Dr. Ladowsky-Brooks acknowledged at the Hearing that it is common practice, and accepted by insurers, for assessors to divide their work. She stated at the Hearing that she had often seen doctors submit two OCF-18s, as this provided a reasonable compensation to the attending practitioner for the amount of work done. She herself considered that a reasonable sum was between \$3500.00 and \$4000.00. On this basis, I might have been

⁴² Exhibit 12, R. Brief, Vol. 2, Tab 12B, p. 512.

persuaded to question the reasonable cost of the assessments. However, TTC had made no complaint about unreasonable cost, basing its denial of each of the three assessments on timing and perceived lack of need. Cost was not pleaded. The first time the issue of the cost arose was on the last day of the Hearing during Dr. Ladowsky-Brooks' testimony. I am not inclined to interfere with the amount billed. Taking into consideration all the circumstances of this case and the evidence, and the contents of the pleadings, I find that the cost of the three OCF-18s was reasonable and that Mrs. Kolapully is therefore entitled to have it paid for by TTC.

4. Is Mrs. Kolapully entitled to interest for the overdue payment of benefits?

The law entitles a successful applicant to interest on amounts awarded.⁴³ Interest under the *SABS* is recognized to be remedial, rather than punitive, and is intended to discourage insurers from delaying payment. The date of Mrs. Kolapully's accident was March 6, 2012. For amounts becoming overdue before December 31, 2014, when the legislation was amended, interest runs at 1% per month, compounded monthly until the date the mediation commenced, in this case June 25, 2013. Thereafter, the interest rate is 1.3% per annum, the pre-judgment interest rate in the *Courts of Justice Act*⁴⁴ for past pecuniary loss, calculated from the date on which a mediation proceeding is commenced and ending on the date of the decision. All other amounts awarded, having become due after December 31, 2014, shall bear interest at the rate of 1% per month compounded monthly, from the date each became due. In light of the Insurer's desire to proceed with the Hearing in September 2016 (when it was originally scheduled before being adjourned), Arbitrator Drory decided that no interest on the overdue payment of benefits is exigible beyond September 6, 2016. I concur with that decision and incorporate it into this decision with respect to any amounts between September 6 and this decision. Post-decision, unpaid amounts shall bear interest at the usual post-judgment rates established from time to time under the *Courts of Justice Act*.

5. and 6. Is TTC liable to pay Mrs. Kolapully's expenses in respect of the arbitration? Is Mrs. Kolapully liable to pay TTC's expenses in respect of the arbitration?

⁴³ Section 51, *SABS* (Ont. Reg. 236/14).

⁴⁴ *Courts of Justice Act*, R.S.O. 1990, c. C.43.

The Parties have made no submissions on the issue of the expenses of this Arbitration. Given the fact that the Applicant has succeeded in her claims, I consider that she should have her reasonable costs paid by the Respondent. I invite the Parties to agree on a reasonable amount for those expenses pursuant to section 282(1) of the *Insurance Act*, failing which either may apply to me for an assessment under Rule 79 of the *Dispute Resolution Practice Code*.

7. Is Mrs. Kolapully entitled to a special award?

Section 282(10) of the *Insurance Act* provides for a special award in cases where an Insurer has unreasonably withheld or delayed payments to which an insured person is entitled.⁴⁵ The case of *Beltrame and Dominion of Canada General Insurance* provides a non-binding but persuasive comment on the duty of the first party insurer:

The case law establishes that as part of its duty of good faith, an Insurer has an obligation to carry out a proper investigation of a claim and to carefully consider all of the available information, giving appropriate weight to that information in a fair and even-handed manner...[A] first party insurer is obliged to prefer the claimant's interests at least as much as its own.⁴⁶

Counsel for the Applicant raised her claim for a special award on the third day of the four-day Hearing of this matter, following her cross-examination of Mr. Luk. In an email to Counsel for TTC, Counsel for the Applicant set out the following particulars:

- unreasonably withheld payment of benefits
- abuse of Section 44 assessments
- breach of Applicant's right to privacy
- adverse interference of Applicant's right to treatment
- bad faith in medically adjusting the file
- misrepresentation of entitlement to benefits under the *SABS* and
- unfair and prejudicial practices.

