



**BETWEEN:**

**MIGUEL ALLEN**

**Applicant**

**and**

**SECURITY NATIONAL INSURANCE CO./  
MONNEX INSURANCE MGMT. INC.**

**Insurer**

**DECISION ON A PRELIMINARY ISSUE**

- Before:** Arbitrator Alan G. Smith
- Heard:** In person at the Financial Services Commission of Ontario on February 28, 2018, and by written submissions completed February 23, 2018
- Appearances:** Mr. Andrew Murray and Ms. Jwan Desai for Mr. Miguel Allen  
Mr. Derek Greenside for Security National Insurance Co./Monnex Insurance Mgmt. Inc.
- Issue:**

The Applicant, Mr. Miguel Allen, was injured in a motor vehicle accident (the “accident”) on September 5, 2008 and sought accident benefits from Security National Insurance Co./Monnex Insurance Mgmt. Inc. (“Security National”), payable under the *Schedule*.<sup>1</sup> The parties were unable to resolve their disputes through mediation and Mr. Allen, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*<sup>2</sup> as amended.

The issue in this continued Preliminary Hearing is:

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<sup>1</sup>The Statutory Accident Benefits Schedule, Ontario Regulation 403/96, as amended - Accidents on or after November 1, 1996, and before September 1, 2010.

<sup>2</sup>R.S.O. 1990, c.I.8, as amended.

The issue in this continued Preliminary Hearing is:

1. Does the Applicant suffer from a *catastrophic impairment* caused by the motor vehicle accident? More specifically, does the Applicant, pursuant to section 2(1.2)(f) of the *Schedule*, suffer from “an impairment or combination of impairments that, in accordance with the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in 55 per cent or more impairment of the whole person” caused by the motor vehicle accident?

**Result:**

1. The Applicant, Mr. Miguel Allen, suffers from a *catastrophic impairment* caused by the motor vehicle accident pursuant to section 2(1.2) (f) of the *Schedule*.

**HISTORY OF THE MATTER:**

**The Initial Preliminary Issue Decision**

The initial preliminary issue hearing in this application took place before me in October 2014 with written submissions completed in November 2014. I rendered a decision on February 3, 2015, finding that the Applicant was not *catastrophically impaired* pursuant to the *Schedule*.

I based my decision partially on the conclusion that the combination of ratings pursuant to Chapter 4 (“The Nervous System”), Table 3 and the table in Chapter 14 (“Mental and Behavioural Disorders”) in the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> edition, 1993, (“the *Guides*”) constituted “double counting” and was not “in accordance with” the *Guides* principles. Instead, I rated the Applicant pursuant to Chapter 4, Table 2, of the *Guides* as suffering from a 14% impairment rating.

I also declined to award the Applicant a rating for medications because he testified that as of the date of the hearing he was, “not taking any medication at the moment”. The Applicant’s assessors had advocated a 1 – 3% rating for use of medication.

In my final analysis, I found that the final estimated Whole Person Impairment (“WPI”) percentage according to the Combined Values Chart in the *Guides*,<sup>3</sup> when all the impairment ratings were combined, (that is, 28% for the “Musculoskeletal System”, 14% for the “Nervous System”, 4% for “The Skin”, and 20% for “Mental and Behavioral Disorders”), was a 52% WPI. 52% rounded to the nearest value ending in 0 or 5, as mandated by the *Guides*, yielded 50%, which was insufficient to meet the threshold WPI in clause 2(1.2)(f) of the *Schedule*, namely 55%.

## The Appeal Decision

The parties appealed my decision to Director’s Delegate Blackman. His Appeal Order<sup>4</sup> reads as follows:

The Arbitrator’s February 3, 2015 Order is rescinded. The question of Mr. Allen’s rating under Chapter 4 (the Nervous System) of the *American Medical Association’s Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, and medication rating are remitted back to arbitration for determination .... The Arbitrator’s other Whole Person Impairment ratings are confirmed.

## THE NEW IMPAIRMENT RATINGS

### The Nervous System

In his appeal decision Delegate Blackman provides the following instruction regarding Chapter 4.1 of the *Guides* that:

It was incumbent upon the Arbitrator to rate both aspects of the Appellant’s brain impairment, providing separate ratings under both Table 2 and Table 3 [of *Guides* Chapter 4], and then use the most severe rating to combine that rating, using the Combined Values Chart, with the other impairment ratings’ ....

