

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



FSCO A16-000329

BETWEEN:

S.P.

Applicant

and

RBC GENERAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Arbitrator Jeff Musson

Heard: In person at ADR Chambers May 23-26, 29-30, July 18, 24-28, September 5-8, 2017 and by written submissions due October 20, 2017

Appearances: Ms. Aliza Karoly for S.P.
Mr. Harry Brown for RBC General Insurance Company

Issues:

The Applicant, S.P., was injured in a motor vehicle accident on November 6, 2010 and sought accident benefits from RBC General Insurance Company (“RBC”), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and the Applicant, through her representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

¹ *The Statutory Accident Benefits Schedule - Accidents on or after September 1, 2010*, Ontario Regulation 34/10, as amended.

The issues in this Arbitration Hearing are:

1. Did S.P. sustain a catastrophic impairment as a result of the motor vehicle accident of November 6, 2010?
2. Is either party liable to pay expenses in respect of the Arbitration Hearing?

Result:

1. S.P. did sustain a catastrophic impairment as a result of the motor vehicle accident of November 6, 2010.
2. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Prior to the start and throughout the Hearing, there were 10 motions that were requested to be heard.

MOTION #1 - Day 1 - May 22, 2017

The Applicant put forward a motion requesting an order to exclude the list of productions being requested by the Insurer, specifically corporate documents from a business at which the Applicant was noted as the Vice President. The Insurer filed a motion with the Superior Court requesting a bench warrant compelling the Applicant's former business partners to testify at the Hearing and to produce relevant corporate documents if they exist.

RULING:

I ruled that the matter is before the Superior Court and therefore it has the jurisdiction to determine this matter.

MOTION #2 - Day 1 - May 22, 2017

The Applicant made a motion to exclude specific documents in the Insurer's brief since they were not filed within 30 days as per Rule 32 of the *Dispute Resolution Practice Code* ("DRPC"). Specifically, the Applicant was requesting the exclusion of items 1, 4 through 15, 16B, and 17, which were Facebook/Instagram photos. The Insurer stated that the pictures only reinforced other pictures that were filed within the Rules.

RULING:

I ruled that I would allow the additional pictures to be entered. Both sides would have an opportunity to question the Applicant on these pictures during her testimony.

MOTION #3 - Day 1 - May 22, 2017

The Applicant put forward a motion to exclude her mother's medical records from the Insurer's arbitration brief. The Applicant stated that her mother's medical records were irrelevant to this Hearing because she was not a named party in this proceeding and therefore has no standing. The Insurer stated that the Applicant's mother's medical records were relevant because, in the opinion of the Insurer, the records will show a family history of mental health issues.

RULING:

I ruled that the Applicant's mother's medical records were not relevant to this Hearing and would not be admitted.

MOTION #4 - Day 1 - May 22, 2017

The Applicant put forward a motion to exclude the Insurer's CAT report by Dr. Valentin because two legal opinion letters were sent to Dr. Valentin and the Applicant's position was that these letters prejudiced Dr. Valentin's opinion. In addition, the Applicant stated she never received the

complete accident benefits (“A/B”) file from the Insurer. The Insurer submitted email evidence where Dr. Valentin acknowledged the letters but stated that the letters were not read. Further, the Insurer stated that it was in compliance, as all documents within the A/B file were sent to the Applicant.

RULING:

After hearing arguments from both parties, I ruled that I would allow the Insurer’s CAT report to be entered into evidence at the Hearing.

MOTION #5 - Day 1 – May 22, 2017

The Applicant put forward a motion to allow two letters written by the Insurer on January 13 & February 13, 2017 to be entered into evidence. The Insurer stated that these letters were privileged and were sent accidentally to the Applicant.

RULING:

I agreed with the Insurer and ruled that these two letters were not to be entered into evidence at the Hearing.

MOTION #6 - Day 1 - May 22, 2017

The Applicant put forward a motion requesting that the Applicant’s discovery transcript not be entered into evidence at this Hearing. The Applicant stated the transcript covered the benefits: housekeeping and home maintenance, income replacement, and non-catastrophic impairment (“CAT”) treatment plans. The Insurer wanted the entire transcript to be entered into evidence because there were questions related to the Applicant’s CAT claim that were addressed. This discovery took place after the Applicant’s CAT assessments took place.

RULING:

Based on the evidence, I felt that the transcript was relevant, and I allowed the transcript to be entered into evidence.

MOTION #7 - Day 6 - May 29, 2017

The Insurer put forward a motion to reintroduce the medical records of the Applicant's mother as it related to bi-polar disorder based on the evidence that was presented at this Hearing. The Insurer was of the opinion that the Applicant suffered from a bi-polar disorder and it wanted to show it was hereditary. The Applicant denied that there was a family history of bi-polar disorder as the Applicant has never been diagnosed as having a bi-polar disorder. Further, the Applicant opposed the introduction of the Applicant's mother's medical records since they are privileged and are a private matter. Finally, the Applicant argued that the Applicant's mother did not have standing at this Hearing.

RULING:

I already ruled on the first day of the Hearing that the Applicant's mother's medical records were not relevant and would not be admitted at the Hearing.

MOTION #8 - Day 7 - May 30, 2017

The Insurer put forward a motion to introduce additional school records into evidence that were not given to the Insurer prior to the start of the Hearing. The Applicant objected to these records being entered as evidence at this Hearing since the Hearing had already commenced. The Applicant objected to the late notice of this motion.

The Insurer stated that at discovery, the Applicant agreed to produce all of her academic records. The Applicant confirmed that she requested her academic file from the school board and it was sent to the Insurer. After the Applicant testified at the Hearing, the Insurer questioned if it had

all of the school records from the Applicant's file. It was confirmed by the Insurer that there were additional records that the school board failed to turn over despite the Applicant requesting the entire file.

Further, the Insurer wanted clarification as to the contents of the missing records, specifically as it related to counseling records. The Applicant confirmed that there are no counseling records in the file. When the Applicant was asked to explain the discrepancy related to the difference in the quantity of pages from the initial request, the Applicant stated that these new records included the Applicant's academic record from kindergarten through to the time she dropped out of high school. Prior to this, the Applicant's school records were provided to the Insurer which spanned from one year pre-accident to when the Applicant dropped out of school, hence the difference in the number of pages.

RULING:

After hearing submissions related to this motion, the value of the additional school records is minimal at best. The Applicant confirmed there are no counseling records and the Applicant's records since kindergarten had no value for this Hearing. Further, as the presiding Arbitrator at this Hearing, I found that these records would not assist me in deciding the outcome of this case. Therefore, I did not allow the additional school records to be entered as evidence at the Hearing.

Motion #9 - Day 7 - May 30, 2017

The Applicant put forward a motion requesting that the Insurer be prevented from executing any bench warrants against any individuals who had been summoned to testify at the Hearing. The Applicant further requested that no further bench warrants be requested from the court for this Arbitration. The Insurer did not object to this motion being requested. It was also noted that the Insurer was using signed, blank photocopied Summons to Witness, Form Ns to summons witnesses to appear at this Hearing.

RULING:

I ordered that no further bench warrants were to be issued for any witnesses testifying at this Arbitration and no further bench warrants were to be requested from the court.

MOTION #10 - Day 12 - July 27, 2017

The Applicant put forward a motion to exclude the witnesses and videos/pictures related to surveillance on the Applicant. There were new videos and pictures that had been located that had not been provided to the Applicant 30 days prior to the Hearing in accordance with the *DRPC*. The Applicant stated she would be at a severe disadvantage should this material be entered into evidence. The Insurer admitted that the surveillance was served less than 30 days prior to the Hearing; however, it stated that the information contained in the material was an addendum to the existing surveillance and information that was obtained from the videos and pictures was only a supplement to prior evidence.

