



Citation: Brewer v. Definity Insurance Company, 2026 ONLAT 25-003710/AABS

Licence Appeal Tribunal File Number: 25-003710/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:

Earl Brewer

Applicant

and

Definity Insurance Company

Respondent

DECISION

ADJUDICATORS:

**Sam Moini
Rebecca Hines**

APPEARANCES:

For the Applicant:

Jonathan Farine, Counsel

For the Respondent:

Stephen Whibbs, Counsel

Court Reporter:

Prashanth Thambillai

HEARD: by videoconference:

January 20 to 22, 2026

OVERVIEW

- [1] Earl Brewer, the applicant, was involved in an automobile accident on April 28, 2023, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”). The applicant was denied benefits by the respondent, Definity Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

- [2] The issues in dispute are:
1. Is the applicant entitled to an income replacement benefit (IRB) in the amount of \$400.00 per week from November 6, 2023, to date and ongoing?
 2. Is the applicant entitled to the following treatment plans (“OCF-18s”) for medical benefits and cost of examination expenses proposed by Downsview Healthcare Inc.:
 - a) \$2,200.00 for a psychological assessment, submitted October 17, 2023;
 - b) \$4,204.32 for psychological services January 25, 2024;
 - c) \$2,486.00 for a chronic pain assessment, submitted July 14, 2023;
 - d) \$1,740.43 for a functional impairment evaluation submitted August 11, 2023;
 - e) \$2,486.00 for an orthopaedic assessment, submitted June 19, 2024; and
 - f) \$2,486.00 for a cervical spine MRI, submitted June 19, 2024?
 3. Is the applicant entitled to \$2,486.00 for a transferable skills analysis proposed by Vocational Alternatives Inc. in an OCF-18 submitted October 21, 2024.
 4. Is the respondent liable to pay an award under s. 10 of Reg. 664 because it unreasonably withheld or delayed payments to the applicant?

5. Is the applicant entitled to interest on any overdue payment of benefits?

[3] The applicant withdrew issues 1,3,4, 5, 6, 7 and 11, as listed in the Tribunal's case conference and order. However, he advised that he was still claiming an award on those issues. In light of our decision in this matter we find an award is not warranted in this case which will be discussed further below.

RESULT

[4] After considering the parties submissions and evidence, we find as follows:

1. The applicant is entitled to an IRB in the amount of \$400.00 per week from November 6, 2023 to date and ongoing.
2. The applicant is entitled to the following OCF-18s proposed by Downsview Health:
 - a) \$2,200.00 for a psychological assessment submitted October 17, 2023.
 - b) \$2,200.00 for a chronic pain assessment submitted July 14, 2023.
 - c) \$1,740.43 for a functional impairment evaluation submitted August 11, 2023.
3. The applicant is entitled to the OCF-18 in the amount of \$2,486.00 for a transferable skills analysis proposed by Vocational Alternatives Inc. submitted October 21, 2024.
4. The applicant is not entitled to the following OCF-18s proposed by Downsview Healthcare Inc.
 - a) \$4,204.32 for psychological services submitted January 25, 2024.
 - b) \$2,486.00 for an orthopaedic assessment submitted June 19, 2024.
 - c) \$2,486.00 for a cervical spine MRI submitted June 19, 2024.
5. The applicant is not entitled to an award.
6. The applicant is entitled to interest, as per s. 51 of the *Schedule*.

PROCEDURAL ISSUES

Motion to exclude surveillance

- [5] The applicant requested that the surveillance evidence relied on by the respondent should be excluded because it was not served by the deadline provided in the Tribunal's Case Conference Report and Order ("order"). The applicant submits that he is prejudiced by the late service of this evidence because his experts have not had a chance to review it and there was insufficient time to prepare addendums to their reports.
- [6] The respondent argues that the surveillance was served on the applicant 41 days prior to the hearing, carries probative value, and is relevant to the applicant's functional capacity. Further, although it was served after the deadline in the Tribunal's order, the applicant is not prejudiced because he received it 41 days prior to the hearing. It also maintains that any prejudice could be cured by allowing the experts to review and comment on it during their testimony.
- [7] We admitted the surveillance evidence because we found that any prejudice to the applicant was minimized, as he had 41 days to review the material and we allowed the medical experts to review and comment on it to cure any prejudice. We advised the parties that the weight to be given to it would be determined considering their respective submissions.

