



Citation: Campbell v. Economical Mutual Insurance Company, 2024 ONLAT 21-002763/AABS

Licence Appeal Tribunal File Number: 21-002763/AABS

In the matter of an application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

Barbara Campbell

Applicant

and

Economical Mutual Insurance Company

Respondent

DECISION

VICE-CHAIR:

Brett Todd

APPEARANCES:

For the Applicant:

Michael R. Switzer, Counsel

For the Respondent:

Angelo G. Sciacca, Counsel

HEARD:

By Way of Written Submissions

OVERVIEW

- [1] Barbara Campbell (the “applicant”), was involved in an automobile accident on August 17, 2018, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”). The applicant was denied benefits by Economical Mutual Insurance Company (the “respondent”) and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

- [2] The issues in dispute are:
1. Has the applicant sustained a catastrophic impairment as defined in the *Schedule*?
- [3] On December 9, 2022, with the consent of the respondent, the applicant filed a Notice of Motion (“NoM”) with the Tribunal seeking to convert a previously scheduled videoconference hearing to a written hearing with the sole issue in dispute being the catastrophic determination. This motion was granted by the Tribunal in a Motion Order dated January 10, 2023. As a result, I am not considering the other issues in dispute as originally listed in the Case Conference Report and Order (“CCRO”) that was released on October 18, 2021.

RESULT

- [4] The applicant has not sustained a catastrophic impairment as a result of the subject accident, pursuant to s. 3.1(1) 8. of the *Schedule*.
- [5] The application is dismissed.

PROCEDURAL ISSUES

- [6] In reply submissions, the applicant raised a number of procedural issues involving both its own submissions and the submissions of the respondent. These matters are as follows:
- i. The applicant requests that the Tribunal review and consider her reply submissions despite their being served later than the deadline for such a filing as established in the Tribunal Motion Order dated January 10, 2023. The applicant submits that a delay was necessary in order to fully review the submissions received by the respondent, due to their size.

- ii. The applicant takes the position that Appendices A and B of the respondent's written submissions are attempts to go beyond the 30-page limit for submissions established by the Tribunal in a Motion Order dated January 10, 2023. As a result, the applicant submits that these appendices should not be considered by the Tribunal.
- iii. The applicant submits that the property damage claim file submitted by the applicant to the insurer—referenced in paragraphs 8 and 9 of the respondent's written submissions and attached as Tab 02 of the respondent's document brief—was not referenced in any s. 25 or s. 44 report prepared for this application. As such, the applicant requests that references to this property damage claim in the respondent's submissions and the claim file itself not be considered by the Tribunal.

[7] The respondent did not file any submissions with the Tribunal regarding the above procedural issues. However, the applicant did include email correspondence from the respondent dated September 28, 2023 with its reply submissions where it is clear that the respondent objected to the late filing of that reply.

[8] I am prepared to consider the reply submissions of the applicant as well as the property damage claim. However, I agree with the applicant that Appendices A and B are essentially an extension of written submissions that contravene the maximum page length for such submissions as established in the CCRO that set this matter down for a hearing, and therefore exclude them from consideration in this hearing.

[9] My reasons follow:

- i. The applicant's reply submissions were submitted on Tuesday, October 10, 2023, just three business days after they were due on Thursday, October 5, 2023. While this was clearly in contravention of Tribunal order, the respondent has not filed anything with the Tribunal to formally object to this late submission, or to establish how it may have been prejudiced by this late reply.
- ii. Appendices A and B consist of extensive tables where all of what the respondent deems to be the most pertinent medical evidence is listed and organized by date. It provides a road map to the formal written submissions (that are within the 30-page limit), although the amount of detail and the 20-page length of these appendices goes well beyond what I would accept as a reasonable extension of the page limit.

- iii. The applicant apparently initiated the submission of this property damage claim, which seems like a standard claim form filed in automobile accidents resulting in insurance claims. As such, she should be familiar with the pertinent facts that the document contains. Also, I fail to see why the admission of such a report would be reliant on it being referenced in an s. 25 or s. 44 report, which is the sole rationale that the applicant advances in her request to exclude this document.

[10] In accordance with the above, I am considering the applicant’s reply submissions and the property damage report in the context of rendering this decision. I am excluding Appendices A and B of the respondent’s written submissions.

ANALYSIS

Catastrophic Impairment

[11] The applicant bears the onus to prove on a balance of probabilities that she is catastrophically impaired. The test for catastrophic impairment is a legal test, not a medical test, which has been established in s. 3.1 of the *Schedule* with reference to the American Medical Association’s *Guides to the Evaluation of Permanent Impairment, 4th Edition 1993* (the “*Guides*”).

[12] Here, the applicant claims catastrophic impairment under Criterion 8 of the *Guides*, which is detailed in s. 3.1(1) 8. of the *Schedule*. The applicant must demonstrate that the mental or behavioural impairments that she suffered as a result of the accident have resulted in a Class 4 impairment (marked impairment) in at least three or more areas or aspects of functioning that preclude useful functioning, or a Class 5 impairment (extreme impairment) in one or more areas that preclude useful functioning. These areas are detailed in the following chart:

