

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

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



File Number: 18-004952/AABS

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

Between:

A.A.

Applicant

and

The Dominion of Canada General Insurance Company

Respondent

DECISION

ADJUDICATOR: Lindsay Lake

APPEARANCES:

For the Applicant: A.A.

For the Respondent: Jason Frost, Counsel

Court Reporter: Brenda Wakelin

HEARD: In Person in Hamilton on October 2 to 4, 2019

**Written closing submissions from the Respondent
on November 15, 2019**

**Teleconference reply closing submissions from
A.A. on November 29, 2019**

OVERVIEW

- [1] The applicant, A.A., was injured in an automobile accident on May 16, 2009 (the “accident”) and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996* (the “Schedule”)¹ from Dominion of Canada General Insurance Company (“Dominion”), the respondent.
- [2] A.A. submitted an Application for Determination of Catastrophic Impairment Form (OCF-19) dated June 9, 2016 because he alleged that he sustained a catastrophic (“CAT”) impairment as a result of the accident.
- [3] Dominion denied that A.A. sustained a CAT impairment as a result of the accident and denied benefits sought by A.A. as A.A.’s non-CAT impairment entitlement to medical and rehabilitation benefits had been exhausted.
- [4] A.A. disagreed with Dominion’s position and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”). Several case conferences were held in this matter and ultimately the matter proceeded to an in-person hearing on October 2 to 4, 2019 with both written and teleconference closing submissions that followed.

ISSUES IN DISPUTE

- [5] The following are the issues to be decided:
 1. As a result of the accident, did A.A. sustained a CAT impairment as defined by the *Schedule*?
 2. If the answer to Issue 1 is “yes,” then I must determine the following:
 - (i) Is A.A. entitled to receive a medical benefit in the amount of \$1,575.00 for chiropractic treatment recommended by Dr. Paul Marando in a treatment plan submitted on July 16, 2016 and denied by Dominion on July 26, 2016?
 - (ii) Is A.A. entitled to receive a medical benefit in the amount of \$913.72 for massage therapy recommended by Niagara Spine & Sport Therapy in a treatment plan submitted on August 4, 2016 and denied by Dominion on August 5, 2016?
 - (iii) Is A.A. entitled to receive a medical benefit in the amount of \$1,575.00 for physiotherapy treatment recommended by Dr. Paul Marando in a treatment plan submitted on December 1, 2016 and denied by Dominion on December 2, 2016?

¹ O. Reg. 403/96.

- (iv) Is A.A. entitled to a medical benefit in the amount of \$1,575.00 for chiropractic treatment recommended by Dr. Paul Marando in a treatment plan submitted on February 2, 2017 and denied by Dominion on February 3, 2017?
- (v) Is A.A. entitled to reimbursement in the amount of \$1,125.00 for out-of-pocket expenses for chiropractic treatment?
- (vi) Is A.A. entitled to interest on any overdue payment of benefits?

RESULT

- [6] I find, on a balance of probabilities, that A.A. did not sustain a CAT impairment as a result of the accident as defined in s. 2(1.2)(g) of the *Schedule*.
- [7] As the maximum amount of A.A.'s non-CAT impairment medical benefits have been exhausted, it is not necessary for me to determine the reasonableness and necessity of the disputed treatment plans or A.A.'s entitlement to the remaining issues in dispute.

PROCEDURAL ISSUES

a) Documents attached to A.A.'s Application and September 19, 2018 Correspondence

- [8] A.A. was self-represented at the hearing. A.A. confirmed at the commencement of the hearing that he did not have any documents that he was relying upon. Nonetheless, A.A. confirmed that he was ready to proceed with the hearing at least four times prior to calling evidence.
- [9] Dominion confirmed the extensive efforts it took to assist A.A. in being ready for the hearing, which included attendance at five case conferences and providing A.A. with authorizations to allow Dominion to obtain the clinical notes and records ("CNRs") of A.A.'s various practitioners. Dominion's understanding was that A.A. was not relying upon any documentary evidence for the hearing as none had been exchanged and filed by A.A. in accordance with the Tribunal's June 27, 2019 Order. The Tribunal also stated in this order:

Failure to adhere to these deadlines may result in one or more of the following:

- a. The hearing adjudicator may draw an adverse inference from the absent document(s) and/or witness(es).
- b. The party who has failed to produce the document(s) or list of witnesses may not rely on the document(s) or call the witness(es) without the consent of the Tribunal.

- c. As the responsibility to prove entitlement to benefits is the applicant's, failure by the applicant to produce documents and/or witnesses that can support this entitlement may result in an unfavourable decision against the applicant.

[10] A.A. also failed to comply with any of the production orders made by the Tribunal in its March 25, 2019 and June 27, 2019 orders.