Motion to exclude the CPP File

- [8] The respondent requested that the CPP file relied on by the applicant should be excluded because it was produced late, contrary to the dates specified in the Tribunal's order. The respondent submits that this admission would cause prejudice, as there was insufficient time for its experts to review and prepare addendums to their reports.
- [9] The applicant argues that these documents have probative value because they are relevant to his inability to work. In addition, the records were served on the respondent shortly after they were received and the applicant recently received a letter approving his CPP benefits, and it could not have been produced by the deadline because it did not exist.
- [10] We admitted the CPP file as we found that any prejudice to the respondent was minimized, as they had over a month to review the material. Although the evidence was admitted, we advised the parties that the weight to be given to it would be determined considering their respective submissions.

ANALYSIS

We find that but for the accident the applicant would not have the impairments that form the basis for his claim for an IRB.

- [11] This matter is complicated by the fact that the applicant had a significant pre-accident medical history including type 2 diabetes, obesity, hypertension, carpal tunnel, frozen shoulder, sleep apnea and emotional issues. The respondent argues the applicant had serious health issues pre-accident and that the accident was not the cause of the applicant's impairments or resulting functional limitations.
- [12] The applicant acknowledges that he had some pre-accident health issues. However, he submits that these health issues did not interfere with his daily activities or his ability to work. Therefore, before we address the applicant's entitlement to an IRB, we will address causation.
- [13] We find that the accident was a necessary cause of the impairments the applicant puts forth in support of his claim for an IRB.
- [14] It is well established law that the appropriate test to determine causation in accident benefit cases is the "but for" test, which was confirmed by the Divisional Court in *Sabadash v. State Farm et al.*, 2019 ONSC 1121CanLII (*Sabadash*). To satisfy this test, the applicant must prove on a balance of probabilities that "but for" the accident he would not have suffered the impairments which form the basis for his claim for an IRB. The court in *Sabadash* sets out that the existence of pre-existing medical issues does not negate an insurer's liability. Further, that the accident need not be the only cause of the impairment but a necessary cause. As per our reasons below, we find that the accident was a necessary cause of the applicant's impairments.
- [15] The respondent highlighted the following in the pre-accident clinical notes and records ("CNRs") of the applicant's family doctor:
- i) In January 2020, he reported bilateral shoulder pain and his family doctor recommended running boards for his truck; In 2020, he was also prescribed Lyrica for diabetes and nerve pain;
 - ii) On April 19, 2022, he was referred for testing for carpal tunnel symptoms in his right hand;
 - iii) On January 12, 2023, there is a reference to nerve pain and poorly controlled diabetes;

- iv) On January 23, 2023, he reported brain fog, poor sleep and increased stress following a family crisis. The family doctor recommended that he take two weeks off work and prescribed an antidepressant to help him sleep;
- v) On April 20, 2023, he had a swollen ankle as a result of diabetes and was prescribed Tylenol 3.
- vi) He was also diagnosed with sleep apnea prior to the accident.

[16] In analyzing causation, it is necessary to compare the applicant's pre- and post-accident function to determine to what extent any accident-related impairment affected his ability to function. The applicant provided the following testimony regarding his pre-accident function:

- i) He was independent with his daily activities, self care and housekeeping and home maintenance tasks. He shared some of the indoor tasks with his wife such as sweeping, washing dishes and making meals. He was responsible for outdoor maintenance tasks such as mowing the lawn, shovelling snow, washing exterior windows and landscaping tasks.
- ii) He loved his job as a construction site supervisor for Ridgeview Homes which was a physically and mentally challenging job. He worked long hours and did not have any extended periods of absence.
- iii) He enjoyed golfing, fishing, wood working and watching his grandchildren's hockey games and walking his dog.

[17] Overall, we find the applicant's testimony credible because it was consistent with what he reported to assessors. His testimony about not being off work for any extended period of time as a result of any health issues was also confirmed by his employer's testimony and his family doctor's CNRs. Much was made by the respondent about the fact that the applicant took two weeks off work in January 2023 as a result of a family crisis, where he was prescribed medication for sleep which can also be prescribed as an anti-depressant. We find that other than this occurrence the applicant's pre-accident health issues did not interfere with his ability to work.