⁴⁵ *Insurance Act*, R.S.O. 1990 c. I.8 as amended, ss. 282(10).

⁴⁶ *Beltrame and Dominion of Canada General Insurance*, FSCO A12-001522 (June 13 2001), cited at Tab 6 of Applicant's Closing Brief, p. 10.

The Respondent's position is that the claim for a special award is untimely and prejudicial and should have been raised earlier in these proceedings, that the Applicant has contravened the *Statutory Powers Procedure Act* and principles of natural justice, and that in any case, there are no grounds on which to base a special award.

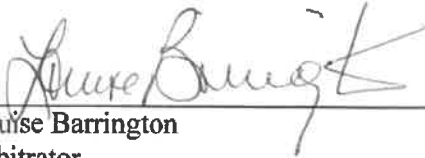
While it is true that a claim for a special award may be raised at any time, it is in the discretion of the Tribunal whether to award it.

While I have found, on a balance of probabilities, that the Applicant has proven her case, there were nevertheless conflicting medical opinions and serious questions regarding the reliability of some evidence. While the Insurer's first obligation is toward the Insured, an adjuster must also consider both the funds available under statutory limits and the commercial effects of his decisions. The decision to partially approve a treatment plan, while perhaps incorrect - if indeed the result was to deny the Applicant treatment for part of the time when she was entitled to it - was a reasonable judgment call. It does not demonstrate any wilful or unfair withholding of payment that would support a special award.

The Applicant also criticizes the failure of the TTC adjuster to provide complete medical records to the independent assessors. This may not have been a perfect investigation, but the error is not grave enough to support a special award. Nor was the visit to Mrs. Kolapully from a TTC adjuster who may have misinformed her regarding housekeeping and transportation benefits, and who photographed her in her hospital bed. Perhaps ill-advised, but not amounting to behaviour serious enough to warrant a special award.

The Applicant has also referred to the recommendation of Dr. Ladowsky-Brooks regarding further radiological and neurological investigation with respect to the reason for cognitive issues, and TTC's failure to follow through on this. While perhaps an unfortunate error of judgement, this decision does not in my view constitute failure to conduct a "proper" investigation. Proper does

not necessarily mean perfect. The circumstances of this case do not support a special award. The Applicant's claim for a special award is therefore denied.



Louise Barrington
Arbitrator

March 9, 2018

Date:



BETWEEN

SHOBA KOLAPULLY

Applicant

and

TORONTO TRANSIT COMMISSION LIMITED

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario *Regulation 664*, as amended, it is ordered that:

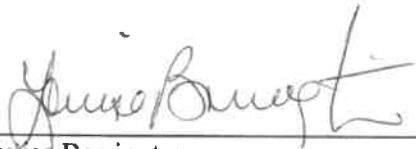
1. Mrs. Kolapully is entitled to receive a non-earner benefit at the rate of \$185.00 per week for the period from November 20, 2012 to date, and ongoing.
2. Mrs. Kolapully is entitled to receive a medical benefit in the amount of \$4090.61 for a treatment plan provided by Scarborough Physio dated June 21, 2012, less any sum already paid by TTC with respect to that treatment plan.
3. Mrs. Kolapully is entitled to payment for the cost of examinations for neuropsychological assessments provided by Dr. Gilman of Oshawa Physio in the total amount of \$6827.76, broken down as follows:
 - i) \$2275.92 for an assessment dated October 24, 2012
 - ii) \$2275.92 for an assessment dated October 24, 2012, and

iii) \$2275.92 for an assessment dated October 24, 2012.

4 and 5. This award is final save as to expenses. TTC is ordered to pay Mrs. Kolapully's reasonable expenses in respect of the arbitration. In the event that the parties are unable to agree on the quantum of the expenses of this matter, pursuant to section 282(1) of the *Insurance Act*, the parties or one of them may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

6. Mrs. Kolapully is entitled to interest for the overdue payment of benefits, calculated from the date each fell due until September 6, 2016.

7. The claim for a special award is denied.



Louise Barrington
Arbitrator

March 9, 2018

Date: