Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A12-003800

BETWEEN:

MIGUEL ALLEN

Applicant

and

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

Insurer

REASONS FOR DECISION

Before: Arbitrator Alan G. Smith

Heard: In person at ADR Chambers on October 27, 28, 29, 30, and 31, 2014 and by written submissions completed on November 10, 2014

Appearances: Ms. Jwan Desai for Mr. Miguel Allen
Mr. Derek Greenside for Security National Insurance Co./Monnex Insurance Mgmt. Inc.

Issues:

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*.[1] 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*[2] as amended.

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

[2] R.S.O. 1990, c.I.8, as amended.

The issue in this 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, ("*Guides*"), 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, is not suffering from a catastrophic impairment caused by the motor vehicle accident pursuant to section 2(1.2)(f) of the *Schedule*.

EVIDENCE AND ANALYSIS:

The following background details were supplied to me as an agreed statement of fact:

The Applicant, Mr. Miguel Allen, was born on November 3, 1988. On September 5, 2008, he was the driver of a Nissan 240, accompanied by three friends. There was a violent head on collision, killing one of the Applicant's friends. According to the Paramedic Call Record, Mr. Allen was observed to be unresponsive for between 10 and 15 minutes. It took first responders upwards to 30 minutes to extract the Applicant from the vehicle.

A copy of Mr. Allen's Hospital Discharge Summary Letter was also provided. The letter provided the following injury details (I quote verbatim):

> Mr. Allen is 19 year old gentleman who was seen in trauma room at St. Michael's Hospital on 5 September 2008 after motor vehicle collision while he was driving his car at high speed. His passenger was killed and his accident was part of a five car collision. Product of this collision, he sustained a right femoral fracture and right calcaneus fracture. At the

> time of the admission, he went to the OR for an open reduction and internal fixation and also a gamma nail. He also had a right pulmonary contusion at that time. Mr. Allen spent days in the NT ICU where he recovered and then was transferred to the Step-Down Unit when further examination discovered right calcaneus fracture that was also taken to the OR for open reduction and internal fixation. After that Mr. Allen received crutches training where he had training on how to use crutches. After Mr. Allen was deemed able to go back home by physiotherapy and occupational therapy, he was discharged on 23 September 2008 with follow-up to Dr. Ahn's clinic in 4 weeks' time and prescription for Percocet, a number of 30 tablets.

Key Issue of Law – "Double Counting"

In his written submissions, Mr. Allen argues:

> In determining Mr. Allen's whole person impairment, the real issues becomes the manner in which physical, mental and psychological complaints ought to be combined in order to derive a whole person impairment rating within the meaning of the AMA *Guides*. Security National has acknowledged that one must take the various impairments of Miguel Allen at their highest [opening submissions of Defence on Day One of Arbitration], but has asserted that restrictions must be implemented to avoid "double counting"....This case turns on the issue of the approach to be adopted for the use of Chapter 4, Table 3, where, in addition to a head injury, there are also separate emotional and behavioural complaints which need to be rated under Chapter 14.

I agree. This Arbitration raises a novel question with regard to the interpretation of s. 2(1.2)(f) of the *Schedule* and *Guides*. Since the Ontario Court of Appeal's Decision *in Kusnierz v. The Economical Mutual Insurance Company*,[3] allowing the combination of physical and emotional/psychological impairments in determining a Whole Person Impairment ("WPI") pursuant to the *Schedule*, s. 2(1.2)(f), it appears that Arbitrators and the Courts have not dealt with

[3] 2011 ONCA 823 (CanLII).

the issue of potential "double counting" in arriving at a final WPI, at least not in the manner that it arises in this Application.[4] In that regard, I note the Court's comments in *Pastore v. Aviva Canada Inc.*[5] with regard to s. 2(1.2) of the *Schedule*:

> A further argument that was raised...was that there could be double counting of the pain impairment under clause (f) and (g) [psychological impairment] 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 answer the issue directly.

The answer to the "double counting" issue is, in my view, determinative of whether Mr. Allen can succeed in the Application.