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

- [13] The applicant submits that she suffers from Class 4 impairment in the Activities of Daily Living; Concentration, Persistence, and Pace; and Adaptation areas of functioning. She relies on her medical history dating from shortly following the accident as well a multidisciplinary Catastrophic Evaluation Report completed by Omega Medical Associates dated June 10, 2021. This report was authored by Dr. Harold Becker, family physician, and Dr. Lisa Becker, physiatrist (catastrophic clinical summary); Dr. Eugene Chang, physiatrist (physiatry assessment); Dr. Dale Robinson, neurologist (neurology assessment); Dr. Giselle Braganza, psychologist (psychology assessment); Nita Patel, physiotherapist (OCF-19 file review); and Shahla Khan, occupational therapist (functional assessment).
- [14] The respondent principally takes a position that the applicant has not established causation. Specifically, the respondent argues that the applicant has such an extensive medical history of impairments that she cannot demonstrate that these impairments would not have occurred but for the accident. It claims that the post-accident presentation of the applicant is not much different from her pre-accident state, and that she is showing symptoms consistent with a progression of her pre-accident medical conditions, not symptoms directly related to the accident.
- [15] In addition, the respondent submits that the applicant has not established that she suffered a mental or behavioural impairment as a result of the accident, in accordance with Criterion 8. Nor has she established that she suffers from a Class 4 impairment in three or more areas of function that preclude useful functioning, again pursuant to Criterion 8. It relies on a number of insurer's examination ("IE") reports, most notably the catastrophic assessment reports of Mohan Iyengar, occupational therapist, and Dr. Emily Gavett-Liu, psychiatrist, both dated June 15, 2022.
- [16] Below, I assess the submissions of both parties.

Causation

- [17] I find that the applicant has failed to establish that she would not have sustained her impairments but for the subject accident.
- [18] In submissions, the respondent largely focuses on the issue of causation. It submits that the subject accident was a minor collision that resulted in minimal damage to the applicant's vehicle. The respondent argues that the accident reports that the applicant made to her insurer and the Ottawa Police Service show that the accident was a minor one, and that applicant and her son altered their accounts of the accident in affidavits (dated January 12, 2023 and January 25, 2023, respectively) for this hearing.

- [19] Further, the respondent submits that the applicant's medical records demonstrate that her physical and psychological impairments began long before the accident in 2018. It notes that the applicant has been receiving disability benefits since she stopped working in 2008. The respondent also cites medical records from 2009 through 2018 that chronicle how the applicant was diagnosed with tremors that limited her mobility, caused fatigue, and resulted in other physical issues as well as depression, anxiety, and stress that made it impossible for her to work.
- [20] As a result, the respondent argues that the applicant had a severe and prolonged mental disability of indefinite duration at the time of the accident. As a result, the respondent claims that the applicant does not meet the "but for" test as confirmed by the Divisional Court in *Sabadash v. State Farm et al.*, 2019 ONSC 1121 ("*Sabadash*"), as she cannot demonstrate on a balance of probabilities that she would not have suffered the psychological or behavioural disorders that resulted in her current impairments but for the subject accident.
- [21] Lastly, the respondent acknowledges that its IE assessors found that the applicant suffered from the complete inability to carry on a normal life and that it paid the applicant non-earner benefits ("NEB") and other benefits to almost the full amount of the \$65,000.00 maximum for non-catastrophic benefits established in s. 18(3)(a) of the *Schedule*.¹ However, the respondent argues in submissions that these findings were the result of the applicant failing to produce the pre-accident medical records detailed above, which prevented its assessors from knowing about the applicant's extensive medical history.
- [22] In her submissions, the applicant acknowledges an extensive pre-accident medical history of physical and psychological issues and a lengthy period of time on long-term disability. However, she claims that she was living independently at the time of the accident. While the applicant was not working, she asserts that she was nearly fully functional before the accident with regard to the activities of daily living, household chores, socializing with friends, recreational pursuits including walking and hiking, and the management of her financial affairs.
- [23] According to the applicant, her physical and psychological condition deteriorated following the subject accident. She stopped driving post-accident, developed chronic pain in her lower back that left her requiring a walker and led to her using a wheelchair, and became socially isolated and withdrawn. The applicant also claims that her son moved in with her post-accident to provide 24/7 care.

¹ In submissions, the respondent acknowledges that the applicant incurred \$64,292.95 in medical and rehabilitation benefits over the length of the claim for this accident.

- [24] In addition, the applicant refutes the respondent's position on the payment of the NEB. While the applicant does not dispute the respondent's argument about the production of her medical records, she notes in reply submissions that the respondent should have requested these records at the time and requested addendum reports from its s. 44 assessors.
- [25] For the above reasons, the applicant submits that her current impairments and functional status would not have occurred but for the accident, and that the accident materially contributed to her current status.

Causation finding overview

- [26] I agree with the respondent and find that the accident was not a necessary cause of the applicant's impairments.
- [27] I make this finding in accordance with *Sabadash*, by which I am bound as I am to all decisions of the Divisional Court. *Sabadash* established that pre-existing medical issues do not negate an insurer's liability. Most importantly, it is noted in paragraph 39 of that decision that an accident does not need to be "sufficient in itself to have caused the impairment." Accordingly, an accident must be "a necessary cause" as opposed to "the cause" to establish causation. As a result, an applicant does not need to prove on a balance of probabilities that an accident alone caused an impairment. Instead, an applicant needs to prove on a balance of probabilities that the accident was a necessary cause.
- [28] While the respondent did pay benefits in relation to this accident nearly to the non-catastrophic limit over the life of the claim, I agree with the respondent's position that these payments without the full knowledge of the applicant's lengthy pre-accident medical history. This extensive history satisfies me that the applicant's impairments were present before the accident and that the accident was not a necessary cause of these impairments. The medical records of the applicant show a continuation of her pre-accident symptoms after the accident, which indicates that her post-accident condition was indistinguishable from her pre-accident condition. There is little to no evidence demonstrating that the accident was a necessary cause of her impairments, as she clearly suffered from these impairments for a decade before the accident.
- [29] In addition, I have doubts as to the reliability of the applicant and her son, largely due to a number of questionable aspects of their affidavits. Much of what is in their affidavits conflicts with the evidence before me to such an extent that I find their accounts difficult to accept, especially when it comes to the applicant's pre-accident medical condition and the impact of the accident.

[30] My full assessment of each facet of the causation argument follows.

Severity of the accident

[31] I find that the accident was a relatively minor collision and that it was largely misrepresented by the applicant in both her affidavit and her submissions for this hearing.

