LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

Date: 2018-01-19
Tribunal File Number: 17-002561/AABS
Case Name: 17-002561/AABS v TTC Insurance Company Limited

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:

Applicant

Applicant

and

TTC Insurance Company Limited

Respondent

DECISION

Adjudicator: Catherine Bickley

Appearances: Mireille Dahab, Counsel for the Applicant
Sandra Benjamin, Student-at-law

Chad Townsend and Steve Anderson, Counsel for the Respondent
Alexandra Vaiay, Student-at-law
Samantha Della Camera, adjuster

Heard: In person: **October 30, 31, November 1, 8, 9 and 14, 2017 with written submissions completed on December 22, 2017**

INTRODUCTION

[1] The applicant, [applicant], arrived in Canada in August 2011. A few months later a bus left her with multiple broken bones and derailed her first steps toward establishing herself in her new country. The March 6, 2012 accident fractured the applicant's left ankle and both knees. She was taken to the hospital by ambulance where she had surgery for her broken bones and stiches for a cut on her head. She stayed in the hospital for eight days before being sent home with casts on both legs.

[2] At the time of the hearing, the applicant still complained of pain from "[her] abdomen to [her] toes". She claims that she has ongoing cognitive and memory impairments. She states that her psychological issues prevent her from doing the activities that she enjoyed before the accident.

[3] Twice the applicant has asked the respondent to determine that as a result of the accident she is catastrophically impaired pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*"). Twice the respondent has replied that, in its view, she is not catastrophically impaired. As a result, the applicant has submitted this application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal"). Her application also seeks payment for a psychiatric paper review denied by the respondent in April 2016.

[4] Each of the applicant's Applications for Determination of Catastrophic Impairment ("OCF-19s") relies on a different criterion. The 2014 OCF-19 states that the applicant qualifies under Criterion 7[1] because she has a combination of impairments that result in 55% or more impairment of the whole person ("WPI"). The 2016 OCF-19 states that the applicant qualifies under Criterion 8[2] because she has three marked impairments due to a mental or behavioural disorder. Under both Criterion 7 and Criterion 8, the *Schedule* directs that the applicant's impairments are to be assessed in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment 4th Edition, 1993* ("the *Guides*").

[5] If I find that the applicant is catastrophically impaired as a result of the accident, she will have access to a larger envelope of benefits. She will still be required to establish that any benefits sought are reasonable and necessary.

[6] This was a lengthy and complex hearing. I thank both counsel for their comprehensive and helpful opening and closing written submissions.

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[1] Exhibit 2, Applicant's Document Brief, Volume 2, Tab 11, OCF-19 signed by Dr. Harold Becker, November 13, 2014. Criterion 7 reflects section 3(2)(e) of the *Schedule*.

[2] Exhibit 2, Applicant's Document Brief, Volume 2, Tab 14, OCF-19 signed by Dr. Lionel Gerber, June 21, 2016. Criterion 8 reflects section 3(2)(f) of the *Schedule*.

[7] Based on the totality of the evidence before me and the parties' submissions, I find that the applicant has not established that she is catastrophically impaired based on her 2014 OCF-19. I find that she has established that she is catastrophically impaired based on her 2016 OCF-19. I find that she has not established entitlement to the March 2016 OCF-18 for a psychiatric paper review.

Witnesses

[8] The applicant, her daughter (A.P.), Dr. Dory Becker (psychologist), Dr. Tajedin Getahun (orthopaedic surgeon) and Dr. Lionel Gerber (psychiatrist) all testified on the applicant's behalf. The respondent called Dr. Joel Eisen (psychiatrist) and Dr. Mark Watson (neuro-psychologist). All five doctors were qualified at the hearing as experts in their respective areas of practice.

ISSUES TO BE DECIDED

[9] The following are the issues to be decided:

1. Has the applicant sustained a catastrophic impairment because as a result of the March 6, 2012 accident she has a combination of impairments that results in 55% or more impairment of the whole person ("WPI") when evaluated in accordance with the *Guides* as of November 13, 2014?

