2018 CarswellOnt 1618
Financial Services Commission of Ontario (Arbitration Decision)

Steinberg and Wawanesa Mutual Insurance Co., Re

2018 CarswellOnt 1618

RUDOLF STEINBERG (Applicant) and WAWANESA MUTUAL INSURANCE COMPANY (Insurer)

Charles Matheson Member

Heard: October 10, 2017; October 11, 2017; October 12, 2017; October 13, 2017; October 16, 2017; October 17, 2017; November 6, 2017; November 7, 2017; November 8, 2017; November 9, 2017
Judgment: January 15, 2018
Docket: FSCO A14-004251

Counsel: Mr. Allan S. Blott, for Mr. Rudolf Steinberg
Mr. David Scott, for Wawanesa Mutual Insurance Company

Subject: Insurance
Headnote
Insurance --- Automobile insurance — Catastrophic impairment — Extent of impairment — Serious impairment of important physical or psychological function
Insurance --- Automobile insurance — Catastrophic impairment — Practice and procedure

***Charles Matheson Member*:**

Issues:

1 The Applicant, Mr. Rudolf Steinberg, was injured in a motor vehicle accident on October 29, 2011. He applied for and received statutory accident benefits from Wawanesa Mutual Insurance Company ("Wawanesa"), payable under the *Schedule*. [1] The parties were unable to resolve their disputes through mediation, and Mr. Steinberg applied for arbitration at the Financial Services Commission of Ontario, through his lawyer, under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

2 The issues in this Hearing are:

1) Did Mr. Steinberg sustain a catastrophic impairment within the meaning of the *Schedule* as a result of the accident?

2) Is either party entitled to its expenses in respect to the Hearing?

Result:

3

1) The Applicant sustained a catastrophic impairment within the meaning of the *Schedule* as a result of the accident.

2) Should the parties become unable to resolve this issue, they shall subsequently schedule an Expense Hearing before me in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Motion or Objection Mid-Hearing

4 Just prior to Dr. Baird's testimony, the Applicant was seeking to have the doctor testify as an expert in several areas including catastrophic determinations as per the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th Edition, 1993 (the "*Guides*").

5 The Insurer raised the issue that s. 45(1)(1) of the *Schedule* precludes a Chiropractor from providing an opinion on a catastrophic determination or a Whole Person Impairment ("WPI"). The Insurer argues that only a "Physician" can offer a catastrophic determination and we do not have one.

6 The Applicant argues that in regards to an application for catastrophic determination, the Insurer is correct, in that this section of the *Schedule* speaks to the rules applicable to the application only, with the exception found of s. 45(1)(2). In this case there are three Physicians who have already initiated three separate OCF-19 applications for a catastrophic determination. Therefore, once the application is successfully launched a Chiropractor may assist the Physician thereafter.

7 The Insurer draws my attention to the wording in s. 45(1)(1) in that the Physician has to do the assessments or examinations in connection with a determination of catastrophic impairment, and then may be assisted by such other regulated health professionals. This language, the Insurer insists, is unambiguous. Therefore, Chiropractors cannot be experts in catastrophic determinations, because the Chiropractor is not retained directly by the Physician.

8 The applicable language in s. 45 reads as follows:

> **45.** (1) An insured person who sustains an impairment as a result of an accident may apply to the Insurer for a determination of whether the impairment is a catastrophic impairment.
>
> (2) The following rules apply with respect to an application under subsection (1):
>
> 1. An assessment or examination in connection with a determination of catastrophic impairment shall be conducted only by a physician but the physician may be assisted by such other regulated health professionals as he or she may reasonably require.
>
> 2. Despite paragraph 1, if the impairment is a brain impairment only, the assessment or examination may be conducted by a neuropsychologist who may be assisted by such other regulated health professionals as he or she may reasonably require.
>
> 3. If a Guideline specifies conditions, restrictions or limits with respect to the determination of whether an impairment is a catastrophic impairment, the determination must be made in accordance with those conditions, restrictions and limits.

9 In my view, this section speaks to the rules of the application process only, in that the application must be completed by the same Physician who does the initial assessments or examinations which triggers the completion of the application being put forward to the Insurer. In this case the Applicant's family Physician signed an OCF-19. Dr. Baird is simply assisting the original Physician to formulate the full medical picture of the Applicant and as such is not precluded as being an expert on the *Guides*. Dr. Baird is accepted as an expert in the *Guides*.

Background

10 The Applicant was a front seat passenger in a pick-up truck when the driver lost control of the vehicle on an icy bridge, causing the vehicle to roll over in the ditch on the opposite side of the road. The vehicle came to rest on its roof. The horse trailer being towed by the pick-up truck also was up-set on its side. The Applicant's daughter was in the rear passenger seat during the accident but was not seriously injured.

EVIDENCE

Applicant's Testimony:

11 The Applicant testified that prior to the subject motor vehicle accident he was living on his 70-acre horse farm in Neebing, Ontario with his daughter and son. He lives in a mobile home on the property that is heated by a wood boiler in a separate building. Today, however, the Applicant lives alone on this property with 5 horses and 3 dogs. His daughter is living independently in Alberta, and his son is currently living and working in Thunder Bay and primarily resides with his mother during his seasonal work year.

12 The Applicant stated he is able to communicate verbally in Finnish, Estonian, and English, with minimal fluency in French.

13 The Applicant testified to the fact that prior to the accident he enjoyed physical activities with his children that included fishing, hunting, horseback riding, martial arts, snow sledding, snow shoeing, cutting wood, and camping. He states that now he can only fish or hunt with the help of a second person on good days and then only for a short time.

14 In regards to employment, the Applicant was a logging truck driver combined with some operation of other logging and construction equipment based on the time of year and the work that was available at the time, for most of his adult life. He stated that he changed his employment just prior to the accident and was working as a heavy equipment mechanic. The Applicant stated that he has not been able to return to work in any capacity since 2012.

