

2009 CarswellOnt 3358

Financial Services Commission of Ontario (Arbitration Decision)

**Brazier v. RBC General Insurance Co.**

2009 CarswellOnt 3358, [2009] O.F.S.C.D. No. 58

**Diane Brazier, Applicant and RBC General Insurance Company, Insurer**

R. Bujold Member

Heard: July 7 - October 2, 2008

Judgment: May 28, 2009

Docket: FSCO A07-001290

Counsel: P. Michael Rotondo, for Ms Brazier

Aldo Picchetti, for RBC General Insurance Company

Subject: Insurance

## **Related Abridgment Classifications**[click here](#)

### **Insurance**

[XII](#) Automobile insurance

[XII.5](#) No-fault benefits

[XII.5.e](#) Disability benefits (loss of income payments)

[XII.5.e.v](#) Miscellaneous

### **Insurance**

[XII](#) Automobile insurance

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[XII.5.i](#) Practice and procedure on claim for benefits

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## **Headnote**[click here](#)

**Insurance --- Automobile insurance — No-fault benefits — Disability benefits (loss of income payments) — Entitlement — General principles**

**Insurance --- Automobile insurance — No-fault benefits — Practice and procedure on claim for benefits**

## **Table of Authorities**[click here](#)

**Statutes considered:**

*Insurance Act*, R.S.O. 1990, c. I.8

Generally — referred to

s. 282 — referred to

s. 282(10) — referred to

**Regulations considered:**

*Insurance Act*, R.S.O. 1990, c. I.8

*Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, O. Reg. 403/96

Generally — referred to

s. 37 — referred to

s. 37(1) — referred to

**R. Bujold Member:****Issues:**

1 The Applicant, Diane Brazier, was injured in a motor vehicle accident on September 15, 2005. She applied for and received statutory accident benefits from RBC General Insurance Company ("RBC"), payable under the *Schedule*.<sup>1</sup> RBC terminated weekly income replacement benefits on April 3, 2006. The parties were unable to resolve their disputes through mediation, and Ms. Brazier 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. Brazier entitled to receive income replacement benefits from April 4, 2006 to September 15, 2007, at the rate of \$385.56 per week, with interest, on the basis that she suffered a substantial inability to perform the essential tasks of her pre-accident employment?
2. Is Ms. Brazier entitled to receive income replacement benefits from September 16, 2007 to date and ongoing, at the rate of \$385.56 per week, with interest, on the basis that she suffered and continues to suffer from a complete inability to engage in any employment for which she is reasonably suited by education, training or experience?
3. Is Ms. Brazier entitled to a special award, pursuant to subsection 282(10) of the *Insurance Act*?
4. Is either party entitled to their expenses of the arbitration, pursuant to subsection 282(11) of the *Insurance Act*?

**Result:**

3

1. Ms. Brazier is entitled to receive income replacement benefits from April 4, 2006 to date and ongoing, at the rate of \$385.56 per week, with interest.

2. Ms. Brazier is entitled to a special award. If required, I will take written submissions on the appropriate quantum of the special award.

3. If the parties cannot agree on entitlement to or the amount of expenses, they may request a determination of these issues in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

**Evidence:**

***Background***

4 Ms. Brazier was struck by a vehicle on September 15, 2005 while walking on the green light across Sheppard Avenue West at the intersection of Arleta Avenue. She does not remember anything from being hit to being on the ground. She was apparently hit by a Jeep and rolled onto the hood of the vehicle before hitting the ground. Ms. Brazier hit her head and suffered a contusion and possible concussion, but no loss of consciousness. She also sustained contusions and bruising to her right lower extremity, as well as a lumbosacral concussion and strain. Ms. Brazier was transported by ambulance to William Osler Health Centre where x-rays were taken of Ms. Brazier's right femur, right hip and pelvis. No acute fracture or dislocation was noted.

5 At the time of the accident, Ms. Brazier was on her way to work at Daton Metal Manufacturing Ltd. ("Daton") where she had been employed since June 2000. Ms. Brazier worked as a receptionist in the front office, but a significant portion of her duties had also come to include assisting with shipping and receiving in the back warehouse. Other than a brief and unsuccessful attempt to return to work, Ms. Brazier has not worked since the accident.

6 Ms. Brazier was 35 years of age and the mother of three children aged 12, 10 and 7 years old when the accident occurred. Ms. Brazier gave birth to her youngest child in October 2006, a little over one year post-accident. Ms. Brazier is a single mother. Although Ms. Brazier has been in a relationship with the father of her youngest child for several years, she does not live with him.

7 Ms. Brazier maintains that she suffers from chronic pain and impairments related to her right lower extremity that not only prevented her from returning to her employment at Daton, but continues to prevent her from engaging in any employment for which she is reasonably suited by education, training or experience. The medical evidence proffered by Ms. Brazier focuses largely on her psychological impairments and the non-organic nature of her disability. The psychological impairments include depression, anxiety and post-traumatic stress.

8 RBC questions the veracity of Ms. Brazier's complaints and relies largely on an orthopaedic assessment by Dr. R. Zarnett in support of its position that Ms. Brazier is not only able to return to suitable employment but, in fact, able to return to the job tasks of her pre-accident position at Daton. To the extent that Ms. Brazier suffers from psychological impairments that prevent her from working, RBC attributes those impairments to Ms. Brazier's unfortunate pre-accident personal history.

***Pre-accident personal history, stressors and level of functioning***

9 In terms of pre-accident stressors, Ms. Brazier related that her mother used to "beat [her] with anything she could get her hands on."<sup>2</sup> However, Ms. Brazier indicated that she had "put it behind her" when she moved out of her parents' house at 18, adding that she was determined to "make it." Ms. Brazier indicated her belief that she did not need counselling on this issue. Ms. Brazier also related that her first boyfriend, the father of her 3 sons, was "abusive and controlling." He is currently in jail for murder. She left him when he tried to kill her by stabbing her. She also related that he used to beat her unconscious. Ms. Brazier had been living in Guyana for 2 years when she left him. She returned to Canada "with the clothes on her back" and again expressed her determination to rise above her circumstances. In her testimony, Ms. Brazier stated "my past is my past... I don't live with what my mother did to me... same with the boys' father... I don't let those things weigh me down.... Those past incidents strengthened me."

10 It was approximately one and a half years after her return to Canada that Ms. Brazier began working at Daton. Her children at that time would have been 7, 5 and 2 years old. Ms. Brazier had been on social assistance prior to getting her job at Daton. She testified that she found it difficult being on assistance. Social assistance did not provide her with enough money. She was not ashamed of being on assistance, but she did not want to collect money for sitting at home when she knew she was capable of working. She wanted to be self-supporting. Her job at Daton was a source of pride - a sign that she could take care of herself and her kids, in spite of her difficult personal history.

11 With respect to her relationship with the father of her youngest child, Mr. Richard John, Ms. Brazier testified that they had been together for approximately 9 years. They decided to have a child together shortly before the accident. They were both working at the time. They also planned to get a house together, although, as Ms. Brazier put it, moving in together would not necessarily follow from the birth of their child. She wanted him to be contributing equally to the support of the household before moving in together. At the time of the hearing, Mr. John was living with his mother and a son from a prior relationship as well as two nieces. He was providing \$297 per month toward support of their child.

12 Ms. Brazier testified that she had been very active prior to the accident. In addition to her full-time job, Ms. Brazier also made her children's lunches, prepared all the dinners and did cleaning and laundry. She also took part in many activities involving her children, such as going to soccer games, taking walks and going to the movies. She noted that nearly every day of the week at least one of her children had a game or practice that she attended. She also coached her youngest son's soccer team.

13 Amanda John, friend of Ms. Brazier and sister of Ms. Brazier's boyfriend, Richard John, also testified. Ms. John described Ms. Brazier as very active pre-accident; busy with both work and her children. She testified that Ms. Brazier was "never home" and "always on the go." When asked if she

ever had to assist Ms. Brazier with homecare prior to the accident, Ms. John answered "No. She was my strength. She helped me."

14 While Ms. Brazier may have been active, pre-accident records of the family doctor, Dr. Barrett, note that Ms. Brazier suffered from difficulties coping with work and home stressors. A clinical note from June 11, 2004 states, for example, "very stressed out, feels tired... snapping easily at kids; crying spells; adjustment disorder. Counselling provided."

15 It seems clear that Ms. Brazier had pre-accident stressors with which she was having difficulty coping. Life was not easy for Ms. Brazier before the subject accident. The pre-accident records suggest that in the year before the accident, she was anxious, depressed, irritable and having difficulty adjusting to life stressors. However, the psychological difficulties pre-accident appear to have been episodic in nature and did not interfere with Ms. Brazier's ability to maintain an active lifestyle including her full-time job and taking care of her children.

