

# **Mooney v. Wawanesa Mutual Insurance Co., [2016] O.F.S.C.D. No. 72**

Ontario Financial Services Commission Insurance Decisions

Ontario Financial Services Commission  
Toronto, Ontario

Panel: Marvin J. Huberman, Arbitrator  
Heard: February 23-27, March 2-6 and 11,  
2015; written submissions, December  
3, 2015.

Decision: February 26, 2016.  
FSCO No. A13-008593

## **[2016] O.F.S.C.D. No. 72**

Between Carolyn Mooney, Applicant, and Wawanesa Mutual Insurance Company, Insurer

(432 paras.)

## **Appearances**

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Mr. Leonard H. Kunka, Lawyer and Mr. Carr Hatch, Lawyer, for Ms. Carolyn Mooney.

Ms. Katherine E. Kolnhofer, Lawyer; Ms. Sarah Scott, Lawyer; Ms. Tanya Giourgis, Law Clerk and Ms. Doema Elshourfa, Articling Student, for Wawanesa Mutual Insurance Company.

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## **REASONS FOR DECISION**

### **Issues:**

**1** The Applicant, Ms. Carolyn Mooney, who was born on September 18, 1989, was injured in a motor vehicle accident on November 14, 2007 (the "accident"). She applied for and received statutory accident benefits from Wawanesa Mutual Insurance Company ("Wawanesa"), payable under the applicable *Schedules*.<sup>1</sup> Issues arose between the parties concerning the Applicant's entitlement to certain statutory accident benefits. The parties were unable to resolve their disputes through mediation, and the Applicant applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

**2** The issues in this Hearing are:

1. Is Ms. Mooney entitled to receive a non-earner benefit of \$320.00 per week from April 1, 2011, to date and ongoing, pursuant to section 12 of the 1996 *Schedule*?
2. Is Ms. Mooney entitled to attendant care benefits from February 15, 2008, to date and ongoing, less amounts paid by Wawanesa, pursuant to section 16 of the 1996 *Schedule*, as follows:
  - (a) February 15, 2008 to April 15, 2008 at \$3,768.43/month;
  - (b) April 16, 2008 to May 20, 2010 at \$3,620.94/ month;
  - (c) May 21, 2010 to January 27, 2011 at \$2,879.27/ month;
  - (d) January 28, 2011 to April 23, 2012 at \$2,737.87/month;

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- (e) April 24, 2012 to February 25, 2013 at \$454.37/month;
  - (f) February 26, 2013 to July 13, 2013 at \$423.10/ month; and
  - (g) July 13, 2013 to date and ongoing at \$607.87/ month?
3. Is Ms. Mooney entitled to housekeeping and home maintenance benefits in the amount of \$100.00 per week from February 15, 2008, to date and ongoing, less amounts paid by Wawanesa, pursuant to section 22 of the 1996 *Schedule*?
  4. Is Ms. Mooney entitled to payment for the following costs of examinations, pursuant to sections 24 and 42.1 of the 1996 *Schedule*:
    - (a) \$5,298.89 for a section 24 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated June 25, 2010;
    - (b) \$3,149.89 for a section 25 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated May 28, 2012;
    - (c) \$1,969.81 for a section 25 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated March 1, 2013; and
    - (d) \$2,600.00 for a Rebuttal to an Insurer Examination provided by Dr. Jeremy Frank, Psychologist, dated September 15, 2011?
  5. Is Ms. Mooney entitled to receive the following rehabilitation benefits, pursuant to section 15 of the 1996 *Schedule*:
    - (a) \$1,106.72 for public transit costs to school incurred from January 8, 2013 to December 16, 2013;
    - (b) \$125.00 for the costs of rewriting her driving test; and
    - (c) \$33.89 for an Ikea shoe cabinet as claimed on September 10, 2014?
  6. Is Ms. Mooney entitled to interest for the overdue payment of benefits awarded, pursuant to the 1996 *Schedule* and the 2010 *Schedule*?
  7. Is either party required to pay the others' expenses of this Hearing, pursuant to subsection 282(11) of the *Insurance Act*, R.S.O. 1980, c. I.8, as amended?

**Result:**

- 3**
1. Ms. Mooney is not entitled to receive a non-earner benefit of \$320.00 per week from April 1, 2011, to date and ongoing, pursuant to section 12 of the 1996 *Schedule*.
  2. Ms. Mooney is entitled to attendant care benefits from February 15, 2008, to date and ongoing, less amounts paid by Wawanesa, pursuant to section 16 of the 1996 *Schedule*, as follows:
    - (a) February 15, 2008 to April 15, 2008 at \$3,768.43/month;
    - (b) April 16, 2008 to May 20, 2010 at \$3,620.94/ month;
    - (c) May 21, 2010 to January 27, 2011 at \$2,879.27/ month;
    - (d) January 28, 2011 to April 23, 2012 at \$2,737.87/month;

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- (e) April 24, 2012 to February 25, 2013 at \$454.37/month;
  - (f) February 26, 2013 to July 13, 2013 at \$423.10/ month; and
  - (g) July 13, 2013 to date and ongoing at \$607.87/ month.
3. s. Mooney is entitled to housekeeping and home maintenance benefits in the amount of:
    - (a) \$100.00 per week from February 15, 2008 to February 26, 2013, and
    - (b) \$92.00 per week from February 27, 2013 to date and ongoing, less amounts paid by Wawanesa, pursuant to section 22 of the 1996 *Schedule*.
  4. Ms. Mooney is entitled to payment for the following costs of examinations, pursuant to sections 24 and 42.1 of the 1996 *Schedule* and subsection 25(5) of the 2010 *Schedule*:
    - (a) \$5,298.89 for a section 24 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated June 25, 2010;
    - (b) \$2,000.00 for a section 25 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated May 28, 2012;
    - (c) \$1,969.81 for a section 25 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated March 1, 2013; and
    - (d) \$2,000.00 for a Rebuttal to an Insurer Examination provided by Dr. Jeremy Frank, Psychologist, dated September 15, 2011.
  5. Ms. Mooney is not entitled to receive the following rehabilitation benefits, pursuant to section 15 of the 1996 *Schedule*:
    - (a) \$1,106.72 for public transit costs to school incurred from January 8, 2013 to December 16, 2013;
    - (b) \$125.00 for the costs of rewriting her driving test; and
    - (c) \$33.89 for an Ikea shoe cabinet as claimed on September 10, 2014.
  6. Ms. Mooney is entitled to interest for the overdue payment of benefits awarded, pursuant to the 1996 *Schedule* and the 2010 *Schedule*.
  7. Should the parties not agree on entitlement to or the amount of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75-79 of the *Dispute Resolution Practice Code*.

**EVIDENCE AND ANALYSIS:****Factual Background**

4 On November 14, 2007, when Carolyn Mooney was an 18 year old high school student, she was struck as a pedestrian by a motor vehicle after getting off a public transit bus. She was rendered unconscious at the scene of the accident and was transported to York Central Hospital. She was intubated and subsequently transferred to St. Michael's Hospital in Toronto. In this accident, Ms. Mooney sustained a brain injury with resultant cognitive impairment, as well as numerous other injuries and impairments, including a fractured pelvis, a fractured left leg, and an injury to her fourth cranial nerve resulting in double vision. On December 4, 2007, Ms. Mooney was transferred from St. Michael's Hospital to Holland Bloorview Kids Rehabilitation Hospital, where she remained until her discharge home on February 15, 2008. She was followed by the outpatient unit at St. Michael's Hospital until May 5, 2008.

5 Ms. Mooney was fully-weight bearing and ambulatory within four months of the accident. She returned to her studies at Richmond Hill High School and took a fitness course during the 2008 winter term, with accommodations in place. Instead of returning to her regular High School course work, Ms. Mooney began the Adult Learning

Education Program ("ALEP") in September 2008, completing the program in June 2009, and receiving her High School Diploma. In October of 2008, as part of the ALEP program, Ms. Mooney started working at Home Depot, where she continued to work with accommodations from her employer until October of 2014 with the support of a full rehabilitation team, including a case manager, various assessments at Holland Bloorview Kids Rehabilitation Hospital, various rehabilitation support workers, occupational therapists, various speech language pathologists, a treating psychologist, and assessments by experts in neuropsychology, clinical psychology, and rehabilitation psychology.

**6** In January of 2013, Ms. Mooney started an educational program called "Redirection Through Education" at George Brown College, designed for people battling addiction and mental health issues, and graduated from that program in April of 2014 with accommodations at school and her full rehabilitation team in place.

**7** In September of 2014, Ms. Mooney enrolled in the Social Service Worker Program at George Brown College, and achieved a near-perfect Grade Point Average, with the assistance of significant accommodations and a full rehabilitation team in place. She was enrolled in this program at the time of this Arbitration proceeding.

**8** Wawanesa has continued to pay for the treatment plans of all of Ms. Mooney's rehabilitation team, for rehabilitation services they have been providing to Ms. Mooney, from the date of the accident through to the present time.

#### **NON-EARNER BENEFITS**

**9** The Applicant claims a non-earner benefit of \$320.00 per week from April 1, 2011, to date and ongoing, pursuant to section 12 of the 1996 *Schedule*.

#### **The Law**

**10** The burden of proof rests with the Applicant. She must prove on a balance of probabilities that she is entitled to each benefit claimed.

**11** Where an insured person "sustains an impairment" as a result of an accident, section 12(1) of the 1996 *Schedule* sets out the eligibility requirements for obtaining a non-earner benefit.

**12** "Impairment" is defined in section 2 of the 1996 *Schedule* as meaning "a loss or abnormality of a psychological, physiological or anatomical structure or function".

**13** Under subparagraph 12(1) 3(i) of the 1996 *Schedule*, the insured person must prove that he or she "suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and was enrolled on a full-time basis in elementary, secondary or post-secondary education at the time of the accident."

**14** Section 12(3) of the 1996 *Schedule* provides that "if a person qualifies for a non-earner benefit under paragraph 3 of subsection (1) and more than 104 weeks have elapsed since the onset of the disability, the amount of the non-earner benefit shall be \$320 for each week that the insured person continues to be eligible to receive the benefit."

**15** Under section 2(4) of the 1996 *Schedule* "a person suffers a complete inability to carry on a normal life as a result of an accident if, and only if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident."

**16** In *N.I. and Allstate Insurance Company of Canada*,<sup>2</sup> it was held that section 2(4) of the 1996 *Schedule* "calls for a determination as to whether the claimant has suffered a complete inability to carry on "a normal life" but it focuses the enquiry on the particular claimant, not on some objective standard of normalcy. It requires an examination of the pre-accident activities in which *the claimant* ordinarily engaged... [T]he Claimant should be permitted to testify about

which activities were more important to his/her "normal life" before the accident. The arbitrator should then be permitted to rely upon that testimony, if accepted, to assign greater weight to those activities in determining his/her entitlement to NEBs."

**17** In *Mikhail Garmider and Co-operators General Insurance Company*,<sup>3</sup> Arbitrator Fadel stated that:

The test for the non-earner benefit has been the subject of extensive discussion in arbitral case law. Arbitrators have been unanimous in stating that the test is onerous, requiring an examination of the activities the insured normally engaged in before and after the accident.

**18** In *Heath v. Economical Mutual Insurance Co.*,<sup>4</sup> the Ontario Court of Appeal set out the test for determining whether an insured is entitled to a non-earner benefit under sections 12 and 2(4) of the 1996 *Schedule*. The court adopted the following general principles as constituting part of a proper approach to the application of the pertinent sections of the 1996 *Schedule*:<sup>5</sup>

- \* Generally speaking, the starting point for the analysis of whether a claimant suffers from a complete inability to carry on a normal life will be to compare the claimant's activities and life circumstances before the accident to his or her activities and life circumstances after the accident. This follows from the language of the section as well as a review of the predecessor provisions. That said, there may be some circumstances in which a comparison, or at least a detailed comparison, of the claimant's pre-accident and post-accident activities and circumstances is unnecessary, having regard to the nature of the claimant's post-accident condition.
- \* Consideration of a claimant's activities and life circumstances prior to the accident requires more than taking a snap-shot of a claimant's life in the time frame immediately preceding the accident. It involves an assessment of the appellant's activities and circumstances over a reasonable period prior to the accident, the duration of which will depend on the facts of the case.
- \* In order to determine whether the claimant's ability to continue engaging in "substantially all" of his or her pre-accident activities has been affected to the required degree, all of the pre-accident activities in which the claimant ordinarily engaged should be considered. However, in deciding whether the necessary threshold has been satisfied, greater weight may be assigned to those activities which the claimant identifies as being important to his/her pre-accident life.
- \* Although this approach differs somewhat from the approach taken in *Walker v. Ritchie*, [2003] O.J. No. 18, 2003 CanLII 17106 (ON S.C.), 2003 CanLII 17106 (S.C.J.), in which the trial judge focused on those activities that were "most important" to the claimant before the accident, in my opinion, it better reflects the high threshold created by the language of the section and at the same time allows a claimant-focused inquiry.
- \* It is not sufficient for a claimant to demonstrate that there were changes in his or her post-accident life. Rather, it is incumbent on a claimant to establish that those changes amounted to him or her being continuously prevented from engaging in substantially all of his pre-accident activities. The phrase "continuously prevents" means that a claimant must prove "disability or incapacity of the requisite nature, extent or degree which is and remains uninterrupted."
- \* The phrase "engaging in" should be interpreted from a qualitative perspective and as meaning more than isolated post-accident attempts to perform activities that a claimant was able to perform before the accident. The activity must be viewed as a whole, and a claimant who merely goes through the motions cannot be said to be "engaging in" an activity. Moreover, the manner in which an activity is performed and the quality of performance post-accident must also be considered. If the degree to which a claimant can perform an activity is sufficiently restricted, it cannot be said that he or she is truly "engaging in" the activity.
- \* In cases where pain is a primary factor that allegedly prevents the insured from engaging in his or her former activities, the question is not whether the insured can physically do these activities, but

whether the degree of pain experienced, either at the time or subsequent to the activity, is such that the individual is practically prevented from engaging in those activities.

19 In *Marco P. and Michael P. and TD General Insurance Company*,<sup>6</sup> Arbitrator Rogers held that where the Applicants for non-earner benefits were children at the time of the accident, and hence their lives were not static, the analysis required by the Court of Appeal in its decision in *Heath v. Economical Mutual Insurance Co.* must be conducted by assessing the effect of accident-related impairments on their "demonstrated potential."

## POSITIONS OF THE PARTIES

### The Applicant's Position

20 The Applicant claims payment by the Insurer of a non-earner benefit in the amount of \$320.00 per week from April 1, 2011, to date and ongoing.

21 The Applicant's position is that she qualifies for non-earner benefits pursuant to sections 12 and 2 of the 1996 *Schedule* because she:

- (a) was enrolled on a full-time basis in secondary education at the time of the accident;
- (b) sustained an impairment as a result of the accident; and
- (c) suffered a complete inability to carry on a normal life as a result of and within 104 weeks after the accident because, as a result of the accident, she sustained an impairment that continuously prevents her from engaging in substantially all of the activities in which she ordinarily engaged before the accident.

22 Relying on the Ontario Superior Court of Justice decision of Brockenshire J. in *Walker v. Ritchie*,<sup>7</sup> where the Applicant -- who was granted non-earner benefits -- was a 17 year old girl in grade 12 who had suffered a brain injury as result of a motor vehicle accident, the Applicant submits that "*activities to which a student should be looking forward to -- obtaining work commensurate with their education and living independently*" are valid factors that ought to form a significant part of the assessment of her entitlement to non-earner benefits.

23 The Applicant further relies on the decision of Arbitrator Sapin in *Bissessar and State Farm Mutual Automobile Insurance Co.*<sup>8</sup> as providing a strong illustration of an arbitrator's application of the test for caregiver benefits 104 weeks after an accident (the same disability test as for non-earner benefits), and as a good example of the proper application of the principles in the *Heath* decision.

24 The Applicant points out that she continues to live with her parents (at the age of 25), and completing high school and pursuing further education beyond high school were important goals for her before the accident.

25 The Applicant submits that her post-accident life -- her activities of daily living, her ability to be independent, her ability to function on a day-to-day basis, her education, and her social and recreational activities -- be assessed through the lens of a qualitative basis, asking the question of whether she is truly "engaging in her post-accident activities."

26 The Applicant further submits that, on a balance of probabilities, she will be unable to achieve any of the "*activities to which a student looks forward to*," from the *Walker* decision, including obtaining work commensurate with experience and being able to live independently. She contends that nearly every aspect of her life since the accident has been heavily influenced by the significant accommodations and supports that she has had in place and has required. She further contends that an examination of what she would be doing but for her accommodations and supports is a relevant question to be considered when assessing the evidence with respect to her entitlement to non-earner benefits. Considering the level of support and accommodation she has received in nearly every aspect of her life since the accident and the way her life has been since the accident, the Applicant

submits that her life cannot be called "normal," and that, since the date of the accident, she has suffered "a complete inability to carry on a normal life."

**27** The Applicant submits that her need to have all of these support services in order to be able to engage in her normal daily activities, in and of itself, answers the question of whether she "suffers a complete inability to carry on a normal life" pursuant to section 12(1)3 of the 1996 *Schedule*. She did not require a full team of support services in order to engage in her daily activities pre-accident, even with her bipolar condition. As Dr. Voorneveld and Dr. Frank testified at the Arbitration Hearing, if those support services were taken away from Carolyn following the accident, or if they are taken away in the future, she would not be able to function. The Applicant asks: *How can it be said that a person is carrying on a normal life if the only way they are able to continue to function, is with the supports from rehabilitation specialists for virtually every aspect of their daily activities?*

**28** The Applicant further contends that, aside from Dr. Tuff, the balance of the medical evidence in this case demonstrates that the injuries she suffered in the motor vehicle accident of November 14, 2007, have been superimposed on her vulnerable pre-accident profile. Not one of the doctors whose evidence is before the Arbitrator stated that she did not suffer a significant brain injury in this accident. Dr. Tuff, Dr. Voorneveld, Dr. Frank, and Dr. Duncan each provided the opinion that the Applicant's injuries from the November 14, 2007 accident have caused an independent psychological injury which has affected her ability to adjust or cope with her injuries. Numerous doctors have provided the opinion that the Applicant's injuries from the accident have caused cognitive and behavioural impairments in her functioning which impact on virtually every aspect of her daily living, and therefore result in a complete inability to carry on a normal life.

### **Wawanesa's Position**

**29** Wawanesa takes the position that the burden of proof rests with the Applicant to establish on a balance of probabilities that she is eligible for the benefits in dispute.<sup>9</sup>

**30** Wawanesa submits that in considering whether the Applicant has met her burden of proof, an assessment of whether her witnesses presented as credible, and provided credible, reliable, and persuasive evidence should be undertaken.

**31** Wawanesa submits that, in the instant case, neither the Applicant's nor her mother's subjective reporting was credible or reliable, and her medical witnesses -- who were not provided with crucial pre-accident medical evidence -- were not reliable, and their reporting was flawed.

**32** Wawanesa contends that the Applicant has not met the burden of proof with respect to any of the claims presently in dispute. Her case rests solely on her and her mother's subjective reporting, which was neither credible nor reliable, and on some flawed reporting by her experts, who were not provided with crucial pre-accident medical evidence.<sup>10</sup>

**33** Wawanesa submits that the Applicant's case is not analogous to those of the applicants in the *Walker* and *Bissessar* decisions, relied upon by the Applicant. Rather, if comparisons to previous cases are to be relied upon, Wawanesa contends that the Applicant's pre- and post-accident circumstances are most analogous to those of the applicant in the *Mulhall* decision.<sup>11</sup>

**34** Wawanesa submits that the Applicant did not suffer a complete inability to carry on a normal life as a result of injuries sustained in the motor vehicle accident of November 14, 2007, as of April 1, 2011.

**35** Wawanesa disputes the Applicant's suggestion that Wawanesa's continuing willingness to fund the Applicant's treatment leads to an inference that the Applicant suffers a complete inability to live a normal life. It submits that the substantive test of entitlement to medical and rehabilitation benefits ("reasonableness and necessity") is completely different from the substantive test of entitlement to a non-earner benefit ("complete inability to live a normal life"). One has nothing to do with the other.

**36** Wawanesa contends that the activities the Applicant alleges that she ordinarily engaged in at the time of the accident were as follows:

- a) Attending school;
- b) Daily activities; and
- c) Spending time with friends and family.

**37** Wawanesa submits that the Applicant is clearly still engaged in all of these activities, at a more functional level than prior to the accident, and she also sustained employment for six years post-accident.

**38** Wawanesa further submits that no credible evidence was adduced by the Applicant that she ordinarily engaged in a self-directed yoga program, sang in a "small" church choir, participated in the "Gay-Straight Alliance," and/or to explain why she cannot do so post-accident as a direct result of any accident-related impairment.

**39** Furthermore, Wawanesa contends that, as in the *Walker* case, the activities must be "ordinarily engaged in and should not include the minutiae of daily living, such as hobbies and chores."

**40** Wawanesa submits that no medical expert has provided an opinion that the Applicant suffers from a complete inability to live a normal life. By contrast, when the Applicant underwent a series of multi-disciplinary assessments in December 2010 by various medical experts (Dr. Gary Moddel, Neurologist; Dr. Lawrence Tuff, Neuropsychologist; Colleen Barnier-Forrester, Kinesiologist; and Dr. S. Gallay, Orthopaedic Surgeon), each returned the opinion that the Applicant did not suffer a complete inability to live a normal life, as defined in the 1996 *Schedule*.

**41** Therefore, Wawanesa contends that the Applicant has not met the burden of proof with respect to non-earner benefits.

### **The Applicant's Reply Submissions**

**42** In reply to Wawanesa's submissions, which criticized the Applicant's medical witnesses for not providing an opinion at the Arbitration that the Applicant suffered "a complete inability to carry on a normal life," the Applicant submits that the "complete inability" test is a legislative/legal test to be applied by the Arbitrator to the facts of the case, and **NOT** a medical test. The Arbitrator is the person to assess whether those impairments satisfy the test of "complete inability to carry on a normal life."

**43** The Applicant further submits that the Insurer's doctors who attempted to give an opinion on the "complete inability test" did so without properly considering all of the evidence relating to the Applicant's post-accident functioning, and without reference to how the test has been interpreted through the case law. As such, their opinions are of little value in assessing the test.

**44** The Applicant further contends that the Insurer's reference to the *Broderick* decision in its submissions is very misleading. The Arbitrator did not discount any of the reports in that case because the doctors did not refer to the complete inability to carry on a normal life test.

**45** The Applicant further submits that, in its submissions, the Insurer has taken isolated pieces of evidence out of context, and ignored the balance of the evidence, in an effort to portray her as being more functional post-accident than she has been. The Applicant contends that while the Insurer's submissions go to great lengths to portray her as an incredible witness, not one of the doctors who assessed or treated Carolyn questioned her credibility or found her to exaggerate or misrepresent her symptoms.

**46** The Applicant further submits that the Insurer's Arbitration submissions are deliberately misleading and



inaccurate in many respects, including with respect to school/educational accommodations, employment accommodations, and the medical evidence.

**47** The Applicant contends that while the Insurer has relied on the *Mulhall* decision, suggesting that it is similar to her case, the comparisons between the *Mulhall* case to Carolyn's case start and end with the commonality of a motor vehicle causing a head injury to a teenager.