15 The Applicant testified that as a result of the accident he developed two black eyes, then started to develop memory problems, with headaches five times per week. Migraine headaches continue to haunt him to this day. He found he was also having short-term memory issues with a slower processing speed of information/memory. He is now prone to lose or misplace his keys, cell phone, tools and/or his wallet. He also testified that he has now developed balance issues since the accident and has experienced "fogginess" feelings in regards to concentration and thought processes. The Applicant also testified that he leaked fluid from his ears for about a year after the accident.

16 The Applicant, during examination and cross-examination, admits to being able to drive but he finds that a significant rest is required if he travels more than two hours as either a passenger or driver. As a passenger he is subject to vertigo/anxiety attacks. The other two modes of long distance transportation that the Applicant has tried since the accident were on a train and a plane, and both were in the Applicant's opinion the most painful and uncomfortable events he has endured.

17 The Applicant testified that he would frequently attempt to socialize, however, he found that he would suddenly be lost mid-sentence in his own story and could not recall what he had said or what was next. This was verified later by his son's testimony and Dr. Schroder's testimony.

18 In regards to his upper body physical limitations, the Applicant described the motions which caused him pain and how those movements impact his ability to work as either a driver, welder or mechanic. He explained that his hand eye coordination prevents him from welding and doing finer mechanical duties.

19 In regards to his lower body injuries, the Applicant testified that he loses sensation in his legs when he is lying down or sitting in any one position too long. He also said that he hit both knees on the dash of the vehicle which in turn required him to acquire knee braces which help him to stabilize his knees, relieving his pain on a daily basis. The Applicant testified that he had right knee surgery recommended in June 2012.

20 Under cross-examination, the Applicant reasoned that he did not go for the surgery because of money issues, recovery time and issues around who would look after him and the farm. As well, the doctor would not give him 100% assurance of a complete recovery.

21 In regards to his sleeping habits, the Applicant testified that he had been diagnosed with severe sleep apnea after experiencing a difficult time going to sleep because he could not get comfortable. He continued to describe moving in bed until he could hear a gurgling sound in his ears before finding the correct neck position which allowed him to sleep. He would be able to sleep for short periods as the pain or numbness in his legs would wake him during the night.

22 Further, in regards to his sleep apnea, under cross-examination, the Applicant testified that he did not have any sleep issues prior to the accident, thus, he attributes the sleep apnea to the accident despite that no medical practitioners explicitly told him that the accident was the cause of the sleep apnea. The Applicant testified that he was assessed with severe sleep apnea where a machine was recommended. He said he tried the machine but to no avail, as the pressure in his head while using the machine was very uncomfortable and as a result he could not sleep, so he did not use it again because of the pain.

23 The Insurer raised his pre-accident medical history, in regards to his visits to his family doctor and his chiropractor during the two months prior to the accident. In this time frame it was noted that the Applicant was complaining of aches and pains in both his shoulders and knees. The Applicant argued that these were aches and pains associated with his recent job change from driver to mechanic.

Dr. Mary Ann Mountain's (Neuropsychologist) Testimony

24 Dr. Mountain testified, on behalf of the Applicant, as to the validity and veracity of her neurological reports dated February 24, 2013, February 15, 2015, and more importantly her catastrophic impairment report April 8, 2017, and the necessity of her authored OCF-19, application for catastrophic determination dated July 5, 2017.

25 Dr. Mountain testified as to her methods and test results of the Applicant, as well as to her collateral interview with the Applicant's son, for verification purposes. She also compared her initial findings in her 2015 report and the differences or similarities between the two reports. Within the catastrophic report, Dr. Mountain compared and justified her findings as being similar to those of the Insurer's neuropsychological assessor, Dr. R. Ladowsky-Brooks, and as such her clinical findings were consistent with a peer and not an outlier.

26 Dr. Mountain reiterated her diagnoses of the Applicant which were:

1) Mild Concussion — resolved;

2) Somatic Symptom Disorder;

3) Depressive disorder due to another medical condition; and

4) PTSD. [2]

27 Further, Dr. Mountain provided her opinion on the Applicant's Impairment Classification — Catastrophic Impairment ratings within the four spheres which are as follows:

- Activities of Daily Living: Class 3 (moderate impairment)
- Social Functioning: Class 1 (no impairment)
- Concentration, Pace and Persistence: Class 4 (marked impairment)
- Adaptability: Class 4 (marked impairment). [3]

28 Finally, Dr. Mountain gave a Whole Person Impairment ("WPI") calculation while using Table 3 in Chapter 4 of the *Guides*, in her report, which reads as follows: [4]

Using this methodology, whole person impairment is estimated at the higher end of the moderate limitation (15-29 percent).

29 Dr. Mountain opined that the Applicant is a self-sustaining person with great sense self-reliance and a fixer. Therefore, she considered it a normal reaction for the Applicant to believe that something needs to be fixed which will relieve his symptoms and associated pain. Thus, the Applicant is now or has become totally pain focused.

30 During cross-examination, Dr. Mountain opined that the Applicant should attend a Chronic Pain Management program, which she recommended in the past. The doctor is also not convinced that the cognitive impairments the Applicant is suffering will resolve in a short period of time. Further the doctor opined that the Applicant's test results, since 2015, have shown his symptoms to be stable.

31 Upon questioning, about the Class 3 WPI rating (15-29%), and its apparent inconsistency of this rating and the previously assessed Marked or Class 4 impairment rating, the doctor testified that she used Chapter 15 — Pain of the *Guides* to increase the upper Class 3 range rating up into a Class 4 or Marked rating. The doctor recognized she did not explain her thought process in her conclusions in her report.

Dr. Francis Puchalski's (Kinesiologist)Testimony

32 Dr. Puchalski testified that he started treating the Applicant in late 2014, and continued to treat him until July 2017. Dr. Puchalski admitted that he had no experience with a case of cervical spine loss of motion segment integrity, in that the pathology was such that the Applicant would make some progress and then slide back almost to the beginning, or other symptoms or issues would arise as a result of his previous treatments. He was puzzled as he has not seen this type of total body trauma before. Therefore, he referred him to New York for some extra imaging (dynamic imaging or moving x-rays) to help the doctor assess the Applicant's future expectations and treatments.