- [18] The applicant submits that his accident-related physical impairments resulted in chronic pain and persistent headaches which resulted in the development of a psychological impairment. He provided the following testimony about how his life drastically changed post-accident:
- i) He has not been able to return to work as a result of his accident-related physical and psychological impairments.
 - ii) He is unable to carry out any heavy outdoor home maintenance tasks due to chronic pain and relies on assistance from his children and grandchildren for lawncare.
 - iii) He no longer golfs or goes fishing because of chronic neck, back and shoulder pain and no longer goes to his grandchildren's hockey games because he cannot sit for prolonged periods. He no longer partakes in woodworking or walks his dog.
- [19] We find that other than a few minor inconsistencies such as a notation in Dr. D'Souza's report which states that the applicant still walks his dog, we note that he reported to all of the other assessors that he has not been able to walk his dog. The applicant also testified that this was a mistake in Dr. D'Souza's report, and we believe him. We also find that the medical records establish that post-accident, the applicant's impairments and functional limitations have fluctuated throughout time and for the most part he did not report that he could not do things but that it was difficult and painful. The respondent relies on a surveillance video conducted in 2025 which shows the applicant shovelling snow from a walkway for 30 seconds and some other activities which will be discussed further below. We find the surveillance video depicting the applicant briefly shovelling a walkway does not discredit his testimony because it was a brief snapshot in time. Overall, we find that the applicant was forthright in reporting his post-accident functional limitations to assessors.
- [20] We find that although he had some pre-accident health issues, they did not interfere with his ability to carry out his daily activities, recreational pursuits or carrying out the tasks of his employment. We find the fact that he took two weeks off work in January 2023 because of a family crisis did little to support the respondent's position that he had any significant disability prior to the accident which interfered with his ability to work. We find that following the accident, he consistently attended his family doctor's office where he reported persistent headaches and ongoing neck, back and shoulder pain. Although there were issues with the applicant's shoulders prior to the accident, we find that there was an increase in his complaints about his symptoms post-accident and that this

condition was exacerbated by the accident. In comparing the applicant's pre- and post-accident function and the totality of the medical evidence (which will be discussed further below) we find that but for the accident, the applicant would not have developed chronic pain and functional limitations which has resulted in an inability to work. Consequently, we find that the causation test has been met.

The applicant is entitled to an IRB in the amount of \$400.00 per week from November 6, 2023, to date and ongoing.

- [21] Section 5(1) of the Schedule states that insured persons are entitled to an IRB if they are 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, or were employed for at least 26 weeks during the 52 weeks before the accident or were receiving benefits under the [Employment Insurance Act \(Canada\)](#) at the time of the accident.
- [22] The applicant argues that, aside from a brief return to work immediately following the accident, he has been unable to return to work due to ongoing chronic neck, back and shoulder pain and persistent headaches. He also submits that he has developed a psychological impairment which has had an impact on his ability to function. The applicant relies on the reports of Dr. Karmy, chronic pain specialist, Dr. Brunshaw, psychologist and CNRs of Dr. Tysdale, family physician, and his treating pain specialist and OHIP funded neurologists. He also relies on the vocational report of Lisa Timmins who concluded that there are no suitable alternative employment options which are compatible with his education, training and experience.
- [23] The respondent submits that this was a minor accident, and the applicant has not met his onus in proving that he has a substantial inability to perform the essential tasks of his employment. It also asserts that the applicant has made numerous inconsistent statements about his post-accident activities. As a result, he is not credible as he has returned to driving, runs his household and is able to lift, push, pull and bend which it submits he denied being able to do on any level. The respondent also maintains that the essential tasks of the applicant's employment were primarily limited to sedentary tasks and that any heavy physical tasks were limited and were done on an occasional basis. The respondent relies on the insurer examination ("IE") reports of Dr. D'Souza, general practitioner, Dr. Reis, psychologist, and Michelle Becker, kinesiologist.

Pre-104 IRBs

- [24] To address whether the applicant suffers a “substantial inability”, the Tribunal must determine:
- (a) What were “the essential tasks” of the pre-accident employment?
 - (b) What, if any, impairments were caused by the accident?
 - (c) Did the applicant’s accident-related impairments cause a “substantial inability” to perform these “essential tasks” of employment?
- [25] The applicant testified that prior to the accident he was employed as a full-time construction site supervisor and would frequently work 10-to-12-hour days, Monday to Friday. His salary was \$140,000.00 a year. He testified that he coordinated and managed all of the trades responsible for the construction of a home from digging the foundation to passing the customer the keys. The applicant testified that the essential tasks of his employment included managing trades, coordinating trade schedules, and overseeing employee health and safety. His role also involved supervising 15 to 20 sites at any given time, which required frequent walking between and around the sites. His duties also included performing physical tasks related to site management, such as setting up heating which involved lifting 50 lb propane tanks up ladders, conducting site inspections, and ensuring sites were kept tidy set to regulation standards. His job was also quite physical and involved constant walking, standing, going up and down ladders, bending, crouching and lifting heavy material on a regular basis. His job duties also required mentally demanding tasks such as good organization, coordination and problem-solving skills.
- [26] We accept the applicant’s testimony about the physical nature of his occupation because we find him to be a credible witness, and it was consistent with his employer’s testimony.