[32] According to a Collision Statement dated September 19, 2018 that the applicant filed with the Ottawa Police Service on September 27, 2018, the subject accident occurred between 2:15 and 2:30 PM on the afternoon of August 17, 2018 at the intersection of Montreal Road and Hannah St. in Ottawa. In this statement, the applicant notes that she was leaving a fast food drive-thru and turning right at this intersection when her vehicle was struck from behind by another vehicle.

[33] A property damage claim submitted by the applicant to her insurer on October 11, 2018 included the applicant's comment that she "didn't [sic] ask for [the other driver's] info because I didn't [sic] see DMG." Photos of the applicant's vehicle included in this report show no visible damage. An insurance claim resulted in a repair of roughly \$2,800.00 in value to deal with bumper cover scratches, bumper sensor and taillight replacement, and bumper painting. While it is clear that the applicant was rear-ended, I concur with the respondent's contention that this was a minor accident.

[34] More notably, the applicant's comments in the property damage claim and police report are contradicted by the applicant in her affidavit. In the affidavit, the applicant describes the collision as "a sudden and severe crash" that involved the other vehicle hitting her car from behind "at a high rate of speed." The applicant further explained in the affidavit that she was in shock and experiencing severe back pain. This, she claims in her affidavit, left her feeling unable to walk and unable to try and prevent the other driver from quickly driving off.

[35] Being in shock at the time of any motor vehicle collision is understandable. But shock does not adequately explain why the applicant failed to detail any of the above factors in her property damage report some two months after the accident took place. Nor does shock explain why the applicant claims in her property damage report that she chose not to seek the other driver's information at the scene because she did not see any damage to her vehicle, but claims in her affidavit that she was injured to such an extent that she was unable to stop the other driver from abruptly leaving the scene of a severe crash.

- [36] Further, the applicant's handwritten synopsis of the accident in the report that she filed with the Ottawa Police Service does not include any of the details from her affidavit regarding the severity of the collision or the conduct of the other driver. This additionally causes me to doubt the applicant's version of events as recounted in her affidavit.
- [37] Still, the severity of the accident is a small part of my overall analysis. Minor damage to a vehicle does not mean minor injuries to an applicant. I also accept the applicant's contention that the respondent's position here is hard to accept given that the insurer paid benefits up to the non-catastrophic limit that included non-earner benefits.
- [38] Overall, though, the applicant's varied accounts of the accident diminish her credibility and leave me with only the documentary record of the damage and police reports to indicate the true severity of the accident.

Medical history overview of the applicant

- [39] I find that the applicant's medical history demonstrates that she was functionally disabled physically and psychologically and that she suffered from a mental or behavioural disorder for many years prior to the subject accident. This makes it impossible to determine that the accident was a necessary cause of her impairments.
- [40] In her affidavit, the applicant details an extensive pre-accident medical history that includes primary orthostatic tremors in her legs, hypothyroidism, a hysterectomy, a deviated septum repair, benign positional vertigo, and bipolar disorder with depression and anxiety. She further explains that she had not suffered from the vertigo condition for years prior to the accident, that her psychological issues were well managed at the time of the accident, and that her orthostatic tremors did not impact on her "ability to walk or cause any pain or impairment whatsoever."
- [41] Additionally, the applicant claims in her affidavit that she engaged in many social and recreational activities prior to the accident. These included painting on canvas, recreational walking and hiking, travelling, dining out, spending time with friends, and attending community events. While the applicant notes that she had been off work since 2008 due to depression caused by personal issues as well as physical symptoms related to her tremor condition, she claims that she was intending on returning to work at the time of the accident.

- [42] All of this changed—the applicant claims in her affidavit—as a result of the accident. Intense pain in the middle of her lower lumbar spine began at the scene of the accident and worsened to spread into her thoracic spine, sacrum, and coccyx, and involve migraine headaches and shooting head pain. This resulted in her complete disability due to these physical symptoms, which has left her unable to ambulate independently and eventually placed her in a “wheelchair at all times.” It also resulted in psychological impairments including depression, anxiety, panic attacks, insomnia, and chronic fatigue. Her son moved in with her between October 2018 until May 2022 to provide her with the attendant care assistance that she required because of these accident-related impairments.
- [43] However, this account of events is not consistent with the medical evidence before me. I do not accept the accuracy of the applicant’s account of her life and medical impairments before the accident. While the applicant recounted in her affidavit that she was living a full life immediately before the subject accident, she had been off work at that time since 2008. Further, she was receiving long-term disability benefits between 2008 and the time of the accident in 2018 and beyond, via her former employer (beginning in 2008) and the Canada Pension Plan (“CPP”) (beginning in 2010).
- [44] The applicant’s medical issues began at least a decade before the accident took place on August 17, 2018, which makes it difficult for me to determine that she was fully forthcoming in her affidavit. She stated in the affidavit that the issues that resulted in her being off work involved depression as a result of personal issues in 2008 and that she was going to return to work—a comment that does not adequately acknowledge that she had been disabled to the point of being unable to work for a decade at the time of the accident. Her affidavit frames her condition as a transitional issue that would have soon resolved if not for the accident, which is not congruent with 10 years of disability.
- [45] Medical documentation of these impairments going back to 2010 and earlier make it clear that the applicant suffered from multiple physical and psychological impairments well before the subject accident. That the applicant did not fully comment on these pre-accident issues in her affidavit makes me further doubt her credibility with regard to the impact of the accident on her conditions.
- [46] Accordingly, I find that the applicant is unable to meet her burden of demonstrating on a preponderance of the evidence that the accident was a necessary cause of her impairments.
- [47] I now turn to a review of the medical documentation.