2. Has the applicant sustained a catastrophic impairment because as a result of the March 6, 2012 accident she has one or more class 4 (marked) impairments due to mental or behavioural disorder when evaluated in accordance with Chapter 14 of the *Guides* as of June 21, 2016?

3. Is the applicant entitled to the cost of a psychiatric paper review in the amount of $2,200.00 recommended by New Age Specialized Assessments in a treatment plan (OCF-18) submitted to the respondent on March 16, 2016 and denied on April 4, 2016?

4. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[10] Based on the totality of the evidence and the parties' submissions, I find that:

1. The applicant is not catastrophically impaired under s.3(2)(e) of the *Schedule* as of November 13, 2014.

2. The applicant is catastrophically impaired under s.3.(2)(f) of the *Schedule* as of June 21, 2016.

3. The applicant is not entitled to the cost of the psychiatric paper review.

4. The applicant is not entitled to interest because the March 16, 2016 OCF-18 is not payable.

ANALYSIS AND DECISION

Credibility

[11] The respondent submits that the applicant's testimony is so unreliable that she has failed to discharge her burden of proof.

[12] The respondent pointed in particular to the applicant's involvement in an alleged fraud regarding attendant care benefits. The applicant acknowledged that she told some assessors she had someone assisting her at a time when she did not. She stated that she did so on the instructions of the lawyer who previously represented her. I make no findings about this situation in light of ongoing litigation between the respondent and the applicant's former representatives.[3] Further, I ruled that several documents related to that alleged fraud were excluded from this hearing. Introducing them would have unduly prolonged the hearing as evidence about their authenticity would have been required.

[13] The cases[4] submitted by the parties on credibility do not conflict with one another, essentially standing for the following well-accepted propositions:

- An adjudicator may accept some, all or none of a witness' evidence.
- An adjudicator should look at the totality of the evidence from all sources.

[14] Credibility is not a static or all or nothing situation. A person may tell the truth on one day but not on another. A person may be truthful about one subject while being untruthful or mistaken on another.

[15] The respondent relies heavily on video surveillance on March 26, March 30 and March 31, 2015 for the proposition that the applicant's physical capabilities and activities are more than she states. Given my conclusions on the applicant's physical impairments (discussed below in determining the appropriate WPI for the 2014 OCF-19), the applicant's physical capabilities are not determinative of this case. Further, a few outings while the applicant was away from home staying in her daughter's apartment while in Toronto for s.44 assessments, are not likely illustrative of her normal level of activity. I discuss the surveillance further below in considering the 2016 OCF-19. I do not, however, find that the surveillance significantly impeaches the applicant's credibility.

[3] There is no suggestion of any improper actions by the applicant's current counsel.
[4] *Faryna v. Chorny,* 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 and *Ansari v. State Farm Mutual Automobile Insurance Company* FSCO A12-004303 (applicant); *Watson v. TTC Insurance Co*. [2008] O.J. No. 3820 and *B. v. RBC General Insurance Co*., FSCO A07-001066.

OVERVIEW OF THE *GUIDES*

[16] The *Schedule* sets out several different criteria which, if met, result in a determination of catastrophic impairment. Some of those criteria, including the two at issue in this case, incorporate the *Guides*.

[17] The *Guides* were developed to assist American doctors in making workers' compensation determinations. Chapters 1 and 2 give a general overview of the *Guides'* purpose and rating methods. Chapters 3 through 13 each focus on a particular body system. Chapter 14 deals with Mental and Behavioral Disorders and Chapter 15 deals with Pain.

[18] The 2014 OCF-19 references section 3(2)(e) of the *Schedule* which provides that an individual is catastrophically impaired if they have an impairment or combination of impairments that results in a WPI of 55% or more when rated in accordance with the *Guides*.

[19] The 2016 OCF-19 references section 3(2)(f) of the *Schedule* which provides that an individual is catastrophically impaired if they have an impairment that results in a class 4 impairment (marked impairment) or a class 5 impairment (extreme impairment) when rated in accordance with Chapter 14 of the *Guides*.

