

Safety, Licensing Appeals and Standards Tribunal Ontario  
Licence Appeal Tribunal

Tribunaux de la sécurité, des appels en matière de permis et  
des normes Ontario  
Tribunal d'appel en matière de permis



**Automobile Accident Benefits Service**

Mailing Address: 77 Wellesley St. W., Box 250, Toronto,  
ON M7A 1N3

**Tel:** 416-327-6500  
1-844-242-0608

**TTY:** 416-916-0548  
1 844-403-5906

**FAX:** 416-325-1060  
1 844-618-2566

Website: <https://slasto-tsapno.gov.on.ca/en/>

**Service d'aide relative aux indemnités d'accident  
automobile**

Adresse postale : 77, rue Wellesley Ouest, Boîte n° 250,  
Toronto ON M7A 1N3

**Tél. :** 416-327-6500  
1-844-242-0608

**ATS :** 416-916-0548  
1 844-403-5906

**Télééc. :** 416-325-1060  
1 844-618-2566

Site Web : <https://slasto-tsapno.gov.on.ca/fr/>

**Friday, May-17-2019**

VIA FAX

Russel Laing

(416) 739-7705

Dear Parties,

**RE: Tribunal File No: 17-005314/AABS**

**Valerie Hathaway-Warner vs. Security National Insurance Company**

Please see the attached AABS Decision related to your Automobile Accident Benefits Service dispute.

Providing you have any questions with regards to this file please contact the assigned Case Management Officer or the Tribunal via phone 416-327-6500 or via email [LATRegistrar@ontario.ca](mailto:LATRegistrar@ontario.ca).

*Sent on behalf of Ala Shoom, Case Management Officer.*

Sincerely,

**Bianca Hintz**

**Case Management Officer**

Licence Appeal Tribunal

Tribunals Ontario – Safety, Licensing Appeals and Standards Division

77 Wellesley St. West, Box 250, Toronto, Ontario M7A 1N3

General Inquiries: 416-327-6500 | Toll Free: 1-844-242-0608

Fax: 416-325-1060 / 1-844-618-2566

Email: [LATRegistrar@Ontario.ca](mailto:LATRegistrar@Ontario.ca)

<https://slasto-tsapno.gov.on.ca/en/>



**Tribunals Ontario**

Safety, Licensing Appeals and Standards Division

NOTICE: Confidential message which may be privileged. If received in error, please delete the message and advise me by return email. Thank you.

AVIS: Message confidentiel dont le contenu peut être privilégié. Si reçu par erreur, veuillez supprimer ce message et aviser l'expéditeur par retour de courriel.

Merci.

LICENCE APPEAL  
TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE  
DE PERMIS



Safety, Licensing Appeals and  
Standards Tribunals Ontario

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

Citation: **Valerie Hathaway-Warner vs. Security National Insurance Company, 2019 ONLAT 17-005314/AABS**

**Tribunal File Number: 17-005314/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:

**Valerie Hathaway-Warner**

**Applicant**

and

**Security National Insurance Company**

**Respondent**

**DECISION**

**ADJUDICATOR:**

Cezary Paluch, Member

**APPEARANCES:**

For the Applicant:

Valerie Hathaway-Warner  
Mark Elkin and Natasha Skupsky, Counsel

For the Respondent:

Bonnie Redden  
Jonathan Schwartzman, Laleh Hedayati, Counsel

Reporter:

Victory Verbatim

**Held in Person:**

**June 11-15, 2018, September 17, 2018  
October 1-5, 2018, December 18, 2018**

**Written Submission:**

January 11, 31, 2019 and February 8, 2019

## OVERVIEW

- [1] On July 14, 2010, the applicant, VHM, was a seat-belted driver when she was rear-ended from behind while stopped at a red light. She exchanged information with the other driver and continued on her way to a meeting without calling the police or an ambulance. Afterwards, she attended at a self-reporting collision center and to a walk in clinic to report her injuries.
- [2] She applied for and received benefits under the *Statutory Accident Benefits Schedule* - accidents on or after November 1, 1996 (the "*Schedule*")<sup>1</sup> from the respondent, Security National Insurance Company of Canada ("SNIC").
- [3] On August 26, 2016, the applicant applied to SNIC for a determination that her accident-related injuries resulted in an impairment that met the statutory threshold for a "catastrophic impairment" as defined in the *Schedule*.<sup>2</sup> SNIC denied her application. It maintained that the applicant did not sustain a "catastrophic impairment" as a result of this accident.
- [4] The parties participated in settlement discussions at the case conference but were unable to come to a resolution and the matter proceeded to an in-person hearing.
- [5] After the completion of the in-person hearing, the respondent brought a motion to strike parts of the applicant's written reply submissions. I deal with this motion at the end of this decision.

### Position of each party:

#### (a) *The applicant*

- [6] The applicant submits that after the accident, she was a totally different person and the accident negatively impacts every aspect of her life due to her pain, fatigue, low energy, and mood change that contributes to her psychological issues. As a result, she submits that she has a mental and behavioural disorder in at least one of the four domains and ought to be deemed catastrophically impairment.

#### (b) *The respondent*

- [7] In reply, the respondent argues that this was a minor accident that aggravated pre-existing musculoskeletal pain and the applicant has returned to her pre-

---

<sup>1</sup> O. Reg 403/96.

<sup>2</sup> See Application (OCF-19) dated August 26, 2016.

accident level of functioning in the activities she has chosen to do. They submitted that the applicant remains highly functional and the evidence shows that the applicant has regularly and successfully engaged in activities of daily living, social functioning, concentration, persistence and pace, and adaption to work-like setting, and that the respondent's expert evidence should be preferred. They also maintain that causation remains an issue for the hearing as the applicant had pre-existing conditions prior to the accident.

- [8] Overall, for the reasons that follow, I find the applicant did suffer a marked impairment in three of the four areas of function as a result of the accident. I preferred the evidence of Dr. D. Becker over that of Dr. A. Luczak for two main reasons. The first is that I found Dr. D. Becker's evidence more reliable, balanced and comprehensive as she was able to explain why certain conclusions were reached based with reference to the facts of the case. Second, I found Dr. D. Becker to have a better understanding of what a "marked impairment" means and therefore conducted her assessment "in accordance with the *Guides*", as required by the *Schedule*. As discussed below, Dr. Luczak's opinion was significantly weakened by his inaccurate description of what constitutes a "marked impairment" coupled with several inconsistencies between his evidence in his report and at the hearing.

## ISSUES

- [9] The main issue in this hearing is whether the applicant suffered a "catastrophic impairment" that results in a class 4 marked impairment or class 5 extreme impairment due to mental or behavior disorder.
- [10] The other issues are whether the applicant is entitled to receive medical benefits as follows:
- i.) \$1,558.32 for chiropractic services recommended by Barrie Core Wellness, submitted to the respondent on March 3, 2017 and denied by the respondent March 21, 2017?
  - ii.) \$4,743.39 for psychological services recommended by Fox Psychological Services, submitted to the respondent on March 13, 2017 and denied by the respondent March 21, 2017?
  - iii.) \$900.00 for other goods and services of a medical nature recommended by Fox Psychological Services, submitted to the respondent on March 13, 2017 and denied by the respondent March 21, 2017?