Chronic Pain

- [27] The applicant testified that when the accident happened his seat broke and jerked back. He had a headache but did not experience any immediate pain until the following day, where he experienced severe shoulder, neck and back pain. The applicant testified that he attempted to go back to work in the week following the accident but could only last a few hours and would have to go home.

- [28] We accept that the applicant suffers from ongoing chronic neck, back and shoulder pain as well as persistent headaches because it is well documented in the medical record before us. For example, Dr. Karmy's report dated January 15, 2024, diagnosed the applicant with multiple chronic pain conditions, including chronic headaches, neck pain, shoulder pain, back pain. It also stated that he was unable to walk for long periods of time. We find that these complaints were corroborated by the testimony and CNRs of Dr. Tysdale. The applicant consistently reported ongoing pain for months following the accident and continues to experience these symptoms. Dr. Tysdale referred the applicant to a pain specialist and neurologist for further assessment and treatment of injuries sustained in the accident. In a progress update dated October 21, 2025, Dr. Ibrahim noted that the applicant's treatment for chronic pain syndrome included numerous weekly nerve block injections to alleviate pain in his back, neck, and shoulders. Dr. Tysdale also testified that the applicant is unable to work and faces significant obstacles as a result of the injuries sustained in the accident
- [29] Dr. Tysdale acknowledged during his testimony that although he diagnosed the applicant with a soft tissue whiplash injury despite him receiving regular treatment and taking pain medication there was no significant improvement. Dr. Tysdale testified that because of the applicant's pre-accident health issues, age and chronic pain he would be unable to return to work to his job in the construction industry or work of any kind. Dr. Tysdale also supported the applicant's application for CPP benefits which was recently approved.
- [30] In contrast, the respondent relies on Dr. D'Souza's reports dated October 30, 2023, and December 27, 2023, who diagnosed the applicant with uncomplicated whiplash associated sprain/strain injuries of his neck and back. Dr. D' Souza concluded that the applicant does not have a substantial inability to perform the essential tasks of his pre-accident employment. Dr. D'Souza testified that he reviewed medical records and performed a physical examination of the applicant which was normal. The doctor concluded that there was no evidence of a physical impairment which would interfere with the applicant's ability to work.
- [31] The respondent also relies on Michelle Becker's functional ability evaluation report dated October 20, 2023. Her report concluded the applicant was able to demonstrate mostly functional range of motion for his neck, back, and shoulder. Ms. Becker concluded that the applicant was able to lift within the lower range of a medium job strength rating and perform isometric pushing at a heavy job strength rating. She also stated in her report that he was able to perform method-time measurement (MTM) tasks at a constant to frequent basis but did not perform the stooping or crouching tasks.

- [32] As highlighted above, we accept that the applicant sustained physical impairments as a result of the accident which have developed into chronic pain. The applicant's testimony provided a compelling account of the physical difficulties he experienced following the accident, including a description of his chronic back, shoulder, and neck pain with constant headaches. Although he was initially diagnosed with soft tissue injuries, the evidence shows that he continues to experience persistent pain resulting in functional limitation. The applicant's ongoing chronic pain and inability to work are also supported by his family physician, who referred him to a neurologist and pain specialist for further treatment.
- [33] We place greater weight on the report and opinion of Dr. Karmy over Dr. D'Souza, because it is consistent with the medical record before us. For example, Dr. Ibrahim's progress note referenced weekly nerve block injections to alleviate pain in the neck, back and shoulders so the applicant can function. Dr. Giles, neurologist, also made referrals to Dr. Sheikh, neurologist, for debilitating headaches that interfere with the applicant's functioning. We also find Dr. D'Souza's report to be outdated, as it was completed only five months after the accident. We also find Dr. D'Souza's report to be brief and lacking in sufficient detail and analysis. In addition, we find that Dr. D'Souza's testimony lacked neutrality because he blamed the applicant's concerns on obesity and stepped outside of his expertise by commenting on the mechanics of the accident.
- [34] We find that the applicant's ongoing chronic pain has resulted in a substantial inability to carry out the essential tasks of his employment as a construction site supervisor for the time period in dispute. We find that the applicant would be unable to carry out both the physical aspects of the position which requires frequent and prolonged walking, standing, lifting and carrying heavy materials. Although Ms. Becker's assessment concluded that he had the functional capacity to carry out some of these tasks, we find that it is unlikely that he could carry out the physical tasks on a repetitive prolonged basis over 10-to-12-hour workdays.
- [35] We also find that the applicant's chronic pain and persistent headaches would substantially prevent him from carrying out the mentally challenging tasks of his employment in coordinating, organizing and supervising numerous tradespeople and employees throughout multiple job sites each day and ensure the safety of the job site. We find the applicant would struggle to carry out these tasks within tight timelines because of fatigue, headaches and resulting emotional symptoms. We also accept that the applicant's ongoing chronic pain has resulted in a psychological impairment which would interfere with his ability to carry out the essential tasks of his employment which we will address next.