**48** The Applicant submits that in the *Mulhall* appeal decision, Director's Delegate Makepeace criticized the Arbitrator by saying the Arbitrator "overstated" Mr. Mulhall's post-accident performance when he said his high school marks were higher than pre-accident. The Applicant submits that a similar type of criticism should be applied to the Insurer's submissions in this case because the Insurer focused almost exclusively on Ms. Mooney's GPA post-accident, without taking into consideration the supports and accommodations she required to complete her education. In addition, the Insurer deliberately ignored the programs that Ms. Mooney was forced to enroll in to complete High School (ALEP) and College (RTEP). Any assessment of post-accident schooling and grades must factor in the analysis the supports and accommodations received, just as Director's Delegate Makepeace highlighted the level of assistance Mr. Mulhall had received during his post-accident schooling.

**49** With respect to the *Mulhall* appeal decision, the Applicant submits that the Director's Delegate Makepeace stated:

I have some sympathy for what I take to be Mr. Mulhall's underlying concern in this appeal -- that the arbitrator may have discounted the severity of his accident-related impairments and their effect on his activities of daily living because of an impression that he had little potential before the accident.

**50** The Applicant submits that such a "discount" and such an "impression" is not at all applicable to her case, considering how different her pre-accident situation was as compared to that of Mr. Mulhall. Carolyn's anticipated trajectory was far superior.

**51** The Applicant submits that a fair and reasonable analysis of the applicable test for non-earner benefits requires a qualitative analysis of all the evidence, which compares her actual performance at school and in her other activities of daily living to her post-accident level of functioning in the same areas, as opposed to picking and choosing isolated pieces of evidence designed to create the skewed Insurer's impression that the Applicant is somehow doing "better" post-accident than she was pre-accident.

**52** The Applicant contends that just as in *Walker*, at paragraph 211 of that decision, on a balance of probabilities, she will not reach the "two activities" to which students should be looking forward: (1) *obtaining work commensurate with their education* and (2) *living independently*. Just as in *Walker*, Carolyn is in a protected environment at school buoyed by tremendous support. Attempting to live independently would be a *massive step for her*. The Applicant submits that Carolyn should be assessed like the applicant in *Walker*, where Justice Brockenshire stated, in his decision at paragraph 212:

I would presume that in her life, as best as it can be forecast now, a point at which she would have some ability to live normally would be when and if she is able to start to live independently. I therefore declare her to be entitled to the non-earner benefits...

### **Wawanesa's Rejoinder**

**53** By way of rejoinder, Wawanesa replies to the Applicant's reply submission that Ms. Mooney's High School transcript "shows" that she "successfully passed 22 of 23 courses earning 21 of 22 available credits before the first accident."

**54** Wawanesa states that this is misleading and objects to it in the Reply, based on the following evidence:

- (a) The Applicant testified on direct examination that she failed 4 courses in grade 10 alone;
- (b) The Applicant testified on re-direct examination that these four failed courses were removed from her transcript by the school;
- (c) The Reports filed in evidence confirm that during high school she flunked half of her grade 10 classes due to her psychiatric issues that set her back; and that in grade 10 she failed half the year and only received four credits.

## Findings, Analysis and Conclusions

### Non-Earner Benefits

**55** Having taken into account all of the relevant evidence that I have accepted and to which weight has been accorded, I conclude that the Applicant has not met the criteria for entitlement to non-earner benefits from April 1, 2011, onward, pursuant to section 12 of the 1996 *Schedule*. My reasons follow.

### Credibility Assessment

**56** Regarding the evidence of the Applicant and that of her mother, Bonnie Mooney, I have considered the generally accepted factors in assessing their credibility in this case including their demeanour, ability and opportunity to observe, power of recollection, interest, bias, prejudice, sincerity, inconsistency, and the reasonableness of their testimony when considered in the light of all of the evidence.<sup>12</sup>

**57** John Sopinka, in his text, *The Trial of an Action* (1981, Toronto, Ontario: Butterworths), wrote of the role of the assessment of credibility through probabilities, at p. 77, as follows:

Probability is the great touch-stone of all evidence. A witness whose testimony strays from the truth will often have built into it some inherent improbability.

**58** As the British Columbia Court of Appeal stated in *Faryna v. Chorny*:<sup>13</sup>

...the real test of the truth of the story of a witness... must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

**59** In the present case, I have considered the testimony of the Applicant and Bonnie Mooney on a standalone basis, and I have evaluated their testimony based upon the consistency with the testimony of other witnesses and with the documentary evidence. I find that in general the substance of their evidence is inherently believable and is consistent with the "preponderance of probabilities which a practical and informed person would recognize as reasonable in that place and in those circumstances."<sup>14</sup> I do not find Wawanesa's challenge to the credibility of Ms. Mooney and her mother, Bonnie Mooney, based on the contention that their evidence was exaggerated, vague and misleading, to be persuasive. I acknowledge that their motives may be inclined to advocacy rather than to the provision of objective evidence. I agree that their evidence must be approached with care. I accept and rely on most of their testimony based upon their veracity and sincerity.

**60** Some of their evidence, however, I find to be unreliable because of their inability or failure to accurately recall, describe and recount certain relevant facts and circumstances. They were not consistent historians in regard to the Applicant's level of functioning pre- or post-accident; they imprecisely recalled the recorded history of academic struggles in the years leading up to the accident as outlined in the clinical notes of Shaw/MacKenzie Health Clinic, which included a consistent history of complaints on the Applicant's behalf in terms of being able to manage school stress as well as a history of dropped courses; and they tended to over-emphasize that the Applicant had the support of treatment providers while engaging in and succeeding beyond her high school performance in terms of her grades in her post-secondary college studies, while underestimating the Applicant's pre-accident trajectory.

**61** Where there is inconsistency between the evidence of the Applicant and Bonnie Mooney, and the testimony of non-party, disinterested witnesses and the information contained in the medical records, employment files, and school transcripts, I consider the information in the latter to be more reliable because that evidence and information was more contemporaneous to the events in issue and was provided by either non- or less interested individuals or professionals. They provide the most accurate reflection of what occurred, rather than memories that have faded over time, have been reconstituted, or have hardened through this Arbitration proceeding.

**62** That stated, I do not find Carolyn Mooney to be an incredible witness, as contended by Wawanesa. I note that: (1) not one of the doctors who assessed or treated Carolyn questioned her credibility or found her to exaggerate or misrepresent her symptoms; (2) all of the doctors whose assessments contained validity testing protocols found that Carolyn's responses were valid and that she was credible in her description of her symptoms and impairments; and (3) Dr. Tuff, the Insurer's assessor, found that Carolyn "responded fully and appropriately to interview questions. At no time did she appear in anyway vague or evasive." In screening tests, Dr. Tuff found "no response bias was detected".

**63** While I note problems with the reliability of the testimony of the Applicant and Bonnie Mooney, there is a sufficient evidentiary basis on which to find both of them generally credible, when combined with the evidence from other witnesses and from the documentary evidence in this Arbitration proceeding.

#### **A complete inability to carry on a normal life**

**64** Based on the overall weight of the evidence, I find that the Applicant did not suffer a complete inability to carry on a normal life as a result of the accident, as of April 1, 2011, onwards.

**65** Having regard to the broad picture painted by the evidence in this case, I find that, as a result of the accident, the Applicant did not sustain an impairment that continuously prevented her from engaging in substantially all of the activities in which she ordinarily engaged before the accident.

**66** In making the determination that the Applicant has not suffered a complete inability to carry on a normal life under section 2(4) of the 1996 *Schedule*, I have focused the inquiry on the Applicant, not on some objective standard of normalcy, and I have examined **in detail** the pre-accident activities in which she ordinarily engaged, including those activities which were more important to her "normal life" before the accident.

#### **Ms. Mooney's Pre-Accident Activities and Life Circumstances**

##### **Pre-Accident Mental Health -- The Applicant's Perspective**

**67** When the Applicant was in Grade 3, she was identified as "gifted" and placed into the "gifted" program for students with high intellectual abilities. Her educational program was modified to provide her with appropriate challenges.

**68** It was Carolyn's evidence that she first began having emotional difficulties in Grade 8, at the age of 13, when she reached out to a teacher due to feeling sad and having suicidal ideations. It was at this time that Carolyn was taken to York Central Hospital, now Mackenzie Health, for an evaluation. Carolyn was diagnosed with atypical depression and was connected to Dr. Urson, a psychiatrist at the hospital, and Rosemary Reid, a therapist. Carolyn did not miss any school due to this medical condition.

**69** As part of Carolyn's treatment, Dr. Urson prescribed medication, and Rosemary Reid provided psychotherapy and strategies to process some of the emotions and changes happening in her life.

**70** It was Carolyn's evidence that she never developed a therapeutic relationship with Dr. Urson, as she felt that

Dr. Urson dealt more with Carolyn's parents and kept her shut out of the treatment process. Carolyn also felt the medication prescribed by Dr. Urson had not been properly regulated.

**71** It was late in 2004 and into 2005 when Carolyn's emotional difficulties became more pronounced. She had an incident of overdosing on painkillers on December 22, 2004 and was taken to York Central Hospital to have her stomach pumped. After this incident she was followed by her family doctor, Dr. Pearl, and she requested a change of psychiatrists. She met with Dr. Boulos who took over Carolyn's care. Dr. Boulos conducted a fresh evaluation of her condition, and changed Carolyn's medication. Dr. Boulos' diagnosis of Carolyn's condition was: Bipolar Disorder, Anxiety Disorder, and Obsessive/Compulsive Disorder.

**72** Carolyn was put on a medication called Tegretol, which she described as "really stuck, that really worked." Carolyn's evidence was that the rest of her medications were built around the Tegretol. Carolyn described Dr. Boulos' approach regarding medications as:

Her approach once we had the backbone of Tegretol was don't mess with it. Keep tweaking or playing around or adding with other medications. And I know at one point I was on a handful of medications.

**73** Carolyn was asked if there was any difference in the treatment received from Dr. Boulos compared to Dr. Urson. Carolyn gave the following answer:

Very much. So, with Dr. Urson, her approach to psychiatry in that clinic was as a child psychiatrist. When I went and had sessions with her, my mom went in with me and she didn't really talk to me. I was sort of the portrait in the room. Dr. Boulos' approach was that I was, you know, becoming an adult and that I needed to have a better sense of control over my own life and my own treatment. And so she spoke to me...it very much helped in rebuilding trust in that...in psychiatrists after having the first relationship for me broken.

**74** When Carolyn started with Dr. Boulos, she also began receiving treatment from David Kydd, a psychotherapist. Carolyn described Mr. Kydd from the York Central Hospital Children's Psychiatric Program as "a really good switch for me. Far more effective. I really connected. He was able to connect with me and communicate with me in a way that was far more meaningful and far more productive in terms of my therapy and my recovery."

**75** After commencing treatment with Dr. Boulos, it took some time for Carolyn's medications and her emotional difficulties to become stabilized. Carolyn had a further admission through Sunnybrook Hospital in October of 2005 after experiencing what she described as "a lot of difficulties" at the time. At Sunnybrook, the doctors assisted in stabilizing her medication, taught her coping and self-care strategies, and helped stabilize her routine.

**76** Carolyn's psychometric intelligence was retested when she was in Grade 10, shortly after her 15th birthday. In a report dated February 19, 2005, psychological associate, Ms. A. Sztabinski, reported on cognitive testing done in November/December 2004 and January 2005. This testing demonstrated that Carolyn's general reasoning abilities were in the Superior range (95th percentile) and in the non-verbal range, she scored in the 97th percentile. Overall, her intellectual ability fell in the "Superior" range. Carolyn's attention/concentration and working memory (recall of visual information) scores fell within the average range, both at the 66th percentile level. These scores were seen as areas of relative weakness for her, compared to her other superior scores. This meant that she understood concepts well, but got blocked when she had to do the work.

**77** Based on her comparatively lower attention/concentration and working memory scores, Carolyn was designated as having a mild-to-moderate learning disability, a diagnosis which the Insurer's doctor, Dr. Tuff, questioned on the basis of psychometric testing.

**78** During Carolyn's cross-examination, counsel for the Insurer focused on selected notations of low mood or low energy in Carolyn's pre- accident medical records. Carolyn provided a general context to the notations in her medical records, when she stated during her cross-examination:

...I would like to comment that all of these, when I went to these therapy sessions, it was the only time I ever talked about this stuff. So, yes, I was a teen experiencing a lot of mood disturbances. And every single one you have pointed out has only talked about how I have been having all these difficulties. But it wasn't like that all of the time. If it was like that all of the time, they would [not] have already changed my diagnosis to bipolar, because it is not depression all the time. Bipolar is not depression all the time.

**79** On May 19, 2007, Carolyn was involved in a motor vehicle accident as a passenger in her parents' vehicle. Carolyn sustained a cervical strain, soft tissue injuries to her neck and shoulder, an injury to her right hand, and some psychological difficulty coping with her injuries and the injuries suffered by her parents. Carolyn could not write her exams for that semester and failed two courses as a result. Carolyn stated that she had expected to fail Chemistry that semester irrespective of the accident.

**80** Carolyn received physiotherapy from Mr. Bakker for the physical injuries suffered in the May 19, 2007 accident. Her physical injuries had improved prior to the November 14, 2007 accident, except for some right hand difficulties.

**81** Dr. Stephen Pearl, Carolyn's family doctor, examined Carolyn periodically following the first motor vehicle accident. In his note, dated November 6, 2007, just 8 days before the second motor vehicle accident, Dr. Pearl described Carolyn's physical condition as:

She was attending physio. She had massage therapy. She was not using Advil. She still had some mild decrease in sleep, some dreaming, which may have been independent of the accident. She had some headaches that were decreased in frequency, and her low back was getting better...she had some right wrist pain but findings were minimal on her exam.

**82** From 2005 through to Carolyn's first motor vehicle accident on May 19, 2007, Carolyn was followed by Dr. Boulos and was taking psychological therapy treatments with Mr. David Kydd. From Dr. Boulos' records, which were reviewed by Ms. Cott, O.T., Carolyn was seeing Dr. Boulos approximately every two weeks "for monitoring of medication issues", and she had been taking psychological treatments with Mr. Kydd approximately every 3-4 weeks prior to the May 2007 accident. However, prior to the May 2007 accident, Carolyn had to discontinue treatments with Mr. Kydd, as he was moving to another clinic.

**83** In her initial Assessment Report, dated February 19, 2008, and in her evidence at the Arbitration Hearing, Ms. Cott testified that from her review of the Shaw Clinic's records (which included Dr. Boulos' records), her opinion was that Carolyn's "2004 diagnosis of bipolar affective disorder, [was] generally well controlled on lithium."

**84** Carolyn did however suffer some difficulty coping emotionally from the injuries suffered in the May 2007 accident.

**85** Dr. Pearl did not recollect any change in Carolyn's functioning comparing the period just before the May 2007 accident to the period following the May 2007 accident (but before the November 14, 2007 accident).

**86** It was Carolyn's evidence that she did not receive or require any attendant care after the May 2007 accident.

**87** The clinical note from Dr. Boulos, dated May 22, 2007 (three days after the first accident) notes, in addition to the physical injuries: "thankful she is still alive," "no suicidal thinking," "mood consistent at present," and "felt closer to mom and dad who were also hurt."

**88** It was Carolyn's evidence that she was physically and mentally in a very good place in September of 2007, two months before the second motor vehicle accident. Just prior to the second motor vehicle accident on November 14, 2007, Carolyn was 8.0 credits away from obtaining her Grade 12 high school diploma, and she believed that she would be able to graduate in 2008.

**89** Ms. Cott, in her initial Assessment Report, reviewed the medical evidence and commented on Carolyn's

condition following the May 2007 accident and prior to the November 14, 2007 accident. On page 12 of her report, Ms. Cott states:

Ms. Mooney suffered injuries in a motor vehicle accident in May 2007. While she had achieved recovery from that accident, some residual issues remained which impacted school performance, that is, she continued to experience right-hand cramping which slowed her writing speed.

### **Academics -- The Applicant's Perspective**

**90** Prior to the motor vehicle accident on November 14, 2007, Carolyn was a high school student enrolled at Richmond Hill High School. 30.0 credit hours were required to graduate from high school.

- \* Her academic average for her Grade 9 year, ending in July of 2004, was 72% with 8.0 credits earned.
- \* Her academic average for her Grade 10 year, ending in July of 2005, for the courses she passed, was 66.4% with 4.5 credits earned.
- \* Her academic average for her Grade 11 year, ending in July of 2006, was 76.5% with 7.5 credits earned (6.5 according to the Insurer).
- \* Her academic marks for the first semester of her Grade 12 year, ending in February of 2007, were 80% in English; 32% in functions; and 73% in chemistry, with 2.0 credits earned for that semester. Her academic average for her Grade 12 year was 52.6%.
- \* Prior to the first motor vehicle accident in May of 2007, Carolyn had successfully completed 22.0 of 23.0 credits attempted. She required 8.0 more credits to graduate (9.0 according to the Insurer).

**91** An individual education plan from Richmond Hill High School, dated October 11, 2005, described Carolyn's areas of strength as follows:

- \* above average intelligence
- \* higher level thinking skills
  - \* ability to absorb and process a large quantity of information
- \* broad and changing range of interests
- \* ability to understand complex concepts
- \* strong skills/interest in specific areas of learning
- \* highly organized
- \* very strong language skills

**92** During her examination in chief, when asked about how things were going during her Grade 11 academic year, Carolyn stated:

In grade 11, I found that I really, really enjoyed biology, I really enjoyed chemistry, and so I was starting to formulate a plan to go into nursing. At that point, I didn't have details at all but that was kind of where I started to think of going. I was kind of starting to figure out what I was going to need in terms of requirements to get into further education. Mood-wise, I was stabilizing. Medication was constantly being tweaked and I managed, but overall things were a lot better. It was a more stable period of my life.

**93** When asked about her plan for schooling as of September of 2007, two months before the November 14th accident, Carolyn said that she planned to graduate by the end of that school year in June of 2008. It was Carolyn's

evidence that she was lined up to take the courses needed to get into a nursing program, which was her goal after high school. She said that things were "clicking" for her and that she had "direction". She said she was happy to have direction and was motivated at that time. It was Carolyn's plan to attend Nipissing University after graduation to get her degree in registered nursing.

**94** During her re-examination by Wawanesa's counsel, Carolyn confirmed that acceptance to University was based on her top six marks in high school. Carolyn also confirmed that she was advised by a guidance counselor from her high school that the amount of time taken to complete high school would not be taken into account for University admission.

**95** Bonnie Mooney, Carolyn's mother, when asked if the first motor vehicle accident on May 19, 2007, impacted Carolyn's high school plans stated during her examination in chief:

Yes, because she didn't do as well as she wanted to, and she knew that she had to get certain levels of marks for the programs that she wanted to go into, like the nursing program that she wanted to go into. She had...over the summer she had to figure it out, 'Okay, if I do this and this and this course, and get these marks,' which wasn't a problem for her, 'then I am back on track. I will be delayed but I am back on track'.

**96** Bonnie Mooney confirmed that Carolyn knew she would be one year delayed in graduating from high school, testifying:

Oh, she knew that she would just be one year. At that point that wasn't unusual, because high school was scheduled to be done in four years. But there were a lot of kids, children, adults, classmates, who took the fifth year, because they either wanted to improve their marks or they need... 'Oh, I need this course now.' And so that is what they did. They took basically what would have been a fifth year and either improve their marks or figure out what they wanted to do. For a lot of them, they didn't know what they wanted to do. Carolyn did. So for her, making up that fifth year was not a problem.

**97** Carolyn's plans to go into nursing after high school are shown in the clinical notes and records of Dr. Boulos, dated January 16, 2007. On that date, Dr. Boulos noted that Carolyn had a good holiday at her sister's wedding, where she was the Maid of Honour. The note records her plans to go away to University and notes that she "wants to do nursing."

**98** Bonnie Mooney disagreed with counsel for the Insurer's supposition that Carolyn struggled with parts of the gifted program. Bonnie stated the following, during her cross examination:

She was not struggling with the program prior to the accident. She might have been at different times with different courses, but that was temporary. Like she would have problems and she would get over them.

**99** It was Bonnie Mooney's evidence that Carolyn did not require extra help in high school before the November accident, even during times of emotional difficulties. Bonnie Mooney stated that Carolyn did not want help and did not need it. She stated: "If she had needed anything we would have sought it out or whatever. But she didn't need it. She didn't want it. So, okay, there is your school, and school is one thing and your emotional difficulties are something else."

**100** Carolyn confirmed that she did not receive any accommodations in school prior to the accident, other than reducing her course load by one class per semester as recommended by Dr. Boulos. Carolyn did not receive any tutoring. She stated that "she was functioning as any other student."

### **Social/Activities -- The Applicant's Perspective**

**101** When asked about her social activities prior to the November accident, Carolyn testified during her

examination in chief:

I was...prior to the November accident I was interested in...I was in a choir at school. I sang a lot, I hung out with friends all the, time. Go to the movies, spend hours on the internet doing just whatever. I would journal. I was doing some art. I played flute at the time.

**102** Carolyn confirmed during her cross-examination that she was still seeing her friends in May of 2007.

**103** During her examination in chief, Bonnie Mooney was asked about Carolyn's recreational or extracurricular activities before the accident. Bonnie provided the following answer:

Okay, well at school she was involved in the music program, and that would be singing, and she was loving the flute: Actually, she learned the flute playing in public school, because they had a music teacher at the Aurora Senior School, and she continued with that. So, she was involved in the band and the signing and so on.

She was involved in the gay-straight alliance, to give it the name I remember. She had tons of friends, and I couldn't keep them straight. I mean, it didn't matter what grade she was in, she made friends with senior kids, with junior kids, whatever. Everybody.

At church she was involved in our choir, especially when it came to things like Advent or Christmas season. At Easter we would put on a cantata for Christmas and a cantata for Easter.

**104** Bonnie Mooney added, in her evidence about Carolyn's activities before the accident:

At high school basically it...she interacted with her friends, with her teachers. There was the clubs that...I could remember the one club, but there was other clubs that she was involved with even as a...just going and seeing what they were doing. If she was interested and if she had time she was in it. If she didn't have the time it was because she was involved in all the other things.

**105** Bonnie Mooney also stated that Carolyn sang solos for the church before the accident. Bonnie continued with her answer with respect to Carolyn's activities before the accident by stating:

At the cottage I... the cottage is on a lake, so it... cottage activities, canoeing, swimming, waterskiing, she was good at waterskiing...

**106** Bonnie stated the following when asked about Carolyn's pre-accident hobbies:

Yes. She had a lot of hobbies. I can't...at the time... before the accident she liked to write prose. Like, poetry, short stories for herself. She was always with a camera. Some of her pictures were incredible. You would think they were professional.

Basically it was a way to express herself. So if it was writing poetry, pictures. She could draw, paint. She really liked crafting. Any kind of craft. I could hand her a bunch of stuff and... we needed something for the bazaar, and she could make one or two things. And they were unique, and they would sell.

**107** Carolyn had received the first stage of her driver's licence prior to the accident. She would learn how to drive up at the cottage with one of her parents accompanying her in the vehicle.

**108** Carolyn also worked at a strawberry farm for one or two summers prior to the accident for four or five week periods.

**109** Just before the second accident, Carolyn had a boyfriend and described things as "fairly stable, fairly consistent." Carolyn was waking up early at this time to participate in a yoga program before going to school. She said that she was "physically and mentally" in a very good place.



**110** When asked to compare Carolyn's pre-accident social and recreational activities with the activities Carolyn could do at the time of the Arbitration, Bonnie Mooney stated:

Pre-accident I would have called Carolyn a social butterfly. She had an incredible number of friends and they were in different activities and so on. She made friends easily. She had a few that she... were her friends and others were just friendly.

