Financial Services Commission of Ontario

Ontario

Commission des services financiers de l'Ontario

Neutral Citation: 2008 ONFSCDRS 79

Appeal P06-00039

OFFICE OF THE DIRECTOR OF ARBITRATIONS

ECONOMICAL MUTUAL INSURANCE COMPANY

Appellant

and

MARIA ONYSZKIEWICZ

Respondent

BEFORE:	Delegate Lawrence Blackman
REPRESENTATIVES:	Mr. Neil Colville-Reeves and Ms. Tamara Broder for Economical Mutual Insurance Company Ms. M. Claire Wilkinson for Mrs. Onyszkiewicz
HEARING DATE:	April 29, 2008 Further materials were submitted May 13, 2008

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The appeal is dismissed and the decision of Arbitrator Ashby dated November 10, 2006 is confirmed.

2. If the parties are unable to agree on the legal expenses of this appeal, a hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – October 2003).

May 20, 2008

Lawrence Blackman
Director's Delegate

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL AND BACKGROUND

Mrs. Onyszkiewicz (the Respondent) was injured in a motor vehicle accident on July 10, 2001. She applied to her insurer, Economical Mutual Insurance Company (the Appellant), for statutory accident benefits payable pursuant to the *Schedule*.[1] The parties disagreed on the Respondent's entitlement to benefits, and ultimately came before Arbitrator Ashby (the Arbitrator) for an eight-day hearing, held over the course of several months.

The Appellant appeals the Arbitrator's November 10, 2006 decision awarding the Respondent both pre and post-104 week income replacements ("IRBs") and housekeeping benefits, together with interest thereon, and seeks that these orders be set aside.

II. THE APPELLANT'S SUBMISSIONS

The Appellant has two main grounds for this appeal, namely that the Arbitrator (1) failed to apply the proper causation test and (2) committed a palpable and overriding error in failing to assess the evidence properly, or at all, in reaching her conclusions. The latter includes the Arbitrator's alleged failure to address the Respondent's credibility and her pre-accident medical history, and not preferring the evidence of the medical experts upon whom the Appellant relied.

As to the alleged error of law regarding causation, the Appellant states that the Arbitrator's conclusion regarding material contribution is found on page 19 of her decision:

> On the basis of the foregoing, I prefer the combined evidence of Dr. Garner and Dr. Swallow. I find that accident-related impairments substantially and materially contributed to Mrs. Onyszkiewicz' development of chronic pain syndrome as a consequence of both psychological factors and a general medical condition.

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

The Appellant submits that the Arbitrator's conclusion regarding causation cannot stand because:

(a) The opinion of Dr. S.R. Swallow, psychologist, regarding causation was entirely dependent on his belief that the Respondent, while experiencing some pre-accident depression, was not suffering a major depression before the accident and that the Respondent's major depressive episode was the result of her accident related pain problems. The Arbitrator accepted that the Respondent had a history of experiencing physical pain as a result of stress and anxiety and agreed with the opinion of Dr. J.C. Farewell, psychiatrist, that the Respondent was suffering a major depression prior to the accident. It was, therefore, a fatal error in the Arbitrator's reasoning to rely on Dr. Swallow's evidence.

(b) The conclusions of Dr. S.H. Garner, a doctor of Physical Medicine and Rehabilitation, were based on the inaccurate information that the Respondent was referred to him by her family doctor, Dr. G.M.J. Taylor. Dr. Garner testified that as the family doctor sent the Respondent to see him, he presumed that Dr. Taylor was seeking help for her; if Dr. Taylor felt the Respondent was fine or was feigning, he would not have made the referral. Dr. Garner's conclusions were also fatally flawed as his evidence was unequivocal that he did not believe, contrary to the clinical records, that the Respondent was experiencing depression or other chronic pain related symptoms before the accident.

(c) The Arbitrator accepted the opinion of doctors who saw the Respondent several years after the accident, while rejecting the opinions of Drs. H. Lau and H. Weinberg who saw the Respondent much closer to the accident date.