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<sup>3</sup>Pages 322-323 of the *Guides*.

<sup>4</sup>(FSCO P15-00018, July 6, 2016), upheld on Judicial Review, 2017 ONSC 6779

It is thus necessary that this issue go back to arbitration for a determination of the Appellant's impairment rating under Table 3 of Chapter 4. If that impairment rating is greater than the Arbitrator's 14% WPI rating under Table 2 of Chapter 4, in accordance with section 4.1 of the *Guides*, "the most severe ... should be used to represent the cerebral impairment."

Regarding the "double counting" vis-à-vis Chapters 4 and 14 of the *Guides*, Delegate Blackman stated that the issue "was not novel". He notes that the Insurer cited in support of its position that a WPI percentage discount is applicable:

...*Taylor and Pembridge Insurance Company of Canada*, (FSCO A12-004886, June 11, 2014), where Arbitrator Huberman determined that some of the insured person's difficulties arose not out of her emotional or behavioural disorders but out of other sources...*Moser and Guarantee Company of North America*, where, because of duplication, Arbitrator Lee reduced the WPI rating for a closed head injury/neuropsychological findings by 2% in rating Chapter 4, Table 3 cognitive impairment and Chapter 14 mental and behavioural disorders.

Unfortunately, none of the decisions where a WPI percentage discount was applied provide a formula as to how to actually discount the percentage quantum.

I note that nowhere in his decision does Delegate Blackman mandate that a WPI discount is applicable in cases such as the present one. In the introduction to his decision he makes no mention of a discount as part of the process an arbitrator must follow:

A significant issue in this catastrophic impairment appeal concerns an insured person injured in a motor vehicle accident who suffers both a physical brain injury and a separate psychological mental and behavioural disorder. If both the organic brain injury and the psychological disorder separately result in emotional or behavioural impairments, are both the physical brain injury and the psychological disorder each to be rated for such impairments and then combined as provided for in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 (the "*Guides*")?

My answer is yes.

Delegate Blackman also remarks:

Section 4.1 of Chapter 4 of the *Guides* requires that the most severe of five listed categories of cerebral dysfunction listed be used to represent the cerebral impairment. The 5 categories include mental status impairments, rated at Table 2, and Emotional or Behavioural Impairments, rated at Table 3. This would seem, where there are multiple manifestations of a cerebral injury, *to underestimate the full extent of the various aspects of such injury*, but that is what both parties agree the *Guides* provide. [Emphasis Mine].

Delegate Blackman notes in his appeal decision that Dr. Vitelli, the Applicant's neuro-psychologist assigned a score of 25 – 27 WPI based on Chapter 4, Table 3. Dr. Finkel, the insurer's psychiatrist, opines after assessing the Applicant in August of 2011 that, "A reasonable Whole Person Impairment rating given his Class 2 – 3 psychiatric impairment would not exceed 18% WPI if one were to utilize Table 3 in Chapter 4 of the AMA Guides for rating emotional and behavioural impairment".

I will start with Dr. Finkel's assessment range and use 17% to be a conservative starting point given his determination that the Applicant's impairment would *not exceed* 18% and Dr. Vitelli's 25 – 27% range. I then apply a 2% discount for "double counting" as per the *Moser*<sup>5</sup> decision. In the result, the final percentage impairment rating for Chapter 4, Table 3, is 15%.

## Medication

In his appeal decision, Delegate Blackman provides the following instruction:

To narrowly tie an assessment to the four corners of a narrow artificial period is simply to encourage repeated applications for catastrophic impairment designation to the detriment in time and money to both parties

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<sup>5</sup>(FSCO A13-000812, September 26, 2014)

In this case, Dr. Rosenblat's June 1, 2012 report states that the Appellant only took medication for pain. Dr. Vitelli's (*sic*)<sup>6</sup> November 15, 2012 states that the Appellant was taking Advil for migraines. Analgesics or narcotic pain medications either caused stomach discomfort or dizziness. Other doctors noted similar complaints. Dr. Ladowsky-Brooks states that the Appellant had been non-compliant regarding prescribed medication for pain control, in part, due to inadequate funds.