#### ***Pre-accident education and employment***

16 Ms. Brazier completed grade 13 and attended college in a nursing program. However, Ms. Brazier did not complete the program as a result of having her first child.

17 Regarding her work history, Ms. Brazier got a job at the CNE when she was 14 where she did a variety of odd jobs. Sometime after her first son was born, she began working at the Rogers Centre where she was a cashier and later ran concession stands. She then had her second son and was home most of the time. After her third son was born, she took an accounting course.

18 As stated above, Ms. Brazier began working at Daton in June 2000 as a receptionist. She later took on the further responsibilities of shipping and receiving.<sup>3</sup> Ms. Brazier split her work day between these two roles and had been working in this dual capacity for at least one year prior to the accident.

19 Domenic Quintieri, the president of Daton, gave evidence at the hearing. He described Ms. Brazier as an A+ employee. He had no concerns with her work performance. She had an excellent attendance record and he recalls that she took her kids to work, if needed, rather than missing work. It was his opinion that Ms. Brazier loved her job. Occasionally, he would need to have someone work late and she was "the first one there." He also noted that Ms. Brazier came to assume the duties of shipper and receiver because the company needed someone to fill a vacancy and she "stepped up to the plate and took the role." She received a raise when she took on the further responsibilities of shipper and receiver.

20 Ms. John also testified that Ms. Brazier never complained about her work and seemed to love what she was doing.

#### ***Ms. Brazier's evidence re: post-accident functioning and return to work attempt***

21 Ms. Brazier testified that the accident has completely changed her life.

22 Ms. Brazier maintained that she had to live on the main floor of her house for 8 months following the accident, due in large part to pain and instability she felt when using the stairs,

especially going down stairs. She spent much of her time on the couch in her living room. She would lie down and elevate her leg. She was having "stabbing, burning" pains in her right leg from the hip down. She used a cane and leaned against the wall in order to minimize pain and deal with instability, especially when going down stairs.

23 Her parents and her sister would come over on weekends to clean and do laundry. Her 10 and 12 year old sons helped with her 8 year old son. She would supervise their activities, but was not able to get around much herself. Her boyfriend would come over and help when available, but most of the time "it is just me trying to do as much as I can or getting the kids to help."

24 Dr. Barrett, the family doctor, prescribed Oxycocet which Ms. Brazier took in the weeks immediately following the accident, but as she notes in her statement "when I take the medication at night, it knocks me out and I am worried about what could happen to the kids if there was an emergency at night after I took the medication." As a result, Ms. Brazier has avoided taking Oxycocet and relies primarily on over-the-counter Advil for pain relief, which she takes on a daily basis.

25 Currently, Ms. Brazier continues to complain of constant pain in her right leg, right knee, right ankle, right hip and low back. Ms. Brazier also complained that she is only getting 3 hours sleep per night. She finds it difficult getting to sleep and rises at 7 a.m. with her children. She experiences headaches daily, sometimes all day long. They vary in intensity, but at times she feels as though "my head's going to drop off my shoulders."

26 It was Ms. Brazier's evidence that, while she is able to do housework, it takes her much longer to complete her tasks and increases her pain. She uses more and lighter bags when grocery shopping. She also finds it difficult taking care of her young daughter. Her oldest son does his own laundry and the children sometimes help with the dishes.

27 Ms. John testified that she visits Ms. Brazier on an almost daily basis and assists her with housekeeping and childcare, although she does not get paid for the help and has not been promised payment. She further testified that Ms. Brazier attempts to complete her own housework, but struggles with pain and "takes the whole day to get it done."

28 With respect to employment, Ms. Brazier testified that she would be willing to retrain, and believed that she could do anything that she set her mind to, but did not feel she could do anything at this point, given her constant pain.

29 Ms. Brazier made an attempt to return to work relatively early in her recovery, although the exact date is unclear. The president of Daton, Domenic Quintieri, testified that the attempt was restricted to her receptionist duties which are less arduous than her duties as a shipper/receiver. Still, she was not able to perform the reception duties. Mr. Quintieri stated that it was Daton's unwritten policy that an employee is not to work unless they are 100%. Mr. Quintieri could not recall any further return to work attempt and stated that business had been slow for the past 6 months and

there would not be a job for Ms. Brazier to return to at this point, even if she were well enough to return. It does not appear that any return to work attempts have been made since the initial attempt.

30 When asked what prevents her from working now, Ms. Brazier testified that it was her constant pain. She would need to "live on pills." She further testified that she just wants to get well again and take care of herself. She has seen "doctor after doctor to try to deal with [her] pain" and doesn't know what else to do. She believes that her pain needs to be dealt with before she can work.

31 Emotionally, Ms. Brazier reported that she is depressed and worries a great deal about her future and her ability to care for her children. She testified that she feels that she is failing her children.

32 She is not able to provide for them the way she would like, she does not have energy for them and she is not able to give them the attention or participate in their activities as she did in the past. Ms. Brazier also reported increased irritability and anxiety related to both driving in a car and as a pedestrian. She stated that she asks herself "What did I do wrong? What did I do to deserve this?" She also reported that "she had plans to get a house and a car, she depended on no one, and she gave to people when she could. She stated that *the accident ruined it all*, she is being punished by it, and she wondered why." [emphasis in report]<sup>4</sup> In short, Ms. Brazier feels that her life has fallen apart and she blames this accident.

#### ***Post-accident medical evidence and RBC's claims handling***

33 The following provides a chronology of the more salient evidence as it relates to Ms. Brazier's medical assessments and treatment. The chronology also highlights certain matters pertaining to RBC's claims handling, especially those matters that Ms. Brazier relies upon in support of her claim for a special award. Although I make certain observations and findings in this section, most of my findings and conclusions are contained later in these reasons.

34 As stated above, Ms. Brazier was taken by ambulance to William Osler Health Centre where x-rays were taken of her right femur, right hip and pelvis. Upon being released from hospital, Ms. Brazier went directly to her family doctor, Dr. Barrett, who noted that she had a swollen knee and was tender all over. He deferred motor strength examination due to pain and instructed her boyfriend to wake her every two hours given concern of head injury. Four days later, Ms. Brazier returned due to "severe pain." Dr. Barrett prescribed Oxycocet and referred Ms. Brazier to Life Mark for physiotherapy.

35 A delay of approximately one month took place between the accident and the filing of an Application for Accident Benefits. Treatment at Life Mark was also delayed as a result. Ms. Brazier did not have information on the vehicle that struck her and, apparently, the driver of the vehicle did not report the accident to RBC. Ms. Brazier followed up with the police, but she did not have an incident number and the investigating officer was away as a result of his own personal injury sustained the day after Ms. Brazier's accident, so it took over a month to get the information she

needed to apply to RBC for accident benefits. Ms. Brazier expressed anger over the fact that the driver of the vehicle had not reported the accident and the fact that it took several weeks to get information regarding the insurer of the vehicle. Ms. Brazier eventually applied for accident benefits to RBC and provided a statement dated October 18, 2005.

36 An initial Disability Certificate dated October 30, 2005 identified Ms. Brazier's primary injuries and sequelae as being hip and knee contusion, concussion syndrome, lumbosacral concussion and lumbosacral strain.

37 Ms. Brazier attended Life Mark from or about October 20, 2005 to March 14, 2006. Ms. Brazier testified that she did not notice much improvement at first. Any relief was temporary and would come back when she had to climb up and down stairs. Eventually, some improvement was noted, as the pain was reduced from 10 out of 10 after the accident to 7 or 8 out of 10 with treatment. The "pain and burning," however, was "always there," referring to her right lower extremity.

38 In early November 2005, Ms. Brazier had a miscarriage. Ms. Brazier wrote to the RBC adjuster, Susy Ferreira, by letter dated November 15, 2005 to advise her of the miscarriage. Ms. Brazier's letter opens as follows:

Not sure how to start this, but the amount of things I have been going through since this accident has been stressing. You get up every day worrying what will happen next. I am worrying about my job, bills, and my children.

39 The letter continues with an account of how over a two week period in early November, Ms. Brazier had initially tested positive for pregnancy, but a follow-up test found that she had miscarried. The letter concludes with the following paragraph:

How am I was (sic) to feel now, it's like everything is wrong with my life. I don't have the emotion right now to feel anything other than just seclude myself from everyone. Don't want to talk to anyone. I have never had a miscarriage in my life.

40 The letter is signed, "Frustrated, Upset, Confused, Diane Brazier."

41 The letter suggests that Ms. Brazier viewed the stress in her life following the accident as contributing to her miscarriage. Whether or not this is medically accurate,<sup>5</sup> the letter does give insight into Ms. Brazier's emotional state at this time.

