Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A09-000167

BETWEEN:

MR. C.

Applicant

and

COACHMAN INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Joyce Miller

Heard: July 5, 6, 7, 8, 9, 12, 13, 14, 15, August 4, 5, September 27, 28, October 4 and 6, 2010, at the offices of the Financial Services Commission of Ontario in Toronto.
Written submissions were received by February 8, 2011.

Appearances: Renee Vinett for Mr. C.
Stanley Tessis and Kerri P. Knudsen for Coachman Insurance Company

Issues:

The Applicant, Mr. C., was injured in a motor vehicle accident on December 1, 2006. He applied for and received statutory accident benefits from Coachman Insurance Company ("Coachman"), payable under the *Schedule.*[1] A number of disputed issues arose between the parties, including whether Mr. C. is catastrophically impaired. The parties were unable to resolve their disputes through mediation, and Mr. C. applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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[1] *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

The preliminary issue is:

1. Is Mr. C. catastrophically impaired pursuant to clause 2(1.2)(g) of the *Schedule*?

Result:

1. Mr. C. is catastrophically impaired pursuant to clause 2(1.2)(g) of the *Schedule*.

EVIDENCE

(1) Mr. C.'s Testimony

Mr. C. was assisted by a Turkish-speaking interpreter during his testimony which he gave in English. Mr. C. provided his testimony standing up, while leaning bent over the table. He would change from leaning on his hands to leaning lower down by resting his arms on the table. Throughout his testimony Mr. C. appeared to be in physical discomfort. He was obviously fatigued during his testimony. There was a clear deterioration in his demeanour as examination and cross-examination proceeded.

Mr. C. underwent a very aggressive and at times inappropriate cross-examination. Inappropriate in that, counsel for Coachman screamed some of his questions at Mr. C. with the clear intention, in my view, of intimidating Mr. C. As well, counsel glared intensely while firing off questions at a very rapid pace. In addition, counsel unnecessarily and redundantly repeated questions that already had been answered. Objections to counsel's behaviour were consistently ignored.

Despite the very vigorous cross-examination, Coachman was unable to impugn Mr. C.'s testimony. I find that Mr. C. provided credible and non-contradictory testimony in support of his claim. Accordingly, I give full weight to his testimony.

(a) Background

Mr. C., who is 47 years old, emigrated from Turkey in 1986. Mr. C. is married and has three children: two daughters ages 14 and 9; and a son 11 years old.

Before coming to Canada, Mr. C. completed grade five education and worked on his family's farm. He also trained in stucco plastering.

When Mr. C. came to Canada he worked at numerous jobs, which included working as a car wash attendant, as a janitor, a worm picker, and as a machine operator in a factory. At the time of the accident, Mr. C. was working for Allied Plastering and Stucco Limited, six and a half days a week as a stucco plasterer.

(b) Pre-Accident

In 2001, Mr. C. was involved in a car accident wherein he injured his back and had to be off work. In January 6, 2002, a CT scan of Mr. C.'s lumbar spine notes that Mr. C. had a "[c]ongenitally small spinal canal. Small left posterolateral disc herniation L4-5 with a moderate spinal stenosis. Right paracentral disc herniation L5-S1 with moderate spinal stenosis."

An MRI report of May 4, 2002 confirmed that Mr. C. did not have any disc herniation. The first time any disc herniation is noted is *after* the car accident in an April 1, 2007 MRI report of Mr. C.'s lumbar spine.

The evidence reveals that one year prior to his 2006 car accident, Mr. C. did not have any body pain, neck or back. This is confirmed not only by his family doctor's clinical notes and records, but also by the OHIP summary.

The family doctor's clinical notes indicate that he did not see Mr. C. often and they were only for matters such as a bronchial cough or haemorrhoid problems.

Mr. C. testified that prior to the 2006 accident, except for a two-month winter layoff, he had never missed a day of work. A December 10, 2008 letter from his employer confirmed that he was "a good and valued employee" who they regret losing.

Mr. C. provided credible evidence, confirmed by the testimony of his wife, that prior to the accident he had a very happy, harmonious family life and a vibrant social life. The details of his pre-accident family life will be described below in the testimony of Mrs. C.

(c) The Accident

The accident occurred on December 1, 2006. Mr. C. had stopped at a crosswalk in his minivan to let a pedestrian pass by. While stopped, another minivan, which according to Mr. C. was going very fast, hit his vehicle. His minivan was pushed into the crosswalk, but avoided hitting the pedestrian. The impact was such that Mr. C.'s airbags deployed. His minivan was damaged to the extent that he could no longer drive it, and it had to be towed away.

Mr. C. testified that he was very close to his house and went home. He sent his wife and son to deal with the aftermath of the accident.

(d) Post Accident

Mr. C. testified that his immediate injury was to his neck. The pain was such he could not sleep that night. As a result of the extreme pain he called an ambulance and was taken to the hospital.

At the hospital Mr. C. was x-rayed, was given a prescription for pain and also a hot and cold pack.

Mr. C. saw his family doctor, Dr. Kerametlian, on December 11, 2006. His complaints to Dr. Kerametlian were that he suffered from headaches, neck and back pain, with pain radiating down to his right foot. Dr. Kerametlian recommended he have chiropractic and physiotherapy treatment.

In addition to the above treatment, Mr. C. also received massage, acupuncture and cortisone shots in both of his shoulders to relieve pain. He has also received nerve blocks.

On January 6, 2007 and February 21, 2007, Mr. C. went to emergency because of severe pain.

On March 20, 2007, he was taken to the hospital by ambulance because of severe pain.

Mr. C. underwent an MRI sometime in March 2007. The radiologist's report dated April 1, 2007, noted that Mr. C. had a broad based left paracentral herniated disc at the L4-5 level impinging on the left L5 nerve root.

In addition, the radiologist noted a broad based central disc herniation at the L5-S1 level which she believed was touching both S1 nerve roots.

On November 10, 2007, Mr. C. was evaluated by Dr. J. Mitsopulos, a psychologist. In her report dated October 10, 2007, Dr. Mitsopulos stated that in her opinion Mr. C.'s symptoms were consistent with the following diagnosis:

- Major Depressive Disorder (severe intensity)
- Pain Disorder Associated with Both Psychological Factors and a General Medical Condition (herniated discs) (chronic)
- Specific Phobia (driving, car riding)

Dr. Mitsopulos considered Mr. C.'s prognosis to be guarded at the time. She recommended psychotherapy with a Turkish-speaking psychologist. On her recommendation Mr. C. began weekly psychotherapy sessions with Mr. Stephane Sefter, a certified psychotherapist, who spoke Turkish.

The following rehabilitation assistance began about one year after the accident: weekly psychotherapy sessions with Mr. Sefter began on November 2, 2007; weekly sessions with a rehabilitation coach, Wayne Fisher, who since July 2008 worked with Mr. C. in his home; the case management services of Ms. Rosemary Whyte since February 2008 assisting Mr. C. in coordinating his care; and Ms. Paula Hilborn, an occupational therapist, working with Mr. C. since April 2008 to assist him in becoming more independent.

Despite all these interventions, Mr. C.'s mental condition significantly deteriorated by the second year after the car accident.

Mr. C.'s pain had so impinged on his mental health that in July 2009, Mr. C. was hospitalized for expressing suicidal and homicidal ideation.

Specifically, on July 20, 2009, Mr. C. was seen by Dr. Mamelak, a psychiatrist who has been seeing Mr. C. since January 2008. According to Dr. Mamelak's clinical notes, Mr. C. was expressing suicidal and homicidal thoughts. He expressed feelings of uselessness and had thoughts he would kill himself and his family by driving into water.

Dr. Mamelak called Mr. C.'s Case Manager, Ms. Whyte, who was a registered nurse, to attend at his office. Ms. Whyte testified that at Dr. Mamelak's office she observed Mr. C. to be "wild and desperate."

Dr. Mamelak's clinical notes for July 20, 2009 indicate that after discussion with Ms. Whyte, it was agreed to send Mr. C. to the emergency at Toronto Western Hospital.

Mr. C. was admitted to the hospital under a Form 1. He was discharged the next day. However, because his suicidal ideation included homicidal thoughts in respect of his wife and children, Children's Aid Services (CAS) was notified and his family was investigated.

Three weeks after Mr. C.'s suicidal ideation, on August 10, 2009, he was admitted to emergency for overdosing on his pain medication. Mr. C. testified that at that time it was his intention to kill himself.

Coachman disputed Mr. C.'s intention as the clinical notes of the hospital only indicated that Mr. C. had taken an overdose of his medication, but did not mention his intention to kill himself. I accept Mr. C.'s testimony as credible and plausible in light of the fact that three weeks before the overdose he had been admitted to the hospital for suicidal ideation.