RULING:

Since the evidence was only a supplemental addendum to the existing evidence, I allowed it to be entered into evidence at the Hearing.

BACKGROUND

The Applicant was 17 years old at the time of the accident. While stopped at a red light, she was rear-ended by the car behind her and the car behind that car. The last driver caused the chain reaction accident. The Applicant's mother was in the passenger's seat at the time the accident occurred. After the accident, the Applicant and her mother disembarked from the vehicle to survey the damage. At this time, they also phoned M.P. (Husband/Father) to tell him what happened. M.P. immediately drove to the accident scene.

There was approximately \$1,300.00 worth of damage to the Applicant's car as a result of the

accident.

The Applicant did not proceed to the hospital immediately after the accident and instead went home as she was supposed to attend a family wedding later that day. While at the wedding reception, the Applicant began to feel nauseated and ended up leaving after only being there for an hour. The following day, the Applicant was feeling substantially worse. She sought medical treatment and went to Southlake Hospital.

It is important to note that due to the Applicant's current condition, a capacity assessment was completed, and a legal guardian was appointed on behalf of the Applicant.²

THE APPLICANT

The Applicant testified that she led the normal life of a teenager prior to the accident. She stated she had average to good grades, was well organized, and didn't have a lack of self-esteem. The Applicant testified that she was able to adapt to change as was demonstrated when her family moved from the greater Toronto area to Innisfil because of her father's job transfer.

The Applicant testified that she had a large circle of friends and despite moving further away from the friends that she grew up with, she still kept in touch. Further, she was able to make new friends in Innisfil where she had an active social life and was attending high school. The Applicant stated that prior to the accident she was active with outdoor activities such as swimming, various water sports, and dirt bike racing. She enjoyed the surge of adrenaline from these types of sporting activities.

She gave evidence that in the summertime during her pre-accident high school years, she would work at the local courthouse filing documents and it was her aspiration to become a criminal lawyer as she was passionate about the law.

² Exhibit 1, Vol 5, Tab 70.

Prior to the accident, other than having the occasional headache, she testified that her health was good. She did break her wrist at some point and required physiotherapy, but it was well healed by the time she was rear-ended in the accident that took place on November 6, 2010. She also stated and agreed with her clinical notes and records that occasionally she suffered from some anxiety as a result of her asthma.

The Applicant testified that prior to the accident, from a personal grooming and hygiene standpoint, she took incredible pride in how she looked. She always liked to dress up and kept current with the latest fashion trends in clothes and jewelry. The Applicant stated that she had a “signature look” by which she was known.

The Applicant testified that she was driving home with her mother after getting their hair done. When the accident occurred, she testified that, “It sounded like a bomb went off”. After the accident, she stated that her vehicle was able to be driven home. The Applicant, along with her family, attended the wedding reception later that day. She did not go to the hospital immediately after the accident.

At the reception, the Applicant testified that she threw up in the bathroom and ended up leaving the wedding after only an hour. She went home to bed and woke up the next day in pain. At this point, she stated that she went to the hospital where she was examined and discharged later that day. The Applicant followed up with her family doctor approximately four days later, on November 10, 2010.

As a result of the accident the Applicant testified that she took two weeks off from school. She also began treatment for her injuries. After this two-week period, she returned to school. However, she testified that once she returned to school she was having problems keeping up with her classmates in her assigned course work and as a result, she required a tutor after school. In the end, she graduated a year after her classmates because she had not completed enough course credits to graduate with her class.

The Applicant testified that since the accident, her life has drastically changed. No longer

was she the outgoing person she was prior to the accident. She testified that since the accident, her life revolved around being sick. Now, she just wants to be left alone and the only activity which she does with any regularity is sleep. Her original plan for post-secondary education was to attend university, but since the accident, this was no longer a reality. As a result, she set the goal of attaining a college diploma. The Applicant testified that once she finally graduated from high school, she enrolled at Fanshawe College in September of 2012 as a full-time student with 6 courses. However, she had trouble coping and as a result, she reduced her course load.

In terms of her ability to function, the Applicant testified that she was able to use assistive devices such as a hearing device in order to listen more intently to her professors while attending Fanshawe. She also was seen by accessibility and academic counsellors in order to assist her through her academic program. These individuals were able to make accommodations for her such as extra time for testing, separate rooms and any other means which could assist her in passing her courses. In terms of attendance, the Applicant testified that she had some absences; the longest absence being when she was sick with gastrointestinal problems.

The pressures of school were getting to the Applicant. She ultimately had a mental breakdown and got into a verbal confrontation at Fanshawe with her roommate who also happened to be her cousin. She testified that the pressure of school and the behaviour of her roommate were too much to take. At this point she testified that she had enough with life and wanted out. She confirmed that her parents drove to London to pick her up and bring her back to Toronto. This episode took place in November 2013.

Once back in Toronto in December 2013, the Applicant was admitted to the Centre for Addiction and Mental Health (“CAMH”) for her mental health issues, specifically her ideation of suicide.³ The Applicant stayed involuntarily based on the Form 1 she submitted with her admittance. Once the time limitation of her Form 1 expired, she testified that she stayed at CAMH voluntarily. As a result, she was allowed to have a weekend pass to leave

³ *Ibid.*, Vol 4, Tab 54.

the facility, which she did during the Christmas holidays on December 23, 2013.

Although she originally had intended to return to CAMH after the holidays, she decided to be treated on an outpatient basis with therapy and prescribed medication. With the medication she was prescribed, it caused her weight to fluctuate. She has been unable to find the medication and proper dosage that works. Without her prescribed medication, she smokes marijuana to deal with her issues.

The Applicant has made a few attempts to return to work since the accident. These attempts inevitably failed because she has difficulty adapting to different environments since the accident. It should also be noted that the Applicant has also been involved in two subsequent motor vehicle accidents in 2011 and 2012. For the 2011 accident, she was on her way to work and she was rear ended. She considered this a minor accident and didn't attend the hospital or seek any medical treatment. With her January 2012 accident, she testified that she was driving on her way home from work and was on Highway 400. The roads were icy and she lost control of her car. Again, she didn't seek any medical treatment.

The Applicant testified that she worked various jobs including: retail, a collection agency, cleaning the interior of airplanes, and at Bradford Greenhouses where her job was to place white sticks to identify flowers in each pot as they went down the assembly line. All of these work opportunities ended with her leaving because she couldn't function well. Some were full-time jobs, but most were part-time and in the case of the Bradford Greenhouse job, the Applicant's friend, M.A., was the one who got her that job. Even with this support, the Applicant still could not hold down the job.

In addition to these jobs, the Applicant testified that she did work for a company called Homegrown. This company was created by two other individuals and she was more or less the face of the business. She testified that the other people involved in this business were M.G. and T.J.W. She stated that she would just model outfits that would then go on display as part of the Caribana Festival Parade in Toronto. As part of this event, the Applicant had numerous photographs taken of her wearing her Caribana costumes.

The Insurer questioned the Applicant as to some photographs that she was in. As part of the Insurer's evidence, it produced pictures of a Toronto Sun Sunshine girl posing in a costume. The Insurer asked the Applicant how she was able to pose for pictures as part of a Sunshine Girl photoshoot while she claimed to be suffering from the medical issues. The Applicant replied much to the surprise of Insurer's counsel that it was not her in these pictures, it was another girl. At the same time that this revelation took place, it was noted that Insurer's counsel, Mr. Brown, swore an affidavit affirming this Sunshine girl to be the Applicant when it was proven to be someone else. This photo and others that were not of the Applicant were sent to many witnesses as evidence, when in fact it was not the Applicant in the pictures.⁴

The Insurer attempted to put forward a theory that the Applicant was involved in a love triangle between M.G. and T.J.W. It was this theory of a love triangle which caused the business called Homegrown to dissolve. The Applicant denied this was true as did M.G. and T.J.W. when they gave their testimony.