Pre-accident medical documentation

- [48] I find that the pre-accident medical history of the applicant indicates that she suffered from essentially the same impairments before the accident as she did after the accident. Further, I find that the applicant misrepresented her medical state before the accident and did not fully account for her pre-accident condition of disability.
- [49] At the time of the accident, the applicant had been in receipt of disability benefits for roughly 10 years. As adduced by the respondent in submissions and not challenged by the applicant, the applicant left her job at a call centre in 2008 and began receiving long-term disability benefits from Manulife Financial. A Manulife report dated June 2, 2008 noted that the applicant had been diagnosed with major depression with anxiety, acute situational reaction, and marital/work stress. It was also noted in the report that the applicant was “unable to tolerate social interactions” and “would be unable to tolerate interactions with customers.” This demonstrates that her psychological disability began at least a decade before the subject accident.
- [50] The respondent submits that the applicant has been receiving disability benefits through CPP since 2010. It detailed aspects of the applicant’s CPP file dating back to 1999, including impairments involving depression, memory issues, forgetfulness, a diminished ability to concentrate, balance problems, and chronic fatigue. The respondent also noted that long-term CPP disability benefits require the applicant to be in accordance with the requirements of s. 42(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C8. These requirements mandate that the applicant needs to have a “severe and prolonged mental or physical disability” that prevents “any substantial gainful occupation” and be of a “long continued” and “indefinite duration.” As there is no indication that the applicant stopped receiving CPP disability payments before the subject accident, I accept that the applicant was already disabled at the time of the accident, pursuant to the legislative requirements noted above.
- [51] Medical records further support that the applicant was disabled for both physical and psychological reasons by 2008. Dr. Matthew Suh, psychiatrist, noted in reports from 2008 that the applicant suffered from major depression to such an extent that he was “pessimistic” that she would ever recover. Joanna Welfeld, counsellor, under the supervision of Martin Rovers, clinical psychologist, detailed in reports from 2008-2010 that the applicant’s severe depression and anxiety resulted in her being unable to work. Clinical notes and records (“CNRs”) of Dr. Vincent Chan, family doctor, from 2010 noted a major depression diagnosis and

show that the physician recommended home care for the applicant and that she use a cane due to a chronic imbalance/musculoskeletal condition. At the same time, Dr. Chan recommended massage therapy to address “myalgias and stress management.”

- [52] CNRs of Dr. Quan-Yong Sim, family doctor, from 2014 also support that the applicant suffered from significant physical impairment (that, as noted above, contributed to the applicant’s psychological issues) well before the subject accident. In the record of an appointment on February 27, 2014, Dr. Sim wrote that the applicant was suffering from “a chronic and severe disability with her orthostatic tremors.” This resulted in “problems standing and walking for at least 8 years because of the orthostatic tremor syndrome,” which was so severe that the applicant suffered pain and tremors in her legs when standing for more than two minutes at a time. These symptoms forced the applicant to use a walker “all the time” to deal with weakness and balance problems, caused her to take lengthy periods of time to complete household tasks like meal preparation and getting dressed, and led to forgetfulness involving personal tasks. The applicant filled out a Pain Inventory form for Dr. Sim on March 16, 2016 where she noted ratings of 9 out of 10 in almost every category, indicating that pain was significantly affecting all aspects of her life except for sleep (which she rated a 5).
- [53] Also, Dr. Sim completed a Disability Tax Credit Certificate dated February 27, 2014 for the applicant’s CPP disability file. In this certificate, the physician noted some of the impairments detailed above, as well as detailing that the applicant had been diagnosed with “orthostatic tremor disorder” and “chronic anxiety/depression disorder.” Dr. Sim also endorsed that the applicant suffered restrictions to her ability to walk, feed, and dress herself from 2006 to present, and that she suffered marked restrictions from the mental functions necessary for everyday life since 2004. Further, Dr. Sim endorsed that these conditions were not expected to improve.
- [54] Pre-accident medical records detailing the applicant’s psychological impairments also support that she was psychologically disabled as early as 2009. The CNRs of Dr. Keith Anderson, psychologist, detail that the applicant was under his care as of September 23, 2009. In a letter to Manulife Financial dated January 26, 2010, Dr. Anderson explained that the applicant was suffering from depression, anxiety, and stress to such a degree that she found “the simplest tasks overwhelming” and that she “spends her days in bed and afraid to get out of the house.” His prognosis was guarded due to the applicant’s “little tolerance for stress.”

- [55] Dr. Anderson's CNRs from 2013 to 2017 further indicate that the applicant continued to suffer from these psychological impairments until just months before the accident. On August 21, 2013, the applicant told Dr. Anderson that she felt there was no way she could possibly return to work. On April 24, 2014, she reported that she had been manic over the winter, and Dr. Anderson noted that she was hypomanic on January 15, 2015. The applicant was voluntarily hospitalized at the suggestion of Dr. Anderson due to her hypomanic state on April 6, 2016 and was admitted by police again on April 25, 2016. In all, she received some six weeks of treatment in two mental health facilities between April and June 2016.
- [56] In totality, these CNRs show that the applicant continued to see Dr. Anderson on a regular basis to the date of the accident in 2018 and beyond. Dr. Anderson was also treating her with medication for her psychological issues throughout this period of time. These records are dramatically dissimilar to how the applicant described her pre-accident life and psychological impairments in her affidavit, to such a point that I cannot accept that the applicant was fully truthful in her affidavit testimony.
- [57] To conclude, the pre-accident medical records of the applicant contradict the contentions in her affidavit and in hearing submissions that her pre-existing psychological and physical impairments had been largely if not entirely resolved before the date of the subject accident.

Post-accident medical documentation

- [58] I find that the post-accident medical history of the applicant demonstrates such a continuum of her pre-existing issues that it is clear that the accident was not a necessary cause of such impairments.
- [59] Medical evidence documenting the applicant's treatment following the accident does not support that she sustained a mental or behavioural disorder as a result of the accident, as required to qualify for a catastrophic designation under Criterion 8. This evidence also establishes that the applicant experienced a continuation of the conditions that she was suffering from prior to the accident, not that the accident was a necessary cause of these conditions.
- [60] While the applicant claims in submissions to have experienced "immediate and significant pain in her lumbar spine" (which she also confirmed in her affidavit testimony) and that this then formed the basis for her psychological impairment, this is not reflected in how she addressed the accident with her two primary

health care providers at the time. What is before me only substantiates that the applicant suffered a soft-tissue physical injury in the accident.