[20] I consider first whether the applicant has met her onus to establish that as a result of the 2012 accident she has a WPI of 55% or more.

1. The applicant is not catastrophically impaired under s.3(2)(e) of the *Schedule* as of November 13, 2014

[21] Section 3(2)(e) of the *Schedule* provides that an individual is catastrophically impaired if they have an impairment or combination of impairments that results in a WPI of 55% or more when rated in accordance with the *Guides*.

[22] Omega Medical Associates ("Omega") conducted a multi-disciplinary assessment of the applicant in October 2014. This included an assessment and rating of both physical and psychological (mental/behavioural) impairments. The resulting report[5] offered a combined WPI rating of 52 to 59%, narrowed to 57% in Omega's August 2017 addendum report. The mental behavioural component was 30%. Seiden Health Management Inc. ("Seiden") conducted a multi-disciplinary assessment of the applicant in March 2015. While the assessment looked at both physical and psychological (mental/behavioural) impairments, only the physical impairments were rated. The resulting report[6] offered a physical impairment rating of 19% which, the report noted, if combined with Omega's 30% rating for mental and behavioural impairment would amount to 43%.

[5] Exhibit 2, Applicant's Document Brief, Volume 2, Tab 11, Omega Catastrophic Impairment Evaluation Reports, November 13, 2014.

[6] Exhibit 4, Tab 6H, AMA Guides Rating Summary addressing Catastrophic Impairment, Dr. Michael Hanna, April 25, 2015.

[23] I have summarized the differences between the Omega and Seiden assessors and my conclusions on the appropriate ratings below.

Medications

[24] Dr. Sangha (Omega) offered a range of 1% to 3%, later narrowed by the summary writer to 3%. Dr. Hanna (Seiden) offered a rating of 3%. I find that the appropriate rating is 3%.

Cervicothoracic spine and the Lumbosacral spine

[25] Dr. Sangha (Omega) rated the impairment of each of these areas at 5% while Dr. Paitich (Seiden) rated each at 0%.

[26] The evidence is mixed both with respect to reports of pain and objective findings of impairment in these areas. Give the applicant's onus, I find that the appropriate rating for each is 0%.

Left lower extremity

[27] The applicant's left ankle was fractured as a result of the accident. Her left knee was also broken. Dr. Getahun (Omega) rated the combined impairment of the left lower extremity at 14% while Dr. Paitich (Seiden) rated it at 6%. Both ratings are made up of a number of sub-ratings as explained below.

[28] Dr. Getahun testified and the medical records support that the applicant's ankle fracture was open (i.e. the bone pierced the skin) and intra-articular (into the joint). Two screws were placed during surgery. Dr. Getahun rated the ankle fracture at 8% based on Table 64[7] of the *Guides*. Dr. Getahun also relied on Table 64 to rate the left tibial fracture at 5%. Dr. Getahun chose the lowest rating of the 5% to 20% range that Table 64 allows for displaced tibial fractures. Dr. Getahun also rated 1% for the left meniscal tear.

[29] Dr. Paitich stated that because there was a low amount of displacement and the fracture was not in a weight-bearing area, the fibular head fracture was equivalent to an undisplaced fracture and therefore warranted a 0% rating. He also offered a 2% rating for the tibial spine fracture, a 1% rating for the left sided medial meniscal tear and a 3% rating for the left medial malleolus involving the left fibula.

[30] I agree with Dr. Getahun that the rating of 14% is supported by the medical evidence and the *Guides*. In particular, while the *Guides* sometimes distinguish between healed and unhealed fractures they do not do so in this case. Further, a fracture is either displaced or undisplaced. I find that the appropriate impairment rating for the applicant's left lower extremity is 14%.

[7] Chapter 3, pages 85 to 86, Table 62: Impairment Estimates for Certain Lower Extremity Impairments.