[11] Upon further review of the Tribunal's previous orders, which unfortunately occurred during A.A.'s cross-examination, I discovered that none of the orders included a paragraph advising of the Tribunal's standard practice that requires the parties to resubmit any documents that were attached to material previously filed with the Tribunal if they were to be relied upon at the hearing. The failure to include this standard paragraph and direction from the Tribunal was important because the Tribunal's June 27, 2019 order stated:

All evidence to be relied upon or referred to and a list of witnesses to be heard at the hearing shall be exchanged by the parties no later than **Tuesday, September 3, 2019**.

[12] A.A.'s application, which was filed on May 29, 2018 by his former counsel, had 11 documents attached to it including two CAT Determination for Mental and Behavioural Disorder and Impairment reports by Dr. J.H. Ennis, psychiatrist, dated June 9, 2016 and December 16, 2016. Further, the Tribunal also had on file correspondence dated September 19, 2018 from Ms. Lizqa Muckle to the Tribunal and to Dominion with attached documents. As a result, I put it to the parties as to what I was to do with the documents attached to A.A.'s application and the September 19, 2018 correspondence given the wording of the Tribunal's June 27, 2019 order.

[13] After hearing submissions from the parties, I allowed the documents attached to A.A.'s application and to the September 19, 2018 correspondence into evidence. I have no doubt in my mind of the significant efforts that both Dominion and the Tribunal made to accommodate A.A. and to ensure that he would be prepared to conduct the hearing as scheduled. However, I also need to be satisfied as the hearing adjudicator that A.A. was afforded procedural fairness. A.A. is self-represented and while I agree with Dominion that the customary practice of the Tribunal is to require the parties to re-file and re-exchange documents to be relied upon at a hearing that were previously filed and exchanged, A.A. would not be aware of this practice and this is not what the Tribunal's June 27, 2019 order reflects. As such, I find that the documents attached to A.A.'s application and to the September 19, 2018 correspondence complied with the Tribunal's June 27, 2019 order as these documents were all exchanged and filed with the Tribunal by September 3, 2019 as required. I appreciate that A.A. did not identify these documents as documents that he would be relying upon for the hearing, but they are documents that were before

the Tribunal and I cannot ignore them, especially when A.A. is a self-represented individual.

- [14] Following my decision regarding the documents attached to A.A.'s application and the September 19, 2018 correspondence, Dominion declined an opportunity to seek an adjournment of the hearing to allow it time to obtain an addendum report to respond to Dr. Ennis's December 16, 2016 report and/or to summons Dr. Ennis to testify at a continuation of the hearing. As such, I disagree with Dominion's written closing submissions that it did not having an opportunity to cross-examine Dr. Ennis and/or an opportunity to obtain a rebuttal/addendum report and, therefore, was prejudiced.² Instead, Dominion elected to continue with the hearing and requested that the Tribunal draw an adverse inference from A.A.'s failure to comply with the previous Tribunal orders, as A.A. was cautioned about this as set out in paragraph [9] above, and also requested the Tribunal to place less weight upon Dr. Ennis' reports.
- [15] There is no rule that a party must call a witness, and any remedy for failing to call a material witness lies in the very limited circumstances within a court or tribunal being able to draw an adverse inference against a party who fails to call such a witness where the failure to do so is not satisfactorily explained.³ In this matter, A.A. was a self-represented individual and clearly struggled with the Tribunal's procedures despite the over-and-above assistance and explanation provided to him by the Tribunal and by Dominion both prior to and at the hearing. In my opinion, this is not an appropriate situation to draw an adverse inference primarily as a result of A.A. being self-represented despite the numerous warnings provided to him prior to the hearing.
- [16] Nonetheless, I do agree with Dominion that little to no weight should be placed on Dr. Ennis' reports when determining whether or not A.A. sustained a CAT impairment as a result of the accident for the reasons discussed below in paragraph [26].

b) Missing Treatment and Assessment Plans ("OCF-18s")

- [17] A second procedural issue arose at the hearing as all but one of the OCF-18s in dispute had not been filed with the Tribunal. After providing an opportunity to A.A. to make submissions and hearing submissions from Dominion, I ordered that the missing OCF-18s would be admitted into evidence. Dominion provided the missing OCF-18s to the Tribunal.
- [18] The issue of the missing OCF-18s, however, is now moot given my finding that A.A. did not sustained a CAT impairment as a result of the accident. I no longer need to determine the reasonableness and necessity of the OCF-18s as the

² Written Submissions of the Respondent, pages 2-3, para. 6.

³ See *M.Y. v Aviva Insurance Canada*, 2019 CanLII 130606 (ON LAT) at para. 51.

parties agreed that A.A.'s non-CAT impairment medical and rehabilitation benefits were exhausted prior to the hearing.