## RESULT

- [11] I find that VHW has a *Marked* level of impairment (Class 4) in three of the four areas of function, namely, in Activities of Daily Living, Concentration, Persistence and Pace and Adaption, and a *Moderate* level of impairment (Class 3) in Social Functioning. Therefore, as a result of the accident, she is catastrophically impaired, pursuant to the *Schedule*.
- [12] The applicant is not entitled to any of the medical and rehabilitation benefits claimed, or interest.
- [13] The respondent's motion to strike the applicant's reply is allowed in part.

## THE LAW

- [14] Definition of "Catastrophic Impairment":<sup>3</sup>
- (1.2)(g)<sup>4</sup>...an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment, 4th edition, 1993*, (the "*Guides*") results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.
- [15] The *Schedule* does not use the word "injury" and uses the word "impairment" which means "a loss or abnormality of a psychological, physiological or anatomical structure or function."
- [16] The *Schedule* requires that medical professional's rate impairment using the criteria and methods set out in Chapter 14 of the *Guides*, entitled *Mental and Behavioural Disorders*. Using this chapter, assessors look at four categories or areas of functioning to derive their ratings:
1. activities of daily living (ADLs);
  2. social functioning (SF);
  3. concentration, pace and persistence (CPP); and
  4. adaptation (AD).

<sup>3</sup> The *Schedule* describes several independent categories of impairment each with their distinct criteria. The only relevant category in this case is s. 1.2(g) or what the assessors refer to as Criterion 8.

<sup>4</sup> Both parties cite section 3(8) of the *Schedule* in their submissions but the correct section is (1.2)(g) of O. Reg. 403/96. However the language is the same.

- [17] The *Guides* do not use percentages for estimating mental/behavioural impairments in the same way that physical impairments are assessed. Rather, impairments are classified according to how seriously they affect a person's useful daily functioning in these four categories or areas of functioning, using word descriptors found in Chapter 14 on a five-category scale that ranges from no impairment (Class 1) to extreme impairment (Class 5).<sup>5</sup>
- [18] The *Guides* also tell us that there is no specific medical test for any one of the categories.<sup>6</sup> In that sense, the word descriptors used to describe each category become all that more important because they assign meaning to each category. For example, Class 4 means "impairment levels significantly impede useful functioning." Under the *Schedule*, criterion (g) states that a mental or behavioural disorder of Class 4 or Class 5 is a catastrophic impairment."
- [19] The burden of proof rests with VHW. She must prove on the balance of probabilities that, as a result of the accident, she sustained a "catastrophic impairment" as defined in clause 1.2(g) of the *Schedule*.
- [20] It is well-established jurisprudence that one *marked impairment* of a single area or aspect of functioning is enough to designate a person as catastrophically impaired under the *Schedule*.<sup>7</sup>
- [21] The applicant relies on the opinion of Dr. Dory Becker, psychologist, who rated the applicant at a Class 4 (marked) in three areas of functioning. She assessed the applicant as a Class 3 (moderate) in social functioning.
- [22] The respondent relies on the opinion of Dr. A. Luczak, psychiatrist, who rated the applicant as a Class 2 to 3 (mild to moderate) in all four areas of functioning.<sup>8</sup>
- [23] Neither of the two experts concluded that the applicant suffered at a Class 5 (extreme impairment). Therefore, the real issue was whether the applicant had a Class 2 (mild), Class 3 (moderate) or Class 4 (marked) impairment within any one of the four categories.

---

<sup>5</sup> See page 301 of the *Guides* for a Table setting out the rating for mental impairment in each of the four areas of functional limitation on a five category scale that ranges from no impairment (Class 1) to extreme impairment (Class 5).

<sup>6</sup> *Guides*, page 14/300.

<sup>7</sup> See *Pastore v. Aviva Canada Inc.*, 2012 ONCA 642 (CanLII) and *16-003415/AABS v Allstate Insurance Company of Canada*, 2018 CanLII 8071 (ON LAT)

<sup>8</sup> See answer to referral question 8a on page 12 of his report and Transcripts, October 4, 2018, page 152.

## ANALYSIS

*Is the applicant catastrophically impaired in that she suffers an impairment that, in accordance with the Guides, results in a class 4 impairment (marked impairment) due to mental or behavioural disorder?*

[24] In *Pastore*, the Court of Appeal summarized the following three-stage approach to deciding the issue of catastrophic impairment due to mental or behavioural disorders.<sup>9</sup>

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

### **1. Did the accident<sup>10</sup> cause the applicant to suffer a mental or behavioural (psychological) disorder?**

[25] Causation in the accident benefit context in Ontario has caused considerable confusion in recent years due to uncertainty in the jurisprudence regarding which legal test applies to the question of causation.<sup>11</sup> Recently however, the *Divisional Court* in *Sabadash v. State Farm*<sup>12</sup>, enunciated that a proper understanding of causation means that it is not correct for an adjudicator to simply choose between the “*but for*” test or the “*material contribution*” test or apply both of them without saying which one applies over the other depending on the facts of a benefits dispute. Rather, as Justice Thorburn, makes clear – the primary test to be applied in determining causation is the “*but for test*” and only in rare and exceptional circumstance, is the material contribution test applied. I am bound by this decision and the “*but for*” test remains the legal test for causation at this time.

[26] With this in mind, in determining whether or not the applicant has suffered a catastrophic impairment caused by the accident, the applicant must still prove

---

<sup>9</sup> *Pastore* at para. 6.

<sup>10</sup> Subsection 2(1) of the *Schedule* defines “accident” to mean “an accident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device”.

<sup>11</sup> The respondent in their written submissions cites the *Supreme Court* decision in *Athey v Leonati*, endorsed by the *Ontario Court of Appeal* in *Blake v. Dominion of Canada General Insurance* as the leading cases.

<sup>12</sup> *Sabadash v. State Farm et al.* 2019 ONSC 1121 (CanLII).

that she sustained the impairment or combination of impairments. I note here that I do not accept the applicant's position (para. 2 of Reply) that it was not clear from the respondent's closing submissions what their position was with respect to causation. At the start of the hearing, during opening statements, respondent's counsel made it clear that "*the issue of causation has certainly not been conceded, and that's very much a live issue, that not only is it a question of the extent of any impairment, but also whether it's caused by the subject accident.*"<sup>13</sup> Therefore, the applicant was always aware, or at least should have been aware, that causation was a live issue for the hearing and the dispute involves both causation and the level of impairment.

[27] Therefore, I find that the correct legal test for determining causation in the statutory benefits context is the "but for" test and requires that the applicant show that but for the motor vehicle accident, her current condition would not have occurred.

[28] In determining causation, and applying the "but for" test in accident benefit cases, I am also guided by the following principles cited by Justice Thorburn in *Sabadash, above*, (derived from *Clements v. Clements*<sup>14</sup>, *Athey v. Leonati, above* and *Resurfice Corp. v. Hanke*):<sup>15</sup>

- a. Causation is a factual determination made on a balance of probabilities: *Clements* at paragraph 46;
- b. The Supreme Court in *Clements* held that, "As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required." See *Clements* at paragraph 46;
- c. "There is no indication in the [Schedule] of a legislative intent that an insurer's liability for the accident benefits in issue in this case

<sup>13</sup> Transcripts, June 11, 2018, page 64.