Mr. C. testified that as a result of the accident, at the present time he suffers from severe headaches that are so bad that if he had a gun "I just blow myself." Mrs. C., in her testimony, confirmed that when his pain is so severe he has on a number of occasions made this threat as well as the threat of driving his family into the water.

Mr. C. indicated that he suffers from jaw pain so severe that every time he bites down he has pain in his jaw. He always has neck pain. His back pain is so severe that it prevents him from sitting. He has a dull shoulder pain that is always there. He has a sharp pain that goes down his right leg. He has a dull pain down his left leg. The pain is greater when he puts his legs together. He has pain in his buttocks all the time.

Mr. C. testified that his foot pain prevents him from walking any distance. He needs orthopaedic shoes and also uses a cane for walking since March 2007. The cane helps him keep his balance.

Mr. C. stated that his hands get numb and he drops things. He stated that he has dropped his coffee many times. His left hand is more numb than his right hand. He tries to relieve the numbness by massaging. The relief only lasts about 5 minutes.

Mr. C. testified that because of his pain he wakes up many times during the night even though he has taken a sleeping pill before he goes to sleep. He stated that he can't sleep with his wife because he disturbs her due to his restlessness. He sleeps on a massage table purchased by Coachman on the recommendation of Ms. Hilborn. The Insurer also bought him a bed which was better than the one he had.

Mr. C. testified that he is always tired. His mood is sad. He has memory problems. He forgets his medical appointments. His memory difficulties have caused him to forget his cell phone or his wallet at home or at the doctor's office. He misplaces his agenda book. On one occasion he left his daughter standing on the sidewalk when he was supposed to be taking her shopping. Forgetting his daughter on the sidewalk was very humiliating to him.

Mr. C. testified that he gets angry all the time. He is very irritable with his wife and children. He throws things when he's angry. To avoid hurting anyone, he slaps himself and has even burned himself by squeezing lit cigarettes in his hands.

Mr. C. stated that he becomes very irritated at his children when they are playing. He stated he cannot stand any noise which would include his wife vacuuming or when the television is on.

Mr. C. testified that since the car accident he is very alienated from his children. He does not initiate any social interactions. His relationship with his wife has completely deteriorated. Their sex life is almost non-existent. His wife has threatened to leave him.

At the present time, he is on a number of prescription medications. These include:

- Co-Venlafaxine antidepressant
- Ratio-Oxycocet pain reliever
- Lyrica for nerve pain
- Teva-Pranol for headache pain
- Co-temazepam sleeping pill

In addition, Mr. C. takes medication for urinary incontinence.

(2) Mrs. C.'s Testimony

Mrs. C. provided her testimony through a Turkish-speaking interpreter. Mrs. C. testified under strained conditions. She works night shift in a factory, packing chickens. Her work starts at 11 p.m. and finishes at 8 a.m. As a result, Mrs. C. gave her testimony in the afternoon.

Mrs. C.'s underwent an aggressive cross-examination. Her cross-examination, on three separate afternoons, was double if not triple the time that Coachman's counsel spent on cross-examining Mr. C. Mrs. C. responded to questions in a detailed and non-evasive manner. Nevertheless, she was repetitively asked the same questions in a tone and manner, which in my view, was meant to be intimidating. She broke down crying several times. Counsel for Coachman ignored any direction to curtail his repetitive questioning.

Despite a very lengthy and intensive cross-examination, Coachman was unable to impugn Mrs. C.'s credibility. Accordingly, I give full weight to Mrs. C.'s testimony.

(a) Pre-accident

Mrs. C. confirmed her husband's evidence that prior to the accident they had a happy, harmonious home life and a vibrant social life.

Mrs. C. described her husband before the accident as "perfect." His relationship with their children was very loving and playful. "He would do everything to what the children asked for."… "My children used to love him more than me." She stated that, before the accident when he came home from work, "all of the [children] would run towards him, and all of them would want to kiss him."

She testified that Mr. C.'s mood was always very good. They got along very well. She stated:

> He was appreciating everything before the accident. He used to like everything what I did. He used to thank me what I did, he used to thank me for everything. He was very positive for everything.

Mrs. C. confirmed her husband's testimony that before the accident she and her husband had a very good sexual relationship. They would engage in sexual relationship at least once a day or every other day.

Mrs. C. testified that her husband would help around the house doing laundry, cooking and washing up. She stated that because she worked night shift, she could not sleep properly until her husband came home from work. When he came home he took charge of the children so that she could sleep.

Mrs. C. said that before the accident, her husband was in charge of the household finances. He made the decisions about any major purchases.

Mrs. C. testified that before the accident she and her husband and children had a very active social life. At least three weekends a month they would socialize with four or five other families. They would go to their homes or they would entertain their friends in their own home. They would go out for dinner. They would attend wedding ceremonies. In the summer, they would go on picnics, to the beach, cherry picking and strawberry picking at farms.

Mrs. C. testified that before the accident her husband had several friends who he would regularly meet at the coffee shop. She said that her husband would go to the Mosque on Fridays and the family would go together to the Mosque on Sundays.

(b) After the Accident

Mrs. C. testified that after the accident her husband's mood and behaviour changed very dramatically. She stated that after the accident he was upset all the time. "… He gets mad at everything, we hesitate to approach him."

She stated that after the accident her relationship with her husband has become very strained. He is now verbally abusive to her. Almost every day there are arguments and disagreements. "He gets upset for everything. He just sees everything from the dark side." Their sexual relationship was significantly diminished.

Mrs. C. testified that Mr. C's relationship with his children has completely deteriorated since the accident. Mr. C. cannot tolerate any noise, especially when the children are in ordinary play. He shouts at the children for no reason. Because he is always angry at them, the children no longer want to be around him.

Mrs. C. stated that after the accident "he forgets everything." She said he forgets to pay his bills. She is now in charge of their finances. She has to remind him about his doctor's appointments, to brush his teeth, to eat and to change his clothes.

Mrs. C. testified that they no longer socialize with other people after the accident. She stated that Mr. C. is very embarrassed for people to see him in his state. They no longer go out as a family. He does not go to the Mosque anymore. He never sees any friends unless they take the initiative to see him. This does not happen often.

Mrs. C. stated that after Mr. C. professed he wanted to kill himself and had overdosed on his pain medication, she now monitors his medication very strictly. He is completely dependent upon her to provide him with his medication on a daily basis.

Mrs. C. confirmed his suicide ideation and that he had expressed on a number of occasions that if he had a gun he would shoot himself in the head. She also confirmed his suicidal/homicidal ideation which included driving his family and himself into the lake. Mrs. C. testified that, as she told the Children's Aid Society of Toronto (CAS) investigators, she did not believe her husband wanted to harm her and her children, but that he made these statements when he was in extreme pain.

(3) Mr. Stephane Sefter's Testimony

Stephane Sefter, a Turkish-speaking psychologist, has been providing therapy to Mr. C. on an ongoing weekly basis since November 2, 2007. These sessions, which lasted for 1 ½ hours, were recently decreased to once every two weeks, due to the fact that Mr. C. was reaching the $100,000 maximum in medical rehabilitation benefits.

Mr. Sefter testified that when he met Mr. C. for the first time, Mr. C. displayed symptoms of severe depression. Mr. Sefter stated: "he seemed very hopeless about his situation, that he was in great pain and he didn't know how he would get over this, how he would be able to get back to the way he was before the accident."

Mr. Setter testified that since the accident Mr. C. has difficulties controlling his anger. Although Mr. C. does not want to, he finds himself lashing out, with anger and irritability, at his wife and children. He can't handle noise and so when the children make any noise he yells at them.

Mr. Sefter testified that as far as he could ascertain Mr. C. was reclusive. Mr. Sefter stated that Mr. C. is embarrassed by his condition and unable to be "like anyone else" in Mr. C.'s words. According to Mr. Sefter this really disturbs him.

Mr. Sefter stated that he interviewed Mr. C.'s children. He said: "… [the children] did indicate that their relationship was not what it was prior to the accident, and that they don't like going to the park with [their father], because he doesn't stay there very long. He wants to get back home, so they don't go with him anymore, they go with the mother only."

Mr. Sefter testified that Mr. C. indicated that "he was very saddened and embarrassed" over the fact that he could not be a proper father to his children. For example, "[h]e took them to school one day, one of the kids [was] asked … whether this was their grandfather. Because of his hunched back, they thought he was the grandfather. So that was a low point for Mr. C."

Mr. Sefter testified that there hasn't been much improvement in Mr. C.'s relationship with his wife. "He still gets angry, and he says he can't control himself. … when I questioned it a little bit deeper, he says they go days without speaking to each other, and then they start again to try and function. He insists that he's unable to control at times his irritability and his anger and lashes out at either the kids or his wife."