Once she had the second accident it didn't take long for the friends that were kind of on the fringe to...like, she wasn't at school. And they kind of forgot about her. And the circle of close friends, because of the physical difference... distance involved in getting to Bloorview, they didn't come very often, hardly at all.

And once she was in school (post-accident) she found it very overwhelming, so she wasn't able to maintain any friendships. How can I explain it? When you are in a friendship relationship, you expect your friend to contact you, and you will contact your friend. It is a back and forth, it is an interplay. Carolyn was not able to contact her own friends anymore. She didn't have the energy, she didn't remember anymore. She there was a lot of, the friend had to contact Carolyn. The friend has to arrange things. The friend has to be involved. And Carolyn didn't have the capacity or the interest or the energy or anything.

So, as time went on, and it wasn't very long, a lot of her high school friends, they had other interests, other things they had to be doing, and they weren't going to be propping up Carolyn all the time. That was what she was needing...

**111** Prior to the accidents of May of 2007 and November 14, 2007, Carolyn assisted with whatever housekeeping and home maintenance tasks her parents would ask her to perform. She was responsible for maintaining her own room. She helped prepare family dinners one to two evenings per week, when her mother worked late at the pharmacy, including shopping for necessary ingredients. She prepared her own lunches and snacks for school. She did her own laundry and helped with laundry for other family members. Carolyn also worked at a strawberry farm close to their home during the summer. Throughout high school she babysat for a family, and just prior to the accident of November 14, 2007, she was babysitting every Friday for one family.

### **Pre-Accident Mental Health -- The Insurer's Perspective**

**112** The Applicant reported feelings of depression as far back as the fourth grade (1999). She was formally diagnosed with depression at age 13 (2003) and Bipolar Disorder at age 15 (2005).

**113** The Applicant has admitted to being bullied as a child in elementary school going back to the first and fourth grades.

**114** According to a report by Dr. Shoshana Urson, psychiatrist, during the summer of 2003, the Applicant's problems might have been exacerbated by what was described as a "very unsettled" Grade 7 year. The Applicant's mother, Bonnie Mooney, reported that **"Carolyn needs structure. When things are not structured, she feels lost. She frequently could be stuck on one thing and doesn't know how to overcome the problem."**

**115** Her initial involvement with psychiatric care arose in Grade 8, when in May 2003 she left a note on her teacher's desk indicating that she wanted to commit suicide. The Applicant was admitted to the emergency room of York Central Hospital later that day. There, she was seen by a psychiatrist, Dr. Joel Eisen, who recorded in his report:

Carolyn has been feeling especially low for the last couple of weeks and was desperately seeking some emotional help. She described feeling depressed mostly, although there are moments when she can feel quite giddy. Her sleep has been highly variable, as has her appetite. Her energy has been low and motivation has been poor. At times she is angry. She has had some fleeting suicidal ideation. She feels at times that her parents don't care for her and don't love her. She feels criticized by them and unfavourably compared to a highly achieving older sister. **She has been overwhelmed at school with assignments**

**and tests...Her school performance has declined marginally. She has some friends at school but isn't particularly close to them. She aspires to be a photographer or a writer...I had a chance to speak with her mother and conveyed to her some of Carolyn's feelings and her mother tended to discount them and seemed to be unaware as to how Carolyn could feel unfavourably compared to the older sister.**

**116** After this incident, the Applicant started attending with Dr. Urson, a child psychiatrist at the Shaw Clinic, and Rosemary Reid, a psychotherapist at the same facility.

**117** Dr. Urson's initial report was drafted on June 5, 2003, and recorded:

...signs and symptoms of Major Depressive Episode, mild to moderate. We are also dealing in this case with sibling relational problems, sibling rivalry. The above-mentioned diagnoses were discussed with Carolyn and her mom to some extent. Psychoeducation about depression was addressed. Medication treatment, like Effexor, was discussed with Carolyn and her mom... At this point, mom seems reluctant for Carolyn to start any medication treatment. If in the future they decide to go ahead with medication treatment, they will call this writer. Carolyn and her family could benefit from individual and family therapy...

**118** The Applicant started attending therapy sessions with Ms. Reid on August 28, 2003, just prior to entering Grade 9. She attended roughly every two weeks. In spite of her mother's initial reluctance, the Applicant was also prescribed Zoloft, an anti-depressant, in November 2003.

**119** The Applicant's depressive symptoms continued to be a concern. While the Zoloft medication helped in the beginning, the Applicant "felt that it was causing more problems: she was feeling constantly tired but also had difficulty falling asleep. When she finally got to sleep, she had difficulty getting up in time for school."

**120** The Shaw Clinic consult notes record that the Applicant had these ongoing sleep issues in 2004:

- \* Her sleep is not good, diff. falling asleep"
- \* Redirected to Dr. Urson in respect to sleep patterns."
- \* Issue with mom over sleeping in, hard to get moving, waking. Therefore, missed school bus."
- \* Feels tired a lot and has to take afternoon nap"

**121** The Applicant's depression reached a crisis point in December of 2004. It started on December 7, when the Applicant relayed to Dr. Urson during their monthly session that she felt overwhelmed with schoolwork, angry and distressed. She had recently cut herself intentionally, using a knife to create a superficial wound on her right shoulder. She had not informed her parents of this and did not show them the wound. Six days later, the Applicant's mother called Ms. Reid looking for the Applicant. Reportedly, the Applicant had run away from home, advising that she "needed some time to think" and that she'd be staying at a friend's house for a couple of days.

**122** Dr. Urson also recorded on December 7, 2004:

15 [year old] teenager seems to have difficulties coping with stress...pressure of school work, housework where there are lots of demands, expectations from school, parents. Her depression ...have worsened. She has poor coping skills by cutting herself...

**123** According to Ana Sztabinski, a private psychologist retained by the Applicant's parents on Ms. Reid's suggestion, the "cutting" wasn't an isolated incident and she had reported "that she had been injuring herself for some time."

**124** Because of the obvious concerns raised by these recent incidents, Ms. Reid arranged for the Applicant's

parents to join her for a family session on December 15, 2004. Ms. Reid proposed the creation of a "safety plan" involving the standby assistance of the Y.C.H. Crisis Team. The need for this type of intervention couldn't be sufficiently emphasized to the parents if they were unaware of the Applicant's recent self-harm behaviour. A decision was made to inform the Applicant's parents of what the Applicant had relayed to Dr. Urson on December 7, 2004.

**125** This amounted to a betrayal of trust for the Applicant and resulted in a breakdown of her relationship with both Dr. Urson and Ms. Reid. Over the course of the next two months, steps were taken to transfer her care to another therapist and psychiatrist.

**126** The Applicant was eventually assigned to Dr. G. Boulos, who remained her treating psychiatrist until November 2012. She was also assigned to another therapist, David Kydd. Before she could start treatment with either individual, there was another incident on December 22, 2004 in which the Applicant attempted to commit suicide by overdosing on her Zoloft medication and had to be hospitalized.

**127** In January 2005, Dr. Urson continued to note that the Applicant had difficulty falling asleep, going late to sleep, complaints of frequent headaches. The Applicant continued to admit difficulties with schoolwork and housework. By her own report, there was no chance of passing English this semester. Regarding her concentration, Dr. Urson noted that the Applicant is easily distracted.

**128** The Applicant ran away the night of February 21, 2005 and then attended the ER with her mother on February 23, 2005 due to her cutting. Dr. Eisen noted in his Emergency Consultation Report that:

she is well known to this department...she sleeps for only about 4 hours from about 4 a.m. to 8 a.m. ...she has lost interest as well as her energy and motivation are poor... Incidentally her boyfriend also cuts himself...up until about a month and a half ago Carolyn was purging and binging...She also has considerable mood instability...

**129** In April 2005, there was an incident at school where the Applicant was caught with an exacto knife and pills, which were confiscated. She was suspended from school for 3 days as a result.

**130** Dr. Boulos prepared her initial report during the Summer of 2005, diagnosing the Applicant with Bipolar Affective Disorder and describing the Applicant's condition as follows:

She has had pass [sic] of suicidal ideation with no plan. She realizes that she would not actually try and kill herself. Self-harm occurs about once a month. She has used a razor blade on her wrist or around her knee or upper arm. She does not have a lot of energy. She has difficulty with initial and middle insomnia. She has had daytime sleepiness... Her focus and concentration has been difficult. It has been harder to grasp information. She has had to reread paragraphs.

**131** As noted in Dr. Boulos' report, the Applicant's psychological concerns continued throughout the 2005 calendar year. For example, the clinical notes of Dr. Pearl note that on February 21, 2005, the Applicant had left the family home after her parents had gone to sleep, spending the night "wandering." Two days later, the Applicant was involuntarily admitted to York Central Hospital after she was found in the school bathroom attempting to cut herself and saying that she wanted to kill herself. Attempts to drive the Applicant to the hospital were complicated by the Applicant's threats to kill herself by jumping out of the moving car on the way to the hospital. Presented with this information on cross-examination, the Applicant admitted that "it was not uncommon for me to cut at school."

**132** In August 2005, Dr. Boulos noted that her mood cycling has gotten worse, her anxiety was building, and she had social anxiety. By September 2005, the Applicant reported that she had more difficulty handling abstract thinking, and was more indecisive. In October 2005, she continued to report concentration problems in that it takes longer for her to focus on what she has to do and longer to process information.

**133** Shortly after the Applicant entered her Grade 11 year, 2005-2006, the Applicant was admitted for 15 days at Sunnybrook Hospital's psychiatric ward due to concerns that she had reported "thinking about overdosing" as an "experiment to see how school + friends handle traumatic event."

**134** Upon her discharge from Sunnybrook, Dr. Boulos recommended that the Applicant pursue group therapy, similar to the type provided at Sunnybrook. In addition to this treatment, the Applicant attended at the Shaw Clinic approximately bi-weekly.

**135** Similar to the reports she made to Dr. Urson and Ms. Reid when she started therapy, the Applicant intimated to Dr. Boulos on several occasions that she was not fitting in well with her peers. For example, during their session on November 22, 2005, the Applicant advised that she was "not socializing as kids live to [sic] far away, doesn't sit with anyone at lunch...discussed taking on a social activity or other activities. Not interested at present."

**136** In March 2006, the Applicant reported that she was upset over March Break because she doesn't do well when she has no structured activities.

**137** Family tensions were also identified by Dr. Boulos and Mr. Kydd as a source of stress. During the Summer of 2006, Mr. Kydd hosted no fewer than 6 family sessions, during which the Applicant and her family discussed how the Applicant had expressed feeling "excluded," and various ways in which they could "problem solve" ways to mitigate the effect of the Applicant's mood swings on the family dynamics.

**138** During her sessions with Dr. Boulos and Mr. Kydd, it was frequently noted that the Applicant's academic obligations were contributing to her psychological stress, or that her psychological issues were interfering with her schooling. Examples include the following:

- \* April 13, 2006: tearful in relating her anxiety about school and talked about her OCD symptoms which were causing her not to have enough sleep. She was repressing increased anxiety about school and her worry about failing English. She wanted admission to the hospital as she is so agitated.
- \* May 11, 2006: it was noted that the Applicant appeared tense and stressed, and was reporting difficulties with her Biology course. She talked about anxiety in relation to people, school, etc...Lots of pressure due to exceptional effort all of her day to day activities take out of her.
- \* October 17, 2006: it was noted "Math grade 11 very difficult to do tests doing university level; finding it hard to learn from the teacher methods. Suggested tutor." To address these concerns, Dr. Boulos drafted a letter to allow the Applicant to drop a course, advising that this "would be helpful" in the treatment of her mood disorder.
- \* November 2006: mood can return to normal briefly then drop to low irritable with low motivation (1/2 level) and difficulties with completing school work as she finds it stressful. Fatigue low energy.

**139** In February 2007, the Applicant continued to struggle with school and, in particular, Biology. Dr. Boulos notes that "memory is something that she has been struggling with for a while. Admits Biology is a stressor." At that time, it was discussed that she should drop a course to allow time to study Biology.

**140** To address these concerns, the Applicant -- with Dr. Boulos' support -- was allowed to transition to a reduced course load over the 2006-2007 school year. She started the year taking 3 credits per semester, and this was later brought down to 2 credits per semester after dropping a Grade 11 art course.

**141** In March 2007, just prior to her first accident, Dr. Boulos noted that the Applicant "was not waking rested, asleep by 3:00 am...a little too alert at night, harder to wind down."

**142** The Applicant's mood continued to be subject to episodes of "cycling," in keeping with her diagnosis of Bipolar Disorder. Notes to this effect were recorded by Dr. Boulos on April 24, 2007, May 8, 2007, May 24, 2007 and July 3, 2007.

**143** On April 24, 2007, the Applicant reported to Dr. Boulos that she had negative cognition about the future, affecting her motivation. She didn't feel the same drive and her mood was lower and she was trying to work on getting up on time.

**144** The Applicant was charged with shoplifting in March/April 2007.

**145** On May 8, 2007, Dr. Boulos noted that the Applicant had asked for an earlier appointment as she was not feeling so well. She had passive suicidal ideation and was very anxious lately - more than usual. Her mood was worse Monday to Friday and would recede over the weekend. This appeared to be related to school, as the Applicant reported that academic work makes it harder to realize a future on completing high school.

**146** School remained an ongoing problem for the Applicant. On May 15, 2007, the Applicant told Dr. Boulos that she was not likely to pass either Biology or Chemistry, "at this point."

**147** The Applicant was then involved in a motor vehicle accident on May 19, 2007 as a passenger in her family vehicle, which rolled on the highway.

**148** She reported shoulder and neck pain, and started complaining of various cognitive limitations, namely, that she had: "low concentration; short term memory not as good; difficulty staying focused; difficulty processing information; normal student activities with school work difficult (excused from an exam); often lose train of thought; not as good [at] conversation; concentration & focusing a problem; [difficulty] remembering specific words; note taking more difficult." She also alleged a degree of emotional impairment as a result of this accident, namely: "haven't been able to drive; mood disorder -- more emotional; limited patience." During her sessions with Dr. Boulos over the following months, the Applicant attributed all sorts of problems to the May 2007 accident.

**149** On October 30, 2007, only weeks before the subject motor vehicle accident, Dr. Boulos noted that the Applicant was taking 2 courses: Math 11 and Biology 12. She recorded that it was hard to be motivated to do Biology, as she was "not following that route."

**150** Subsequent to this prior accident, the Applicant also commenced physiotherapy with Greg Bakker which continued up until the subject accident.

**151** The Applicant was also starting to demonstrate a notable lack of judgment, prior to the subject accident. This was manifested in an age-inappropriate relationship with her boyfriend, Doug Murray, who was eleven years her senior (the Applicant was 18), and who the Applicant later indicated was physically, emotionally and sexually abusive. Despite that she was still in school and recovering from a very serious accident, the Applicant nonetheless moved in with Doug, less than six months after the subject accident, and lived with him for a period of seven months.

**152** The Applicant testified at this Arbitration Hearing that her pre-accident mental health issues had more-or-less resolved by the time of the accident. Specifically, she testified that "Mood-wise, I was stabilizing...I was getting back on track relatively quickly...Things were fairly stable, fairly consistent." However, the clinical notes and records of Dr. Boulos and Mr. Kydd clearly note ongoing issues with mood cycling throughout the Spring and Summer of 2007, and at no point is there a suggestion that the Applicant was ready to be discharged from their care.

#### **Academics -- The Insurer's Perspective**

**153** As a young girl, the Applicant had been enrolled in the Gifted stream of courses. However, she struggled with

certain aspects of the curriculum. As early as Grade 5, there had been reports by teachers expressing concern regarding Ms. Mooney's organization, time management, and timely completion of assignments.

**154** An excerpt from a report card from Grade 6 indicated that the Applicant sometimes required prompting to stay on task and was late in finishing work.

**155** In Grade 8 (2002-2003) she obtained mostly "B-'s" and "C's".

**156** Her Grade 9 year (2003-2004) was hardly better. The Applicant's grades averaged out to 72% according to her high school transcript, however, she had a near-fail (54%) in her non-gifted Math class.

**157** In light of the Applicant's academic difficulties and low grades, Ms. Reid recommended that a psychoeducational assessment be performed. Dr. Ana Sztabinski, a private psychologist, was retained by the Applicant's parents to "evaluate Carolyn's cognitive abilities" and "assist in program planning." Dr. Sztabinski concluded that [emphasis added]:

However, such a placement decision [in the gifted program] ignores **the important weaknesses that were likely always present in her cognitive profile. These weaknesses constitute a mild to moderate learning disability.** The initial screening did not include these areas, but, in hindsight, programming at the Gifted level might not have been the best alternative. While Carolyn's written language is indeed developed in the gifted range, her reading and math skills are somewhat lower. She may not be performing at the level of most students in her program.

The weaker attention/concentration and working memory typically affects school performance, not reasoning. **Carolyn has mentioned that she understands the concepts but gets "blocked" when she has to do the work...**

Students with these problems can be disorganized and distracted. Like Carolyn, they may feel overwhelmed by increasing amounts of work and find it difficult to organize and manage their time and resources. Coping with assignments at the High School level would be daunting for a student with attentional weaknesses. For Carolyn, the amount of work is much greater, given the depth and breadth of the curriculum in the Gifted program...

It is unknown whether the attentional difficulties were present at the time of the Gifted screening. However, a review of the school history indicates that Carolyn coped better in the first year of the Gifted placement but gradually struggled more. Further, there is evidence of possible attentional problems in past teacher reports. The demands of the Gifted placement have likely taxed **Carolyn's weaker capacity to organize and manage increasing workloads.**

**158** Dr. Sztabinski's report made several recommendations to address the Applicant's documented learning disability:

1. With regard to school placement, Carolyn's mental health needs should take precedence. She may require a residential or Day Treatment placement that will focus first and foremost on those needs.
2. In the future, educational planning should keep in mind Carolyn's attentional weaknesses, relative to her well-developed thinking abilities. She may be able to cope with a regular High School curriculum, since **the Gifted program will end for her in 2005.** However, the assessed weaknesses constitute a mild learning disability that will likely continue to affect her ability to manage her time and keep up with written work.
3. Therefore, she will benefit from understanding, support and some program modifications to address the **deficits in working memory and related organizational problems. Accordingly, it would be beneficial to share the results of this assessment** with her staff at her school and other post-secondary institutions when the time comes.

4. Carolyn can be taught strategies to address organizational problems, such as task analysis prior to embarking on the assignment, as well as charts showing steps for assignments. As she completes each step, she can cross it out. Such plans should be available as a resource during homework periods.
5. The following **accommodations** and modifications might be useful:
  - \* **Writing, copying and note-taking** demand working memory. **Carolyn may require additional time for such tasks**. Alternatively, she can be provided with photocopies of material, allowing her ample time to prepare.
  - \* In general, evaluation procedures may need to be modified for Carolyn, as she may not be able to remember all steps. **She may need more time when taking tests** or solving problems, and she may also need to be gently encouraged to persevere. It may be better to evaluate her understanding of concepts and procedures by allowing her to present orally or complete a project.
  - \* When evaluating Carolyn, emphasis should be put on quality, not quantity. She certainly has well developed writing skills. **Her workload should be reduced** to ensure that she is on top of assignments, rather than behind and overwhelmed. She may also require extended time for some writing tasks.
6. Carolyn will need to develop her own strategies for keeping an updated agenda that will help her keep track of assignments, tests and related due dates. She will also need to ensure that she is managing, and if she is not, to talk to her teacher before she gets overwhelmed with an impossibly heavy workload.
7. **In order to combat procrastination and other avoidance strategies it will be useful to remove distractions during work periods**. On the other hand, **short breaks may help** Carolyn refresh her mental energy.

**159** The Applicant admitted that Grade 10 (2004-2005) was a "rough year" for her. She failed four of the eight courses she was supposed to take that year, including the half-credit "Civics" class, which had to be made up over the summer of 2005. Even her passing grades (a "51" in history, a "63" in science, a "75" in choir, and a "56" in art) were fairly abysmal.

**160** Despite that she was now almost half a year behind her peers, the Applicant entered Grade 11 (2005-2006) on a reduced course load, taking only 3 credits per semester (6 per year) rather than the typical 4 per semester (8 per year).

**161** The Applicant also stopped taking courses at the Gifted level, aside from Grade 10 English, in which she which she ultimately received a near-failing 55% grade. This was the last time the Applicant attempted to take a course at the Gifted level.

**162** Grade 12 (2006-2007), being the school year prior to her accident, did not go well either. During the Fall semester, the Applicant failed her Grade 11 Math class, which set her back even further. When these concerns were brought to her attention on October 17, 2006, Dr. Boulos suggested she obtain a tutor.

**163** About a third of the way into the 2006-2007 winter semester, the Applicant further reduced her course load to two credits per semester by dropping her Grade 11 Art course. According to the contemporaneous clinical note, Dr. Boulos had recommended this because **"Biology [work was] heavy on memorization; memory is something she has been struggling with for a while."**

**164** A copy of the Applicant's June 2007 report card was later reviewed by Drs. McKay and Stewart, who noted issues with absenteeism and unfinished assignments. These struggles were compounded by the May 2007 motor vehicle accident, which interfered with the Applicant's ability to study for her final exams. She ended up failing both of her courses that semester.

**165** When the Applicant re-enrolled for Grade 13 the following year (2007-2008), and prior to the subject accident, she continued with this two-credits-per-semester course load, taking only Grade 12 Biology and Grade 11 Math. She "participated" in an unspecified third class, but as a "teacher's assistant" and not for a high school credit. At this time, she was still 9 credits short of graduation.

**166** Despite this documented evidence in the transcripts and mental health records, the Applicant testified at Arbitration that she was on a full course load at the time of the accident, and was adamant that she had "three or four" courses in every semester. Specifically, she testified that:

Everything was set. I was registered in some...in the classes I need to be. I had my timetable set out. Graduation at the end of that year (the 2007-2008 school year) was not only logistically possible but manageable for me...I still had three or four courses in every semester. And full-time...I was starting to get prepared for leaving home.

**167** However, the Applicant's high school transcript clearly shows that she was taking only two credits per semester at the time of the accident, and was nine credits shy of graduation as of the start of that school year. Graduation at the end of 2007-2008 was not only logistically not feasible, but mathematically impossible. Even if the Applicant had passed both of her courses in the Fall, and suddenly returned to a 4-credit schedule the following semester, she still would have been 3 credits shy of graduation in June 2008. Another semester would have been required.

**168** The Applicant testified at this Arbitration Hearing that prior to the accident, "other than the written notes for reduced course load," she didn't receive "any tutoring assistance or educational assistance" and "was functioning as any other student." The Applicant's complete high school records have not been produced, aside from her 1-page transcript. However, in light of the voluminous recommendations made by Dr. Sztabinski, and the subsequent creation of an Individual Education Plan for -- at a minimum -- the 2005-2006 school year, it is clear that some form of accommodation was in place for the 2005-2006 and the 2006-2007 school years.

**169** Certainly the Applicant cannot be said to have been functioning "like any other student".

**170** The Applicant also testified at this Arbitration Hearing that she was on track to enroll in a nursing program at Nipissing University in the Fall semester of 2008. Specifically, she testified that:

...the plan was to finish my grade 12 by the end of that school year, so...which would have been, like, June, 2008. I should have graduated. I was all lined up to take the courses that I needed to get into a nursing program.

**171** However, the Applicant's high school transcript shows that graduation by June 2008 was a mathematical impossibility due to the Applicant's academic history. Moreover, there is no pre-accident evidence, aside from the Applicant's own testimony, that she had ever formulated a specific plan for her post-secondary education. When asked by her own counsel where Nipissing University is located, the Applicant erroneously answered "Thunder Bay" (Nipissing University is actually located in North Bay). The only specific details the Applicant could remember about the college was that "they had a backdrop ...and they would take a picture with a Polaroid camera so you could picture yourself in this beautiful scenic area with lakes and trees..."