I note the Divisional Court decision in *Sabadash* was released on February 15, 2019 - after the parties had already filed their submissions. During my deliberation, I considered whether pursuant to Rule 9.1 of the Tribunal Rules of Practice and Procedure, which allows a Tribunal to request additional particulars from a party "at any stage in a proceeding" as it considers "necessary for a full and satisfactory understanding of the issues in the proceeding", I should request further submissions. However, I did not find this was necessary given the parties position on this issue including that the respondent agreed that the "but for" test was the applicable test in their submissions.

<sup>14</sup> *Clements v. Clements*, [2012] 2 SCR 181, 2012 SCC 32 (CanLII).

<sup>15</sup> *Resurfice Corp. v. Hanke*, 2007 SCC 7 (CanLII), [2007] 1 S.C.R. 333.



should be subject to discount for apportionment of causation due to an insured's pre-existing injuries ... The [Schedule] simply states, in clear and unambiguous language, that an insurer 'shall pay an insured person who sustains an impairment as a result of an accident, medical, rehabilitation and attendant care benefits.'": See *Monks* at paragraphs 94 to 96;

- d. In exceptional circumstances, where (i) the plaintiff establishes that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each of whom could be responsible for the loss; but (ii) the plaintiff is unable through no fault of her own, to show that one tortfeasor is *the* "but for" cause of her injuries because each tortfeasor can point to the other as the possible "but for" cause of the injury, a plaintiff may establish liability against one defendant if that defendant's conduct materially contributed to the plaintiff's risk of injury: See *Clements* at paragraph 46;
- e. This is because public policy dictates that a defendant should not be permitted to escape liability by pointing the finger at another wrongdoer, thereby defeating a finding of causation on a balance of probabilities against anyone: See *Clements* at paragraphs 13 and 46;
- f. A material contribution to the risk of impairment is one that falls outside the *de minimis* range: See *Athey* at paragraph 44.  
[emphasis added]

[29] Ultimately, however, causation is a question for the Tribunal, taking into account the totality of the evidence. The remaining question to be answered is how it applies to the facts of this case. In order to do this, the starting point in resolving causation is to examine the applicant's condition before and after the accident.

[30] The applicant had some impairments and some personal trauma before the accident which are well-documented in her medical records. They include fibromyalgia, a concussive brain stem injury from a windsurfing accident resulting in right side and facial weakness and injuries from three previous accidents with no significant physical or psychological consequences. There was also evidence that she experienced anxiety, although that was never diagnosed and she never sought treatment for this condition. Further, the applicant separated from her husband in 2004 and in 2007 her son was

diagnosed with epilepsy and Kawasaki Disease, a type of vascular disorder that requires supervision. As a result of all this, the respondent in their submissions seem to maintain that there are some issues of causation but ultimately says it is the applicant's onus to prove that she suffered catastrophic impairment as a result of the accident.

- [31] The applicant's submissions are anchored in Dr. D. Becker's opinion that the VHM would not have ended up in her present condition had the accident not occurred. Dr. D. Becker opined that in spite of all of the obstacles that VHM had in her life prior to the accident, she was still quite functional and managing things well. Dr. D. Becker found that it was the accident that was the major precipitating factor resulting in the exacerbation of her pain, which then put her over the edge by impacting her ability to focus and get things done like she was able to do prior.
- [32] Dr. D. Becker presented as an objective witness who was careful and measured in her testimony. Dr. D. Becker acknowledged in her testimony places where she was lacking certain information (*i.e.* that she did not obtain information from VHW about what was involved in being a graduate assistant or when she started working as her daughter's manger or that she did not know that she drove to Missouri and Nashville). I found her evidence impartial, compelling and her opinion was not weakened in cross-examination.
- [33] Even the respondent's expert, Dr. A. Luczak, conceded at the hearing that VHW did suffer an impairment, specifically an adjustment disorder, as a result of the accident.<sup>16</sup> Another respondent expert, Danielle Reich, occupational therapist, who conducted an in-home assessment over two days, concluded that MHW is struggling to cope with the changes in her life caused by the accident in question.<sup>17</sup>
- [34] Therefore, as far as causation is concerned (putting aside the parties disagreement about the appropriate rating), the respondent's IE assessor concluded that the applicant did suffer an impairment as result of the accident. I also note that the respondent admitted that the applicant suffered some form of impairment as a result of the accident because they paid her benefits up to the maximum allowable amount. However, any payment of benefits in a previous period by the respondent are irrelevant to my determination of catastrophic impairment, as an insurer can be wrong about an approval (just as they can be wrong about a denial).

---

<sup>16</sup> Transcripts, October 4, 2018, page 160.

<sup>17</sup> See Occupational Therapy Catastrophically Examination Report dated December 5, 2016, page 29.

- [35] It is a common theme in the case law that the “but for” test does not require that the accident be the only contributing factor to the applicant’s condition.<sup>18</sup> There can be other contributing factors and the effect can be cumulative but if both (the accident and pre-existing factors) contribute to the applicant’s injuries then the “but for” test is met. Here, the applicant’s particular susceptibility to pain and vulnerability from a neurocognitive perspective due to her brain stem injury, and combination of her pre-existing conditions and the injuries sustained in the accident which caused her the pain disorder and the depressive disorder. Although the accident was a relatively minor accident and VHM concedes that, in large part, her physical injuries have resolved,<sup>19</sup> I find that the accident was the main cause of bringing about her psychological impairments or injuries. This finding is based on my conclusion that the applicant’s cognitive difficulties, pain and depression only began after the accident. The timing and progression of the pain and injuries support a direct link to the accident. As a result, I am satisfied, based on all of the evidence, that but for the accident, VHM would not have suffered her psychological impairments.
- [36] The accident was a contributing factor to an exacerbation of her pain and her neurocognitive deficits due to a pre-existing concussive brain stem injury. The “but for” test is met because the accident was a factual cause of her injuries. Put another way, if the “but for” test was not met then VHM’s injuries would have occurred regardless of the accident in question.
- [37] Therefore, I am satisfied that on a balance of probabilities that the applicant’s impairments were caused by the motor vehicle accident. In other words, but for the motor vehicle accident, she would not have suffered the impairments which form the basis for her catastrophic claim.

### *Diagnosis*

- [38] The first stage of a three-stage process for evaluating catastrophic impairment in Chapter 14 of the *Guides* is a diagnosis of any mental disorder. The methodology in the *Guides* requires that the presence of a mental disorder be documented primarily on the basis of reports from accepted professional sources, such as psychiatrists, psychologists and other health professionals.
- [39] Both the applicant and the respondent’s medical experts seem to agree that the applicant suffered a mental or behavioural disorder as a result of the accident. However, the medical practitioners have diagnosed the applicant with

---

<sup>18</sup> See Director’s Delegate review of the case law in *State Farm and Sabadash*, Appeal Order dated September 18, 2017.