42 RBC referred Ms. Brazier to a multidisciplinary assessment by Dr. Zarnett, orthopaedic surgeon, and Susan Scott, occupational therapist, at West Park Health Centre which was conducted on December 8 and 15, 2005. The referral questions included whether Ms. Brazier was substantially unable to perform the essential tasks of her pre-accident employment and also whether she was substantially unable to perform her pre-accident housekeeping tasks.

43 A functional capacity evaluation was conducted and demonstrated impairments were noted with respect to standing and walking tolerances, as well as kneeling, crouching, and stooping. Ms.

Brazier was also noted to use awkward alternate movement patterns in order to minimize placing weight through her right lower extremity.

44 Medically, from an orthopaedic perspective, Dr. Zarnett found that Ms. Brazier suffered a contusion to her right knee and a strain or contusion to her right ankle. Especially with respect to the right knee, Dr. Zarnett found that Ms. Brazier was impaired from being able to engage in continuous standing, walking, bending and squatting. He did not have a job site analysis to review, but based on the functional capacity evaluation and Ms. Brazier's self-report of her job tasks, Dr. Zarnett found Ms. Brazier to be substantially unable to perform the essential tasks of her employment. However, Ms. Brazier was found to be able to perform her housekeeping duties. An MRI was recommended given her ongoing symptoms.

45 A physical demands analysis conducted at the work site by Courtney Samotie, occupational therapist, with NRCS Inc. (referred to above in footnote 3) was subsequently provided to Dr. Zarnett who, in an addendum report dated January 16, 2006, confirmed that while Ms. Brazier could resume her receptionist duties, she could not perform the essential tasks of her shipping and receiving job. Dr. Zarnett noted the need for an MRI and physiotherapy, after which he recommended that Ms. Brazier be assessed again for further recommendations and opinions.

46 At or about this time, Ms. Brazier became pregnant with her youngest child. As a result, the MRI recommended by Dr. Zarnett could not be performed and had to be deferred until after the pregnancy.

47 Although Dr. Zarnett found Ms. Brazier to be unable to return to work, Ms. Brazier wrote to Ms. Ferreira by letter dated February 9, 2006<sup>6</sup> complaining of Dr. Zarnett and the manner in which he conducted his assessment. In particular, Ms. Brazier focussed on what she perceived as Dr. Zarnett's failure to listen. The letter provides:

...

His assessment of me I though (sic) was hurtful. He doesn't listen to anything you say and before you are even finished answering one question he cuts you off and goes on to something else. When I walked into this assessment I was in pain, unable to walk to (sic) he didn't give a damn because he is doing his job.

When he began the assessment he ask (sic) you a question before you are even finish you (sic) ask another while you are still answering, so to me he only wants his questions answered with one word."

...

He finished what he had to do told me to get dress (sic) when I was ready I could leave... So I went downstairs sat there and called a cab and try (sic) started crying.

...

48 Ms. Brazier's letter also points out what she viewed as several discrepancies or errors in Dr. Zarnett's report. The discrepancies were not, in my view, particularly material to the question of disability. However, Ms. Brazier's letter again demonstrates her emotional state and the obvious frustration arising from her belief that she was not being heard, even though the report supported her entitlement to ongoing IRBs.

49 Dr. Zarnett saw Ms. Brazier again on March 20, 2006 for a follow-up assessment. He noted that it was possible that there was a small meniscal tear to the right knee, but did not believe it would prevent her from returning to her pre-accident employment. He reported a full, painless range of motion and stated that Ms. Brazier reported an 80 percent improvement in her symptoms. Dr. Zarnett concluded that should Ms. Brazier's symptoms continue after her pregnancy, she should have an MRI at that time. At this time, however, he found that the examination failed to reveal any evidence of a current disability which would cause Ms. Brazier to suffer a substantial inability to perform the essential tasks of her employment as a "receptionist." Dr. Zarnett confirmed in his evidence that he also took into account her duties as a shipper/receiver in arriving at his conclusion. Dr. Zarnett did note that Ms. Brazier had not reached maximum medical recovery and continued to have some residual discomfort in her knee, but he expected that "this will continue to improve."

50 Again, Ms. Brazier wrote to Ms. Ferreira complaining of the manner in which Dr. Zarnett conducted his assessment. In an undated letter,<sup>7</sup> Ms. Brazier again took issue with several particulars contained in Dr. Zarnett's report<sup>8</sup> and focused again on her perception that Dr. Zarnett "doesn't listen to what you said and just cuts you off as you are answering what he asked you." In her oral evidence, Ms. Brazier denied telling Dr. Zarnett that her condition was 80% improved. She also complained "how does he know if I am in pain after seeing me for 15 minutes." Dr. Zarnett agreed that since there was no history to take, this second orthopaedic assessment would have been a short appointment.

51 Ms. Ferreira wrote to West Park on April 24, 2006 and forwarded a copy of Ms. Brazier's letters of complaint regarding Dr. Zarnett's examinations.<sup>9</sup> Ms. Ferreira's letter states "upon review of it's (sic) contents, we found it prudent to forward a copy of the same for your review." Ms. Ferreira forwarded the letters without comment and testified that she did not follow-up with West Park neither to confirm that they had received the letters nor to determine whether the complaints had been put to Dr. Zarnett.

52 Dr. Zarnett testified that the letters of complaint had not come to his attention. He testified that had the letters been presented to him, he would have responded in writing to West Park, but it would not have materially affected the way he would have conducted his assessment.

53 Dr. Zarnett stated that his report recorded what Ms. Brazier had told him, but admitted that he may have cut off Ms. Brazier while answering questions. Dr. Zarnett also testified that his focus during an examination is on the physical examination. Subjective complaints need to co-relate with

physical findings. From his perspective as an orthopaedic specialist, if the physical examination shows no abnormalities, then "she can complain about what she wants." In any event, Dr. Zarnett maintained that, in terms of subjective complaints, Ms. Brazier had told him that she was 80% better, could manage her caregiving, housekeeping and self-care tasks, and also that she had found therapy to be extremely helpful.

54 On cross-examination, Dr. Zarnett admitted that he was not qualified to comment on whether Ms. Brazier might be suffering from a somatoform disorder and admitted he did not examine Ms. Brazier with a view to a possible chronic pain condition. First of all, he denied that she communicated significant pain complaints. Further, even the second examination took place only 6 months post-accident. Dr. Zarnett indicated that he would not be investigating the possibility of chronic pain until closer to one year post-accident. Dr. Zarnett agreed that ongoing pain complaints beyond one year could suggest chronic pain. He also agreed that chronic pain can be primarily a psychological condition and further agreed that he was not qualified to provide an opinion on a chronic pain diagnosis from a psychological perspective.

55 On the basis of Dr. Zarnett's second assessment, Ms. Brazier's IRBs were terminated by Explanation of Benefits (OCF-9) dated April 3, 2006. Ms. Brazier was not offered to attend a Designated Assessment Centre (DAC) for an independent assessment of her ability to return to her pre-accident employment. The *Schedule* was amended to eliminate the DAC system effective March 1, 2006. Bulletin A-08/05 issued by the Commission provides as follows regarding the transition from the DAC to non-DAC system:

DAC assessments will continue under the provisions of the current regulation until February 28, 2006. A DAC assessment will only take place on or after March 1, 2006 if it was already in progress, scheduled or requested prior to March 1, 2006. This run-off period may take several months before all DAC assessments are completed. Further details on these transition provisions are set out in the regulation amendments.

56 After March 1, 2006, rather than the DAC process, subsection 37 (1) provides as follows:

**37. (1)** If an insurer wishes to determine if an insured person is still entitled to a specified benefit, the insurer,

(a) shall request that the insured person submit within 15 business days a new disability certificate completed as of a date on or after the date of the request; and

(b) may notify the insured person that the insurer requires the insured person to be examined under section 42. O. Reg. 546/05, s. 11.

57 In this case, RBC requested that Ms. Brazier attend the follow-up assessment by Dr. Zarnett by letter dated February 20, 2006, before the March 1, 2006 amendment took effect. At that time, there was no requirement that RBC request an updated Disability Certificate as part of its process for determining Ms. Brazier's ongoing entitlement to IRBs. However, the assessment itself and

RBC's decision to terminate IRBs did not occur until after March 1, 2006. As such, no DAC was "already in progress, scheduled or requested prior to March 1, 2006."

58 In other words, if Ms. Brazier had been asked after March 1, 2006 to attend an assessment to determine her ongoing entitlement to IRBs, RBC would have been required to request and consider an updated Disability Certificate from her health care provider. Alternatively, if RBC had decided to terminate benefits before March 1, 2006, Ms. Brazier would have had the option of requesting that her ongoing entitlement to IRBs be referred to a DAC. However, since the assessment was requested prior to March 1, 2006, but the decision to terminate did not take place until after March 1, 2006, Ms. Brazier received the benefit of neither. She effectively fell through the cracks.