Psychological Impairment

- [36] The applicant testified that he has experienced ongoing emotional symptoms post-accident because he cannot do the things he used to do. He does not socialize as often, he no longer goes to his grandchildren's hockey games, and he feels lonely and sad from being at home by himself while his wife is at work. The applicant relies on Dr. Brunshaw's psychological report dated December 1, 2023, which diagnosed him with adjustment disorder with mixed anxiety and depressed mood and specific phobia, situational type (vehicular: driver, passenger (moderate to severe); pedestrian (mild)). Dr. Brunshaw based her diagnosis on the applicant's self-reporting, valid psychological testing, and corroborating medical records.
- [37] The respondent relies on Dr. Reis' psychological report dated October 20, 2023, which did not diagnose the applicant with any significant psychological injuries. Dr. Reis based his diagnosis on the applicant's self-reporting, valid psychological testing, and corroborating medical records. The applicant reported experiencing a wide range of psychological symptoms such as depressed mood, anxiety and feeling helpless. Of significance, the applicant's scores on the psychometric tests administered by the doctor were elevated. For example, his score on the Brief Symptom Inventory-18 suggested the presence of significant psychopathology, with specific difficulties regarding somatization, depression and anxiety. In commenting on his result on the Pain Catastrophizing Scale Dr. Reis indicated that his scores reflect moderate to marked risk for the development of chronicity of pain symptoms. Despite these elevations on the psychometric tests Dr. Reis concluded the applicant did not meet the criteria for a DSM-5 diagnosis. The doctor did indicate that the applicant should continue to monitor these symptoms and seek support from a mental health professional should they persist or worsen. Dr. Reis concluded that the applicant did not have a substantial inability to perform the essential tasks of his pre-accident employment from a psychological perspective.
- [38] During cross-examination, Dr. Reis was asked whether the applicant's results on the psychometric tests were clinically significant, and he answered "possibly." We find this explanation unclear. Further, the doctor conceded that because of the applicant's symptoms and psychometric test results a further assessment would be reasonable. As a result, we give some weight to the assessment done by Dr. Brunshaw a month later.

- [39] We find that both parties' assessments establish that the applicant consistently reported ongoing psychological symptoms to both doctors and the psychometric tests administered by both doctors revealed evidence of a psychological impairment. We also find the CNRs of Physiomed establish that the applicant was dealing with a sad and depressed mood due to his physical limitations. Although we note that the family doctor's CNRs did not note any psychological symptoms, we find that he consistently reported being depressed and having problems with his mood to most assessors throughout this claim. Moreover, we observed the applicant break down crying when he testified about his limitations and changes to his life post-accident. Consequently, we accept that the applicant's psychological impairment has also contributed to his inability to carry out the essential tasks of his employment.
- [40] We conclude that the applicant has proven on a balance of probabilities that he has ongoing chronic pain and a psychological impairment that has resulted in a substantial inability for him to perform the essential duties of his employment within the 104-week period. Now we will address whether he meets the post-104 test.

Post-104 IRBs

- [41] To receive payment for post-104-IRBs under s. 6 of the *Schedule*, the applicant must demonstrate on a balance of probabilities that he suffers from a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training, or experience.

Applicant's Academic and Employment History

- [42] The applicant is now 60 years old, and his highest level of education is a college certificate in carpentry from 1987. We accept that the applicant has spent his entire adult life working in the carpentry and construction industry. Over the years he had several related jobs including carpentry, painting and prior to the accident as a construction site supervisor at Ridgeview Homes where he earned \$140,000 a year.
- [43] We find that the applicant's age, education and work experience in construction limits his options for alternative employment. We accept that his line of work requires sustained concentration, organizational skills and the ability to problem solve and work within tight deadlines. It also involves skilled labour, and a significant level of physical activity.

