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

Ontario

Date: 2017-12-12
Tribunal File Number: 16-002234/AABS
Case Name: 16-002234 v Unica Insurance Inc.

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:

Applicant

Applicant

and

Unica Insurance Inc.

Respondent

DECISION

ADJUDICATORS: **Deborah Neilson, Nicole Trecksler**

APPEARANCES:

For the applicant: Anushika Anthony, Counsel
For the respondent: Angela Comella, Counsel

HEARD: In person: **April 24 to 26, May 9, 2017**
By teleconference: **June 12, 2017**

I. OVERVIEW

[1]. The applicant was in an automobile accident on July 28, 2014, and applied to the respondent for income replacement benefits (IRBs) and a catastrophic (CAT) determination under the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("*Schedule*").

[2]. The applicant is presently 26 years old. Prior to the accident, she was employed at three jobs:

a) Counter clerk/driver with a Deli & Catering company on a full-time basis;

b) Bar manager on the weekends; and

c) Babysitter (every week day on a bi-weekly basis after her work with at the Deli).

[3]. As a result of the accident, the applicant was diagnosed with soft tissue injuries, anxiety and acute distress disorder. The applicant's condition improved and she started work part-time at Chapter's in November 2014 and started a Police Foundation program at Humber College in January 2015. The respondent paid income replacement benefits up until February 9, 2015, but denied that the applicant was entitled to any further IRBs after February 9, 2015.

[4]. On June 15, 2015, the applicant blacked out while she was the passenger in a vehicle that was almost in another motor vehicle accident. The applicant alleges that since then, she is not able to work or continue her studies because of her blackouts, which can occur every day when she is under stress or in pain. The applicant alleges that she suffers a catastrophic impairment because she continues to suffer from PTSD, anxiety and blackouts from the accident.

[5]. The respondent denied the applicant suffered a catastrophic impairment. The respondent based its denial on insurer's examinations, which indicate that the blackouts are not a result of the accident and that the applicant's symptoms are likely exaggerated.

[6]. The applicant appealed the respondent's denial of catastrophic impairment to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal"). She also appealed to the Tribunal to have her income replacement benefits reinstated from August 22, 2015, which the respondent has since refused to do. The parties were unable to resolve their dispute at a case conference before the Tribunal and the matter proceeded to a hearing before us.

[7]. The onus is on the applicant to show that she is entitled to pre and post 104 IRBs and is catastrophically impaired.

II. ISSUES

[8]. The issues to be determined are as follows:

a) Is the applicant entitled to receive a weekly income replacement benefit ("IRB") in the amount of $231.00 per week for the following periods:

- From August 22, 2015 to July 28, 2016; and
- From July 28, 2016 to date and ongoing

b) Has the applicant sustained a catastrophic impairment as defined by either section 3(2)(e) or (f)[1] of the *Schedule*?

[9]. In order to determine whether the applicant sustained a catastrophic impairment or is entitled to further income replacement benefits, we must first determine whether the motor vehicle accident of July 28, 2014 caused the applicant's blackouts.

III. RESULT

[10]. We find that the applicant's blackouts are a result of the July 28, 2014 accident. She is catastrophically impaired because she sustained a Class 4 marked psychological impairment in two areas of function.

[11]. Because of the applicant's blackouts, we find that she is entitled to IRBs for the first 104 weeks of disability.

[12]. The applicant did not present any evidence or submissions on whether she is entitled to IRBs after the first 104 weeks of disability.

[1] Section 3(2)(e) An impairment or combination of impairments that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in 55 percent or more impairment of the whole person; or Section 3(2)(f) An impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.

IV. ANALYSIS

A. Are the Applicant's Blackouts a Result of the Accident?

[13]. The applicant submits that she did not blackout prior to the accident and the blackouts are a symptom of PTSD resulting from the accident. In contrast, the respondent submits that there was a pre-accident blackout and concludes that the post-accident blackouts are not related to the accident.

[14]. First, we must first determine whether there was a pre-accident blackout. Second, we must establish whether the post-accident blackouts were a result of the accident. Lastly, we must then decide whether there is a correlation between the pre-accident and post-accident blackouts.

i. Pre-accident Blackout

[15]. The applicant denied that she blacked out prior to the accident. We find that the applicant had a blackout prior to the accident for the following reasons.