(d) The contribution of the accident, based on the overwhelming evidence, was no greater than *de minimis*.

In the alternative, the Appellant submits that the Arbitrator erred in law in failing to apply the robust and pragmatic approach to the question of causation as enunciated in *Aristorenas v. Comcare Health Services* (2006), 83 O.R. (3d) 282 (Ont. C.A.). The Appellant argues that the robust and pragmatic approach applies not merely to the determination of the question of

causation, but also to appellate review, and requires a determination on appeal not if there was any evidence to support a conclusion on causation, but whether there was sufficient evidence.

The Appellant further submits that the Arbitrator failed to meet the standard set by the Divisional Court in *Kanareitsev and TTC Insurance Company Limited et al.*, (Court File No.: DC-060081917-00, February 6, 2008) that "reasons must address the major points in issue; it is insufficient for the decision-maker to summarize the parties' positions and 'baldly state its conclusions'; and the same reasoning process followed must be set out and reflect consideration of the main relevant factors. See also *Fisher v. Moir*, [2005] O.J. No. 4479 (Div. Ct.)."

The Appellant argues that Delegate McMahon's decision in *Lombardi and State Farm Mutual Automobile Insurance Company*, (FSCO P01-00022, February 26 2003) supports the proposition that issues of fairness are legal issues, and that *Kanareitsev* evinces that adequacy of reasons is a question of fairness. The Appellant maintains, therefore, that procedural fairness and justice dictate that, in the alternative to being reversed, this matter should be remitted to a new hearing. The Appellant submits that the Arbitrator failed to acknowledge, address, or properly address:

(a) Dr. Weinberg's unchallenged opinion, consistent with the evidence of the Respondent and Dr. Taylor, that in October 2001 the Respondent had recovered from any accident related injuries.

(b) The Respondent's failure to seek treatment for eight months between the fall of 2001, when she was discharged from Trafalgar Physiotherapy and Rehabilitation Centre ("Trafalgar") and June 2002 when Dr. Taylor referred the Respondent to Dr. I. Marshall. The Respondent, however, did not start the further treatment for another three months. Further, there was no medical report produced supporting a conclusion of ongoing accident related impairment until Dr. Garner's report of October 2, 2003.

(c) In the six months before the accident, the Respondent visited Dr. Taylor 15 times for, amongst other things, depression, anxiety, functional pain, insomnia, CT muscle spasm and carpel tunnel syndrome. The Appellant states that this was during a period of a deteriorating marital situation. During these visits, Dr. Taylor prescribed Lipitor, Paxil,

Pantaloc, Dalmane, Imovane, Xanax, Estrogel, Halcion, Zithromax, Ledacrin, Valium, Restoril, Nortryptoline and Cerax. Dr. Taylor testified that Halcion "scares you to death." He further testified that there was a correlation between the frequency of visits and the level of functioning. The Appellant argues that there was an absence of any evidence that the Respondent was meaningfully functional prior to this motor vehicle accident and that Dr. Taylor's comments regarding the Respondent functioning prior to the accident were based solely on the absence of any notes to the contrary.

(d) The Respondent's history of emotional turmoil. In 1995 there were major difficulties in the Respondent's marriage, which Dr. Taylor stated was when "things started to turn worse." Dr. Taylor agreed that in 1998 there was another decline, or another increase in the rate of decline of the marriage, his clinical notation using the word "shellshock." Dr. Taylor agreed that late 2000 and early 2001 represented "another notch down," that things were getting worse. He testified that there was "a progressive downward" and that marital discord was the "one primary underlying problem." Dr. Taylor testified that the "pain depression cycle" started well before the accident.