33 The resulting imaging started to explain what challenges were before the Applicant which led to subsequent MRI images, which now in this doctor's opinion confirmed that the Applicant has an unstable neck vertebrae. In his opinion, the Applicant's muscles in the neck and shoulders are over working to help support the vertebrae in the neck. Thus, the very sensitive spot at C7 and T1 makes more sense. Dr. Puchalski agreed with the findings of Dr. Baird in that there is a "translation" of the neck vertebrae.

34 Under cross-examination, the doctor recalled two slips and falls by the Applicant in 2014 and 2016, but they were not significant in his opinion. Further, Dr. Puchalski testified that he sent or referred the Applicant to Mr. Hare, which eventually led him to Dr. Rosa in New York for more imaging. He said he did not know what else to do for the Applicant as this was a "weird" case, in that there were confounding symptomology being presented after numerous treatments.

Dr. Brian Schroder's (Chiropractor) Testimony

35 Dr. Schroder testified that he was the Applicant's treating Chiropractor prior to the accident and continued to treat him for about 18 months post-accident.

36 Dr. Schroder verified that he too wanted more imaging done on the Applicant but was unable to persuade the family physician to make the referrals. Dr. Schroder confirmed Dr. Puchalski's earlier testimony and findings that the added imaging showed several ligaments, including the Alar and Apical ligaments, were damaged, which were as a result of very traumatic event, and that all the Applicant's divergent symptoms were not (as previously thought) from pre-existing injuries. The doctor opined that these ligaments support and centre or stabilize the skull on the spine. These injuries to this cervical-cranial architecture are significant and are severe in nature, in that blockage of blood flow may result, which in turn may block the cranial spinal fluid ("CSF") flow. Finally, if the above is true, the nerve information flow from the brain to the rest of the body's communication mechanisms may be subject to interruptions. The doctor opined that ligaments do not repair themselves as they generally stretch out of shape and don't return or tear. In this case they are stretched out of shape, so they are then no longer properly supporting the bone structure.

37 Under-cross examination the doctor explained that he had been the Applicant's treating Chiropractor since 2011, and he had worked on numerous parts of the Applicant's body at different times pre-accident, as required. The doctor opines that the Applicant's visits two months prior to the accident were related to the Applicant's recent vocational changes only. The doctor testified that he has not seen the Applicant for treatments since June 2014, since his funding had expired or since he has been receiving treatments from Dr. Baird.

38 Further, Dr. Schroder opined that his diagnosis of a closed head injury was based on self-reports of the Applicant combined with his general knowledge of same. The doctor stated he changed his original opinion of the Applicant's condition and anticipated recovery as reported in his "Rehabilitation Assessment Report" [5] dated January 9, 2013, where he gave an opinion of "prognosis is excellent". Upon questioning the doctor opined that ligaments do not regenerate once they are over stretched.

Dr. Brian Hartford's (Family medical doctor) Testimony

39 Dr. Hartford testified on behalf of the Applicant, and confirmed that he authored one of the three OCF-19s or applications for catastrophic impairment. [6]

40 The doctor testified that the Applicant was suffering from post-concussion head injuries, displayed by the Applicant's medical post-accident medical history, complaints and symptoms. The doctor confirmed the Applicant complained about numbness and tingling in his limbs. The doctor opined that the Applicant was high functioning prior to the accident.

41 Under cross-examination, the doctor confirmed that the Applicant had tenderness in his right elbow, consistent with tennis elbow, throughout August and September 2011. The Applicant then was referred to Dr. H. E. Elshirif who diagnosed him with shoulder tendonitis, [7] with which Dr. Hartford agreed.

Dr. Baird's (Chiropractor) Testimony

42 Dr. Baird testified for the Applicant, as to the validity and veracity of his evidenced report, [8] and his addendum report. [9]

43 Dr. Baird described his 3D digital imaging processes using x-rays which are taken consecutively with three lenses at the same time. Dr. Baird described the above radiograph process as it is then combined with an Atlas Orthogonal technique and a software program known as "PostureRay". Dr. Baird suggested that the best way to describe the result is like comparing a still picture to that of a movie or video.

44 The information from this process allows the treating health professional to see if the patient has any misalignments of the skull in relation to the spine, in particular C1 to C6. It also allows for a focused concussive force to be applied to help correct the misalignment and give pain relief to the patient, which the doctor testified happened in this case, and the relief results were immediate.

45 Dr. Baird opined that the Applicant had suffered a misalignment of the C1 and C2 in relationship to the skull. This misalignment explains, in the doctor's opinion, the fogginess the Applicant is experiencing. He continued to opine that the misalignment is pulling the brain down into the foreman magnum of the skull (the hole at the bottom of the skull) which in turn blocks both blood and spinal fluid flow, like a cork in a bottle. The doctor suggests that this explains the "gurgling" sound the Applicant reports when trying to sleep.

46 Dr. Baird also determined in his report [10] and during his testimony, with the aid of slides, that the Applicant's ligaments were damaged or compromised letting the spinal cord be pinched, which allows the brain to be overloaded with its own waste products. The doctor stated that a damaged ligament generally can no longer give resistance or restrictions and support to the spine or skull, as it maybe. Thus, the mechanical stresses are exerted on the spine which perpetually insults the spine. Dr. Baird confirms that he agrees with Dr. Puchalski's and Dr. Schroder's diagnosis of ligament damage.

47 Dr. Baird continued to testify about the measurable results from the x-rays [11] taken of the Applicant which show that C2/3 up to C5/6 demonstrate a loss of segment integrity in translation. In other words, the angles of translation of each vertebrae to the other is greater than 3.5 mm. The doctor concludes when comparing these results while referring to the *Guides*, [12] chapter 3, page 104 under the heading of DRE Cervicothoracic Category IV: Loss of Motion Segment Integrity or Multilevel Neurologic Compromise, that the Applicant has suffered a 25% WPI as a result of the accident.

