Appeal P15-00018

OFFICE OF THE DIRECTOR OF ARBITRATIONS

MIGUEL ALLEN

Appellant

and

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

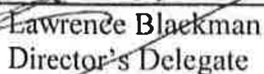
Respondent

BEFORE:	Delegate Lawrence Blackman
REPRESENTATIVES:	Mr. Andrew C. Murray and Ms. Jwan Desai for the Appellant, Mr. Miguel Allen Mr. Derek Greenside for the Respondent, Security National Insurance Co./ Monnex Insurance Mgmt. Inc.
HEARING DATES:	May 6 and June 15, 2016

APPEAL ORDER

Under section 283 of *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 Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The Arbitrator's February 3, 2015 Order is rescinded.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, as set out below. The Arbitrator's other Whole Person Impairment ratings are confirmed.



Lawrence Blackman
Director's Delegate

July 6, 2016
Date

REASONS FOR DECISION

I. BACKGROUND AND THE NATURE OF THE APPEAL

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.

The Appellant, Mr. Miguel Allen, was injured in a September 5, 2008 motor vehicle accident. As a result, he sought statutory accident benefits under the *1996 Schedule*[1] from his first-party insurer, the Respondent, Security National Insurance Co./Monnex Insurance Mgmt. Inc.

The parties came before Arbitrator Smith (the "Arbitrator") of ADR Chambers for a determination of whether the Appellant had sustained a catastrophic impairment ("CAT") as defined by clause 2(1.2)(f) of the *1996 Schedule*. The Arbitrator noted the parties' agreed Statement of Fact that the accident was a violent head-on collision. One of the Appellant's friends was killed. The Appellant was unresponsive for 10 to 15 minutes after the accident.

In the exhibit material before the Arbitrator was a November 15, 2012 report of Dr. R. Vitelli, psychologist. Dr. Vitelli, in providing a history of this matter, stated that the Appellant had:

> … survived a motor vehicle accident on September 5, 2008 in which three friends were seriously injured, one of whom he observed die beside him in the passenger seat. Mr. Allen suffered a closed head injury with 10 to 15 minutes loss

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

> of consciousness and subsequent GCS [Glasgow Coma Scale] of 14, two bruised lungs, a gash to the inside of his bottom lip, a fractured right femur [thigh bone], a shattered right calcaneus [heel bone], a chipped bone in his left wrist, various cuts and bruises, and soft tissue injuries to his neck, back, left elbow and shoulders. He underwent two surgeries to repair his fractured right knee and ankle. He spent one month in hospital …

Dr. Vitelli further stated:

> Mr. Allen had just begun Grade 12 at the time of the accident, but was unable to return to school due to his injuries. He attempted an English course in the summer of 2009 which was unsuccessful, as well as attempting an entrepreneur course in September 2010 which he was also unable to manage. He has not been able to return to his employment as a cook at Swiss Chalet, where he worked 32 hours per week. He and his girlfriend had a daughter in December 2010 whom he is not able to physically care for thus, she resides with his girlfriend and her parents. Mr. Allen has not been able to resume his usual housekeeping activities. He is independent in self-care and has resumed socializing. He has been unable to resume his usual pre-accident sports, including running, basketball, and various other activities due to his injuries. He has not completed school or worked for the last four years. Essentially, Mr. Allen's life is at a stand-still and he sees no future for himself because of the accident, particularly his ongoing pain and memory problems.

A catastrophic impairment determination allows an insured person to claim, but not necessarily collect, a higher level of first party benefits under the *1996 Schedule*. *The Guarantee Company v. Dong Do et al.*, 2015 ONSC 1891 (CanLII), in dismissing the application for judicial review in *Guarantee Company of North America and Do*, (FSCO P12-00037, October 11, 2013), noted my finding that "a CAT determination does not by itself bestow any monetary award but rather entitles an insured person to claim a greater level of benefits."

Clause 2(1.2)(f) of the *1996 Schedule* states:

> (1.2) For the purposes of this Regulation, a catastrophic impairment caused by an accident that occurs after September 30, 2003 is,
>
> …
>
> (f) subject to subsections (1.4), (2.1) and (3), 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 …

The Arbitrator's February 3, 2015 decision held the Appellant had not sustained a catastrophic impairment under clause 2(1.2)(f) of the *1996 Schedule*. He found that the arbitration raised a question of "double counting." The Arbitrator found that the answer to the "double counting" issue was determinative of whether the Appellant could succeed in his application.

The issue of double counting is not novel.

Ms. G and Pilot Insurance Company, (FSCO A04-000446, March 16, 2006), upheld in *Pilot Insurance Company and Ms. G,* (FSCO P06–00004, September 4, 2007), held:

> The intent of the Guides to accurately estimate the extent of each impairment means, amongst other things, not underestimating or overestimating the extent of the impairment. The former includes not penalizing insured persons for gaps in the *Guides* or in the catastrophic impairment designated assessment (CAT DAC) process. The latter concern includes not double counting impairments.
>
> Double counting does not mean that one activity of daily living can only be counted once. Impairments of various parts of the body can affect one activity of daily living. Vacuuming may be affected by neck, back, foot, arm or other impairments. Each of those impairments must be separately rated. Double counting may exist where the impairment originates in one area of the body, such as the back, and the impairment extends to another body part, such as the leg, and each bodily area is rated separately. However, if one assesses the related back/leg impairment solely as one impairment, that rating must accurately and fully capture the complete extent of that impairment.