- [61] During an appointment with Dr. Anderson on August 29, 2018, the applicant did not mention the accident at all. While the applicant did mention the accident in an appointment with Dr. Sim on August 31, 2018, she reported that she had twisted her back a few weeks earlier while exercising, and that the accident was a “bump” that aggravated this symptom. Dr. Sim diagnosed the applicant with a back sprain. The applicant first noted the accident in a subsequent appointment with Dr. Anderson on September 25, 2018, but only to complain of back pain.
- [62] Also, the two OCF-3s completed by Dr. Jason Elk, chiropractor, on October 24, 2018 and November 21, 2018 include diagnoses of whiplash associated disorder (“WAD-1”), strain and sprain of the lumbar spine, intervertebral disc disorders, and sciatica. There is no indication on these forms that the applicant suffered mental or behavioural disorders as a result of the accident.
- [63] Dr. Sim filled out another Disability Tax Credit Certificate dated after the accident, on November 15, 2018, that shows that the applicant’s condition at almost three months after the subject accident was largely the same as it was in 2014. As with the 2014 certificate detailed above, Dr. Sim diagnosed the applicant with orthostatic tremor disorder and chronic anxiety/depression disorder again in 2018. She further diagnosed that the applicant’s lower back pain was caused by severe arthritis of the facet joints. Dr. Sim also again endorsed that the applicant had been markedly restricted with walking, feeding, and dressing since 2006, and that the applicant had been markedly restricted from the mental functions necessary for everyday life since 2004. Additionally, Dr. Sim did not mention the accident in the 2018 tax credit certificate.
- [64] Further psychological medical evidence has similar weaknesses, due largely to a reliance on the applicant’s self-reporting. Barbara Wendlowski, psychotherapist, wrote in a letter dated October 7, 2019 that she had treated the applicant from 2014 through 2016 and again for 17 sessions beginning in 2018. While Ms. Wendlowski noted that the applicant reported being in a motor vehicle accident in August 2018 and suffering a number of issues with depression, anxiety, and sadness and isolation afterward, the therapist provided no records of these therapy sessions, provided no psychological testing results, and did not acknowledge the applicant’s extensive pre-accident history of psychological impairment.
- [65] Similar issues are found in the psychological assessment report of Dr. Kenneth Reesor, psychologist, dated December 1, 2019. In the report, Dr. Reesor

acknowledged that the applicant had “pre-existing physical and emotional conditions,” but then noted that “she was stable with respect to these conditions and was receiving appropriate medical oversight and management.” Dr. Reesor did not cite any medical evidence or accompanying rationale for this statement, even though he did apparently review an extensive amount of the applicant’s pre-accident medical history. Instead, he seemed to rely on the applicant’s report of how dramatically the accident affected her psychological impairments, which, as I have already well documented, conflicts with the pre-accident medical evidence.

- [66] In all, I assign limited weight to the letter of Ms. Wendlowski and the report of Dr. Reesor with regard to causation, for the reasons mentioned above.
- [67] I am not satisfied by the applicant’s argument in both her initial and reply submissions that it should be determined that the accident caused her impairments because she was found to have suffered a complete inability to carry on a normal life and therefore warranted payment of non-earner benefits (“NEB”). This was the determination of Dr. Gilbert Yee, orthopaedic surgeon, and Donna Mathieson, registered occupational therapist, who both made this determination in IE reports that were filed with the respondent on March 11, 2019. This resulted in the respondent paying NEB and other medical and rehabilitation benefits to nearly the full amount of the \$65,000.00 non-catastrophic limit specified in s. 18(3)(a) of the *Schedule*.
- [68] Further IE assessments dated January 27, 2020 completed by Dr. Sanjeev Sharma, orthopedic surgeon; Dr. Minh Nguyen, neurologist; and Ron Wiltshire, occupational therapist, resulted in varying conclusions with only Dr. Sharma concluding that the applicant suffered the substantial inability to carry on a normal life. At the same time, the respondent relied on these reports to determine that the applicant continued to suffer from the complete inability to carry on a normal life as a result of the accident, and sent a letter to the applicant on February 10, 2020 confirming that it would continue to pay NEB.
- [69] However, based on the reports before me, none of these IE assessors had full access to the applicant’s pre-accident medical records. This led to the assessors declining to comment on causation and/or making assumptions based on the self-reporting of the applicant and the disclosed post-accident evidence. For example, Mr. Wiltshire wrote that he “defers comment on causality, given [the applicant’s] medical history,” as a result of the applicant’s self-reporting in the absence of support in the medical records. Dr. Nguyen noted that the applicant’s “symptoms of headaches, cognitive complaints, sensitivity to light and noise also were not existent before the accident and therefore would have to be assumed to

be the direct result of the accident,” an assumption that does not withstand a review of the applicant’s pre-accident medical records. And even though Dr. Sharma found that the applicant suffered a substantial inability to carry on a normal life due to myofascial strain and the exacerbation of her orthostatic tremor, he also noted that he accepted the applicant’s reports regarding being “completely independent” before the accident. Again, this is demonstrably untrue with a review of the applicant’s pre-accident medical records—but Dr. Sharma did not have access to these records.