ANALYSIS

- [19] The applicant bears the onus of establishing, on the balance of probabilities, that, as a result of the accident, he sustained a CAT impairment as defined by s. 2(1.2)(g) of the *Schedule*. This section defines a "catastrophic impairment" as "an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993,⁴ results in a class 4 (marked impairment) or class 5 (extreme impairment) due to a mental or behavioural disorder."⁵
- [20] In Chapter 14 of the *Guides*, impairments are classified according to how seriously they affect a person's useful daily functioning in the following four functional domains: activities of daily living ("ADLs"); social functioning ("SF"); concentration, pace and persistence ("CPP"); and adaptation ("AD").⁶ Further, impairments are also classified using the word descriptors in Chapter 14 of the *Guides* on a five-category scale that ranges from no impairment to extreme impairment. These word descriptors are important because they assign meaning to each category. Therefore, it is not the category label itself (e.g., mild, moderate, marked, extreme) that must be carefully assessed and analyzed, but the language that the *Guides* use – the verbal rating criteria – describing these classifications.
- [21] The following table from Chapter 14 of the *Guides* describes the four functional domains, the classes of impairment and the verbal rating criteria for each class:⁷

⁴ Hereafter referred to as the "*Guides*."

⁵ This definition is subject to subsections 2(1.4), 2(2.1) and 2(3) of the *Schedule*. Section 2(1.4) does not apply as A.A. is not under 16 years of age, section 2(2.1) does not apply as two years have elapsed since the accident and section 2(3) was not raised by either party regarding any impairments that were not listed in the *Guides*.

⁶ *Ibid.* at chapter 14, page 294. The full name for "Adaptation" is actually, "Deterioration or decomposition in work or work life setting."

⁷ *Ibid.* at page 301.

Area or Aspect of Functioning	Class 1: No Impairment	Class 2: Mild Impairment	Class 3: Moderate Impairment	Class 4: Marked Impairment	Class 5: Extreme Impairment
ADLs	No Impairment is noted	Impairment levels are compatible with <i>most</i> useful functioning	Impairment levels are compatible with <i>some</i> , but not all, useful functioning	Impairments levels <i>significantly impede</i> useful functioning	<i>Impairment levels preclude</i> useful functioning
SF					
CPP					
AD					

- [22] In *Pastore v. Aviva Canada Inc.*,⁸ the Ontario Court of Appeal confirmed that a single “marked,” or class 4, impairment in any one domain will qualify as a CAT impairment. As a result, a person is catastrophically impaired if he or she is found to have a class 4 “marked” impairment or a class 5 “extreme” impairment that affects useful functioning in any one of the four functional domains due to mental or behavioural issues. This is referred to as “Criterion 8,” which is the criterion that A.A. is relying upon for a designation of catastrophic impairment. More specifically, A.A. relies upon the opinion of Dr. Ennis in his June 6, 2016 Catastrophic Determination for Mental and Behavioural Disorder and Impairment report that A.A. meets the criteria for a CAT impairment in the domains of social functioning, concentration, persistence and pace and adaptation.
- [23] Dominion disagrees and maintains that A.A. does not meet the threshold for CAT impairment as a result of the accident. Dominion relies upon the opinion of Dr. Leslie Kiraly, psychiatrist, who opined that A.A. sustained a class 3 “moderate” impairment as a result of the accident in each of the four domains.
- [24] The burden of proof, on a balance of probabilities, rests with A.A. and the test of determining a CAT impairment is a legal test, and not a medical one.⁹ As a result, the following three-step approach was established by the Court of Appeal in *Pastore* when deciding the issue of CAT impairment due to mental or behaviour disorders:
- (i) Did the accident cause the applicant to suffer a mental or behavioural disorder?
 - (ii) If it did, what is the impact of the mental or behavioural disorder on the applicant’s life?

⁸ 2012 ONCA 642 (CanLII) [*“Pastore”*].

⁹ *Liu v. 1226071 Ontario Inc. (Canadian Zhorong Trading Ltd.)*, 2009 ONCA 571 (CanLII) at para. 30.

(iii) In view of the impact, what is the level of impairment?¹⁰

Did the accident cause A.A. to suffer a mental or behavioural disorder?

[25] I find that A.A. suffered a mental and/or behavioural disorder as a result of the accident.

[26] Apart from the Application for Determination of CAT Impairment (“OCF-19”) dated June 9, 2016, the only evidence that I had before me supporting A.A.’s position that he sustained a CAT impairment as a result of the accident was Dr. Ennis’ reports dated June 9, 2016 and December 16, 2019. I agree with Dominion and place little to no weight on Dr. Ennis’ reports for the following reasons:

- (i) Dr. Ennis’ CNRs were not produced to Dominion despite A.A. being ordered by the Tribunal in its March 25, 2019 and June 27, 2019 orders to produce the CNRs of any specialists consulted as a result of the impairment he sustained from the accident on or before August 6, 2019;
- (ii) I find that Dr. Ennis’ June 9, 2016 report contains numerous inconsistencies regarding A.A.’s function when compared to A.A.’s testimony and the surveillance evidence relied upon by Dominion at the hearing. For example, Dr. Ennis reported that post-accident, A.A. was in his home almost all of the time isolating himself socially, he had no friends except one that he saw once in a while, the only outside contact he had was with his parents, he did no meal preparation, he did no exercise of any kind and his father did all of the outside work at A.A.’s home.¹¹ This information is in complete contrast when compared to A.A.’s testimony about his post-accident life and the surveillance evidence which is discussed in greater detail below at paragraphs [33] to [37]. In my opinion, these substantial inconsistencies undermine the reliability of Dr. Ennis’ June 9, 2016 report,¹² especially when he was not called to testify as a witness by A.A. at the hearing to address any of these inconsistencies;
- (iii) No information was provided on what credentials, education and training Dr. Ennis had that would qualify him as an expert in determining CAT impairments or in the application of the *Guides*. The qualification section of his two reports contains no information about CAT impairment determinations or the *Guides*, and Dr. Ennis’ *curriculum vitae* was not produced by A.A. to Dominion as ordered by the Tribunal; and

¹⁰ *Ibid.* at para. 6.

¹¹ Application by an Injured Person for Auto Insurance Dispute Resolution under the *Insurance Act* dated May 29, 2018, tab 8 at page 8.

¹² *16-000270 v Allstate Insurance Company of Canada*, 2017 CanLII 3144 (ON LAT).

- (iv) Most troubling is Dr. Ennis' opinion regarding the level of A.A.'s impairment in the four domains that was set out in his June 9, 2016 report. On page 76 of this report, Dr. Ennis notes that A.A. has a "class V impairment" in the domain of adaptation. However, on page 77 he states:

In summary [A.A.] has a *class V or marked impairment* in the areas of social functioning, concentration, persistence and pace, and adaptation-deterioration or decomposition in a work or work-like setting. As a result, in my opinion, he does meet criteria for a catastrophic impairment (my emphasis added).

According to the *Guides*, a class V or 5 impairment is an "extreme" impairment whereas a class IV or 4 impairment is a "marked" impairment. Dr. Ennis provides a similar confusing opinion under the CPP domain as he first opines that A.A. sustained a class 3 or moderate impairment while later in the same paragraph opines that A.A. has a class 4 or marked impairment. As such, I find that Dr. Ennis' opinions regarding A.A.'s impairment levels are incoherent in two of the four domains and, given these significant errors, coupled with the lack of information regarding Dr. Ennis' experience and training in the application of the *Guides* and in CAT impairment determinations, I cannot place weight on his opinions of A.A.'s impairment levels as a result of the accident.

- [27] Nevertheless, Dominion's experts confirm that A.A. sustained a psychological impairment as a result of the accident. For example, in his October 7, 2016 Insurer's Examination ("IE") CAT Determination Analysis,¹³ Dr. M. Rajwani reports that Dr. Leslie Kiraly, psychiatrist and a member of the multidisciplinary IE CAT determination team, diagnosed A.A. with Major Depressive Disorder and Chronic Pain Associated Disorder due to Psychological Factors and General Medical Condition as a result of the accident.¹⁴
- [28] Dr. Kiraly's diagnosis of A.A.'s post-accident psychological conditions is also consistent with A.A.'s testimony that he has been receiving psychiatric treatment on a regular basis from just after the accident up to the date of the hearing. A.A. also reported to Dr. Kiraly that he sees his psychiatrist, Dr. Naqvi, every six weeks, a counsellor and had previously seen a therapist, Mr. David James Cockman.
- [29] Therefore, I find that, on a balance of probabilities, the accident was the cause of A.A.'s psychological impairments and/or injuries. This finding is also consistent with A.A.'s testimony at the hearing that he was still taking anti-

¹³ Respondent's Document Brief, tab C3.

¹⁴ *Ibid.* at page ii.

depressants as he had been for over ten years post-accident which, in my opinion, also supports a direct link to the accident.

What is the impact of the Mental or Behavioural Disorder on A.A.'s life?

- [30] A.A. testified that prior to the accident, he had a “normal job and life.” He worked at Penzoil for six to seven days per week completing vehicular oil changes. A.A. testified that prior to the accident, he resided with his girlfriend but that their relationship ended post-accident. A.A. also explained that post-accident he developed Type 2 Diabetes and was on a number of prescription medications, including anti-depressants, and that receives by-weekly injections in his left shoulder, back, neck and buttocks for the past 3 to 5 years. A.A. also told the Tribunal that he receives physical treatment once per week as he cannot afford any further treatment now that he has exhausted his non-CAT amounts for medical benefits.
- [31] Much more detail was elicited from A.A. on cross-examination about his pre- and post-accident life. Prior to the accident, A.A. worked at a slaughter house and left this position when he moved to Hamilton and began working at Jiffy Lube where he completed oil changes. A.A. was forthright in his testimony and confirmed that he was fired from Jiffy Lube but could not recall the reasons for his termination. Following Jiffy Lube, A.A. was hired as an oil lube technician at Penzoil where he worked for approximately 10 years until the accident.
- [32] In the Occupation Therapy Assessment report by Ms. Tracie Shaw, occupational therapist, which was included as part of the October 7, 2016 multidisciplinary IE CAT Determination Report, Ms. Shaw reported that prior to the accident A.A. was independent with his self-care and housekeeping activities.¹⁵ A.A. also reported to “never really” eating at home prior to the accident as he went to his parent’s house for meals. A.A. reported to Ms. Shaw that he slept well pre-accident, estimating that he obtained 7 to 8 hours of continuous sleep per night¹⁶ and that he was independent with his finances.¹⁷
- [33] Since the accident, A.A. testified that he is able to do the following tasks independently:
- (i) Drive to pick up his medications;
 - (ii) Drive to, shop and make purchases on his own including groceries and items at the Dollarstore and at the hardware store;
 - (iii) Drive to Tim Hortons on a daily basis prior to purchasing a Tassimo coffee maker for his home;