As part of her 21st birthday celebration, the Applicant took a trip to Australia to visit a friend for three weeks in the summer of 2014. Both the Applicant and her parents, as well as her family doctor, felt this trip might be beneficial to clear her mind. She testified that she suffered from anxiety while on the trip and her first week was spent in a hostel. After three weeks, she was ready to come back home. Once back at home, she said that the trip temporarily helped her mood and her outlook on life but that was short-lived and she regressed to her previous state.

The Applicant testified that she has outbursts, screams at people, throws fits of rage, and ultimately withdraws from stressful situations. She has many verbal confrontations with family, friends, her legal counsel, and then gets depressed. An example of the Applicant's reaction to a stressful situation occurred as a result of comments from the Insurer's lawyer. At an earlier time in the Applicant's claim, the Insurer's lawyer stated the "Applicant looked too pretty to be sick."⁵ Evidence was submitted that described comments such as this caused

⁴ Applicant's Written Submission, pg. 46.

⁵ Ibid, pg. 14.

the Applicant to act out irrationally during the holiday season at this time around her family home.

The Applicant testified that her relationship with her parents is poor and she yells at them a lot. Even though they are her support system, she will lash out at them from time to time. In one episode, she threatened her life as well as the lives of her parents. Her father had to pry a knife out of her hands and called 911. The police and an ambulance attended the scene at the family home. The Applicant confirmed that after this episode, she was admitted to Royal Victoria Hospital for treatment for her psychological issues.⁶

Ultimately, she testified that she fears for her future and her parents fear for her future as well. She knows that she has outbursts and is verbally abusive to people, but she testified that she cannot control her behaviour.

Ms. M.A.

M.A. is 24 years old and has been the Applicant's best friend since they were both in Grade 11 when the Applicant moved to Innisfil. She testified she knew the Applicant prior to the accident. She was summoned to testify by the Insurer. M.A. testified that she was harassed at her residence because of this case by the Insurer's investigator who showed up unannounced to serve her with her summons to attend this Hearing. The Insurer's investigator served the summons on M.A.'s mother. After promptly serving the documents, the Insurer's investigator stated that if her daughter did not attend the Hearing that there would be an arrest warrant issued for M.A. M.A. stated that this upset her household especially since the Insurer's investigator was harassing her mother on Mother's Day in 2017.

M.A. testified that prior to the accident, the Applicant and she would always be going out, having fun, and generally living the normal life of a teenager in Ontario. She never witnessed any mental or psychological episodes by the Applicant prior to the accident. Those episodes have only been prevalent since the accident. M.A. testified that now, even the smallest things

⁶ Exhibit 1, Vol 2, Tab 50.

set the Applicant off, such as M.A. chewing gum, which she has discontinued when she is around the Applicant.

She gave evidence at the Hearing that prior to the accident, the Applicant was well dressed, with her nails and hair always done when they were going out. Now, the Applicant doesn't practice good hygiene.

M.A. testified that, since the accident, the Applicant has not been the same person. She has to continually remind her of conversations that they had and other things that one would not expect a young person to have trouble keeping up with.

When the Applicant was admitted to Royal Victoria Hospital after one of her psychotic episodes, M.A. testified that she visited her. She said that after this time, the Applicant has gained weight, has trouble sleeping, and is extremely moody. She testified that she can no longer take the Applicant out with her in group settings because she does not know how the Applicant will react when she has one of her outbursts. As an example, she will go to the mall with the Applicant and then they have to turn around because something set the Applicant off. If there are any activities that she wants to do with the Applicant, it all has to be planned out ahead of time, otherwise it will end in disaster. For example, she testified that she went to a Russell Peters comedy show with the Applicant. They had to arrive a day early in order to get settled. It was a structured activity as opposed to a spontaneous one. She said, by doing it this way, it worked out. Another time, she and the Applicant were out at a New Year's Eve party and the Applicant had one of her troubled episodes. As a result, they sat in the hotel room and missed New Year's Eve. She testified that the Applicant's behaviour is continually a moving target.

M.A. tried to be supportive of the Applicant and her schooling when the Applicant attended Fanshawe College. M.A. also tried to be supportive with her return to work attempts. She also was encouraging of her efforts around the Caribana parade with the Homegrown team since it has always been the Applicant's dream to be a part of this festival. From a work perspective, M.A. went so far as to get the Applicant a job on the greenhouse assembly line

planting seedlings in pots at Bradford Greenhouses. However, like other attempts at working, this one failed and the Applicant quit because she couldn't keep up.

Ultimately, the testimony of M.A. concluded that the Applicant's behaviour prior to the accident was a complete reversal of the person she knows today.

Mr. T.J.W.

T.J.W. was summoned by the Insurer to testify at this Hearing which he reluctantly did. He testified that he knew the Applicant since they were 16 years old, however, they reconnected when they both were in London when the Applicant was enrolled at Fanshawe College.

T.J.W. founded the business, Homegrown, and invited the Applicant to be a part of it. He testified that he handled all the business aspects of running the company and the Applicant was just the face of the group. This business was established to help promote Caribbean Culture in the GTA through events.

T.J.W. testified that the business made no money and in fact they lost money. For example, there was a boat cruise on Lake Ontario which was organized as a memorial boat cruise for the Applicant's cousin who passed away at a young age. T.J.W. testified that they lost \$2,500 on this cruise. He was asked to provide business records to this Hearing, however, he testified that he doesn't have any bank account records as this company didn't make any money. He testified that any records that he has are sitting someplace in his bedroom at his mother's house where he resides.

Ultimately, T.J.W. testified he could not continue having the Applicant as part of his business because the Applicant could not hold her own, couldn't model, and had no capacity to live up to obligations to which she committed. The Insurer asked if the Applicant was involved in any marketing or business aspects. T.J.W. responded, "Would I be stupid enough, if I have a public relations degree...why would I let a girl that is clearly disabled and has no focus, no attention span, write my marketing materials? That is the most incompetent thing I ever

heard.”⁷

As with M.A., T.J.W. testified that the Insurer’s investigator harassed his mother when the investigator attempted to serve notice that T.J.W. was to testify at this Hearing. The investigator told T.J.W.’s mother that if her son did not attend the Hearing, there would be an arrest warrant issued for him. T.J.W. stated that the investigator didn’t end up leaving his notice to appear with his mother. Instead, Mr. Brown personally served the summons to appear at this Hearing on T.J.W. at T.J.W.’s place of employment. T.J.W. testified that he did not appreciate the scene that Mr. Brown caused.

Ms. E.W.

E.W. is the mother of T.J.W. She was at home when the Insurer’s private investigator showed up at the house uninvited. T.J.W. wasn’t home so, the investigator continued to harass the household on three more occasions. E.W. testified that it was nothing short of harassment in terms of how the Insurer’s investigator was targeting her son and their household over the summons for her son to appear at the Hearing. In her opinion, her son had nothing to add to this file and yet, they continued to harass the family. E.W. confirmed all aspects of her son’s testimony, mainly that the Homegrown business was nothing more than a hobby which her son attempted to make money from, but ultimately lost money.

Mr. M.G.