[16]. The applicant's family physician, Dr. Maged Fahim, wrote in his clinical notes that on June 16, 2014, the applicant fainted after she was upset with her friend. Her friend said that she was out for about 20 minutes. The applicant submitted that Dr. Fahim's clinical note was incorrect, but could not explain why Dr. Fahim would have recorded that information. We accept the respondent's submission that Dr. Fahim's clinical note was written at the time of the incident and that he would have no incentive to write anything other than that which was reported to him.

[17]. Because of the incident, Dr. Fahim referred the applicant for a CAT scan of her head and an EEG, which were both normal. We find it highly unlikely that Dr. Fahim or any other physician would subject a patient to those diagnostic tests because a patient was simply tired and fell asleep for 20 minutes, as alleged by the applicant. For these reasons, we find that the applicant suffered a blackout when she was upset before the accident.

[18]. Regarding the applicant's credibility about the pre-accident blackout, the applicant did not tell any of the doctors who testified at the hearing of her blackout before the accident. However, the failure to disclose the incident does not affect the applicant's credibility. Either the applicant did not make a connection between her one isolated pre-accident incident and her multiple post-accident blackouts or she does not remember that she had a pre-accident blackout.

ii. Post-accident Blackouts

[19]. According to the applicant, the July 28, 2014 accident was traumatic because she was trapped in her car after the accident and could not get out. The police

officer on the scene could not open the door and the applicant had to wait for the fire department to do so.

[20]. The applicant was initially diagnosed with anxiety and acute distress disorder by Dr. Madhu Bhardwaj, the applicant's treating psychologist. She was diagnosed with post-traumatic stress disorder (PTSD) in partial resolution by Dr. Stephanie Wiesenthal, a psychiatrist who conducted an insurer's examination to determine entitlement to the IRBs in mid-January 2015. Dr. Wiesenthal testified at the hearing. When Dr. Wiesenthal saw the applicant, the applicant had been working at Chapters for a few months and was about to start College.

[21]. On June 15, 2015, eleven months after the accident, the applicant had a blackout. She was travelling as a passenger in a vehicle and, when she thought it was going to be struck by a truck on the highway, she blacked out. In the same month, she started her exams in her second semester at school and was blacking out during her exams. Since then, except for a period of about four days in October 2016, the applicant has been experiencing two to four blackouts per week, panic attacks, anxiety, and depression as indicated in Dr. Fahim's Canada Pension Plan Report dated October 31, 2016 and the hospital emergency record dated February 19, 2017.

[22]. The applicant was put on unpaid medical leave from Chapters in September 2015 and stopped going to college.

[23]. According to the applicant, her blackouts are triggered by anxiety, frustration or pain and usually last about two minutes, but can last up to twelve minutes. She underwent cardio pulmonary, neurological and physical assessments to determine the cause. The medical evidence is that the cause of the applicant's blackouts is psychological because no physical cause can be found.

[24]. Dr. Natasha Browne is a psychologist who was retained by the applicant as part of the team from Omega Medical Associates to conduct a catastrophic assessment of the applicant. Dr. Browne testified at the hearing and diagnosed the applicant with a major depressive disorder of mild severity and PTSD with a unique presentation of symptoms, including blackouts during times of increased stress and anxiety. Dr. Browne noted the applicant's difficulty coping with pain, anxiety and stress has manifested in loss of consciousness, but testified that the applicant met the test for PTSD without the blackouts. She also stated that if blackouts are not a symptom of PTSD, then they may be a symptom of panic disorder.

[25]. The respondent relies on the recommendation of Dr. Chris Hope that the applicant's reports of her symptoms and complaints be taken with caution. Dr. Hope is a neuropsychologist who was part of a team who conducted a catastrophic impairment assessment of the applicant at the request of the respondent. Dr. Hope testified at the hearing. He did not diagnose the applicant

because he considered that the results from her psychological validity tests were invalid[2].