48 Dr. Baird then opined on his report's [13] findings in his cross-examination testimony, where he defended his WPI ratings using other health practitioners' diagnoses. He then combined the percentages found in the *Guides*, assigned to said diagnosis and arrived at a range of impairments as demonstrated by the following chart: [14]

Impairment WPI	**Using DRE IV Cervical 25%**	**Using DRE III Cervical 15%**
Chapter 14 (25-37%)	44-53% WPI Combined	36-46% WPI Combined
Gait Impairment 20%	55-62% WPI Combined	49-57% WPI Combined
Lumbar DRE III 10%	60-66% WPI Combined	58-65% WPI Combined
Sleep Disorder 9%	64-69% WPI Combined	58-65% WPI Combined
Sexual Dysfunction 9%	67-72% WPI Combined	62-68% WPI Combined
Right Knee 3%	68-73% WPI Combined	63-69% WPI Combined
Total Whole Person %	*68-73% WPI Combined*	*63-69% WPI Combined*

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49 During questioning, Dr. Baird testified that the two Cervical DRE ratings in the above chart were used to give the trier of facts the second best alternative to a rating within the *Guides*, in his opinion.

50 Dr. Baird also authored and testified about his addendum report dated September 6, 2017, where he rebuts Dr. Paitich's addendum reports. Dr. Baird argues that the significant mistake on Dr. Paitich's addendum #3 report dated May 8, 2017 is that he mistakenly criticized his use of a Gait Derangement, when he in fact was talking about and used a Gait Impairment rating as described on page 228 and 229 of the *Guides* (Criteria of Vestibular Impairment) and not a Gait Derangement rating. Dr. Baird argued that the Applicant best fits in a Class 3 impairment rating and slotted him into the centre of the 10 to 30% rating range found in the *Guides*.

51 During cross-examination Dr. Baird confirmed that a perfect alignment of C1 and the skull cannot be expected in any patient as they are not perfectly symmetrical. However, in this case the doctor opines that in this late stage of life, something else has impacted the Applicant in order for him to complain about these new symptoms. Ligaments just don't suddenly fail.

52 In regards to Gait Impairments, the doctor opines that a medium range of 20% impairment best fits the Applicant's condition in that some functioning continues and not all functioning is precluded.

53 Dr. Baird could not confirm that sleep apnea was caused by the accident, but suggested that the *Guides* look at the whole person and as such the sleep apnea is apparent after the accident. He therefore suggests that there has been some kind of contribution the accident gave to the condition.

54 In regards to the WPI rating of 73%, Dr. Baird defended this finding. The doctor suggested that the intention of the *Guides* is to look at the impairment of a whole person and how the impairment will eventually impact the person's life. Therefore, in his opinion respectively, the Applicant's life will have a downward spiral and may cut his life expectancy significantly and thus, the effects of the accident will have a negative impact on the Applicant's life over time, which the impairment ratings should ultimately show.

Mr. Rod Hare's (Registered Kinesiotherapist and Professional Ergonomist) Testimony

55 Mr. Hare testified for the Applicant as to the accuracy and integrity of his evidenced report. [15] Mr. Hare, during cross-examination, testified that he simply reviewed the existing medical reports and the clinical notes and records of the Applicant since the subject motor vehicle accident, looked up the corresponding WPI rating listed within the *Guides* for that issue and combined them in accordance with the *Guides*.

56 As evidenced in his report, Mr. Hare produced a chart [16] which found that the Applicant suffered a WPI of 85%. The chart reads, in part, as follows:

Body part, System or Function, related directly or indirectly to the subject MVA (impairment Rating)	Actual WPIR Score Rating
Mental & Behavior Disorder (Class 3: Moderate)	37%
Bilateral Glenohumeral Labrum Tears with Bilateral Supraspinatus Tendonitis	36%
DRE-Spine, Loss of Motion Segment Integrity	25%
Mental Status and integrative functioning abnormalities, combined with sleep disorders	22%
Gait Derangement — both left and right knees meniscus tears, use of a long leg functional knee bracing bilateral	20%
DRE-Lumbosacral Category III: Radiculopathy	10%
Greater Occipital nerves	5%
Lesser occipital nerves	3%
Knee joint crepitus (direct trauma)	2%
Final combined WPI Rating Score	85%

57 During cross-examination, Mr. Hare agreed that the ratings should be attributed to, or related to, injuries suffered as a result of the accident, but also explained that he realized that he did not provide any apportionment to his ratings nor did he attribute any of the medical injuries to previous accidents, work related or otherwise as the Insurer also did not do any apportionment. Mr. Hare believes that the Applicant had pain in some parts of his body, however there were no impairments in his medical records prior to the accident.

Dr. John Thornton's (Psychiatrist) Testimony

58 Dr. Thornton testified on behalf of the Applicant and defended his findings of his evidenced report [17] dated September 6, 2017.

59 Dr. Thornton's practice focuses on those patients who appear to be normal but who have suffered a subtle brain injury, and cannot sustain any cognitive or mental function moving forward. These types of injuries can be identified by using a "SPECT Scan" [18] which allows the treating physician to recognize where the damaged brain blood flow is in each region of the brain. The idea is that the injured brain's blood flow patterns are identified and then when compared to the patient's psychiatric symptoms, allows for the right treatment to be provided in order to help a patient return to an improved functional life. He believes that this is the only objective finding in psychiatry where no guessing is required. The doctor opines that a person can receive a concussion from a severe whiplash.