Mr. Sefter testified that his therapeutic role was supportive with the intention of preventing Mr. C.'s condition from getting worse.

(4) Mr. Wayne Fisher's Testimony

Wayne Fisher, a rehabilitation coach, has been working with Mr. C. in his home on a weekly basis since July 2008. These sessions, which lasted for 1 ½ hours, were recently decreased to once every two weeks, due to the fact that Mr. C. was reaching the $100,000 maximum in medical rehabilitation benefits.

Mr. Fisher described Mr. C.'s mood when he met him to be depressed. Mr. Fisher testified that: "…the sessions involved distracting [Mr. C.] from his depressional thoughts … I would have to lift up his spirits somehow during the session. It was a victory in itself if I could get him to maybe feel a touch better at the end of the session than he was at the beginning. That was a huge goal."

Mr. Fisher testified that in his sessions with Mr. C., his job was to find ways in which to encourage Mr. C. to become more involved with his children. He provided a number of examples of his efforts to engage Mr. C. with his children. He testified that despite initiatives to bring the children closer to Mr. C., their relationship today remains strained with little interaction.

Mr. Fisher testified that because of Mr. C.'s memory problems, he assists him with keeping track of his appointments, and organizing the wealth of paper work in relation to his car accident. He has assisted in helping Mr. C. search for an apartment and facilitate the move.

Mr. Fisher testified that he has "observed [Mr. C.'s] concentration to be very limited. His frustrations seem to be so much that it prevents him from engaging. And it's very frustrating to try and work on goals with him and to not always achieve. It's very difficult at times, but his concentration is definitely very low.[2]"

Mr. Fisher gave an example of Mr. C.'s concentration problems. For example, he has attempted to teach Mr. C. to use a computer. This goal was never reached.

Mr. Fisher testified that Mr. C.'s concentration in respect of working on a computer is "seconds." Mr. Fisher stated, "Sitting at the coffee shop doing some research on finding an apartment, it's me looking at the screen, me calling him over to look at the screen to look at a visual of a home, or whatever is found. He looks and moves away. It's quick. There's no standing and peering at it. That's my observation of him."

According to Mr. Fisher, Mr. C.'s concentration and persistence continue to be limited. As well, Mr. C.'s relationship with his wife and his children is only marginally better than when he began to work with Mr. C.

Mr. Fisher testified: "As far as engaging human activity, it hasn't progressed from the time I've met him. But I think providing emotional support of continuing on to try and get into some kind of value of life, or role in his family is ongoing."

(5) Ms. Rosemary Whyte's Testimony

Rosemary Whyte, a registered nurse, has been providing case management services since February 2008. She assisted Mr. C. in the co-ordination of care, which included attending many doctor's appointments with him and helping him to understand information being provided with respect to diagnosis and treatment options.

[2] Transcript page 47

In her testimony, Ms. Whyte confirmed Mr. C.'s limitations as provided by Mr. and Mrs. C. and the other witnesses in their testimony.

(6) Ms. Paula Hilborn

Paula Hilborn, an occupational therapist, who has been working with Mr. C. since April 2008, was recommended by Rosemary Whyte to assess Mr. C.'s functioning in areas of self-care, productivity and leisure, and to assist him in becoming more independent.

She arranged for assistive devices which included a zero gravity chair, bathroom equipment, a new mattress, a massage table to facilitate sleep and an infrared hot bed. As well, she arranged for Mr. C. to participate in a mindfulness-based stress reduction program geared to clients with depression, anxiety and chronic pain. He was unable to continue this program.

In her testimony, Ms. Hilborn confirmed Mr. C.'s limitations as provided by Mr. and Mrs. C. and the other witnesses in their testimony.

(7) Dr. Henry Rosenblat's Testimony

Dr. Rosenblat, a psychiatrist, conducted a catastrophic impairment assessment on November 2, 2009 on behalf of Mr. C. In his report dated January 4, 2010, Dr. Rosenblat diagnosed Mr. C. with a major depressive episode, chronic, severe, partially treated; anxiety disorder NOS (not otherwise specified); and a pain disorder associated with both psychological factors and a general medical condition.

Specifically, Dr. Rosenblat states in his report that the diagnosis of major depressive episode is based:

> ... on the presence of sad mood nearly all the time, poor sleep, decreased appetite, weight loss, poor concentration, hopelessness, suicidal thoughts, decreased energy, a lowered interest, loss of sex drive and guilt feelings.

In addition, Dr. Rosenblat stated:

> Secondary to the presence of a major depressive episode, psychological factors are judged to play an important role in his pain. Therefore a diagnosis of pain disorder associated with both psychological factors and a general medical condition was made. Because of the presence of this disorder, pain related impairments are rated under mental and behavioural impairments.

Dr. Rosenblat's assessment also found that Mr. C.'s injuries are a direct result of his car accident and that he "… is judged to be stable as it has been more than 2 years since the index accident in accordance with Bill 198."

Dr. Rosenblat's ratings in relation to the four domains of functioning pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment Guides*, "the *Guides*" were as follows:

- Activities of daily living – moderate impairment
- Social functioning – moderate to marked impairment
- Work adaptation – marked impairment
- Concentration , persistence and pace – moderate impairment

Accordingly, Dr. Rosenblat concluded that based on his assessment, as a result of mental and behavioural impairments, Mr. C. was catastrophically impaired.

In its cross-examination and submissions, Coachman made much of the fact that Dr. Rosenblat did not have sufficient evidence to come to his conclusion that Mr. C. is catastrophically impaired.

Despite counsel's rigorous cross-examination on the issue of information gathering, I accept that Dr. Rosenblat's report reflects a reasonable, thorough and thoughtful assessment by an experienced and qualified expert. In my view, the level of detail that the Insurer seemed to require of Dr. Rosenblat was neither realistic, nor was it reflected in the catastrophic impairment assessment reports Coachman provided in its own defense.

Unlike the reports of Dr. Wilkins and Dr. Lawson, who provided catastrophic impairment reports on behalf of Coachman and whose testimony will be dealt with below, Dr. Rosenblat, in his report, addressed in detail Mr. C.'s level of functioning. As well, unlike Dr. Wilkins and Dr. Lawson, Dr. Rosenblat explained in detail all of the factors he considered when determining Mr. C.'s level of impairment under the four domains of functioning as outlined in the *Guides*.

Again, unlike Dr. Wilkins and Dr. Lawson, as part of his assessment Dr. Rosenblat also interviewed Mrs. C. I find that the information Dr. Rosenblat received from Mr. and Mrs. C. is consistent with their testimony at the hearing and consistent with the evidence and testimony provided at the hearing by Mr. C.'s treatment providers, Stephane Sefter, Rosemary Whyte, Paula Hilborn and Wayne Fisher.

Although I find that Dr. Rosenblat provided a detailed and professionally objective assessment report, nevertheless, in my view, Dr. Rosenblat, who testified that 60 percent of his assessments were for insurers, was conservative in his conclusions.

Moreover, I find that if Dr. Rosenblat had the additional detailed, credible evidence that was presented at the hearing, Dr. Rosenblat's rating should have been higher than one "marked impairment."

Mr. C.'s treatment providers, who testified at the hearing, had the advantage of seeing Mr. C. on a regular basis over several years. This included Mr. Sefter and Mr. Fisher, who saw Mr. C. on a weekly basis, in his home or in an office setting. In my view, their testimony and evidence at the hearing provided a much more comprehensive picture of Mr. C.'s abilities to function than could have been obtained alone from any expert's in-depth catastrophic impairment assessment.

I find that taking into consideration the observations of Mr. C.'s treatment providers, who have observed him over a long period of time, as well as the credible evidence of Mr. and Mrs. C., as noted below, I have increased Dr. Rosenblat's ratings on my findings on the four domains of mental or behavioural impairments.

ANALYSIS AND FINDINGS

The burden of proof rests with Mr. C. to show on a balance of probabilities that he is catastrophically impaired as a result of his car accident.

After reviewing the evidence and testimony of witnesses in this hearing, for the following reasons I have concluded that Mr. C. is catastrophically impaired pursuant to clause 2(1.2)(g) of the *Schedule*.

Clause 2(1.2)(g) of the *Schedule* provides that a catastrophic impairment includes an impairment that, in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Fourth Edition (American Medical Association, June 1993), results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.

In assessing the severity of mental or behavioural impairments under the *Guides*, four aspects of functional abilities are considered: (1) activities of daily living; (2) social functioning; (3) concentration, persistence and pace; and (4) deterioration or decompensation in work or worklike settings (sometimes referred to as "adaptation"). Also, independence, appropriateness, and effectiveness of activities must be considered.