- [44] The respondent relies on surveillance conducted between November 21 and 30, 2025, which is within the post-104 period. The video showed the applicant placing a small box and a tool in the trunk of his car. He was also observed at a hardware store kneeling and carrying sheets of plywood, and some lumber which he placed into his truck with assistance from a store clerk. Then he unloaded it from his truck and placed it into a garage on his own. During his testimony, Dr. Tysdale reviewed the surveillance and stated that his opinion remained unchanged, noting that the activities depicted were brief and that the applicant would likely be unable to sustain such activity repeatedly over a prolonged period. The applicant's employer also reviewed the surveillance and agreed that his real work involves a lot more physical activity on a repeated sustained basis. Overall, we find the surveillance of limited probative value, because we agree that the applicant could not carry out these types of activities over a prolonged consistent basis because of ongoing chronic pain and persistent headaches. Further, other than the trip to the hardware store he was observed doing minimal activity over the nine days of surveillance. We also note that the applicant did not report that he could not drive or walk but that he was limited in doing these activities.
- [45] As highlighted above, we accept that the applicant's accident-related injuries consist of ongoing chronic pain, persistent headaches and a psychological impairment which has resulted in functional limitations. We find that the functional limitations resulting from these impairments would preclude the applicant from returning to his pre-accident employment in carpentry, or as a construction site supervisor. Now we must consider whether the applicant has a complete inability to engage in any reasonably suitable employment
- [46] The applicant relies on the court of appeal's decision in *Traders General Insurance Company v. Rumball*, 2025 ONCA 656 (CanLII) which outlined some factors a decision maker may consider in assessing reasonably suited employment. Those factors may include an individual's ability to sustain employment in a competitive, real-world setting and take into account the remuneration of the job as well as its status compared to their pre-accident work. This Tribunal has also considered an employer's demands for reasonable hours and productivity in assessing whether alternative employment is suitable.
- [47] The applicant relies on the vocational evaluation and transferable skills report of Lisa Timmons dated June 11, 2025, wherein the assessor concluded that given the applicant's advanced age and physical limitations, he would face considerable difficulty in retraining and would be placed at a competitive disadvantage in obtaining alternative employment. Ms. Timmins acknowledged

during her testimony that the applicant did have some positive results on the aptitude tests administered such as general reasoning, numeracy and non-verbal reasoning. However, she noted that the applicant has limited computer and clerical skills and was below average in certain language skills.

- [48] In identifying alternative employment options Ms. Timmons indicated that a building inspector or construction estimator would be within the applicant's skill set and involve more sedentary tasks. However, these professions would require a licence or retraining and the pay ranges from \$32.48 per hour to \$61.43 per hour. Ms. Timmons testified that while the applicant could possibly retrain, he could not retrain to a point of meaningful work comparable to his past position or wages. Her report also noted that he would be competing against younger candidates with greater technical training. A construction estimator would also require clerical skills, which the applicant scored low on the aptitude test. In addition, both occupations would also require periods of prolonged standing, walking, and climbing, analytical thinking and attention to detail, which would be challenging for the applicant given his combination of impairments. Ms. Timmon's report indicated that it is unlikely that the applicant would make it through the retraining process because of his chronic pain and psychological impairment or reap any benefit from becoming employed given his proximity to statistical retirement age.
- [49] The respondent submits that we should give Ms. Timmons' report and opinion little weight because she is acting as an advocate as opposed to a neutral assessor. We accept Ms. Timmons' opinion because we find that the respondent did little during cross-examination to challenge Ms. Timmons' neutrality because she acknowledged the applicant's strengths and weaknesses in her aptitude testing. In addition, we do not have a report from the respondent to challenge her findings.
- [50] We agree that the alternative jobs identified by Ms. Timmons would require retraining which we find the applicant would struggle to complete because of his lack of computer skills and his ongoing physical and psychological impairments. Dr. Tysdale opined that retraining at the applicant's age considering his medical condition was not an option. In addition, we do not find the role of a building inspector or construction estimator to be comparable in status or reward to the applicant's pre-accident role as a construction site supervisor with an annual salary of \$140,000. We also find that even if the applicant was able to retrain and obtain a licence or certificate in these alternative jobs, his age and medical condition would create a competitive disadvantage when competing for these positions with younger individuals with greater technical expertise. As a result,

we do not find these alternative occupations constitute reasonably suited employment in the applicant's case.

- [51] For the above-noted reasons, we find the applicant has established on a balance of probabilities that his accident-related impairments have resulted in a "complete inability" to perform any "reasonably suited" employment for which he is suited by education, training, or experience for the post-104 period.