M.G. was called to testify by the Insurer. He along with T.J.W. started Homegrown. There were three incorporated directors, T.J.W., the Applicant & M.G. The company was incorporated in February of 2015. M.G. confirmed that T.J.W. was the founder and provided the business acumen while he and the Applicant played a significantly smaller role. He confirmed that the business lost money and that the Applicant’s role was greatly reduced as time passed.

⁷ Applicant’s written submission, pg. 28.

M.G. also testified to the harassment that he endured as part of this Hearing. Mr. Brown swore an affidavit in support of a granted court order to arrest M.G. for not showing up at the Hearing when in fact M.G. did appear on the first day of the Hearing. It was agreed by all parties that M.G. would return at a later date when he could be made available to testify. M.G. stated that Mr. Brown was aware of that fact when Mr. Brown sent a junior associate to appear before Justice Firestone to request a bench warrant for the arrest of M.G. for not showing up when summonsed.

Ms. A.H.

A.H. was called to testify at the Hearing. She and the Applicant modelled as part of the Caribana costume pre-party. A.H. was asked by her friend, T.J.W., to be part of the program to showcase costumes at the Caribana party. She had the opportunity to know the Applicant throughout the event including the rehearsals that were mandatory to attend.

She found the Applicant to be pleasant and happy when she was at the event. She didn't exhibit any abnormal behaviour based on their interactions. When asked how long she had known the Applicant, she replied that she only knew her a short while and hadn't seen her since the event.

Dr. Mohammed Rajani

Dr. Rajani is the Applicant's family doctor. I found his testimony to be truthful and forthright. Even though he has had the Applicant as his patient since she was born to the present date, he testified based on the facts and not as someone advocating for the Applicant.

He sees approximately 1500 patients per year, which he described is a busy practice. Dr. Rajani stated that prior to the accident, the Applicant was fine from a physical and mental health perspective. She was maturing through her teen years no differently than the average teenager. There were no pre-existing issues remotely related to the issues that she is suffering from now as a result of the accident. The Applicant's clinical notes and records confirmed

Dr. Rajani's testimony.

He testified that the Applicant's first post MVA visit to his office was on November 10, 2010, which was four days post-accident. He also confirmed that the Applicant visited the Emergency Room at Southlake Hospital the following day after the accident.⁸ From a physical standpoint, the Applicant suffered various strains and sprains because of the accident. She also suffered from muscle spasms in her neck and back. He suspected that the Applicant may have had a closed head injury, so he sent the Applicant for a computerized tomography ("CT") scan of her head.

The Applicant was next seen by Dr. Rajani approximately one month later on December 22, 2010. Dr. Rajani filled out the Applicant's OCF-3 form after this visit.⁹ He testifies that as part of this visit, he referred the Applicant to Dr. Khan, a psychologist in Barrie who could provide her with psychological treatment as a result of her accident. He also referred her to a Psychiatrist, Dr. Godfrey, for her neck and back pain.

Dr. Rajani continued to monitor the Applicant's progress after she was referred to Dr. Khan. He testified that he agreed with Dr. Khan when he recommended that the Applicant attend group therapy as well as being prescribed medication for her psychological issues. The Applicant was ultimately given a referral to a Psychiatrist for further issues related to the accident. The one drug that the Applicant was prescribed in low doses was for a sleeping disorder which the Applicant suffered from. This drug on occasion can also be used in much higher doses for the treatment of bi-polar symptoms, which Dr. Rajani testified that the Applicant did not suffer from.

In April 2011, he testified that he wrote a note in the Applicant's clinical notes and records that the Applicant is unable to leave her house and advised retaining the services of a tutor.¹⁰ He stated that the Applicant suffered when going out in public and the Applicant also suffered

⁸ Exhibit 1, Vol 2, Tab 45.

⁹ *Ibid.*, Tab 42.

¹⁰ *Ibid.*, Tab 44.

difficulties in various situations. Even though the Applicant had academic accommodations allowed for her studies, she failed most of her in-home schooled courses.

Further clinical notes and records of September of 2011 note that the Applicant suffers from anxiety and numerous phobias. There were also numerous comments about the Applicant being difficult in 2011 and 2012 which further concluded that from a mental standpoint, the Applicant was not well.

Towards the end of 2011, the Applicant had a visit to her family doctor's office. At this time, Dr. Rajani referred the Applicant to the Simcoe Pain Clinic and Dr. Rajani inquired how the Applicant was managing with her home schooling and found that the Applicant was still having problems achieving passing grades. She was sent back for a follow up visit to Dr. Khan. The Applicant was seeing a Physiotherapist on and off post-accident. It was her mental health which required more treatment as opposed to her soft tissue injuries.

Post-accident, the Applicant also started having hearing issues. She described to Dr. Rajani that she had trouble processing sounds. As a result, an assistive device was ordered for the Applicant so she was able to hear the professors teach in her classrooms. While away at Fanshawe College, the Applicant had some temporary gastrointestinal issues which distracted her from her studies. However, her psychological issues were still prevalent throughout and Dr. Rajani recommended that the Applicant see another Psychiatrist as well as a school counsellor in order to find a way to cope with her ongoing mental health issues.

In September of 2013, Dr. Rajani testified that the Applicant's mental health issues were getting worse. The Applicant's parents contacted him because of their daughter's suicide attempts as well as her anger management issues. He recommended that the Applicant be taken to the emergency room at a hospital immediately. By December of 2013, the Applicant, based on Dr. Rajani's advice, decided to withdraw from her courses at Fanshawe and come home. In addition, it was also noted that it was unsafe for the Applicant to be living alone.¹¹ He confirmed that the Applicant was self-admitted to the mental health ward at CAMH in

¹¹ *Ibid.*, Vol 1, Tab 33.

December of 2013. She was suffering from suicidal ideation.

In addition, the Applicant was also threatening her family and they were concerned for her safety. While at CAMH, she was diagnosed as suffering from a major depressive disorder, and the Applicant's global assessment of functioning ("GAF") score reflected this as well. The assessor at CAMH hypothesized that this was due to a bi-polar disorder, however, no testing was ever completed, and this diagnosis was never confirmed.

The Applicant never went back to CAMH after leaving during the Christmas holidays in 2013 and a discharge letter was given on January 9, 2014. The doctor testified that the Applicant decided to continue her mental health treatment as an outpatient.

Dr. Rajani testified that the Applicant decided that travelling to visit friends might aid in her recovery. The Applicant as a result went on a three-week trip to Australia. When she returned to Canada, she felt better, but the recovery was short lived. Ultimately, things progressively declined with the Applicant's mental health and she was admitted to Royal Victoria Hospital for psychological issues. The reason for this admittance was that the Applicant's parents struggled to get a knife out of the Applicant's hands when she was threatening to stab herself and others. She was referred to Dr. Zooer, a Psychiatrist, and was prescribed more medication. The Applicant was referred to a sleep clinic to rule out sleep apnea. In the end, Dr. Zooer moved his practice to the U.S. and the Applicant sought no further treatment.

Under cross-examination, Dr. Rajani was asked if there was a history of family mental illness which would cause the mental issues that the Applicant suffered from. Dr. Rajani stated that he was not able to comment on the Applicant's mother's medical history because of privacy issues, however he can say that in the Applicant's clinical notes and records, which he has completed since the Applicant's birth, there is no indication that such a history exists.

Dr. Rajani summarized his testimony by saying the Applicant had some anxiety related to asthma in 2008. In addition, she also had a history of having migraine headaches. Other than

relatively minor medical issues, there was nothing in the Applicant's file which would cause her to suffer from the mental health issues that she is suffering from other than the accident of November 6, 2010.

Mr. M.P.