¹⁵ *Ibid.* at page 24.

¹⁶ *Ibid.* at page 25.

¹⁷ *Ibid.* at page 27.

- (iv) Purchased, including arranging financing for, two vehicles;
- (v) Puts gas in his vehicle;
- (vi) Completes his banking, including cheque deposits, at the bank branch as he does not do online banking;
- (vii) Travel to and attend his various treatments and appointments without forgetting to attend them;
- (viii) Purchased a hot tub and installed a canopy over it with the help of his sister and friends;
- (ix) Cleans and maintains his hot tub year-round by adding chemicals every 3 days and purchases additional chemicals as needed. A.A. also drained and refilled his hot tub by a garden hose that he would and put back on a storage wheel;
- (x) Renews his licence plate stickers and his driver's licence;
- (xi) Routinely walked approximately 20 minutes to his chiropractor's office for treatment appointments;
- (xii) Started walking and rode a bicycle quite often for weight control;
- (xiii) Spoke with family and friends about documents received from Dominion;
- (xiv) Kept his garage clean and organized;
- (xv) Operated a chop saw; and
- (xvi) Shovels snow off of his steps. His father continues to clear snow from his driveway as he did pre-accident.

[34] A.A. also testified that he drove to the hearing alone and that the hearing location was a 40-minute drive from his residence. A.A. confirmed that he has continued driving since the accident and that he has not had an accident in the last 10 years. A.A. stated that he did not continue to eat dinner with his parents, but this evidence is inconsistent with the information that he provided to Ms. Shaw and also to surveillance evidence which shows him bringing two pizzas to his parents' home. In any event, I find that A.A.'s meal preparation had not significantly changed post-accident as the evidence is that generally A.A. did not, and continues to not, prepare the majority of his meals.

[35] Although A.A. has not returned to work post-accident, A.A. still maintains his social life. A.A. confirmed that he has a small number of close friends and that he saw one of his friends two days in a row when he was under surveillance. A.A. also testified about his best friend, Heather, who comes and stays at his

home every weekend for the past 3 years. Although they are not romantically involved, A.A. confirmed that he shares meals and meal preparation with Heather, including clean-up duties, each weekend. A.A. testified that he has a positive relationship with one of his sisters and his mother and that he converses with his neighbour and his parent's neighbour. A.A.'s description of his positive familial relationships is consistent with what he reported to Ms. Shaw, stating that he visits his parents every afternoon.¹⁸

[36] A.A. also reported to Ms. Shaw that he continues to be independent with his finances, self-care and housekeeping tasks post-accident. Ms. Shaw also noted in her report that A.A.'s home as neat and tidy¹⁹ and that at the time of her in-home assessment, A.A. was living alone.²⁰ A.A. also reported sleeping difficulties to Ms. Shaw which resulted in his doctor increasing his sleeping medication as some nights within 2 months prior to the assessment A.A. reportedly did not sleep at all and other nights he reportedly was only able to sleep for 3 hours.²¹ A.A. also complained of poor memory since the accident to Ms. Shaw, as he reportedly often forgot if he had completed tasks, such as locking the front door.²²

[37] A.A. was also candid and confirmed his post-accident activities depicted in surveillance evidence of him from May and July of 2016 and May 2017, which included:

- (i) Completing lawn maintenance including cutting grass and weeding;
- (ii) Undertaking physical work on his property, which involved putting up a sign on his grass, first using a regular hammer and then moving to a mini sledge hammer that weighed approximately 5 pounds;
- (iii) Completing physical work on another person's property to repair a driveway, which included moving paving stones and gravel with a shovel and maneuvering a loaded wheelbarrow. A.A. confirmed that he was engaged in heavy labour for approximately one hour to one-and-a-half hours while he was moving the gravel;
- (iv) Carrying two cases of 24 bottles of beer at the same time from the Beer Store to his vehicle; and
- (v) Was involved with the purchase of a BBQ as a gift for his mother that involved various steps, including attending a car dealership to obtain a larger vehicle to transport the BBQ from a retail location to his parents' house, using his left arm to lower a tailgate on a truck, climbing into the

¹⁸ *Ibid.* at page 24.