The Table at page 301 of the *Guides* provides a guide for rating impairments due to mental and behavioural disorders on a five-category scale that ranges from no impairment to extreme impairment. The following are recommended by the *Guides* as anchors for the categories of the scale (see pp. 300-301):

"None"	▪ means no impairment is noted in the function
"Mild"	▪ implies that any discerned impairment is compatible with most useful functioning
"Moderate"	▪ means that the identified impairments are compatible with some but not all useful functioning
"Marked"	▪ is a level of impairment that significantly impedes useful functioning
"Extreme"	▪ means that the impairment or limitation is not compatible with useful function

In coming to my decision that Mr. C. is catastrophically impaired, I am guided by Paragraph 61 of the Judicial Review decision in *Aviva and Pastore*.[3] That is, I am not relying solely on the one marked impairment noted in Dr. Rosenblat's report dated November 2, 2009. I am following the direction of the majority decision having found that one marked impairment, without considering the other areas of functioning, is insufficient for a finding of catastrophic impairment.

Paragraph 61 of the majority decision states:

> This is not to say that there cannot be a finding of catastrophic impairment that is dominated by the assessment of one of the four areas of function. The requirement is that all four must be considered in undertaking the assessment. The *Guides* do not say when an assessment leads to a determination of a catastrophic impairment. What they do is to lay out a process for a proper assessment. The process requires accounting for all four areas of function.

Before dealing with my findings on the ratings in respect of the four areas of functional abilities as outlined in the *Guides*, I will first deal with the issues of credibility, and causation, as well as Coachman's defense in this arbitration.

[3] *Aviva Canada Inc. v. Pastore*, 2011 ONSC 2164 (CanLII). This decision reversed the Director's Delegate's decision in *Aviva Canada Inc. and Pastore* (FSCO P09-00008, December 22, 2009) which upheld the Arbitrator's decision in *Pastore and Avivai Canada Inc.* (FSCO A04-002496, February 11, 2009). This case held that one marked impairment in the four domains was sufficient to conclude that an applicant was catastrophically impaired.

CREDIBILITY

The *Guides*, at page 293, state that in gathering evidence of an applicant's mental disorder:

> The individual's own description of his or her functioning and limitations is an important source of information. The presence of a mental disorder does not automatically rule out the individual as a reliable source of information. Information from non medical sources, such as family members and others who have knowledge of the patient, may be useful in indicating the level of functioning and the severity of the impairment.

Given these guidelines, credibility is an important factor in coming to my decision. In assessing the credibility of the various witnesses, I have concluded that despite lengthy, vigorous and at times inappropriately aggressive cross-examination, Coachman completely failed to impugn the very clear, consistent, credible testimony of Mr. C.[4], his wife and all the witnesses who testified on his behalf.

Having reviewed the treatment providers' reports and records and taking into consideration their very detailed testimony, I find that the treatment providers' observations and their experience with Mr. C. were all substantially consistent with each other and consistent with the testimony of Mr. and Mrs. C., as well as Dr. Rosenblat's assessment and testimony.

Accordingly, I find that Mr. C., and the witnesses on his behalf, provided consistent, credible and reliable evidence in support of his claim that he is catastrophically impaired as a result of his car accident in December 2006.

CAUSATION

In deciding whether an applicant has suffered a catastrophic impairment due to mental or behavioural impairments, it must be shown that these impairments are a direct result of a car

[4] In its written submissions, Coachman at paragraph 43 confirmed that "At the hearing Mr. C. was a relatively good historian…"

accident or that a car accident significantly contributed to and exacerbated a pre-accident condition.

In reviewing the totality of the evidence, I find that there is no medical evidence, whatsoever, that at any time before the car accident Mr. C. suffered from any mental or behavioural problems. There is no evidence that he had ever suffered from a major depressive disorder or suicidal/homicidal ideation.

Less than a year after the car accident, in a report dated October 10, 2007, Dr. Mitsopulos diagnosed Mr. C. with a Major Depressive Disorder (severe intensity); Pain Disorder Associated with Both Psychological Factors and a General Medical Condition (herniated discs) (chronic); and Specific Phobia (driving, car riding). On July 20, 2009, Mr. C. was admitted to the hospital for suicidal/homicidal ideation. On August 10, 2009, he was taken to emergency, because he overdosed on his pain medication.

I accept the consistent, credible evidence of Mr. and Mrs. C. that prior to the car accident, Mr. C. was a hard working, self-sufficient man who was lovingly devoted to his family. His relationship with his wife and children was happy and harmonious. As a family they had a very active social life, attending social events such as weddings, going out for dinner and exchanging home visits with other families several times a month. As a family they went out on picnics, to the beach, and cherry and strawberry picking at a farm. As well, Mr. C. and his family regularly attended services at the Mosque.

Two years post-accident, Mr. C. is completely alienated from his wife and children. Outside of attending numerous medical appointments, driving short distances to a coffee shop, a shopping mall or his children's school, Mr. C. lives mostly a reclusive existence.

From a pre-accident self-sufficient person, he has turned into a person who now needs constant supervision and reminders for the most basic care such as brushing his teeth, changing his clothes or eating a meal. He has serious memory problems and has had to cede the task of managing the family finances to his wife. His concentration and persistence is very limited.

From an easy going person, he has turned into a person who is in a constant state of irritability and anger, lashing out inappropriately at his wife and children.

Accordingly, I find that the totality of the evidence shows that Mr. C.'s present mental and behavioural impairment is a *direct* result of the December 2, 2006 car accident.

COACHMAN'S EVIDENCE AND SUBMISSIONS

(1) Coachman's Evidence

After reviewing the evidence and transcripts of the hearing, I have concluded that Coachman did not have a defense of any substance in this case. While Mr. C. has the burden of proof, I would first like to outline why I reject Coachman's defense in this case.

Coachman did not call any witnesses to defend its case. Mr. C., however, summoned for cross-examination Dr. Wilkins and Dr. Lawson in respect of their catastrophic impairment assessment reports that were prepared on behalf of Coachman.

I give very little weight to Dr. Wilkins' and Dr. Lawson's reports and their testimony wherein they conclude that Mr. C. is not catastrophically impaired as a result of his car accident. Both came across as poor examples of an expert witness. They both clearly appeared to be strong advocates for Coachman.

(a) Dr. Judy Wilkins' Testimony

On October 8, 2009, Dr. Wilkins, a psychiatrist, performed an attendant care assessment for Coachman. In her report dated October 22, 2009, she concluded that Mr. C. suffered from symptom magnification and did not require attendant care.

Coachman provided Dr. Wilkins with Dr. Rosenblat's catastrophic impairment assessment report and asked her to review it. On March 2, 2010, Dr. Wilkins prepared a very short three-page report where she concluded that Mr. C. was not catastrophically impaired.

Dr. Wilkins testified that she was fully qualified to make a catastrophic impairment determination and came to the conclusion that Mr. C. was not catastrophically impaired even though she had never examined him for a catastrophic impairment determination.

Although she did not provide a diagnosis in her report, Dr. Wilkins testified that she based her conclusion that Mr. C. was not catastrophically impaired because in her view Mr. C. was a malingerer. Dr. Wilkins, however, did not provide any objective, credible evidence to support this conclusion. Her conclusion that Mr. C. is a malingerer stands alone in the face of an abundance of consistent and objective evidence that Mr. C.'s behaviour and complaints are credible. I, therefore, give very little weight to her opinion that Mr. C. is a malingerer.

In her report, Dr. Wilkins came to the conclusion that Mr. C. was "moderately" impaired in all four classes mostly for the same reason, namely, that Mr. C. could drive his car and go to a coffee shop. Accordingly, she concluded he was not catastrophically impaired.

While the evidence shows that Mr. C. drives, it clearly shows that he does so because he has no choice as he is limited in his ability to walk any distance. He drives out of necessity, in a limited fashion and for very short distances.

The evidence is very clear that Mr. C. has a lot of anxiety around driving. As noted in Dr. Rosenblat's report, which Dr. Wilkins reviewed, Mr. C. has frequent disturbing memories of his accident. He is afraid of driving and is fearful for his safety. As a result of his assessment, Dr. Rosenblat had significant concern about Mr. C.'s ability to drive and, accordingly, notified the Ministry of Transportation of his concern.

While Dr. Wilkins emphasized Mr. C.'s ability to drive, she completely ignored commenting on the fact that in July 2009, Mr. C. was hospitalized under a Form 1 for suicidal/homicidal ideation

which included *driving his car* into a lake with his family. She also ignored the fact that three weeks after being hospitalized for suicidal ideation, he was taken to emergency for overdosing on his medication. In fact, she completely ignored commenting on any of the objective, relevant evidence that could support a catastrophic impairment determination.