M.P. is the Applicant's father and he testified on her behalf. The Applicant is the only child to him and his wife. M.P. started working for the provincial government in 1988. M.P. accepted a transfer to a courthouse located north of Toronto where he was given the position of supervisor of court operations and was responsible for managing a staff of 108 people.

He testified as to what life was like for his daughter prior to the accident. He said that she was a typical teenager and had an ability to make friends easily. She also had both personal and career goals. One of the jobs that the Applicant had was working as a summer student for two summers at the courthouse. She received high evaluations from judges and was a valued employee in the courthouse over the two summers. It was this job in particular that sparked an interest with the Applicant to consider a career as a lawyer. On the personal side, M.P. testified that his daughter was a well put together individual who took pride in her appearance. She even had a talent agent at ages 15-16 who attempted to find her work involving dancing and singing.

In his opinion, his daughter was normal in every sense of the word prior to the accident. After the accident occurred, he received a phone call from his daughter and wife that they had been involved in a car accident. He proceeded to drive to the intersection where the accident occurred. They determined at the time there was no need to call the police or an ambulance. The following day, M.P. attended the collision reporting centre with his daughter.

M.P. confirmed all of the details regarding his daughter's medical condition both pre- and post-accident. He also confirmed many details about her medical condition as evidenced within her clinical notes and records.

M.P. testified that he and his wife were actively involved in their daughter's life, including her schooling. The Applicant was living with her cousin (his niece) while attending Fanshawe College when he and his wife received the call from his niece that his daughter was having a mental breakdown. M.P. and his wife drove to London to pick up their daughter and move her back to Toronto.

Once in Toronto, M.P. encouraged his daughter to consider admission to CAMH for treatment and told her that he and her mother would support her in terms of getting her mental health better. Ultimately, with their prodding, they brought their daughter to CAMH to be admitted. He testified that his daughter was in tears and said that his daughter was being verbally abusive and was acting aggressively towards them. Once admitted to CAMH, she was examined and was given some medication to try and control her verbal outbursts. Eventually, he testified that his daughter received a weekend pass and she came home for Christmas. His daughter decided not to return to CAMH after the holidays and instead decided to be treated on an outpatient basis.

M.P. confirmed aspects of his daughter's two subsequent accidents and her work history. The Applicant's parents were of the mindset that if the Applicant was able to hold down a job that this would relieve a lot of the mental anguish that she was suffering from. M.P. was asked about his daughter's involvement with the business called Homegrown. He testified that he had only met T.J.W. once in 2014 and didn't know much about the business. At the Hearing, M.P. questioned the Insurer's assertion that his daughter was a business partner who was also romantically involved with T.J.W. and M.G. He denied that she was dating either T.J.W. or M.G.

M.P. testified that his daughter threatened to commit suicide and on one occasion in particular, he had to grab a knife from his daughter's hand. He called the police as well as an ambulance to the family home. After this episode, his daughter was admitted to Royal Victoria Hospital based on a Form 1 intake form. She was eventually discharged from the hospital and attempted to receive psychotherapy treatment for her issues from a medical doctor.

M.P. testified that he attends most medical appointments with his daughter. He stated that his daughter's behaviour was unpredictable and he considered her to be a loose cannon at these appointments. He would wait in the waiting room outside while the various doctors assessed her.

In the clinical notes and records from CAMH, it notes that his daughter's behaviour mimics a bi-polar disorder, but this was never diagnosed by any doctor.¹² M.P. also testified that there was never a diagnosis at CAMH of his daughter being bi-polar as was being theorized by the Insurer.

The Applicant's father confirmed in his testimony that he was the one who wrote the resignation letter on behalf of his daughter which she submitted to her employer, Bradford Greenhouses, because his daughter was not able to mentally complete this task. He testified that this whole ordeal has been extremely stressful on the entire family. He can only take one day at a time and is trying everything to enable his daughter to return to the life she led prior to the accident.

Mr. Tony Gutta & Mr. Jim Hamilton

Mr. Gutta was subpoenaed to testify at this Hearing by the Insurer. He has been a manager at Bradford Greenhouses for the past 30 years. He testified as to the job that the Applicant had which was planting seedlings and inserting a plastic stick into pots as the pots passed along a conveyor belt. He didn't know the exact number of people he supervises, but it was a lot because he uses a golf cart to move around the Bradford Greenhouse plant.

Mr. Gutta started testifying about the details that he remembered about the Applicant's employment. However, near the end of his testimony he stated that he just realized that he has been talking about a girl named Nicole who stopped working at the plant because her car broke down and didn't have transportation which is why she left. It was only after this

¹² *Ibid.*, Vol 2, Tab 54.

recollection that Mr. Gutta realized that all of the comments he made about the Applicant were actually about Nicole. Further, he didn't remember anything about the Applicant's employment, so he recanted everything that he provided testimony on and was unable to comment on the Applicant's work.

Mr. Jim Hamilton also testified from Bradford Greenhouses at this Hearing. He has been the Human Resource Manager for Bradford Greenhouses since December of 2010. He testified that he didn't have the letter of resignation that the Applicant submitted to the company. Mr. Hamilton testified that the Applicant did get hired in 2013 and that it was for a short duration of time.

Dr. Lara Davidson

Dr. Davidson was an expert in clinical and neuro psychology.¹³ She has conducted over 200 insurer's examinations as well as over 1,000 catastrophic exams. She started her career doing work strictly for the insurance companies, but now does work on behalf of applicants. When questioned by the Insurer's lawyer, she confirmed she is able to conduct bi-polar assessments. Dr. Davidson was accepted as an expert witness by the Insurer and the Applicant, as well as by me.

She testified that she has been trained on the AMA Guides 4th edition for catastrophic impairment assessments.¹⁴ She stated that the AMA Guides do not require standard tests such as the Personality Assessment Inventory ("PAI") test to be completed in order to do a Criteria 8 assessment.

Dr. Davidson completed the Applicant's catastrophic report on October 28, 2014.¹⁵ She found the Applicant to have a marked impairment within criteria 8. As part of her assessment, she interviewed the Applicant for three hours and the Applicant was only able to

¹³ *Ibid.*, Vol 5, Tab 76.

¹⁴ A.M.A. Guides to the Evaluation of Permanent Impairment, 4th Edition (AMA Guides)

¹⁵ *Ibid.*, Vol III, Tab 58.

answer some questions. The Applicant's father, M.P., was the person who gave collateral information that Dr. Davidson required. The Applicant completed various testing including a post-traumatic stress disorder ("PTSD") test, a Pain Catastrophizing Scale ("PCS") test, and a Tampa Scale test for Kinesiophobia. However, when looking at some of the answers, the responses were not what one would expect of a normal and mentally stable person. For example, when asked on one of the tests to state her occupation, the Applicant responded "Bum". From the Applicant's answers, Dr. Davidson concluded that the Applicant is a very angry person who has feelings of hopelessness.

Dr. Davidson gave the Applicant a functional GAF score in the range of 42 - 46.¹⁶ This was in a similar range to the Insurer's Examination ("IE") GAF score. Dr. Davidson concluded that the accident materially contributed to the Applicant being (Class 4) marked in the fourth sphere: adaptation. She agreed that having Dr. Rajani's clinical notes provided a perfect snapshot of the Applicant's health and as a result, there is a clear disorientation of the Applicant's mental health after the accident.

Dr. Davidson testified that she found no evidence that the Applicant was malingering during the assessment. She did find that the Applicant could not control her anger. As she succinctly stated, "if one was expecting a favorable score from a catastrophic assessment, you would not expect the Applicant to annoy the person doing the examination with her behavior, which is what happened in this situation."

