CITATION: Security National Insurance Co. v. Allen, 2017 ONSC 6779
DIVISIONAL COURT FILE NO.: DC 372-16
DATE: 20171220

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Fragomeni, M.G.J. Quigley and Matheson JJ.

BETWEEN:	
SECURITY NATIONAL INSURANCE CO./MONEX INSURANCE MGMT. INC.	*Derek Greenside*, for the Applicant
Appellant	
– and –	
MIGUEL ALLEN and the FINANCIAL SERVICES COMMISSION OF ONTARIO	*Andrew C. Murray*, for the Respondent Miguel Allen
	Jessica Spence and Deborah McPhail, for the Respondent Financial Services Commission of Ontario
Respondents	
	HEARD at Toronto: October 24, 2017

Fragomeni, J.

Nature of the Proceeding

[1] The Applicant, Security National Insurance Co./Monnex Insurance Mgmt. Inc., seeks judicial review of the appeal decision of Director's Delegate Blackman reviewing a decision of Arbitrator Alan D. Smith. The issue before Arbitrator Smith was whether the Respondent to this Application, Miguel Allen, suffered from a catastrophic impairment, specifically a 55% Whole Person Impairment (WPI) pursuant to s. 2(1.2)(f) of the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*, O. Reg. 403/96 (*Schedule* or SABS), under the *Insurance Act*. R.S.O. 1990, c.I.8.

[2] Arbitrator Smith released a decision in this matter on January 30, 2015. He concluded that Mr. Allen did not suffer a catastrophic impairment. Arbitrator Smith found a 52% WPI rating.

[3] Mr. Allen appealed the decision to the Director of Arbitrations on two issues of law, submitting as follows:

(i) that it was an error in law to refuse to combine the impairment ratings from Chapter 4 (the Nervous System) Table 3 of the *AMA Guides to the Evaluation of Permanent Impairment*, 4th Edition 1993 (the *Guides*)[1] to Mr. Allen's brain injury, with the impairment as related under Chapter 14 of the *Guides* (Mental and Behavioural Disorders); and

(ii) that it was an error in law to decline to award an impairment rating to Mr. Allen's use of medications solely because Arbitrator Smith concluded that his assessment must be done as of the date of the hearing, at which time Mr. Allen was not taking medication.

[4] Security National is Mr. Allen's statutory accident benefits insurer in relation to the accident in question. It cross-appealed from the decision of Arbitrator Smith with respect to the 4% rating awarded in connection with scarring on Mr. Allen's body.

[5] Director's Delegate Blackman granted the appeal and dismissed the cross-appeal. Security National now brings this application for judicial review. For the reasons set out below, the application is dismissed.

The Accident

[6] Mr. Allen was born on November 3, 1988. On September 5, 2008, Mr. Allen was driving a Nissan 240. Three of his friends were passengers in his vehicle. There was a violent head-on collision that was part of a five-car collision. One of Mr. Allen's friends was killed.

[7] According to the paramedic call record, Mr. Allen was observed to be unresponsive for between 10 and 15 minutes. It took first responders upwards of 30 minutes to extract Mr. Allen from the vehicle.

[8] Mr. Allen was airlifted to St. Michael's Hospital. His injuries consisted of the following:

- A fractured femur in the right leg, requiring intramedullary nailing with an open reduction and internal fixation
- A right calcaneal fracture requiring open reduction and internal fixation
- Multiple abrasions to the thorax and abdomen
- A closed head injury
- Neck and back injuries
- Dental injuries

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[1] The *Guides* are incorporated by reference into the SABS: *Desbien v. Mordini*, [2004] O.J. No. 4735, at paras. 227-228.

[9] In his written submissions to Arbitrator Smith, Mr. Allen described his application for the determination of catastrophic impairment as follows, in paragraphs 35 and 36:

> Mr. Allen's friend, Chad, died in the accident. The two rear seat passengers also suffered serious injuries. Mr. Allen has had a variety of physical, mental, psychological, and emotional complaints following the accident. His problems are permanent.
>
> The Application for Catastrophic Impairment is based on a combination of Mr. Allen's physical injuries, including his neuropsychological head injury and his emotional and behavioural injuries, which Mr. Allen asserts totals 55% of his whole person (within the meaning of the *Guides*).

[10] Security National disputed the designation of Mr. Allen as catastrophically impaired. Under the SABs regime, more generous benefits are available for people who are catastrophically impaired. For example, there are increased monetary limits for medical and rehabilitation benefits. The legislature's definition of "catastrophic impairment" is "intended to foster fairness for victims of motor vehicle collisions by ensuring that accident victims with the most health needs have access to expanded medical and rehabilitation benefits": *Arts v. State Farm Insurance* (2008), 91 O.R. (3d) 394 (S.C.), at para. 14.

Arbitrator Smith's Decision

[11] In order to provide context to the discussion that follows, it is informative to set out portions of Arbitrator Smith's decision relating to the issues that had to be determined by Delegate Blackman, specifically regarding brain injury, medication and scarring.