[26]. Dr. Hope testified that he could not conclude that the applicant was malingering[3] or consciously exaggerating her symptoms because he was not sure what was or was not intentional or conscious. Dr. Hope did not rule out the possibility that the applicant is experiencing genuine symptoms of psychological distress, but he questioned the reliability of the applicant. According to Dr. Hope, the applicant's validity test results were invalid because the applicant probably exaggerated her symptoms. Dr. Hope submitted his opinion that the applicant exaggerates her symptoms is supported because it is rare for a person to have a relapse of PTSD more than two years post-accident. We prefer Dr. Browne's opinion over Dr. Hope's for the following reasons.

[27]. According to Dr. Wiesenthal, the typical course for PTSD, for someone who has shown improvement, is that it is unlikely to regress unless there was a new or an additional stressor. In the applicant's case, there was an additional stressor that explains the PTSD regressions and the blackouts. That additional stressor was the near miss accident that the applicant experienced on June 15, 2015. It was not until she had the near miss that the applicant started experiencing the blackouts, which have been witnessed by three different health practitioners.[4] Dr. Hope's opinion is that the course of the applicant's PTSD is inconsistent because it did not follow the normal course of recovery. We give little weight to Dr. Hope's opinion because he did not consider any other reasons such as the near miss accident exacerbating the initial PTSD.

[28]. We also prefer Dr. Browne's assessment of the applicant over Dr. Hope because we accept the evidence that there were cultural factors that likely affected Dr. Hope's testing. Dr. Browne also administered a validity test and she did not find any instances of malingering. Dr. Browne's evidence was that one has to look at cultural factors that may also play a part in terms of a patient's presentation and her performance on the psychological validity tests. The applicant is of African descent who was born and raised in the Caribbean and came to Canada when she was 10 years old. Dr. Browne's evidence was that culturally, one must look at the history of mental health and mental illness and how it is displayed within the Caribbean community. This means looking at possibilities of defensiveness, the social stigma that is attached to mental health and how that may present in terms of the applicant wanting to express her symptoms or at possible elevations in test measures. The psychological test measures are Westernized measures that are normed, primarily, on a Caucasian population, which does not mean that the

[2] Validity tests are applied to determine if someone is consciously or subconsciously faking or exaggerating their psychological and cognitive symptoms.

[3] Malingering means the intentional production of false or vastly exaggerated physical or psychological symptoms, motivated by external factors such as avoiding work or obtaining financial compensation.

[4] The Exhibits filed disclose that Dr. Fahim, S. Javasky, an occupational therapist retained by the respondent to conduct a number of insurer's examination of the applicant, and an emergency physician at the Credit Valley Hospital witnessed the applicant blackout.

results are invalid. However, Dr. Brown stated that there is research that mentions that, given the social history of the English speaking Caribbean population, being marked by oppressive power dynamics, colonialization, slavery and racism, if the client is of African heritage and the clinician is male and Caucasian, that can impact engagement or rapport building, which in turn could affect the validity testing.

[29]. Dr. Browne is a woman of African descent and so is the applicant. Dr. Browne testified that being a Black woman, she was more likely to build a rapport with the applicant than Dr. Hope, who is a white male. Dr. Hope testified that there was no indication that he did not develop a rapport with the applicant. However, he testified that a failure to build a good rapport could affect the test results. He also agreed that cultural and gender differences between a neuropsychological assessor and the patient will have an impact on their rapport.

[30]. We find that the applicant is not "exaggerating" or malingering and suffers from blackouts, which are a symptom of the PTSD and were triggered by the June 15, 2015 incident.

iii. Connection Between the Pre-Accident Blackout and Post-Accident Blackouts

[31]. We find that there is a connection between the pre-accident blackout and post-accident blackouts.

[32]. Dr. Jagtaran Dhaliwal, the applicant's treating psychiatrist, and Dr. Browne diagnosed the applicant with PTSD and indicated her blackouts were a symptom of the PTSD. Dr. Dhaliwal testified at the hearing by telephone. Drs. Dhaliwal and Browne did not think the pre-accident blackout had any relation to the post-accident blackouts because they are symptoms of PTSD. They reasoned that because the PSTD was caused by the accident, a symptom of the PTSD, a blackout, could not have occurred prior to the accident.