59 It was at or about this same time that IRBs were terminated that Ms. Brazier's treatment at Life Mark ended. The Life Mark file does not contain a discharge report, but the progress notes suggest that Ms. Brazier showed improvement over her course of treatment. Still, progress notes as late as March 7, 2006 continue to reference a "burning" pain in her right knee. There is also reference to stiffness and gait "improvements." Ms. Brazier testified that she feels her condition has worsened since she stopped going to Life Mark. It was Ms. Brazier's understanding that treatment ended when it did because RBC would not fund any further treatment, although there do not appear to be any denied treatment plans at or about this time period.

60 Although treatment ended at Life Mark, Ms. Brazier continued to have complaints related to her lower right extremity for which she continued to seek help.

61 Ms. Brazier was referred by her family doctor to Dr. Mel Catre, orthopaedic surgeon. In his report of May 23, 2006, Dr. Catre notes that her complaints at that time (2 months after physiotherapy was discontinued and 8 months post-accident) include right knee pain in the superior patella with radiation to the ankle anteriorly, as well as joint pain. Ms. Brazier complained of a funny bone type feeling in her right knee and leg. She complained of locking, grinding, pain on stairs, feelings of instability in her right knee and pain on squatting. Dr. Catre also noted pain in range of motion. Dr. Catre concluded "At this point in time, there is little else I can do for this really unfortunate patient. When she comes to full term and gives birth, then MRI should be done. I will be most happy to share once again with the MRI results in hand. Also at that time, I can help relieve her knee pain."

62 Shortly thereafter, Ms. Brazier was also referred to Dr. Krystyna Prutis. In her report of June 9, 2006, Dr. Prutis noted low back pain radiating to the right lower extremity, right knee pain and right ankle pain. Ms. Brazier was noted to complain of sharp pain, stiffness, stabbing, numbness, throbbing, tingling and burning resulting in back pain, weakness, swelling, and difficulty walking in the right lower extremity. The symptoms were identified as being exacerbated by walking, standing and negotiating stairs. Ms. Brazier's gait was noted to be antalgic and her right leg internally rotated. Again, an MRI was indicated, but not possible given the pregnancy.

63 Ms. Brazier gave birth to her youngest child on October 21, 2006. A mediation of Ms. Brazier's entitlement to IRBs had taken place shortly before on October 2, 2006. In response to these events, RBC wrote to Ms. Brazier on November 30, 2006 noting that it had now been 15 months post-accident and confirmed that Ms. Brazier had recently given birth, but the approved MRI of her right knee had not been conducted. The letter continues: "In light of the results of the recent mediation conducted in October 2006, RBC finds it prudent to continue to investigate your eligibility to benefits by requesting an updated OCF-3..."

64 Dr. Barrett provided an updated Disability Certificate dated December 19, 2006 that essentially repeated the primary complaints and sequelae listed in his initial Disability Certificate: concussion syndrome; hip and knee contusion; lumbosacral strain.

65 The MRI of the right knee that was delayed due to the pregnancy was finally conducted on December 21, 2006. The MRI results were fairly unremarkable noting mild degenerative changes and mild collateral ligament strain. An addendum report from Dr. Zarnett dated January 24, 2007 confirmed that he had received and reviewed the MRI and the opinions contained in his orthopaedic reports of December 23, 2005 and March 29, 2006 remained unchanged.

66 At or about this same time, however, Ms. Brazier was referred by her counsel to Allied-Medical Trauma Evaluations to assess the nature and extent of any psychological or emotional difficulties resulting from the accident that could be causing or contributing to her complaints.

67 Dr. Mel Perlmutter, psychologist, and Beverly Hann, registered nurse, conducted a psychological assessment of Ms. Brazier on December 20, 2006 (the "Perlmutter report").

68 The assessment employed four self-report procedures to measure depression, anxiety and posttraumatic stress, as well as Ms. Brazier's perception of her rehabilitation needs and barriers to recovery.

69 The test results indicated severe levels of depression and anxiety. Post-traumatic stress indicators also revealed a high level of anxiety and depressed mood, as well as defensive avoidance, "both cognitive (i.e. pushing painful memories or thoughts of the accident out of her mind) and behavioural (i.e. avoidance of stimuli that remind her of the accident)." The rehabilitation self-report inventory identified 17 barriers to recovery. The five most significant were prioritized, beginning with the pain in her right leg, and followed by emotional problems, financial difficulties, comfort with present lifestyle and anxiety or stress.

70 Ms. Brazier reported feeling severe impairment in her parental activity and in her personal relationships. She reported a severe level of impairment in her participation in her sports/hobbies, in her social activities, and in her employment. The report provides:

She [Ms. Brazier] has severe pedestrian and passenger anxiety, nightmares, flashbacks, and intrusive thoughts of the accident. Her mood has been affected since the accident and she is much more sad, angry, frustrated, and irritable since the accident. **Ms. Brazier suffers a substantial**

**inability to perform her pre-accident employment tasks.** [emphasis added] She cries easily and she is more easily angered and irritated since the accident. She would like the opportunity to learn about how to deal with her accident-related impairments through therapy. She is experiencing a high level of emotional distress and is willing to come for therapy in order to deal with her accident — related impairments.

71 Dr. Perlmutter and Ms. Hann note that Ms. Brazier's test results "suggest she was suffering from some psychological and emotional difficulties prior to the accident but they were not as incapacitating as her present symptoms." Based on the assessment, Dr. Perlmutter and Ms. Hann concluded that Ms. Brazier had suffered both physical and psychological impairments as a result of the September 15, 2005 accident including depression and severe pedestrian anxiety. The report identifies the need for a treatment plan that should address her pain, depression and driving/passenger anxiety. In that regard, Dr. Perlmutter and Ms. Hann recommended as follows: ... it is our opinion that Ms. Brazier could benefit from a referral to a multidisciplinary pain management program, which includes comprehensive psychological treatment for chronic pain along with physical re-activation and a strong psycho-educational component. Her cognitive-behavioural psychological treatment sessions will help to decrease her depression, anxiety, assist her with her sleep problems, and help her to better manage her pain. Follow-up with her family physician regarding the option of going on anti-depressant and antianxiety medication is recommended. A referral to a psychiatrist may be helpful to investigate pharmacotherapy options for Ms. Brazier.

The treatment is important for her overall rehabilitation...

72 RBC admits to receiving the Perlmutter report in or about March 2007 (apparently from Mr. Rotondo's office), but through inadvertence, the report was filed digitally in RBC's paperless system as an OCF-21 (because an OCF-21 invoice was the top document in the fax that was scanned into the system) with the result that the report did not get included in RBC's medical file for Ms. Brazier. Even the file delivered to RBC's counsel for this arbitration did not include the Perlmutter report. It was effectively buried. The report was, however, apparently paid for by RBC.

73 A further consequence of RBC's misfiling of the Perlmutter report is that the report did not get forwarded to any subsequent assessors who examined Ms. Brazier at RBC's request.

74 Although the reference to Ms. Brazier not being able to work as a result of her psychological impairments is somewhat buried in the body of the report, the reference is nevertheless clear. Ms. Ferreira admitted that, in the ordinary course, a section 24 assessment suggesting a disability and entitlement to a benefit would be sent to a section 42 assessor for an opinion and, if agreed with, the benefit would be reinstated. Ms. Ferreira could provide no explanation as to why that did not happen in this case, other than the fact that the Perlmutter report had been misfiled.

75 Apart from RBC's oversight, I also note that there does not appear to be an OCF-18 treatment plan from Dr. Perlmutter, notwithstanding the treatment recommendations contained in his report, nor is there reference in Dr. Barrett's file to suggest that he received a copy of the report. As a result, it does not appear that any further investigation into nor treatment of any psychological impairments that Ms. Brazier may have sustained as a result of the accident took place in the months following the Perlmutter report; not by RBC, Dr. Perlmutter nor Dr. Barrett.

76 MRIs of Ms. Brazier's right hip and right ankle were conducted on May 11, 2007, again with relatively insignificant findings that would not explain the pain, burning and stiffness in the lower right extremity. Again, an addendum report from Dr. Zarnett dated July 5, 2007 confirmed that the MRIs did not affect his prior orthopaedic opinion.

77 Nearly a year after the Perlmutter report, Ms. Brazier was referred by her counsel for a further psychological assessment by Dr. Gerald Young, psychologist, in November 2007. On the basis of his initial assessment, Dr. Young prepared a treatment plan dated November 27, 2007 recommending 15 sessions of mental health therapy. Dr. Young's treatment plan was not filed in evidence.