**172** The Applicant also admitted she had never volunteered at a hospital or performed community work related to nursing or healthcare. She reluctantly acknowledged that the nursing program at Nipissing required English, Biology, Chemistry and Mathematics. When asked to confirm that those were her poorest grades, she agreed "by marks."

**173** No documentation in the nature of application forms, school pamphlets, course enrollment, or any other



evidence whatsoever, was produced to support the Applicant's purported plans to attend Nipissing University for nursing.

### **Post-Accident Activities and Life Circumstances -- The Applicant's Perspective**

**174** On November 14, 2007, Carolyn Mooney was struck by a motor vehicle, as a pedestrian, after having exited from a public transit bus. Carolyn has little memory of the accident itself.

**175** As a result of the November 14, 2007 accident, Carolyn suffered the following injuries:

- \* Unconsciousness at the scene of the accident and combative at York Central Hospital with a Glasgow Coma Scale ("GCS") of 6-8/15. She was intubated and transferred to St. Michael's Hospital with a GCS of 5
- \* Scalp laceration
- \* Subdural and subarachnoid hemorrhage of the brain
- \* a traumatic closed head injury (traumatic brain injury) with resultant cognitive impairments, difficulty with memory and concentration, difficulties processing information, intolerance to various environmental factors and certain scents, sensitivity to loud noises, impaired motivation, impaired organization, scheduling and time management, impaired initiation, impaired sleep, impaired concentration and headaches
- \* hematoma left forehead & laceration of temporal lobe
- \* right upper lobe pulmonary contusions
- \* splenic hematoma
- \* left-sided pelvic fractures (lateral compression fracture of the left hemipelvis involving the sacrum with S-1 joint gapping, left superior pubic rami fracture, left inferior pubic rami fracture)
- \* left proximal fibular shaft fracture
- \* left peroneal nerve injury
- \* Injury to the 4th cranial nerve resulting in diplopia (double vision) with tilting of her head and looking through the lower quadrants of her field of vision.

**176** Following the November 14, 2007 accident, Carolyn remained in hospital for a period of 3 months. She was initially admitted to York Central Hospital Emergency Department, stabilized, and transferred to St. Michael's Hospital where she was admitted from November 14, 2007 to December 4, 2007. She was then admitted to Holland Bloorview Kids Rehabilitation from December 4, 2007 until February 15, 2008, and was also followed by the outpatient unit of St. Michael's Hospital until May 5, 2008.

**177** Carolyn has a vague memory of being in St. Michael's Hospital. She recalls that they were doing basic memory exercises with her, and some physiotherapy for her fractures, and patching of her eye.

**178** Upon her discharge from Holland Bloorview Kids Rehabilitation, Carolyn's mother worked on a modified schedule in order to assist her daughter. Carolyn's typical day included 10-14 hours of sleep per day with a great deal of cueing to get out of bed, for personal hygiene, to eat, and to leave her bedroom. It was Carolyn's evidence that she would have stayed in bed without the cueing from her parents.

**179** Ms. Cott testified that following the accident, Carolyn asked Ms. Cott if she could resume psychological counselling sessions with Mr. Kydd, because, "with the most recent accident, and its sequelae, there are numerous other issues she would like to address." The social worker from Holland Bloorview Kids Rehabilitation had also recommended that Carolyn obtain "counselling related to the accident and adjustment issues."

**180** Carolyn moved from her parents' home to live with her boyfriend from April until November of 2008. The boyfriend was unsupportive of her needs and was abusive. Carolyn stayed at her parents' home a few nights per week during this period to attend medical appointments. Carolyn exited the relationship with her boyfriend, and moved back into her parents' home.

**181** Carolyn's Occupational Therapist at the time, Ms. Beverly Cott, performed a kitchen assessment at the apartment where Carolyn and her boyfriend had moved. While Ms. Cott testified she was already aware of Carolyn's organizational and planning problems arising from Carolyn's head injury, the kitchen assessment reinforced just how significant those organizational and planning problems were. When Ms. Cott arrived for the assessment, the apartment was a mess. The kitchen was a mess. Carolyn had to be prompted to clean up a workspace in the kitchen before doing a simple task like making cookies. She needed cueing during the exercise itself. She used dirty clothes rather than oven mitts to remove the cookies, and then needed to be reminded to shut off the oven which she had forgotten to do after baking the cookies.

**182** Because of the difficulties with planning and organization which Carolyn demonstrated during the kitchen assessment, Ms. Cott recommended that Carolyn begin receiving the assistance of a rehab support worker, to assist her with cueing, and implementing things she needed to do.

**183** Carolyn attempted to return to her high school in February of 2008 following her discharge home from the rehab hospital. She was set to attempt courses in English, Fitness, Chemistry and Math. Carolyn dropped the Math course before she actually returned to school. Carolyn struggled in English, as she had difficulty reading the material. It was Carolyn's evidence that she was not making the connections she used to despite the supports from her parents and her teachers that were in place. Carolyn ended up dropping English because she couldn't get the appropriate accommodations; and she found the material too hard for her. Carolyn received a mark of 80% in the previous English course she took, ending in February of 2007.

**184** Carolyn also had to drop Chemistry. Carolyn could not comprehend material she learned going back to her studies in Grade 9. Her vision and balance problems made it unsafe for her to do any lab work.

**185** Carolyn continued with the fitness class, with accommodations in place. Carolyn's teachers, parents, occupational therapist, and school counsellors all believed it would be beneficial if Carolyn attended classes to have a schedule and experience a routine as well as interacting with other students.

**186** It was Carolyn's evidence that even though her high school had a learning disabilities centre, the centre was not equipped to support a student with memory and concentration problems, like herself.

**187** Ms. Cott, in her cross-examination, confirmed that the November 2007 accident was responsible for Carolyn failing her two courses, when she attempted to return to high school.

**188** Ms. Cott also confirmed the accommodations which were necessary for Carolyn to return to school. These accommodations were recommended from the occupational therapist at Holland Bloorview Kids Rehabilitation, and Ms. Cott agreed with those accommodations as being necessary for Carolyn, as a result of the injuries sustained in the accident of November 14, 2007.

**189** During her examination in chief, Carolyn was asked how she was feeling in school by the end of June 2008, after managing to only get marks in her fitness class. Carolyn stated the following:

I was, like, defeated. I had come out of Bloorview feeling, you know, 'Oh my life might get back on track now.' And being in school really showed me that this was not going to be like the first accident where you go and do some recovery for a while and then you are okay. I wasn't at that time even really willing to finish high school. It had been such a negative experience for me that I was done. I thought I was going to drop

out... I had a complete re-awakening to how my abilities had been affected. And it was not a very good picture for me.

I had been going into guidance, there was a guidance department, I was speaking with a counsellor through that. There was no talk anymore of university, there was not talk of further education. And the guidance counsellors quickly made it their goal to get me through high school.

**190** The guidance counsellors at Carolyn's high school directed her into the ALEP. The program was designed to help students get their diploma who could not do so in the standard school environment. The program required being in class for one day per week while working, with every 110 hours of work counting as a high school credit, up to 3 credits for work experience.

**191** Carolyn began the ALEP program in September of 2008 while receiving assistance from her occupational therapist and a rehab social worker. Upon hearing that Home Depot was an accommodating employer, Carolyn applied and received a job there as a cashier.

**192** Carolyn's occupational therapist at the time, Beverly Cott, had to attend at the Home Depot to make sure appropriate accommodations were in place for Carolyn, including the use of a stool, extended breaks, and memory aids for the computer component. Carolyn also received two weeks of training from Home Depot instead of the usual one week training period. She was also shadowed by a full time employee for a longer period than most new employees. Carolyn found it necessary to redo training modules, as she would complete one module and not remember anything from it.

**193** In terms of Carolyn's functioning while working at Home Depot, Carolyn stated during her examination in chief:

I was basically only functioning at work during this time. I would get up, and, you know, Mom would get me through getting dressed and getting lunches and getting hygiene and things done. Get me out of the door, and I had problems in the beginning with time management. Getting to work on time, being there. There were problems with that and we tried to address them. Even, like, breaks, I would go on break and sometimes I would fall asleep and I wouldn't wake up on time. Or I would lose track of time, and so somebody would have to come and find me. But in terms of like, at home, I wasn't doing anything. I was at home to sleep and eat, and then I went back to work. Or on school days I was at home to sleep and eat and then go to school. And then back home to do it all over again. There was really nothing else going on.

**194** The ALEP program consisted of one course per semester along with the paid work component. Carolyn took English in the first semester and Math in the second semester. For Math, Carolyn received significant accommodations, and was allowed to complete the course at home. It was Carolyn's evidence that she fell asleep in the first Math class and she was overwhelmed. The teacher was concerned over this, and determined it would be best for Carolyn to do the Math program at home with a tutor, rather than at the school.

**195** Counsel for the Insurer attempted to demonstrate that Carolyn's grades were higher in English and Math after the accident when compared to before the accident. The following exchange ensued, which shed light on the academic component of the ALEP program:

Q. And Math, in the second semester, with a grade of 75 percent, which were better grades than you had received previously, prior to the accident; correct?

A. With a lot of support.

Q. But the exams that you had, you wrote them yourself?

A. There were no exams.

Q. Tests?

A. No. No tests, no exams.

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- Q. The assignments, did you write them yourself?
- A. So we have to separate it. The English ones I did myself. The Math I did with a tutor. I did the entire class with a tutor.
- Q. But in terms of the actual assignment, you completed it yourself; is that correct?
- A. There weren't assignments in math.
- Q. So what was there in Math? If there were no tests, exams...
- A. It was a module.
- Q. If there were no tests, exams, or assignments, what were you doing?
- A. It was a module, so there were packs that were sent home with me, had learning components...and while it was my writing I was coached the whole way by a tutor, the whole way. I didn't do any of that.

**196** In the "Analysis and Recommendations" section of Ms. Cott's initial assessment, she summarized Carolyn's difficulties arising from her head injury suffered in the November 2007 accident, including the effect of those injuries on her schooling:

She articulates well and demonstrates knowledge as to what needs to be accomplished, i.e., housekeeping, personal hygiene as well as need related to employment in order to comply with the requirements of the ALEP program at school in September 2008. However, she is clearly experiencing difficulty planning, initiating, and organizing all that need to be accomplished to achieve these goals...

**197** Carolyn completed the ALEP program in June of 2009, and received her diploma. The grades on her transcript reflect 4.0 credits each for the Fall and Winter semesters in the 2008-2009 academic year, and make up the last six courses listed on her school transcript.

**198** Carolyn continued to work at the Home Depot after graduation. She did not see how she could possibly work at a job that required more education. She stated:

I didn't have the confidence in my abilities, I didn't have the same level of ability. I didn't have the direction. The direction I had before the nursing... well, nursing requires being on your feet, long shifts, it requires a variable schedule. It requires at least a college education, but I was aiming for a university education. It was going to require independence. I was going to need to drive. I needed to...and with all of those things are the cognitive components, and not just the physical components, the cognitive components. You know, having to be able to have the endurance to get through it. Having the problem solving skills. Having the ability to not only remember things but to recall them on demand all the time.

**199** When discussing her desire to get into nursing before the accident, Carolyn stated:

So, where emotionally I was getting set to head into nursing before the accident, after the accident I was couldn't process things enough to find myself...like on a consistent basis, every single day, on my own to feel confident that I could even manage myself in the emotional sense. I basically abandoned that dream and was focusing on just, you know, this is one day, tomorrow is the next day. The day after that. You know, get out of bed; put on clothes, eat some food. Go to work, pretend you like it. Eat some more food, go home, go to bed.

**200** With the assistance of Michelle Killick, Carolyn's speech language therapist, Carolyn enrolled and completed an online weight management course at Durham College. The purpose of doing the program was to attempt to develop Carolyn's cognitive abilities.

**201** Carolyn was frustrated with the idea of being a retail worker, so she and Michelle Killick began looking at other college courses. They found a jewellery making night course at George Brown College, at the Casa Loma campus

in Toronto. The course also gave Carolyn a chance to work on transit training as well, as she had been overwhelmed, lost, confused when taking the public transit system, and not knowing where she was going, and not being able to figure out maps.

**202** Carolyn ended up dropping the jewellery making program after three weeks. She described the anxiety of being in the classroom would cause her to shake. She also had to use sharp tools and be around gas and open flames, which she could not control, and it was dangerous for her to continue. Carolyn returned to the class with her mother to collect her belongings and to advise the instructor they were dropping the class. They received a full refund. Carolyn's eye-sight remained a problem and it was her evidence that her vision also presented a safety concern for the class. It was Carolyn's evidence that dropping the program was a "big let down."

**203** When describing Carolyn since the second accident and after the set back from the jewellery course, Bonnie Mooney stated during her examination in chief:

She tried the jewellery making course and that was, you know it was an interest, and it defeated her. So then what? And in the meantime she is progressing, she is getting better with the support of her whole team, but what next? She knew at that point she could never go back to being a nurse. That was her original plan before the accident. She knew herself well enough that she could never go back. She was not the same person.

**204** Carolyn's social worker came across another program at George Brown College, which was a full-time program intended for people overcoming mental health and addiction issues. The program was a wellness program called "Redirection Through Education." Carolyn started the program in January of 2013.

**205** Prior to the program commencing, Carolyn worked with her speech language therapist, her rehab social worker, her communication disorders assistant, as well as her occupational therapist to prepare for the program. Carolyn was also working with her physiotherapist. The group prepared Carolyn for the transit challenges, as well as for the navigation of the school itself, so she would not get lost or overwhelmed.

**206** It was Carolyn's evidence that the program was designed to be accommodating. Carolyn had a full support team in place that assisted her while she attended the "Redirection Through Education Program." Carolyn's team consisted of her speech language therapist, her occupational therapist, her physiotherapist, her rehab support worker, her psychologist, and her psychiatrist.

**207** During the program, Carolyn received significant accommodations, which included preferential seating in class, extra time on tests, a quiet room, having a computer to type tests on, and having an iPad in class to take notes.

**208** Carolyn was asked what her Rehabilitation Support Worker ("RSW") did to assist her during the George Brown Program. Carolyn answered:

So, the RSW was working a lot in terms of functioning. Like, the rest of the functioning.' So, to go to school you still got to have food. So, things like grocery shopping and finding... first, learning to cook, and then being comfortable and safe in cooking...

**209** Carolyn was then asked to compare the work with the RSW to the time period before the accident when she made meals for her family. Her answer sheds light on Carolyn's daily difficulties following the accident:

Before I was making meals once or twice a week. I required not too much direction, I knew what I was doing. I wasn't worried about things like setting extra timers so I wouldn't forget the stove was on. Finding...going through flyers to find deals to go grocery shopping and then a recipe that that went with that food, or a recipe and then the flyers. I did all of that without batting an eye. And after I needed to be walked through what I was doing. And when I would get hung up on something I would need to be re-directed, you

know, sometimes really silly little things like, 'oh, one of my favourite snacks is on sale,' 'No, what we are trying to find is dinner.' Or you know, like, in the grocery store, 'have we been down this aisle?' Yes. We have been down this aisle.

**210** With a full support team, Carolyn graduated from the program in April of 2014 with Honours and a Dean's Medal. It took Carolyn four semesters to finish the three semester program.

**211** Carolyn was asked how she thinks she would have done in the program if she did not have the support that was built into that program, including the support of her family and each of her therapists. Carolyn testified:

I probably wouldn't have even ever gotten down there, let alone gotten through the program. I certainly wouldn't have found it. No, I wouldn't have been or felt very successful.

**212** While taking the "Redirection Through Education" program, Carolyn continued to work at Home Depot on reduced hours of approximately 8-12 hours per week. Carolyn worked at Home Depot during the summer of 2014.

**213** Carolyn was asked about her post-accident social activities from the time of her discharge from Holland Bloorview Kids Rehabilitation until the time of completing the "Redirection Through Education Program." Carolyn stated, when comparing the above period to before the accident:

Diminished. I lost a lot of friends. A lot of people just never...they never looked me up. They didn't ask where had been, they didn't reconnect. I wasn't capable of reconnecting with them at that time, things were very overwhelming. I really...I didn't really see friends immediately...It was like I only had so much energy and time and attention to pass around. And I made my priorities, and friends often didn't make the big cuts even though they are crucial for me in terms of my well-being... And a lot of my friend interactions weren't face to face. There was a lot more connection with people by texting or email, or Skype or electronic methods that allowed for distance, and that allowed for things like, you know, closing the window when things start to get overwhelming.

**214** In September of 2014, Carolyn enrolled in the Social Service Worker program at George Brown College, which runs for two years. Carolyn has several accommodations in place from the College itself, including a note-taker, a laptop in class, frequent breaks, preferential seating, a reduced course load component, access to the teachers' slides and resources ahead of time, extensions on assignments, extra time on tests, testing in a private room, extra preparation from teachers for tests, a word list, and a memory aid on tests.

**215** Carolyn gave examples of memory aids for tests, which included a cheat sheet where Carolyn could fill a piece of paper with any notes for tests. Carolyn also gave an example of use of a vocabulary list as a memory aid to promote recall, as it was her evidence that word finding was very difficult for her.

**216** Carolyn has moved around her schedule at George Brown in order to be home in King City two days per week to receive all of her therapy. In addition to the supports at school, Carolyn continues to receive support in various forms -- *i.e.* physiotherapy, occupational therapy, a rehab social worker, a speech-language pathologist, a chiropractor, psychologist, psychiatrist, family doctor, and an optometrist. It was Carolyn's evidence that the occupational therapist and the rehab social worker, along with Carolyn's parents, assist her with her school work. Carolyn stated that Dr. Frank, her psychologist, continues to assist her with processing information.

**217** Carolyn attempted to continue working at Home Depot while she was enrolled in the Social Service Worker program at George Brown, but she could not manage and had to resign. Carolyn's last shift at Home Depot was October 10, 2014.

**218** After completing the first semester on a reduced course load basis, Carolyn received good grades and honour roll status. However, when asked how things went during her first semester, Carolyn stated the following:

But it is the same thing. Like, I have had... people were coaxing me through this the whole time. My mom stayed up with me one night, before I left Home Depot, until like 2:00 in the morning working on a project that was due the next day because there wasn't other time. The SLP spent hours and hours with me on reading strategies and trying to...because there are a lot of articles to be read in this program. There is a lot of material, written material, to be incorporated. And I am not strong in that anymore.

**219** Carolyn was asked how she thought she would be doing in her program without the accommodations in place at school, at home, and from support workers. Carolyn gave the following answer:

I wouldn't be doing well. Even as it was, there were some problems acquiring an alternative format of the textbook in the first semester. And while I recovered that, it was because of the way the teacher conducted the class that I was able to negotiate the material with less of an understanding of the text. And then when I did finally get what I did have, that is...the first test I had in that class I didn't do as well as the second two. And it was because I had had additional support. I had people helping me with the readings of the extra material and incorporating it and drawing connections between what was happening in class and the textbook. If I hadn't had the people to help me figure out those ways to draw connections and ways to navigate the system of being a student...I mean, no. I wouldn't have gotten near as much success and satisfaction as I have.

**220** Bonnie Mooney, when asked how Carolyn would be doing in school without all the supports in place, stated: Oh, she couldn't have functioned. She couldn't have functioned at the college level.

**221** With regard to Carolyn's future educational program, Carolyn provided the following answer, when asked if she felt she required her support team:

Yes. Well, I am performing academically but I need a lot of help to perform at that level I am. And in terms of other parts of my life, they kind of have had to be shoved aside. Between time and energy it is difficult to do the things that I was pre-accident. Like having a social-life is difficult, having a home life is difficult. I am, right now, not even completing my laundry on my own most of the time. I am getting Mom's assistance.

There is no housekeeping, no cleaning of the house, on my part, happening. My room is an utter disaster by even my standards of having lived with disorganization for a while.

Because with what time and energy am I supposed to clean? I am getting homework done, I am going to classes, I am going to therapy. And if I am lucky I can still get a good night's sleep. But even, like, sleep-is difficult right now too with all the stresses pulling me in a lot of different directions. Yes, I need supports.

**222** It was Carolyn's evidence that she could not see herself living independently. She said she could not picture it. Carolyn stated: "I can't imagine actually being able to function living on my own. Just...it is unfathomable for me right now."

**223** Carolyn was asked during cross-examination and on re-examination about different boyfriends she had since the November 2007 accident. Carolyn was asked during re-examination if she had a reason to explain why she has gone through so many boyfriends from the time of the accident until now. Carolyn answered as follows:

I had mentioned briefly, it is really, really hard now to find people that presented support from the beginning, and then could actually maintain being supportive throughout. And some of the time will have other things go wrong. Like, the long distance relationship was long distance and had other complicated factors, but the local ones, especially this last one, Mike, which just ended in December of 2014. An understanding eventually was reached that I needed more than they could offer. In terms of support around my healing and my therapies and my life, as well as, you know, just me personally.

**224** During her cross-examination, in response to questions about how many boyfriends Carolyn has had, she

answered: "Well, it is hard to keep a relationship with people when they can't necessarily support you the way I need to be supported, because your needs are so great."

**225** Carolyn added: "The bi-polar is only a component. Most people can actually deal with bi-polar. They can't deal with the bi-polar, plus the brain injury, plus the physical injury, but mostly the brain injury stuff."

**226** Ms. Cott testified in cross-examination that by the time she turned the file over to the new OT, Ms. Nancy Lok, Carolyn continued to require the services of an occupational therapist, a rehab support worker, a speech language pathologist, a psychologist, a physiotherapist, a chiropractor, and a case manager, to deal with the physical, emotional and cognitive sequelae of the injuries from the November 14, 2007, accident.

**227** Ms. Cott admitted that Wawanesa was not hiring her to deal Carolyn's bipolar condition, and that each treatment plan which Ms. Cott submitted was for occupational therapy services for injuries which were related to the motor vehicle accident of November 14, 2007.

**228** By the time Ms. Cott transferred the file to Ms. Lok, Ms. Cott commented on the therapeutic interventions Carolyn continued to require as a result of her injuries from the November 14, 2007, accident. She stated in her report and in her evidence:

The rehabilitation therapy intervention continues to address the following difficulties, planning, initiation, motivation, organization, goal setting, prioritizing, developing consistent structure and routine, mood fluctuation, sleep hygiene, and fatigue...

**229** Ms. Cott further indicated that the therapy intervention was directed toward promoting "functional independence and life skills acquisition toward future independent living," for the "ongoing sequelae from those injuries sustained in the accident with residual physical and visual deficits, along with cognitive impairments arising from a head injury."

### **Post-Accident Mental Health -- The Insurer's Perspective**

**230** After being discharged from Holland Bloorview Kids Rehabilitation in February 2008, the Applicant continued her pre-accident psychiatric treatment with Dr. Boulos, first meeting with her on February 19, 2008. The clinical notes and records by Dr. Boulos on February 19, March 4, March 25 and April 8, 2008, appear to document a relatively uneventful recovery. The Applicant's mood cycling continued to be an intermittent issue, and was treated pharmaceutically. The Applicant continued to express concerns about her stress at school. On April 8, Doug Murray, who the Applicant introduced as her "fiancé," participated in the session.

**231** During a session on June 3, 2008, the Applicant advised Dr. Boulos that she wanted to stop taking her medications due to financial issues. By her own report, she was "finishing school," "living with her fiancé" (which she said was "going Ok"), and described her mood cycling as "gentle." Dr. Boulos was agreeable to discontinuing her Seroquel prescription, and not prescribing anything in its place, but convinced the Applicant to continue taking her Lithium and Tegretol.