Numerous other cases have also discussed the question of "double counting." [2]

The Arbitrator held that in determining the Appellant's actual level of impairment it made no sense to rate "the same set of symptoms twice for the same set of symptoms, each obtained in isolation from the other." The Arbitrator found that double counting would occur if percentage impairment ratings were obtained from both Chapter 4, Table 3 (the Nervous System: Emotional or Behavioural Impairments) and the Chapter 14 Table (Mental and Behavioural Disorders).

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[2] *McMichael and Belair Insurance Company Inc.,* (FSCO A02-001081, March 2, 2005), upheld on appeal (FSCO P05-00006, March 14, 2006), application for judicial review dismissed, (2007), 86 O.R. (3d) 68 (Div. Ct.). *Aviva Canada Inc. and Pastore*, (FSCO P09-00008, December 22, 2009), set aside in *Aviva Canada Inc. v Pastore*, 2011 ONSC 2164 (CanLII), appeal decision restored in *Pastore v. Aviva Canada Inc.*, 2012 ONCA 642 (CanLII), *State Farm Mutual Automobile Insurance Company and P.B.*, (FSCO P13-00036 and P13-00037, July 30, 2014), and *George and State Farm Mutual Automobile Insurance Company*, (FSCO P04-00028, December 6, 2005).

That, in the Arbitrator's view, would significantly overestimate the extent of the Applicant's psychological impairment.

The Arbitrator agreed with Arbitrator Nastasi, in *Pastore and Aviva Canada Inc.*, (FSCO A04-002496, February 11, 2009) (ultimately upheld, see Footnote 2 below), that the correct approach in determining whether psychological impairments should be rated under Chapter 4 or Chapter 14 was to determine the cause of the impairment. He concluded that "although the exact etymology of the Applicant's symptoms are uncertain, from a causation point of view, an impairment rating from Chapter 4, Table 2 [Mental Status Impairments] is more properly included in the final WPI [Whole Person Impairment] Rating, rather than Table 3."

The Arbitrator held that burden of proof rested on the Appellant to prove, on a balance of probabilities, that as a result of the accident he had sustained a catastrophic impairment as defined by clause 2(1.2)(f) of the *Schedule*. The Arbitrator concluded:

> It is clear that under the *Schedule*, the determination of catastrophic impairment is ultimately an adjudicative, not a medical determination … given my determination regarding the "double counting" issue, I find that taking the Applicant's case, at its extreme best (with the exception of the rating proposed for "use of medications" which I have denied), cannot succeed. I believe this is a fair approach … I am convinced that Mr. Allen's case is certainly no better than the maximum of what the assessors have determined.

Applying the Combined Values Chart in the *Guides*, the Arbitrator combined a 28% WPI rating under Chapter 3 (The Musculoskeletal System), a 14% WPI under Table 2 of Chapter 4 (The Nervous System), a 4% WPI under Chapter 13 (The Skin) for scarring and a 20% WPI under Chapter 14 (Mental and Behavioural Disorders).

This resulted in a 52% WPI (the Combined Values Chart does not add impairments; rather, it combines them using a set formula). Rounding this number to the nearest value ending in 0 or 5, as permitted by the *Guides*, resulted in a 50% WPI, which was insufficient to meet the clause 2(1.2)(f) of the *Schedule* threshold of 55% WPI.

Subsection 283(1) of the applicable pre-transition *Insurance Act* restricts appeals from the order of an arbitrator to questions of law. The Appellant submits that the Arbitrator erred in law in:

1. Failing to combine the impairment ratings from Chapter 4 (the Nervous System), Table 3 (instead of Table 2) and Chapter 14 (the "double counting" or "overlap" issue); and,

2. Not awarding an impairment rating for the Appellant's use of medication.

The Respondent submits that the Arbitrator erred in law in awarding a WPI rating for scarring. No other impairment ratings are challenged by either party.

II. THE PARTIES' SUBMISSIONS

1. The Nervous System

The Appellant argues that the Arbitrator should have combined a WPI rating under Chapter 4, Table 3, with a Chapter 14 WPI rating. The Arbitrator's Order should, therefore, be revoked. If required (should the Appellant not be successful on the other appeal issues), the Appellant submits that the matter should be referred back to the Arbitrator to determine, on the existing evidence, the correct Chapter 4, Table 3, WPI. In the alternative, the Appellant suggests that I, as an appellate officer, could substitute my decision for that of the Arbitrator.

The Appellant maintains that as a result of the 2008 accident he suffered a brain injury and, separate from that, psychological problems. He submits that both of these separate areas of disability manifested themselves in emotional and behavioural disorders.

The Appellant argues the Arbitrator fettered his analysis by refusing to apply Chapter 4, Table 3, to the Appellant's brain injury. The Appellant rejects concerns about what the Arbitrator called "double counting" but is more aptly, in the Appellant's submission, an "overlap," for the following reasons:

1. The *Guides* are an artificial construct. The appeal decision in *Ms. G* agreed that an "impairment percentage derived by means of the *Guides* is intended, among other purposes, to represent an 'informed estimate' of the degree to which an individual's capacity to carry out daily activities has been diminished."

2. One must avoid a "common sense" approach to the *Guides*. While one section may result in an overrating, other areas are not assessed at all such as, in this case, the Appellant's headaches, a nail running through the length of his femur, a chip in his wrist that still causes pain and a leg discrepancy.

3. The *Guides* are meant to be read in a broad and inclusive manner, rather than in a narrow and restrictive fashion that avoids coverage.