60 Dr. Thornton provides a psychiatric diagnosis (DSM 5 [19]) on page 6 of his report, which reads as follows:

1. Adjustment Disorder with Emotional Features

2. Post-Traumatic Stress Disorder

3. Chronic Pain Disorder

4. Subtle Brain Injury

5. Whiplash Injury

6. Acquired Attention Deficit Disorder.

61 Dr. Thornton also opines in his report [20] that "the combination of diagnoses 3-6 inclusive are highly suggestive of a diagnosis of Craniocervical syndrome." Dr. Thornton opines that the white fluid that the Applicant complained of coming from his ears was in fact leaking spinal fluid which was being blocked or backed up in the skull, but deferred any physical findings to others who specialize in this area.

62 The doctor described his findings within the SPECT Scan via a slide presentation where he opined he could determine that there are 7 indicators of brain trauma present in the Applicant. The doctor cautioned that this SPECT Scan must be used in conjunction with his psychiatric clinical findings. The doctor opined that in this case, there is cognitive dysfunction and that therapy will not help the Applicant with this issue. The Applicant's physical realities of brain activities show under-functioning within the identified brain anatomy associated with said dysfunction.

63 Further during cross-examination and re-direct, Dr. Thornton testified that he used the "World Health Organization Disability Assessment Schedule" ("*WHODAS*"), a self-reporting tool in order to help him assess the Applicant's impairment ratings as per Chapter 14 of the *Guides*. The *WHODAS* is found within the DSM 5.

64 With all the information of the Applicant's self-reported symptoms, the previously found physical findings, and the *WHODAS* test results supported by the corresponding SPECT Scan results, the doctor provided impairment ratings for the Applicant with regards to the four spheres in his report [21] which reads as follows:

1. Activities of daily living- Class 5

2. Social Functioning- Class 4

3. Concentration, Pace and Persistency- Class 5

4. Adaptation- Class 5.

65 Dr. Thornton testified under cross-examination that Mount Sinai Hospital in Toronto did the original SPECT Scan and gave the raw data to him, but refused to magnify the SPECT Scan to the degree he required and was forced to send the raw data to a Boston hospital which provided the SPECT Scan as presented in the Hearing. The doctor confirmed that the original radiologist reported normal findings in 2D SPECT Scan and no significant findings of the 3D SPECT Scan at a resolution of 50%. The subnormal blood flow in the brain was observed at a higher resolution. The doctor agreed that he was unable to discern if the accident alone accounted for the abnormal blood flow in the Applicant's brain.

66 Dr. Thornton made it clear that the SPECT Scan does not in itself give any ratings for impairment; it only measures blood flow within identifiable brain anatomy.

Dr. Gary Moddel's (Neurologist) Testimony

67 Dr. Moddel testified on behalf of the Insurer and to the veracity of his report's [22] findings as well as his three Neurological addendum paper reports. [23]

68 Dr. Moddel reiterated his findings contained within his original report. On page 6 in the second paragraph under Assessment, he states:

> At this point in time I do not think gentlemen suffered any neurological sequelae as far as the motor vehicle accident is concerned.

69 In his first addendum, the doctor opined that he was not persuaded to change his neurological assessment after reviewing Katherine Chisholm's Occupational Therapist's report. In his second addendum, the doctor was again not persuaded to change his opinion after reviewing Dr. Baird's report and Dr. Mountain's Catastrophic report. Further Dr. Moddel did not change his mind based on Dr. Thornton's findings and SPECT Scan.

70 Dr. Moddel deferred any decision on the SPECT Scan to a radiologist who is better at reading this type of Scan images. The doctor opined that these types of scans are in his opinion not specifically enough, in that a variety of etiologies may produce these types of brain images.

71 Dr. Moddel suggests that this SPECT Scan should be used as a secondary tool for any neurological issues as MRIs are the norm.

72 Dr. Moddel confirmed his opinion that the issues that the Applicant is suffering from were not the result of the motor vehicle accident, for example, the temperature of the Applicant's limbs are not neurological in nature, it relates to his obesity. The pinched nerve in his back is a result of a horse accident. The doctor opined that the referenced "meralgia" is again related to the Applicant's being overweight.

73 Under cross-examination Dr. Moddel did not see any evidence of a WAD III whiplash at the time of his physical assessment. Dr. Moddel opined that dysfunction of the neck was the primary source of his problems, and that a Chiropractor would not be qualified to make this assessment or diagnosis in any event.

74 Dr. Moddel opined that there is no clinical evidence that the spinal fluid flow is constantly being interrupted, and that there are no corresponding sequelae of this issue. Further, he opines that the MRIs he reviewed do not show any issues that are neurological in nature, and the headaches the Applicant is suffering from are tension type headaches only and not a result of spinal flow interruption on a clinical basis.

Dr. Ricki Ladowsky-Brooks' (Neuropsychologist) Testimony

75 Dr. Ladowsky-Brooks testified on behalf of the Insurer, as to the veracity and validity of her first report which was a catastrophic impairment report dated June 24, 2014. [24] The doctor testified that she reviewed all medical documents sent to her by the third party service provider, and listed only those documents that were relevant to her assessment and her findings. Further, the neuropsychological testing that she executed were the normal tests which were on the subjects of motivation; intellectual functioning, including verbal reasoning and verbal working memory; psychomotor attention; academic achievement; memory; and frontal lobe functioning.

76 Dr. Ladowsky-Brooks reiterated her written conclusions that the Applicant did not suffer a major impairment from the accident, despite trouble with his memory recall, number recall for math questions, low word generation, poor frontal lobe testing results and very poor psychomotor test results. Dr. Ladowsky-Brooks provided a WPI rating of 5-7 percent.

77 In regards to her addendum report, [25] the doctor confirmed it was a paper review only. The Insurer requested that she review new medical information in order to determine if she would change her medical opinion. She did not change her opinion.