Right lower extremity

[31] Dr. Getahun (Omega) rated the right lower extremity impairment at 2% while Dr. Paitich (Seiden) rated it at 0%.

[32] Dr. Getahun testified that he based this rating on a finding of crepitus in the right knee although he did not specifically list crepitus in his report. Dr. Paitich's report states that the applicant had "barely detectable right-sided patella femoral crepitus"[8]. The note to Table 62 states specifically that when a patient has "a history of direct trauma, a complaint of patellofemoral pain, and crepitation on physical examination"[9] a 2% WPI is given. I find that the appropriate impairment rating for the applicant's right lower extremity is 2%.

Scarring (of the knees and the left ankle)

[33] Dr. Sangha (Omega) rated this impairment at 0 to 9%. He stated in his report that if required to narrow the range "something in the middle of this range would be appropriate". In writing the Omega summary report, Dr. Becker, chose 5%. Dr. Hanna (Seiden) rated scarring at 0%.

[34] Having reviewed the examples given by the *Guides* and after a review of the cases submitted by the parties,[10] I find that the appropriate rating is 4%.

Closed Head Injury/Mental Status Impairment

[35] Dr. Sangha (Omega) offered a range of 0% to 14%. The Omega summary writer selected 14%. Dr. Watson offered a range of 8% to 12% in his report. At the hearing, he testified that the appropriate rating was 12%. Omega, in its addendum report, and the applicant in her closing submissions accept 12% as the appropriate rating.

[36] In its closing submissions, the respondent questions whether the applicant had ongoing cognitive impairment as a result of the accident. It further submits that, the appropriate rating is 10%. This is contrary to the testimony of its own expert witness, Dr. Watson.

[37] I find Dr. Watson's evidence helpful in deciding this rating. He found no validity issues with the applicant's performance on neuro-psychometric testing. The applicant scored below average, borderline or lower extreme on the majority of those tests[11]. I find that the appropriate rating is 12%.

[8] Exhibit 4, Respondent's Document Brief, Tab 6B.
[9] Table 62: Arthritis Impairments Based on Roentgengraphically Determined Cartilage Intervals.
[10] Taylor v. Pembridge Insurance Company of Canada, FSCO A-12-004886 (applicant) and King v. State Farm Mutual Automobile Insurance Co., FSCO A11-001204 (respondent).
[11] Exhibit 4, Tab 6G, Neuropsychometric Examination Report, April 24, 2015, Dr. Mark Watson, page 8 of 11.

Conclusion on physical impairment

[38] The total rating for physical impairment, when the ratings set out above are combined[12], is a WPI of 29%.

	Omega	Seiden	Conclusion
Medications	3%	3%	3%
Cervicothoracic spine	5%	0%	0%
Lumbosacral spine	5%	0%	0%
Left lower extremity	14%	6%	14%
Right lower extremity	2%	0%	2%
Scarring	5%	0%	4%
Closed Head Injury/ Mental Status Impairment	12%	12%	12%
WPI Rating Summary for Physical Impairment	**35%**	**19%**	**29%**

Mental and behavioural impairment

[39] Dr. Watson (Seiden) did not offer a rating in this area due to validity issues in the results of the psychological tests he administered to the applicant.

[40] When Dr. Becker (Omega) assessed the applicant in October 2014, she made a provisional diagnosis of the following:

- Major depressive disorder, single episode, moderate
- Pain disorder associated with both psychological factors and a general medical condition
- Generalized anxiety disorder.

[41] Dr. Becker did not find that the applicant had a marked impairment due to mental and behavioural disorder in any of the four functional areas set out in Chapter 14. Thus, she found that the applicant did not qualify for a catastrophic impairment designation on the basis of Criterion 8.

[42] Dr. Becker also assigned a Generalized Assessment of Global Functioning (GAF)[13] rating of 50 to 54 to the applicant. The Omega summary writers used the

[12] Calculating a total WPI rating is not done by simply adding the numerical rating of each impairment. Rather, the *Guides*' Combined Values Chart must be used.