4. The Arbitrator accepted that the Appellant had suffered a mental/behavioural disorder within the meaning of Chapter 14 of the *Guides*. Finding that the experts of both parties came to essentially the same result, the Arbitrator assigned a 20% WPI for the Appellant's emotional and behavioural disorder caused by the emotional sequelae of the motor vehicle accident, including the death of his friend. The Arbitrator also accepted the Appellant had suffered a brain injury. Chapter 4 of the *Guides* provides that permanent impairments resulting from brain dysfunction need to be evaluated.

The Appellant cites Arbitrator Nastasi's agreement in *Pastore* "that it is not possible to factor out [of psychological disorders the impact of] discrete physical impairments and associated pain limitations, and that any impairment rating should incorporate both on a 'cumulative basis.'"

Submitting that this statement was upheld by the Court of Appeal, the Appellant argues that a similar approach should be adopted here by combining mental or psychological impairments in Chapter 14 and the Chapter 4, Table 3, impairments associated with a head injury. In this regard, it is submitted that the Arbitrator should have followed the direction at Section 4.1, page 4/140 of the *Guides* and picked the most severe of the listed five categories of cerebral dysfunction, in the circumstances of this case, being either Table 2 or Table 3 of Chapter 4.

In support of this submission, the Appellant notes that in determining his Chapter 14 Mental and Behavioural WPI, the Arbitrator adopted the 20% WPI put forward by Dr. H. Rosenblat, based on the "California GAF [Global Assessment of Function] Conversion" method, rather than Chapter 4, Table 3, that was utilized by the Respondent's medical expert, Dr. R.M. Finkel.

The Respondent argues that the submission that the *Guides* be given a remedial, broad and liberal interpretation is "completely out of context." Rather, it would be "inappropriate and unjust to find an insurer responsible for any ambiguity contained in the referenced Guides."

The Respondent distinguishes *Pastore* as that case did not deal with a head injured claimant or the cognitive impact that a head injury might have on a claimant. However, *Pastore v. Aviva Canada Inc.*, 2012 ONCA 642 (CanLII), did note:

> A further argument that was raised on this issue was that there could be double counting of the pain impairment under clauses (f) and (g) in certain cases because, following this court's decision in Kusnierz, the impairments under clause (g) can be put together with physical impairments for a whole body impairment total under clause (f). Since that did not occur in this case, the possibility of double counting under clause (f) does not change the reasonableness of the delegate's conclusion. In a case where that is a concern, the assessors and adjudicators may have to address the issue directly.

The Respondent argues that Chapter 4 does not contemplate combining impairment assessment ratings under Table 2 with Table 3. Nor do the *Guides*, the Respondent submits, contemplate combining impairment ratings assessed under Chapter 4, Table 3, with an impairment rating assessed under Chapter 14. Doing so would constitute double counting and would not be in accordance with the *Guides*, contrary to the express stipulation of clause 2(1.2)(f) of the *1996 Schedule*.

The Respondent cites section 4.1c of the *Guides*, entitled Emotional or Behavioural Disturbances, that these types of disturbances illustrate the interrelationship between the fields of neurology and psychiatry. These disturbances may be the result of neurologic impairments but may also have psychiatric features including depression, manic states and other kinds of central nervous system responses. The section notes that the criteria for evaluating these disturbances, in Table 3 of Chapter 4, relate to the Chapter 14 criteria for mental and behavioural impairments.

The Respondent notes that Dr. R. Ladowsky-Brooks assessed the Appellant's July 2011 cognitive memory difficulties under Chapter 4, Table 2 at a 7% WPI. Dr. Finkel, part of the same IME (insurer medical examination) multi-disciplinary team, assessed the Appellant's August 2011 emotional or behavioural impairments at a 19% WPI under Chapter 4, Table 3.

The Respondent cites in support of its position *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. It also relies on *Moser and Guarantee Company of North America*, (FSCO A13-000812, September 26, 2014) 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.

2. Medication

The Appellant argued at arbitration that his use of medication should be given a 1% to 3% WPI. He submits that this appeal asks what time frame should be considered when assessing this impairment. While the Appellant concedes the Arbitrator correctly found that he was "not taking any medication at the moment," he submits the Arbitrator erred in not rating his medication use.

The Appellant submits that the *1996 Schedule* requires adjudicators to take a "snapshot" of the insured person at the two-year mark "unrelated to a claimant's recovery, condition, or level of stability." He argues that the *Guides* must yield to the *1996 Schedule*, which states at subsection 2(2.1) that clauses (1.2)(f) and (g) do not apply in respect of an insured person who sustains an impairment as a result of an accident that occurs after September 30, 2003 unless,

(a) the insured person's health practitioner states in writing that the insured person's condition is unlikely to cease to be a catastrophic impairment; or

(b) two years have elapsed since the accident.

The Appellant cites my decision in *Bains and RBC General Insurance Company*, (Appeal P09-00005, June 3, 2010):

> … while clause 2(1.2)(f) of the *Schedule* states that impairments are to be rated in accordance with the *Guides*, the timing of all rating assessments are determined by subsection 2(2.1) of the *Schedule*, to which the *Guides* must defer. The *Guides* are indeed a guide to be applied, under the direction of and consistent with the purpose of the *Schedule*, in determining catastrophic impairment. The *Guides*, created for a purpose different than that of the *Schedule*, cannot be blindly obeyed in every procedural aspect as if the *Guides* exist in a statutory vacuum.