¹⁹ *Ibid.* at page 26.

²⁰ *Ibid.* at page 18.

²¹ *Ibid.* at pages 24-25.

²² *Ibid.* at page 24.

bed of a truck to assist in loading the BBQ into the truck, completing a full squat while bending down to inspect the lower portion of the BBQ, assisted in loading and unloading the BBQ into and out of the truck while confirming he was taking on most of the weight of the BBQ during its unloading and operating the unfamiliar truck and returning it back to the car dealership once the BBQ was delivered.

- [38] Based on all of the evidence before me, I find that the accident has resulted in a mental or behavioural disorder which negatively impacted A.A.'s daily functioning primarily in respect to medication use, dissolution of his former romantic partnership, his failure to return to work post-accident and sleep disturbance. The analysis now requires an assessment of the severity of the limitations to see if they reach the level of a CAT impairment determination.

What is the Level of A.A.'s Impairment in View of the Impact of the Mental or Behavioural Disorder?

a) Activities of Daily Living (ADLs)

- [39] As a result of the accident, I find that A.A. sustained class 2 "mild" impairment in the ADL domain.
- [40] Despite affording little to no weight to Dr. Ennis' report, none of the IE or A.A.'s CAT impairment determination reports before me assigned A.A. a class 4 marked impairment or a class 5 extreme impairment rating under the ADL domain. As this domain focuses on activities such as self-care, personal hygiene, communication, ambulation, travel, sexual function, sleep and social and recreational activities, I as well find that A.A.'s ADL impairment level does not reach the threshold of a class 4 or class 5 impairment.
- [41] No evidence was led at the hearing that A.A. was not capable of initiating and participating in the activities focused on under this domain independently or that he required supervision or direction. I also place weight on Dr. Kiraly's analysis of A.A.'s function under the ADL domain, as he assigned A.A. "at the most" a moderate or class 3 level of impairment. Relying upon Ms. Shaw's assessment of A.A., Dr. Kiraly noted in his report that A.A. was independent with his personal hygiene, completed his own laundry, was able to ambulate without any assistive devices and was able to manage all of his financial transactions independently, all of which was consistent with A.A.'s testimony at the hearing. Dr. Kiraly, however, noted that A.A.'s activities of daily living were "somewhat compromised," as A.A.'s sleep was disturbed in both quality and quantity and A.A. self-reported that his libido was down. Dr. Kiraly also reported that A.A. was socially withdrawn and isolated, and that he did not cook and ate his meals at his parents' house.
- [42] Based on the evidence at the hearing, however, it appears as though A.A. had improved somewhat since his August 25, 2016 assessment with Dr. Kiraly. For

example, A.A. testified that he participated in meal preparation at his home with his friend Heather each weekend and also participated in clean-up duties. A.A. also testified that he had several close friends and positive familial relationships. Therefore, I find that he was not socially isolated as earlier reported by Dr. Kiraly.

- [43] Unfortunately, A.A. did not testify as to his sleep at the time of the hearing but, in any event, I find that, even if A.A.'s sleep disturbances continued from the time of Dr. Kiraly's assessment, there was no evidence before me that it was impacting his ADL functioning. Further, while A.A. reported to Dr. Kiraly that at the time of his assessment he was unable to play soccer, enjoy concerts and go to Canada's Wonderland as he had previously done pre-accident, A.A. led no other evidence about his functional status as of the hearing date regarding his post-accident recreational activities. A.A. did confirm on cross-examination that he watches hockey games on the weekends at his house with his best friend Heather and that he walked and rode his bicycle post-accident "quite often" for weight control. A.A. also testified that he did not do a lot of activities pre-accident because of his work schedule.
- [44] For all of the reasons set out above, I find that A.A.'s ADL functioning had improved since Dr. Kiraly's 2016 assessment and, as a result, I assign A.A. a class 2 "mild" impairment in this domain as his impairment levels are compatible with most useful functioning.

b) Social Functioning (SF)

- [45] I find that A.A. sustained a class 2 "mild" impairment as a result of the accident in the SF domain.
- [46] The SF domain refers to an individual's capacity to interact appropriately and communicate effectively with other individuals. SF includes the ability to get along with others, such as family members, friends, neighbours, etc. The *Guides* explain that impaired social functioning may be demonstrated by a history of altercations, evictions, firings, fear of strangers, avoidance of interpersonal relationships, social isolation, or similar events or characteristics. On the other hand, strength in social functioning may be demonstrated by an individual's ability to initiate social contact with others, communicate clearly with others, and interact and actively participate in group activities. The *Guides* also state that cooperative behaviour, consideration for others, awareness of others' sensitivities and social maturity also need to be considered under this domain.²³
- [47] Dr. Kiraly opined that A.A. sustained a class 3 "moderate" impairment in the SF domain as A.A. reported that he stayed home most of the time, had a history of altercations or getting upset and throwing things resulting in the involvement of the police, had mood swings and anger outbursts which ultimately resulted in

²³ *Supra* note 4 at page 294.

the break-up of his relationship with his girlfriend post-accident. In contrast, Dr. Kiraly reported that A.A. did not avoid interpersonal relationships or have a fear of strangers and that he reported a good familial relationship. Ms. Shaw also noted that A.A. was polite and cooperative, answering all of her questions, during his occupational therapy in-home assessment on August 24, 2016.