78 In regards to her second addendum, [26] also a paper review, she was requested to see if her opinion would change after reading Dr. Mountain's catastrophic assessment. The doctor opined that her clinical findings were very similar to Dr. Mountain's and also found that the primary difference between the two reports was the interpretation of the results of the tests. Dr. Ladowsky-Brooks asserts that Dr. Mountain was inaccurate in her assessment of a catastrophic impairment in two spheres. To this point, Dr. Ladowsky-Brooks recognizes that the Applicant has problems completing tasks because of pain, but the Applicant, in her opinion, was not catastrophic in the sphere of concentration, pace and persistence. The doctor also acknowledged that the Applicant struggled with completing work related tasks related to the adaptation sphere, because of pain, but in her opinion, he is not catastrophic.

79 In regards to her third addendum report, [27] also a paper review, she was requested to see if her opinion would change by reading Mr. Hare's catastrophic report. It did not.

80 The doctor opined on Dr. Thornton's catastrophic impairment ratings in his report and stated that anyone in a Class 5 category would be someone who is institutionalized or at best confined to a wheelchair. She opined that Dr. Thornton's impairment rating conclusions were incorrect.

81 Under cross-examination, the doctor recognized that she had not physically seen, retested or subsequently interviewed the Applicant in the past three years, and that her previous tests were exclusively cognitive testing only. The doctor argued

that a psychologist or psychiatrist (Dr. Thornton) should not, under Chapter 14 of the *Guides*, give an impairment rating for activities of daily living because pain prevents the Applicant from doing the activities. It should only be given if his mental impairment alone interferes with the activity. In her opinion, no rating should be given under Criterion 8 as the patient is already getting a rating under Criterion 7, which amounts to double counting. Yet the doctor agrees that being prevented from walking a kilometre or more can be caused by both mental and physical issues.

Dr. C. B. Paitich's (Orthopaedic Surgeon) Testimony

82 Dr. Paitich testified on behalf of the Insurer, about his evidenced assessment dated June 26, 2014, [28] and reiterated his findings.

83 In this report, the doctor summarizes his impairment scores, [29] which resulted in a 13% WPI score, as follows:

1) Myofascial strain injury lumbar spine — 5% WPI

2) Myofascial strain injury cervical spine — 0% WPI

3) Left sided medial collateral ligament strain — 3% WPI

4) Left sided medial and lateral meniscal tear — 4% WPI

5) Right sided medial meniscal tear — 1% WPI

84 In regards to the Applicant's injury to his L5 nerve root and corresponding muscle atrophy, Dr. Paitich gave no rating to this condition as it did not occur as a result the accident, as found by Dr. Moddel.

85 In regards to crepitus in his right knee, Dr. Paitich gave no rating to this as he decided that this too was not a result of the accident or a traumatic event, but rather it was from arthritis and other degenerative conditions.

86 Dr. Paitich authored an addendum report dated July 2, 2014 so that the doctor could opine on further medical documentation not previously available to him and see if it would alter his opinion. It did not.

87 Dr. Paitich authored a second addendum report dated May 8, 2017 [30] in regards to Dr. Baird's chiropractic catastrophic report and whether this report alters his opinions within his original report. It did not.

88 Specifically, Dr. Paitich takes exception to the use of PostureRay images to diagnose cervical spine loss of motion segment integrity. Dr. Paitich opines that this diagnostic tool is the wrong tool for a diagnosis for this type of injury. Upon his inspection and interpretation of the Applicant's x-rays under cross-examination, the doctor opined that the Applicant is suffering from a degenerative cascade, and most likely in the third stage of a four stage cascade of degeneration due to the normal degenerative body processes, and not from a traumatic event. Dr. Paitich opined that instability of the neck (loss of motion segment integrity) can only be assessed and diagnosed when an "acute" neck injury has been sustained. He referenced this as being within the meaning of the *Guides*. Further, damaged ligaments are a soft tissue injury and injuries as listed in the MRIs show degenerative issues only, and not the pathology leading to a cervical spine loss of motion segment integrity.

89 In regards to Dr. Baird's advancement of a 20% whole person impairment rating as a result of a Gait Derangement, Dr. Paitich opines and reiterates his findings on page 3 of his addendum report as follows:

> It is clearly stated on page 75, section 3.2(b) does not apply to abnormalities based on subjective factors such as pain or sudden giving way, as with, for example, a patient with low back discomfort who chooses to use a cane to ease walking.
>
> In addition to this Dr. Baird has combined a gait derangement rating with the right sided knee impairment and it remains true that gait impairment is a stand-alone rating not to be combined with other lower extremity ratings. Consequently, the methodology utilized by Dr. Baird is flawed.

90 Further, Dr. Paitich opines on Dr. Baird's sexual functioning impairment rating of 9%, where he disagrees with this impairment rating as there is "no indication that this man has sustained any injury that would impair sexual function". [31]

91 Under cross-examination, Dr. Paitich agreed that Dr. Baird gave his opinion of the Applicant's condition within the scope of his professional boundaries.

92 Dr. Paitich agrees that the Applicant did suffer injuries in the neck, however, the injuries do not rise to the level or degree that requires an impairment rating from his perspective as an orthopaedic surgeon. Indeed the doctor agrees that there has been a serious sprain injury in the neck, which may have injured the ligaments and in some cases slippage of the vertebrae may occur, but in his opinion it has not happened in this case. Further C1 and C2 misalignment could not be felt by manipulation of the spine in order to correct same.

93 Dr. Paitich also opined that Dr. Baird and Mr. Hare were assigning ratings to images and not to the whole person.

94 In regards to the Applicant's shoulder pain and the lack of impairment ratings for it, Dr. Paitich opined that neck and shoulder pain can masquerade as one another and can be missed or misinterpreted by any medical professional. In this specific case, despite range of motion issues with the shoulders being found, Dr. Paitich ultimately decided not to assess a rating for the shoulders.

95 Dr. Paitich agreed that he made a mistake in commenting on Dr. Baird's rating on Vestibular Impairment and refused to comment on same as it was out of his scope of practice to make a comment on same.