The Appellant submits that the Arbitrator, on his own initiative, took from the criminal law case of *R. v. St. Pierre*, [1995] 1 S.C.R. 791, a "rebuttable presumption of identity," that the Arbitrator stated was that "evidence will be viewed as current to the date of the Arbitration Hearing unless evidence to the contrary is presented." The Appellant argues that this evidentiary short cut was inappropriate to the *Guides* given his fluctuating use of medication and his young age. Rather, his current medication use equated to his "best day" and underestimated his true level of functional impairment.

The Respondent argues that subsection 2(2.1) of the *1996 Schedule* merely states there can be no catastrophic determination before 104 weeks have elapsed. The provision does not state that a claimant's medical condition should be assessed at the 104-week mark. The Respondent submits that it makes no sense to base a claimant's WPI at any point in time other than the arbitration hearing.

Citing section 2.2 of the *Guides*, the Respondent argues that the "entire justification for increasing the impairment estimate by a small percentage is to account for the masking of symptoms that would otherwise be apparent without the consumption of medication and/or account for side effects which might be associated with the consumption of medication."

The Respondent references the following evidence:

1. Dr. Ladowsky-Brooks' February 23, 2011 report that stated that the Appellant had been non-compliant regarding the use of prescribed medication for pain control due to "a bias he has against medication use as well as inadequate funds to purchase medication." Her July 25, 2011 report stated that the Appellant was still not taking medication.

2. Dr. Finkel's March 1, 2011 report that stated the Appellant had been taking an anti-depressant at one point from which he had experienced no benefit. Experiencing side effects such as nausea, he refused to continue to take them. Dr. Finkel's August 30, 2011 report stated that the Appellant had stopped a trial period of anti-depressant medication in the summer of 2011.

3. The September 8, 2011 report of Dr. V.A. Naumetz that stated the Appellant was not taking analgesic or anti-inflammatory medication and had stopped taking anti-depressant medication the summer of 2011.

4. At a June 1, 2012 assessment Dr. Rosenblat noted that the Appellant only took medication for pain and had stopped taking anti-depressant medication because he did not believe in it.

5. Dr. Vitelli's November 15, 2012 report stated that the Appellant was taking Advil for migraines but was not taking prescription medications as all medications would cause stomach discomfort or make him dizzy.

6. The Appellant conceded in his testimony that he does not believe in anti-depressant medication and the only medication he had taken was non-prescription Advil.

7. Dr. L. Becker conceded in her testimony that the preponderance of the available medical evidence was that the Appellant was not taking prescription medication. She did not know whether she was entitled to take into consideration when assessing the Appellant's WPI his prescribed but unfilled medication. The Appellant replies that it is inappropriate to refer to oral testimony in the absence of the transcript.

   The Respondent notes that Dr. L. Becker had testified in *D.B. and Economical Mutual Insurance Company*, (FSCO A12-000632, October 2, 2013), that "it is necessary to rate what you observe in the present."

The Respondent cites Arbitrator Feldman in *Jaggernauth and Economical Mutual Insurance Company*, (FSCO A08-001413, December 20, 2010):

> I prefer the interpretation of the doctors from Custom Rehab and Omega who both used their discretion in this case to increase the impairment estimate for Mr. Jaggernauth by a small percentage. This recognizes the possibility that the medications Mr. Jaggernauth must take may be contributing to his overall level of impairment or harming him in ways that are not otherwise captured in other impairment ratings provided under the *Guides* and carry the risk of future side-effects.

The Respondent also cites Lax J., in *Snushall v. Fulsang*, 2003 CanLII 48418 (ON SC), that the "*Guides* direct a physician to estimate the extent of the patient's primary impairment or impairing condition based on current findings and evidence." At paragraph 60, Lax J. held:

> The Guides assess impairment on the basis of an individual's current level of functioning and define impairment as conditions that interfere with activities of daily living. In this case, Ms Snushall suffered significant injuries, but her level of impairment is not "catastrophic" because her functional abilities are reasonably good. However, there was consistent medical evidence that the plaintiff's spinal fusion places her at increased risk of developing degenerative arthritis above and below the fusion and at some risk of a further fusion if her symptoms become incapacitating. Her brain injury puts her at greater risk of developing degenerative neurological diseases such as Alzheimer's. Ultimately, these conditions may interfere in a significant way with her ability to perform daily activities, but as long as the legislation links the recovery of health care expenses to a definition of catastrophic impairment that is governed by the *Guides*, these losses will not be compensated.

3. Scarring

The Arbitrator states at page 15 of his decision:

> My notes indicate that Dr. Naumetz, the orthopaedic surgeon who provided the Chapter 3 assessment for Health Impact, testified that the Applicant's scarring would only rate a 1% impairment pursuant to the 1-9% scale contained in Chapter 13, Table 2, Class 1 - "Impairment Classes and Percents for Skin Disorders". In Mr. Allen's submissions, he indicates that, in fact, Dr. Naumetz was "pushed to 4% in cross examination".
>
> Giving the Applicant the benefit of the doubt, I will assign Mr. Allen a 4% rating for scarring.

The Respondent argues that Chapter 13, Table 2, of the *Guides* is intended to provide the medical expert with direction in giving a WPI rating for scarring. It argues that an adjudicator "cannot unilaterally select an impairment rating which is not supported by the evidence."