The Insurer asked Dr. Davidson if she was surprised to know that the Applicant travelled to Australia on a three-week vacation post-accident. She replied that no, she wasn't surprised that she was able to do that because the Applicant was given a rating of "moderate to marked" in the area of daily living.

The Insurer also asked Dr. Davidson why she only did an assessment using Criteria 8. She replied that it was Omega, the clinic who engaged her services, that requested only a psychological CAT report, and that is why no physical assessments were completed.

¹⁶ *Ibid.*

The Insurer also asked why her CAT report didn't comment on a bi-polar diagnosis. She replied because there wasn't a bi-polar diagnosis and the Insurer's own CAT assessor never even commented on a bi-polar diagnosis.

Ms. Louise Silverston

Ms. Silverston was called by the Applicant as an expert in social work as well as a capacity assessment expert. Ms. Silverston has been doing these capacity assessments for over 20 years. In 2017 alone, she completed over 45 accident-related assessments. Ms. Silverston explained how she conducted a capacity assessment on the Applicant. As part of this process, she interviewed the Applicant for approximately 2 hours. She concluded that the Applicant was unfocused and needed to be calm to answer questions. In her expertise, she has seen similar behavior to this. She concluded that the Applicant wasn't able to make informed decisions about her case and could not, based on her assessment, appreciate the outcomes resulting from her decisions. Also, she noted that in the middle of the interview, she had to use crisis intervention in order to complete the assessment.

Ms. Silverston also said that as part of the Applicant's history, it was significant in her mind that the Applicant had been admitted to a couple of hospitals for psychological care. Therefore, once she factored in the totality of the data points collected, she determined that the Applicant required a legal guardian to manage her legal affairs. As she stated at the conclusion of her testimony, her expertise is in the area of capacity, she is not qualified to make any medical diagnoses, and based on this framework, the Applicant had capacity issues.

Ms. Chantal Sands

Ms. Sands testified at the Hearing as she was employed with Centric Health as the Director of Catastrophic and Serious Injury Services. Since the time that the CAT assessments were completed for the Applicant on behalf of the Insurer, Centric Health has sold off its assessment division. At that time, it was her responsibility to determine which CAT

assessments were required by the Applicant, and which would be completed by the Insurer. When the request comes into the clinic, she decides which doctor will be assigned the assessment. In other words, insurance companies can't "Assessor shop" for someone who they believe will provide a favourable assessment. Once the types of assessments were determined and the assessors selected, she testified that it is Dr. Oshidari who organizes the team of professionals to conduct their assessments.

Dr. James Delaney

Dr. Delaney testified on behalf of the Insurer. He is an orthopedic surgeon who completed an orthopedic assessment on the Applicant on April 7, 2011.¹⁷ The assessments were completed to determine the Applicant's inability to perform the essential tasks of her pre-accident caregiving along with housekeeping and home maintenance tasks. He explained how he conducts his assessments. He begins by reading the Applicant's background information and medical history. He also does a personal interview with the Applicant. The Applicant complained of suffering from constant back pain. Dr. Delaney completed a physical exam of the Applicant and he concluded that he did not see any signs of root tension or pain issues with her spine. He did however testify that he found the Applicant to have evidence of pain magnification when he was conducting his exam. For example, he would give a light touch to an area where the Applicant had stated she had pain. This would then result in an exaggerated reaction. He concluded that the Applicant doesn't suffer an impairment from a musculoskeletal point of view and has reached maximum medical recovery. He ultimately concluded that the Applicant's subjective complaints were far exceeding the medical evidence from his perspective, and the Applicant should be examined by a Psychologist.

Dr. Alex Luczak

Dr. Luczak was a Psychiatrist and an expert witness who testified on behalf of the Insurer. He has a private practice in Barrie and has been practicing for over 30 years in his area of expertise. His practice consists of 2/3 being patient related and 1/3 being assessments. He

¹⁷ Exhibit 2, Vol 4, Tab G5.

also does medical reports for both insurance companies and the applicants. When asked under cross-examination how long he spent with the Applicant, he stated that she was in his office for about an hour and that he spoke to her alone.

Dr. Luczak completed his psychiatric assessment of the Applicant on June 30, 2011.¹⁸ He was asked to complete an assessment on the ability of the Applicant to complete housekeeping and home maintenance tasks. In addition, he was asked to complete an assessment on the Applicant's entitlement to post-104 income replacement benefits. Dr. Luczak concluded that in his opinion, the accident did not cause the Applicant to suffer a substantial inability to work. If anything, he found that the Applicant suffered from an adjustment disorder with feelings of hopelessness, crying, and avoidance of family and friends.

Dr. Luczak was asked by Applicant's counsel to give his opinion as it related to adjustment disorders. He testified that if an adjustment disorder was still present after six months and if the reason causing the adjustment disorder was still present, this would in his opinion be diagnosed as chronic. He stated that when he examined the Applicant, he felt her adjustment disorder was close to becoming chronic. He also noted that an adjustment disorder is a marked psychological distress that impairs functioning. There is also a possibility that an adjustment disorder can be a precursor to a major depressive disorder. Further, he testified that with an adjustment disorder, you have to worry about suicide attempts. Dr. Luczak also gave comment on the GAF score of 65 that the Applicant had. In his opinion, this suggests distress because a normal GAF score is in the 80 - 90 range, however when asked if he still stood by his recommendations in his report that the Applicant does not suffer a complete inability to work, he said "yes, he stands by his findings".

Dr. Wayne Baici

Dr. Baici was called to testify by the Insurer. He was the Applicant's treating Psychiatrist while she was under the care of CAMH. He testified that a full multidisciplinary assessment

¹⁸ *Ibid.*, Vol 4, Tab G6.

was completed prior to the completion of the Applicant's Form 1 upon admission to the hospital by Ms. Roseanne Mills, and based on the exam conducted by Dr. Baici.¹⁹

Upon the Applicant's initial admission to the hospital, she was found to have a low GAF score of 25. She was observed finger painting on the floor with tubes of toothpaste. Dr. Baici met with the Applicant's parents to discuss how best to treat their daughter's condition. Initially, it was suspected that the Applicant may have a bi-polar disorder; however, none of the exams that were administered found this to be true.²⁰

He confirmed that the Applicant was discharged on December 23, 2013. He testified that part of the reason why the Applicant left was that she was frightened by the people who were around her. Since her involuntary Form 1 had expired, she was at the hospital voluntarily, so she could leave at any time. Dr. Baici testified that he would have preferred her to stay. While under his care, the Applicant was prescribed "Seroquel", which is an anti-psychotic drug, and she was given instructions to take the drug nightly. Following his assessments, he concluded that the Applicant had manic symptoms and demonstrated manic episodes. One of the reasons why he wanted the Applicant to stay as an inpatient at CAMH was to determine what was causing her mental distress. He testified that completing an assessment in a hospital is much easier than as an outpatient because in a hospital, it is a controlled environment. When the Applicant is treated as an outpatient, some of her non-prescribed drug interactions such as marijuana and ecstasy may be contributing to her symptoms. If the Applicant was treated as an in-patient at CAMH, there would be no recreational drug interaction

Dr. Oshidari

Dr. Oshidari conducted the psychiatry and general assessment on the Applicant on February 11, 2015 on behalf of the Insurer.²¹ He was the team coordinator for the Insurer's catastrophic assessments. He was responsible for conducting the physical assessment while

¹⁹ *Ibid.*, Tab G15.

²⁰ *Ibid.*

²¹ *Ibid.*, Tab G3.