"California method"[14] to convert these ratings to a WPI range of 23 to 30% (and chose 30% as the WPI rating). The California method of conversion is well-accepted in the rating of impairments in the Ontario accident benefit context.[15]

[43] In my view the GAF range selected by Dr. Becker overstates the applicant's mental and behavioural impairments at the time of Dr. Becker's assessment. A GAF of 50 to 54 touches on the serious rating. I am not persuaded that in a case where three class 3 impairments and one class 2/3 impairment have been found that such a low GAF is appropriate. In addition, there were validity issues with Dr. Becker's testing. She noted that the applicant endorsed some unusual and unlikely symptoms and offered inconsistent responses. She stated that the results of the Personality Assessment Inventory should be interpreted with caution.[16]

[44] For all of these reasons, I find that the appropriate GAF for the applicant in 2014 was between 54 and 58. Using the California method, this translates into a WPI of 18 to 24%.

	Omega	Seiden	Conclusion
WPI Rating Summary for Mental Behavioural Impairment	**30%**	**0%**	**18-24%**

Conclusion on s.(2)(e)of the Schedule

[45] I have found that the appropriate rating for physical impairment is 29% and for mental and behavioural impairment is 18 to 24%. When these ratings are combined in accordance with the Guides, the total WPI is 42 to 46%. This is lower than the 55% WPI required by s.3(2)(e) of the Schedule. Accordingly, the applicant has not established that she is catastrophically impaired under s.3(2)(e) of the Schedule.

[13] GAF ratings are from the DSM-IV-TR. The ratings are in 10 point ranges from 1 to 100 with descriptions for each 10 point range. The higher the GAF number, the better the psychological, social and occupational functioning of the individual being rated.

[14] Exhibit 18, Global Assessment of Functioning (GAF) to Whole Person Impairment (WPI) Conversion Table, Schedule for Rating Permanent Disabilities under the Provisions of the Labor Code of California, State of California, January 2005.

[15] See, for example, *Applicant v. Peel Mutual Insurance Company*, 2017 CanLII33649 (ON LAT).

[16] Dr. Becker downplayed these concerns during her testimony at the hearing. I find, however, that the comments in her report expressed valid concerns that she had at the time of assessment.

2. The applicant is catastrophically impaired under s.3(2)(f) of the *Schedule* (2016 OCF-19)

[46] Section 3(2)(f) of the *Schedule* provides that an individual is catastrophically impaired if they have a *marked* (class 4) or *extreme* (class 5) impairment in one of four functional areas[17] due to a mental or behavioural disorder.

[47] The applicant submits that she is catastrophically impaired based on the April 21, 2016 findings by Dr. Gerber that she has a marked impairment in three of the four functional areas (all except concentration, persistence and pace). The respondent submits that the applicant's impairments do not rise above the level of a *moderate* (class 3) impairment in any of the areas based on Dr. Eisen's findings that the applicant had moderate impairment in three areas and mild impairment in one area.

[48] I prefer the findings of Dr. Gerber. He gathered information not only from the applicant but also from her two daughters. His report was considerably more detailed than was Dr. Eisen's. Dr. Gerber explained, with examples supported by the evidence, why he reached the conclusions he did. In contrast, Dr. Eisen's report generally contains conclusory statements without sufficient detail as to how he reached those conclusions. Dr. Eisen testified that his analysis takes place in his brain. That was not of much assistance to me in understanding and evaluating his conclusions.

[49] The following chart sets out the functional areas and describes the criteria for assigning an individual to each class of impairment.