The Respondent disputes that Dr. Naumetz conceded that the Appellant's scarring warranted a 4% WPI. Rather, it submits that Dr. Naumetz recalled the scarring as being barely visible and covered by the Appellant's sock. The Respondent argues that the Appellant's own assessor "had not seen fit to offer a scarring impairment rating."

The Respondent argues that the Arbitrator's conclusion that the Appellant's scarring warranted a 4% WPI was in the complete absence of supporting evidence. It submits that, in accordance with Delegate McMahon's decision in *Lombardi and State Farm Mutual Automobile Insurance Company*, (FSCO P01-00022, February 26, 2003), this constitutes an error of law.

The Appellant argues that it was not an error of law for the Arbitrator to assign a 4% WPI for a Class 1 impairment under Table 2 of Chapter 13. That is mid-range in the Class 1 (0% to 9%) and clearly within the Arbitrator's purview, regardless of any expert's opinion. The Appellant submits that the Respondent conceded the existence of scarring in its written submissions. Accordingly, there was not a complete absence of evidence, conjecture or a misapprehension of the evidence caused by a misdirection of a legal principle.

III. ANALYSIS

I find that the following general principles applicable to the issues in dispute:

1. The *Guides* should be given a remedial, broad and liberal interpretation.

In oral submissions, the Respondent stated that it had no case law in support of its submission that it was completely out of context that the *Guides* be given a remedial, broad and liberal interpretation or that it would be "inappropriate and unjust to find an insurer responsible for any ambiguity contained in the referenced Guides."

On the other hand, as stated by Mackinnon J. in *Arts v. State Farm Insurance Company*, 2008 CanLII 25055 (ON SC), the *Schedule* is remedial and inclusive, not restrictive, and constitutes consumer protection legislation; the "goal of the legislation is to reduce the economic dislocation and hardship of motor vehicle accident victims."

Further, in *Pastore*, the Ontario Court of Appeal cited its decision in *Kusnierz v. Economical Mutual Insurance Co.* (2011), 2011 ONCA 823 (CanLII), where they "approved the view expressed by Spiegel J. in Desbiens, that the definition of 'catastrophic impairment' was intended by the legislature to be inclusive and not restrictive."

As the Appellant noted, *Desbiens v. Mordini et al.*, 2004 CanLII 41166 (ON SC), held that "[n]on-statutory instruments that have been incorporated into a regulation by reference are considered part of the regulation:"

> The principle that a referenced instrument is considered part of the Regulation is further supported by the maxim *verba relata hoc maxime operantur per referentiam rit it eis inesse videntur* which means "words to which reference is made in an instrument have the same operation as if they were inserted in the instrument referring to them."

As the Appellant further submitted, subsection 64(1) of the *Legislation Act*, S.O. 2006, c. 21, thus applies to the *Guides* (incorporated by reference into the *1996 Schedule*), that an "Act shall be interpreted as being remedial and shall be given such fair, large, and liberal interpretation as best ensures the attainment of its objects."

I agree with Arbitrator Feldman in *Jaggernauth* that as the *1996 Schedule* is consumer protection legislation and as a determination of catastrophic impairment only permits an insured person to advance a claim but does not necessarily result in any compensation, a larger and more liberal interpretation of the *Guides* is justified. Accordingly, the *Guides* should not "automatically bar a person who is seriously impaired from making further claims because of an unnecessarily restrictive or narrow interpretation of a guide to medical assessments that was designed for use in a different regime and, at best, provides only an estimate of the person's level of impairment."

2. Whether a person has sustained a catastrophic impairment, including all intermediate findings necessary to a final decision, is an adjudicative, not a medical determination.

As stated in *Liu v. 1226071 Ontario Inc. (Canadian Zhorong Trading Ltd.)*, 2009 ONCA 571 (CanLII), it is a legal definition to be met by a claimant and not a medical test. I agree with the Appellant's submission that while the parties can suggest, through evidence, WPI ratings or ranges, it is the trier of fact who ultimately makes the finding of WPI.

I disagree with the Respondent's submission that the only discretion available to an adjudicator in determining a WPI rating is the range between the positions of the parties' medical assessors.

3. Under clause 2(1.2)(f) of the *1996 Schedule* the applicable statutory determination is that of impairment.

Clause 2(1.2)(f) of the *1996 Schedule* speaks of "an impairment or combination of impairments." Section 1.1 of the *Guides* defines impairment as a "deviation from normal in a body part or organ system and its functioning." The Glossary of the *Guides*, at page 315, defines impairment as "the loss, loss of use or derangement of any body part, system, or function."

As the Arbitrator notes at page 4 of his decision, the *Guides* are divided into chapters that "each deal with rating impairments in different 'organ systems.'" As the Arbitrator further notes, "section 2.2 of *Guides* explains the methodology of obtaining a final WPI, '…each organ system impairment should be expressed as a whole-person impairment, the whole-person impairments should be combined by means of the Combined Values Chart (p. 322).'"

Chapter 4.1 of the *Guides*, as an example, provides a wealth of descriptive words including, but not limited to, disturbances, features, illnesses, abnormalities, deficiencies, function and symptoms. I am not persuaded that these are synonyms for the term "impairment." They may be encompassed within, but are not a substitute for, the more expansive term "impairment."

The Arbitrator's decision uses the word "symptoms." At page 9 he states that "it makes no sense to rate the Applicant twice for the same set of symptoms, each obtained in isolation from the other." On page 11, he states that the "exact etymology of the Applicant's symptoms are uncertain, from a causation point of view." At page 8, the Arbitrator notes the Respondent's argument that "the *Guides* do not allow for the combination of percentage scores that both contain an impairment rating for the same symptomatology."