78 RBC referred Dr. Young's treatment plan to Dr. Muhammad Rashid, psychologist, at Riverfront Medical Services for the purpose of providing an opinion on whether the treatment proposed by Dr. Young was reasonable and necessary. Dr. Rashid's report is dated January 17, 2008.

79 As with Dr. Perlmutter, whose report he did not have, Dr. Rashid found that Ms. Brazier's test results indicated severe levels of both anxiety and depression.

80 A Pain Patient Profile (P3) test that measures emotional distress associated with primary complaints of pain was also conducted. The P3 scores also indicated above average levels of depression, anxiety and somatisation, which suggest that "pain and suffering is likely affecting her attention and concentration and causing her to be easily distracted from her engagement in any activity." However, Dr. Rashid expressed concern with the validity of the P3 profile noting "as the above profile indicates, most likely in her attempt to convey the severity of her distress, she has endorsed most of the symptomologies in an excessive manner."

81 Validity measures used in another test, the Millon Clinical Multiaxial Inventory III (MCMI-III), also led Dr. Rashid to note "Ms. Brazier's response on this measure indicates that she has been reticent and secretive in her responses, and she strongly indicates that she has been suffering from severe mental/emotional distress, and to redress it, she has been seeking help desperately; however, she has made no attempt to present herself in a favourable and personally appealing light."

82 Dr. Rashid arrived at the following conclusions and impressions:

The current assessment results indeed suggest that Ms. Brazier has been endorsing symptomologies that suggest severe mental/emotional distress. Her responses on all of the

measures employed, including the BAI, BDI II, P3, CAQ, and MCMI-III, indicate that she suffers highly from anxiety, depression, somatoform disorder (distress associated with physical problem and pain), and posttraumatic stress disorder. However, it seems that Ms. Brazier has been making a desperate attempt to convey the degree of the severity of her mental/emotional distress. In that process, she has endorsed a variety of symptoms likely in an indiscriminate and exaggerated manner: she has not only been reticent and secretive in her responses, as suggested by her responses on the MCMI-III, but also she has checked too many symptoms (likely indiscriminately), including those that suggest thought disturbance (both the CAQ and MCMI-III profile suggest this pathology), even though her personal presentation gives no indication of such symptomatology or behaviour patterns.

83 Notwithstanding the number and severity of psychological impairments suggested by the test scores, Dr. Rashid found that he was unable to make a valid and reliable psychological diagnosis due to the indicators suggesting symptom magnification and exaggeration and/or the indiscriminate endorsement of symptoms. Without a reliable diagnosis, Dr. Rashid concluded that there was a "lack of psychological impairment" and "treatment is not required."

84 Dr. Young prepared a psychological assessment report dated March 17, 2008. In addition to the November 5 and 20 assessments that resulted in the treatment plan of November 27, Dr. Young also saw Ms. Brazier on December 3, 10, 17 and 27, 2007, January 2, 9 and March 17, 2008. In total, Dr. Young's report followed 8.8 hours of clinical interviews and assessments.

85 In preparation of his report, Dr. Young reviewed the report of Dr. Rashid dated January 17, 2008, a report by Dr. Karen Spivak, psychologist, dated November 16, 2007<sup>10</sup>, as well as Dr. Perlmutter's report of December 20, 2006.

86 Dr. Young took a detailed pre-accident personal, work and education history. He also reviewed her prior health including prior stresses in her life.

87 Dr. Young administered several standardized tests and self-report questionnaires which were interpreted in conjunction with his overall clinical impression conveyed by the interview. Dr. Young and Dr. Rashid used many of the same tests to assess Ms. Brazier. Although Dr. Young and Dr. Rashid draw different conclusions, the tests produced similar results indicating severe levels of anxiety, depression and posttraumatic stress disorder ("PTSD")

88 On the issue of malingering, Dr. Young conceded that the modifying indices of two of three tests revealed that Ms. Brazier was over reporting her symptoms, indicating symptom exaggeration. However, Dr. Young noted that while symptom exaggeration may indicate conscious or unconscious malingering, this was not, in his opinion, the case here. Dr. Young found instead that Ms. Brazier's symptom exaggeration was a "cry for help." Dr. Young reached this conclusion on the basis of Ms. Brazier's history, his interview and the test results taken as a whole. Dr. Young noted that a malingering patient is often sullen, ill-at-ease, uncooperative, suspicious, resentful and blaming. Dr.

Young found no such presentation to him, although he noted that Ms. Brazier did harbour ill feelings toward the driver of the vehicle that hit her as well as certain insurance examiners. On the question of malingering versus a cry for help, Dr. Young also noted, in particular, that Ms. Brazier met all validity and impression management tests of the Detailed Assessment of Posttraumatic Stress (DAPS) questionnaire, exhibiting a classic pattern of PTSD.

89 While Dr. Rashid found that symptom exaggeration prevented him from reaching any diagnosis, Dr. Young concluded that Ms. Brazier met the DSM IV<sup>11</sup> criteria for chronic PTSD and chronic pain disorder. With respect to the pain disorder, Dr. Young noted that "her pain experience has become pervasive and persistent, and partially reflects the interplay of psychological and physical factors. Both medical factors and psychological factors play important roles in the onset, maintenance, exacerbation, and severity of her pain. It should be stressed that this psychological disorder is genuine, is not consciously produced, and should not be confused with Malingering or Factitious Disorder."

90 Overall, Dr. Young found Ms. Brazier's global functioning impaired at the moderate to serious level.

91 Dr. Young found Ms. Brazier's impairments to be a direct result of the accident of September 15, 2005 noting that "... her personality structure contributed to the spiral, but had it not been for the accident, one can conclude that she would be still working today, providing for her family, perhaps visiting her doctor to deal with stress on an intermittent basis..."

92 Dr. Young also opined that Ms. Brazier had suffered a catastrophic impairment as a result of the accident, noting the Ontario Superior court decision in *Desbiens v. Mordini*<sup>12</sup> that concluded that an assessment of whole person impairment (WPI) should consider the combined effect of physical and psychological impairments. Although Dr. Young did not arrive at a WPI impairment for Ms. Brazier, he noted that Ms. Brazier had a marked level of impairment in the four areas that the AMA Guidelines assess for permanent impairment, i.e. 1) her activities of daily living, 2) social functioning, 3) concentration/persistence/pace and 4) deterioration/decompensation in work like settings, with some tendencies toward extreme impairment. Given these effects of the accident, Dr. Young concluded, at page 41, as follows:

...it is my professional opinion that it is reasonable to suggest that the combination of Ms. Brazier's physical and psychological impairments that have been induced by her accident constitute catastrophic impairments. These impairments (1) have substantially, continuously, and permanently incapacitated her from being able to pursue not only her prior employment but probably any type of instrumentally productive, gainful employment, and (2) have substantially, continuously, and permanently induced a deep psychological suffering requiring continued long term psychotherapy and related treatments.

93 In connection with his report, Dr. Young also prepared an Application for Determination of Catastrophic Impairment (OCF-19) dated March 17, 2008 and a further treatment plan (OCF-18) dated March 18, 2008.

94 With respect to the treatment plan, it was referred to Dr. Rashid for a paper review. In a brief report dated April 23, 2008, Dr. Rashid simply notes that he reviewed Dr. Young's report "with interest" and found no reason to alter the opinion expressed in his earlier report of January 17, 2008. Dr. Rashid repeated that he had been unable to establish a diagnosis for Ms. Brazier based on the fact that she had been highly engaged in symptom magnification. As a result, Dr. Rashid remained of the opinion that psychological treatment was not reasonable and necessary.

95 With respect to the Application for Determination of Catastrophic Impairment, Ms. Brazier was referred to a section 42 multidisciplinary assessment, again at Riverfront Medical Services.

96 Ms. Brazier was assessed by a neurologist, a psychiatrist, an occupational therapist and a physiatrist between May 30, 2008 and June 11, 2008.

97 Although a determination of catastrophic impairment is not an issue in this arbitration, Ms. Brazier submitted that the psychiatric evaluation conducted by Dr. Ari Zaretsky, psychiatrist, was helpful in understanding the nature and degree of her accident-related psychological impairments. RBC did not object to the admission into evidence of Dr. Zaretsky's report.

98 Dr. Zaretsky met with Ms. Brazier and took a fairly extensive social and medical history. He refers specifically to Ms. Brazier's challenging childhood and early adult life, as well as the reference in Dr. Barrett's clinical notes to Ms. Brazier's difficulty coping with work and home stressors in the year before the accident. Dr. Zaretsky also had access to extensive medical documentation including Dr. Rashid's reports of January 17, 2008 and April 23, 2008 expressing concerns over Ms. Brazier's symptom magnification. As with all other section 42 assessments, however, Dr. Zaretsky did not have the benefit of the Perlmutter report that first concluded that Ms. Brazier had serious psychological issues.