- [70] While the applicant argues in reply submissions that the respondent accepted the opinions of the assessors when it approved the NEB and should have requested the applicant’s earlier medical records if it had any concerns, I cannot fault the respondent here. Essentially, this would mean reproaching the respondent for doing the right thing and ensuring that the applicant received benefits in a quick and efficient fashion, as the consumer-protection mandate of the *Schedule* requires.
- [71] As a result, I agree with the respondent that these IE reports are of minimal value when assessing causation, even though they played a factor in the respondent paying benefits. The assessors largely relied on the applicant’s problematic self-reporting, as detailed throughout this decision, and operated in the absence of the applicant’s pre-accident medical records, discussed thoroughly in the preceding section of this decision. They accepted that the accident resulted in her condition, as they did not have the entire picture as presented by the full scope of the pre- and post-accident medical evidence—namely that the applicant’s impairment was present before the accident and continued afterward.
- [72] The s. 25 catastrophic psychological assessment completed by Dr. Giselle Braganza, psychologist, dated June 10, 2021, further indicates that the applicant’s post-accident symptoms were similar to her pre-accident symptoms. In this report, the psychologist diagnosed the applicant with an adjustment disorder with mixed anxiety and depressed mood, a specific phobia (vehicular travel), and a somatic symptom disorder with predominant pain. Dr. Braganza also noted that the applicant’s Global Assessment of Functioning (“GAF”) score was 41-50. This is very close to the psychological assessment completed for Manulife Financial on June 2, 2008. In that assessment, the applicant was diagnosed with the major depression and anxiety, and her GAF score was 40-45.
- [73] Dr. Braganza found that the accident made a material contribution to the applicant’s psychological impairments, and therefore met the causation test. But the diagnoses and the GAF scores from 2008 and 2021 noted above indicate

otherwise. In my view, comparing these two reports shows very little demonstrable change as the result of the accident—or at least not enough to support a finding that the accident was a necessary cause of the applicant's impairments.

- [74] In addition, I assign limited weight to Dr. Braganza's conclusions with regard to causation as she relied on the applicant's self-reporting, which I have already demonstrated to conflict with much of the medical evidence. For instance, Dr. Braganza accepted the applicant's comments that "99% of her cognitive issues" started post-accident and that "99% of the time she walked unassisted," and concluded that the applicant was a "good historian." Again, as I have recounted above, this is not borne out by more than a decade of medical evidence from before the accident, which clearly indicates that the applicant had long suffered from significant, disabling psychological issues.
- [75] Other aspects of the overall June 10, 2021 multidisciplinary catastrophic report are also overly reliant on the self-reporting of the applicant. While neither Dr. Chang nor Dr. Robinson commented at length on causation, Ms. Kara accepted the applicant's report that she was independent in all aspects of daily living pre-accident and was able to walk long distances unsupported despite her tremors. This conflicts with the applicant's disability status, most notably the 2018 Disability Tax Credit Certificate completed by Dr. Sim some three months after the accident on November 15, 2018.
- [76] Additionally, the assessors who contributed to this catastrophic report accepted the account of the applicant's son regarding the impact of the subject accident and how he needed to move in with her following the accident to provide her with 24/7 care (this was also reiterated in her son's affidavit). However, while the applicant's son may have provided assistance to his mother post-accident, as noted above the medical evidence does not indicate that her accident-related injuries were severe enough to require such care. Also, the CNRs of the applicant's appointments with Dr. Anderson indicate that her son was suffering from a number of issues with substance use and mental health, and was in regular conflict with his mother while they were living together.
- [77] I am also unpersuaded by the opinion of Dr. Gavett-Liu in her IE report when it comes to causation. The psychologist determined that the applicant met the *AMA Guides* causation test and that the subject accident, on a balance of probabilities, contributed to the psychiatric impairments that "she is currently faced with." However, Dr. Gavett-Liu devoted just one paragraph specifically to causation in her report. Moreover, despite reviewing an extensive amount of medical

documentation, Dr. Gavett-Liu accepted the applicant's claim that she was "psychiatrically stable and functioning well in most aspects of her life." As I have detailed above, the medical evidence does not support such an assertion.

- [78] Further, although Dr. Gavett-Liu found that the applicant met the causation test, she also mitigated her findings with regard to Criterion 8 and causation. For example, Dr. Gavett-Liu agreed with Dr. Braganza that the applicant should be rated as a Class 4 (marked) impairment in Adaptation. But she reduced this rating to a Class 3 (moderate) in her report solely because of the applicant's pre-accident psychological impairments. Dr. Gavett-Liu also noted the applicant's pre-accident "psychiatric difficulties" in the section on Activities of Daily Living, even though she rated the applicant as a Class 4.
- [79] Overall, Dr. Gavett-Liu's opinions on causation are not entirely matched by other key aspects of her report. It is clear from her section on Adaptation that she accepted that the applicant's pre-accident psychological impairments had a significant impact. This played a significant role in the psychologist's finding that the applicant was not catastrophically impaired pursuant to Criterion 8. This, in my opinion, is incongruent with Dr. Gavett-Liu's causation opinion.
- [80] To summarize, the applicant's post-accident medical records indicate that her impairments were an extension of the same impairments that she had already been suffering from in the years prior to the accident. Although some assessors determined that the accident had a material impact on these impairments, these findings were largely made due to an acceptance of the applicant's self-reporting. This renders it impossible to conclude that the accident was a necessary cause of the applicant's impairments.

Causation conclusion

- [81] On the totality of the evidence, I do not believe that the accident was a necessary cause of the applicant's impairments.
- [82] As detailed above and contrary to the affidavit of the applicant, the evidence supports that the applicant had been impaired with substantially if not entirely the same issues and symptoms before the accident that she presented with after the accident. Although *Sabadash* does allow for more than one necessary cause of an impairment, the applicant's pre-existing impairment continues after the accident in such a similar fashion that it is not possible to isolate the before and after periods so that the applicant can meet her burden.

[83] Accordingly, I find that the accident was not a necessary cause of the applicant's impairments and that she does not meet the "but for" test for causation.

Criterion 8 and Areas of Functioning

[84] Even though I have determined that the applicant has failed to establish that the subject accident was a necessary cause of her post-accident impairments, and therefore that she does not meet the "but for" test for causation, I continue my analysis to review the medical evidence relating to Criterion 8 in order to be completely thorough in my analysis.