OCF-18 for a psychological assessment

- [52] Section 25(1) of the *Schedule* provides that an insurer shall pay for reasonable fees to complete an assessment. Section 25(5)(a) limits the cost of any one assessment or examination to \$2,000.00 plus tax. The applicant bears the onus of proving on a balance of probabilities that the assessment is reasonable and necessary. The jurisprudence also supports that to prove that an assessment is reasonable and necessary the applicant must have evidence that he has an accident-related impairment which the assessment is meant to address.

- [53] To receive payment for a treatment and assessment plan under s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.

- [54] We find the OCF-18 proposing a psychological assessment in the amount of \$2,200.00 to be reasonable and necessary because for the reasons noted above, we accept that the applicant sustained a psychological impairment as a result of the accident. As a result, we find a psychological assessment to be reasonable and necessary for the purpose of providing a diagnosis and recommending treatment. Further, we find the amount reasonable because it is within the \$2,000 cap outlined in s. 25(5)(a) of the *Schedule*.

- [55] For the above-noted reasons we find the applicant has established on a balance of probabilities that the OCF-18 recommending a psychological assessment is reasonable and necessary.

OCF-18 for psychological services

- [56] The OCF-18 for psychological treatment was prepared by Dr. Brunshaw and proposed 14 hour and a half counselling sessions for a total cost of \$3,141.88; \$428.00 for report writing, and \$200 for form completion for a total cost of \$4,

204.32. The goal of this OCF-18 was to provide counselling to improve the applicant's psychological state. The respondent denied the OCF-18 because it took the position that the applicant's impairments fit within the Minor Injury Guideline. We note that he has since been removed from the MIG.

- [57] We find the goal of the OCF-18 to be reasonable and necessary because we accept that the applicant sustained a psychological impairment. However, the applicant did not address the cost of the OCF-18. In the absence of proper submissions, we find that the applicant has not proven that the cost is reasonable and necessary.
- [58] For the above-noted reasons we find the applicant has not established on a balance of probabilities that the cost of the OCF-18 recommending psychological treatment is a reasonable and necessary.

OCF-18 for chronic pain assessment

- [59] We find that the OCF-18 in the amount of \$2,486.00 proposing a chronic pain assessment to be reasonable and necessary.
- [60] The OCF-18 was prepared by Dr. Pivtoran, chiropractor and the goal is to assess the applicant's chronic injuries in order to recommend treatment. The cost was \$2,000 for the assessment, \$200 for form completion plus tax for a total cost of \$2,486.00. The respondent denied the OCF-18 on the basis that the applicant's impairments fell within the MIG.
- [61] As highlighted above, we accept that the applicant suffers from chronic pain as a result of the accident. Consequently, we find a chronic pain assessment to be reasonable and necessary in order to recommend treatment. Furthermore, the associated cost of the OCF-18 falls within the \$2,000 cap and is proportionate and reasonable for the goal of facilitating the applicant's recovery.

OCF-18 for a functional abilities evaluation

- [62] We find the applicant is entitled to the OCF-18 for a functional abilities evaluation in the amount of \$1,740.43
- [63] The OCF-18 was authored by Dr. Pivtoran and proposed a functional abilities evaluation in the amount of \$1,340.20 plus form completion plus tax for a total cost of \$1,740.43. The goal of the OCF-18 is to assess the applicant's limitations in the workplace and in the home.

[64] We find that the functional abilities evaluation is reasonable and necessary to assess the applicant's function in order to determine his entitlement to IRBs. As we have determined that the applicant is entitled to IRBs, we find that the OCF-18 for a functional abilities evaluation is reasonable and necessary to assess his functional limitations. Further, we find the cost is within the \$2,000.00 cap so we accept the cost as being reasonable.

OCF-18 for transferable skills analysis

[65] We find that the OCF-18 in the amount of \$2,486.00 for a transferrable skills analysis to be reasonable and necessary.

[66] The OCF-18 was authored by Dr. Goldstein, physician and recommends a transferrable skills analysis to evaluate whether there are any suitable employment options available to the applicant in keeping with his physical abilities. The OCF-18 recommended the assessment at a cost of \$2,000, plus \$200 for form completion plus tax for a total cost of \$2,486.00.

[67] We find the OCF-18 for a transferrable skills analysis to be reasonable and necessary in order to assess the applicant's post-104 entitlement to an IRB. As highlighted above, we have determined that he meets the threshold for entitlement based on Ms. Timmons assessment. Therefore, we find the OCF-18 to be reasonable and necessary to test the applicant's aptitudes in order to determine whether any alternative employment options are available. Further, the cost is within the \$2,000 cap so accept the cost as being reasonable.