99 Although Ms. Brazier was not found to be catastrophically impaired as a result of the accident, Dr. Zaretsky concluded as follows:

In summary, Ms. Brazier has experienced significant symptoms of depression and anxiety over the last three years since her motor vehicle accident. She has experienced chronic depression, anxiety and chronic pain; however, her current emotional and behavioural status reflects a level of impairment that would not meet SABS Criteria for a Catastrophic Impairment.

...

As opined by Justice Spiegel with the *Desbiens* decision, physical and psychological impairments are considered together and their scores combined in determining total whole person impairment. Using Table 3, Chapter 4 to determine the claimant's psychological impairment by analogy, I propose a 22% whole person impairment of psychological impairment.

100 While the focus of Ms. Brazier's assessments and requests for treatment shifted to psychological as opposed to physical assessments and treatment modalities, investigations into an underlying pathological explanation for her symptoms has continued. The most current medical report tendered into evidence is a report by Dr. Joseph Wong, physiatrist, dated May 21, 2008.

101 Dr. Wong assessed Ms. Brazier and noted that, while exhibiting a full range of motion in the hips, knees and ankles, Ms. Brazier continued to experience constant pain and a burning sensation in those areas. Her pain symptoms were exacerbated by prolonged walking or standing. Low back pain was also noted. Given the chronicity of her complaints (now 2 1/2 years post-accident), and also given his review of the reports of Drs. Perlmutter and Young and the psychological diagnoses contained therein, Dr. Wong concluded that Ms. Brazier was unable to return to any occupation and would likely remain that way unless her psychological problems were addressed and she embarked on an aggressive exercise program to build her muscle strength and endurance to control her chronic pain. He recommended a chronic pain program that would address both her physical and psychological problems. Thereafter, a vocational assessment and transferable skills assessment could be conducted to identify employment that suited her impairments, although her prognosis for returning to gainful employment remained guarded.

102 Finally, I note that Dr. Barrett, the family doctor, testified at the hearing. It was his evidence that he had "missed the boat" in his efforts to diagnosis Ms. Brazier. He focussed exclusively on a pathological or physical explanation for her complaints. He overlooked the persistence of her complaints and the absence of any clear organic pathology as signs that she might be suffering from chronic pain with a significant psychological component. When he read Dr. Young's report of March 18, 2008, it was something of a "revelation" to him and he had to "wholeheartedly agree" with Dr. Young's diagnoses. In addition to the injuries and sequelae identified in his previous two Disability Certificates, Dr. Barrett issued a third Disability Certificate dated June 25, 2008 that lists phobia and related syndromes, and chronic pain syndrome as injuries and sequelae directly related to the accident.

### **Analysis and Findings:**

#### ***Credibility***

103 An applicant's credibility is often an important consideration when determining the nature and extent of disability and, consequently, entitlement to benefits. This is especially true where there is little or no evidence of underlying pathology that would adequately explain an applicant's complaints.

104 RBC takes the position that Ms. Brazier is not only able to engage in employment for which she is reasonably suited by education, training or experience, but that she would be able to return to her pre-accident employment at Daton, if it were still available. RBC challenged the veracity of Ms. Brazier's complaints and her assertion that she is unable to return to work.

105 Throughout her evidence, Ms. Brazier's presentation alternated between despondency and anger. Ms. Brazier emphasized her independence and seemed particularly distraught that she had not been able to surmount the adversity of this accident the way she had been able to rise above some of the other challenges in her past. She cried intermittently. At times, her responses and behaviours appeared somewhat histrionic and prone to hyperbole, raising the question of whether Ms. Brazier may be malingering or whether, as Dr. Young opined, her exaggerated responses were themselves symptomatic of her psychological condition and represented a "cry for help." I am compelled on the evidence to agree with Dr. Young.

106 Dr. Young arrived at his opinion on the basis of an extensive assessment of Ms. Brazier taken over several days. Dr. Rashid simply responded that he read Dr. Young's report "with interest" and repeated his conclusion that treatment was not reasonable and necessary because Ms. Brazier's responses were not reliable and prevented him from making a diagnosis. I find Dr. Rashid's response inadequate and unhelpful. Dr. Rashid effectively sidesteps the issue of whether exaggerated responses can be a symptom of a psychological condition. I accept Dr. Young's opinion that exaggerated responses may represent a "cry for help" and I further accept that such was the case with Ms. Brazier.

107 I find that the evidence, when taken as a whole, supports the conclusion that Ms. Brazier's exaggerated responses are not evidence of malingering. I accept that Ms. Brazier took pride in her ability to care for herself and her children and is motivated to return to work. I accept not only her evidence in that regard, but also the evidence contained in several medical reports, as well as the evidence of Ms. John and Mr. Quintieri who testified in a straightforward and credible manner.

108 I also find that Ms. Brazier's letters to Ms. Ferreira were early indicators of her psychological vulnerabilities and could themselves be fairly characterized as a "cry for help."

109 I note that RBC made much of the fact that Dr. Barrett's clinical notes and records contain several entries that do not reference accident-related complaints. Further, those entries that do refer to the accident fail to mention complaints of headaches, sleeplessness and anxiety which appear in other reports.

110 With respect to his note taking, Dr. Barrett testified that he has approximately 5,000 patients. He works in a clinic setting and sees 3 or 4 patients per hour, as well as emergency patients. He works 12 to 15 hours per day. Dr. Barrett stated that while he is required to take notes, they are not a record of all complaints but rather represent a "biased report of chief complaints" based on both the patient's complaints and his assessment. In short, Dr. Barrett notes what he finds to be important. Chronic or ongoing complaints may not be noted in every visit.

111 Ms. Brazier testified that she did not complain as often as she should have to Dr. Barrett about headaches, as she was already taking Advil and expected that there was not much else to be done. She also testified that headaches were not her primary complaint. She also testified that she

did not tell Dr. Barrett about the extent of her sleep problems because she did not want to be taking sleeping pills since she cares for four children. This is consistent with the concerns noted earlier that Ms. Brazier had regarding her use of Oxycocet.

112 I accept that Dr. Barrett's notes likely do not reflect the full extent of Ms. Brazier's complaints. Further, I find that RBC has underemphasized the several accident-related complaints that are noted in Dr. Barrett's records and the fact that investigations into Ms. Brazier's ongoing complaints increasingly shifted from her family doctor to other specialists, such as Dr. Catre, Dr. Prutis, Dr. Perlmutter, Dr. Wong and Dr. Young.

113 RBC also challenged the veracity of Ms. Brazier's complaints and her assertion that she could not return to work by referring to a note in Ms. Brazier's social assistance file dated August 2, 2007. The note states: "applicant states that she is able to work but requires assistance obtaining daycare for dependents. Ms. Brazier responded that she had told Social Services that she was "willing" to work, not that she was able to work. I note that the Social Services record also provides: "states that she cannot stand on her feet for long periods of time."

114 RBC also found it suspect that Ms. Brazier would proceed with plans to have a child with Mr. John in January 2006, if her accident-related injuries were of the nature and extent reported. Ms. Brazier responded that, at the time, she was still receiving IRBs and attending treatment at Life Mark. She did not anticipate that her benefits would be terminated or that she would still be experiencing pain three years post-accident.

115 While Ms. Brazier's evidence may have contained some inconsistencies, I do not find them to be very significant, especially when viewed in light of the evidence as a whole. I find that Ms. Brazier's evidence was largely internally consistent, as well as largely consistent with the evidence of both lay and medical witnesses.

116 I therefore accept Ms. Brazier's evidence as it relates to her perception of her injuries and her pain complaints. While her affect was highly emotional and some of her responses exaggerated, I do not find that her evidence was intended to mislead or was motivated by malingering.

### ***Disability***

117 I find that Ms. Brazier is both unable to perform the essential tasks of her pre-accident employment at Daton and currently completely unable to engage in any occupation for which she is reasonably suited by education, training or experience.

118 I find that Ms. Brazier continues to experience significant ongoing pain in the area of her right leg, right knee, right ankle, right foot, right hip and lower back as a result of the accident. I also find that she continues to suffer from frequent stress-related headaches and sleeplessness that are also sequelae of the accident. Although there is little evidence of an underlying pathological condition that would adequately explain Ms. Brazier's pain complaints, I accept the opinions of Dr. Perlmutter, Dr. Young, Dr. Barrett and Dr. Wong that Ms. Brazier suffers from chronic pain with a strong

psychological component. In addition to her heightened pain perception, I accept that the accident has materially contributed to psychological disorders that include depression and anxiety.