Dr. Valentin was responsible for conducting the psychological assessment. There was also an occupational therapy (“OT”) assessment that he wanted to conduct, however, the Applicant failed to attend any OT assessments. He agreed that an OT assessment was not mandatory in order to assess for a catastrophic impairment, but it would have been nice to have.

During his exam, he found the Applicant to be highly uncooperative. She completed the interview, but she gave a half-hearted attempt in his professional opinion. When he was completing his report, he testified that he had Dr. Delaney’s and Dr. Luczak’s reports.

As part of the intake process, the Applicant told Dr. Oshidari about her pain complaints. He testified that he found the Applicant to be a difficult patient. He found she showed signs of pain magnification on a number of occasions. From what he could determine, the Applicant had no physical impairments that would cause her to be found catastrophic. At most, he could only give the Applicant a Whole Person Impairment (“WPI”) rating of 15% based on his assessment.

In his report, he found the Applicant to be marked in the 3rd sphere of criteria 8 in the AMA Guides. However, he testified that being marked in this section was only a provisional conclusion due to difficulties in rating the Applicant due to her unruly behaviour. Dr. Oshidari ultimately gave evidence that at the time of his report, the Applicant met the definition of catastrophic impairment under Criteria 8, however, it was a “provisional” catastrophic impairment.

When asked to comment on the GAF score that he used in the CAT report, Dr. Oshidari stated that when conducting an assessment, it is just a snapshot in time. Things may change, daily, weekly, or monthly depending on circumstances. He was also questioned as to why a marked score was used, when if it was “provisional” as he claimed, he could have put an incomplete for that same category. He said this is how he writes his reports. In the end, Dr. Oshidari stood by the findings in his report.

Dr. Irvine Valentin

Dr. Valentin conducted an assessment of the Applicant in two sessions spread over two days on February 7 and 9, 2015.²² She testified that the Applicant was agitated and was extremely difficult to assess because of her behaviour. Dr. Valentin testified that the Applicant could not complete a standardized PAI questionnaire to measure validity of the Applicant's test results. Just as the Applicant had done with her own psychological assessor, the Applicant failed to answer the questions that Dr. Valentin put before her. Dr. Valentin would have liked to have asked the Applicant more questions, but that was an impossible task. She found the Applicant's pre-accident academic history to be sketchy and her report card did not portray a high-level academic student as she claimed to be prior to the accident.

With her assessment, she was unable to conduct validity testing. In addition, she could not pinpoint the cause of the mental health issues that the Applicant was displaying. Dr. Valentin, as a result, stated that all four spheres in which the Applicant was assessed were all provisional conclusions.

Under cross-examination, Dr. Valentin was asked what she thought of Dr. Davidson's report, and specifically around learning disabilities and if that would change any of her own conclusions. She testified that she found at the time of her assessment that the Applicant did not suffer from any learning disabilities, however, if she did find that the Applicant suffered from a learning disability, it would not automatically make the Applicant's condition catastrophic. She also testified that professionally speaking, she knows of some people who have had learning disabilities who have excelled in their careers, including a few lawyers.

Dr. Valentin found this a difficult case to assess and included the colorful language used by the Applicant; however, it didn't stop her from giving a diagnosis. Dr. Valentin testified that she found the Applicant could control her emotions at some points while at other points she could not. She found no evidence of a brain injury in reviewing the Applicant's medical documents. She found the Applicant to have a GAF score in the mild range of functioning. Dr. Valentin testified that at the time of the assessment and based on the information that she

²² *Ibid.*, Vol 5, G3.

reviewed, she agreed that the Applicant was marked in one sphere, however she prefaced this by saying the assessment is but a snapshot in time.

When assessing for catastrophic impairment, there were many areas that she reviewed. The areas included the Applicant's return to school and her attempts at working various jobs. There was even video surveillance that she was given to look at, but in the end, she stands by her report. Lastly, she was asked to comment on a bi-polar disorder. She stated that she found no evidence that the Applicant suffered from such a disorder.

Dr. Valentin testified that she recommended in her report that the Applicant undergo psychological testing. She also concluded that the Applicant had a GAF score of 50 after completing the psychological assessment. Further, in her report, she gave the Applicant a marked category in the area of concentration, persistence and pace; however, in her opinion, it was based on an incomplete dataset. At the time of the assessment, she concluded that the Applicant met the definition in criteria 8 of a catastrophic individual. When asked if she would change her findings now, she said no.

CATASTROPHIC IMPAIRMENT DETERMINATION

Both the Insurer's and the Applicant's catastrophic assessment teams on their initial examination of the Applicant found her to be marked in one category, however, the Applicant's doctor found her to be marked in the area of adaptation while the Insurer's doctor found her to be marked in the area of concentration, persistence and pace.

The Applicant was assessed by her own expert, Dr. Davidson, on October 14, 2014 to determine if her injuries from a medical perspective were considered catastrophic in nature from the November 2010 accident.²³ Dr. Davidson administered numerous tests as part of her assessment. She ultimately came to the conclusion that the Applicant's injuries are considered to be catastrophic in nature because she found the Applicant to be marked in the fourth sphere in the area of adaptation. Further, she concluded that the accident of November

²³ Exhibit 1, Vol 3, Tab 58.

2010 had a material contribution to the Applicant's current state of mental health. Dr. Davidson also found the Applicant to have a GAF score in the range of 42-46, which was similar to the GAF score that the Insurer's CAT assessor, Dr. Valentin, concluded.

The Insurer's CAT assessment was written by Dr. Oshidari on April 20, 2015.²⁴ In addition, he was also responsible for conducting a psychiatry assessment of the Applicant on February 11, 2015.²⁵ The second part of the CAT assessment included a psychological assessment completed by Dr. Valentin on February 7 and February 9, 2015.²⁶ Dr. Oshidari scheduled an OT assessment for the Applicant; however, this was never completed because the Applicant failed to attend the assessment.

As part of the evidence submitted at the Hearing, Dr. Oshidari's psychiatry assessment found the Applicant to have at most a 15 % WPI rating. He was unable to find any evidence from his examination of the Applicant, that from a physical standpoint, the Applicant suffered a catastrophic impairment.

Dr. Valentin found, after completing her examination, the Applicant to be marked under criteria 8 in the area of concentration, persistence and pace. However, this was a provisional diagnosis because the Applicant failed to complete the self-testing portion on many of the exam questions. There were over 340 questions that the Applicant failed to answer and instead, the Applicant used the pen and paper to write vulgar and demeaning messages which would make the savviest of orators blush with embarrassment. She wanted to answer these questions verbally, but when she was not allowed, she in her words "lost it". The Applicant returned a second time to attempt to complete her CAT psychological assessment. She was unable to do this and during the second attempt, the Applicant's uses of four-letter swear words increased exponentially.

The Applicant also took the position that she in all likelihood could be found to be CAT under

²⁴ Exhibit 2, Vol 4, Tab G3.

²⁵ *Ibid.*

²⁶ *Ibid.*

criteria 7 in addition to Criteria 8. The Applicant's CAT assessor came to this conclusion that if they took Dr. Oshidari's psychiatry report (because the Applicant didn't complete a psychiatry report), which gave the Applicant a 15% rating for WPI, and added it together with the Applicant's psychological rating of 38%-36%, that the Applicant would achieve a WPI of 55%, which would make her catastrophic under criteria 7. The Applicant came to the 38%-46% psychological rating by converting Dr. Davidson's GAF score of 42-46.

The Insurer ultimately denied that the Applicant sustained a catastrophic impairment as a result of the accident because Dr. Valentin could not complete a standardized PAI questionnaire to measure validity of the Applicant's test results.