(e) The Respondent's lack of credibility and the Arbitrator's blanket finding regarding credibility without providing adequate reasons and without addressing the following:

- The Respondent testified she had only been prescribed medication by her family doctor, when a letter from Dr. Lau indicated she had prescribed her Oxycocet;
- The Respondent's claim for housekeeping expenses included maintenance of the family pool notwithstanding her testimony that the swimming pool had been broken and she had not been able to use it;
- The Respondent misrepresented to Dr. Farewell that she had left her pre-accident employment at Sheridan Villa due to stress, when in fact, she had been let go;
- The Respondent requested that her doctor advise the Appellant she was participating in a program recommended by Dr. Marshall, when she was not;
- The Respondent had incorrectly told virtually every doctor she attended she had been in good health prior to the car accident; that she painted a "Hallmark Card" portrait of her pre-accident life that was clearly not the case; and,

- The Respondent testified that by the summer of 2001, prior to the accident, she was "feeling pretty good," contrary to Dr. Taylor's notes and his testimony that as of June 25, 2001, two weeks before the car accident, there was still no relief for her sleeping problems.

The Appellant further submits that the Arbitrator accepted that the Respondent's evidence was unreliable, yet nonetheless, accepted her evidence where it supported her ultimate conclusion and rejected it when it did not.

(f) The fundamental errors in Dr. Garner's opinion that the family doctor had made the referral and regarding the Respondent's pre-accident medical condition.

The Appellant also challenged the Arbitrator's finding of disability and her award of housekeeping benefits, when, by the Respondent's own evidence, some of the services for which reimbursement was claimed could not have been provided and, in addition, no housekeeping expenses were submitted after February 2002.

The Appellant submitted that if I find that the Arbitrator erred in her finding regarding causation, I should rescind the order and substitute my own order.

If, however, I find that the Arbitrator erred in law in failing to provide adequate reasons, the appropriate remedy would be to remit the matter back to arbitration for a rehearing, as in *ING Insurance Company of Canada and Sohi*, (FSCO P04-00026, May 5, 2005). In that case, Delegate Makepeace found that the arbitrator did not explain why he preferred Mr. Sohi's evidence over that of the insurer, and remitted the matter back to arbitration for a new hearing. The Appellant submits that in *Sohi*, the arbitrator did not address inconsistencies in the evidence, deal with contradictory evidence and left too many unanswered questions.

III. THE RESPONDENT'S SUBMISSIONS

The Respondent submits that the issues raised in this appeal pertain to factual issues, not questions of law. She cites the Supreme Court of Canada in *Housen and Rural Municipality of*

Shellbrook, [2002] S.C.J. No. 31, that "palpable and overriding error" is the "standard of review applicable to all factual conclusions made by the trial judge." She further submits that the Arbitrator's decision was carefully and well considered, was supported by the evidence and that there was no misapprehension of the evidence caused by a misdirection on a legal principle.

Regarding the basis of the Arbitrator's finding on causation, the Respondent replies that:

(a) Dr. Swallow acknowledged that the Respondent had pre-accident episodes of depression and suffered from "a dysthymic disorder which is a low grade chronic kind of depression which certainly pre-dated the accident." It was Dr. Swallow's opinion that "[b]y definition a Major Depressive Episode is not permanent but episodic."

Dr. Swallow opined that there was likely a pre-existing pattern for the Respondent experiencing emotional stress via somatic channels, and as such, her accident-related pain became a "lightning rod" of sorts for experiencing and expressing the considerable stress she experienced. It was Dr. Swallow's view that this made the Respondent more vulnerable to subsequent episodes of depression, that the Respondent "had a variety of vulnerability factor issues." Dr. Swallow acknowledged the Respondent's pre-accident marital tension and that "[c]ertainly those factors undoubtedly played some role and have played some role in her mood disorder."

It was Dr. Swallow's view that the Respondent "seemed to be functioning okay prior to the accident. She had been able to work. She was working for a temp agency. She was functioning. She was getting along." Once the pain disorder set in, a "vicious spiral" occurred. Dr. Swallow testified that he did not see anything in the pre-accident documentation "of something that looked to me like a chronic pain syndrome."