**232** On July 15, 2008, the Applicant advised Dr. Boulos that she was doing worse since discontinuing the Seroquel. She didn't want to restart it, but was agreeable to trying a new medication: Olanzapine. The Applicant advised that she wasn't happy with the apartment she had moved into with her boyfriend, but due to the lack of "guaranteed privacy" rather than any specific fault on Doug's part.

**233** On August 26, 2008, the Applicant advised Dr. Boulos that she and Doug had moved into a new apartment. She advised that things had "calmed down" since her last visit, and made the same complaints as pre-accident, noting that she felt "unmotivated" to continue school and was "not sure where her future is going." During her next visit, on September 9, 2008, it was noted that she and Doug had recently purchased 2 ferrets as pets.



**234** On October 31, 2008, the Applicant was admitted to York Central Hospital after consuming an overdose of Lithium. The hospital records related to this visit have not been produced. However, notes taken by Dr. Boulos on November 4, 2008 indicate that the Applicant reported that the incident happened at around 5 pm. She had been feeling very sad and "impulsively" took an overdose of Lithium. She called Doug 15 minutes later, who was likely the one who called an ambulance. The Applicant was discharged from the hospital on November 2, 2008. It was also noted at this time that the Applicant's relationship with Doug had become "rocky."

**235** The breakup of that relationship was not related to the accident, as the Applicant testified that Doug was abusive emotionally, physically and sexually.

**236** During their next 3 sessions, on December 9, 2008 and January 6, 2009, the Applicant advised that she was still seeing Doug casually, and spent New Year's Eve with him. It was only on February 3, 2009, that the Applicant advised that she had broken-up with Doug. However, during that same session it was noted that she had met someone else at a retreat.

**237** The Applicant continued to see Dr. Boulos, who managed her medications and kept notes of her psychological status and social activities. Her notes from 2009 to 2012 show none of the "crises" that had characterized her condition prior to the subject accident, and are generally indicative of a good degree of improvement. Mood cycling continued to be a problem as a result of the Applicant's Bipolar Disorder, but was manageable through medication. There were no further suicide attempts since 2008.

**238** Due to the paediatric nature of Dr. Boulos' practice, the Applicant was transferred to the care of Dr. S. Youssoufian, psychiatrist, on November 26, 2012.

**239** Dr. Boulos was not called to testify as a witness in this Arbitration Hearing.

**240** Like Dr. Boulos, Dr. Youssoufian was not called to testify. However, his initial assessment and clinical notes likewise document no crises and only intermittent mood cycling issues that were manageable with medication. For example, at the time of his initial assessment on November 4, 2012, Dr. Youssoufian noted that the Applicant's mood "is currently described as 'up and down.' She describes this as being smoother than in the past. She enjoys doing arts, including floral design, knitting, making jewelry, photography and poetry." He assessed the Applicant under the GAF at 61, a level synonymous with "some mild symptoms (e.g. depressed mood and mild insomnia or some difficulty in social, occupational or social functioning) (e.g. occasional truancy or theft within the household), but generally functioning pretty well, has some meaningful personal relationships."

**241** His subsequent clinical notes, based on his sessions, substantially confirm that assessment: At their first session, on January 15, 2013, the Applicant confirmed that her mood was "not too bad" and that "school [was] going well". At their second session, on February 12, 2013, the Applicant again noted that "school [was] going well" and that she was successfully waking up at 6:45 am every morning to catch the train to school. At their third session, on March 5, 2013, the Applicant again noted that she had "made a friend at school and had been working on connecting with other [students]." Her mood was good and she reported feeling "stable" since beginning school, as opposed to previously when she had not been doing much during the day.

**242** Dr. Youssoufian's reporting continued in this vein over the next 2 years, during which time the Applicant continued to be entirely "crises-free." She confirmed on May 23, 2013 that she was having "0 difficulties waking in a.m." Her reports of school are generally positive, and it was frequently noted that she was successfully interacting with her peers, with at least one medium-to-long term romantic relationship in addition to her peer relationships. Consistent with her pre-existing condition, the Applicant's mood was occasionally subject to periods of cycling, though reports of her mood being "good" are just as frequent as reports of her mood being "low."

### **Post-Accident Academics -- The Insurer's Perspective**

**243** The Applicant returned to her high school in February, 2008 after being discharged from Holland Bloorview Kids Rehabilitation Hospital. For unspecified reasons, the Applicant enrolled in a full course load, attempting to take Grade 12 English, Grade 12 Chemistry, Grade 11 Math and a Grade 12 Gym class. Understandably, she struggled to keep up with a sudden return to full course loads and withdrew from three of these courses before the end of the semester.

**244** The following year (2008-2009), the Applicant enrolled in ALEP program at Beverly Cott's recommendation. This was a program offered through her school's guidance office, under which the Applicant would attend school one day a week while earning additional credits through a work placement at Home Depot.

**245** Under this program, the Applicant was able to obtain a full eight credits during this 'grade 14' year, allowing her to graduate with her high school diploma in the spring of 2009. This was the first time in five years that the Applicant had managed to complete a full course load.

**246** The following year (2009-2010), the Applicant enrolled in an online health course with Durham College, continued to work at Home Depot and continued with her rehabilitation program.

**247** This pattern continued for the next two-and-a-half years. In that time, the Applicant participated in a variety of rehabilitation therapy activities, including a number of volunteer activities, work with community organizations, and a night-time jewelry-making course taught by George Brown College in Toronto.

**248** In May 2012, the Applicant submitted an application to attend George Brown College as a full-time student through its Redirection Through Education program. She graduated from that program in April 2014, with Honours and a Dean's Medal.

**249** Following her completion of this program, the Applicant enrolled in George Brown's Social Service Worker Program, starting in September 2014. This is a full-time, two year, regular stream college program. The Applicant's expected date of graduation is May 2016.

**250** No representative from George Brown College was called by the Applicant to provide testimony at this Arbitration Hearing that the Applicant required or received disability services or special accommodation. Similarly, no or insufficient documentation was filed to support what, if any, disability services were utilized by the Applicant while engaging in her full-time college studies.

**251** The Applicant has managed to obtain a near-perfect GPA of 3.98 in this program thus far. She has also been active outside the classroom, having successfully run for the position of 'Accessibility Representative' with the George Brown College Student Association.

#### **Pre-Accident Employment -- The Insurer's Perspective**

**252** The Applicant had a negligible pre-accident employment history. According to her LinkedIn profile, she worked on a strawberry farm one summer.

**253** The Applicant had not worked in the year prior to the accident, though she claims that she did some occasional babysitting. However, no income was ever declared on a tax return and no documents were provided to confirm that the Applicant was employed in such a capacity.

#### **Post-Accident Employment -- The Insurer's Perspective**

**254** The Applicant obtained employment at Home Depot in Richmond Hill starting in October 2008. She was trained as a cashier, but also performed other duties commensurate with the needs of a big-box hardware chain,

such as working returns, training new employees, and as a sales associate. She worked on average 20-30 hours/week.

**255** The Applicant did not call her employer or any co-workers as witnesses at this Arbitration Hearing. Her employment file, which contained numerous performance reviews, painted a picture of someone who was consistently regarded as a capable, proactive and valued employee. For example:

- \* September 28, 2009: "Carolyn is friendly with everyone she interacts with... She is polite to all her customers and always thanks them without fail... Carolyn does a great job at making sure her work area is kept tidy. She makes sure there aren't any protruding items that could cause a trip hazard and uses proper personal protection equipment on a daily basis. She works in a safe manner on a daily basis and helps empty the garbage at night."
- \* January 10, 2010: "Carolyn is very consistent with meeting and greeting the Customers when on her register...She always asks if they found everything they were looking for and is quick to offer assistance when they tell her they haven't Carolyn does a great job filling the cashgates when required...Carolyn works in returns, she keeps return area tidy and makes sure that returned items go back to the department so that the area is free of clutter and trip hazards."
- \* September 28, 2011: "Carolyn is friendly and with positive attitude and punctual. Carolyn is a great cashier. She invites customers to checkout and processes their transaction quickly and efficiently... When in returns, she makes great effort to meet and greet. When she is not helping customers, she shows all great deal of respect and appreciation for their business. She always comes prepared to serve our customers."
- \* May 24, 2012: "Carolyn is friendly with positive attitude. She is energetic, very responsible. Carolyn proactively seeking customers. She invites customers to checkout and processes their transactions very quickly and efficiently...She effectively follows all specified procedures and duties according to her job description. Carolyn is a good example for the new cashiers. Carolyn displays great deal of energy and enthusiasm... Thank you and keep up the great work."
- \* September 21, 2012: "Carolyn understands how to process all customer transactions whether it is in returns, on a mainline, in lumber, or the garden centre...Carolyn does a great job at keeping her area clean and tidy, whether she is in returns, or at any cash. Would like to see her encourage her fellow associates to do the same...Carolyn has been able to keep a good metrics score as a cashier."
- \* April 6, 2013: "Carolyn understands how to process all customer transactions whether it is in returns, on a mainline, in lumber, or the garden centre...Carolyn does a great job at keeping her area clean and tidy, whether she is in returns, or at any cash. Would like to see her encourage her fellow associates to do the same...Carolyn has been able to keep a good metrics score as a cashier. Very pleasant and always smiling."
- \* September 20, 2013: "Carolyn is an excellent cashier who always exemplifies FIRST behaviors. Carolyn is reliable, she always shows up for work on time and has a great attitude. Carolyn is also one of the top performers in Metrics. Thank you Carolyn for always performing accurate transactions."
- \* October 2014: "Carolyn is an excellent cashier, she is truly dedicated to her job the moment she comes in the doors...Carolyn is always looking for ways to improve efficiency at the front end encouraging communication and ensuring she knows anything new that's happening in the store, this is definitely evident in her customer transactions. Carolyn doesn't skip a beat with customer services... One of the higher scanning percentages and one of the lowest void percentages. Great work."

**256** Within 6 months of starting work, the Applicant was awarded 'Cashier of the Month'.

**257** As reported by Nancy Lok in her Progress Reports, dated December 20, 2011, April 17, 2012, July 18, 2012 and October 10, 2012, there were periods of time that the Applicant worked up to 30 hours a week.

**258** The Applicant successfully continued working at Home Depot until starting her Social Service Worker program in the Fall of 2014, a period of 6 years. She maintained this employment even during her time in the Redirection Through Education program.

**259** She left the employment to focus on her studies, and not due to any performance issues at work.

**260** Once the Applicant is finished with her education at George Brown College, it should be expected that she will enter the workforce as a social service worker.

### **The Medical Evidence**

**261** Dr. Margaret Voorneveld, who was qualified as an expert in the areas of clinical psychology, rehabilitation psychology and neuropsychology, performed a neuropsychological assessment of Carolyn Mooney on July 20 and July 23, 2010, with respect to the injuries Carolyn sustained in the motor vehicle accident of November 14, 2007. Dr. Voorneveld provided a report, dated November 12, 2010, which detailed her findings following her assessment.

**262** Dr. Voorneveld testified that, as part of her practice, she focuses on rehabilitation of injured individuals, which is focusing on optimizing that person's level of functioning following an accident. As part of her assessment, she looks at treatment needs, vocational outcomes, attendant care needs, the need for supervision in their environment, and any difficulties the patient has in day-to-day functioning, or performing their activities of daily living. Dr. Voorneveld also reviewed an extensive medical brief in preparation for her assessment, and summarized the relevant portions of those medical reports in the body of her report.

**263** Dr. Voorneveld testified that an injured party's performance on neurocognitive testing (i.e. during a neuropsychological examination) does not always correlate to how that person is functioning in their daily life. Consequently, it is important when conducting an assessment, like Dr. Voorneveld was asked to perform, that behavioural observations by the treatment team members, of the injured party's daily activities, be taken into account as part of the assessment process. Often a person who has suffered a brain injury may have relatively normal neurocognitive test results, but not be functioning very well, from a neurobehavioural perspective. In this particular case, while Carolyn performed relatively well on the neuropsychological testing, the reports of her family, and her treatment providers indicated that neurobehaviourally, she was not coping well in her day-to-day life (her natural environment).

**264** Dr. Voorneveld and her psychometrist administered 28 different neuropsychological tests to Carolyn, in addition to the interviews Dr. Voorneveld conducted with Carolyn and her mother. Based on the results of the neuropsychological testing, together with a review of the medical reports provided, and the results of her assessment of Carolyn and an interview with Carolyn's mother, Dr. Voorneveld opined that, as a result of the motor vehicle/pedestrian accident of November 14, 2007, Carolyn suffered a severe brain injury with relatively typical neurobehavioural consequences from that brain injury. A summary of Carolyn's injuries arising from the November 14, 2007 accident, as outlined by Dr. Voorneveld in her evidence and her report, are as follows:

- (a) Carolyn suffered a severe brain injury
- (b) Carolyn suffered orthopaedic injuries
- (c) Carolyn suffered vision problems, which affected her reading ability when she attempted to return to school
- (d) Carolyn suffered lacerations to the forehead and the temporal lobe
- (e) Carolyn suffered from a pre-existing psychiatric condition (bipolar affective disorder) and a learning disability (based on average working memory and processing speed as compared to her superior intellect)

- (f) Prior to the accident Carolyn was beginning to get her bipolar condition under control, as she was trying to maintain a regular stream at school and complete her high school studies; she had goals for further education, she had reduced her course load to assist in completing her high school education; she was active in the church choir; she was being monitored by a psychiatrist, and her "medication cocktail" was in the process of being stabilized by her psychiatrist; she had a supportive family; and she had the necessary treatment team supports in place
- (g) Carolyn had increased fatigue secondary to her brain injury
- (h) Carolyn performed fairly well on neuropsychological testing, however she demonstrated problems with processing speed and notable behavioural problems
- (i) Carolyn was suffering headaches post-accident
- (j) Carolyn had sleep difficulties post-accident
- (k) Carolyn had chronic pain in her left hip, low back, left leg and foot
- (l) Carolyn had left foot neuropathy (like drop foot), which affected her ability to run, and created worry for her about re-injury
- (m) Carolyn had alteration in her sense of smell and taste secondary to her brain injury
- (n) Carolyn was suffering from an exacerbation of her pre-existing psychiatric disorder (exacerbation of bipolar affective disorder)
- (o) Carolyn was exhibiting problems with impulsivity, inability to control behavior, anger outbursts, inappropriate behavior, and she was more opinionated
- (p) Carolyn was suffering from increased depression and an anxiety disorder as a result of her brain injury
- (q) Carolyn had difficulty coping when returning to school
- (r) Carolyn had light sensitivity in the classroom
- (s) Carolyn suffered an exacerbation of her pre-existing executive functioning issues, including planning, organization, and self-monitoring
- (t) Carolyn demonstrated difficulties with working memory (auditory working memory) including difficulties learning new information and retaining new information
- (u) Carolyn suffered from "overload" (i.e. an inability to process too much information)
- (v) Because of this overload, Carolyn became overwhelmed and began to suffer from lowered self-esteem
- (w) Due to her brain injury, Carolyn could not learn appropriate coping mechanisms or strategies to help her cope with these injuries
- (x) Carolyn required regular prompting and cueing to assist her with "problem solving in the moment," in order to assist her in functioning and to carry on a productive life.

**265** Dr. Voorneveld testified that, in her opinion, there is no question that the brain injury from the motor vehicle accident exacerbated or intensified all of the pre-existing symptoms, plus added additional cognitive and neurobehavioural symptoms, which Carolyn did not suffer from prior to the accident.

**266** Dr. Voorneveld testified that Dr. Frank, Dr. Duncan, Dr. MacKay and Dr. Stewart were also of the opinion that Carolyn's pre-existing condition was exacerbated by the brain injury in the motor vehicle accident of November 14, 2007.

**267** Doctors MacKay and Stewart opined that Carolyn's traumatic brain injury exacerbated her previous problems with processing speed and working memory, and they determined this exacerbation while Carolyn was still in the hospital and not yet in her normal environment.

**268** Dr. Duncan's opinion was that the decline in Carolyn's neuropsychological performance was most likely explained by psychological factors that were complicating her recovery from her brain injury. Dr. Voorneveld agreed that Carolyn suffered a psychological injury in addition to her pre-existing Bipolar Disorder. Dr. Voorneveld diagnosed a cognitive disorder due to her head injury and the development of an adjustment disorder with anxiety and depressed mood, due to her struggle to cope with the changes arising from her brain injury, together with her struggle to cope with the impact on her functioning from her physical injuries.

**269** Dr. Frank testified that he was of the opinion that Carolyn's pre-accident Bipolar Disorder was exacerbated by the injuries in the motor vehicle accident of November 14, 2007.

**270** Carolyn's treating psychiatrist, Dr. Boulos, also provided an opinion to Beverly Cott, indicating that Carolyn's pre-existing Bipolar Disorder and depression had been exacerbated by the motor vehicle accident of November 14, 2007. While the questionnaire and Dr. Boulos' actual responses to the questionnaire were not produced as part of the Karen Rucas and Associates clinical notes and records, Beverly Cott's Progress Report #4, dated January 5, 2009 (corrected date from the report which says January 5, 2008), states on page 5 that she prepared a questionnaire in September 2008, which was sent to Dr. Boulos for a response. On page 3 of this progress report, Ms. Cott summarizes Dr. Boulos' response to the questionnaire, (and quotes sections of the responses from Dr. Boulos), as follows: (emphasis added)

**October 7, 2008 Response to Questionnaire, Dr. Boulos, Psychiatrist**

- \* Diagnosis of Bipolar Disorder pre-accident: medications include Olanzapine
- \* 10 mg. HS, Tegretol CR 900 mg. PM, Lithium -- 600mg HS

"Presently Carolyn has Bipolar Disorder with a depressed mood including lack of motivation, low interest, fatigue and problems with focus, concentration and memory. These symptoms are more severe since the accident." "In addition to medication, she could benefit from individual therapy to deal with her emotional and cognitive symptoms as well as assistance adjusting with the workforce."

- \* Opines there are counseling needs related to the injuries in the accident; subsequent complications have worsened her mood symptoms

"The impact of the accident cognitively, emotionally and physically has been significant in worsening her depression and affecting her academic/occupational capabilities."

**271** Dr. Voorneveld testified that, as a result of Carolyn's injuries sustained in the motor vehicle accident of November 14, 2007 (which exacerbated her pre-existing condition), Carolyn would require ongoing supports for the rest of her life, in order to engage in her daily functioning. Dr. Voorneveld testified that Carolyn continued to exhibit impairment in all areas of her life, and would continue to require assistance, as her condition was unlikely to improve. She testified that the supports Carolyn would continue to require were necessary in order for Carolyn to have a productive life. These were:

- (a) assistance to make sound decisions due to frustration and anger control;
- (b) assistance to engage in her daily activities;
- (c) ongoing attendant care, in particular, daytime monitoring due to her behavioural problems, and evening monitoring, as at the time of Dr. Voorneveld's assessment, Carolyn was still having issues with hypersomnolence;
- (d) psychological intervention to assist with difficulties in interpersonal interactions, social appropriateness, anger, depression and anxiety;
- (e) occupational therapy support to assist with physical and cognitive adjustment issues and emotional difficulties;

- (f) a recreational therapist or a rehabilitation support worker to assist with exploring appropriate social and recreational activities, and to provide cueing where necessary to redirect her when necessary;
- (g) continuing support from her psychiatrist.

**272** Dr. Voorneveld testified that without the continued supports which Carolyn has been receiving since the accident, she will continue to have impaired functioning, and would not be able to lead a productive life. Dr. Voorneveld also testified that Carolyn will continue to require support for her personal life and home life, including should she marry and have a child, as well as for any future employment she may be able to secure.

#### **Dr. Jeremy Frank**

**273** Dr. Jeremy Frank is a psychologist who has provided treatment to Carolyn since 2008 to treat her impairments arising from the second motor vehicle accident. Dr. Frank gave evidence at this Arbitration Hearing and was qualified as an expert in clinical and rehabilitation psychology. Dr. Frank joined Carolyn's treatment team to provide treatment for her psychological functioning. He was referred by the Occupational Therapist, Beverly Cott, in 2008.

**274** Dr. Frank first assessed Carolyn on November 19, 2008, and prepared a report with respect to the first assessment, dated December 18, 2008. Dr. Frank stated that Carolyn reported to him ongoing physical problems, including intermittent pain in her ankle, tailbone and in her shin, headaches several times per week, dizziness, frequent low back pain, and vision problems.

**275** Dr. Frank also stated that Carolyn reported she suffered from what he called Hypersomnia. In discussing the condition, Dr. Frank stated:

Hypersomnia is simply a term that means sleeping too much...she was describing sleeping 10-14 hours a night and also described chronic fatigue. She talked about having... seeing no reason to get out of bed unless she has to go to school or work. And she didn't really know why she was sleeping so much, noting that it could be from the depression or from the injury, but she didn't think it was from the medication.

**276** In terms of the depressive symptoms Carolyn reported, Dr. Frank stated:

She described a significant decrease in appetite, persistent sadness and irritability and low mood...which she said was worse since the accident. She described decreased pleasure and interest in activities. She reported persistent low energy and hypersomnolence...She described difficulties with indecisiveness. She reported feelings of guilt and worthlessness. She reported recent active suicidal ideation and noted that she had recently ingested 50 300 milligram tablets of lithium, and was hospitalized at York Central Hospital.

**277** Carolyn reported that her depression was well-managed at the time of the accident, and has since exacerbated. With regards to her Bipolar Disorder, Carolyn reported manic episodes that had decreased in frequency since the accident with an increase in frequency and severity of the depressive episodes. Carolyn also reported that she was diagnosed with a traumatic brain injury following the accident, with short term memory problems. Carolyn also reported difficulties organizing her thoughts, as well as concentration difficulties since the accident.

**278** For housekeeping, it was Dr. Frank's evidence that Carolyn reported feeling physically able to do most housekeeping, but regularly failing to do it, owing to both low motivation and forgetting to do it. She also described poor planning behaviour and problems with task initiation.

**279** Dr. Frank also interviewed Bonnie Mooney on November 19, 2008. Dr. Frank summarized the information obtained from Bonnie as follows:

Her mother reported that she had noticed a number of changes in her daughter's cognitive functioning. She noted that Carolyn was more tentative, less focused, struggling with memory. She described how she didn't...she felt that she wasn't sure of herself, nor sure if she knows something or why she would know it. If she's trying to do school work, she isn't as opinionated. This is just a quote her mother had given to me. She talked about how she was having difficulty differentiating between her opinion and factual knowledge. She didn't trust if she reads something that she remembers correctly when she reads, and that double vision has been worse these past few days. She indicated that Carolyn required reminders to take her keys, wallet, cell phone and medications when she leaves the house.

**280** With regard to emotional functioning, Bonnie reported her daughter was more frustrated and there was a fragility to her. She reported to Dr. Frank that Carolyn appeared depressed and was quiet and withdrawn. Dr. Frank found Bonnie's reporting to be candid. Dr. Frank stated, with regards to Bonnie Mooney's reporting of her daughter's emotional functioning:

Before the accident she was very social and now is just down to a few friends. She doesn't seem to know how to connect with new situations and new people. She is more timid, she needs reassurance. She meets people at Home Depot and has met people, but not friends.

She reported that she sees her daughter's suicide attempt as a cry for help...She reported that her daughter's manic and depressive phases were cycling more rapidly and her manic phases were less intense. She said the highs weren't as high and intense as they were, but the lows are still quite low for her, and she said that Carolyn had told her that her mood would cycle 10 to 12 times daily.