Significantly, is the fact that in coming to his determination that Mr. C. was catastrophically impaired, Dr. Rosenblat had relied upon the occupational therapy assessment of Faye Perreras, which formed part of the catastrophic determination report by Work Able on behalf of Coachman. This report provided a detailed account of Mr. C.'s functional impairments.

In his report, Dr. Rosenblat summarized Ms. Perreras' report. At the hearing, Dr. Rosenblat testified that Ms. Perreras' report provided important details that allowed him to understand Mr. C.'s impairment levels and to incorporate them into his impairment rating. He testified that there was no specific conflict between her findings and his findings.[5]

Despite the fact that Ms. Perreras' assessment on Mr. C.'s ability to function was summarized in great detail in Dr. Rosenblat's report, Dr. Wilkins nevertheless failed to comment or even consider this very important report.

I find it significant that despite the fact that Dr. Wilkins ignored credible evidence that would support a catastrophic impairment determination, she was still able to conclude that Mr. C. was "moderately" impaired in all four categories. In my view, if Dr. Wilkins had properly assessed Mr. C., and was being objective in her assessment, based on the abundance of credible evidence in support of a catastrophic impairment determination, it is more likely than not she could have found him marked impaired in one or more categories.

Accordingly, for all these reasons I give little weight to Dr. Wilkins' report and testimony that Mr. C. is not catastrophically impaired.

[5] It should be noted that I also find Ms. Perreras' report not only to be consistent with Dr. Rosenblat's report and findings, but also with the evidence and testimony provided at the hearing by Mr. C., his wife and his treatment providers.

(b) Dr. Kerry Lawson's Testimony

Dr. Lawson, a psychologist, conducted a catastrophic impairment assessment on behalf of Coachman on August 4, 2009.

Like Dr. Wilkins, I find that Dr. Lawson was a poor example of an expert witness. I agree with Mr. C.'s submissions where he states: Dr. Lawson's demeanour when testifying, was argumentative, evasive, confusing and demonstrated a lack of understanding of his role as an expert to assist the Tribunal in reaching its decision on the complex issue of whether Mr. C. is catastrophically impaired.

Unlike Dr. Wilkins, Dr. Lawson did provide a diagnosis in his report. In his report dated September 1, 2009, Dr. Lawson diagnosed Mr. C. with an adjustment disorder associated with depressed mood; anxiety; chronic pain disorder associated with a general medical condition and psychological factors. He also provided a differential diagnosis of major depressive disorder associated with anxiety.

In a short report, Dr. Lawson, without providing much information, rationale or analysis, concluded that Mr. C. was not catastrophically impaired. I give little weight to his conclusion.

The *Guides*, at page 293, state:

> Taking a standardized test requires concentration, persistence and pacing; thus observing individuals during the testing process may provide useful information. The description of test results should include the objective findings, a description of what occurred during the testing and the test results.

As well, at page 294, the *Guides* points out that when evaluating fitness for work, consideration must be given to the fact that while a person may score well on a test, this may not be a reflection of the person's ability to function in a setting more like the working world.

Although Dr. Lawson testified that the test results determined a significant part of his diagnosis and conclusion, he stated that he did not observe Mr. C. during testing pursuant to the *Guides.* He stated that his personal observations were not as important to him as the test results.

Dr. Lawson also testified that he gave no consideration to the fact that Mr. C. is Turkish and that the tests were answered with the assistance of an interpreter. He stated that test participants were held to the Canadian norm, and not to the norms of their culture.

I find that in failing to follow the *Guides* to observe and record a description of Mr. C.'s "concentration, persistence and pacing" during the testing, I cannot give much weight to Dr. Lawson's conclusions regarding Mr. C.'s functionality when they are solely based on the test results.

Like Dr. Wilkins' report, I find Dr. Lawson's report to be superficial and biased in favour of Coachman. For example, in his report, Dr. Lawson notes: "Mr. C. stated he was hospitalized ***within the past two weeks*** as a result of depression and suicidal ideation."... "He reiterated he has experienced suicidal ideation at times and has threatened to hurt himself and family members." (It should be noted at the time of his assessment with Dr. Lawson, Mr. C. had not yet been hospitalized for overdosing on his medication.) [Emphasis added]

In light of this information, Dr. Lawson ignored the significance of Mr. C.'s very recent suicidal/homicidal mental state in relation to Mr. C.'s ability to function in any of the four domains noted in the *Guides*. I find this to be an important omission, especially since in his conclusion Dr. Lawson states that "Mr. C.'s accident occurred two years prior to his evaluation. As such, his psychological status is considered stable at this time."

Another significant omission in Dr. Lawson's report is his failure to comment on or consider the occupational assessment by Ms. Perreras. Dr. Lawson was on the same team as Ms. Perreras, who were carrying out a catastrophic impairment assessment on behalf of Coachman. Nevertheless, Dr. Lawson, without any explanation, ignored this very relevant assessment regarding Mr. C.'s capacity to function.

Although Dr. Lawson found that Mr. C. was not catastrophically impaired, he completely failed to substantiate his conclusions regarding the four areas of function pursuant to the *Guides*. He did not provide any supporting evidence or rationale for his conclusions. He merely stated that in

his view Mr. C.'s impairment in the domains of concentration, persistence and pace and activities of daily living was "mild." In the domains of social functioning and adaptation, hefound Mr. C. to be "moderately" impaired.

Like Dr. Wilkins, I find that Dr. Lawson ignored consistent, credible medical evidence, which could lead to a finding that Mr. C. suffered a "marked" impairment in one or more domains and accordingly was catastrophically impaired. Accordingly, I give very little weight to Dr. Lawson's conclusion that Mr. C. is not catastrophically impaired.

(2) Coachman's Submissions

I give little weight to Coachman's submissions. In its written submissions, I find that Coachman engaged in a self-serving summary, "cherry-picking" its way through the evidence, in minute detail, to present a completely distorted, out of context picture of the reality of the objective evidence.

In reviewing the submissions, one easily sees that there are numerous significant distorted assertions of the evidence.[6] In his reply submissions, Mr. C. submitted a number of examples which he characterized as "gross mischaracterization of the evidence by Coachman."[7] I note below several additional relevant examples.

At paragraph 111, Coachman submits:

> There is no evidence that Dr. Rosenblat knew that Mr. C. is solely responsible for looking after his children when his wife is working and sleeping during the day, including summer holidays when his children are not in school. Dr. Rosenblat failed to consider this information when making his functional impairment.

[6] While parties presenting their submissions will try to put the best spin they can on the evidence, I find that Coachman went beyond what is considered reasonable advocacy and engaged in a pattern of distortions that did not reflect the evidence in a credible manner.

[7] Reply Submissions, Pages 1 and 2

I find the submission that "Mr. C. is solely responsible for looking after his children," when his wife is working, is not reflected in the evidence. When reviewing the evidence in its totality, it shows that, while the children may be at home at the same time as Mr. C., there is little, if any, evidence that Mr. C. provides any meaningful parental supervision and/or care to his children.

Credible evidence reveals that prior to the car accident, Mr. C. had a loving, harmonious relationship with his three children. After the car accident, there is ample evidence to show that Mr. C. is alienated from his children and has very little interaction with them.

Ms. Whyte testified that Mr. C.'s children avoid him. Moreover, she described how his son will talk back to him and laugh in his face if he tries to give parental instruction.

In his testimony, Mr. Fisher noted that part of his job was to find ways in which to encourage Mr. C. to become more involved with his children. He testified that despite initiatives to bring the children closer to Mr. C., their relationship remains strained with little interaction. In his testimony, Mr. Fisher provided a number of examples of his efforts to engage Mr. C. with his children that failed.

Most significantly, Ms. Hilborn, in her Form 1 for attendant care, stated that ***Mr. C. required supervision*** when his wife was not at home so that ***if a crisis arose with one of the children,*** there would be someone there to assist with making sure the children were okay.

In summary, I find that Coachman's submission attributing a greater ability of functionality in respect of Mr. C.'s interaction with his children is clearly not borne out by the evidence.

At paragraphs 105 and 107 Coachman submits:

> Dr. Rosenblat did not have the clinical notes and records of any of the treatment providers or Toronto Western Hospital regarding Mr. C.'s admission on July 20, 2009 or his alleged overdose on August 10, 2009. ...
>
> In light of the above, it is Coachman's position that Dr. Rosenblat's consideration of Mr. C.'s bald statements that he harms himself and has suicidal homicidal thoughts is problematic and should be given no weight. Dr. Rosenblat merely

> accepted Mr. C.'s statements and made no inquiries as to the frequency and seriousness of the circumstances. As a result, Dr. Rosenblat's opinion that Mr. C.'s self-harm and suicidal/homicidal thoughts would impair his function under the sphere of adaptation should be given no weight.