There was no inconsistency between Dr. Swallow's evidence and the Arbitrator's conclusions. The Arbitrator noted only that Dr. Farewell "may" have been correct that the Respondent suffered depressive episodes prior to the accident, but that did not result in a substantial inability to function. She accepted Dr. Swallow's evidence that the Respondent was "a vulnerable person who was functioning." In any event, whether the

Respondent was suffering from a major depressive episode in the six months before the accident was not determinative; the important point is that she was functioning.

(b) Although counsel suggested Dr. Garner, Dr. Taylor chose to make the referral, testifying that he needed help to address the Respondent's issues. In any event, the question of who made the referral was not relevant to the causation and disability issues before the Arbitrator.

The Respondent agrees that Dr. Garner testified "my understanding is that [depression, short-term memory loss, fatigue, poor ability to concentrate, swelling sensation of feet and legs, and other symptoms] started after the accident, never really resolved, and are part and parcel of what I'm calling a chronic pain problem."

While acknowledging that "there are places where some of the evidence is muddy," the Respondent submits that it is obvious, when considering the whole of Dr. Garner's evidence, that is not what Dr. Garner meant to say, that he was quite aware of the Respondent's pre-existing psychological problems. Dr. Garner acknowledged that the Respondent had headaches and other pain symptoms pre-accident, but he did not think that the pattern, severity or degree of functional limitation post-accident was the same as pre-accident. Dr. Garner testified that:

> . . . this is a person with lots of problems before hand of a psychological nature and there are lots of things that were difficult for her before. This accident, which is a minor accident, she was fertile soil, if you like, for chronic pain problems, probably because of those problems . . . So if you are going to pick a person who is going to develop chronic pain, this is the person.

Dr. Garner further stated that:

> I think I wouldn't say it's all accident related. I would just say that the accident seems to have played a substantial role in the initiation of the symptoms of chronic pain. I am not saying it's the sole cause at all . . . patients have complicated lives, and that seems to be fairly common in patients that develop chronic pain I would say.

The Respondent submits that Dr. Garner acknowledged the Respondent's pre-accident issues, but was of the view that there was a qualitative difference.

(c) The Appellant relies on the conclusions of Dr. Farewell who saw the Respondent almost three years after the accident. The Arbitrator did not need to specifically accept or reject Dr. Weinberg's conclusions as the latter failed to address in his report the chronic pain syndrome or the emotional issues.

(d) Regarding the argument that the contribution of the accident was no greater than *de minimis*, Dr. Taylor, in his May 2, 2005 report, stated that the Respondent's "disability resulted from the motor vehicle accident of July 2001. The accident definitely contributed to the onset of her disability. Her pre-existing problems were treatable and she had been able to maintain employment prior to this accident."

Dr. Taylor had no concerns regarding the Respondent's pre-accident ability to work. He testified that the Respondent developed a chronic pain syndrome as a result of the motor vehicle accident, in particular experiencing neck pain, back pain and upper shoulder pain.

Dr. Taylor testified that the number of visits by the Respondent with him before the accident did not suggest she was not functioning. On cross-examination, Dr. Taylor was asked: "Well, I think you are saying that, in this period of time, she was employable, functional, and able to go out and work if she could find a job." He answered: "If she could find a job, yes." Dr. Taylor testified that the Respondent's deteriorating marriage and her chronically depressed husband was a factor, but not the only factor.

The Arbitrator confirmed that the contribution of the accident was more than *de minimis* when she stated that she found that "the accident-related impairments substantially and materially contributed to [the Respondent's] development of chronic pain syndrome as a consequence of both psychological factors and a general medical condition."

(e) Dr. Farewell, upon whose expert opinion the Appellant relies, contradicted himself in his report, stating on page 43 that the Respondent was not disabled from her pre-accident employment from a psychiatric perspective, but on page 42 that he believed that the Respondent "is likely disabled from a psychiatric perspective as a result of non-accident related psychosocial stressors." At the arbitration hearing, Dr. Farewell testified that the Respondent was indeed disabled from a psychiatric perspective and would be unable to work in any job.