[85] The applicant submits that she suffers from Class 4 marked impairment in the Activities of Daily Living, Concentration, Persistence, and Pace, and Adaptation areas of functioning as established in the *Guides*, which would meet the criteria for her to be designated as catastrophically impaired, pursuant to Criterion 8. She relies on her medical history dating from shortly following the accident, as well as a multidisciplinary Catastrophic Evaluation Report completed by Omega Medical Associates dated June 10, 2021.

[86] The respondent counters with a twofold argument. First, it alleges that the applicant did not suffer a mental or behavioural impairment as a result of the accident. The respondent submits that the applicant's own medical evidence demonstrates only that she suffered a minor physical injury in the accident, and that any mental or behavioural impairment post-accident was solely in relation to her pre-accident impairments. Second, the respondent argues that the applicant has not proven that she suffers from this Class 4 impairment in three or more areas of function. It relies primarily on the catastrophic assessment IE reports of Mr. Iyengar and Dr. Emily Gavett-Liu dated June 15, 2022.

[87] As I have already addressed the respondent's contention that the applicant did not suffer a mental or behavioural impairment as a result of the accident above, I focus here solely on the positions of the parties regarding Class 4 impairment (marked impairment) with regard to Criterion 8.

Areas/aspects of functioning

[88] The reports of the principal catastrophic assessors from both parties are similar, at least in regard to how they rate the applicant's level of impairment within Criterion 8. They assign the following impairment ratings:

Area or Aspect of Functioning	Omega Medical	Mr. Iyengar, Dr. Gavett-Liu
Activities of Daily Living	Class 4 (Marked)	Class 4 (Marked)
Social Functioning	Class 2 (Mild)	Class 2 (Mild)
Concentration, Persistence, and Pace	Class 4 (Marked)	Class 3 (Moderate)
Adaptation	Class 4 (Marked)	Class 3 (Moderate)

[89] Each of these areas or aspects of functioning are described in the *Guides* as follows:

- i. **Activities of Daily Living:** This category includes self-care, personal hygiene, communication, ambulation, travel, sexual function, sleep, and social and recreational activities. Any limitation in these activities should be related to the person’s mental disorder. The quality of these activities is judged by their independence, appropriateness, effectiveness, and sustainability given the context of the individual’s overall situation. What is assessed is not simply the number of activities that are restricted, but the overall degree of restriction or combination of restrictions.
- ii. **Social Functioning:** Factors to consider under this domain include an individual’s capacity to interact appropriately and communicate effectively with other individuals such as family and friends, neighbours, clerks, and others. An individual’s ability to initiate social contact with others, communicate clearly with others, and interact and actively participate in group activities are seen as strengths in social functioning. It is not only the number of aspects in which social functioning is impaired that is significant, but also the overall degree of interference with a particular aspect or combination of aspects.
- iii. **Concentration, Persistence, and Pace:** This sphere is defined as having the ability to sustain focused attention long enough for the timely completion of tasks commonly found in work settings. Deficiencies in concentration, persistence and pace are best noted from previous work attempts or from observations in work-like settings. In activities of daily living, this may be reflected in terms of the ability to complete everyday tasks. The *Guides* specify that psychological tests are useful in assessing intelligence, memory, and concentration. Frequency of errors, the time it takes to complete a task and the extent of which assistance is required to complete a task.

- iv. Adaptation: In this area, the definition includes the repeated failure to adapt to stressful circumstances, in the face of which “the individual may withdraw from the situation or experience exacerbation of signs and symptoms of a mental disorder; that is, decompensate or having difficulty maintaining activities of daily living, continuing social relationships, and completing tasks.” By definition, impairment in adaptation affects the ability to function across all activity areas. Regarding activities of daily living, their quality is judged by their independence, appropriateness, effectiveness, and sustainability.

[90] As the assessors for both parties agree on their ratings in both the Activities of Daily Living and Social Functioning areas, I will not address them here. Instead, I will focus on the two areas in which the assessors disagree on their ratings, namely Concentration, Persistence, and Pace and Adaptation.

Concentration, Persistence, and Pace

[91] I accept the opinions of Mr. Iyengar and Dr. Gavett-Liu regarding this sphere, as expressed in their IE reports. Each rated the applicant at a Class 3 moderate level of impairment in the area of Concentration, Persistence, and Pace.

[92] Specifically, these assessors found that the applicant was attentive and alert throughout their in-person examinations, albeit with some signs of fatigue. Mr. Iyengar wrote in his report that the applicant could “return to the topic at hand with some prompting when interrupted,” although she did display some signs of fatigue.

[93] Dr. Gavett-Liu noted in her report that the applicant was able to describe her symptoms without difficulty, showed a “grossly normal” recollection of events from short- and long-term memory, exhibited intact concentration, and responded appropriately to questions and commands. As a result, Dr. Gavett-Liu determined that the applicant was “able to process, comprehend, interpret, and respond to information within the context of the assessment.”

[94] I am not persuaded by the report of Dr. Braganza, who rated the applicant as having a Class 4 impairment in this domain. I concur with the respondent’s argument and assign limited weight to Dr. Braganza’s report, primarily because she did not fully reference that the applicant had been suffering from impairments prior to the accident and that she was receiving disability benefits as a result of these issues.