EVIDENCE AND ANALYSIS

In order for the Applicant to be found to be catastrophically impaired, the Applicant must either attain a minimum 55% WPI rating, which combines a physical rating along with a psychological rating, or the Applicant must be found to be marked in one of 4 spheres under criteria 8.

The test of catastrophic impairment is set out in section 3(2)(f), of the *Schedule*; namely whether the Applicant's impairments result in a class 4 (marked) or class 5 (extreme) impairment, due to a mental or behavioral disorder as described in Chapter 14 of the AMA Guides, 4th Edition.

The impairment of function due to mental or behavioural impairments is measured in four spheres: 1. Activities of Daily Living, 2. Social Functioning, 3. Concentration, Persistence and Pace and, 4. Adaptation.

The *Pastore v. Aviva Canada*²⁷ case reaffirmed that an applicant may only need to be found marked in one sphere to be considered catastrophic. This case also determined that a three-

²⁷ *Pastore v. Aviva Canada*, 2012 ONCA 642 at paras. 46 and 50.

step approach should be used in determining catastrophic impairment under s. 3(2)(f) of the *Schedule*. In *Pastore v. Aviva Canada*, there were three key questions which were addressed:

1. Did the accident cause the Applicant to suffer a mental or behavioural disorder?
2. If it did, what is the impact of mental or behavioural disorder on the Applicant's life?
3. In view of the impact, what is the level of impairment? (one of five classes)

The court was referenced within this decision and has stated that "Catastrophic impairment" is to be given an inclusive and not a restrictive meaning. It is only necessary to have a marked impairment in one area of function.

Dr. Valentin in her report found the Applicant to be marked in the third sphere (concentration, persistence and pace). However, Dr. Oshidari testified that the Applicant was only being "provisionally" marked in this section due to difficulties in rating the Applicant as a result of her unruly behaviour and lack of a completed PAI. Even though Dr. Oshidari said the marked category was a provisional conclusion, nowhere in the report written by Dr. Valentin were the words "provisional" ever documented next to the word "marked". If either Dr. Valentin or ultimately Dr. Oshidari felt that the results of the assessment were inconclusive, they could have put an "unable to rate" next to any of the four spheres.

There was a lot of evidence tendered at the Hearing as to the requirement that an applicant complete a PAI test in order to be deemed catastrophic as part of their assessments. Both the Insurer and Applicant's assessors testified that completing a PAI is not mandatory in order to determine catastrophic impairment as part of the AMA Guides to establishing a catastrophic designation under s. 3(2)(f) of the *Schedule*. Therefore, based on the evidence, I find it moot that the Applicant did not complete her PAI. The AMA Guides and the experts who testified agreed it is not mandatory. However, it was also stated that it would have been beneficial to have the additional data points that a completed PAI would provide, but it did not prevent the assessors from doing their job in assessing the Applicant for catastrophic impairment.

The Applicant submitted the decision of *Serafini and Security National*²⁸ in support of her position at the Hearing: specifically, that the descriptions of moderate, marked and extreme impairment of function are part of a continuum. As I was the Arbitrator of record for *Serafini*, I am quite familiar with this decision. In addition to the descriptions being considered as part of a continuum, it is equally important for the evidence to line up in order to form a complete record.

In the case before me, I find the evidence that was given by the Applicant, the lay witnesses, and the experts (Ms. Silverston, Dr. Davidson, Dr. Rajani, along with the Insurer's expert witnesses, Dr. Oshidari and Dr. Valentin), all lead to a conclusion that the Applicant is catastrophically impaired under criteria 8 as a result of her accident of November 6, 2010.

It is rare to find an applicant who has maintained the same family doctor from birth through to her adult life. This was extremely helpful in regard to the Applicant's case because it provided a complete medical history from pre- to post-accident.

In terms of Ms. Silverston, she concluded that the Applicant lacked capacity, which affects the Applicant's decision capabilities. I believe based on the balance of probabilities that this would partly explain why the Applicant did not feel the need to complete her PAI questions.

With Dr. Davidson's assessment, the finding in the report concluded that the Applicant was marked in the area of adaptation as defined in the AMA Guides, Chapter 14. Adaptation refers to repeated failures to adapt to stressful circumstances by having difficulty maintaining activities of daily living, continuing social relationships and completing tasks. The evidence presented throughout this Hearing supports Dr. Davidson's conclusions.

Dr. Davidson agreed with Dr. Valentin that the 2010 accident materially contributed to the Applicant's mental behaviour impairment noted within her report. Dr. Davidson's opinion remained the same after reading subsequent reports and viewing the video surveillance. Dr.

²⁸ *Serafini and Security National*, FSCO 13-013246 at pg. 22.

Valentin also agreed with Dr. Davidson that the Applicant didn't have pre-existing learning disabilities, behaviour or retention problems prior to November 6, 2010.

Ultimately, I prefer the findings of the Applicant's assessors over the evidence tendered by the Insurer even though the Insurer found the Applicant to be catastrophically impaired in another sphere and later attempted to modify this conclusion at the Hearing.

The Insurer is putting forward the position that the Applicant is functioning at a higher level than she is letting people believe. It also attempted to put forward the position that if the Applicant has psychological issues, it is because of a bi-polar disorder, not because of the accident.

In my opinion, the evidence shows that the Applicant is actually functioning at a much reduced level. There is no credible evidence presented at the Hearing that shows the cause of the Applicant's current behaviour episodes stems from a pre-existing condition. Therefore, I agree with both the Insurer's and Applicant's psychological experts when they stated that this accident materially contributed to the Applicant's current behaviour episodes.

CONCLUSION

The Insurer submitted the case of *Kidder v. Economical*. I agree with Arbitrator Schnapp when he stated "that the burden of proof rests with the Applicant. The Applicant must prove on a balance of probabilities that they have been catastrophically impaired as a result of the accident."²⁹

With the case before me, the onus is on the Applicant to prove her case, and specifically as it relates to the issue of catastrophic determination. The question that is germane to the Applicant's claim for catastrophic impairment designation comes down to: are the Applicant's mental health issues a direct result of the accident she was involved in on November 6, 2010?

²⁹ *Kidder v. Economical Mutual Insurance Company*, [2014] OFSCD No. 242, para. 41.

The Insurer insisted that the Applicant had a bi-polar disorder, however, no conclusive medical evidence was produced which confirmed this diagnosis. Dr. Baici, who was the Applicant's treating Psychiatrist at CAMH, testified there was no bi-polar disorder diagnosed.

Further, the conduct and borderline harassment demonstrated by the Insurer as it related to some witnesses that the Insurer called is rarely ever seen. The Insurer had its investigator attempt to serve witnesses in a hostile and confrontational manner, including threatening to have witnesses arrested if they did not comply with their summons. In addition, the Insurer used photocopied pre-signed summonses to serve individuals, which did not afford an Arbitrator or FSCO the opportunity to oversee who was being summonsed and why. It left the Insurer with unchecked power in which it overstepped its bounds on numerous occasions. Insurer's counsel misled the court when requesting a bench warrant and stated before the court that a witness failed to attend this Hearing when in fact Mr. Brown knew that this was false.

Ultimately, despite these distractions, the Hearing proceeded, and the Applicant was able to satisfy the onus of proof as it related to her case. She successfully was able to prove that she is catastrophically impaired as a result of the accident which occurred on November 6, 2010.

EXPENSES:

If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Jeff Musson
Arbitrator

January 2, 2018
Date

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



FSCO A16-000329

BETWEEN:

S.P.

Applicant

and

RBC GENERAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

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

1. S.P. did sustain a catastrophic impairment as a result of the motor vehicle accident of November 6, 2010.
2. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Jeff Musson
Arbitrator

January 2, 2018
Date