I find this submission raises a red herring issue of credibility where none exists. The fact is, there is ample objective, credible evidence to support Dr. Rosenblat's acceptance of Mr. C.'s credible reporting which Coachman knew was credible at the time of writing its submissions.

As noted above, the evidence clearly shows that more than two years after his car accident, Mr. C.'s mental health had so deteriorated that he was hospitalized for suicidal and homicidal ideation and a few weeks later he was brought to emergency for having overdosed on his medications. The evidence also shows that concern for further suicide attempts resulted and continues to result in very strict monitoring of Mr. C.'s medication.

Accordingly, I reject Coachman's submission and, as will be detailed below, I give full weight to Dr. Rosenblat's conclusion that Mr. C. is significantly impeded in his ability to adapt and be involved in work like situations.

At paragraph 113, Coachman submits:

> Dr. Rosenblat knew that Mr. C. expressed homicidal thoughts towards his children and that he was irritated by his children. The fact that Mrs. C. , the treatment team and the Children's Aid Society did not have any difficulties leaving the children in Mr. C.'s care and allowing him to drive them is something Dr. Rosenblat should have considered when forming his functional impairment rating.

In support of this statement Coachman referred to a number of extracted statements from the transcript.[8] In reviewing these pages, there was nothing in these pages that in any meaningful way reflected Coachman's submission.

[8] Using its own pagination system, Coachman referred to extracted transcript pages referenced at Tabs 14B, 3C, 10A and 10B of its written submissions.

Aside from noting the fact that Dr. Rosenblat was unaware that in the summer of 2009 that CAS was involved in the family, the referenced pages only note that CAS investigated the family and provided 6 weeks of housekeeping for Mrs. C. There was no mention whatsoever, nor was there any inference that could be drawn that could support Coachman's submission at paragraph 113.

According to Ms. Hilborne's testimony there was concern by his treating team regarding Mr. C. being left alone with the children. As noted above, in her Form 1, she recommended attendant care be provided to assist Mr. C. when he was alone with the children.

Moreover, it should be noted from the Motion decision, dated July 23, 2010, for a Third Party Production Order, Coachman failed to obtain the records of CAS. Without these records, Coachman did not have any objective basis to submit what conclusions the CAS had made regarding Mr. C.'s ability to supervise his children.

Accordingly, I find that Coachman's statement "that Mrs. C., the treatment team and the Children's Aid Society did not have any difficulties leaving the children in Mr. C.'s care" is not borne out by the objective evidence.

At paragraph 115 Coachman further submits:

> …Coachman's position that Dr. Rosenblat's failure to consider Mr. C.'s involvement in the caring of his children affects the weight of his opinion regarding Mr. C.'s impairment ratings, especially in respect of social functioning and adaptation. It is Coachman's position that Mr. C.'s ability to care for his children was an important factor for Dr. Rosenblat to have considered in forming his functional impairment rating in respect of Mr. C.'s social functioning and adaptation and *would likely have resulted in a **lower** impairment rating.* [Emphasis added]

This submission does not reflect Dr. Rosenblat's testimony. In fact, it is contrary to what Dr. Rosenblat testified.

In his testimony, Dr. Rosenblat admitted, that had he been aware at the time of his assessment that Mr. C.'s family was being investigated by the CAS for homicidal ideation that involved his children, it would have affected his rating of Mr. C.'s impairment. Specifically, it *would have* ***increased*** *his impairment rating.*

Dr. Rosenblat stated: "… if we're talking about someone who is a danger to his children, that's a whole other category." "… It's a very serious issue that would affect ratings in Social Functioning, Activities of Daily Living, and Adaptation." In his view, it would be a "further impairment."[9]

Succinctly, according to Dr. Rosenblat's testimony, his impairment rating would likely have increased, not be rated "lower," as Coachman submitted.

One more example should be acknowledged. At paragraphs 54 and 55 of its submissions, Coachman provided a list of 17 functions that it alleges witnesses and reports substantiated that Mr. C. was able to perform and accordingly, submits that Mr. C. should be considered moderately impaired (Class 3) and therefore not catastrophically impaired.

I give little weight to this submission. In my view, it is a simplistic list of facts, created out of context from the totality of evidence, distorting the complexity and reality that the totality of the objective evidence presented regarding Mr. C.'s functioning.

Coachman made submissions on the law which, like its submissions on the evidence, was out of context, distorted and mostly incorrect.

A little less than half of Coachman's 50 pages of submissions was devoted to two arbitration decisions on catastrophic impairment − *Jaggernauth*[10] and *M.R.*[11] which found the applicants in those cases to be catastrophically impaired.

[9] Transcript, July 14, 2010, page 146, lines 1-25 and page 147, lines 1-3
[10] *Jaggernauth and Economical Mutual Insurance Company* (FSCO A08-001413, December 20, 2010)
[11] *M.R. and Gore Mutual Insurance Company* (FSCO A09-001224, December 23, 2010)

These two decisions were dissected in minute detail and presented as determinative of a factual threshold for "marked" impairment in respect of the four domains of mental and behavioural impairment. For the following reasons, I give very little weight to Coachman's submissions.

I find that Coachman compared the facts and evidence of these two cases with Mr. C.'s case in a completely out of context manner. Coachman then submitted that I was bound by these decisions to conclude that Mr. C. did not meet the threshold of marked impairment and accordingly was not catastrophically impaired.

Although there may be some similarity in the facts of these cases with Mr. C.'s case, these cases were decided on their own unique facts which were, in substance, very different to the facts in relation to the totality of the evidence presented in Mr. C.'s case.

For example, in *Jaggernauth*, the Arbitrator found that "pharmacological treatment and psychotherapy have helped Mr. Jaggernauth to reach a level of stability in recent years."[12] This is not the case with Mr. C. Despite several years of medication, psychotherapy and the ongoing support of a case manager, occupational therapist and rehabilitation coach, Mr. C.'s mental and behavioural functioning had so deteriorated by 2009 that he was hospitalized in July for suicidal/homicidal ideation and in August for overdosing on his medication.

As well, in *Jaggernauth*, surveillance revealed that the applicant was functioning on a higher level than claimed. Surveillance showed, amongst other things, the applicant climbing a ladder to change a light bulb and washing his car. Based on the totality of the evidence in the present case, there is a vast difference in the functional abilities of the two applicants. On the facts in the present case, it would be near impossible for Mr. C. to climb a ladder to change a light bulb or physically wash his van.

Significantly, Coachman had surveillance on Mr. C.'s functionality that it chose not to present at the hearing. I draw an adverse inference from this, namely, that Coachman was unable to record any surveillance that had Mr. C. functioning at a higher level than his evidence indicated.

[12] Page 37

The facts in the *M.R.* case are so distinctively different, like comparing apples to eggs, that little, if any, comparison can be made with the present case, except for the fact that both were making a claim for catastrophic impairment due to mental and behavioural impairment.

Accordingly, for these reasons, I give little if any weight to Coachman's submission that I am bound by the *Jaggernauth* and *M.R.* decisions, as determinative of a factual threshold for "marked" impairment.

In addition, Coachman made a number of statements on the law which, in my view, are distorted and incorrect. The following are two relevant examples.

At paragraph 215 Coachman submitted:

> While the Guides *do not specifically state* that an overall marked or moderate impairment (Class 4 or 5) is required, it does strongly suggest that it is.
> [Emphasis added]

Coachman then went on to submit at paragraph 221 (f) that:

> Catastrophic impairment is to be interpreted in accordance with the Guides and as such one marked or extreme impairment (Class 4 or 5) in one sphere of function is not determinative. Instead a person's overall impairment rating is determinative;

This submission would lead one to believe that the *Guides* govern the legal determination of what is a catastrophic impairment. This is incorrect. It is the statute and the case law that are determinative of how the term "catastrophic impairment" is to be interpreted. The *Guides* only provide criteria of what should be considered when a determination is being made on a claim for catastrophic impairment. Succinctly, the *Guides* lay out a process for a proper assessment; they do not say when an assessment leads to a determination. [13]

[13] See *Pastore and Aviva* Judicial Review decision, at paragraph 61

The issue of whether or not one marked or extreme impairment in one sphere of function is determinative of whether a person is suffering from a catastrophic impairment injury is not settled law.

The Arbitrator's decision in *Pastore and Aviva* that one marked impairment in one sphere of function was sufficient to find a person catastrophically impaired, was upheld on appeal by the Director's Delegate. However, the majority in a judicial review of the Director's Delegate's decision disagreed with his decision.

It should be noted, however, that pursuant to paragraph 61 of majority in the judicial review decision, it would appear that the judges did not rule out that "… a finding of catastrophic impairment [can] be dominated by one of the four areas of function." It left open for such a finding as long as all four areas of function are "considered in undertaking the assessment."