Structure and Methodology of *Guides* – Determining the WPI Percentage

Guides begins with two introductory chapters. Chapter 1 is entitled "Impairment Evaluation" and Chapter 2 is entitled "Records and Reports". Chapters 3 through 15 each deal with rating impairments in different "organ systems". Relevant to this Arbitration are Chapter 3 - "The Musculoskeletal System"; Chapter 4 - "The Nervous System"; Chapter 13 - "Skin"; and Chapter 14 - "Mental and Behavioural Disorders". As 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)."

[4] For a discussion of the "double counting" issue in a somewhat different context, where a discount was applied by the arbitrator to the final WPI, see, *Moser v. Guarantee Company of North America*, FSCO A13-000812, September 26, 2014.

[5] 2012 ONCA 642 (CanLII) at para. 69.

The critical issue in this Arbitration is the determination of the correct expression of the degree of Mr. Allen's WPI vis-à-vis Chapter 4 - "The Nervous System" and Chapter 14 - "Mental and Behavioural Disorders". To put the question more precisely, is it permissible to combine impairment ratings determined by way of *Guides* Chapter 4, Table 3, and the Table contained in Chapter 14? Or is the correct approach (assuming ratings are to be made pursuant to both Chapters 4 and 14 to only allow the combination of a rating made by reference to Chapter 4, Tables 2 or 4, with the Table in Chapter 14? A perusal of the Tables relevant to this Arbitration clearly elucidates the issue:

Chapter 4:

Table 2. Mental Status Impairments.

Impairment description	% Impairment of the whole person
Impairment exists, but ability remains to perform satisfactorily most activities of daily living	1 - 14
Impairment requires direction and supervision of daily living activities	15 - 29
Impairment requires directed care under continued supervision and confinement in home or other facility	30 - 49
Individual is unable without supervision to care for self and be safe in any situation	50 - 70

Table 3. Emotional or Behavioral Impairments.

Impairment description	% Impairment of the whole person
Mild limitation of daily social and interpersonal functioning	0 14
Moderate limitation of *some* but not all social and interpersonal daily living functions	15 - 29
Severe limitation impeding useful action in *almost all* social and interpersonal daily functions	30 - 49
Severe limitation of all daily functions requiring total dependence on another person	50 - 70

Chapter 14:

Table. Classification of Impairments Due to Mental and Behavioral Disorders.

Area or aspect of functioning	Class 1: No impairment	Class 2: Mild impairment	Class 3: Moderate impairment	Class 4: Marked impairment	Class 5: Extreme impairment
Activities of daily living Social functioning Concentration Adaptation	*No* impairment is noted	Impairment levels are compatible with *most* useful functioning	Impairment levels are compatible with *some*, but not all, useful functioning	Impairment levels *significantly impede* useful functioning	*Impairment levels preclude* useful functioning

In *Desbiens v. Mordini et.al.*,[6] Spiegel J. explained the potential interplay between *Guides* Chapters 4 and 14 as follows:

> Dr. Finlayson [neuropsychologist] testified that there is a significant amount of overlap between Chapter 4 and Chapter 14. Although Chapter 4 is used when the disturbance or disorder is caused by dysfunction to the brain or central nervous system, the features of the disorder causing the impairment, for example, depression and anxiety, may be common in both chapters. The essential difference is the cause of the impairment. The Guides state that emotional and behavioural disturbances and anxiety disorders, "illustrate the interrelationships between the fields of neurology and psychiatry. The disturbances may be the result of neurological impairments but may have psychiatric features as well" [*Guides* at p. 141-2]. In Chapter 4, clinicians are instructed to assign percentages to the impairment classifications within designated ranges. The Guides state, "the criteria for evaluating these [emotional and behavioural] disturbances relate the criteria for mental and behavioural impairments" [*Guides* at 142]. According to Dr. Finlayson, the word "relate" implies some kind of similarity between the two sets of criteria. As can be seen from the chart below [*Guides* Chapter 4 Table 3 and Chapter Table Chapter 14], *the impairment descriptions under Chapter 4 and Chapter 14 are strikingly similar* [emphasis added].

The Position of the Parties regarding the "Double Counting Issue"

[6] 2004 CanLII 41166 (ON SC) at para. 249.