Again, clause 2(1.2)(f) of the *1996 Schedule* does not use the word "symptoms." The extent to which the Arbitrator was rating symptoms rather than impairments, was an error in law.

I now turn to the three impairment ratings in dispute in this appeal.

1. The Nervous System

Regarding the relationship between Chapters 4 and 14 of the *Guides*, a key to ensuring that impairment ratings under clause 2(1.2)(f) of the *1996 Schedule* neither underestimate nor overestimate the impairment rating is to determine the cause of the impairment.

The Arbitrator cited Spiegel J. in *Desbiens* that an expert witness testified "there is significant amount of overlap between Chapter 4 and Chapter 14 … The essential difference is the cause of the impairment." As Spiegel J. sets out, Section 4.1c of the *Guides* states that emotional or behavioural disturbances "may be the result of neurological impairments but may have psychiatric features as well." Section 4.1c notes that these illnesses "may include depression, manic states, emotional fluctuations, socially unacceptable behaviour, involuntary laughing or crying, and other kinds of central nervous system responses."

Again, the key is that these Chapter 4 emotional or behavioural disturbances are the result of neurologic impairments. Chapter 14, however, states in its introduction that this "chapter discusses impairments due to mental disorders."

Arbitrator Lee, in *Moser*, similarly looked at causation. He stated at page 34 of his decision:

> I agree that double-counting is a distinct possibility when combining the closed head injury/neuropsychological findings with impairments due to mental and behavioural disorders. Nonetheless, in the present case, Ms. Moser suffered amnesic effects following her accident. She had no memory of the incident itself. She also has post-concussive disorder, manifested in problems with memory, concentration, multitasking, and other symptoms. Certainly, some part or much of her impairment might be attributable to mental and psychological disorders developed since the accident, but I am not convinced that the entirety of her presentation is due to mental or psychological disorders alone.

Arbitrator Lee did not agree with an expert subtracting the entire 5% WPI due to the insured person's closed head injury/neuropsychological findings. Rather, he found it appropriate to subtract 2% from that component and then "combine the remainder with the WPI based solely on [the insured's] mental and behavioural disorders."

As noted, the Arbitrator concluded that in this case the "exact etymology of the Applicant's symptoms is uncertain." Under Chapter 4 of the *Guides* it was incumbent upon the Arbitrator to determine what, if any, emotional or behavioural disturbances were "the result of neurological impairments." I find that the Arbitrator erred in law in failing to do so.

The Appellant argued that, given the similarity in symptoms, it may be impractical, at the least, to determine causation. However, section 4.1 of the *Guides* requires that one look at specific categories of impairment "resulting from" disorders of the forebrain. In considering the words "resulting from," one may consider whether the material contribution test would then be appropriate, rather than the "but for" test held in *Resurfice Corp. v. Hanke*, 2007 SCC 7 (CanLII) to be the generally applicable tort cause test. As the Supreme Court of Canada held:

> One situation requiring an exception to the "but for" test is the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: *Cook v. Lewis*, 1951 CanLII 26 (SCC), [1951] S.C.R. 830. Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the plaintiff in fact suffered (i.e. carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied.
>
> A second situation requiring an exception to the "but for" test may be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the "but for" chain of causation. For example, although there was no need to rely on the "material contribution" test in *Walker Estate v. York Finch General Hospital*, this Court indicated that it could be used where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned him against donating blood. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central.

In *Pastore*, the issue was clause 2(1.2)(g) of the *1996 Schedule*, not clause (f). Although the former does speak of "an impairment," the statutory test is further refined as resulting a resulting class 4 (marked) or 5 (extreme) impairment "due to mental or behavioural disorder." In *Pastore*, the mental or behavioural ***disorder*** in question was a pain disorder associated with both psychological factors and a general medical condition. In that case, I was not persuaded, regarding a "mental or behavioural disorder," that it was necessary to tweeze out of the mental

or behavioural disorder those parts that were purely psychological from those that were not, when the pain disorder encompassed both.

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.

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, and then use the most severe rating to combine that rating, using the Combined Values Chart, with the other impairment ratings.

I am not persuaded by the Respondent's argument that the Arbitrator implicitly, because of "double counting," presumed that Table 2 of Chapter 4 was more severe than Table 3. Rather, the Arbitrator stated that "an impairment rating from Chapter 4, Table 2 is more properly included in the final WPI Rating, rather than Table 3." I find that this was an error of law. The Arbitrator states at page 10 of his decision:

> Dr. Romeo Vitelli, the Applicant's neuropsychologist, concluded in his written report that Mr. Allen had, "sustained a moderate traumatic brain injury", and appears to attribute both psychological and neuropsychological symptomology to that injury.