- [48] Again, I find that based on the evidence before me that A.A. has somewhat improved regarding his social functioning since Ms. Shaw's and Dr. Kiraly's assessment. For example, while A.A. confirmed that his previous romantic relationship ended and remained ended post-accident, he described several close friendships including his friendship with Heather, his best friend, who visits his home and stays overnight each weekend with him for the past 3 years. A.A. also confirmed the surveillance evidence of him completing physical work with his father, speaking with his father's neighbour, bringing two pizzas to his parents' house for his niece and nephew, bringing his mother a BBQ as a present for Mother's Day, providing rides for one of his friends two days in a row and talking on a cell phone while walking to his chiropractor's office. A.A. also testified that he speaks with his own neighbours and often texts people on his phone. A.A. additionally confirmed that prior to purchasing a Tassimo, he would attend Tim Horton's daily, either on foot or by car, to purchase coffee and reported no negative interactions with any of the staff.
- [49] A.A. attended the Tribunal hearing in-person 3 days in a row and, for the most part, arrived promptly. There were no outbursts and A.A. was polite, cooperative and respectful towards the Tribunal and to Dominion. In my opinion, any lack of engagement in the proceeding was as a result of A.A.'s unfamiliarity with the Tribunal processes as opposed to any inability to effectively communicate.
- [50] For all of the above reasons, I find that A.A.'s level of impairment has improved since his 2016 assessments with Ms. Shaw and with Dr. Kiraly and, as a result, I find that he has sustained a class 2 "mild" impairment in the SF domain such that his impairment levels are compatible with most useful functioning. I find that a class 2 assignment is most appropriate due to his improved social situation as described above.

c) Concentration, Persistence and Pace (CPP)

- [51] I find that, as a result of the accident, A.A. sustained a class 3 "moderate" impairment in the CPP domain, which refers to the ability to sustain focused attention long enough to permit the timely completion of tasks commonly found in work settings. Concentration may be reflected in activities of daily living in terms of the ability to complete everyday household tasks. Further, deficiencies

in concentration, persistence and pace are best noted, according to the *Guides*, from previous work attempts or from observations in work like settings.²⁴

- [52] Dr. Kiraly assigned A.A. a class 3 “moderate” level of impairment in the CPP domain. Dr. Kiraly reported that A.A. showed some difficulties in terms of concentration during his clinical interview but testified that A.A. had no obvious problems with his cognition. This is consistent with Dr. Kiraly’s report wherein he noted that A.A.’s cognitive functions were grossly intact and that his short-term memory scored a “3/3” on a cognition test. Dr. Kiraly explained that A.A.’s score was evidence that A.A. was able to listen to information and retrieve it from his memory. Dr. Kiraly also noted that A.A.’s scored 29/30 on his Mini Mental Status Examination, which Dr. Kiraly confirmed was within normal limits. Further, Dr. Kiraly noted that A.A. performed “Serial 7’s” testing, an example assessment set out in the *Guides* for testing concentration and mental status,²⁵ which entails counting backwards from 100 by subtracting 7. A.A. completed this test on his second attempt with no errors. As a result of these tests, Dr. Kiraly concluded that A.A.’s cognitive difficulties were not so bad that A.A. would not be able to complete and persist through problems.
- [53] The surveillance evidence is, in my opinion, most demonstrative of A.A.’s level of impairment under the CPP domain. For example, A.A. was confronted with a challenging and presumably novel situation when he was observed purchasing a BBQ for his mother on Mother’s Day. After determining the BBQ would not fit in his vehicle, A.A. attended a car dealership and borrowed a truck to transport the BBQ back to his parents’ house. He testified that he was able to drive the unfamiliar truck and assist with loading and unloading the BBQ into and out of the bed of the truck. The surveillance evidence of A.A. undertaking this task, which he fully admitted to, demonstrated that A.A. persisted and was able to concentrate to complete this task which, in my opinion, required multiple steps and problem solving.
- [54] Further, while A.A. did not attempt a return to work, the surveillance evidence showed A.A. functioning in physical work-like activities for a sustained period of time, for approximately 60 to 90 minutes. A.A. was observed assisting with drive-way replacements at two locations that involved shoveling gravel into a wheelbarrow, operating the loaded wheelbarrow, raking and lifting and carrying very large paving stones. A.A. was also observed to begin using a hammer to insert a wooden stake into the ground and then move to a mini-sledge hammer to complete the task, further demonstrating his persistence and ability to adapt to the situation when the first hammer was not the appropriate tool for the activity.
- [55] Nevertheless, as Dr. Kiraly’s impairment rating in this domain was based on a number of tests, I defer to his opinion and find that A.A. has sustained a class 3