[33]. The respondent claims there is no connection between the applicant's blackouts and the accident for the following reasons:

a) The applicant had a blackout before the accident;

b) She exaggerated her symptoms and is not credible;

c) She did not have a blackout until eleven months after the accident and did not explain the time gap;

d) It is rare for blackouts to be a symptom of PTSD; and

e) It is rare for person who has essentially recovered from PTSD to undergo a relapse.

[34]. The blackouts post-accident are also experienced when the applicant is stressed either from anxiety or pain. We are of the view that the similarities between the pre-accident blackout and the post-accident blackouts are too close not to be related. We accept Dr. Browne's opinion that they may be a symptom of panic disorder. Accordingly, we do not accept that there is no relation between the pre-accident and post-accident blackouts just because it does not fit into a diagnosis of PTSD that could only occur after the accident. We find that because of the pre-accident blackout, the applicant was vulnerable.

[35]. We also find the July 28, 2014 accident and the resulting PTSD and anxiety caused the applicant to be even more vulnerable to blacking out in stressful situations and when she experiences pain than she was prior to the accident. In other words, she would, on a balance of probabilities, not now be experiencing the blackouts or at the same frequency if she had not been involved in the July 28, 2014 accident.

B. Is the Applicant Entitled to IRBs?

[36]. The test for entitlement to IRBs changes after 104 weeks of disability. Neither party provided any submissions or case law on when 104 weeks of disability in this case started or ended. We have determined that the disability started on the day of the accident because the applicant applied for IRBs shortly after the accident and received IRBs from one week post-accident. Since the parties were silent on the issue, we have drawn an inference that the disability started on July 28, 2014, which means the change in the test for IRBs was on July 28, 2016.

i. Entitlement to IRBs Pre-104 Weeks

[37]. We find that the applicant is entitled to IRBs from August 22, 2015 to July 28, 2016 for the following reasons.

[38]. Section 5(1) of the *Schedule* provides that the respondent shall pay an IRB if the applicant was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment.

[39]. To determine entitlement to IRBs for the first 104 weeks of disability, we must identify the applicant's essential tasks of her employment at the time of the accident. The essential tasks of the applicant's employment as a counter clerk/driver for the Deli & Catering company include some lifting and bending to a maximum weight of 20 kilograms, making sandwiches, delivering orders by way of a vehicle, operating the cash, receiving stock, manning the salad bar and chopping vegetables. Her employment as a babysitter involved cooking for the children and

picking them up from school and driving them home about two to three times per week. We heard no evidence on the applicant's essential tasks of managing a bar.

[40]. The respondent's position is that the applicant had recovered from her accident injuries by January or February 2015. She was hired on as a permanent part-time employee at Chapters after the Christmas season. She was doing well in her part-time employment at Chapters, as evidenced by her wage increase from $11.00 to $11.25 at the applicant's six month performance review in May 2015. In January 2015, she started attending the police foundations course at Humber College and was able to successfully complete her first semester.

[41]. The respondent relies on the evidence of Dr. Wiesenthal and Dr. Heitzner, a general practitioner who also assessed the applicant in January 2015 at the respondent's request and testified at the hearing. Dr. Wiesenthal and Dr. Heitzner determined that the applicant was able to engage in the essential tasks of her pre-accident employment. We give little weight to Dr. Wiesenthal's and Dr. Heitzner's evidence on the applicant's ability to work for the following reasons.

[42]. Dr. Wiesenthal did not know what the essential tasks of the applicant's pre-accident employment were. Further, the applicant underwent a deterioration after she was assessed by Dr. Wiesenthal and Dr. Heitzner. The applicant is not seeking IRBs from the time of their assessment, but from August 22, 2015.

[43]. The respondent became aware that the applicant stopped work when the applicant applied to the Tribunal on August 25, 2016. The respondent did not provide any updated medical records or reports to either Dr. Heitzner or Dr. Wiesenthal or seek an updated opinion from them after that date. Accordingly neither assessor provided an opinion on the applicant's ability to work after her relapse in June 2015.

[44]. The *Schedule* contemplates that a person may attempt a return to work without compromising the person's entitlement to IRBs. Section 11 of the *Schedule* states that a person receiving an income replacement benefit may return to or start employment or self-employment at any time during the first 104 weeks for which she is receiving the benefit without affecting her entitlement to resume receiving IRBs if, as a result of the accident, she is unable to continue the employment she was engaged in at the time of the accident.