**281** Dr. Frank performed tests and recorded data on Carolyn. Dr. Frank concluded that the tests results showed:

Looking at testing data alone, it's suggestive of somebody who is struggling with considerable anxiety, anxious and depressive symptoms, with an elevated risk for suicide or suicidal behavior. Physical symptoms are likely to be present and interfere with life potentially, but such individuals are unlikely to be preoccupied by their physical symptoms.

I noted-difficulties with impulse control and anger are likely to interfere with productive interpersonal functioning, and a degree of behavioral avoidance of accident related stimuli suggestive of some degree of phobic patterns.

**282** Dr. Frank provided the following opinion or diagnosis of Carolyn on the basis of his assessment of Carolyn, interviewing her mother, the interpretation of test results performed, and a review of the available medical file:

I arrived at a diagnosis of bipolar disorder and at that point I said type I or II, unclear to me at the time, most recent episode depressive. I noted that her traumatic brain injury had resulted in considerable cognitive difficulties and that Ms. Mooney was feeling frustrated with her limitations and lack of confidence in herself.

Depressive symptoms appear to exacerbate significantly since the accident, and are likely to be related to perceived limitations and difficulties adjusting to her limitations.

I noted that she was a woman with significant pre-accident of bipolar affective disorder and a learning disability. That she developed a host of psychological difficulties since the accident,...I said that it was described most parsimoniously as an exacerbation of bipolar affective patterns, and most notably depression and difficulties with emotional reactions and relationships...And so I noted that she had a bipolar condition prior to the accident, and I noted that there was evidence that it had exacerbated as a result of the accident.

I noted that she was struggling to regain her independence and appeared to have assumed a passive role in her rehabilitation. Ongoing relationship difficulties were likely to further fuel depressive symptoms, and I noted that I was concerned about her risk of suicide.

**283** When asked whether Carolyn had suffered a separate and distinct psychological impairment from the



accident, aside from the exacerbation of a pre-existing condition, it was Dr. Frank's evidence that Carolyn's phobic symptoms were specific to the accident itself. Dr. Frank also stated: "My understanding, based on all the information I had, was that she had significant cognitive symptoms that were not there before."

**284** Dr. Frank confirmed that he submitted his first treatment plan to the Insurer on January 5, 2009, for treatment for Carolyn as a result of injuries from the accident. Dr. Frank stated that he has submitted ten treatment plans to the Insurer since the first treatment plan was approved. Dr. Frank confirmed that there have not been any denials of his treatment plans from the Insurer to date, and he continues to provide treatment to Carolyn under an approved treatment plan.

**285** In describing a therapy session with Carolyn, it was Dr. Frank's evidence that:

Sessions focused on helping her to impose further structure and organization in her life. She discussed feeling overwhelmed with what she had on her plate, which I can tell you is a theme that has been true for Ms. Mooney ever since I've known her.

**286** While describing the motivational problems Carolyn exhibited throughout the time that Dr. Frank treated her, Dr. Frank opined:

I was explaining that when the accident happened and she developed this brain injury that she herself experienced cognitive problems, that...she had a family and a treatment team who noticed the cognitive problems and who would work with her about them, and she's intelligent and she is aware of how things felt differently for her.

The brain injury, irrespective of whether there's an ongoing organic basis to it, which is something that I am the first to say is out of my scope to comment on, and I leave that to the neuropsychologists, irrespective of that issue, her brain injury resulted in her experiencing herself this way.

What people do, there's sort of a...there's a certain ilk of brain injury where...there's a certain clinical picture, if you will, when a brain injury happens where a pre-existing mood disturbance, which includes depressogenic thinking, in other words, a negative outlook on life, a negative way of understanding yourself, that leads her to latch on to the brain injury, to latch on to her experience of the cognitive problem. And now she doesn't only experience herself as having mood disturbance, she also experiences herself as having a brain injury and it's become a core part of her identity. And so what happens is that since then she has a strong propensity to really be overwhelmed very easily.

When I look back on the entirety of my reports I see a woman who very regularly looks like she is doing okay, so long as life demands are low and so long as she has her treatment team supporting her...When life demands kick in, for example school assignments, issues with scheduling, issues at home with her parents, she can flip and immediately she will become highly overwhelmed. She will talk about cognitive problems a lot more and she will...and what happens is she gives up. And I think that the apathy and the low motivation that's been so core for her, as I've noticed since early on, even in the absence of significant depression or significant depressive symptoms, relates to that.

**287** It was Dr. Frank's evidence that Carolyn was highly vulnerable, and the fact that she understands herself as having a brain injury resulting in cognitive difficulties for her, and that other people notice that and give her feedback about it, plays a role in her sense of helplessness and feeling like life challenges are too great for her. Dr. Frank stated, "First she had the bipolar stuff, the mood stuff and now she has these cognitive difficulties, and she experiences herself as being unable to amount to much or accomplish much."

**288** In reference to Carolyn's relationship difficulties, Dr. Frank stated:

So, just in a bit of elaboration about the relationship difficulties, you know, her social life in terms of friendships, her...she doesn't have any friends. Or people who are friends are not meaningful friends in any significant way, she does not have any confidantes. As far as I can recall since I've known her she has not.

**289** During his examination in chief, Dr. Frank agreed with Dr. Voorneveld's opinion that Carolyn had exhibited difficulty with processing speed, multitasking, learning of new information, dividing attention, interpreting social situations and planning and organizing herself. Dr. Frank stated, with reference to Dr. Voorneveld's opinion: "I noted that my own observations over time behaviourally, which is a word I am injecting here for...just for explanatory purposes, were in line with those impairment descriptions."

**290** Dr. Frank provided his opinion that Carolyn's understanding of who she is, is impacted due to suffering a brain injury, and that creates a vulnerability for Carolyn that changes the essence of her pre-existing bipolar condition.

**291** Dr. Frank opined that Carolyn has a tendency to misinterpret social situations, which has resulted in a significant deterioration of her social life and feelings of being discouraged by her social life. Dr. Frank stated:

I've witnessed break-ups with two different men, and can attest to her tendency to become very emotionally distraught as a result of social difficulties. I noted that she'll be observed to be in a good mood for an extended period of time, and then crash as a result of a social interaction with one of her peers. And I understand, based on my conversation with her mother, that these difficulties were not present prior to the subject accident, lending credence to Dr. Voorneveld's conclusion in that regard... that the brain injury resulted in certain elements of personality change.

**292** In response to a question about whether Carolyn would be capable of working on a full-time basis if her support team was taken away, Dr. Frank opined: "Based on what I know of her and on a balance of probabilities, don't think she would be able to do it and be able to work productively without significant emotional deterioration."

**293** Dr. Frank criticized the approach taken by Dr. Tuff in his assessment and stated:

I was struck by the fact that he did not consider evidence of accident related changes, as noted by her treatment team and family. I noted at the time that I wrote this that I found evidence of significant psychological impairment that precludes her from advancing in life. By the way, I don't mean to imply that opinion has changed right now.

**294** During cross-examination, with reference to Carolyn's condition, Dr. Frank gave the following answer:

They are certainly things that one might see with bipolar disorder, but as I said before, this does not seem to me like a bipolar disorder with other elements. There are other... there are too many other inconsistencies with what one would expect with somebody with bipolar disorder. When someone has bipolar disorder they have energy when their symptoms are under control, when their depression is under control, they are productive. In fact, they are often very productive. They often stay up at night and come up with things and put plans into place if they're in a hypomanic state, or even if they're subhypomanic. People with bipolar disorder in their adulthood, when they're symptoms are under control, often do well. They function well.

**295** Dr. Frank also opined, during his cross-examination:

As I've gotten to know [Carolyn] over the years, what became clear to me is the...you know, whether or not there are more periods of time when she, you know, is feeling sad or not, isn't exactly where the money is when I think about Carolyn. What I think about is the fact that she has latched on to the idea that she has noticed increased cognitive problems, and she experiences herself differently in that way. And I can tell you I've spent a lot of time with her.

**296** The Insurer's witness, Ms. Cott, is of the opinion that Carolyn's pre-existing bipolar condition was a "compounding factor to the other injuries in the accident," by which she means that all of the injuries Carolyn suffered in the November 14, 2007 accident have been made worse because of her pre-existing condition.

**297** The reports of Case Manager, Kim Wilson-Wiles of Karen Rucas & Associates, detail her efforts in managing Carolyn's rehabilitation team with the numerous rehabilitation services Carolyn has received since the date of the accident. Each of her reports summarize the injuries which Carolyn suffered from the accident, the symptoms she was presenting with due to those injuries, and the various rehabilitation services which were implemented in an effort to deal with those injuries and symptoms. Wawanesa has continued to pay for each treatment plan submitted by Ms. Wilson-Wiles, from the date of the accident through to the present time.

**298** Kirsten Hadleycrane, from Lawlor Therapy Support Services, is the most recent of the many Rehabilitation Support Workers ("RSW") who have worked with Carolyn since the accident. The RSWs who have worked with Carolyn include: Brandi Gridel, Ava Kolodziej (Jikidzueh), Olena Paredes and Kirsten Hadleycrane. Each of the RSWs who have worked with Carolyn have been from Lawlor. Ms. Hadleycrane's reports detail the services provided to Carolyn to assist her in regaining her independence and a return to as much of her regular activities as possible. Ms. Hadleycrane's reports also detail the assistance she provided to Carolyn to assist her with the educational pursuits since the accident.

**299** Michelle Cohen & Associates have provided Speech Language Therapy services to Carolyn following the November 14, 2007 accident, upon referral from Beverly Cott. An initial assessment of Carolyn's needs was performed to detail Carolyn's post-accident deficits, and continuing therapy has been provided since Ms. Cott's original referral in February of 2009. The speech language therapists who have been involved in providing services to Carolyn include, Michelle Killick, Johanna Bouter, and Stephanie Zawalicz-Mowinski. The speech language therapists worked on numerous difficulties Carolyn has arising from her head injury, including reading difficulties secondary to diplopia, memory and word-finding difficulties, difficulties with comprehension and expression, difficulty prioritizing and making decisions, as well as difficulties with initiating and carrying on conversations. These therapists' reports detail ongoing struggles in each of these areas from the date of the accident to the present time.

#### **The Treating Occupational Therapist (to September 2011), Beverly Cott**

**300** Beverly Cott was the Applicant's initial treating occupational therapist following her November 14, 2007, accident. She first met the Applicant and her parents on December 18, 2007, while the

**301** Applicant was still a patient at Holland Bloorview Kids Rehabilitation Hospital. She remained in this role until September 2011, when she transferred to another company, and her colleague Nancy Lok took over the file. By her estimate, she met with the Applicant approximately 45 times over this period, or about 1-2 times/month on average.

**302** Ms. Cott interacted with hospital staff to obtain their opinions as to the Applicant's cognitive status, and performed her own testing as well. She recalled that the Applicant's cognition was functional, even during her first meeting with her while she remained hospitalized. Ms. Cott elaborated by stating that the Applicant clearly understood what was being discussed, and what the recommendations were.

**303** Ms. Cott also met with the Applicant's parents, and obtained the Applicant's personal, medical and social history. She assessed the Applicant's care needs upon her discharge from Holland Bloorview Kids Rehabilitation Hospital, and reviewed the outcome of her assessment with the Applicant's mother. As part of her assessment, she recalled explaining to both the Applicant and her mother that in quantifying the Applicant's attendant care needs, she was considering all of the Applicant's needs and impairments, whether they be physical, cognitive, or psychological in nature.

**304** The Applicant was noted to have presented as being fairly strong from a cognitive perspective when she returned home from the hospital. She was alert and orientated and capable of engaging in conversation. She was also noted to have made an even more remarkable recovery from a physical perspective.

**305** Ms. Cott noted that as the Applicant's treating occupational therapist, she quickly developed a strong

therapeutic rapport with the family, and advised them that they could always contact her by phone or email to address any issues that they may have had.

**306** Ms. Cott testified that she always asks her clients whether they have sleep issues, and noted that she was aware that there was a sleep issue, and that the Applicant had behaviours such as staying up late at night that would have made it difficult for her to get up in the morning. She confirmed that, as a Form 1 item, she would have discussed with the Applicant's mother, on subsequent assessments, the Applicant's ability to respond to an emergency.

**307** In regard to whether the Applicant required assistance with managing and organizing her clothing post-accident, Ms. Cott testified that it was not only identified as an issue by the Applicant or her mother, but also that Ms. Mooney would not have allowed her mother to invade her personal space and rummage through her clothing at that time.

**308** When it was suggested to Ms. Cott that the Applicant had motivation issues post-accident, Ms. Cott stated "there were many a time that when Carolyn was motivated to be up, because there was a particular task that she wanted to be doing, like going to the mall with the RSW, Carolyn was awake."

**309** Ms. Cott recalled that, over time, the Applicant advised her that she gained independence with grooming tasks, as of Ms. Cott's report of May 12, 2008. The Applicant advised Ms. Cott that she was no longer receiving assistance from her mother with washing her face and hands, shaving her legs and underarms, or looking after her fingers and toenails. When the Applicant moved in with Mr. Murray on April 24, 2008, she advised Ms. Cott that she was withdrawing her consent for Ms. Cott to speak to her parents. Ms. Cott testified that while the Applicant was residing with Doug Murray, Ms. Cott did not observe Bonnie Mooney in attendance at the apartment, and the Applicant did not report that her mother had been at the apartment providing attendant care to the Applicant. Ms. Cott testified that she did not make presumptions about her client's ongoing independence with personal care tasks, solely as a result of her changed living situation, but rather viewed the evidence comprehensively, and based on her ample training and experience.

**310** The Applicant's ability to utilize public transportation was explored as early as April 2008, as outlined in the May 12, 2008 report of Beverly Cott. Ms. Cott noted on examination that Carolyn did very well in a transportation assessment that she conducted with her. Carolyn was noted to be mindful of the bus routes, and appropriately scanned in all directions when she was crossing the street.

**311** As noted in her numerous progress reports, Ms. Cott testified that the Applicant's needs were not static over the more than two-and-a-half years she was treating the Applicant; her needs fluctuated, and Ms. Cott accounted for this as often as necessary, by preparing updated attendant care assessments, if and when necessary.

**312** Ms. Cott's opinion, based on her more than two-and-a-half years of treatment and 45 attendances with the Applicant, was that the Applicant's hypersomnolence was not something that raised a safety concern. Throughout her involvement in Carolyn's case, the Applicant always maintained the cognitive and physical ability to be able to respond to an emergency situation appropriately.

**313** Ms. Cott confirmed that, at no point in time, was there a suggestion that the Mooneys took issue with her assessments or recommendations, or that they wanted a new treating occupational therapist.

**314** Ms. Cott stopped working with the Applicant in September 2011, as Ms. Cott left her employ with Karen Rucas & Associates, and so the file had to be transferred to another therapist.

#### **The s. 44 Neuropsychologist, Dr. Lawrence Tuff**

**315** Dr. Lawrence Tuff, Neuropsychologist, completed a section 44 Neuropsychological and a Psychological

Assessment of Ms. Mooney. The assessments took place on December 14 and 17, 2010, and the resulting reports were dated January 27, 2011.

**316** Dr. Tuff reviewed the results of neurocognitive testing available in Dr. Voorneveld's report and in the report of Dr. Mary Stewart, completed through Holland Bloorview Kids Rehabilitation Hospital at three months post-accident. He also had access to the February 19, 2005 report of Dr. Sztabinski. He noted that:

It is not that often that you get a nice baseline measure of how well you expect the person to perform these standardized tests. And in her case, we had a baseline measure that was completed two years prior to the accident...so you have a baseline for predicting how well you would expect her to perform on subsequent assessment.

**317** Dr. Tuff opined that the neurocognitive test results obtained at Holland Bloorview Kids Rehabilitation Hospital three months post-accident showed that the Applicant was doing quite well from a cognitive perspective, in light of the mechanism of injury, noting that: "The results of that assessment are almost indistinguishable from the premorbid assessment in 2005. Now, there are some subtle possibly lower scores on things like processing speed. In fact, I mean, the scores are lower, but in fact, they are actually not even statistically lower."

**318** Dr. Tuff admits that scores on such neurocognitive testing are not a perfect measure of cognitive functioning. However, he opined that this testing is important, as it is an objective, standardized measure in which scores can be compared before and after, and to the normal population, and that random observations, anecdotal reports or descriptions of behaviour or self-reports of behaviour have their own variability and reliability issues, which you cannot necessarily measure well. Furthermore, his evidence was that the result of the neurocognitive testing served as a good predictor of performance in day-to-day living, because if there was a clear neuropsychological deficit, the Applicant's difficulty with day-to-day tasks would translate to an inability to apply themselves to the testing, even under ideal testing conditions.

**319** In regard to her pre-accident Bipolar Disorder, Dr. Tuff opined that the Applicant's condition was not entirely stabilized, pointing out that she was not doing well in school, was still under medical care, and had hospital admissions in the two years prior to the accident. He further testified that, as the Applicant's condition was not stabilized in terms of her pattern of functioning, one could not easily predict what her course her treatment and education would have taken, were it not for the accident.

**320** Dr. Tuff testified:

If you look at her profile and cognitive performance and emotional functioning, school functioning before the accident, take a look at the literature on bipolar and try to project forward on the basis of premorbid functioning on, you would predict that she would have difficulty with multiple things, including employment and mood control and socialization. That is the nature of bipolar disorder.

**321** Dr. Tuff did not find that Ms. Mooney sustained a complete inability to carry on a normal life. This was based not only on a comparison of her pre- and post-accident psychometric testing, but also on his clinical interview with Ms. Mooney, wherein she described what she was doing, her level of independence in her day-to-day life, and her continuing participation in remunerative employment.

**322** Unlike the Applicant's assessors and treatment providers, including Dr. Voorneveld and Dr. Frank, Dr. Tuff reviewed and commented on the pre-accident and post-accident psychiatry records from the Shaw/Mackenzie Clinic and Dr. Youssoufian.

**323** He found that the information contained therein regarding her pre-accident functioning was consistent with other pre-accident records that he was previously provided, including the school records. He opined that the Applicant's history preceding the accident consisted of fluctuating moods and functioning difficulties. He went so far as to opine that, on a comparison of her current functioning and her academic, social and psychological

circumstances on November 13, 2007, "you would be hard-pressed not to say that she is actually doing better after the accident."

**Findings -- comparing Ms. Mooney's pre-accident activities and life circumstances to her post-accident activities and life circumstances**

**324** I have compared Ms. Mooney's activities in which she ordinarily engaged, including those activities which she identified as being important to her pre-accident life, and her life circumstances over a reasonable period of time before the accident to her activities and life circumstances after the accident.

**325** I find that, as a result of the accident, the Applicant sustained impairments that affected her ability to engage in substantially all of the activities in which she ordinarily engaged before the accident. This finding is supported by the evidence of Carolyn Mooney, Bonnie Mooney, Beverly Cott, Dr. Voorneveld, Dr. Frank, Dr. Duncan, Dr. MacKay, Dr. Stewart, the Progress Reports of Nancy Lok of Karen Roucas & Associates, the initial Report and Progress Reports of Kim Wilson-Wiles, the Progress Reports of Kirsten Hadleycrane of Lawlor Therapy Support Services, and the Reports of Speech Language Therapists from Michelle Cohen & Associates. I accept this evidence and give weight to it.

**326** Based on the overall weight of the evidence, I find that, as a result of the November 14, 2007, motor vehicle accident, Ms. Mooney sustained: (1) a brain injury which exacerbated her pre-existing condition, including her pre-accident Bipolar Disorder; and (2) an independent psychological injury, an adjustment disorder, secondary to her brain injury, including clinically associated sequelae to such injuries.

**327** To qualify for non-earner benefits under section 2(4) of the 1996 *Schedule*, however, the Applicant must prove that, as a result of the accident, she sustained an impairment that continuously prevents her from engaging in substantially all of the activities in which she ordinarily engaged before the accident.

**328** I have scrutinized the Applicant's post-accident activities as a whole, and considered the manner in which those activities are performed and the quality of performance post-accident.

**329** Having carefully considered the evidence, I am of the view that the Applicant has failed to establish on a balance of probabilities that the changes in her post-accident life, from April 1, 2011, onwards, amounted to her being continuously prevented from engaging in substantially all of the activities in which she ordinarily engaged before the accident.

**330** Based on the evidence before me, and considering the manner in which Ms. Mooney's post-accident activities are performed and the quality of performance post-accident, I find that the degree to which Ms. Mooney can perform those activities is not sufficiently restricted that it can be said that she is truly continuously prevented from engaging in substantially all of those activities. Ms. Mooney's overall performance after the accident, viewed as a whole, is not so inconsistent with her demonstrated pre-accident potential that it can be determined that she was continuously prevented from engaging in school or in any of the activities in which she ordinarily engaged before the accident. I find that on April 1, 2011, and onwards, Ms. Mooney was back on a trajectory that was not significantly inconsistent with her pre-accident potential.

**331** I am unable to find that, on a balance of probabilities, Ms. Mooney will be unable to achieve any of "the activities which a student looks forward to," from the *Walker* decision, including work commensurate with experience and being able to live independently, as contended by the Applicant.

**332** In making these findings, I am cognizant of the requirement in section 2(4) of the 1996 *Schedule*, when determining whether a claimant has suffered a complete inability to carry on a normal life, to focus the inquiry on the particular claimant, not on some objective standard of normalcy.

**333** In my view, the claimant-focused inquiry, mandated by the language of section 2(4) of the 1996 *Schedule*,

relevant case law authorities, and pertinent arbitral jurisprudence, requires an examination of Ms. Mooney's life, before and after the accident, to determine whether she -- specifically -- suffered a complete inability to carry on a "normal life," as a result of the accident.

**334** One important change in Ms. Mooney's life has been the impact of the significant accommodations and supports that she had in place and has required in respect of many aspects of her life after the accident.

**335** The evidence shows, and I find, that Ms. Mooney had required and received significant school/educational and employment accommodations and extensive supports following the accident, and that Wawanesa has continued to pay for the treatment plans submitted by each member of Ms. Mooney's rehabilitation team for rehabilitation services provided to her from the date of the accident, November 14, 2007, to the present time.

**336** The Applicant argues that these significant supports and accommodations support the conclusion that Carolyn has suffered a complete inability to carry on a normal life under section 12(1)3 of the 1996 *Schedule*. I am unable to accept that argument. Pursuant to section 2(4) of the 1996 *Schedule*, a person is considered to have suffered a complete inability to carry on a normal life, if they have sustained an accident-related impairment "that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident." The conclusion sought by the Applicant does not follow logically from the premise that she has required and received a high level of support and accommodation in nearly every aspect of her life since the accident to assist her to engage in substantially all of the activities in which she ordinarily engaged before the accident. This underlying assumption does not, *per se*, support the conclusion that without the assistance of the post-accident supports and accommodations, Carolyn "suffers a complete inability to carry on a normal life," as defined in the 1996 *Schedule*. Because this argument is a *non sequitur*, it must fail.

**337** The Applicant submits that I should examine Ms. Mooney's life, **without regard to her post-accident accommodations and supports** when assessing the evidence to determine her entitlement to non-earner benefits. I reject this argument. To ignore Carolyn's post-accident supports and accommodations would: (1) incorrectly assume facts not proved by the evidence; (2) engage in impermissible speculation or conjecture based on hypothetical facts; and (3) improperly disregard clear and cogent evidence that is relevant -- logically probative to a material issue -- in this Arbitration proceeding. Furthermore, this approach would be inconsistent with the claimant-focused inquiry, that is, looking at Ms. Mooney's actual post-accident life, **with** her supports and accommodation, not without them, as mandated by the language of section 2(4) of the 1996 *Schedule*, and as interpreted by the pertinent case law authorities and arbitral jurisprudence.