Classification of Impairments Due to Mental and Behavioural Disorders[18]

<table>
<tr><th>Area or aspect of functioning</th><th>Class 1: No impairment</th><th>Class 2: Mild impairment</th><th>Class 3: Moderate impairment</th><th>Class 4: Marked impairment</th><th>Class 5: Extreme impairment</th></tr>
<tr><td>Activities of daily living</td><td rowspan="4">*No* impairment is noted</td><td rowspan="4">Impairment levels are compatible with *most* useful functioning</td><td rowspan="4">Impairment levels are compatible with *some*, but not all, useful functioning</td><td rowspan="4">Impairment levels *significantly impede* useful functioning</td><td rowspan="4">*Impairment levels preclude* useful functioning</td></tr>
<tr><td>Social functioning</td></tr>
<tr><td>Concentration</td></tr>
<tr><td>Adaption</td></tr>
</table>

[17] The four areas are activities of daily living; social functioning; concentration, persistence and pace; and deterioration or decomposition in work or work like settings. The last domain is commonly referred to as adaptation and the practice has developed of looking beyond strictly work and work like settings. The Schedule has subsequently changed to require marked impairment in at least three areas. The version of the Schedule applicable to the applicant's application, however, requires a marked impairment in only one area.

[18] *Guides*, Chapter 14, page 301, Table. Classification of Impairments Due to Mental and Behavioral Disorders.

Diagnosis

[50] The assessors all agree that the applicant has psychological issues. The respondent submits that any marked impairment is caused not by the accident but by moving to a new country and then moving to the isolation of Fort McMurray combined with "empty nest syndrome". The difficulty with this argument is that the respondent's own assessors attribute the applicant's mental and behavioural impairments to the accident. There is no real dispute between the assessors on causation. For example, Dr. Eisen diagnosed the applicant, "as a consequence of the subject motor accident" with the following[19]:

- Chronic pain disorder associated with both psychological factors and a medical condition
- Chronic adjustment disorder with mixed mood features
- Specific phobia (passenger/pedestrian anxiety)

[51] The respondent also submits that the applicant did not complain about any mental or behavioural issues until two years after the accident. The evidence does not support this contention. As early as October 2012, Dr. Paitich, stated that the applicant's inability to return to her pre-accident activities was "predominantly related to fear that she will aggravate her symptomatology or reinjure herself".[20] As well, in October 2012, Dr. Ladowsky-Brooks, another s.44 assessor, reported that the applicant scored in the severe range on a questionnaire which screens for depression. Dr. Ladowsky-Brooks noted that the anxiety the applicant was experiencing "may require intervention" and recommended further investigation including a psychological assessment.[21] In January 2013, Dr. Gilman found "moderate clinical levels of Psychological Depression"[22] in December 2013, Dr. Getahun, who assessed the applicant for physical issues, noted that the applicant reported "feelings of anxiety, depression and nightly sleep disturbances"[23].

[52] Dr. Gerber diagnosed the applicant with the following:

- Chronic Severe Major depressive disorder
- Pain disorder associated with both psychological factors and a general medical condition
- Phobia of crossing the street

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[19] Exhibit 4, Tab 6I
[20] Exhibit 3, Tab 6B.
[21] Exhibit 3, Tab 6D page 231
[22] Exhibit 4, Tab 7B page 522.
[23] Exhibit 4, Tab 8, Independent Orthopaedic Medical Examination report by Tajedin Y. Getahun, December 2, 2013, page 3 of 6.

[53] While the respondent attributes the applicant's acknowledged psychological issues solely/primarily to her move to Fort McMurray and her "empty nest", I find that those factors simply exacerbated the impact of the accident. I find that but for the accident, it is more likely than not that the applicant would have continued to adjust to her new life circumstances and integrate further into Canadian society. There is no reason to believe, for example, that she would not have continued with her volunteer work while searching for a job. She had already moved countries before from India to Dubai.