[45]. In this case, the applicant suffered deterioration in her psychological health after June 15, 2015, such that she was unable to continue working. She is one of those rare cases described by Dr. Wiesenthal where a triggering event, the near miss accident on June 15, 2015, caused the applicant to undergo a relapse of her accident related PTSD, anxiety and depression.

[46]. Both Dr. Dhaliwal and the applicant's family physician, Dr. Fahim, are of the opinion that the applicant cannot return to her pre-accident employment because

of her anxiety, panic attacks, PTSD and her blackouts. The respondent submits that little weight be given to Dr. Dhaliwal's opinion because he appeared not to have knowledge of the pre-accident passing out incident and he appeared to be still in the process of refining his diagnosis. Regardless of whether he was refining his diagnosis, that would not affect Dr. Dhaliwal's ability to determine what effect the applicant's symptoms have on her functional abilities. For this reason, we do not accept that little weight should be given to his evidence.

[47]. We find that although the applicant may have been able to return to her employment at the Deli as of February 2015, she was unable to continue with her employment at either the Deli or as a babysitter after August 22, 2015 because her blackouts, PTSD, anxiety and depression, which all together prevented her from working at her pre-accident occupations.

[48]. Dr. Fahim reported the applicant's blackouts to the Department of Transportation and her licence was medically revoked in August 2015 and remains suspended because of the blackouts. The blackouts are a result of the accident and, since driving was an essential task of her employment with the and as a babysitter, we find that the applicant is unable to engage in either employment as a result of the accident.

[49]. Accordingly, the applicant meets the test of entitlement to IRBs up to the 104 week mark.

ii. Entitlement to Post-104 week IRBs

[50]. The test for post-104 week IRBs is whether the applicant suffers a complete inability to engage in an employment for which she is reasonably suited by education, training or experience. The onus is on the applicant to show that she meets this test. We find that the applicant is not entitled to IRBs from July 28, 2016 to date and ongoing because she failed to satisfy her onus.

[51]. We accept that the applicant suffers from blackouts which would likely make employment difficult. However, we were not provided with any evidence on alternative suitable employment, whether there was employment that could work around the applicant's blackouts, or any evidence that the applicant made some effort to identify suitable employment or attempt to work at the suitable employment. For these reasons, the applicant is not entitled to post-104 week IRBs.

C. Did the Applicant Sustain a Catastrophic Impairment?

[52]. We find that the applicant is catastrophically impaired for the following reasons.

[53]. Section 3(2)(f) of the *Schedule* allows for a catastrophic determination if a person suffers from psychological impairments assessed in accordance with the *AMA Guides*. The *AMA Guides* rate a person's psychological impairments on the following basis:

Area or aspect of functioning	**Class 1: No impairment**	**Class 2: Mild impairment**	**Class 3: Moderate impairment**	**Class 4: Marked impairment**	**Class 5: Extreme impairment**
Activities of daily living Social functioning Concentration, pace and persistence Adaption in the workplace	*No* impairment is noted	Impairment levels are compatible with *most* useful functioning	Impairment levels are compatible with *some*, but not all, useful functioning	Impairment levels ***significantly impede*** useful functioning	Impairment levels *preclude* useful functioning

[54]. If a person is assessed as having a *marked* (Class 4) or an *extreme* (Class 5) psychological impairment that affects her useful function in any one of the four aspects or areas of function, the person will meet the definition of catastrophic impairment in s.3(2)(f) of the *Schedule*.

[55]. The other method for determining if the applicant sustained a catastrophic impairment is the whole person impairment definition in s.3(2)(e) of the *Schedule.* Under the *AMA Guides*, impairment levels of different parts of the body are assessed and then expressed as a percentage of the impairment of the whole person ("WPI"). This represents an estimate of the degree to which a person's functional capacity to carry out her activities of daily living daily activities has been diminished.[5] The Court of Appeal has held that a WPI percentage may also be assigned for a person's mental or behavioural impairments and combined with the physical WPI percentage.[6] A person meets the definition of catastrophic impairment under s.3(2)(e) of the *Schedule* if she has a combined WPI of 55% or more.