119 I find that, prior to the accident, Ms. Brazier was functioning quite well in her activities of daily living and work, although she was clearly a psychologically vulnerable person. She had had a difficult past and was juggling the responsibilities of a full-time job and three children that she was raising mainly on her own. I find that Ms. Brazier's vulnerability left her exposed to a chronic pain disorder with significant psychological overlay.

120 I also note and find it significant that Ms. Brazier had risen above the issues in her past by working hard and proving that she could be self-sufficient and take care of her family. It was a source of pride and self-esteem. Here, however, her pain precluded using hard work, at home and at her job, to generate feelings of self-worth and success. In some ways, the emotional and physical abuses of her past proved easier to manage than the physical pain that persisted months after her accident. Dr. Barrett, her family doctor, prescribed physiotherapy and continued to investigate a purely physical etiology for her pain complaints. While physiotherapy helped, it did not eliminate her symptoms and when treatment was withdrawn, her symptoms became worse, likely due in large part to the psychological component of her condition that remained undiagnosed and untreated. Even when Ms. Brazier's chronic pain with significant psychological overlay was finally diagnosed by Dr. Perlmutter, some 15 months post-accident, Ms. Brazier continued to go untreated for her chronic pain and psychological disorders. I accept that the length of time that Ms. Brazier's psychological problems have gone untreated constitutes a barrier to recovery.

121 Dr. Young, Dr. Barrett and Dr. Wong all arrived at the conclusion that Ms. Brazier's chronic pain, and related psychological conditions including anxiety and depression, render Ms. Brazier completely unable to engage in any productive and gainful employment. As Dr. Perlmutter assessed Ms. Brazier within two years of the accident, his opinion was limited to the question of whether Ms. Brazier could perform the essential tasks of her pre-accident employment. Dr. Perlmutter concluded that Ms. Brazier could not return to her job at Daton based on both physical and psychological impairments.

122 I accept the opinions of Dr. Perlmutter, Dr. Young, Dr. Barrett and Dr. Wong and prefer them to the opinion of Dr. Rashid who, in fact, did not arrive at any conclusion, other than the conclusion that he could not make a diagnosis on the basis of Ms. Brazier's test results.

123 In arriving at my decision, I also find it significant that Dr. Zaretsky, who examined Ms. Brazier in the context of a section 42 catastrophic impairment examination and who reviewed Dr. Rashid's reports, was able to conclude that Ms. Brazier experienced significant symptoms of chronic depression and chronic pain, and assigned a WPI rating of 22% on account of her psychological impairments.

124 I also accept the opinions of Dr. Perlmutter, Dr. Young and Dr. Wong that Ms. Brazier would likely benefit from a pain management program with a strong psycho-educational component. In time, and with proper medical and rehabilitative support, Ms. Brazier may very well make a successful return to the work force. As stated, I accept that Ms. Brazier is motivated to work to support herself and her family. At present, however, the preponderance of the medical evidence suggests that the prognosis for a return to work is guarded.

125 With respect to Dr. Zarnett's evidence, I find that his orthopaedic opinion does not conflict with my conclusion that Ms. Brazier suffers from a largely psychological condition that renders her currently unemployable. Dr. Zarnett agreed that the etiology of chronic pain can be largely, if not exclusively, psychological. Dr. Zarnett examined Ms. Brazier from a limited orthopaedic perspective. He agreed that he did not have the expertise to provide an opinion on somatoform disorders or to comment on Ms. Brazier's psychological condition. He also believed that his assessments were conducted too soon after the accident for a chronic pain diagnosis.

126 While Dr. Zarnett testified that Ms. Brazier did not communicate significant pain symptoms during his assessments of her, it is clear from Ms. Brazier's letters that, rightly or not, she felt "shut down" by Dr. Zarnett's manner (even when his opinion supported her claim for ongoing IRBs), and it is equally clear that Ms. Brazier continued to have significant pain complaints after Dr. Zarnett's assessments, as evidenced by Dr. Barrett's clinical notes and his referrals to Dr. Catre and Dr. Prutis.

127 In short, I do not find Dr. Zarnett's opinion, based on orthopaedic examinations performed at 3 and 6 months post-accident, to be particularly helpful when it comes to understanding Ms. Brazier's chronic pain condition, its significant psychological component and its impact on her ability to work.

128 In conclusion, I find that, due to the accident, Ms. Brazier was substantially unable to return to her pre-accident employment from April 4, 2006 to September 15, 2007. Thereafter, she has been and currently remains completely unable to engage in any employment for which she is reasonably suited by education, training or experience. As a result, RBC shall pay to Ms. Brazier IRBs at the rate of \$385.56 per week, with interest, from April 4, 2006.

### **Special Award**

#### **a) General Principles**

129 Ms. Brazier also seeks a special award.

130 Section 282(10) of the *Insurance Act* provides as follows:

(10) If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all

amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

131 The general principles guiding the inquiry into whether an insurer's conduct warrants a special award have been discussed in several cases. Some of the main considerations may be summarized as follows:

- an insurer is not held to a standard of perfection in responding to a claim, that an insurer's claims decision is to be judged on the basis of the information available at the time, and not from hindsight, and that an insurer is not to be found unreasonable just because an arbitrator concludes its claims decision was wrong.<sup>13</sup>
- A special award is not granted merely because the insurer incorrectly interpreted or failed to comply with a provision of the *Schedule*; if that were the case, a special award would be granted to every successful applicant. An insurer can come to the wrong conclusion without having acted unreasonably. To merit the granting of a special award, there must be something more - *unreasonable* conduct on the part of the insurer.<sup>14</sup>
- the question of whether an insurer's delay or failure in paying a benefit is "unreasonable" is fact driven and highly dependent on the arbitrator's view of the evidence<sup>15</sup>
- unreasonable conduct does not need to amount to "bad faith" or "wilful misconduct"<sup>16</sup>
- in considering a special award, the conduct of both parties should be considered<sup>17</sup>
- the sort of conduct that would constitute "unreasonable" behaviour in withholding or delaying payments includes "excessive, imprudent, stubborn, inflexible, unyielding or immoderate" behaviour<sup>18</sup>
- an insurer's failure to act promptly where there has been a change or clarification of the law has formed the basis for a special award<sup>19</sup>

**b) Did RBC unreasonably withhold payment?**

132 In the case at hand, Ms. Brazier advanced her claim to a special award on the following grounds:

- that RBC failed to adequately address Ms. Brazier's complaints regarding Dr. Zarnett's assessments;
- that RBC ignored the medical evidence relevant to entitlement to IRBs, i.e. that RBC ignored the psychological assessments of Dr. Perlmutter and Dr. Young, as well as the assessments of Dr. Wong, physiatrist;
- that RBC failed to provide critical information to its own examiners, i.e. it failed to forward the Perlmutter report to any section 42 assessors; and
- that RBC failed to comply with section 37 of the *Schedule* in stopping payment of her IRBs, i.e. that Ms. Brazier was provided with neither the opportunity to be examined by a DAC (as required pre-

March 1, 2006) nor was she given the opportunity to provide an updated Disability Certificate before being assessed by Dr. Zarnett (as required post-March 1, 2006).

133 With respect to the last point, I agree that Ms. Brazier was not offered the procedural protections afforded under either the prior or current provisions of section 37 of the *Schedule*. It would seem, however, that RBC complied with the provisions of section 37, as it read at the relevant times, both when requesting Ms. Brazier to attend the assessment by Dr. Zarnett and when it provided notice of stoppage. It is unfortunate that the timing of each event, together with the operation of the transitional provisions, neither required RBC to secure an updated Disability Certificate before making its decision to conduct an assessment nor provided Ms. Brazier with the right to a DAC after the assessment. However, while it is easy at this stage to suggest that RBC should have seen the gap created in this case, I accept that Ms. Brazier fell through the cracks for reasons attributable to the transition from a DAC to non-DAC system and not as a result of any bad faith or negligence on the part of RBC. As stated above, an insurer is not to be held to a standard of perfection and I do not find that RBC's conduct on this point warrants a special award. Even the drafters of the transitional provisions do not seem to have anticipated the scenario where a request for a section 42 assessment is issued prior to March 1, 2006, but the assessment and resulting notice of stoppage take place after March 1, 2006.

134 I also note that Dr. Barrett was still pursuing a strictly physical cause for Ms. Brazier's complaints in March 2006. In fact, the Disability Certificate that Dr. Barrett provided several months later in December 2006 still listed the same injuries and sequelae as those listed in the October 2005 Disability Certificate that was available to Dr. Zarnett. In other words, I find it unlikely that providing Ms. Brazier with the opportunity to provide an updated Disability Certificate prior to Dr. Zarnett's assessment in March 2006 would have made any difference to Dr. Zarnett's findings and conclusions.