OCF-18s for an MRI and orthopaedic assessment

[68] We find that the applicant is not entitled to the OCF-18s recommending an MRI in the amount of \$2,486.00 or orthopaedic assessment in the amount of \$2,486.00.

[69] Both OCF-18s were authored by Dr. Minella, chiropractor and recommended an MRI and orthopaedic assessment, each for a total cost of \$2,486. The goal of the OCF-18 for an MRI is to visualize internal structures with Magnetic Resonance Imaging to facilitate a diagnosis and treatment. The goal of the OCF-18 for an orthopaedic assessment was to evaluate the extent of the applicant's injuries to provide recommendations for recovery.

[70] The applicant has not proven that these OCF-18s are reasonable and necessary. During his in-chief testimony Dr. Tysdale was asked whether he felt that the applicant would benefit from the OCF-18 for an MRI or orthopaedic assessment

and the doctor indicated that he saw no benefit from either of these assessments. Specifically, Dr. Tysdale indicated that these OCF-18s are not required for the management of the applicant's condition. The applicant did not put forth any additional arguments to support that these OCF-18s are reasonable and necessary and his family doctor testified that they were not. Consequently, we find that the applicant has failed to discharge his burden of proof in establishing that these OCF-18s are reasonable and necessary.

The applicant is not entitled to an award

- [71] The applicant sought an award under s. 10 of Reg. 664. Under s. 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits.
- [72] The applicant submits that the respondent acted unreasonably and handled the file in an unfair manner by withholding the applicant's IRB and failing to objectively assess the medical records. Instead, the respondent selectively relied on certain information while disregarding other relevant evidence. This conduct culminated in the late strategic removal of the applicant from the MIG shortly before the scheduled hearing date and late reversals of its denials of the OCF-18s.
- [73] The respondent submits that there is no evidence to suggest that this file was not assessed fairly. Furthermore, it maintains that all decisions made was based on relevant medical evidence and thorough insurer examinations, ensuring that each determination was properly informed and objective. In addition, it decided to take the applicant out of the MIG after it received an application for a catastrophic determination and records from the applicant's chronic pain clinic in the fall of 2025. As a result, it properly adjusted the file and reversed some of its denials based on the medical information received from the applicant.
- [74] We do not find the respondent unreasonably withheld or delayed payments of benefits. It is well established that an award is an exceptional form of relief and is not warranted where a party was wrong. We find the applicant has not met his onus in proving that the respondent acted unreasonably in the adjustment of his claim. Further, the applicant did not direct us to the evidence in support of his claim for an award. We find that simply making a blanket statement that the respondent unreasonably withheld all benefits in dispute is not enough for us to determine that an award is payable. While there is a disagreement between the parties regarding whether the applicant was entitled to certain benefits, we do not find this sufficient evidence to conclude that the respondent acted excessively, inappropriately, or in bad faith.

Interest

[75] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the Schedule. The applicant is entitled to interest on the benefits we have determined to be overdue pursuant to s. 51 of the *Schedule*.

ORDER

[76] For the reasons noted above, we make the following order:

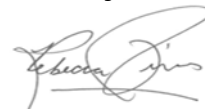
1. The applicant is entitled to an IRB in the amount of \$400.00 per week from November 6, 2023, to date and ongoing.
2. The applicant is entitled to the following OCF-18s proposed by Downsvew Health:
 - a) \$2,200.00 for a psychological assessment submitted October 17, 2023.
 - b) \$2,200.00 for a chronic pain assessment submitted July 14, 2023.
 - c) \$1,740.43 for a functional impairment evaluation submitted August 11, 2023.
3. The applicant is entitled to the OCF-18 in the amount of \$2,486.00 for a transferable skills analysis proposed by Vocational Alternatives Inc. submitted October 21, 2024.
4. The applicant is not entitled to the following OCF-18s proposed by Downsvew Healthcare Inc.
 - a) \$4,204.32 for psychological services submitted January 25, 2024.
 - b) \$2,486.00 for an orthopaedic assessment submitted June 19, 2024.
 - c) \$2,486.00 for a cervical spine MRI submitted June 19, 2024.
5. The applicant is not entitled to an award.

6. The applicant is entitled to interest, as per s. 51 of the *Schedule*.

Released: April 20, 2026



**Sam Moini
Adjudicator**



**Rebecca Hines
Adjudicator**