At page 36 of his November 15, 2012 report, Dr. Vitelli states:

> ***From a psychological perspective***, the test results reveal that Mr. Allen suffers from severe levels of anxiety, moderate depression with suicidal ideation, moderate somatization, and minimal posttraumatic stress ... Mr. Allen presently meets DSM-IV-TR diagnostic criteria for a Chronic Pain Disorder Associated with both Psychological Factors and a General Medical Condition, and an Adjustment disorder with Mixed Anxiety and Depressed Mood ... [Emphasis added]

Dr. Vitelli assigned a score of 25-27% WPI given the Appellant's "Pain and Adjustment Disorders, with depressed mood and suicidal ideation." Dr. Vitelli's psychological rating

was based on Chapter 4, Table 3. Dr. Vitelli further stated:

> From a ***neuropsychological perspective***, Mr. Allen demonstrated a number of relative deficits, with borderline alternating attention, borderline short-term and long-term visuospatial memory, and mildly impaired short-term and long-term verbal memory … Mr. Allen's effort throughout the assessment was shown to be exemplary, with perfect scores on all overt and embedded measures of engagement. [Emphasis added]

Dr. Vitelli assessed the Appellant's Mental Status Impairment using Chapter 4, Table 2. Given the Appellant's "borderline alternating attention, borderline short-term and long-term visuospatial memory, and mildly impaired short-term and long-term verbal memory, resulting insignificant functional memory impairment," Dr. Vitelli assigned a 14% WPI.

In oral submissions, the Appellant conceded that Dr. Vitelli's report does not address, at least directly, the question of what emotional or behavioural impairments result from the Appellant's Chapter 4 Nervous System injury rather than from his Chapter 14 Mental and Behavioral Disorders. While the Appellant states, at paragraph 32 of his written submissions, that both Dr. Vitelli and his counter-part for the Respondent, Dr. Ladowsky-Brooks, testified at the arbitration hearing, their oral evidence has not been produced for this appeal.

Accordingly, even if it were appropriate for an appellate officer to make findings at first instance, to which the Respondent objects, pertinent recorded evidence is not before me. 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."

2. Medication

Chapter 2.2 of the *Guides* states that in certain instances the treatment of an illness may result in apparently total remission of the patient's signs and symptoms, such as type 1 diabetes mellitus with insulin. Where it is debatable that the patient in such cases has regained a previous status of normal good health, "the physician may choose to increase the impairment estimate

by a small percentage (e.g. 1% to 3%), combining that percent with any other percent by means of the Combined Values Chart (p. 322)."

In this case, there is no submission that the Appellant's use of medication has resulted in an apparent total remission of symptoms. Rather, the parties agree that the evidence is that the Appellant is not taking medication presently.

Arbitrator Feldman, in *Jaggernauth*, held that limiting an increased impairment estimate for use of medication where it controls the symptoms of an illness in remission was too restrictive. He preferred to exercise discretion to increase the impairment estimate by a small percentage to recognize the possibility that the medications the insured must take may be contributing to his overall level of impairment or harming him in ways that are not otherwise captured in other impairment ratings provided under the *Guides* and carry the risk of future side-effects.

Arbitrators, and Director's Delegates, are "creatures of statute." Their exercise of discretion must have a statutory basis. In this case, the statutory basis of such discretion is subsection 2(3) of the *1996 Schedule* that states:

> For the purpose of clauses (1.1) (f) and (g) and (1.2) (f) and (g), an impairment that is sustained by an insured person but is not listed in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 shall be deemed to be the impairment that is listed in that document and that is most analogous to the impairment sustained by the insured person.

I turn to the question of the timing of the impairment assessment. The Respondent submits that the assessment must be as of the date of the arbitration hearing. However, the Respondent concedes that the medical assessments upon which it relies are from 2011 and 2012, two to three and a half years before the October 2014 arbitration hearing. The Respondent responds that one can still receive these reports into evidence, updated as best as one can by the oral evidence received at the oral hearing.

I am persuaded that a more flexible, rather than rigid, approach to timing is appropriate regarding this issue. The Respondent has also persuaded me that the Appellant's reliance on clause 2(2.1)(b) of the *1996 Schedule* (that determinations of catastrophic impairment for clauses

(1.2)(f) and (g) do not apply until two years have elapsed since the accident) is misplaced. I am persuaded that the latter provision speaks to a temporal pre-requisite to determining catastrophic impairment, in the absence of clause 2(2.1)(a) being met (written confirmation by the insured person's health practitioner that the insured's condition is unlikely to cease to be a catastrophic impairment).

At oral submissions I noted Arbitrator Jones' decision, albeit it in a difference context, in *J.P. and Wawanesa Mutual Insurance Company*, (OIC A96–001312, August 11, 1997), that one cannot simply take a "snapshot" of the person's activities on a single day or week. Rather, citing prior case law, Arbitrator Jones held that the activities "must be assessed over a reasonable time period which depends very much on the facts of each case."

I find that this flexible and realistic approach makes sense in this present context. It specifically makes sense when the Court of Appeal held, in *McLinden v. Payne*, 2011 ONCA 439 (CanLII), that a person was not precluded from making more than one application for a determination that he or she has suffered a catastrophic impairment. 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.

The presumption of identity taken by the Arbitrator from *St. Pierre*, as stated in the headnote of that case, refers to the specific assistance provided in subsection 258(1)(c) of the *Criminal Code* to the Crown in overcoming the hurdle of having to prove in every case that the accused's blood alcohol level at the time of driving was the same as his or her blood alcohol level at the time of testing. I am not persuaded that the statutory wording of the *Criminal Code* is applicable to this present issue.

In this case, Dr. Rosenblat's June 1, 2012 report states that the Appellant only took medication for pain. Dr. Vitelli's 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.

3. Scarring

In *Young and Liberty Mutual Insurance Company*, (FSCO P03-00043, June 20, 2005), application for judicial review dismissed, 2006 CanLII 7286 (ON S.C.D.C.), Delegate Evans cited Delegate McMahon in *Lombardi*, that "errors of law include findings of fact made in the complete absence of supporting evidence ... The vital distinction is between a conclusion that there was "no evidence" to support a finding and a mere "insufficiency of evidence."