The judicial review decision has been appealed and will be heard by the Court of Appeal of Ontario this Fall. Accordingly, the law on this issue is not settled.

Accordingly, I give little weight to Coachman's submission that one marked or extreme impairment in one sphere of function is not determinative of whether a person is suffering from a catastrophic impairment injury.[14]

At paragraphs to 217 and 218 of its written submissions, Coachman submitted:

> The use of a person's overall impairment under (g) is also consistent with the approach of calculating a whole person impairment ("WPI") under (f) to determine if a person meets the threshold of catastrophic impairment.
>
> It is respectfully submitted that if the Guides direct that it is a person's WPI under (f) that is determinative and not whether they have one severe physical injury that impairs significantly their function the same ought to be true for the assessment under (g).

[14] In any case, this is a moot point as according to my findings below, I have found that Mr. C. suffers from more than one marked impairment.

At paragraph 221 (g), Coachman submitted in its conclusion:

> To find [Mr. C.] catastrophically impaired under (g) while not finding [Mr. C.] catastrophically impaired under (f) would create an inconsistent result;

This is a disconcerting submission. It is very clear from the pre-hearing letter, and confirmed at the commencement of the hearing, as well as the evidence presented in this 15 day hearing, that the issue to be determined in this case was whether Mr. C. was catastrophically impaired pursuant to section 2(1.2)(g) of the *Schedule*.

Specifically, the issue to be determined in this case is whether Mr. C. suffers from "a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to a mental or behavioural disorder." There has never been any consideration of section 2(1.2)(f) in this hearing.

What is especially disconcerting about this submission is that Coachman should clearly have known that its submission is not the correct law. Not only because the *Schedule* is very clear and unambiguous that clauses (f) and (g) are separated by an "or," and can be dealt with separately, but it should have known this from its very detailed analysis of the *Jaggernauth* case.

In its written submissions, Coachman presented 28 detailed submissions over seven pages that dealt exclusively with the *Jaggernauth* case. This can only lead one to conclude that Coachman not only read the *Jaggernauth* case but had read it in a very careful and detailed manner. Nevertheless, Coachman completely failed to acknowledge or comment on a clear statement of the law in the *Jaggernauth* decision that is contrary to its submission.

In *Jaggernauth*, Arbitrator Feldman stated:

> If an insured person proves that they suffer from a marked or extreme mental or behavioural impairment under clause (g), they will be deemed to be catastrophically impaired and **there is no need to refer to clause (f)**. [Emphasis added]

I fully agree with Arbitrator Feldman's succinct statement of the law.

Accordingly, I find that Coachman's submissions on the law in this case are distorted and incorrect.

Accordingly, for all these reasons, I give very little weight to Coachman's defense and submissions in this case.

Although Coachman did not have a substantial defense in this case, the burden still remains with Mr. C. to show on a balance of probabilities that he is catastrophically impaired as a result of his car accident. For the following reasons, I find that Mr. C. has discharged his burden.

As noted above, the majority decision in the judicial review of *Aviva and Pastore* held, at paragraph 61, that although one domain can dominate a catastrophic determination, all four domains must be considered for the determination to be valid. Adhering to this direction by the majority decision, below are my findings on all four domains.

FINDINGS ON THE FOUR DOMAINS OF MENTAL OR BEHAVIOURAL IMPAIRMENTS"

For the reasons stated above, I gave little or no weight to the catastrophic impairment assessments by Drs. Wilkins and Lawson. Both assessors ignored relevant, credible information when coming to their conclusions. Not only did Dr. Wilkins not assess Mr. C. for a catastrophic impairment, nor did she provide any diagnosis in her short three-page report,[15] but she completely failed to comment on obvious, relevant and material information in Dr. Rosenblat's catastrophic impairment assessment report, although she purported to have reviewed his report.

In the case of Dr. Lawson, he not only narrowly relied on his test results in a manner that was contrary to the *Guides*, but provided no rationale, whatsoever, as to how he arrived at his ratings. His ratings were completely arbitrary and provided no foundation for his conclusions.

[15] At the hearing, Dr. Wilkins stated that her diagnosis of Mr. C. was that he was a malingerer. As noted above, I gave very little weight if any to this diagnosis.

Accordingly, in my findings below, I will only be focusing on and discussing Dr. Rosenblat's assessment ratings.

The four areas for assessing the severity of mental impairments are discussed in the *Guides* at pages 294-295. These are summarized below.

According to the *Guides*, a person with "moderate" impairment levels can still have some useful functioning in all four areas of function. A person with "marked" impairment levels will find useful functioning significantly impeded (but not necessarily precluded). Accordingly, I agree with Arbitrator Feldman in *M.R.* when he states: "… even at the *marked* level of impairment one can expect some useful function in multiple areas of functioning." This view will be taken into consideration in my findings below.

(1) Effect of Mr. C.'s Mental or Behavioural Impairments on Activities of Daily Living

- Activities of daily living include such activities as self-care, personal hygiene, communication, ambulation, travel, sexual function, sleep, and social and recreational activities.

- The *Guides* state that any limitations in these activities should be related to the mental disorder rather than to other factors such as lack of money or transportation.

- In the context of the individual's overall situation, the quality of these activities is judged by their independence, appropriateness, effectiveness, and sustainability. It is necessary to define the extent to which the individual is capable of initiating and participating in these activities independent of supervision or direction.

- The *Guides* further state that what is assessed is not simply the number of activities that are restricted, but the overall degree of restriction *or combination of restrictions*. The example the *Guide* gives is that while a person may be able to cook and clean, that person can still have a "marked" impairment if he or she is too fearful to leave the house to shop or attend at a doctor's appointment.

Dr. Rosenblat's rating for the domain of "Activities of Daily Living" was "moderate." It's my view, if Dr. Rosenblat had the additional information that was provided at the hearing by Mrs. C., as well as Mr. C.'s treatment providers, Dr. Rosenblat's rating on functionality would have been higher.[16]

There is no evidence to contradict the fact that prior to his car accident Mr. C. was a physically and emotionally healthy, happy hardworking family man. This is not only supported by the medical records, including the OHIP report from one year prior to the accident, but also the consistent, credible evidence of Mr. and Mrs. C.'s testimony.

More than two years after the accident, not only is Mr. C. not working because of serious chronic pain, but, as noted above, his mental and behavioural state of health had so deteriorated that he was admitted to the hospital for suicidal and homicidal ideation. Significantly, shortly afterwards, Mr. C. overdosed on his medication. As a result, Mr. C.'s intake of medication is now strictly monitored to avoid a repeated incident of overdosing.

Consistent, credible evidence reveals that Mr. C. is very limited in his activities of daily living. While he is capable of some self-care, not only is Mr. C.'s medication required to be administered by his wife, but he needs prompting and reminders from his wife for such basic things as when to eat, to change his clothes, and brush his teeth.

Pre-accident, Mr. C. was responsible for the household finances and now he is dependent on his wife. He pays his Visa bill, but needs to be prompted by his wife to do so.

Mr. C. is alienated from interacting with his children. Normal sounds such as his children playing, the sound of the vacuum cleaner, or the television or radio being on greatly irritates him. He lashes out in anger at his children because he cannot tolerate their sounds of play. His children avoid him.

[16] For example, as noted above, Dr. Rosenblat admitted in his testimony that had he known that CAS was called into investigate after Mr. C.'s hospitalization for suicidal and homicidal ideation, it would have impacted on a higher rating of functionality in the areas of activities of daily living, social functioning, and adaptation. Specifically, he would see Mr. C. as being further impaired.

Mr. C.'s day-to-day relationship with his wife is significantly diminished including his sexual relationship with his wife. He has no enjoyment from sex. Any sexual relation he has with his wife is initiated by her. In order to engage in sex he has to take the medications Cialis or Viagra.

Mrs. C. testified that her husband is always irritable and angry with her. Mrs. C., who administers his medication on a daily basis, testified that her husband in desperation has at times tried to choke her for not providing him with more medication than he is allowed.

The evidence of Mr. C.'s treatment providers, the occupational assessment by Ms. Perreras and Dr. Rosenblat's assessment all confirm Mr. C.'s unprovoked irritability with his wife.

Mr. C. cannot walk for any length of time. He submitted a treatment plan for a scooter which was denied by Coachman. As a result, he drives his car out of necessity. He does so for very short periods of time and with a great deal of anxiety and fear of getting into an accident.

Dr. Rosenblat in his evaluation was concerned about Mr. C.'s ability to drive and therefore felt it was necessary to report him to the Ministry of Transportation.

Accordingly, for these reasons, in evaluating Mr. C.'s abilities of activities of daily living in the context of "independence, appropriateness, effectiveness, and sustainability" and "the extent to which [Mr. C.]is capable of initiating and participating in these activities independent of supervision or direction," I find the rating of Mr. C.'s impairment is greater than "moderate."