**338** The Applicant relies on the opinions of Drs. Voorneveld and Frank, and contends that, if Ms. Mooney's post-accident support services were or will be taken away from her, she would not be able to function, including assuming full-time employment. I find that these opinions are unconvincing and I accord little weight to them, for the following reasons.

**339** First, these opinions are based on a substratum of facts -- Ms. Mooney's post-accident life without her supports and accommodations -- which have not been proved, exclusive of the evidence of these doctors, to my satisfaction in this Arbitration proceeding on the appropriate standard of proof: on a balance of probabilities. Therefore, these opinions are unacceptably speculative.

**340** Second, Dr. Voorneveld had no access to the Applicant's pre-accident psychological treatment records and grade school transcripts. Instead, she relied on the statements of the Applicant and those of her mother, which contained numerous inconsistencies and inaccuracies, particularly with respect to the Applicant's academics. Dr. Voorneveld was not aware of the entries in the Shaw Clinic's notes extending years prior to the accident, and listing regular issues Ms. Mooney had with socialization and general functioning in the family unit, school performance, her inability to cope with day-to-day stress, and her complaints of low motivation and focus, pre-accident.

**341** Third, Dr. Frank had not obtained a copy of Ms. Mooney's pre- and post-accident pediatric records from the Shaw Clinic/MacKenzie Health Clinic. He did not see Ms. Mooney's employment file, including performance

evaluations, from Home Depot. Instead, he relied on Ms. Mooney's subjective comments and speculation regarding her ability to function at work or to potentially take on more hours at work in the future.

**342** Fourth, Drs. Voorneveld and Frank were not provided with relevant pre- and post-accident documentation, including a copy of Ms. Mooney's complete psychiatric records and information from the Applicant, her school records and transcripts, and her employment file.

**343** In my view, because these opinions are based upon incomplete, inaccurate and unproven facts, they deserve little weight.

**344** The Applicant submits that I am entitled to draw an adverse inference from Wawanesa's continuing payment for a full complement of rehabilitation support services, and to find that those services are reasonable and necessary in order to assist Carolyn in engaging in the normal activities of daily living. I am unable to draw that inference. This argument conflates the test for entitlement to medical and rehabilitation benefits -- "reasonable and necessary" -- with the test for entitlement to non-earner benefits -- "complete inability to carry on a normal life" -- under sections 14, 15, and 12(1) 3, respectively, of the 1996 *Schedule*.

**345** Further evidence before me that supports the conclusion that the Applicant did not "suffer a complete inability to carry on a normal life as a result of the accident," because "as a result of the accident, she did not sustain an impairment that continuously prevents her from engaging in substantially all of the activities in which she ordinarily engaged before the accident," under sections 12(1)3 and 2(4) of the 1996 *Schedule*, includes the following:

- (1) The evidence of Beverly Cott, the treating Occupational Therapist to September 2011, and her initial report, dated February 19, 2008;
- (2) The evidence of Dr. Lawrence Tuff, Neuropsychologist, his Psychological Report, dated January 27, 2011, and his Neuropsychological File Review, dated January 27, 2011;
- (3) Executive Summary of Dr. Sheldon Levy, dated January 27, 2011;
- (4) Neurological Assessment Report of Dr. Gary Moddel, dated January 27, 2011;
- (5) Functional Abilities Evaluation of Colleen Barnier-Forrester, dated December 15, 2010; and
- (6) Orthopaedic Assessment Report of Dr. Stephen Gallay, dated January 27, 2011.

**346** I am persuaded by, and accept, the evidence that Ms. Mooney did not suffer a complete inability to carry on a normal life, in the Multidisciplinary Assessments of the Applicant, completed by Colleen Barnier-Forrester, Kinesiologist, Dr. Lawrence Tuff, Psychologist, Addie Greco-Sanchez, Vocational Assessor, Dr. Gary Moddel, Neurologist, and Dr. Stephen Gallay, Orthopaedic Surgeon, to determine Ms. Mooney's entitlement to non-earner benefits under the 1996 *Schedule*.

**347** I am particularly persuaded by the clear evidence of Dr. Tuff, that Ms. Mooney did not sustain a complete inability to carry on a normal life. I accept this evidence, and that of the multidisciplinary assessors, and give it significant weight. Dr. Tuff testified in a straightforward manner and was an impressive witness. His evidence is consistent with the preponderance of probabilities, and is reasonable in the circumstances of this case. I was impressed with his expert qualifications, reputation, objectivity, demeanour, and his performance under a thorough cross-examination. His methodology, reasoning and analytical process by which he reached his conclusions were compelling. His expert opinion was founded on a factual foundation which was proved to my satisfaction, on a balance of probabilities. While Dr. Tuff did not direct or participate in any of the treatment of Ms. Mooney following her motor vehicle accident of November 14, 2007, and he was not involved in the rehabilitation or treatment of her pre-accident condition, his conclusion was based not only on a comparison of Ms. Mooney's pre- and post-accident psychometric testing, but also on her clinical interview, in which she described what she was doing, her level of independence in her day-to-day life, and her continuing participation in remunerative employment. Dr. Tuff also reviewed and commented on the pre- and post-accident psychiatry records from the Shaw/MacKenzie Clinic and



Dr. Youssoufian. Dr. Tuff was fully aware of Ms. Mooney's pre- and post-accident academic performance since he reviewed and considered her high school and college transcripts prior to giving evidence. In addition, Dr. Tuff considered the specific test for entitlement to non-earner benefits under the 1996 *Schedule*, namely, whether Ms. Mooney suffered a complete inability to carry on a normal life, in both of his reports and in his testimony.

**348** I am not persuaded by the evidence of Dr. Voorneveld, Dr. Frank, Dr. Duncan, Dr. MacKay, Dr. Stewart, Dr. Boulos, Dr. Rumney, Dr. Young, and each of the therapists who have worked with Ms. Mooney, in relation to whether she suffered a complete inability to carry on a normal life as a result of a injuries sustained in the motor vehicle accident of November 14, 2007. While this evidence related to the deficits/impairments arising from Ms. Mooney's injuries suffered in the accident, and to how those impairments have affected Carolyn's normal activities of daily living, it did not directly or sufficiently address the critical question. Dr. Voorneveld did not provide an opinion that the Applicant suffered a complete inability to carry on a normal life as a result of her injuries from the accident, either in her report or in her testimony. Dr. Frank did not specifically comment in his direct examination or in his report as to whether the Applicant suffered a complete inability to carry on a normal life as a result of the accident. His testimony simply concluded that Ms. Mooney would have difficulty maintaining full-time employment without experiencing significant emotional deterioration, if her support team was taken away.

**349** I find this evidence unconvincing and I place little weight on it.

**350** I, therefore, conclude that Ms. Mooney is not entitled to receive a non-earner benefit of \$320.00 per week from April 1, 2011, to date and ongoing, pursuant to section 12 of the 1996 *Schedule*.

#### **ATTENDANT CARE BENEFITS**

**351** The Applicant claims payment by Wawanesa of an Attendant Care Benefit, from February 15, 2008, to date and ongoing, less amounts paid by Wawanesa, in accordance with the Form 1s (Assessments of Attendant Care Benefits) completed by Robin Kadanoff, dated June 25, 2010, May 28, 2012 and March 1, 2013, in the following amounts:

- (a) February 15, 2008 to April 15, 2008 \$3,768.43/ month
- (b) April 16, 2008 to May 20, 2010 \$3,620.94/month
- (c) May 21, 2010 to January 27, 2011 \$2,879.27/month
- (d) January 28, 2011 to April 23, 2012 \$2,737.87/month
- (e) April 24, 2012 to February 25, 2013 \$454.37/month
- (f) February 26, 2013 to July 13, 2013 \$423.10/month
- (g) July 13, 2013 to Arbitration & continuing \$607.87/ month

#### **The Law**

**352** Under section 16 of the 1996 *Schedule*, an insurer is required to pay an attendant care benefit for all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of the accident for services provided by an aide or attendant. The monthly amount payable shall be determined in accordance with Form 1.<sup>15</sup>

**353** The term "incurred," which is used but not defined in the 1996 *Schedule*, is given a broad interpretation such that the "insured... need not actually receive the items or services or spend the money or become legally obliged to do so...if the reasonable necessity of the service or item and the amount of the expenditure determined with certainty," and is calculated in accordance with a Form 1, which is a question of fact in each case.<sup>16</sup> A person may be entitled to attendant care benefits prior to the submission of a Form 1 (retroactive attendant care benefits), under

the 1996 *Schedule*, where the evidence prior to the receipt of the Form 1 reflects the assessment contained in the Form 1, in light of the evidence at the relevant times.<sup>17</sup>

## Background

**354** Occupational Therapist and Certified Life Care Planner, Robin Kadanoff, of Inter-Action Rehabilitation, was retained by counsel for Carolyn Mooney to perform a present, future, and retroactive assessment of Carolyn's attendant care needs in or about May of 2010. Ms. Kadanoff performed an assessment at Carolyn's home, with Carolyn and her mother present on May 21, 2010, and June 11, 2010. Ms. Kadanoff assessed Carolyn's attendant care needs over three periods:

- (a) February 15, 2008 to April 15, 2008;
- (b) April 16, 2008 to May 20, 2010; and
- (c) May 21, 2010 (Carolyn's needs as at the time of the assessment), forward.

**355** Ms. Kadanoff prepared an initial report, dated June 25, 2010, which outlined her findings in regard to Carolyn's attendant care needs for each of these three periods.

**356** The initial retroactive period assessed by Ms. Kadanoff ran from the time Carolyn returned home from hospital (when Carolyn required the most attendant care), through to the time when she first began demonstrating some changes in her functioning, which would affect the amount of attendant care Carolyn required.

**357** Ms. Kadanoff chose the period from April 16, 2008 to May 20, 2010, as the second period of assessment, because it represented a time period where Carolyn's attendant care needs were similar.

**358** For the final period of assessment from April 16, 2008 through to May 20, 2010, Ms. Kadanoff relied upon discussions with Carolyn and her mother, the progress reports of Ms. Cott dated January 5, 2009, and September 24, 2009, and medical reports, including the reports of Tharsi Sivapalam, OT dated April 20, 2008, Dr. Frank dated December 18, 2008, May 15, 2009 and November 26, 2009, the Catastrophic Paper Review Report dated December 24, 2008, the RSW reports of Ava Kolodziej dated February 28, 2009, and September 30, 2009, discussions with Carolyn following her participation in the Turning Point Program, the Neuropsychological Report of Dr. Duncan, and Dr. Doxey's report of December 13, 2009.

**359** A further assessment of attendant care needs was performed by Ms. Kadanoff on April 24, 2012, culminating in a report dated May 28, 2012. This assessment followed an insurer's assessment of attendant care needs performed by Luciana Zazzara, dated February 18, 2011.

**360** Ms. Kadanoff's further attendant care assessments were based on an assessment of Carolyn on April 24, 2012, discussions with Carolyn's mother at that time, and are full of further medical information, as outlined in Appendix "B" of Ms. Kadanoff's report.

**361** In or about February of 2013, Wawanesa requested an updated attendant care assessment of Carolyn. Ms. Kadanoff was requested to perform a reassessment of Carolyn's attendant care needs at that time.

**362** For the purposes of this assessment, Ms. Kadanoff again interviewed Carolyn and her mother on February 26, 2013, and reviewed further medical reports, which are listed in Appendix "A" of Ms. Kadanoff's report, dated March 1, 2013.

**363** Ms. Zazzara provided a responding assessment to Ms. Kadanoff's assessment. Ms. Zazzara's report is dated March 20, 2013. Ms. Kadanoff, then provided a rebuttal to Ms. Zazzara's report, which contained a further assessment and Form 1, dated July 13, 2013.

### The Issues

**364** Up to March 9, 2011, the Applicant was paid attendant care benefits as per the various Form 1s submitted by her treating occupational therapist, Ms. Beverly Cott. As of March 10, 2011, the Applicant has been paid attendant care benefits as per the January 28, 2011 Form 1 of Ms. Luciana Zazzara, an occupational therapist.

**365** The issue in dispute is whether additional attendant care benefits should be paid to the Applicant pursuant to the various Form 1s (3 of them retroactive) of Ms. Robin Kadanoff. Ms. Kadanoff was retained by the Applicant's representative in 2010 to perform a medical-legal attendant care assessment.

**366** Ms. Kadanoff's Form 1s recommended a higher level of attendant care assistance than had previously been recommended. For the most part, this difference is attributable to Ms. Kadanoff's retroactive opinion that -- up to her attendance on April 24, 2012 -- the Applicant needed 9-12 hours of supervisory care every night in order to ensure her safety in the event of an emergency.

**367** For ease of reference, these assessors' various Form 1 quantum have been reproduced below, together with an indication whether or not nighttime supervision was recommended as part of the assessment:

<u>Cott/Zazzara Form 1s</u>	*	<u>Kadanoff Form 1s</u>	*
February 19, 2008: \$578.88/month	X	May 21, 2010 (retroactive for February 15, 2008 to April 15, 2008 period): \$3,768.43/month	√
May 12, 2008: \$95.62/month	X		
July 18, 2008: \$75.19/month	X		
August 6, 2008: \$120.29/month	X	May 21, 2010 (retroactive for April 16, 2008 to May 20, 2010 period): \$3,620.94/month	√
December 18, 2008: \$253.65/month	X		
February 18, 2010: \$331.27/month	X	May 21, 2010: \$2,879.27/month	√
January 28, 2011: \$446.03/month	X	April 24, 2012: (retroactive for January 28, 2011 to April 23, 2012 period): \$2,737.87/month	√
		April 24, 2012: \$454.37/month	X
March 20, 2013: \$281.90/month	X	February 26, 2013: \$423.10/month	X
		July 15, 2013: \$607.87/month	X

**368** As demonstrated by the above chart, once the issue of nighttime supervision is dispensed with, the additional

attendant care benefits claimed by the Applicant pursuant to Ms. Kadanoff's reports are similar to those already paid by Wawanesa pursuant to Ms. Cott's and Ms. Zazzara's reports.

**Did the Applicant reasonably require nighttime supervision from February 15, 2008 to April 24, 2012?**

**369** Based on the totality of the evidence, I find that the Applicant has established on a balance of probabilities that she reasonably required nighttime supervision from February 15, 2008 to April 24, 2012.

**370** I accept the evidence of Dr. Voorneveld, and find that as a result of Carolyn's injuries sustained in the motor vehicle accident of November 14, 2007, which exacerbated her pre-existing condition, Carolyn would require ongoing supports for the rest of her life, including ongoing attendant care, particularly, daytime monitoring due to her behavioural problems, and evening monitoring because Carolyn was still having issues with hypersomnolence (a sleep-wake disorder, the main symptom of which was prolonged nighttime sleep).

**371** The preponderance of the evidence supports the conclusion, and I find, that the Applicant reasonably required nighttime supervision during the disputed timeframe, for her own safety and that of others around her, due to her inability or diminished capacity to respond to an emergency.

**372** Wawanesa submits that no nighttime emergency ever occurred during the disputed timeframe and, as such, supervision was not reasonable or necessary. I am unable to accept this argument. This approach -- looking backward **after** an assessment has already been completed to determine whether an Occupational Therapist's assessment at the time was reasonable or necessary -- would undermine the necessity for a contemporaneous assessment of attendant care needs, and would be inconsistent with the Ontario Society of Occupational Therapists' ("OSOT") Manual, which governs how attendant care assessments are to be conducted.

**373** The OSOT Manual makes it clear that an assessment of attendant care needs must be based on an insured's "needs" during the time period considered in the assessment, irrespective of what others may be doing for the insured person. In the section of the Manual outlining Guiding Principles, the Manual states, at page 8:

**When using the Form 1, occupational therapists are responsible to assess to determine those activities that the client is not able to do for themselves as a result of injuries sustained in the accident as opposed to determining what they have others doing for them. This will identify and validate appropriate needs for attendant care.**

**The therapist's role is to determine the extent to which the client can perform the skills and activities identified on the Form 1, safely and functionally and to objectively identify what assistance, if any, is needed from the present time into the future until such re-assessment may identify modified needs. (underlining added)**

**374** I find that the Applicant has provided sufficient evidence of the nature of the attendant care services claimed, the identity of the individuals or type of people providing the care, and the times this assistance was required or provided.

**375** In conclusion, I find that Applicant reasonably required the nighttime supervision services in question from February 15, 2008 to April 24, 2012, and that the expenses claimed have been established with certainty, and in accordance with a Form 1.

**Whose Form 1s should be accepted?**

**376** I prefer the evidence, including the Form 1 opinions, of Robin Kadanoff over that of Beverly Cott. I accept the evidence of Ms. Kadanoff and give it significant weight. I give less weight to Ms. Cott's evidence. My reasons for these conclusions follow.

**377** As part of her assessment, Ms. Kadanoff reviewed a complete medical brief regarding Carolyn's injuries following the accident, and also reviewed the report of Beverly Cott, dated February 3, 2010.

**378** As explained by Ms. Kadanoff, the hourly rates on the Form 1 are legislated hourly rates, and the appropriate hourly rates are reproduced on the Form 1 for each period. In addition, Ms. Kadanoff followed the Resource Guide from the OSOT in completing the Form 1.

**379** Ms. Kadanoff testified that the Professional Guidelines for occupational therapists provide instructions to occupational therapists about how to conduct retroactive assessments. It is important for the assessor to review the medical documentation which existed at the time the assessment is intended to cover, and to speak with the claimant, her family and other persons who would be able to assist the assessor in determining the amount of attendant care necessary for each retroactive period. Ms. Kadanoff interviewed Carolyn and her mother to determine how Carolyn was functioning during each retroactive period. In addition, Ms. Kadanoff reviewed the extensive medical documentation, including treatment provider records, to gather evidence to support the level of attendant care Carolyn required during each retroactive period.

**380** Ms. Cott's assessments failed to properly capture the full extent of the care Carolyn required and the amount of cueing and supervision being provided by Carolyn's family, and, in particular, her mother. Examples include the following:

- (a) Ms. Cott testified that if Bonnie Mooney gave evidence about cueing or other attendant care services she was providing to Carolyn at various times since the accident, Ms. Cott would have no reason to believe that Mrs. Mooney wasn't being truthful;
- (b) Ms. Cott acknowledged the major difference between her assessment and Ms. Kadanoff's assessment was the issue of supervision during nighttime hours;
- (c) Instead of assessing Carolyn's needs based on known deficits/conditions Carolyn was suffering from, Ms. Cott relied on Carolyn (a head injured patient) and Carolyn's family to advise what attendant care needs Carolyn may have had. In cross-examination, Ms. Cott acknowledged that Carolyn and her family would have relied upon Ms. Cott to tell them what attendant care needs Carolyn would have at various stages post-accident;
- (d) Ms. Cott also admitted that she was aware of Carolyn's sleeping issue well before Ms. Kadanoff did her assessment, and that she was aware that Carolyn's sleeping problem was also interfering with her rehabilitation, because Carolyn often would not be awake in the morning when therapists arrived.
- (e) Carolyn's mother acknowledged that she did not consider the issue of Carolyn's inability to respond to an emergency until Ms. Kadanoff raised the issue in her assessment. Ms. Cott admitted in cross-examination that nobody, including her, had thought of Carolyn's inability to wake to an alarm in the evening until Ms. Kadanoff raised the issue in her assessment;
- (f) Ms. Cott expected Carolyn and her mother to think of Carolyn's potential safety needs in the evening (due to Carolyn's inability to wake to an alarm). She thus expected people not professionally qualified to think of an attendant care need, which Ms. Cott, as a professional Occupational Therapist, did not think of herself;
- (g) Ms. Cott agreed in cross-examination that, if Carolyn could not wake up to an alarm in the middle of the night, or if she could not appreciate that the alarm was going off, it would not have been safe to leave Carolyn alone at night;
- (h) Ms. Cott agreed in cross-examination that according to the OSOT Manual, used by Occupational Therapists to guide them in conducting attendant care assessments, nighttime supervision is to be assessed from the time a person goes to bed to the time they wake. In addition, the assessment of nighttime supervision is to be considered as if the person being assessed is alone in the house.

Occupational Therapists are not to discount the attendant care needs in the evening because other family members may be present in the home.

- (i) Ms. Cott failed to follow the OSOT Manual in relation to how attendant care services for people suffering cognitive limitations are to be recorded on the form. The Manual, at page 17, states:

For those clients with cognitive limitations, consideration of the need for attendant care services to provide ongoing cueing and prompts in order to complete the task is important. If appropriate, the time allotment for such support should be included in each area of the *Assessment of Attendant Care Needs* (Form 1).

- (j) On numerous occasions (as pointed out by Ms. Kadanoff), Ms. Cott simply put a minimal amount of time toward cueing by lumping it under a general category, rather than applying the need for cueing to the specific task or area of the Form 1 where it should have been applied.
- (k) Ms. Kadanoff properly assessed the attendant care need, as it pertained to safety, whereas Ms. Cott did not. Ms. Kadanoff made a recommendation in her June 25, 2010, report that a Silent Call Shake-Up It with vibrator (a smoke alarm which vibrates and is typically used for the hearing impaired), be trialed, in an attempt to deal with Carolyn's inability to respond to an emergency while sleeping. Ms. Kadanoff made this recommendation as a means to reduce attendant care needs, if Carolyn was able to use this device effectively;
- (l) Ms. Cott was aware, or should have been aware, that Carolyn's sleeping problem created an issue with regard to safety and the need for attendant care, or some other manner to ensure her safety, because: (i) Ms. Cott began to trial different devices which were recommended by Ms. Kadanoff (i.e. shaker alarm clock; emergency bed shaker), and (ii) Ms. Cott ultimately made a recommendation for the bed shaker to Wawanesa. However, Ms. Cott's assessment failed to include any amount under the "Supervisory Care-Inability to respond to an emergency" category of the Form 1;
- (m) Ms. Cott's assessments inexplicably provide different amounts for certain sections of the Form 1, during a period where Carolyn's needs were relatively stable;
- (n) Ms. Cott admitted in cross-examination that her opinion was that Carolyn's bipolar disorder was exacerbated by the accident. However, she did not include in her attendant care assessment anything for mood management; and
- (o) Ms. Cott admitted in cross-examination that despite reviewing information from Dr. Boulos, which stated that Carolyn's mood was getting worse following the accident, Ms. Cott did not add anything to her attendant care assessment to deal with this issue.

**381** Regarding the latter two periods, i.e. the period January 28, 2011 to March 23, 2012 and the period April 24, 2012 to February 26, 2013, I prefer and accept the evidence, including the assessments of attendant care, of Robin Kadanoff over that of Ms. Zazzara, because:

- (a) The Zazzara assessment, like the Cott assessment, did not take into account supervision at night while Carolyn was unable to respond to an emergency alarm during the period January 28, 2011 through March 23, 2012. By the time of the Zazzara assessment, Carolyn's inability to respond to an emergency alarm due to her sleeping issue was clearly established, and Ms. Zazzara was aware, or should have been aware, that Ms. Cott had been attempting to deal with the issue of hypersomnolence by use of some type of shaking alarm device. This notwithstanding, Ms. Zazzara's assessment fails to take nighttime supervision into account; and
- (b) The Zazzara assessment failed to include any amount for supervising Carolyn when attempting to walk in the community, due to Carolyn's condition of pedestrian anxiety, despite medical reports (Dr. Frank and other therapists) which clearly documented that Carolyn had developed that condition.