Issues

1. Did Mr. Steinberg sustain a catastrophic impairment within the meaning of the Schedule as a result of the accident?

96 The Applicant is seeking a catastrophic impairment determination under Criterion 7 and 8 as is defined within the *Schedule* in s. 3(2)(e-f), which reads as follows:

> 3(2)(e) subject to subsections (4), (5) and (6), 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; or
>
> 3(2)(f) subject to subsections (4), (5) and (6), an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.

Arguments for Mental and Behavioural Impairment

97 The Applicant argues that he was assessed by a Neuropsychologist (Dr. Mountain) and a Psychiatrist (Dr. Thornton) who have, by their own methods, independently found the Applicant to have a Class 4 or Class 5 impairment in the two spheres of Concentration, Pace and Persistence, and Deterioration or decompensation in work or work like settings. Therefore, based on this criteria alone the Applicant meets or exceeds the criteria set out in the *Schedule*.

98 The Applicant defends this position by arguing that Drs. Mountain, Thornton and (the Insurer's expert) Ladowsky-Brooks have all come up with the same history, test results and interview results. The only difference is the clinical findings of each of the doctors. In short, Dr. Mountain finds Class 4 impairment in the two spheres of Concentration, Pace and Persistence, and Deterioration or decompensation in work or work like settings. Dr. Thornton finds Class 5 impairments in these same two spheres. While Dr. Ladowsky-Brooks provided a 5-7% WPI rating.

99 The Applicant argues that Dr. Ladowsky-Brooks erred when she only assessed him on cognitive criteria and did not do any testing and resulting assessments for depression or traumatic stress. Had she done so, the Applicant implies that her findings

would have been much closer if not the same as Dr. Mountain's in that the Applicant has many of the symptoms of depression and traumatic stress, despite his denial or under-statement of same.

100 The Applicant argues that Dr. Thornton diagnosed him as suffering with adjustment disorder, with emotional features, post-traumatic stress disorder, and chronic pain disorder. Dr. Thornton also agreed with Dr. Mountain and Dr. Ladowsky-Brooks that the Applicant had a tendency to under-report psychological symptoms, which the doctor opined is common for people who have suffered this type of brain injury.

101 The Insurer argues, in part, that Dr. Moddel (Neurologist) found that the Applicant had not sustained a neurological impairment as a result of the accident. Further, Dr. Moddel suggested that any cognitive sequelae attributable to a concussion was to be addressed by a section 44 assessor. In that regard, Dr. Ladowsky-Brooks found that the Applicant did not demonstrate any major cognitive impairments, despite having difficulties with his memory which may be from the effects of a concussion, which the doctor could not rule out. This was the reason why the doctor provided a WPI rating as it was given out of caution. However, Dr. Ladowsky-Brooks thought a concussion was not the most likely cause of the cognitive difficulties and that non-accident related factors, such as the age-related brain changes as indicated in the MRI of the brain, could be causing the symptoms.

102 The Insurer argues that Dr. Mountain's evidence should not be given any weight as she did not know how to use the *Guides* in performing her catastrophic impairment assessment rating. She assigned two marked impairment ratings and then assessed and assigned a moderate level WPI rating of 15-29%. Upon questioning, she admitted that she was unaware that one marked impairment rating meets the 55% WPI threshold under the *Schedule*. Dr. Mountain explained that she used a Chapter 15 assessment in order to elevate her moderate (Class 3) ratings up into the Class 4 ratings but did not show her thought processes within her report. Further, Dr. Ladowsky-Brooks thought that Dr. Mountain's rating were too high.

103 The Insurer argues that Dr. Thornton's assessments of three Class 5 impairment ratings and one Marked impairment rating are outliers and so extreme that they are incongruous with all the other evidence. The Insurer implies that Class 5 impairment ratings should be reserved for those who exhibit impairment levels which preclude useful functioning, which is not this case.

104 Finally, the Insurer argues that the Applicant's experts were not familiar enough with the Applicant's pre-accident medical history when preparing their assessment reports, and thus, they do not account for pre-accident limitations and issues. Therefore, no or little weight should be given to their reports or testimony.

Decision

105 After reviewing all the evidence in the mental, behavioural and physical aspects of this case, I believe that Dr. Mountain's conclusions best fit the Applicant's condition in regards to the two Marked or Class 4 impairment ratings for Concentration, Pace and Persistence, as well as Deterioration or decompensation in work or work like settings.

106 I come to this conclusion by agreeing with the Insurer that Dr. Thornton's ratings are extreme and do not fit the Applicant's conditions.

107 I also agree with the Applicant's argument that Dr. Ladowsky-Brooks assessed half of the Applicant's condition, once, without collateral interviews or giving the proper weight to therapists' or other treating health practitioners' reports and clinical notes and records that clearly stated or showed the current issues the Applicant was suffering in an up close and personal manner. Further, all the addendum reports of Dr. Ladowsky-Brooks are paper reviews which, in some cases, occurred two or three years from her first report. She had the opportunity to re-assess the Applicant "in-person" and make a "complete" whole person assessment, which in my view, would have appropriately challenged Dr. Mountain's findings, and she did not.

108 Dr. Mountain's answers were sufficient to satisfy my questions about her selection of a WPI rating of 15-29% (moderate), after giving Class 4 ratings in two spheres. She simply stated that this was the best fit for the Applicant in her clinical view. I have also taken into account her earlier evidence that pain related to the Somatic Symptom Disorder along with his PTSD and Depressive disorder make this Applicant pain focused, in that the Applicant's day's functional activities revolve around or are subject to his pain tolerance or perception.