[54] In June 2015, the applicant took an overdose of her antidepressant medication. The respondent submits that the evidence is unclear on whether this was a suicide attempt of whether the applicant simply got her pills mixed up in the dark. The applicant has, at times, denied that she was attempting suicide. I find this implausible. It would be quite possible to confuse one pill for another in the dark. The evidence, however, is that the applicant took several pills (up to half a bottle). The Alberta hospital referred her for counselling. That counsellor's notes record the applicant's shame at having attempted suicide.[24]

[55] The respondent criticized Dr. Gerber's use of only a small segment of the Structured Interview of Reported Symptoms ("SIRS") test to evaluate the validity of the applicant's responses. I agree that it would have been better to administer the entire test. However, Dr. Gerber also administered the Rey 15 item memory test. He testified that a score of 9 or more establishes that an individual is not malingering; the applicant scored a perfect 15. When considering the validity of the self-reports that form part of the basis for Dr. Gerber's findings, I also note that the respondent's witnesses, Dr. Eisen and Dr. Watson, found no indication that the applicant was malingering or "faking bad" during their assessments. Dr. Watson administered the TOMM test and it indicated valid effort on the part of the applicant. Dr. Watson found some validity issues with the psychological (as opposed to cognitive) testing he did of the applicant. He was adamant, however, that if he had felt there was symptom exaggeration or malingering he would have stated that in his report.

[56] I will now consider the impact of those diagnoses above on the applicant's daily life and determine the appropriate class of impairment for each of the three areas in dispute.

Activities of Daily Living

[57] Chapter 14 of the *Guides* explains that activities of daily living include such activities as shopping, travel and ambulation.[25]

[24] Exhibit 2, Tab 7, page 425.
[25] *Guides*, page 294

[58] I agree with the respondent that the March 2015 surveillance[26] is inconsistent with the applicant's report that she uses extreme caution when crossing the street. I disagree that the two shopping trips shown on the March 2015 surveillance are representative of the applicant's normal activities. She was in Toronto staying at her daughter's apartment while attending s.44 assessments.

[59] On the other hand, the applicant's ability to travel independently by plane between Fort McMurray and Toronto suggests a relatively higher level of functioning. She was, however, accompanied up to the point of the security checkpoint in Toronto by her daughter and was being picked up by her husband in Fort McMurray.

[60] I find that the applicant has a moderate impairment in this area.

Social Functioning

[61] Social functioning refers to an individual's capacity to interact appropriately and communicate effectively with other individuals.[27] Social isolation, fear of strangers and a history of altercations are some of the indications of an impairment in this area.

[62] I accept the applicant's testimony that before the accident she had a monthly Metropass and travelled "everywhere" by herself in Toronto. The video surveillance supports the applicant's position that she is now socially isolated. On the majority of the days when the applicant was under surveillance, she did not leave her apartment. During 10 days of surveillance between March and December 2013, the applicant was only seen outside her apartment once.[28] On that day she visited a medical centre across the road from her apartment and returned home within an hour. Similarly, four days of surveillance in May 2014 produced no observations of the applicant because she did not leave her apartment.[29] During two days of surveillance in January 2015[30] the applicant left her home only once. Her husband drove her to a library. She was back home in less than an hour. Notably, the surveillance in Fort McMurray shows no independent activity by the applicant.

[63] As part of her counselling, she was given an exercise in which she was to go the library and speak to a librarian. She went to the library but was unable to engage in conversation with the librarian.[31]

[26] Exhibit 5, Tab 67, Surveillance report of April 6, 2015.
[27] *Guides*, Page 294.
[28] Exhibit 5, Tabs 61 (March 22 and 25), Tab 62 (June 12 and 13), Tab 63 (November 13, 14 and 18), Tab 64 (December 23, 26 and 31), Surveillance reports of May 14, 2013, July 2, 2013, November 27, 2013 and January 15, 2014. The applicant's apartment was under surveillance each day for between 5.25 and 9 hours.
[29] Exhibit 5, Tab 65, Surveillance report of May 30, 2014.
[30] Exhibit 5, Tab 66, Surveillance report of February 5, 2015.
[31] Exhibit 2, Tab 7, page 432.

[64] I accept the evidence of the applicant and her daughter that her relationship with her family has changed. She is now more irritable. The applicant's testimony demonstrated her resentment at family and others who "make [her]" do things – such as her husband "making" her go for a walk, her counsellor "making" her go to an employment agency and "making" her visit the library.

[65] I find that the applicant has a marked impairment in this area.