Re: Brain Injury

[12] Arbitrator Smith identified the issue of law to be that of "double counting". At pages 2 and 3 of his decision Arbitrator Smith stated as follows:

> [Quoting Mr. Allen's submissions] In determining Mr. Allen's whole person impairment, the real issue 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*, 2011 ONCA 823 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 the issue of potential "double counting" in arriving at a final WPI, at least not in the manner that it arises in this Application. In that regard, I note the Court's comments in *Pastore v. Aviva Canada Inc.* 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. [Footnotes omitted.]

[13] In his analysis of the "Double Counting" issue, Arbitrator Smith reached the following conclusion at pages 9 and 10:

> I conclude that my mandate to "rising [sic] 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 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.

Re: Medication

[14] The second relevant issue before the Arbitrator related to medication. At page 16 of his decision Arbitrator Smith dealt with the issue as follows:

> 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". In other words, evidence will be viewed as current to the date of the Arbitration Hearing unless evidence to the contrary is presented.
>
> 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 Arbitrations 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".
>
> I therefore decline to award any impairment rating for medication. [Footnotes omitted.]

Re: Scarring

[15] Lastly, at page 15 of his decision Arbitrator Smith dealt with the applicant's scarring as follows:

> 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.

Appeal Order of Delegate Blackman

[16] As set out above, three of the Arbitrator's impairment ratings were appealed. Mr. Allen appealed the ratings regarding brain injury and use of medications. Security National cross-appealed the rating regarding scarring on Mr. Allen's body.

[17] Again, it is informative to set out portions of Delegate Blackman's decision.

[18] In his analysis, at pages 12-14, Delegate Blackman set out the general principles applicable to the issues in dispute, summarized as follows:

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

   Delegate Blackman made reference to the decisions in *Arts v. State Farm Insurance Company*, 2008 CanLII 25055 (ONSC) and *Kusnierz v. Economical Mutual Insurance Company*, 2011 ONCA 823, 108 O.R. (3d) 272, in support of this principle.

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, 97 O.R. (3d) 95, 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." [at p. 13]

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

   The *Schedule* speaks of "an impairment or combination of impairments" and does not use the word "symptoms" that was used by the Arbitrator.

Re: Brain injury

[19] Delegate Blackman stated the issue, at page 1, as follows:

> 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 *Guides*]?
>
> My answer is yes.

[20] Delegate Blackman noted, at pages 3-4, that the double-counting issue is not novel as suggested by the Arbitrator, citing numerous cases in which the issue had been discussed.

[21] Delegate Blackman considered the relationship between Chapters 4 and 14 of the *Guides* at pages 14-18. He found that the cause of the impairment was a key to ensuring that impairment ratings under s. 2(1.2)(f) of the *Schedule* neither underestimated not overestimated the impairment rating. Chapter 4 emotional or behavioural disturbances are the result of neurologic impairments. Charter 14, however, relates to impairments due to mental disorders.

[22] Delegate Blackman considered relevant prior decisions, concluding at page 16 that it was incumbent upon the Arbitrator to determine what, if any, emotional or behavioural disturbances were the result of neurological impairments and that the Arbitrator had erred in law in failing to do so. Delegate Blackman noted that s. 4.1 of the *Guides* requires that one look at the specific categories of impairment "resulting from" disorders of the brain.

[23] Delegate Blackman reached the following conclusions on pages 17 and 18:

> 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.
>
> ...
>
> 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."

[24] Delegate Blackman thus concluded that Arbitrator Smith erred in law and ordered that this issue be returned to arbitration for determination.

Re: Medication

[25] Delegate Blackman addressed the timing of the impairment assessment for medication. Security National submitted that the assessment must be at the date of the hearing, as found by the Arbitrator, but conceded that the medical assessments upon which it relied were from two to three and a half years prior to the arbitration hearing.

[26] Delegate Blackman considered s. 2(2.1)(b) of the *Schedule* and relevant authority and found, on page 19, that rather than a rigid approach, a more flexible approach to timing was appropriate. At page 20, Delegate Blackman found as follows:

> I find 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.

[27] On page 21, Delegate Blackman concluded that Arbitrator Smith erred in law by not assigning a WPI rating for medication and that the issue of assigning an impairment rating to the effects of medication, over a reasonable time period based on the facts, should be returned to arbitration for determination.

Re: Scarring

[28] Delegate Blackman was not persuaded that there was a complete absence of evidence supporting the Arbitrator's decision on scarring, as submitted by Security National.

[29] At pages 23-24 of his decision, Delegate Blackman reviewed the oral evidence of Dr. Naumetz that was before the Arbitrator, as follows:

> (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 times goes on. That open-ended approach to timing, however, is contrary to the Respondent's general approval 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."

[30] Delegate Blackman therefore confirmed the Arbitrator's 4% WPI rating under Chapter 13 (the skin) of the *Guides*.