²⁴ *Ibid.*

²⁵ *Ibid.*

“moderate” impairment in the CPP domain. Additionally, while the surveillance showing A.A.’s concentration, persistence and pace, Dr. Kiraly testified that such actions would be consistent with someone who has a “moderate” or class 3 impairment level with some, but not all, useful functioning. Further, this rating would be consistent with A.A.’s reports to Ms. Shaw of some memory issues, although he provided no further details of these memory issues at the hearing.

d) Adaptation (Deterioration or Decomposition in Work or Work Like Setting) (AD)

- [56] I find that A.A. sustained a class 3 “moderate” impairment as a result of the accident in the AD domain.
- [57] The AD domain refers to repeated failure to adapt to stressful circumstances and, in the face of such circumstances, individuals may withdraw from the situation or experience exacerbation of signs and symptoms of a mental disorder. That is, the individual would decompensate and have difficulty maintaining activities of daily living, continuing social relationships and completing tasks. The *Guides* explain that stresses common to the work environment include attendance, making decisions, scheduling, completing tasks and interacting with supervisors and peers.²⁶
- [58] Dr. Kiraly assigned a class 3 “moderate” impairment to A.A. in the AD domain. Dr. Kiraly reported that A.A. had poor stress tolerance, low stamina and was preoccupied with his pain symptoms. Dr. Kiraly reported that A.A. had difficulty performing complex functions and multitasking, and that his “cognitive difficulties are persistent due to longstanding symptoms of pain, depression, poor sleep.”²⁷ Dr. Kiraly also testified that while he took A.A.’s unemployment status into account when determining A.A.’s level of impairment in the AD domain, it is improper to solely consider employment status, as Dr. Ennis did, to arrive at an impairment rating regarding AD. I also agree with Dominion’s submission that A.A. has little incentive to work given that his income at the time of the hearing was the same if not minimally more than what it was pre-accident and that A.A. testified that he was able to afford all of his pre-accident costs of living on this income.
- [59] There was no evidence before me that A.A. had any more than mild impairments regarding his activities of daily living and his social relationships which were both discussed in greater detail above. A.A. attended and was present at the Tribunal hearing over the 3 days, which is arguably a stressful environment especially for an unrepresented party such as A.A. Although A.A. exhibited pain behaviours during the hearing by often moving positions, this behaviour was not consistent with the surveillance evidence before me of A.A. actively walking, bicycling, driving, lifting, carrying heavy objects, etc. Furthermore, no evidence was led that A.A. failed to attend his treatment

²⁶ *Supra* note 4 at pages 294-295.

²⁷ *Supra* note 13 at page 11.

appointments. A.A. also testified that he was also able to maintain his hot tub, which involved routine water testing and administration of chemicals, and was independent with his finances including bill payments. Ms. Shaw testified that A.A.'s home was "meticulously clean and organized," and that A.A. was able to replace an empty water cooler jug in her presence. Ms. Shaw also described A.A.'s ability to plan the task of having blood work taken after his assessment and noted that A.A. was effectively managing his Type II Diabetes independently through exercise and diet. Furthermore, the surveillance evidence of A.A. transporting the BBQ to his parents' home showed no decomposition or withdrawal from the situation and A.A. completed the task at hand. Ms. Shaw testified that it was clear that A.A. had not decomposed during this long chain of events because he did not take any steps that demonstrated that A.A. reached his limits, such as requesting someone else to return the truck to the dealership.

- [60] While it is likely that A.A. has improved in the AD domain since Dr. Kiraly's assessment, I accept his opinion regarding A.A.'s level of impairment in this domain. Based on all of the evidence set out above, I find that A.A. sustained a class 3 "moderate" impairment in the AD domain as a result of the accident.
- [61] In summary, I find A.A. sustained a class 2 "mild" impairment in the ADL and SF domains and a class 3 "moderate" impairment in the CPP and AD domains as a result of the accident. Therefore, A.A. has failed to prove on a balance of probabilities that he sustained a CAT impairment as defined by s. 2(1.2)(g) of the *Schedule* as a result of the accident.

Treatment Plans

- [62] As A.A.'s non-CAT impairment benefits have been exhausted, the issue of whether or not the disputed treatment plans are payable under s. 14 and s. 15 of the *Schedule* is moot.

Interest

- [63] Because I have found that there are no benefits or costs that are overdue, no interest is payable.

CONCLUSION

[64] For the reasons outlined above, I find that A.A. has not sustained a catastrophic impairment as defined by s. 2(1.2)(g) of the *Schedule*. As a result, A.A. is not entitled to any of the dispute treatment plans or other benefits and interest. This application is dismissed.

Released: March 25, 2020



Lindsay Lake, Adjudicator