- [95] Instead, Dr. Braganza relied mainly on the self-reporting of the applicant, with the result that her prior impairments are minimized. For example, Dr. Braganza noted that the applicant told her that she suffered from significant cognitive difficulties post-accident involving focus, attention, multitasking, and information processing.
- [96] However, as noted above, medical records show that the applicant suffered from such issues well before the accident. Although I have already covered these records in detail above and will not repeat these sections here, I reiterate that the records of Dr. Suh, Dr. Chan, Dr. Anderson, and other care providers indicate that the applicant was suffering from serious, disabling psychological issues with anxiety, depression, and concentration from 2008 on, which formed a significant part of the basis for her disability pre-accident, and that these issues were not expected to improve.
- [97] In all, Dr. Braganza's assessment does not align with the applicant's pre-accident medical records. Dr. Braganza's conclusion that the "subject accident has contributed to a multitude of psychological symptoms and impairments that preclude useful functioning for this woman who is not only unable to manage what she did pre-accident, but also what would be expected of a woman of 62 years old" causes me to doubt her entire report. This opinion fails to account for the fact that applicant was clearly suffering from serious impairments to her "useful functioning" before the accident to the point that she was disabled.
- [98] Additionally, I am unpersuaded by the applicant's submission that issues with the "demeanour and professionalism" of Mr. Iyengar during his occupational therapy assessment resulted in a "misleading, inaccurate, and not independent" report. In reply submissions, the applicant reiterates this point and takes the position that Mr. Iyengar's report should hold little to no weight.
- [99] The applicant references the applicant's comments in her affidavit, where she accused Mr. Iyengar of being "aggressive, angry, and annoyed" during his in-person assessment on October 13, 2021 for "reasons which he did not explain." Other comments in the affidavit indicate her belief that Mr. Iyengar was upset because she could not participate in some of the tests that he asked her to perform, even though she explained to him at the time that this was due to her having a bad day due to a recent fall.
- [100] Further, the applicant alleged in her affidavit that Mr. Iyengar was "there to prepare a report that would assist my insurer in denying benefits" due to his direct comments to her about his returning to work with these insurer assessments to make money for his retirement. The applicant's son supported his mother's version of events in his own affidavit.

- [101] Due to the above allegations, the applicant's legal representative sent an email to the respondent on June 30, 2022 following receipt of Mr. Iyengar's report dated June 15, 2022. In this letter, the applicant's counsel detailed a number of issues with the accuracy of Mr. Iyengar's report and the applicant's allegation that Mr. Iyengar was not independent in his assessment. The applicant's counsel further requested in this email that the respondent arrange a new occupational therapy examination with a different "independent" assessor.
- [102] No evidence has been submitted indicating that the respondent replied to this email. The respondent did not schedule a second occupational therapy assessment. Further, the respondent does not mention the above allegations in its submissions. The respondent does, however, reference Mr. Iyengar's report and his conclusion that that the applicant appeared to be "more functional than her performance."
- [103] Serious allegations such as these require proof which is not found here. As I have noted elsewhere in this decision, I have considerable doubts regarding the credibility of the applicant and her son. Therefore, I do not have confidence in the accuracy of their accounts here regarding what Mr. Iyengar allegedly said during his assessment. At best, I believe that they have misinterpreted Mr. Iyengar's comments and are assuming an underlying motive that was not reflected in what he allegedly told the applicant and her son.
- [104] Further, the respondent was under no obligation to order a second occupational therapy assessment based on this dispute. Much of what the applicant's counsel cited in the June 30, 2022 email regarding the allegedly biased approach of Mr. Iyengar is about a disagreement with Mr. Iyengar's conclusion that the applicant did not give full effort in testing. A review of the applicant's level of effort and commitment to completing such tests is a standard part of occupational therapy assessments. While I can understand the applicant's frustration with the end results, a difference of opinion does not entitle an applicant to a new assessment with a new assessor.
- [105] Lastly, the report of Mr. Iyengar is a minor part of my analysis of Concentration, Persistence, and Pace. As this area concerns the applicant's psychological condition, the psychological report of Dr. Gavett-Liu is of much greater import regarding my finding here.
- [106] Correspondingly, I find the applicant's impairments with regard to Concentration, Persistence, and Pace more compatible with a Class 3 moderate impairment rating than a Class 4 marked impairment rating.

Adaptation

- [107] I accept the opinion of Dr. Gavett-Liu, as expressed in her IE report. She rated the applicant at a Class 3 moderate level of impairment in the area of Concentration, Persistence, and Pace.
- [108] Both Dr. Gavett-Liu and Dr. Braganza assess the applicant similarly when it comes to Adaptation. Dr. Gavett-Liu actually rated the applicant as a Class 4, but then reduced this to a Class 3 due to what she viewed as the applicant's "pre-existing psychiatric difficulties." I agree with the final rating of Dr. Gavett-Liu here and find it more reliable than the rating of Dr. Braganza, even though, as I have expressed above, I doubt Dr. Gavett-Liu's rationale for making this reduction given the lengthy period of psychological instability chronicled in the applicant's medical records.
- [109] This is of particular importance to Adaptation, the sphere that encompasses how a person adapts to stressful circumstances. In my view, the evidence does not support Dr. Gavett-Liu's conclusion that the applicant was psychologically stable and functioning before the accident. The medical evidence actually indicates that the applicant had suffered from the inability to adapt to stressful circumstances for a decade prior to the accident.
- [110] Again, I have detailed this evidence above and will not repeat it here. However, I note that the records of virtually every medical professional that treated the applicant from 2008 to the date of the accident indicated that she suffered from such severe psychological impairments that she was unable to mentally function and adapt to stresses in her everyday life. This inability continued post-accident with little if any discernible change, based on the accounts that she provided to both Dr. Gavett-Liu and Dr. Braganza, making it impossible to determine that Adaptation was impacted by the accident.
- [111] Accordingly, I find the applicant's impairments with regard to Adaptation more suitable with a Class 3 moderate impairment rating than a Class 4 marked impairment rating.

Criterion 8 conclusion

- [112] For the reasons detailed above, I find that the applicant has failed to support her claim that she suffers from at least three Class 4 marked impairment ratings in accordance with Criterion 8. Therefore, she has not demonstrated that she suffers from a catastrophic impairment.

ORDER

[113] The applicant has not sustained a catastrophic impairment, pursuant to s. 3.1(1) 8. of the *Schedule*.

[114] The application is dismissed.

Released: September 10, 2024



Brett Todd
Vice-Chair