Accordingly, I find that Mr. C.'s activities of daily living impairment as a result of mental or behavioural impairment is "**moderate to marked**."

(2) Effect of Mr. C.'s Mental or Behavioural Impairments on Social Functioning

- Social functioning refers to an individual's capacity to interact appropriately and communicate effectively with other individuals. It includes the ability to get along with others, such as family members, friends, neighbours, grocery clerks, landlords, or bus drivers.

- Impaired social functioning may be demonstrated by avoidance of interpersonal relationships or social isolation.

- The *Guides* state that 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.

  For example, hostile antagonistic behaviour that may be tolerated by shopkeepers and neighbours may have a "marked" restriction in overall functioning, because antagonism and hostility are not acceptable in the workplace or in social contexts.

Dr. Rosenblat's rating for the domain of "Social Functioning" was "moderate to marked." I find this rating is conservative in regard to the totality of the evidence. In my view, Dr. Rosenblat had sufficient evidence to give this domain a higher rating. Moreover, I find that the totality of the evidence based on the observations of Mr. C.'s treatment providers and his wife, supports a higher rating.

The evidence is very consistent that since the accident, Mr. C. lives a very reclusive life. Once a happy family man with a vibrant social life, he is now completely alienated from his wife and children. His social life is negligible.

Although Mr. C. maintains some friends, he does not initiate any social contact with them. The evidence shows that if he sees any of his friends, they initiate the contact, not very often and for a short period of time – approximately an hour.

Dr. Rosenblat notes in his report that Mr. C. has a sister who lives in Toronto, but he has not visited her since the accident. There is no family conflict. Although his sister does visit, the contact is initiated by his wife.

Mr. C. testified, and confirmed by his wife and health care providers, that he is very embarrassed by how badly he appears; specifically, the demeanour of his bent over body and his inability to sit like a normal person. Dr. Rosenblat noted in his report that Mr. C. stated, "People see me at the edge of being a crazy person."

More than avoiding social contact because of his demeanour, the evidence shows that Mr. C.'s mood is generally not only depressed, but such that he becomes irritable and angry very easily.

In his report, Dr. Rosenblat noted: "He feels irritable much of the time. Even the smile of his children may irritate him at times. When he is irritated he may burn himself at the oven, hit the oven, pull his beard, throw or break objects as well as yell. His children avoid him because he is so irritable."

In his report, Dr. Rosenblat noted: "He looked downward throughout the assessment and had no eye contact. He was ***irritable*** during the assessment ***towards the assessor.*** When I explained that I prefer to have his wife wait outside he raised his voice and told her to get out." [Emphasis added]

Ms. Perreras, in her report, summarized by Dr. Rosenblat, stated the following:

> Mr. C. lost his temper and expressed anger at his wife during the completion of the interview. Mrs. C. was noted to cry following this incident. Mr. C. later on reported to feel sorry on how he reacted to his wife.

In the history obtained from Mr. C.'s wife, Dr. Rosenblat reported the following:

> His wife was seen alone in order to collect additional history. She indicates that he is upset about "everything" and forgetful. He used to participate in family activities. Now he does not care. Prior to the accident he was able to recall birthdays and anniversaries but he does not now. Before the accident he used to complement her on activities such as cooking. And now he always argues and complains. She feels that he is always looking for something to complain about.

Besides the observations of Ms. Perreras and Dr. Rosenblat, Mr. C.'s health providers have all reported in their testimony regarding Mr. C.'s irritable, angry and rude behaviour to his wife. They have also all reported that Mr. C. is alienated from his children.

In addition to Mr. C.'s irritable and hostile behaviour towards his immediate family, the evidence shows that he is also hostile and irritable with neighbors, landlord and shopkeepers.

The *Guides* note that "hostile antagonistic behaviour that may be tolerated by shopkeepers and neighbours may have a 'marked' restriction in overall functioning, because antagonism and hostility are not acceptable in the workplace or in social contexts."

Accordingly, based on the totality of the evidence, I find Mr. C.'s impairment to social functioning as a result of mental or behavioural impairments is **marked.**

(3) Concentration, Persistence and Pace

- Concentration, persistence and pace refer to the ability to sustain focused attention long enough to permit the timely completion of tasks commonly found in work settings or everyday household tasks.

- The *Guides* state that one should not place too great emphasis on results of psychiatric or psychological testing as a person may score well in a clinical setting but have real difficulties completing tasks in a real-world situation.

Dr. Rosenblat's rating for the domain of "concentration, persistence and pace" was "moderate." In his report, Dr. Rosenblat noted under this domain that Mr. C. "does not multitask;" "has difficulty following instructions and directions"; "his pace at tasks is very slow;" and "in terms of persistence, he indicated he does very little."

Dr. Rosenblat testified that the reason he rated this domain as "moderate" is because he does not give a rating higher than "moderate" in this domain when a person drives. That is, according to Dr. Rosenblat, it would appear that no matter how marked a person's functionality in this

domain, his rating would not be higher than "moderate" where a person drives. I disagree with this view.

Not only is this a view that the *Guides* does not stipulate, but it is clearly arbitrary and does not take into consideration the particular facts of the individual case. Specifically, it does not consider the fact that just because a person drives does not mean that the person can or should be driving.

The evidence in this case is very clear that Mr. C. drives only out of necessity and for very short distances and in his neigbourhood. He drives with anxiety and fear. He has been involved in two minor accidents.

In his report, Dr. Rosenblat acknowledges Mr. C.'s fear of driving and notes that: "[Mr. C.] is afraid of driving especially when other vehicles come close. He will not go for merely a recreational drive. He wants to avoid driving and has therefore requested a scooter."

And finally, most significantly, Dr. Rosenblat himself had serious concerns about Mr. C.'s ability to drive. As a result, Dr. Rosenblat notes in his report that he felt it was "necessary" to notify the Ministry of Transportation of his concerns.

Accordingly, on the facts of this case, I do not accept Dr. Rosenblat's limiting the rating in this domain because Mr. C. drives.

In my view, there is ample evidence to show that in this domain, Mr. C.'s impairment rating should be "marked." Aside from Dr. Rosenblat's acknowledging in his report that Mr. C. cannot multitask; has difficulty following instructions and directions; his pace is slow and persists very little; Mr. C.'s health care providers in their testimony, and reports all confirm that Mr. C.'s ability to function in this domain is very limited.

Accordingly, for these reasons, I find that Mr. C.'s impairment in this area as a result of mental or behavioural impairments is "**marked."**

(4) Deterioration or Decompensation in Work or Worklike Settings ("Adaptation")

- This category refers to repeated failure to adapt to stressful circumstances. In the face of such circumstances the individual may withdraw from the situation or experience exacerbation of signs and symptoms of a mental disorder; that is, decompensate and have difficulty maintaining activities of daily living, continuing social relationships, and completing tasks.

- Stresses common to the work environment include attendance, making decisions, scheduling, completing tasks, and interacting with supervisors and peers.

Dr. Rosenblat's rating for the domain of "work and adaptation" was "marked." In his report, Dr. Rosenblat stated the following:

> [Mr. C.] has been unable to return to work since the accident. His irritability would affect his ability to get along with work colleagues. His irritability leads into inappropriate behaviors such as self-harm, yelling or throwing objects. When he is under stress he will scream or curse. He has difficulty in coping with his pain to the extent that he was overdosing on his medication. As a result his medication must be doled out by his wife. He usually leaves decisions to his wife. He has difficulty following directions and instructions. He has sometimes booked appointments but usually leaves this task to his case manager. He no longer manages his finances.

I find that Dr. Rosenblat has succinctly summed up the evidence regarding Mr. C.'s functionality in this domain. I fully agree with Dr. Rosenblat's rating. It is not only consistent with the evidence of Mr. and Mrs. C., it is also consistent with the totality of the medical evidence and the evidence of his health care providers. Accordingly, for these reasons, I find that Mr. C.'s impairment in the area of "work adaptation" as a result of mental impairments is **"marked."**

Accordingly, for all of these reasons, I find that Mr. C. is catastrophically impaired pursuant to clause 2(1.2)(g) of the *Schedule*.

EXPENSES:

If needed, the parties may speak to the issue of expenses within 30 days of this decision.

	October 21, 2011
Joyce Miller Arbitrator	Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A09-000167

BETWEEN:

MR. C.

Applicant

and

COACHMAN INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. C. is catastrophically impaired pursuant to clause 21(.2)(g) of the *Schedule*.

2. If needed, the parties may speak to the issue of expenses within 30 days of this decision.

October 21, 2011

Joyce Miller
Arbitrator

Date