<sup>19</sup> See Applicant’s Closing Submissions para. 3.

varied findings and parties differ regarding the correct diagnosis. For example, the applicant's expert witness, Dr. D. Becker, psychologist, diagnosed the applicant with Pain Disorder and Major Depressive Disorder. The respondent's medical expert, Dr. Luczak, a psychiatrist, diagnosed the applicant with adjustment disorder with anxious irritable mood. He did not agree that the applicant had depression, although Dr. Luczak conceded that problems with hygiene or grooming is one indication of severe depression.<sup>20</sup>

- [40] At the hearing, Dr. D. Becker disagreed with Dr. Luczak's diagnosis of an adjustment disorder, because, as she said, he did not acknowledge VHW's pain disorder and did not evaluate the potential psychological factors with regards to her pain. I agree. The *Guides* tell us that pain is relevant to the consideration of mental and behavioral disorders and mental illness may distort the perception of pain.<sup>21</sup>
- [41] I find that Dr. Luczak was clearly aware of VHM's pain complaints, as they were noted in his report, including that she stopped working because of her pain, fatigue and cognitive issues. He also acknowledged VHW's chronic pain by referring to her being diagnosed with fibromyalgia in 1993 and that her pain was not as severe or as chronic as it is now. Despite his acknowledgment that VHM's impairments were pain-related, Dr. Luczak did not factor pain into his assessment and merely deferred this to the "appropriate assessor".<sup>22</sup> I find the end result being that he did not factor VHM's increased pain into his diagnoses, which may have ultimately distorted his impairment ratings.
- [42] Furthermore, as far as other diagnoses, Dr. Z. Gilano diagnosed the applicant with Mixed Anxiety and Depressive Disorder. In 2004, Dr. Moore diagnosed Mild Adjustment difficulties. In 2015, Dr. A. Walton and Dr. P. Milder diagnosed an Adjustment Disorder with Mixed Anxiety and Depressed Mood. In 2016, Dr. Davidson documents anxiety and depression. In 2016, the Disability Certificate of Dr. M. Hsin, family doctor, listed Adjustment Disorder with mixed anxiety and depressed mood.
- [43] I find that what all of these diagnoses mean, is that the applicant has had emotional difficulty adapting to and coping with her many psychological and physical symptoms, including pain, since the accident. I find that, regardless of the differences in diagnoses amongst the medical practitioners, the diagnosis of some form of pain disorder and depression describes her symptomology. I

---

<sup>20</sup> Transcripts, October 4, 2018, page 124.

<sup>21</sup> *Guides*, 14/297.

<sup>22</sup> See Report dated November 14, 2016, page 10.

also could not reconcile how Dr. Luczak refused to acknowledge that the applicant suffered from depression. This conclusion seems based on VHW telling him she was not depressed when he did acknowledge in cross-examination that she did present as sad, frustrated and distressed. More importantly, it was evident that VHW prided herself on her academic achievements and had professional ambitions. Now, as a result of not being able to fulfill those expectations, she feels like a failure, which has resulted in the onset of depressive symptoms.

**2. What is the impact of mental or behavioural disorders on the applicant's life?**

- [44] I find that the mental or behavioural disorders significantly impacted on VHW's daily life. The overall weight of the evidence before me supports this finding.
- [45] Before the 2010 accident, the evidence established that the applicant led a busy and active life. In 1991, she completed a Bachelor of Fine Arts degree from York University. In 2007, she went back to university to complete a Bachelor of Education eventually earning a prestigious Atkinson Scholarship. In 2009, she started a full time Masters of Education program which she was enrolled in at the time of the accident, with a goal of becoming a professor. At this time, the applicant was also working about 10 hours a week as a graduate assistant and home-schooling her two children for about 30 hours a week. She managed household demands and was the sole caregiver to her children, as her husband left the family in 2004. Her son required supervision due to developmental difficulties. There was evidence that she was also looking after her mother who was waiting for a hip replacement. She was active socially, going to the park and visiting with friends. In summary, she managed all of her ADLs independently without much assistance and was a relatively high-functioning and motivated person.
- [46] After the accident, the applicant was a totally different person and the accident seemed to affect every aspect of her life. She withdrew from her master's program after her work assignments did not meet the required minimal standards or were not submitted at all. Related to this, she stopped working as a graduate assistant. She could not continue to homeschool her children any longer. Her relationship with her parents changed. The applicant testified she does not feel love anymore for anyone. She stated in direct examination that: *"I don't like people anymore. I prefer to be by myself."* She explained that she does not have a social life anymore. That she is irritable with very little patience. She is bothered by sounds and has trouble remembering things. She

stays in bed for days and does not wash herself regularly. As one example, she stated that in July 2019, she was in bed for 25 of 31 days. Simply put, she cannot do the normal things that she used to do prior to the accident.

- [47] Her testimony was backed by her daughter, Victoria Warner (Tori), who contrasted the applicant's level of functioning before and after the accident. Tori's testimony was critically important in this regard because Tori was the only witness that had known VHW well prior to the accident, so she was in an optimal position to be able to evaluate changes in her behaviour and mood. Tori testified that before the accident her mother was a busy, energetic, outgoing person involved in community events. She described her as a "go-getter...her role model...she loved her life. She was strong throughout all of the hard things we had to go through...". After the accident, she stated that she essentially lost her mom and described her "as a shell of human". She described her as nervous, upset all the time and that there was a big shift in how she was responding to things. With respect to her daily activities, Tori stated that her mother gets up around noon, spends 90% of the time in her room and goes without showering for months.
- [48] Similarly, Jen Hansen, a rehabilitation support worker (RSW) who started working with VHM two to three times per week in February 2015 to assist with everyday tasks and activities, testified that she observed VHM's lack of hygiene, that the house was cluttered and that the kitchen would be a mess with dirty dishes.
- [49] Likewise, with respect to VHM's functioning, the respondent's own expert, Danielle Reich, occupational therapist, in her Occupational Therapy Catastrophic Examination Report dated December 5, 2016, concluded that VHM presented as a lady who suffers from on-going chronic pain, altered mood and changes to her cognition that have led to a deterioration of her functioning.
- [50] Although there was evidence that after the accident, the applicant did work at Rhythmfest as a stage manager, Blyth Academy as a guitar teacher, made a presentation to the City of Barrie in support of a grant and corresponded in person and in writing with Amanda Dyke, volunteered her time with an organization called OMCI, and was driving with her daughter to various locations to support her music career, I accept that these were limited temporary engagements and not ongoing tasks that equated to any form of full time work or regular daily ongoing commitment.
- [51] The evidence was that she was not re-hired as a music teacher and this was a one-time assignment. The Rhythmfest was a once a year weekend special

event. That she was more of a figurehead for the Ontario Music Cooperative (OMCI) to run the emerging musicians program and never played a central role in this organization but for the one time presentation. That although she did make the presentation to the city she did not prepare the PowerPoint presentation and there were other people at the meeting from OMCI in support. Also, that Amanda Dyke did not work exclusively with VHM on the proposed partnership.