I am not persuaded that an impairment rating for use of medication is restricted to the use of prescription medication. I am also persuaded that it would be an odd system of consumer protection where impecuniosity would lead to disentitlement to purchased insurance coverage.

I am persuaded that the Arbitrator erred in law in not assigning a WPI rating for medication. Again, the arbitration transcript is not before me, other than a small portion dealing solely with the issue of scarring. I am persuaded that the issue of assigning an impairment rating to the effects of medication, *over a reasonable time period* based on the facts of this case should, likewise, return to arbitration for determination. [Emphasis Added]

Unfortunately, Delegate Blackman provides no guidance as to what constitutes a "reasonable time period".

I interpret Delegate Blackman's decision as providing that non-prescription over-the-counter drugs are "medication" pursuant to the *Guides*. I accept Dr. Vitelli's report as factual with regard to the Applicant consuming "Advil" (ibuprofen - a non-prescription, anti-inflammatory/analgesic medication) as of mid-November 2012. The original hearing took place in late October 2014, less than two years later. I find that to be within a "reasonable time period" pursuant to Delegate Blackman's directive.

With regard to what WPI percentage to assign for medication, I note that Dr. Vitell's mid-November assessment stated that the Applicant reported, "Analgesics or narcotic pain medications either caused stomach discomfort or dizziness". This appears factually similar to the situation in *Morrison and State Farm Mutual Automobile Insurance Company*<sup>7</sup> where the Arbitrator noted under the heading "Effects of Medication":

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<sup>6</sup>In Director's Delegate Blackman's decision, he referred to a report. This was omitted in the decision.

<sup>7</sup>(FSCO A13-004672, February 4, 2016)

Under this category, Dr. Platnick assigned a WPI of 1% to Ms. Morrison for the effects of her medication. Dr. Becker on the other hand assigned a WPI of 1 – 3%. Page 9 of the *Guides* states that where medication is used to control signs and symptoms of an underlying condition that is likely to remain, an assessor may choose to increase the impairment percentage by 1 – 3%.

Ms. Morrison is currently on antidepressant medication, narcotics and a sleep aid. Some of the side effects of these medications include dizziness, nausea and vomiting.... Given the seriousness of the effects of the medications on Ms. Morrison, I find a percentage of 3% reasonable in the circumstance.

In the present case, the Applicant's assessors proposed a 1 - 3% rating for medication. The Applicant now requests a 2% rating. The Insurer's assessors advocated a 0% rating. Compared to that in *Morrison*, the impact of medication is somewhat less in the present case. I will therefore discount the WPI percentage rating to 2%.

### **The Final Estimated WPI Impairment Rating**

According to the Combined Values Chart in *Guides*, when I combine all the impairment ratings (that is, 2, 28, 15, 4, and 20) the result is a 54% WPI. 54% rounded to the nearest value ending in 0 or 5, as permitted by the *Guides*, yields 55%, which is sufficient to meet the criteria in clause 2(1.2)(f) of the *Schedule*.

### **CONCLUSION**

I conclude that Mr. Allen has proven, on a balance of probabilities, that he sustained a *catastrophic impairment* as a result of the accident as defined in section 2(1.2)(f) of the *Schedule*.

**EXPENSES**

The parties did not address expenses at this resumed hearing. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, they may request an appointment with a FSCO arbitrator for determination of it in accordance with Rule 79 the *Dispute Resolution Practice Code*.



Alan G. Smith  
Arbitrator

March 15, 2018  
Date





**BETWEEN:**

**MIGUEL ALLEN**

**Applicant**

and

**SECURITY NATIONAL INSURANCE CO./  
MONNEX INSURANCE MGMT. INC.**

**Insurer**

**ARBITRATION ORDER**

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario Regulation 664, as amended, it is ordered that:

1. The Applicant, Mr. Miguel Allen, suffers from a *catastrophic impairment* caused by the motor vehicle accident pursuant to section 2. (1.2)(f) of the *Schedule*.

A handwritten signature in black ink, appearing to read 'Alan G. Smith', written over a horizontal line.

Alan G. Smith  
Arbitrator

March 15, 2018

Date