[56]. The applicant may apply for catastrophic impairment due to a psychological Class 4 or 5 impairment or a 55% WPI impairment no sooner than two years after the accident. The applicant may apply before the two year mark if the impairments are not likely to change.

[5] See *Ellis and Guarantee Company of North America* (FSCO 412-001073 and 412-004644, April 13, 2015) for a clear explanation of the WPI percentage ratings.
[6] *Kusnierz v. Economical Mutual Insurance Company*, 2011 ONCA 823 (CanLII)

[57]. There is no dispute that the applicant's total physical impairment is assessed at a 10% WPI. The parties disagree on whether the applicant suffers a Class 4 or 5 psychological impairment and on what percentage should be assigned for her psychological impairments.[7] The respondent also claims that the applicant's application is premature.

[58]. We do not find that the application is premature. We do not need to address whether the applicant has a 55% WPI because we have determined that the applicant is catastrophically impaired because she has a Class 4 marked impairment under s.3(2)(f) of the *Schedule.*

i. Premature Application

[59]. The applicant submitted an application for catastrophic impairment OCF-19 signed by Dr. Harold Becker dated July 25, 2016. The respondent submits the application was premature because it is dated three days shy of the two year mark. The *Schedule* allows an application for catastrophic impairment like the applicant's to be made before the two year mark only if a physician determines the applicant's condition is unlikely to stop being catastrophic.

[60]. In this case, Dr. Becker concluded the applicant was unlikely to cease being catastrophic. Dr. Becker did not meet with or examine the applicant, but we accept his conclusion because it is supported by Dr. Dhaliwal's and Dr. Browne's opinions that the applicant's condition is chronic. We rejected the respondent's submission that the applicant has improved since October 2016 for reasons previously discussed. Dr. Becker's conclusion is also supported by Dr. Dhaliwal's evidence that the applicant's symptoms were getting worse and the applicant's evidence that her condition initially improved with treatment, but that treatment no longer has any effect.

i. Class 4 Marked or Class 5 Extreme Psychological Impairment

[61]. The applicant submits she meets the test for catastrophic impairment because Dr. Browne determined that she sustained a marked or Class 4 psychological

[7] For the purpose of determining the WPI percentage, a table in the AMA Guides allows the different classes or levels of psychological impairment to be converted to a WPI percentage. See Footnote 4 in *Applicant v. Wawanesa Mutual Insurance Company,* 2017 CanLII 62155 (ON LAT) where Vice Chair Sapin provides a good explanation of the process: The word descriptors *mild*, *moderate*, *marked* and *extreme* can, if required, be converted or "translated" to WPI percentages using Table 3 of Chapter 4 in the *Guides*, so that psychological impairments can be combined with other impairments under s.2(1.2)(f) of the Schedule. Table 3 provides a percentage range for each class of impairment. A 15% WPI is equivalent to the bottom of the *moderate* impairment range, which extends from 15 – 29%. A WPI of 49% represents the top end of the *marked* impairment range, which is 30 – 49%.

impairment in both her Activities of Daily Living and in her Adaption. We accept that a Class 4 marked impairment in either the applicant's Activities of Daily Living or her Adaption meets the test for a catastrophic impairment in s.3(2)(f) of the *Schedule*.

[62]. We disagree with the respondent`s submission that, because the applicant is able to engage in a number of activities without any demonstrated impairment, she should, at the most, have a moderate or Class 3 impairment. The respondent relies on Dr. Hope's opinion that that the applicant's symptoms are exaggerated, but for reasons already given, we found the applicant is not exaggerating her symptoms. Further, Dr. Hope did not provide any other impairment rating that addresses the alleged exaggeration of symptoms.

[63]. The respondent also relies on the fact that at the occupational therapy assessments by Ms. Chen from Omega and Ms. Javasky, who was retained by the respondent, the applicant showed good pre-planning and organizational skills, was able to follow multiple step instructions, paid attention to detail, was not distracted by noise, and required little to no supervision. There is no dispute that the applicant, for the most part, was functionally able to complete most of the testing administered by the occupational therapists. However, we accept that the applicant has a marked or Class 4 impairment in two of the areas because of the applicant's panic attacks, anxiety and blackouts when under stress or in pain as witnessed by Ms. Javasky. She observed the applicant during a panic attack and a blackout and stated that, as a result, the applicant demonstrated functional limitations in the area of activities of daily living, social functioning and concentration, persistence and pace.