- [52] With respect to VHM's role as a so-called "momager" or manager of her daughter's music career, I viewed this role differently and simply saw a mother trying to help her young daughter advance her music career in any way she can and not in a formal professional role. This was most evident when VHM described her role as the "credit card and car keys".<sup>23</sup>
- [53] Most importantly, I accepted Dr. D. Becker's explanation, consistent with VHM's own testimony, and that of Stacey Baboulas, OT, that VHM was a person who would save energy to do these tasks and took breaks in between to pace herself. In relation to this, and in accordance with the *Guides*, one cannot just look at one task and how she managed it, one must look at several tasks over a longer period of time. Again, these tasks were temporary or isolated events and her ability to do them had to be viewed on a longer continuum to adequately assess her true level of functioning.
- [54] In that sense, I agree with Dr. D. Becker and find that VHM's pain, her excessive fatigue and her inability to cope, have impacted her ability to carry on a normal life, including basic activities like showering, getting up and making food for herself.
- [55] I made observations of VHM during the hearing. She testified on two occasions. First, on June 14, 2018, and then in reply on December 18, 2018. I am cognizant that my observations of her are but a snapshot in time in her life. I simply note my observations here. On the first appearance, the applicant was clearly confused, disoriented and had trouble focusing. She had a piece of paper with her and kept drawing figures or pictures. She appeared disheveled. She was bothered by sounds, needed several breaks and was easily disrupted. She referred to "spoons" as a way to manage her energy levels. On December 18, she appeared somewhat better but was still in a disoriented state and became frustrated with the questioning, irritable, and had trouble remembering things.

---

<sup>23</sup> Transcripts, December 18, 2018, page 18.

- [56] Having regard to the evidence before me, particularly the testimony of the applicant that she continues to experience pain, anxiety, depression, feelings of sadness, I find that the weight of the evidence supports a finding that the accident resulted in a mental or behavioural disorder which impacted the applicant's daily functioning.
- [57] The third step in assessing the effect of the mental or behavior disorder on the applicant's life is to determine the severity of the impairment in each of the four domains according to the criteria of mild, moderate, marked or extreme as set out in the *Guides*.

The Four Spheres of Function:

**3. Regarding the impact of the mental or behavioural impairment, what is the severity of the limitations in relation to activities of daily living, social functioning, concentration and adaptation as set out in the *Guides*?**

- [58] As stated previously, Dr. D. Becker rated the applicant as a Class 4 (marked) in three of the four areas of functioning (ADLs, CCP and AD), and a Class 3 (moderate) in the fourth category (SF). Whereas Dr. A. Luczak rated the applicant as a Class 2 to 3 (mild to moderate) in all four areas of functioning (ADLs, CCP, SF and AD).
- [59] Overall, I prefer Dr. D. Becker's evidence over that of Dr. Luczak, because I find Dr. Becker provided a rating that was more consistent with the evidence as a whole and her assessment was carried out in accordance with the *Guides* by utilizing the Table on page 301 and the word descriptors for a Class 4 (marked) – impairment levels significantly impeding useful function.
- [60] The *Schedule* requires an assessor to rate an individual with the methodology set out in the *Guides*. To assist the assessor, the *Guides* provide a detailed table in Chapter 14 describing the four functional domains, the classes of impairment and the verbal rating criteria for each class. For an evaluation to be considered to have been done in accordance with the *Guides*, it is imperative that an assessor have an exact understating of the meaning of each of the five classes and the language, or word descriptors, for each domain, contained in Chapter 14.
- [61] My sense is that there are two main reasons for this requirement. First, because the *Guides* do not use percentages, or convert the word descriptors into percent values and there are no other definitions of what it means to be classified as "mild", "moderate" or "marked" or "extreme" other than the word



descriptors themselves. Second, and perhaps more obvious, the *Guides* tell us that there is no specific medical test for any one of the categories, so it is the word descriptors themselves that stand alone and have to be satisfied and become the central focus of assigning a rating by the assessors. Again, if an assessor does not understand, or consistently misstates, the meaning of any category they will not be able to properly rate someone “in accordance” with the *Guides*.

- [62] In cross-examination, Dr. Luczak incorrectly described or mischaracterized a Class 4 Marked Impairment as “persistent, permanent, and impedes useful function.”<sup>24</sup> [emphasis added] However, the *Guides*, describe a Marked Impairment as “a level of impairment that significantly impede useful function”<sup>25</sup> Notably, the word descriptors do not use the word “permanent” or “persistent” as used by Dr. Luczak. Permanent means “not expected to change for an indefinite time.”<sup>26</sup> All that the *Guides* require is that they significantly impede useful function, which, in my view, does not rise to the level of it being permanent. I did not read anywhere in Chapter 14 that the activities to be assessed by a medical expert needed to be permanent to rise to the level of them being “marked.” It seems to me that Dr. Luczak confused the seriousness of a diagnosis with the levels of impairment or severity of the limitations.
- [63] As a further example of Dr. Luczak’s mischaracterization of the marked impairment category, Dr. Luczak was asked if he accepted that if VHW went weeks without bathing, leaving the house and was essentially bedbound, would he then rate her as marked in the ADLs. Dr. Luczak responded that if that was her “permanent and unchanging”<sup>27</sup> condition that it might qualify her for a marked rating. Again, the *Guides* refer to a marked impairment as significantly impeding useful function and do not speak to it as being permanent and unchanging.
- [64] Therefore, Dr. Luczak’s conclusion that VHM’s impairment could not be ‘Marked’ because her impairment levels were not “persistent, permanent, and impedes useful function,” applied the wrong test and is not in accordance with the *Guides*. The test for “marked impairment” is not “permanent, persistent and impedes useful functional.” That would be akin to a new threshold level not envisioned by the *Guides*.

<sup>24</sup> Transcripts, October 4, 2018, page 212.

<sup>25</sup> *Guides*, pages 300-301.

<sup>26</sup> <https://www.thefreedictionary.com/permanent>

<sup>27</sup> Transcripts, October 4, 2018, page 212.

- [65] On this basis, in my view, Dr. Luczak's entire assigned ratings regarding VHM's level of impairment appear to be tainted, compromised and ultimately unreliable based on a fundamental misunderstanding about the precise meaning of what constitutes a 'marked impairment' under the *Guides*. This is in contrast to Dr. D. Becker's correct description of a 'marked impairment' that she defined at the hearing, which was consistent with the word descriptors in the *Guides* – that a client is evidencing impairment levels that significantly impede useful functioning.<sup>28</sup>
- [66] Looked at another way, since psychological impairments are rated qualitatively, rather than by percentages, and the use of words (mild, moderate, marked) are used to quantify the severity of psychological injuries combined with the word descriptors to determine placement in a specific category, the usage of such descriptors such as "mild" or "moderate" cannot be taken to mean something other than how they are defined in the *Guides*. Any such approach cannot be in accordance with the methodology in the *Guides* because it fails to do what the *Guides* require.
- [67] Dr. Luczak's opinion was also weakened by the fact that there were several inconsistencies between what was written in his report and his testimony. For example, on page 11 of his report, regarding social functioning, Dr. Luczak rated the applicant as "*Mild (Class 2)*". Strictly speaking, this is different than saying someone is Mild to Moderate (Class 2-3), which puts them in between two categories, as he did at the hearing (and also under his response to question 8a in his report).
- [68] Perhaps even more problematic, is that, on page 11 of his report, Dr. Luczak wrote: "*I would provisionally rate VHW's problems with concentration, persistence and pace as **no more** than Moderate (Class 3)*" adding, at the top of page 12, that: "*...therefore a Class 3 impairment may be an overestimate.*" Similarly, with respect to adoption, on page 12, Dr. Luczak also used the same terminology writing: "*I would provisionally rate VHM's impairments in adoption as **no more** than Moderate (Class 3).*" Words are critically important in a medical assessment such as this, especially one rating a person's impairments in a catastrophic determination, as they may significantly impact a person's ultimate rating and access to benefits. As such, I regard his choice of words used on page 11 and 12 of his report—"no more than moderate (Class 3)"—to mean that it could actually be any one of three categories: Class 1, 2 or 3. This is different than what Dr. Luczak stated at the hearing (or in his response to question 8a in his report): that he rated VHW in between Class 2-3.