Adaptation

[66] This area focuses on the workplace or work like settings. The *Guides* note that common stressors include attendance, making decisions, scheduling, completing tasks, and interacting with supervisors and peers.

[67] The applicant was not in paid employment at the time of the accident. She had, however, already taken steps to establish herself in her new country, including steps toward employment. She completed an Enhanced Language Training Course and began volunteering at a retirement home. She also prepared a resume and attended Dress for Success to obtain interview clothing.[32]

[68] The applicant's behaviour during the hearing supports Dr. Gerber's opinion that she has a marked impairment in this area. She was hostile and argumentative during cross-examination and had to be reminded that she was required to answer the questions posed by respondent counsel. She lashed out verbally, accusing the respondent's adjuster (who was present at the hearing) of smiling and mocking her.[33]

[69] Her angry reaction to an occupational therapist who was assessing her (throwing a laundry basket) and her behaviour at the hearing are illustrative of an individual who would have a great deal of difficulty fitting in to a typical workplace. I agree with Dr. Gerber that the applicant would have difficulty tolerating negative feedback from supervisors and interacting appropriately with the general public and with co-workers. I find that this is not due to any embedded personality trait but due to the impact of the accident on the applicant.

[70] As a result of the accident, the applicant's focus is on her pain, on her perceived physical limitations and her difficulty with what she sees as people's intrusive questioning of her circumstances. As a result, she is less able to adapt to changes in her life such as the move to Fort McMurray.

[71] I find that the applicant has a marked impairment in this area.

[32] Testimony of A.P. the applicant's daughter, Transcript, October 31, 2017, , page 27.
[33] Transcript, October 30, 2017, page 30.

Conclusion on s.3(2)(f)

[72] I find that the applicant has a marked impairment in two areas – social functioning and adaptation. As a result, she is catastrophically impaired under s.3(2)(f) of the *Schedule* as of June 21, 2016.

3. The applicant is not entitled to the cost of a March 2016 OCF-18 for a psychiatric paper review

[73] The applicant seeks payment of $2,200.00 for the cost of a psychiatric paper review recommended by New Age Specialized Assessments in a March 16, 2016 OCF-18[34].

[74] The applicant submits that the OCF-18 was both reasonable and necessary. She had not undergone a psychological assessment since September 2014 (shortly after she started taking anti-depressant medication). In the interim, she had attempted suicide. The applicant also relies on Dr. Watson's recommendation[35] in his report (confirmed during his testimony)[36] that the applicant would benefit from a psychiatric assessment.

[75] The respondent submits that the report requested in the instruction letter related to this OCF-18 was "a wide-ranging report addressing various issues that had nothing to do with Accident Benefits, treatment or catastrophic impairment".

[76] I find that the applicant has not established that this OCF-18 is reasonable and necessary. I agree with the respondent that the instruction letter[37] includes a number of questions that are more relevant to an assessment for a tort case than to the accident benefits context. As well, that letter states that the medical opinion sought is "intended to assist the Courts" [emphasis added]. Because Dr. Gerber was unable to remember completing this OCF-18, his testimony shed no light on how the cost of the contemplated paper review was apportioned between tort and accident benefits.

CONCLUSION

[77] For the reasons set out above, I find that:

1. The applicant is not catastrophically impaired under s.3(2)(e) of the *Schedule* as of November 13, 2014.

2. The applicant is catastrophically impaired under s.3(2)(f) of the *Schedule* as of June 21, 2016.

[34] Exhibit 2, Tab 10. Exhibit 24A and 24B.
[35] Exhibit 4, Tab 6G.
[36] Transcript, November 9, 2017, page 57.
[37] Exhibit 15, Letter from Dahab Law Firm to Dr. Gerber, March 10, 2016.

3. The applicant has not established entitlement to the March 16, 2016 OCF-18 for a psychiatric paper review.

4. The applicant is not entitled to interest because the disputed OCF-18 is not payable.

Released: January 19, 2018

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Catherine Bickley
Adjudicator