135 With respect to Ms. Brazier's letters outlining her complaints about Dr. Zarnett's assessments and the discrepancies in his reports, I find that RBC failed to adequately address Ms. Brazier's concerns.

136 I expect that Ms. Brazier's dissatisfaction with Dr. Zarnett's assessments stems, at least in part, from a misapprehension of the difference between a primary or treating physician and an assessor, like Dr. Zarnett, who is primarily concerned with understanding injuries and their sequelae from the perspective of functioning. At the same time, I expect that Dr. Zarnett's manner may have been somewhat "clinical" and he likely could have done more to make Ms. Brazier feel comfortable with the assessment and taken more time to listen to and understand her pain complaints. However, the focus on this point is not Dr. Zarnett's conduct, but RBC's conduct.

137 Upon receiving Ms. Brazier's letters, RBC forwarded her correspondence to West Park for their review. Ms. Brazier did not take issue with her letters being sent to West Park. However, it is

not clear what RBC expected West Park to do with Ms. Brazier's complaints. There is no direction or stated expectation that the complaints and discrepancies would be brought to Dr. Zarnett's attention or that Dr. Zarnett should provide an addendum report. There was also no follow up with West Park by RBC and, as we know from Dr. Zarnett's evidence, the concerns with his assessments were never brought to his attention. Still, I find it unlikely that better handling of Ms. Brazier's complaints regarding Dr. Zarnett and his assessments would have altered Dr. Zarnett's opinion. In his oral evidence, Dr. Zarnett maintained the accuracy of the information contained in his reports and minimized the importance of subjective pain complaints where they do not co-relate with physical findings.

138 The primary concerns I have with RBC's conduct as it relates to Ms. Brazier's IRBs having been unreasonably withheld or delayed arise out of the misplaced Perlmutter report and RBC's continued reliance on Dr. Rashid's reports over the report of Dr. Young.

139 With respect to the Perlmutter report, I accept that there was no attempt by Ms. Ferreira to keep the Perlmutter report or any relevant medical evidence from RBC's section 42 assessors. I also accept that the report was misfiled and forgotten, as opposed to intentionally ignored. However, I do not agree that an insurer's conduct needs to be intentional in order to attract a special award. As stated above, wilful misconduct, as well as excessive, imprudent, stubborn, inflexible, unyielding or immoderate behaviour may be relevant considerations, especially as it relates to the appropriate quantum of a special award. However, in my view, such behaviour is not necessary for a finding that an insurer has unreasonably withheld or delayed payment of a benefit. While it may have been mere negligence in this case that buried the Perlmutter report, this does not change the fact that Ms. Brazier was entitled to have RBC either accept Dr. Perlmutter's findings or conduct its own timely assessment of her psychological condition and any impairments affecting her ability to work. As a result of RBC's negligence, neither occurrence took place. RBC's negligence also meant that subsequent assessments conducted by RBC were flawed in that the assessors did not have the complete medical record for their review. In these circumstances, I find that IRBs were unreasonably withheld as a direct result of RBC's conduct.

140 I also find that it was neither sufficient nor reasonable for RBC to have relied on Dr. Rashid's opinion of April 23, 2008 in response to Dr. Young's report of March 17, 2008. The main problem with Dr. Rashid's opinion is that he really does not provide an opinion, especially on the central issue of whether Ms. Brazier's exaggerated responses could be a symptom of her psychological condition and represent a cry for help. Dr. Rashid had a clear opportunity to respond to that issue when he provided his second report of April 23, 2008. He also had a clear duty to address the issue since his earlier report of January 17, 2008 (that RBC relied upon) found a "lack of psychological impairment" specifically because Ms. Brazier's responses were exaggerated and unreliable.

141 For the above reasons, I find that Ms. Brazier is entitled to a special award. I find that RBC's withholding of IRBs became "unreasonable" no later than 30 days following its receipt of the Perlmutter report by which time RBC should have conducted its own assessment.

**c) Quantum of Special Award**

142 I did not hear submissions on the quantum of any special award I might order. I encourage the parties to try and reach consensus on an amount appropriate in the circumstances and, in that regard, they may wish to review *Liberty Mutual Insurance Company and Persofsky et al.*<sup>20</sup> and other Commission case law for guiding principles. Although I have not had the benefit of submissions on quantum, I offer my impression that RBC's conduct does not appear to warrant an award at the highest or lowest ends of the scale of special awards previously awarded at the Commission.

143 In the event that the parties are unable to reach a negotiated resolution, I will take written submissions on the appropriate quantum of the special award. In order to allow time for the parties to attempt to resolve this issue between themselves, Ms. Brazier's submissions will not be due until 60 days following the release of my reasons. RBC will have 15 days thereafter to respond. Ms. Brazier will have a further 7 days for reply submissions. I will render a decision on the basis of the written submissions filed.

**Expenses:**

144 The parties did not make submissions on the issue of expenses. If the parties cannot agree on entitlement to or the amount of expenses, they may request a determination of these issues pursuant to Rule 79 of the *Code*.

**R. Bujold Member:**

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

1. Ms. Brazier is entitled to receive income replacement benefits from April 4, 2006 to date and ongoing, at the rate of \$385.56 per week, with interest.
2. Ms. Brazier is entitled to a special award. If required, I will take written submissions on the appropriate quantum of the special award.
3. If the parties cannot agree on entitlement to or the amount of expenses, they may request a determination of these issues in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

**Footnotes**

[1](#)

*The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

[2](#)

My account of Ms. Brazier's evidence includes both her oral testimony as well as statements attributed to her in various medical and other reports, especially the report of Dr. Gerald Young, psychologist, dated March 17, 2008 (see Exhibit 1, vol.2, tab 8)

3

A physical demands analysis conducted at the work site by Courtney Samotie, occupational therapist, with NRCS Inc., confirmed that, as it related to the lower extremities, the physical demands of the job as receptionist and shipper and receiver included frequent standing, frequent walking, occasional squatting, frequent crouching/squatting. The strength level was classified as "light" based on NOC definition: "work activities involving handling of loads of 5 kg but less than 10 kg."

4

See report of Dr. Young dated March 17, 2008, p. 20

5

No evidence was led on this issue.

6

It is not clear when this letter was sent to Ms. Ferreira, but the letter is date stamped April 20, 2006.

7

Page 2 of the letter has the handwritten date of April 6/06, although this letter, as with the letter dated February 9, 2006, is date stamped April 20, 2006. It would appear, therefore, that both letters from Ms. Brazier were received by RBC on April 20, 2006.

8

I note that Ms. Brazier is correct in at least one respect regarding inaccuracies in Dr. Zarnett's report. Dr. Zarnett's report refers to Ms. Brazier being laid off from employment prior to the accident which is not correct.

9

Although only the letter of February 9, 2006 is referenced, Ms. Ferreira testified that she believes both letters were forwarded to West Park. She indicated that there would be no reason to forward only the one letter of complaint and not the other. I accept that it is likely that both letters were forwarded and it is likely that only one date is referenced as the second letter is not dated on its first page.

10

Dr. Spivak's report was not tendered into evidence, although it apparently responded to an OCF-22 prepared by Dr. Young dated November 5, 2007 recommending a psychological assessment. Dr. Spivak found a psychological assessment to be not reasonable and necessary. As I do not have Dr. Spivak's report, I do not know the exact basis for her opinion. It seems clear, however, that, as with Dr. Rashid, Dr. Spivak would not have had the benefit of Dr. Perlmutter's report that had diagnosed

physiological impairments and identified the need for psychological treatment a year before in December 2006.

11

*American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders* (4<sup>th</sup> Edition, Washington, DC, American Psychiatric Association, 1994)

12

*Desbiens v. Mordini*, 2004 CanLII 41166 (S.C.J.).

13

*Aviva Canada Inc. and Peters* (FSCO P06-00013, March 15, 2007)

14

*Melchiorre and Wawanesa Mutual Insurance Company* (FSCO A05-000491 and A05-000492, December 22, 2006)

15

See, for example, *Maas and State Farm Mutual Automobile Insurance Company* (OIC P96-00080, December 8, 1997)

16

See, for example, *Erickson and The Guarantee Company of North America* (FSCO A-000560, July 16, 1992)

17

See, for example, *Garcia and Liberty Mutual Insurance Company* (FSCO A98-001471, January 20, 2000)

18

*Plowright and Wellington Insurance Company* (OIC A-003985, October 29, 1993)

19

*Moschonissios and York Fire & Casualty Insurance Company* (FSCO A97-002196, December 23, 1999)

20

*Liberty Mutual Insurance Company and Persofsky et al.* (FSCO P00-00041, January 31, 2003)

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