---

<sup>28</sup> Transcripts, September 17, 2018, page 53.

- [69] Third, Dr. Luczak also used the somewhat-ambiguous word “*provisionally*” several times in his report to describe VHW’s impairment severity. To me, this indicates an inherent level of uncertainty, or perhaps that he was qualifying his opinion for some reason, or it was premature, or he was open to change with different information. In any event, it is not clear and in the end, for me, it ultimately weakened his opinion, as his conclusion was not precise or definite but rather appeared qualified or conditional by the use of these words.
- [70] In the same way it is also worth noting that Dr. Luczak’s opinion appeared to have changed at the hearing from what was set out in his 2017 report regarding the main referral question 8a, found on page 12, as follows: “*As a result of the motor vehicle accident of July 14, 2010, has VHW sustained a catastrophic impairment under any of the criterion in the SABS*”. To which Dr. Luczak replied in his report that: “*In summary, VHW presents with mild to moderate impairments in the areas of activities of daily living, social functioning, concentration, persistence and pace and adaption.*”
- [71] In contrast, at the hearing, during his testimony, Dr. Luczak’s answer to this same line of questioning appeared to have changed. More precisely, when asked if VHM if the accident caused VHM her impairments, Dr. Luczak qualified his answer by stating: “***Not complete***...*I am saying that, you know, she presents with mild to moderate impairments...but they could be multifactorial, that there are issues of causality, and over-representation, and reliability that may diminish the severity of her impairments to some degree.*”<sup>29</sup> Ultimately, this inconsistency was extremely telling, and indicated to me that Dr. Luczak may have been uncertain about his assigned impairment ratings as part of his catastrophic determination assessment. I queried how he was able to diagnose the applicant with an Adjustment Disorder as a result of the accident, yet maintain his position that other factors contributed to her psychological complaints.
- [72] Finally, I note that Dr. Luczak rated the applicant by assigning a range - Class 2 to 3 (mild to moderate), in all four areas of functioning rather than assigning just one class for each particular category. I queried whether this meant that VHW was rated as either a Class 2 or 3, or was it 2.5, or even perhaps a 2.9? This may be an accepted practice in the medical community that has developed over the years. In cross- examination, Dr. Luczak explained that some aspects were mild and others moderate but I was not clear what exact

---

<sup>29</sup> Transcripts, October 4, 2018, page 166.

aspects he was speaking about.<sup>30</sup> His written report also did not delineate what aspects within a particular area were Class 2 or Class 3.

[73] In my view, this range or splitting of classes, is problematic as it leads to uncertainty and ambiguity for an adjudicator and denies the adjudicator the aid of the word descriptors in the *Guides* in assessing the evidence. It should be avoided. As stated, the word descriptors are critically important because they assign meaning to each of the five respective classes (ie. Class 4 - significantly impedes useful functioning). But they are only assigned to each individual class and not across a range of classes. If splitting of classes were to be an accepted practice in rating impairments under the *Guides*, this would lead to difficulty in the analysis regarding the degree to which the applicants function has been impaired. As just one example, how can one combine the meaning of the words: "impairment levels are compatible with most useful function" (Class 2) with "impairments levels are compatible with some, but not all, useful functions" (Class 3). To me, each of the Classes, as defined by the word descriptors, are a class of their own and should not be comingled with any other classes. To further support my view, there are only 5 Classes in the *Guides*, and the table on page 301 does not provide for half class category anywhere. If the drafters of the *Guides* wanted more classes they surely would have provided for that. Of all of the examples in Chapter 14<sup>31</sup>, none of them render a rating as a range. All of the examples are grounded in one class rating only.

[74] From a strictly legal analysis, assigning a range is not in accordance with the language used in the *Schedule*. My plain reading of the definition of the "catastrophic impairment" (criteria 8) is that it refers to the medical professional rating a person "in a class". The meaning of "a" as a singular article, is for the practitioner to rate the person in **one class** as opposed to two classes or between two, or perhaps three classes. Moreover, s. 1.2(g) of the *Schedule* has the word "or" in between class 4 and 5 and is a disjunctive use of the word – *i.e.*, each class is separate and distinct. Extrapolating this analysis, it would seem reasonable that when the experts are rating the injured person that they are required to rate them "in a class".

### *Credibility Assessment*

<sup>30</sup> Transcripts, October 4, 2018, page 206.

<sup>31</sup> *Guides*, pages 14/294, 14/300 and 14/302

- [75] The *Guides* instruct the physician to be aware that when evaluating impairments of the possibility that obtaining monetary awards increases the likelihood of malingering or exaggeration of symptoms, although it is rare.<sup>32</sup>
- [76] In his testimony, Dr. Luczak raised VHM's credibility as an issue as far as possible symptom exaggeration.<sup>33</sup> He stated that: "...*validity issues on detailed neuropsychological testing casts doubt on the authenticity of her symptoms. When you are taking self-reports into consideration, you need to look at reliability veracity of these reports....so again you wonder whether she is endorsing symptoms on a scale haphazardly, and trying to present herself as symptomatic when she isn't.*"<sup>34</sup>
- [77] I found Dr. Luczak's attempt to challenge the applicant's credibility at the hearing regarding the cause of her injuries to be unconvincing and confusing for several reasons. First, the preponderance of the evidence was that other assessors did find the applicant credible. I also note that the respondent's final written submissions did not speak with any specificity to any issues of credibility. Primarily, however, I did not see this evidence included in his report and I did not put a lot of weight on this part of his evidence as it would be unfair and highly prejudicial for the respondent to rely upon it without being in Dr. Luczak's catastrophic determination report and giving the applicant's an opportunity to respond. In relation to this, during cross-examination, the following exchange took place which appears to contradict Dr. Luczak's earlier testimony (at page 136), and highlights this deficiency:
- Q. There is nothing in the report that you expressed any concerns about her truthfulness or validity in terms of your assessing her. There is nothing in there...and I am suggesting to you that you concluded that she was being credible and truthful with you. Do you agree with that?
- A. During my assessment, I...**yes**, I have nothing to indicate that she wasn't being truthful.
- Q. **There is nothing that you saw suggested that she was feigning malingering exaggerating.** You didn't make any note of that in your report?
- A. **No.** [emphasis added]

---

<sup>32</sup> *Guides*, p. 14/298.

<sup>33</sup> Transcripts, October 4, 2018, pages 135 and 158.

<sup>34</sup> Transcripts, October 4, 2018, page 135.