**382** I also prefer and accept the evidence, including the assessments of attendant care, of Robin Kadanoff, for the

periods January 28, 2011 to March 23, 2012 and March 24, 2012 to February 24, 2012 and for February 24, 2013, onwards, over that of Ms. Zazzara. I find that Ms. Zazzara's assessments were incomplete, and did not capture all of the attendant care Carolyn required. In addition, there were new issues which developed (i.e. the illness while at the retreat which Carolyn could not independently cope with), which had not occurred at the time of Ms. Zazzara's assessment, and consequently, she did not have an opportunity to consider the attendant care needs for emergency situations.

**383** Having considered the evidence, I find that the Applicant has met the evidentiary burden of substantiating her need for the attendant care outlined in the Form 1s, and that the expenses claimed are reasonable, and have been properly calculated in accordance with a Form 1.

**384** Accordingly, for the reasons stated, I find that the Applicant is entitled to attendant care benefits from the date she was released home from the hospital, February 15, 2008, to date and ongoing, less amounts paid by Wawanesa, as follows:

- (a) February 15, 2008 to April 15, 2008 \$3,768.43/month
- (b) April 16, 2008 to May 20, 2010 \$3,620.94/month
- (c) May 21, 2010 to January 27, 2011 \$2,879.27/month
- (d) January 28, 2011 to April 23, 2012 \$2,737.87/month
- (e) April 24, 2012 to February 25, 2013 \$454.37/month
- (f) February 26, 2013 to July 13, 2013 \$423.10/month
- (g) July 13, 2013 to date and ongoing \$607.87/month

## **HOUSEKEEPING AND HOME MAINTENANCE**

**385** The Applicant claims housekeeping and home maintenance benefits in the amount of \$100.00 per week from February 15, 2008 to date and ongoing, less amounts paid by Wawanesa, pursuant to section 22 of the 1996 *Schedule*.

### **The Law**

**386** Under section 22 of the 1996 *Schedule*, Wawanesa must pay for reasonable and necessary additional expenses incurred by or on behalf of the Applicant up to a maximum of \$100.00 per week for housekeeping and home maintenance services if, as a result of the accident, the Applicant sustained an impairment that resulted in a substantial inability to perform the housekeeping and home maintenance services that she normally performed before the accident.

### **The Issues**

**387** Is Ms. Mooney entitled to housekeeping and home maintenance benefits in the amount of \$100.00 per week from February 15, 2008, to date and ongoing, less amounts paid by Wawanesa, pursuant to section 22 of the 1996 *Schedule*?

### **Findings, Analysis and Conclusions**

**388** I am of the view that Ms. Mooney is entitled to housekeeping and home maintenance benefits from February 15, 2008, to date and ongoing, less amounts paid by Wawanesa, pursuant to section 22 of the 1996 *Schedule*.

**389** I agree with Wawanesa that the evidence shows that prior to the accident there was tension at times between

Ms. Mooney and her mother with regard to her lack of motivation in completing housework; and that at the time of the accident, Ms. Mooney's mother was responsible for the majority of the housekeeping tasks.

**390** I also accept the evidence of Beverly Cott, Ms. Mooney's initial treating Occupational Therapist, that Ms. Mooney spent approximately 2.75 hours a week assisting with cooking and house duties prior to the accident, including time for assisting with preparing one to two family dinners per week and with assisting with laundry; that Ms. Mooney was feeling substantially able to participate in the cleaning tasks while living with her then boyfriend in July, 2008; and that she cited only meal preparations with the stove top or oven and independent grocery shopping to be problematic.

**391** I agree with Wawanesa that the evidence at the Hearing and as contained in the documentation filed supports a finding that Ms. Mooney was responsible for few housekeeping duties pre-accident, and that at times Ms. Mooney had poor follow-through in completing those tasks before the accident took place.

**392** However, in my view, the preponderance of the evidence supports the conclusion, and I find, that as a result of the accident, Ms. Mooney sustained an impairment that resulted in a substantial inability to perform the housekeeping and home maintenance services that she normally performed before the accident. It further shows, and I find, that Ms. Mooney reasonably requires additional expenditures on her behalf, as a result of the accident, for housekeeping and home maintenance services.

**393** These findings are supported by the evidence, which I accept, of Robin Kadanoff, including her Reports, dated May 28, 2012, and March 1, 2013, the evidence of the Applicant, and that of her mother, Bonnie Mooney.

**394** Ms. Kadanoff assessed Carolyn's housekeeping needs in her report of May 28, 2012. At that time, Ms. Kadanoff assessed that Carolyn required 5 hours per week of housekeeping assistance because she was essentially unable to assist with housekeeping following the accident, up to the time of Ms. Kadanoff's assessment. At the time of Ms. Kadanoff's assessment, Carolyn was only capable of very occasionally assisting with her laundry, as compared to just over 5 hours per week Carolyn spent on assisting with multiple housekeeping duties prior to the accident. On weeks where Carolyn could assist with laundry, the housekeeping assessment would be 4 hours per week. This information was also confirmed by Carolyn's mother, Bonnie Mooney, in her testimony. Ms. Kadanoff testified that housekeeping services from an outside agency would cost anywhere between \$23-\$30 per hour. Carolyn has claimed the sum of \$100.00 per week for housekeeping from February 15, 2008.

**395** I find that prior to the accident Carolyn performed the following household duties:

- a) Assisted with family meals (2-4 hours/week)
- b) Tidied her room (up to 30 min/week)
- c) Assisted with general tidying of house (up to 30 min/week)
- d) Assisted with sweeping and vacuuming (up to 60 min/ week)
- e) Accessed the mail (up to 5 min/week)
- f) Completed laundry (up to 60 min/week)

**396** A further housekeeping assessment was undertaken by Ms. Kadanoff on February 26, 2013. In her report, dated March 1, 2013, Ms. Kadanoff assessed that Carolyn was only engaging in two housekeeping tasks, completing her own laundry and cleaning the toilet bowl in her bathroom, although according to the RSW reports, these housekeeping duties were still being performed inconsistently by Carolyn. Ms. Kadanoff assessed Carolyn's housekeeping requirements at 4 hours per week, at this time.

**397** Using the lowest figure for the cost of an outside housekeeper which was provided by Ms. Kadanoff (\$23/hr), I find that Ms. Mooney reasonably required additional expenses for housekeeping and home maintenance services in



the maximum amount of \$100.00/week from February 15, 2008 to February 26, 2013 (i.e. 5 hours x \$23/hr = \$115.00 which exceeds the maximum), and in the amount of \$92.00 per week from February 27, 2013, to date and ongoing, less amounts paid by Wawanesa, pursuant to section 22 of the 1996 *Schedule*.

### **COST OF EXAMINATIONS**

**398** The Applicant claims payment for the following costs of examinations, pursuant to sections 24 and 42.1 of the 1996 *Schedule*:

- (a) \$5,298.89 for a section 24 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated June 25, 2010;
- (b) \$3,149.89 for a section 25 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated May 28, 2012;
- (c) \$1,969.81 for a section 25 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated March 1, 2013; and
- (d) \$2,600.00 for a Rebuttal to an Insurer Examination provided by Dr. Jeremy Frank, Psychologist, dated September 15, 2011.

### **The Law**

#### **Reasonableness and Necessity**

**399** In assessing whether a proposed cost of examination is reasonable or necessary under section 24 of the 1996 *Schedule*, the following factors may be considered:

- (a) Whether the assessment was conducted for the purposes of the *Schedule*;
- (b) Whether it was reasonable to conduct in light of the benefits in issue;
- (c) Whether the tests were necessary given available information from other sources; and
- (d) Whether the fees charged are reasonable.<sup>18</sup>

#### **Transitional Policies under the 2010 Schedule ("the 2010 Schedule")**

**400** Effective September 1, 2010, the *Statutory Accident Benefits Schedule* -- Effective September 1, 2010 (the "New Regulation") came into force.

**401** The transitional rules in the 2010 *Schedule* provide that, subject to certain exceptions, benefits that would have been available pursuant to the *Statutory Accident Benefits Schedule* -- *Accidents on or after November 1, 1996* ("the 1996 *Schedule*") shall be paid under the 2010 *Schedule*, but in the amounts determined under the 1996 *Schedule*, other than under section 24 (Cost of the Examinations) of the 1996 *Schedule*, or under subsections 25(1), (3), (4), and (5) of the 2010 *Schedule*.<sup>19</sup>

**402** Section 24(1) 6 of the 1996 *Schedule* provides that:

The insurer shall pay the following expenses incurred by or on behalf of an insured person for reasonable fees charged by a member of a health profession for preparing an assessment of an attendant care needs under section 39.

**403** Under sections 42.1(3), 3(1.2), and 3(1.3) of the 1996 *Schedule*, rebuttal reports were eligible for payment by the Insurer, until August 31, 2010.

**404** Pursuant to section 3(1.4) of the 1996 *Schedule*, an amount that would, but for subsection 3(1.3) be paid under the 1996 *Schedule* after August 31, 2010, shall be paid under the 2010 *Schedule*, but in the amount determined under, *inter alia*, subsection 25(5) of the 2010 *Schedule*.

**405** Subsection 25(5) of the 2010 *Schedule* provides, in part, that despite any other provision of this Regulation, an insurer shall not pay more than a total of \$2,000.00 in respect of fees and expenses for conducting any one assessment or examination and for preparing reports in connection with it, whether it is conducted at the instance of the insured person or the insurer.

### **Wawanesa's Position**

**406** Wawanesa takes the position that the Applicant has not met the burden of proof with respect to the reasonableness and necessity of the three attendant care reports and the rebuttal report claimed, as per the *Tesfai* decision.

**407** Further, or alternatively, Wawanesa submits that, since Ms. Mooney's motor vehicle accident occurred on November 14, 2007, her motor vehicle liability insurance policy with Wawanesa qualifies as a "transitional policy" under the 2010 *Schedule*. As a result, the costs of the Attendant Care Reports, dated May 28, 2012, and March 1, 2013, and the Rebuttal Report, dated September 15, 2011, claimed by the Applicant, are capped at a total of \$2,000.00 in respect of fees and expenses for each report, pursuant to the funding limits in subsection 25(5) of the 2010 *Schedule*.

### **Findings, Analysis and Conclusions**

**408** Having considered the evidence, I am satisfied that the Applicant has met the burden of proof with respect to reasonableness and necessity of the costs of the four reports claimed by her, as per the *Tesfai* decision. I find that all three of the Attendant Care Reports prepared by Ms. Kadanoff were necessary to calculate the Attendant Care Benefits which the Applicant submits ought to have been paid under the 1996 *Schedule* by Wawanesa since the date Ms. Mooney was released home from hospital. Moreover, these reports contain rebuttals of the Insurer's assessments and it would have been unfair to the Applicant to have proceeded to Arbitration without the benefit of these assessments and rebuttal reports from Ms. Kadanoff.

**409** I also find that the Rebuttal report of Dr. Frank was reasonably required for the purposes of: (1) having Dr. Frank give expert evidence at the Arbitration Hearing, and (2) an aid to Wawanesa in making or re-visiting its determination on entitlement at any stage in the claims process.

**410** I agree with Arbitrator Wilson who stated in the *R.J. and Dominion of Canada General Insurance Company* decision,<sup>20</sup> that:

Having a rebuttal report available can assist an insurer in making a fair determination and, to an arbitrator hearing this matter, should streamline the process by drawing together and placing in a medical context the alleged shortcomings of the insurer's medical legal reports.

**411** Subject to my findings below relating to the funding limits in subsection 25(5) of the 2010 *Schedule*, I am of the view, and find, that the costs of the three Attendant Care Reports and the Rebuttal Report claimed by the Applicant are reasonable. I find them to be "within the limits of reason; not greatly less or more than might be expected; inexpensive not extortionate; tolerable; fair."<sup>21</sup>

**412** That stated, however, I also find that because Ms. Mooney's motor vehicle accident occurred on November 14, 2007, her motor vehicle liability insurance policy with Wawanesa qualifies as a "transitional policy" under the 2010 *Schedule*. As a consequence, the costs of the Attendant Care Reports, dated May 28, 2012, and March 1, 2013, prepared by Ms. Kadanoff, and the Rebuttal Report, dated September 15, 2011, prepared by Dr. Frank, claimed by

the Applicant, are capped at a total of \$2,000.00 in respect of fees and expenses for each report, pursuant to the funding limits in subsection 25(5) of the 2010 *Schedule*.

**413** As a result, I find that Ms. Mooney is entitled to payment for the following costs of examinations, pursuant to sections 24 and 42.1 of the 1996 *Schedule* and subsection 25(5) of the 2010 *Schedule*:

- (a) \$5,298.89 for a section 24 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated June 25, 2010;
- (b) \$2,000.00 for a section 25 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated May 28, 2012;
- (c) \$1,969.81 for a section 25 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated March 1, 2013; and
- (d) \$2,000.00 for a Rebuttal to an Insurer's Examination provided by Dr. Jeremy Frank, Psychologist, dated September 15, 2011.

## REHABILITATION BENEFITS

**414** The Applicant claims the following rehabilitation benefits, pursuant to section 15 of the 1996 *Schedule*:

- (a) \$1,106.72 for public transit costs to school incurred from January 8, 2013 to December 16, 2013;
- (b) \$125.00 for the costs of rewriting her driving test; and
- (c) \$33.89 for an Ikea shoe cabinet as claimed on September 10, 2014.

## The Law

**415** The burden of proof rests with Ms. Mooney. She must prove on a balance of probabilities that she is entitled to each benefit claimed.

**416** For a rehabilitation benefit to be payable, it must be reasonable and necessary, incurred and undertaken, for the following specified purposes:

- (1) To reduce or eliminate the effects of any disability resulting from the impairment; or
- (2) To facilitate the insured person's reintegration into his or her family, the rest of society and the labour market.<sup>22</sup>

**417** There must be evidence that the rehabilitation benefit in question is reasonable and necessary to reduce the effects of an accident-related disability or to facilitate the insured's reintegration into his or her family, the rest of society and the labour market. It is insufficient that the benefit claimed is simply helpful in some generic sense.<sup>23</sup>

**418** To be recoverable, the rehabilitation benefit claimed must come under subsection 15(5) of the 1996 *Schedule*, including the catch-all paragraph 15(5)(l), "other goods and services that the insured person requires, except services provided by a case manager".

## Findings, Analysis and Conclusions

**419** For the following reasons, this claim is dismissed.

**\$1,106.72 for public transit costs (GO train) to school incurred from January 8, 2013 to December 16, 2013**

**420** This claim for public transit costs was submitted to Wawanesa by letter dated June 25, 2014. Bonnie Mooney gave evidence that this cost was related to Carolyn's Presto card which she used to pay for the GO train ride from her home in King City to George Brown's campus in downtown Toronto. However, no evidence was provided by the Applicant to indicate that this was a reasonable and necessary medical or rehabilitation expense, or even one related to an injury or impairment.

**421** No evidence was provided to establish that Carolyn Mooney required these travel costs to access medical or rehabilitation benefits.

**422** Bonnie Mooney, on cross-examination, admitted that the Applicant would have incurred expenses related to travelling to work or college, regardless of whether or not the accident occurred.

**\$125.00 for the cost of rewriting her driving test**

**423** No evidence was led by the Applicant to indicate that this was a reasonable and necessary medical or rehabilitation expense. It was not submitted for approval under a treatment plan, as required under the section 38 of the 1996 *Schedule*. Instead, it was simply submitted to Wawanesa for payment -- without explanation -- under an OCF-6 Application for Expenses on February 27, 2013. Payment was denied by Wawanesa.

**424** No medical evidence was introduced in response to the denial. Rather, an employee of the law firm retained by the Applicant wrote a letter indicating that because of the accident "she was unable to proceed to take the road test in a timely fashion, her G1 licence expired, and she had to re-take the written test."

**425** 'Direct attributability' is not the test for entitlement to medical and rehabilitation benefits under the 1996 *Schedule*.

**\$33.89 for an Ikea shoe cabinet as claimed on September 10, 2014**

**426** No evidence was led by the Applicant to indicate that this was a reasonable and necessary medical or rehabilitation expense. It was not submitted for approval under a treatment plan, as required under the section 38 of the 1996 *Schedule*. Instead, it was simply submitted to Wawanesa for payment -- without explanation -- under an OCF-6 Application for Expenses on September 10, 2014.

**427** The Applicant did not testify or adduce evidence in relation to this claim.

**428** No medical evidence was presented to support this claim.

**429** As a result, I find that the Applicant has failed to prove on a balance of probabilities that she is entitled to the rehabilitation benefits claimed, pursuant to section 15 of the 1996 *Schedule*.

**EXPENSES:**

**430** Should the parties not agree on entitlement to or the amount of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75-79 of the *Dispute Resolution Practice Code*.

**Postscript**

**431** I am indebted to counsel for the parties for their thorough preparation and presentation of the evidence and high-quality submissions. I commend them for their professionalism throughout this lengthy, complex, and hard-fought Arbitration proceeding.

February 26, 2016

Date

Marvin J. Huberman

Arbitrator

\* \* \* \* \*

### ARBITRATION ORDER

**432** Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, it is ordered that:

1. Ms. Mooney is not entitled to receive a non-earner benefit of \$320.00 per week from April 1, 2011, to date and ongoing, pursuant to section 12 of the 1996 *Schedule*.
2. Ms. Mooney is entitled to attendant care benefits from February 15, 2008, to date and ongoing, less amounts paid by Wawanesa, pursuant to section 16 of the 1996 *Schedule*, as follows:
  - (a) February 15, 2008 to April 15, 2008 at \$3,768.43/month;
  - (b) April 16, 2008 to May 20, 2010 at \$3,620.94/ month;
  - (c) May 21, 2010 to January 27, 2011 at \$2,879.27/ month;
  - (d) January 28, 2011 to April 23, 2012 at \$2,737.87/month;
  - (e) April 24, 2012 to February 25, 2013 at \$454.37/month;
  - (f) February 26, 2013 to July 13, 2013 at \$423.10/ month; and
  - (g) July 13, 2013 to date and ongoing at \$607.87/ month.
3. Ms. Mooney is entitled to housekeeping and home maintenance benefits in the amount of \$100.00 per week from February 15, 2008, to February 26, 2013, and in the amount of \$92.00 per week from February 27, 2013, to date and ongoing, less amounts paid by Wawanesa, pursuant to section 22 of the 1996 *Schedule*.
4. Ms. Mooney is entitled to payment for the following costs of examinations, pursuant to sections 24 and 42.1 of the 1996 *Schedule* and subsection 25(5) of the 2010 *Schedule*:
  - (a) \$5,298.89 for a section 24 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated June 25, 2010;
  - (b) \$2,000.00 for a section 25 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated May 28, 2012;
  - (c) \$1,969.81 for a section 25 Attendant Care Report by Ms. Robin Kadanoff, Occupational Therapist, dated March 1, 2013; and
  - (d) \$2,000.00 for a Rebuttal to an Insurer Examination provided by Dr. Jeremy Frank, Psychologist, dated September 15, 2011.
5. Ms. Mooney is not entitled to receive the following rehabilitation benefits, pursuant to section 15 of the 1996 *Schedule*:
  - (a) \$1,106.72 for public transit costs to school incurred from January 8, 2013 to December 16, 2013;
  - (b) \$125.00 for the costs of rewriting her driving test; and
  - (c) \$33.89 for an Ikea shoe cabinet as claimed on September 10, 2014.

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6. Ms. Mooney is entitled to interest for the overdue payment of benefits awarded, pursuant to the 1996 *Schedule* and the 2010 *Schedule*.
7. Should the parties not agree on entitlement to or the amount of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75-79 of the *Dispute Resolution Practice Code*.

February 26, 2016

Date

Marvin J. Huberman

Arbitrator

- 1 Effective September 1, 2010, the *Statutory Accident Benefits Schedule -- Effective September 1, 2010* (the "2010 *Schedule*") came into force. The transition rules in the 2010 *Schedule* provide that, subject to certain exceptions, benefits that would have been available pursuant to the *Statutory Accident Benefits Schedule -- Accidents on or after November 1, 1996* (the "1996 *Schedule*") shall be paid under the 2010 *Schedule*, but in amounts determined under the 1996 *Schedule*. As a result, both the 1996 *Schedule* and the 2010 *Schedule* are applicable to accidents that occurred on or after November 1, 1996 and before September 1, 2010 and both should be considered.
- 2 *N.I. and Allstate Insurance Company of Canada* (FSCO A04-002030, June 26, 2007), at p. 8.
- 3 *Mikhail Garmider and Co-operators General Insurance Company* (FSCO A12-006193, February 2, 2015), at p. 12.
- 4 *Heath v. Economical Mutual Insurance Co.*, [2009] O.J. No. 1877 (ONCA).
- 5 *Supra* at para 50.
- 6 *Marco P. and Michael P. and TD General Insurance Company* (FSCO A13-001116 and A13-001136, May 16, 2014), at p. 5.
- 7 *Walker v. Ritchie*, [2003] O.J. No. 18, at paras. 65-72 and 202-211.
- 8 *Bissessar and State Farm Mutual Automobile Insurance Co.*, [2013] O.F.S.C.D No. 230.
- 9 *Shakur v. Pilot Insurance Co.*, 1990 CanLII 6671 (ONCA); *El-Saikali and Co-Operators General Insurance Company* (FSCO A99-000059, November 21, 2002).
- 10 *Broderick and State Farm Mutual Automobile Insurance Company* (FSCO A10-000901, June 20, 2011); *M.L. and Economical Mutual Insurance Company* (FSCO A09-001059, October 20, 2011); *Mulhall and Wawanesa Mutual Insurance Company* (FSCO A04-000384, December 16, 2005).
- 11 *Mulhall and Wawanesa Mutual Insurance Company* (FSCO A04-000384, December 16, 2005).
- 12 *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at pp. 356-8, per O'Halloran, J.A. (B.C.C.A.).
- 13 See footnote 11.
- 14 *Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298, at para. 13 (Alta. Q.B.).
- 15 1996 *Schedule*, sections 16, 2(7), 32 and 39.
- 16 *S.M. and Intact Insurance Company* (FSCO A11-000666, November 8, 2013); *Wawanesa Mutual Insurance Company v. Smith*, (1998) 42 O.R. (3d) 441; *T.N. v. Personal Insurance Co. of Canada*, [2012] O.F.S.C.D No. 101, at para. 50; *Belair Insurance Company v. McMichael*, [2007] O.J. No. 1972, at para. 11.
- 17 *T.M. v. Personal Insurance Co. of Canada*, *supra*; *Whyte and State Farm Mutual Automobile Insurance Company* (FSCO A12-005721, July 24, 2015), at pp. 19 and 20.
- 18 *Tesfai and Allstate Insurance Company of Canada* (FSCO A99-000321, July 26, 2000).

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- 19 The 2010 *Schedule*, section 2(2) 2.
- 20 *R.J. and Dominion of Canada General Insurance Company*, (FSCO A12-001233, September 17, 2013), at p. 8.
- 21 *Amoa-Williams and Allstate Insurance Company of Canada*, 2000 CarswellOnt 5293, at paras. 19-26.
- 22 Section 15 of the 1996 *Schedule*; *Monks v. ING Insurance Co. of Canada*, 2008 CarswellOnt 2036 (C.A.), at pp. 15-17; *Justin Vanden Berg-Rosentha and Motor Vehicle Accident Claims Fund*, (FSCO A07-000417, May 14, 2007), at p. 5.
- 23 *Parminder Rehsi and Dominion of Canada General Insurance Company*, (FSCO A06-002468, June 30, 2008), at pp. 13-15.

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