109 I take arbitral notice of passages on page 304 of Chapter 15 of the *Guides* [32] which read as follows:

> In considering pain, it is prudent to list the following assumptions.
>
> 1) Pain evaluation does not lend itself to strict laboratory standards of sensitivity, specificity, and other scientific criteria.
>
> 2) Chronic pain is not measurable or detectable on the basis of the classic, tissue-oriented disease model.
>
> 3) Pain evaluation requires acknowledging and understanding a multifaceted, biopsychosocial model that transcends the usual, more limited disease model. [33]
>
> The important task of evaluating impairment due to pain is difficult but not impossible. [34]
>
> Embodied in the [pain] definitions above are the following concepts. Pain is subjective and cannot be measured objectively. Pain evokes negative psychologic reactions, such as fear, anxiety, and depression. [35]
>
> Chronic pain and pain-related behaviour are not, per se, impairments, but they should trigger assessments with regard to ability to function and carry out daily activities. [36]

110 I have not heard any evidence to dispute that Dr. Mountain, Dr. Thornton or Dr. Ladowsky-Brooks do not possess the skills or judgment training necessary to assess pain as an impairment, as noted above. The Applicant's implied argument is that Dr. Ladowsky-Brooks did not do the triggering assessments for her report.

111 Therefore, in my view, it makes sense in this context that Dr. Mountain, when taking into account the plethora of physical pain symptoms being displayed or complained about by the Applicant since the accident, despite not explaining her logic within her report, would have used the same Table 3 in Chapter 4 of the *Guides* and rate the Applicant's pain within the "Severe limitation impeding useful action in almost all social and interpersonal daily functions" range of 30-49%. I note that the border line percentage of 34% is required to be combined with earlier assigned 29% to elevate the Applicant to a 53% WPI rating which in turn by rounding up to the nearest 0 or 5 provides the Applicant with a 55% WPI rating.

112 I also rely upon Dr. Paitich's expert testimony that he recognizes that shoulder pain and neck pain often masquerade as the other. There is no dispute that the Applicant suffers from both shoulder and neck pain, constantly.

113 In the Insurer's closing arguments, the Insurer acknowledged that the Applicant was involved in a serious accident and suffered serious injuries, but those injuries do not rise to the level of a catastrophic impairment. I disagree.

114 For the above reasons, I find the Applicant sustained a catastrophic impairment within the meaning of the *Schedule*.

115 In regards to the physical impairment or WPI issue, the parties have made significant submissions, which had a substantial impact on my understanding of the Applicant's condition as a result of the accident. I have taken the parties' submissions into consideration in all aspects of this arbitration. In doing so, I prefer the evidence and arguments of the Applicant in combination with that of the Insurer's expert, Dr. Paitich, in that I am convinced that the Applicant would have been found catastrophic as a result of being found to have reached a 55% WPI rating.

116 In my view, the below listed ratings would have applied, and when combining these values, as per the *Guides*, the Applicant reaches 55% WPI. Dr. Mountain — 28% WPI + Dr. Paitich's WPI combined with a shoulder ratings of 6% as per the Applicant — 19% WPI + Undisputed brain injury rating — 11% WPI + Undisputed sleep disorder — 9% WPI = 53%, which requires a rounding up to the nearest 0 or 5 = 55%

117 However, any subsequent findings on the WPI issue are irrelevant as the result of the above Mental and Behaviour (Class 4 - Marked) impairment issue is separate and independent from the WPI issue. To satisfy one of the two different criterion is sufficient in itself to establish a catastrophic impairment as per the *Schedule*. As such I do not find it necessary to comment further on the WPI issue.

2. Expenses:

118 Neither party made submissions on expenses. Should the parties become unable to resolve this issue, they shall subsequently schedule an Expense Hearing before me in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

***Charles Matheson Member*:**

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

1) The Applicant sustained a catastrophic impairment within the meaning of the *Schedule* as a result of the accident.

2) Should the parties become unable to resolve this issue, they shall subsequently schedule an Expense Hearing before me in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Footnotes

1 *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

2 Neurological Assessment, Dr. Mountain, April 8, 2017, page 14.

3 *Ibid.*, page 14 and 15.

4 *Ibid.*, page 15.

5 Tab 76, Applicant's Brief.

6 Joint Brief, Tab #2, OCF-19 dated April 28 2017.

7 Tab 68 B, Letter to Dr. Hartford from Dr. Elshirif, dated October 14, 2011.

8 Diagnostic Services-Assessment of Whole Person Impairment using the Diagnostic Related Estimates Method of The AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, February 22, 2017.

9 Diagnostic Services — Addendum Report, dated September 6, 2017.

10 *Ibid.*, page 3 of 6.

11 *Ibid.*, bottom table on page 3 or 6.

12 American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition.

13 *Ibid.*, page 5 of 6.

14 *Ibid.*, page 5 of 6.

15 Whole Person Impairment Rating, May 6, 2017.

16 *Ibid.*, page 2 of 6.

17 Rossiter-Thornton Psychiatric Report.

18 3D imaging process that shows areas of the brain's blood flow.

19 Diagnostic and Statistics Manual 5th Edition, American Psychiatric Association.

20 *Ibid.*, page 6 of 23.

21 *Ibid.*, page 21 and 22 of 23.

22 Neurology Independent Medical Examination Re: Catastrophic Report, dated June 25, 2014.

23 *Ibid.*, dated July 4, 2014, May 10, 2017 and May 13, 2017, respectively.

24 Independent Neuropsychological Examination Re: Catastrophic Determination.

25 Independent Neuropsychological Examination Re: Catastrophic Determination Addendum, dated April 13, 2015.

26 Independent Neuropsychological Examination Re: Catastrophic Determination Addendum, dated May 23, 2017.

27 Independent Neuropsychological Examination Re: Catastrophic Determination Addendum, dated June 6, 2017.

28 Orthodpaedic Independent Medical Examination Re: Catastrophic Determination dated June 26, 2014.

29 *Ibid.*, page 13 of 14.

30 Orthodpaedic Independent Medical Examination Re: Catastrophic Determination, Addendum #2, dated May 8, 2017.

31 *Ibid.*, page 3.

32 Exhibit 32.

33 *Ibid.*, 15.1 Basic assumptions.

34 *Ibid.*

35 *Ibid.*, 15.2 Definitions.

36 *Ibid.*, 15.3 Pain, Impairment, and Disability.