[31] In summary, at set out in his appeal order, Delegate Blackman remitted the questions of Mr. Allen's rating under Chapter 4 (the Nervous System) and medication rating back to arbitration for determination. He confirmed the Arbitrator's other WPI ratings.

Analysis

[32] The standard of review on an application for judicial review of a decision of the Director's Delegate is reasonableness.

[33] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 1 S.C.R. 190, the Court set out the following at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquiries into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of

> justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[34] With respect to a case where the Tribunal is interpreting its own statute, the Court in *Dunsmuir* set out the following at paragraph 54:

> Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, 1995 CanLII 148 (SCC), [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1997 CanLII 378 (SCC), [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, 1974 CanLII 12 (SCC), [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

[35] In *Pastore v. Aviva Canada Inc.*, 2012 ONCA 642, 112 O.R. (3d) 523, the Court dealt with the standard of review of a delegate at paras. 17 to 26:

> The respondent concedes that the Divisional Court erred in requiring the delegate to be correct in his interpretation of the legislation and in finding that he acted beyond his jurisdiction by including physical pain as due to a mental disorder. The respondent agrees with the appellant that the Divisional Court was required to apply the reasonableness standard of review to both aspects of the decision of the delegate.
>
> I agree that following the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, 2008 SCC 9 (CanLII), the correct standard of review in this case is the reasonableness standard. The delegate was engaged in the interpretation and application of his home statute, the Insurance Act, and the SABS regulations to that Act. Applying the first test in *Dunsmuir*, both the delegate's authority to interpret the SABS and

> *Insurance Act* and to grant or deny SABS benefits has been recognized in previous jurisprudence as reviewable on a standard of reasonableness. [Citations omitted.]

[36] The decision of Delegate Blackman attracts a high degree of deference. The decision was made in the context of a specialized regime and one in which the Delegate has expertise.

[37] On all three issues before us, the Delegate Blackman's decision was reasonable as discussed below.

[38] With respect to the brain injury and double counting, the proper methodology and approach to be used with respect to the interaction between Table 2 and Table 3 of the *Guides* falls squarely within the expertise of the Director's Delegate, interpreting his home statute. Further, the *Guides* do not provide a precise formula – the *Guides* specifically acknowledge the inability to provide complete and definitive answers. The impairment ratings derived by means of the *Guides* are informed estimates. As a result, there is a considerable range of reasonable outcomes.

[39] As shown in his reasons for decision, summarized above, in reaching his decision Delegate Blackman interpreted the *Schedule* and the *Guides* and applied the principles applicable to catastrophic impairment determinations. Delegate Blackman reasonably decided to apply these general principles:

(1) that the *Guides* should be given a remedial, broad, and liberal interpretation; and,

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

[40] The Director's Delegate considered the facts and law within the context of the legislative scheme and relevant prior decisions. He addressed the alleged double counting issue and relevant authorities. His approach was consistent with clause 2(1.2)(f) of the *Schedule*, which speaks of "an impairment or combination of impairments" – not "symptoms" as was used by the Arbitrator.

[41] The Director's Delegate decided 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, and then use the most severe rating to combine that rating, using the Combined Values Chart, with the other impairment ratings.

[42] The Director Delegate's decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The applicant has failed to establish otherwise.

[43] With respect to medication, the Guides permit the WPI to include a small percentage for the effects of medication. Delegate Blackman considered clause 2(2.1)(b) of the *Schedule* and relevant authority and found that rather than a rigid approach, a more flexible approach to timing was appropriate. The decision to direct the rating be returned to arbitration for a determination based on the facts and the related discussion of the use of non-prescription drugs and Mr. Allen's

personal circumstances are deserving of deference and are within the range of possible and acceptable outcomes.

[44] With respect to scarring, the evidentiary record, as reviewed by Delegate Blackman in his decision, anchors his conclusion that the 4% rating for scarring ought to be confirmed. Counsel for Mr. Allen acknowledged that at the arbitration stage he had erroneously submitted to Arbitrator Smith that Dr. Naumetz had been "pushed to" 4%. However, there was nonetheless sufficient evidence to support the rating and it was therefore reasonable for Delegate Blackman to reject the appeal based on the inaccurate submission. The applicant notes that the figure of 4% was not specifically mentioned in the medical evidence. However, as Delegate Blackman found, the adjudication is not restricted to merely choosing impairment ratings offered by the experts. The confirmation of a 4% rating for the scarring, while not the only possible result as acknowledged by Mr. Allen, is within the range of possible and acceptable outcomes.

Disposition

[45] This Application for judicial review is dismissed.

[46] As agreed to by the parties, costs are ordered in favour of the Respondent, Mr. Miguel Allen, in the all-inclusive sum of $5,000.

Fragomeni J.

I agree

M.G.J. Quigley J.

I agree

Matheson J.

Date of Release: DEC 2 0 2017

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Appellant

– and –

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Respondent

REASONS FOR DECISION

Fragomeni J.

Date of Release: December 20, 2017