The Applicant

The Applicant argues that Dr. Harold Becker, qualified at the Arbitration Hearing as an expert on the use of *Guides*, took the proper approach in combining the percentage ratings in the relevant chapters of *Guides*. Dr. Harold Becker's methodology allows for a percentage rating pursuant to *Guides* Chapter 3 - "The Musculoskeletal System" to be combined with a percentage rating provided by physiatrist Dr. Lisa Becker pursuant to Chapter 4, Table 3 and a further rating made by psychologist Dr. Henry Rosenblat pursuant to the Table in Chapter 14.

The Applicant opines that the Insurer's psychologist, Dr. R. Ladowski-Brooks, took the wrong approach, that is, by only providing an impairment rating for Mr. Allen under Chapter 4, Table 2 and deferring a rating assessment for emotional/behavioural issues to Dr. Finkel, who assessed the Applicant pursuant to the Table in Chapter 14. In support of his position, Mr. Allen points to page 140 of *Guides* which states:

> The most common categories of impairment resulting from disorders of the forebrain are as follows: (1) disturbances of consciousness and awareness; (2) aphasia or communication disturbances; (3) mental status and integrative functioning abnormalities; (4) emotional or behavioural disturbances; (5) special types of preoccupation or obsession;...
> A patient may have more than one type of cerebral dysfunction listed above. *The most severe of the first five categories shown above should be used to represent the cerebral impairment*... [emphasis in original].

The Applicant says this passage from *Guides* illustrates that it was a mistake in law for the Insurer not to rate Mr. Allen for emotional or behavioural disturbances under Chapter 4. Mr. Allen urges me in his written submissions to attempt, "an approach that conforms with the Guides". He goes on to argue:

> There are numerous examples of genuine impairments that simply cannot be rated, as the Guides afford no impairment rating. In particular, as it relates to Mr. Allen, unrated areas

including headaches, the permanent placement of an inter-modularly nail running the length of the femur, the chip in his wrist that still causes pain, and leg length discrepancy of less than 2 cm. In its wisdom, the *Guides* leave out such things, but then, in its wisdom, the Guides also demand other methodologies which might appear to overrate certain other impairments.

The Applicant asks me to consider that Dr. Harold Becker provided an opinion in his testimony that there was a "synergy" between *Guides* Chapters 4 and 14, but he was uncertain whether that meant there should be a subtraction or addition to the final WPI when ratings under both chapters were included. Dr. Harold Becker also indicated in testimony that he was undecided whether the "overlap" between the two chapters was quantifiable.

Mr. Allen also points out that Dr. Howard Platnick, the Insurer's expert in the interpretation of *Guides*, admitted at the Hearing that 10 years ago, it would have been his opinion that physical and psychological impairment should not be combined under the *Schedule*, s. 2(1.2)(f). That approach now being ruled as wrong by the Ontario Court of Appeal in *Kusnierz*.[7]

The Insurer

The Insurer argues that it is not appropriate to use Chapter 4 to arrive at a psychological impairment rating because the chapter was intended for use in the case of a head injury. The Insurer opines that *Guides* do not allow for the combination of percentage scores that both contain an impairment rating for the same symptomology.

Analysis of the "Double Counting" Issue

Since *Guides* is unclear on the issue of double counting as it is manifested in the present Application, it is necessary to "tease out" an answer from the underlying methodology in *Guides*. In other words, an answer must be found that, in the words of s. 2(1.2)(f) of the *Schedule* is, "in

[7] *Supra*, footnote 3.

accordance with" *Guides*. The *Concise Oxford Dictionary*[8] defines "in accordance with" as "in a manner corresponding to".

The Purpose of *Guides*

In my view, part of the answer to the double counting question is to determine the real purpose of *Guides* in the context of s. 2(1.2)(f) of the *Schedule*. In *Pilot Insurance and Ms. G*,[9] Director's Delegate Makepeace quotes with approval from the original Arbitration Order as follows:

> ...it is important to be cognizant that the *Guides* are not intended to reduce human beings to a collection of bones, nerves, flesh and sinew. Body parts do not have impairments. People have impairments. I agree with the comments of Dr. J. McCall, orthopaedic surgeon, in his December 3, 2003, report that "[i]n dealing with a case like this [that of the Applicant], it is important to deal with the person as a whole and not just focus on the individual injuries." The challenge for adjudicators is to rise above the trees and to see the forest.