Table 2 of Chapter 13 sets out five different classes of impairment for skin disorders. Class 5 provides a range of 85% to 95% impairment. Class 1 provides a range of 0% to 9% impairment. The pre-requisites for Class 1 are:

1. Signs and symptoms of skin disorder are ***present or only intermittently present.***
2. There is ***no limitation or limitation of a few activities of daily living***, although exposure to certain chemical or physical agents might increase limitation ***temporarily***.
3. ***No treatment or intermittent treatment*** is required. [Emphasis added]

The Divisional Court stated in *State Farm Mutual Automobile Insurance Co. v. Movahedi*, [2001] O.J. No. 5099:

> Not reciting all the evidence does not mean the arbitrator failed to consider it. We find there was ample evidence before the arbitrator to support his findings of credibility as described in his decision.

The Appellant's counsel submits that he went through the evidence with the Appellant himself about his scarring, including that his lip was split and that a scar still remains. That evidence, however, is not before me. However, based on what is presently before me, I am not persuaded, applying *Young*, that there was a "complete absence of supporting evidence" to support the Arbitrator's finding of 4% WPI for scarring, for the following reasons:

1. As stated, catastrophic impairment is an adjudicative, not a medical determination. The adjudicator is not restricted to merely choosing impairment ratings offered by the experts any more than merely deciding between medical reports.

   Accordingly, the comments of Senior Arbitrator Rotter in *Walker and State Farm Mutual Automobile Insurance Company*, (OIC A-009905, February 23, 1996), upheld on appeal (OIC P96-000036, December 3, 1996) regarding Designated Medical Centres (DACs) apply equally to this case, that it:

   > … is not sufficient to simply accept or adopt the judgement of [an assessor] who does not have the legal responsibility or opportunity to hear and weigh all the available evidence in a particular case … Ultimately, the arbitrator has the responsibility of considering *all* the evidence- not just the evidence from the DAC - and making a final determination based on his or her best judgement. [Emphasis in the original]

2. In *Moser*, relied upon by the Respondent, Arbitrator Lee used his discretion to arrive at a WPI rating advanced by neither party. The Arbitrator in this present case also had before him the evidence of Dr. Naumetz' September 8, 2011 medical-legal report, noting the presence of signs and symptoms of five different scars ranging from 1 centimetre to 6½ centimetres in length, and that exposure to the physical agent of touch increased limitation temporarily:

   > There was scarring on Mr. Allen's right lower extremity. He had a ***4½ centimetre scar*** above the tip of the greater trochanter [hip bone] on the right and he had a ***5 centimetre scar*** somewhat below the grater trochanter on the right. He also had ***two well-healed 1 centimetre scars*** just above the lateral aspect of the knee joint. Below the lateral malleolus [a bony prominence on each side of the ankle] Mr. Allen had an ***L-shaped scar*** from the open reduction of his calcaneus [heel bone]. The vertical portion of the L-shape measured 4 centimetres and the horizontal portion 6½

centimetres. ***It was well-healed but it was sensitive to touch***. [Emphasis added]

3. The Arbitrator had before him Dr. Naumetz' October 30, 2014 oral evidence:

(a) Dr. Naumetz testified that you could put the Appellant's scars in Class 1 and that Class 1 is a range (pages 16 to 17 of the transcript). As I note above, the range of Class 1 is 0% to 9%.

(b) Dr. Naumetz testified that the scarring was not significant (page 18). If the scarring was covered by a sock 90% of the time he would not rate it very high (page 29). As noted above, Class 1 does not require "significant" scarring.

(c) Dr. Naumetz testified that the scar is sensitive, that is, "if you can run your finger along the scar and they go woo," to be charitable he might give 1 or 2%, "but I would never give him more than that," because "there's so many worse scars that people have, that are really sensitive and you can barely touch them. This is almost negligible" (page 30).

As noted above, the *Guides* provide four higher classes of skin disorder impairment, with an impairment range of up to 85% to 95% impairment. 9% WPI is not the maximum rating for the worst scarring impairment.

(d) Under "aesthetics," Dr. Naumetz would rate the scarring as zero or would not give very much at all as it "was a fine white line."

However, Dr. Naumetz could not remember the colour of the Respondent's skin. The Appellant's counsel suggested that such a scar would "be disfiguring then on a black skin." The Arbitrator specifically states on the record that would be "more disfiguring" (page 31 of the transcript).

(e) In Dr. Naumetz' experience, scars get less sensitive as time goes on. That open ended approach to timing, however, is contrary to the Respondent's general approach to the timing of impairment assessments.

> Dr. Naumetz states that he "never had a patient that had a scar that they found incredibly annoying and tough to live with." That, however, is not the view of the *Guides* that includes in Class 5 the recognition that with the skin disorder there "is limitation in the performance of most of the activities of daily living."

Accordingly, the Arbitrator's 4% WPI rating under Chapter 13 (the Skin) of the *Guides*, the last of the three impairment ratings in dispute in this appeal, is confirmed.

IV. LEGAL APPEAL EXPENSES

As the parties have agreed on the legal expenses of this appeal, an expense order is not required.

I wish, however, to acknowledge and most sincerely thank both counsel for their courtesy, co-operation, assistance, expertise and professionalism throughout this appeal.

Lawrence Blackman
Director's Delegate

July 6, 2016
Date