- [78] In summary, I found Dr. Luczak's testimony on this issue to be vague, somewhat confusing, inconsistent and less persuasive and therefore gave it less weight.
- [79] Dr. Watson, neuropsychologist, was the only other expert witnesses who testified and raised issues regarding MHW's possible symptom amplification and exaggeration. In his report dated March 6, 2017,<sup>35</sup> to address MHW's cognitive functioning, he did not offer any diagnoses concluding that due to validity issues there was less than an ideal amount of supportive evidence from his assessment in support of VHM's subjective psychological complaints. In direct examination, Dr. Watson tried to explain his findings that VHM passed some tests and did not pass others and there was real inconsistency in her level of effort and because he was unable to gauge how reliable and credible an effort she was giving he was unable to put any weight on the test results and arrive at a diagnosis.
- [80] I did not find that Dr. Watson's evidence impeached the applicant's credibility. Although Dr. Watson noted issues with validity testing, in the end, he could not say with any absolute certainty that VHM was exaggerating her symptoms because there may have been other reasons for the poor test results, including poor engagement - meaning that VHM could have been overwhelmed and exhausted by the whole process. In other words, as he conceded, it was not clear whether the test results were conscious, unconscious or purposeful. The reason for the issues with the validity could be attributed to VHM's poor engagement. Indeed, VHM reported to Dr. Watson during the assessment that her biggest issues are her constant pain, headaches, tiredness, feeling "wooly" (indicating that she has problems with memory and concentration) and frustration, and it seems to me, there was a real likelihood, that she was disengaged during the testing. I also note that Dr. Watson did not provide a rating under criterion 8 so his report is very limited as far as the main issue in dispute.
- [81] The respondent provided surveillance reports and video conducted over several days by Mr. J. Leichner who also testified at the hearing. The most significant, on August 12-14, 2016, the applicant was observed participating at a musical festival called Rhythmfest conducting a drumming seminar and other activities such as answering questions, standing, walking, and emceeding an event. In direct examination, VHM explained that it is the one thing that makes

---

<sup>35</sup> There were two reports prepared by Dr. Watson both appear to be dated March 6, 2017 with respect to the same assessment dates of November 23, 2016 and March 1, 2017, found at Tab 3 and 4 of the Respondent's Hearing Brief.

her feel good that she looks forward to and she prepared for it by having a light schedule prior to the event, takes extra treatment and wears a "support hose." I also did not find that this evidence impeached the applicant's credibility.

- [82] I note that Dr. D. Becker was asked about the surveillance evidence which she viewed and, specifically, if VHM's participation at Rhythmfest affected her opinion in any way. Her opinion did not change because this was a role that VHW had done before and she was able to pace herself and spent a lot of time resting. This view was also supported by Stacey Baboulos, OT, who testified that VHW was able to pace herself at Rhythmfest adding that during the two day assessment conducted by her she did not see anything to suggest that VHM was "faking it".
- [83] Overall, I found that the applicant was generally credible and the evidence rules out malingering or deliberate magnification of symptoms. I have evaluated her testimony on a standalone basis, and based upon the consistency with the testimony of other witnesses together with the documentary evidence. I agree that there were some discrepancies with respect to some of her evidence, including her involvement with the OMCI, and in particular the evidence of Amanda Dyke, cultural office at the City of Barrie, (who was the community events planner when OMCI partnered with the City to run an emerging artist program). However, when VHW was recalled in reply she was able to explain that she was more of a figure head for the organization because of her degrees and that people did not want to deal with her daughter because of her age. Ms. Dyke acknowledged in her testimony that Tori was, until recently, a minor, so she was communicating with VHW. Ms. Dyke also acknowledged that she did not know what VHW's title at OMCI was and understood VHW was a volunteer and not being paid.
- [84] It also appeared that several other people helped out with the OMCI proposal for the government grant including VHM's brother and daughter. I noted that the email that Ms. Dyke used to correspond with OMCI was "icanmakeit@gmail" which appears to be a general type of an email address and not specific to VHW individually. I accepted that several people used this email address to correspond with Ms. Dyke. Some inconsistency and failure of recollection is not unexpected given the age of this matter and also because of her current medical condition.
- [85] I also accepted her testimony and explanation that she uses a technique of "spoons" to save her energy and refrain from performing tasks in the days leading up to an event, so she can do certain tasks when there is a big event

that is coming up for her. After the event, she than rests or recuperates to save her energy levels. This was supported by the testimony of Jen Hanson who has known VHM for several years and worked with her closely as a support worker and also Stacey Baboulas, the therapist.<sup>36</sup>

- [86] My credibility finding are supported by Dr. Becker, who stated that she had no evidence that VHM was not credible and passed all validity measures not only with her but other assessments as well.<sup>37</sup> This was consistent with at least one part of Dr. Luczak's testimony, that he had nothing to indicate that VHW wasn't being truthful.<sup>38</sup>
- [87] I now return to the three-step process set out in *Pastore* to address briefly each area of functioning.

1. Activities of Daily Living (ADLs)

- [88] The *Guides* include in this category activities such as self-care and personal hygiene, eating, preparing food, communicating, speaking, writing, maintain one's posture, standing and sitting, caring for home and personal finances, walking, travelling, recreational and social activities, work activities, driving, sexual activity, hobbies, and sleep.<sup>39</sup>
- [89] Regarding the rating for this category, I prefer Dr. D. Becker's rating of marked over that of Dr. Luczak because Dr. Becker's assessment of the applicant's functional daily abilities was more consistent with the overall evidence that was presented at the hearing and corresponded more accurately to the word descriptors for this category: "impairment levels significantly impede useful functioning."
- [90] I find the following observations made by Stacey Baboulas, OT, who conducted a two day situational assessment of VHM's activities, which included a review of a full spectrum of activities, are consistent with marked impairment. In particular, the following findings: that VHM was not taking care of her hygiene; she had a reduced interest in her appearance; she showers once every two to three weeks; she showed up in the same clothing each day and had a slight odour and her hair was greasy; she has trouble engaging household chores, her parents are responsible for grocery shopping and light housekeeping and when they go to Arizona during the winter months, the home gets more

<sup>36</sup> Transcripts, June 13, 2018, pages 56 and 63.

<sup>37</sup> Transcripts, September 17, 2018, pages 63, 72-73.

<sup>38</sup> Transcripts, October 4, 2018, page 195.

<sup>39</sup> *Guides*, page ½ and 317 includes a Table of examples.



cluttered; she is overwhelmed with making decisions about bill payments. There was also evidence that VHM did need assistive devices, such as a handled shower head, grab bars, and a chair to maintain her safety in the shower.<sup>40</sup>

- [91] With respect to VHW's hygiene, Dr. Luczak conceded in cross-examination that if VHW went weeks without bathing or leaving the house, and is basically bedbound, then that might qualify her for a marked rating.<sup>41</sup>
- [92] Before the accident, BHW managed her ADLs without much assistance. Therefore, I find that the applicant's functioning in her ADLs has been significantly impeded and she has been unable to return to the independence she once enjoyed before the accident including her education, teaching, self-care and recreational activities. The applicant's diagnosed disorders undermine her ability to cope and adjust, she struggles each day with the simplest activities like showering and making food, leading to an increased perception of pain and fatigue and increased functional decompensation, resulting in a more pronounced level of disability. I find that the applicant was a psychologically and physically vulnerable individual pre-accident and her response to the accident-related impairments must be considered in that context. Again, despite her noted pre-existing challenges, the evidence clearly supports a picture that the applicant was functioning at a much higher pre-accident level.