In the same vein, the Court in *Kusnierz*[10] noted that one of the aims of *Guides* is:

> ...assessing the total effect of a person's impairments on his or her everyday activities. An objective, standardized system of assessment is only useful to the extent that it can reflect persons' *actual levels of impairment* [emphasis added].

I conclude that my mandate to "rising above the trees to see the forest" requires me to consider Mr. Allen's impairments in their totality, viewing him as a whole person and to not fixate on the individual organ system chapters contained in *Guides*. Ultimately, I must attempt to determine the Applicant's actual level of impairment. Therefore, in my view, it makes no sense to rate the Applicant twice for the same set of symptoms, each obtained in isolation from the other. This

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[8] 9th edition, Claredon Press, Oxford, 1995.
[9] Appeal Order, P06-00004, September 4, 2007, at p. 19.
[10] *Supra*, footnote 3.

would be exactly the case if percentage impairment ratings are obtained from both Chapter 4, Table 3 and the Table in Chapter 14. Such a methodology would indeed be double counting and lead to significantly over estimating the extent of the Applicant's psychological impairment.

Differentiating Chapters 4 and 14 by Causation

In *Pastore v. Aviva Canada Inc.*,[11] Arbitrator Nastasi opined, citing the passage I quoted above from *Desbiens*:[12]

> Chapter 4 of the Guides provides percentage ranges for psychological impairments. Chapter 4 is used when the disturbance or disorder is caused by dysfunction to the brain or central nervous system. The features and characteristic of the mental disorders that fall within Chapter 4 and 14 may be the same, *the difference however, is the cause of the impairment* [emphasis added].

Also in the *Pastore*[13] Decision, Arbitrator Nastasi noted that Dr. Harold Becker had provided an opinion that, "...Chapter 4 was not appropriate for arriving at a psychological impairment rating because the chapter is intended for use in the case of a head injury."

I agree with Arbitrator Nastasi and therefore conclude that the correct approach in determining whether psychological impairments should be rated under Chapter 4 or 14 is an initial determination as to the *cause* of the impairment. In Mr. Allen's case, Dr. Lisa Becker provided a 1-14% "mental status impairment" rating pursuant to Chapter 4, Table 2 of *Guides*, but this was eliminated from the final WPI assessment by Dr. Harold Becker. 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. Dr. Ladowsky-Brooks, Security National's neuropsychologist, opined in her testimony that Mr. Allen's depression and suicidal ideation was

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[11] FSCO A04-002496, February 11, 2009.
[12] *Supra*, footnote 6.
[13] *Supra*, footnote 5.

not the result of a brain injury, but rather the result of a psychiatric condition. However, Dr. Ladowsky-Brooks conceded that Mr. Allen had suffered a concussion as a result of the accident and therefore rated his cognitive memory difficulties as 7% pursuant to Chapter 4, Table 2. In cross-examination, she conceded that Mr. Allen's rating under that table could be as high as 9%.

On balance, I conclude 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 is more properly included in the final WPI Rating, rather than Table 3.

The Relationship between Chapter 14 and other Chapters in *Guides*

In *Kusnierz,*[14] the Court noted that:

> "...the Guides describe a number of situations where an assessment of a person's physical impairment should take into account c. 14 mental and behavioural impairments...
>
> -- At p. 230 ("Facial Disfigurement"): "We recommend that 'total disfigurement of the face' after treatment be deemed a 15% to 35% impairment of the whole person. For the assessment of impairment related to mental and behavioral aspects of disfigurement, the reader may refer to the chapter on mental and behavioral disorders [Chapter 14]." [page281]
>
> -- At p. 275 ("Mammary Glands"): "A female patient of childbearing age with absence of the breasts, a patient with galactorrhea sufficient to require the use of absorbent pads, and a male patient with painful gynecomastia that interferes with the performance of daily activities would each have a 0% to 5% impairment of the whole person. If there were a coexisting psychiatric impairment, the whole-person impairment would be greater."

[14] *Supra*, footnote 3 at para 28.