[64]. According to the AMA Guides, a marked or Class 4 impairment in adaptation is a deterioration or decompensation in work or work like settings and may be apparent from a repeated failure to adapt to stressful circumstances. In stressful circumstances, the individual may withdraw from the situation or experience an exacerbation of signs and symptoms of stress. She or he may decompensate and have difficulty maintaining activities of daily living, continuing social relationships, and completing tasks. Dr. Browne found that the applicant is overwhelmed with the changes she has experienced as a result of the accident and has difficulty coping under stressful situations as evidenced by her blackouts. Dr. Browne`s opinion is that the applicant's symptoms have impacted her ability to adequately adapt to her current situation.

[65]. The *AMA Guides* directs that in assessing impairment, any limitation with respect to activities of daily living should be related to the psychological disorder. The assessor is required to determine the impact of the psychological condition on normal life activities. The assessor is required to look at the number of activities that are restricted in addition to the degree of restriction. We find that Dr. Browne did so. Dr. Browne determined that the applicant's symptoms were significantly impacting her activities of daily living because the applicant was unable to return to

her pre-accident employment, to her work at Chapters, to college or to driving a car. Dr. Browne's opinion is supported by the observations of Ms. Javasky.

[66]. We reject Dr. Hope's opinion that Dr. Brown's impairment ratings are likely artificially inflated for the reasons listed earlier. His opinion is also weakened by the fact that the applicant's blackouts have been witnessed by other health practitioners and that he provided no alternative level of impairment that Dr. Browne should have applied. For these reasons, we accept Dr. Browne`s opinion that the applicant sustained a Class 4 marked psychological impairment. This means that the applicant sustained a catastrophic impairment under s.3(2)(f) of the *Schedule.*

iii. Whole Person Impairment

[67]. The applicant relies on Dr. Becker's opinion that the applicant sustained a 53% WPI under s.3(2)(e) of the *Schedule* based on the combined values of an 8% WPI for physical impairments and a 49% WPI for psychological impairments. Any rating less than a 48% WPI for psychological impairment and the applicant would not meet the criteria for catastrophic impairment under s.3(2)(e). It is not necessary for us to address Dr. Becker's opinion on the WPI percentage because we have already determined that the applicant sustained a catastrophic impairment under s.3(2)(f) of the *Schedule*. Otherwise, we would have rejected Dr. Becker`s use of a 49% WPI for the applicant`s psychological impairment for the following reasons.

[68]. Dr. Becker assigned a broad range of 30% WPI to 49% WPI for the applicant`s psychological impairment, then relied on the uppermost 49% WPI for combining the physical and psychological WPI values without providing a compelling reason for his choice. The AMA Guides requires the assessor to pick a specific impairment rating to use in the combined calculations that accurately reflect the assessor's determination of the person's impairment. We find that Dr. Becker's approach does not follow the requirements in the *AMA Guide.* His use of the higher 49%WPI does not consider that the applicant displayed only a moderate or Class 3 impairment in persistence pace and concentration and social function. Further, Dr. Becker rejected another approach[8] that would have resulted in figure closer to a 30% WPI for psychological impairment, even though he has used the other method in the past and has endorsed that method.

[8] This is a conversion of a person`s Global Assessment of Function score under the California Labour Code scale of WPI. Dr. Dhaliwal had assessed the applicant with a Global Assessment of Function score of 55 in January 2016, which converts to a 23% WPI score under the California Labour Code.

V. DETERMINATION and ORDER

[69]. The applicant sustained a catastrophic impairment in accordance with the definition in the *Schedule* because she sustained a Class 4 marked psychological impairment.

[70]. The applicant is entitled to income replacement benefits from August 22, 2015 to July 28, 2016.

[71]. The applicant is not entitled to income replacement benefits beyond the first 104 weeks of disability.

Released: December 12, 2017

_____

Deborah Neilson, Adjudicator

_____

Nicole Treksler, Adjudicator