## 2. Social Functioning (SF)

- [93] This category refers to an individual's capacity to interact appropriately and communicate effectively with other individuals. It includes the ability to get along with others including family members and friends.<sup>42</sup>
- [94] Regarding the socialization category, the parties' medical experts essentially agreed that the appropriate rating was not catastrophically impaired, as they rated the applicant as mild to moderate (Class 2-3).<sup>43</sup> What is important here is that both Drs. Becker and Luczak recognized that VHW was more socially isolated from her family and friends but still maintained some relationships with them after the accident. I have nothing further to add to that and find a moderate level of impairment in social functioning

---

<sup>40</sup> Transcripts, June 13, 2018, page 52.

<sup>41</sup> Transcripts, October 4, 2108, page 212.

<sup>42</sup> *Guides* page 14/294.

<sup>43</sup> I note that Dr. Luczak on page 11 of his report rates her as Mild (Class 2) whereas on page 12 under the referral question he states she is mild to moderate (Class 2-3) in this domain so there was a slight difference. Dr. Becker rated provided a moderate rating only.

### 3. Concentration, Persistence, Pace (CPP)

- [95] This category refers to the ability to sustain focused attention long enough to permit the completion of tasks. In activities of daily living, concentration may be reflected in terms of ability to complete everyday household tasks.
- [96] In this category, I also prefer the opinion of Dr. D. Becker over that over Dr. Luczak for many of the reasons already mentioned. Dr. Becker's report and testimony in this area was more thorough, persuasive and consistent with the overall evidence that was presented at the hearing, noting VHW's pain and fatigue repeated failures to adapt to her post-accident life, and her inability to complete even the simplest of tasks.
- [97] During the two-day situation assessment conducted by Ms. Baboulas, which included some functional testing, the applicant became overwhelmed, frustrated and was not able to follow instructions at one point withdrawing from the assessment process. During the first day, she deteriorated almost immediately, began trembling with tears streaming down her face and went outside to sleep on the concrete pavement during the lunch break. She was only able to do two of the four activities assigned to her (applying for a credit card, creating grocery list, visiting a store, and organizing appointments into a calendar), took breaks totaling 92 minutes and tolerated about two hours and 43 minutes of intermittent and unproductive activities. Day two was almost a complete failure. She became very upset and angry and left at 1:55 pm because of her pain, fatigue and stress. This also evidenced her inappropriate social behavior. I find the *Guides'* definition of marked impairment is a better fit than a mild/moderate impairment.

### 4. Deterioration or Decompensation in Work or Work-like Settings (Adaption)

- [98] This category refers to repeated failure to adapt to stressful circumstances. In the face of such circumstances the individual may withdraw from the situation or experience exacerbation of signs and symptoms of a mental disorder; that is, decompensate and have difficulty maintaining activities of daily living, continuing social relationships, and completing tasks.
- [99] I also prefer the marked rating assigned by Dr. D. Becker to Dr. Luczak's moderate rating for this domain because I found it to be more comprehensive and consistent with the preponderance of the medical and non-medical evidence which shows VHM's repeated failure to adapt to stressful circumstances and her deterioration or decompensation and difficulties

maintaining activities of daily living, continuing social relationships, and completing tasks.

- [100] As just one example, Dr. Luczak referred to VHM's really poor stress tolerance in the face of even the simplest stressors and her inability to cope appropriately. I find that the applicant was so overwhelmed with the changes in her life (*i.e.*, that she was not able to fulfill expectations of herself and felt like a total failure) as a result of the accident and has difficulty coping and with her inability to do things that she once was able to do with ease that exacerbated her depressive symptoms.

### **Medical and Rehabilitation Benefits**

- [101] Sections 14, 15 and 16 of the *Schedule* provide that an insurer is only liable to pay for medical and rehabilitation expenses that are reasonable and necessary as a result of the accident. The applicant bears the onus of proving on a balance of probabilities the treatment plans in dispute are reasonable and necessary.
- [102] The Case Conference Report, dated January 26, 2018, reminded the parties that the evidence they intended to rely on for the hearing had to be resubmitted. During the hearing, after the filing of the briefs, I did not see the Treatment Plans (OCF-18) in dispute as being included in any the document briefs. I raised this with the parties during the hearing as I presumed there were treatment plans that were submitted prior to the filing of the application. The Case Conference Order did set out denial dates. With the cooperation of respondent's counsel, I made an order, on consent, to allow the applicant to serve and file copies of the treatment plans (OCF-18) that are in dispute as part of this hearing with their submissions due January 11, 2019. It appears this was not done. Therefore, the treatment plans in dispute are not currently before me for the hearing. As a result, I cannot discern what the exact proposed treatment is for and what the goals of the proposed treatment were.
- [103] In addition, the applicant did not lead me to the most basic information pertaining to these treatment plans. For example, I do not know how the proposed treatment will assist the applicant and are accident-related. I also do not know if the expenses have been incurred. The applicant's medical experts did not address the necessity of these medical benefits. The final written submissions do not speak to how the dispute medical benefits are reasonable and necessary.

[104] For the reasons above, I find the applicant has not met her onus of proving on a balance of probabilities that the treatment plans/expenses in dispute are reasonable and necessary. Therefore, the applicant is not entitled to any of the medical and rehabilitation benefits claimed as part of this application.

## INTEREST

[105] Since I found no benefits payable, the applicant is not entitled to any interest pursuant to section 51 of the *Schedule*.

## MOTION

[106] On February 15, 2019, after the completion of the in-person hearing, the respondent filed a motion letter requesting that 53 of the 66 paragraphs in the applicant's Reply dated February 8, 2019 be struck or excluded from consideration. The basis of this request was that it was not proper reply submissions and reply is not an opportunity for a party to raise issues that should have been raised in initial submissions or to reformulate their argument.

[107] The respondent filed a response dated March 11, 2019 opposing the request, submitting that the Tribunal consider the applicant's full reply as filed.

[108] The Tribunal's *Common Rules of Practice and Procedure* do not specifically provide for striking a reply submission. However, it is well-settled law that reply evidence or submissions should not introduce any new issues and must respond only to those matters raised by the respondent.

[109] The applicant's reply is a very-detailed 66 paragraphs on 11 pages. The applicant's reply submissions were not to exceed 10 pages. Paragraphs 62-66 on page 11 are excluded on this basis alone. After reviewing the applicant's initial and reply submissions, I agree with the respondent that the applicant used the reply to introduce new information and arguments that should have been addressed in her initial submissions. It appears to me that most of the contentious areas are where the applicant is introducing new information. Moreover, I note that the reply did not reference any of the treatment plans in dispute.

[110] For the reasons above, the applicant's reply paragraphs 6-30, 37-53, 55-57 and 60-61, are struck and were not considered when rendering my decision on the substantive issues. Paragraph 5 appears to be a factual paragraph with dates.

**CONCLUSION/ORDER**

- [111] For the above reasons, I conclude on the balance of probabilities, that VHM has a Marked level of impairment (class 4) in three of the four areas of function, namely, in Activities of Daily Living, Concentration, Pace and Persistence and Adaption, and a Moderate level of impairment (Class 3) in the fourth area of Social Functioning.
- [112] Therefore, I find that VHM has sustained a Catastrophic Impairment as a result of the accident, as defined in the *Schedule*.
- [113] I also find that the applicant is not entitled to the benefits claimed, or interest, under the *Schedule*.

**Released: May 16, 2019**



---

**Cezary Paluch, Adjudicator**