-- At p. 279 ("Disfigurement"): "With disfigurement there is usually no loss of body function and little or no effect on the activities of daily living. Nevertheless, disfigurement may impair by causing social rejection or an unfavorable self-image with self-imposed isolation, life-style alteration, or other behavioural changes. If impairment due to disfigurement does exist, it is usually manifested by a change in behaviour, such as withdrawal from social contacts, in which case it would be evaluated in accordance with the criteria with the Guides chapter on mental and behavioral conditions."

-- At p. 284 (Examples of Class 2 Skin Impairments): In example 5, a patient is assessed as having a "20% impairment due to chemically induced nail dystrophy, which is to be combined using the Combined Values Chart (p. 322) with an appropriate value for the paresthesia (see the part on the hand in Guides chapter on the musculoskeletal system) to estimate the whole-person impairment. A mental and behavioral impairment (Chapter 14, p. 291) might further increase the estimate."

-- At p. 285 (Examples of Class 3 Skin Impairments): In example 1, a patient is assessed as having a "30% impairment due to the skin disorder, which is to be increased by an amount that is proportional to the estimated mental and behavioural impairment (see Chapter 14)." (Emphasis added)...

In my view, the Guides examples are illustrative rather than exhaustive. In at least five places, the Guides recommend [page282] that physicians refer to c. 14 in assessing the total impairment of persons suffering from both physical and behavioural/mental impairments. These recommendations reflect the principle that a total impairment assessment must take both physical and psychiatric impairments into account. There is nothing in the text of the Guides to suggest that this principle should be limited to persons with mammary gland or disfigurement problems. Accordingly, it seems to me that combining physical and psychiatric impairments can be done "in accordance with" the Guides.

This passage from *Kusnierz* not only illustrates that *Guides* recommends *reference* to c. 14 in assessing the total impairment of persons suffering from both physical and behavioural/mental impairments, it can also be read as recommending that an assessor *defer* to Chapter 14 when there is overlap with another organ system including the Nervous System (Chapter 4).

Conclusion

I conclude that the combination of ratings pursuant to Chapter 4, Table 3 and the table in Chapter 14 in *Guides* constitutes double counting and is not "in accordance with" *Guides*.

Findings – Impairment Ratings

Burden of Proof

The burden of proof rests with the Applicant, Mr. Allen. He must prove, on the balance of probabilities, that as a result of the accident, he sustained a catastrophic impairment as defined by s. 2(1.2)(f) of the *Schedule*.[15]

Role of the Arbitrator

It is clear that under the *Schedule*, the determination of catastrophic impairment is ultimately an adjudicative, not a medical determination. Thus, it is the role of the Adjudicator to scrutinize the evidence and give it such weight as he or she thinks it deserves. Adjudicators decide cases, experts do not.[16] However, 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. Having reviewed all of the assessor reports, heard five days of testimony, and read the

[15] See for example, *Scarlett v. Belair*, [2013] OFSCD No. 42, at para. 33 and *Taylor v. Pembridge*, FSCO A12-004886, June 11, 2014.

[16] See for example, *Taylor*, *Ibid.*

submissions of counsel, I am convinced that Mr. Allen's case is certainly no better than the maximum of what the assessors have determined.

Following is a chart provided by the Applicant, which I believe fairly illustrates the applicable impairment ratings proposed by Omega Medical (Mr. Allen) and Health Impact (Security National).

Complaint	Omega Medical Rating	Health Impact Rating
Headaches	0%	0%
Neck	0%	0%
Left wrist	Not rated	Not rated
Shoulders	0%	0%
Low back	5%	0%
Hip	3%	
Leg length discrepancy	Not rated	0%
Muscle atrophy	Not rated	2% for muscle atrophy
Knees	Right 10% Left 2%	Right 3%
Right ankle	6% + 2%	3% + 2% ROM or 6% + 3% DRE method
Head injury/neuropsychological	25-27%	7%, pushed to 9% in cross-
Emotional and behavioral	17-20%	18%
Use of medications	1-3%	0%
Scarring	Not rated	0%, pushed to 4% in cross-exam

N.B: some ratings are alternatives and cannot be combined. Dr. Platnick (Health Impact) chose a 15% gait derangement impairment to represent all lower extremity impairments.

The Ratings

Chapter 3 – The Musculoskeletal System

Omega Medical's total assessment is 28%. Health Impact's total maximum assessment, using any of the methodologies, is 15%.

I will therefore assign Mr. Allen a 28% rating.

Chapter 4 – The Nervous System

Given my decision regarding "double counting", Table 2 is the appropriate rating scale. Dr. Lisa Becker, Omega Medical, provided a 1-14% "mental status impairment" rating pursuant to that Table.

I will therefore assign Mr. Allen a 14% impairment, the maximum rating in the range, provided by Dr. Lisa Becker of Omega Medical.

Chapter 13 – The Skin

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.

Chapter 14 – Mental and Behavioral Disorders

As the Applicant states in his written submissions:

> The parties agreed not to call the psychiatrists who assessed Mr. Allen. Their reports are contained in the Arbitration material but essentially accord with one another. Dr. Rosenblat, as part of the Omega Medical Associates team, determined that the appropriate rating for mental [emotional] and behavioural disorders is 17 – 20%. Dr. Finkel, as part of the Health Impact team, gave a single numerical rating of 18%.

I note that the two assessors used different methodologies for arriving at their percentage ratings pursuant to the Chapter 14 table (which provides no percentage ratings): Dr. Rosenblatt utilized the "California GAF Conversion" method while Dr. Finkel used the method which refers to Chapter 4, Table 3 of *Guides*.[17] In my view, given that the two different methods employed came to essentially the same result, there is a high level of reliability inherent in the final percentage ratings.

I will therefore assign Mr. Allen a 20% impairment, the maximum rating in that range, provided by Dr. Rosenblatt.

Rating for Medication

It is clear that my assessment pursuant to the *Schedule* s. 2(1.2)(f) must be done as of the date of the Arbitration Hearing and not retrospectively. Nonetheless, because of the nature of the Hearing process, much of the evidence proffered in the Hearing is necessarily somewhat dated, that is, medical assessments will have been conducted weeks or even months before the Hearing. There is inherent in the Arbitration Hearing process therefore, to borrow an expression from the Supreme Court of Canada, "a rebuttable presumption of identity".[18] In other words, evidence will be viewed as current to the date of the Arbitration Hearing unless evidence to the contrary is presented.

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[17] For a discussion of the various methodologies which have been used to arrive at a percentage impairment rating pursuant to Chapter 14 Table, see *Jaggernauth v. Economical*, FSCO A08-001413, December 20, 2010.

[18] See *R. v. St. Pierre*, [1995] 1 S.C.R. 791.

The Applicant asks that I provide a 1-3% rating for the Applicant's use of medication. However, the Applicant gave clear *viva voce* testimony during his examination-in-chief during the first day of the Arbitration Hearing that he is, "not taking any medication at the moment". I accept this evidence as rebutting the presumption of identity of any evidence regarding Mr. Allen's consumption of medication at the time of being medically assessed. It may well be that Mr. Allen was consuming medication at some point post-accident. However, he is not consuming medication at the time of the Hearing. Mr. Allen may even have medication prescribed currently, however, *Guides* is also quite clear that, "if a patient declines therapy for a permanent impairment, that decision should neither decrease nor increase the estimated percentage of the patient's impairment".[19]

I therefore decline to award any impairment rating for medication.

The Final Estimated WPI Impairment Percentage

According to the Combined Values Chart in *Guides*,[20] when all the impairment ratings (that is, 28, 14, 4, and 20) are combined, the result is a 52% WPI. 52% "rounded to the nearest value ending in 0 or 5", as permitted by the *Guides*,[21] yields 50%, which is insufficient to meet the criteria in clause 2(1.2)(f) of the *Schedule*, namely 55%.

Conclusion

I conclude that Mr. Allen has failed to prove, 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:

[19] Chapter 2, page 9 of the *Guides*.
[20] Pages 322-323 of the *Guides*.
[21] *Supra*, footnote 17.

If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with the *Dispute Resolution Practice Code*.

Alan G. Smith
Arbitrator

FEB. 3, 2015
Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A12-003800

BETWEEN:

MIGUEL ALLEN

Applicant

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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 amended, it is ordered that:

1. The Applicant, Mr. Miguel Allen, is not suffering from a catastrophic impairment caused by the motor vehicle accident pursuant to section 2. (1.2)(f) of the *Schedule.*

Alan G. Smith
Arbitrator

FEB. 2, 2015
Date