On cross-examination, Dr. Farewell testified that prior to the accident, the Respondent was suffering from dysthymia (a low-grade chronic depression) and agreed that dysthymia is generally not a disabling condition. Dr. Farewell further agreed that the Respondent may not have suffered from major depressive episodes prior to the accident and that he had erred in his report when he stated that she left her job at Sheridan Villa due to stress. Dr. Farewell also agreed that even if the Respondent was suffering from a major depressive episode before the accident, her ability to work on July 5 and 6, 2001 confirmed that she was not disabled during that time period:

> So, again, would you agree with me that in the event that you are right, that she was suffering from a major depressive episode during that time frame, it wasn't disabling her from working given the fact that she worked in the week before the motor vehicle accident? Yes.

Dr. Farewell conceded that there was no medical report or record stating that the Respondent could not work for any reason prior to the motor vehicle accident.

The Respondent submits that the Arbitrator's conclusions were consistent with the evidence that she did not have pre-existing disabling neck or back pain and that her prior abdominal and gastric pain and vulnerability to emotional stress through somatic or physical channels had not impeded her functioning.

Regarding the argument that the Arbitrator failed to use the robust and pragmatic approach in analyzing the evidence, and failed to address, or properly address certain evidence, the Respondent submits that:

(a) Dr. Weinberg's opinion was inconsistent with the evidence of the Respondent and Dr. Taylor. The Respondent continued to have accident-related impairments following the accident. Dr. Weinberg, himself, noted residual problems in the Respondent's neck, shoulders and back, along with headaches, stress, difficulty sleeping and depression. Dr. Taylor confirmed in his June 8, 2002 report that the Respondent "has been unable to work since July 10, 2001." In addition, Dr. Garner commented that Dr. Weinberg's physical findings were only part of the Respondent's clinical picture, as she suffered from a persistent chronic regional myofascial pain syndrome.

(b) Regarding the period from the fall of 2001 to June 2002, the Respondent sent a letter to the Appellant dated November 15, 2001, advising that her depression was worsening, it had become more difficult for her to do household tasks, and at the end of the day and the next day, the pain became worse. As indicated, Dr. Weinberg's October 24, 2001 assessment noted residual symptoms and that the Respondent was "experiencing a lot of stress and having difficulty sleeping . . . she was also suffering from depression."

(c) Regarding the six month period pre-accident, the Respondent worked at Sheridan Villa from May 29, 2000 to February 28, 2001. Her supervisor, Mr. Thornton, testified that the Respondent was hard working and energetic, and worked overtime hours on the weekend. He did not remember her mentioning any physical or other medical issues and nothing of that nature significantly impacted on her work performance. Mr. Thornton described the position as complex.

The Sheridan Villa Administrator, Ms. I. Mazuryk, wrote a pre-accident March 2, 2001 memo recommending the Respondent for a clerical position that did not require complex scheduling. Ms. Mazuryk stated that "[t]his individual put in considerable effort to master the necessary skills and was punctual." The Respondent states that the Arbitrator did not specifically refer in her decision to this note or to many other facts in evidence supportive of her reasoning. The Respondent, therefore, submits that one cannot merely point to missing pieces of evidence in the decision and say that there is an inadequacy of reasons.

The Respondent's testimony that she continued to look for work after this position (but before the accident) was supported by her daughter, Ms. Sherri Onyszkiewicz, who testified that "there was nothing that [her mother] really couldn't do." The Respondent applied to a minimum of fifty companies, eventually finding work through Manpower as a receptionist. The Respondent worked two days in the week before the accident, and was called into work the actual day of the accident.

Dr. Taylor testified he had no notes of the Respondent having any difficulty performing her employment during this pre-accident period. His June 11, 2001 entry (one month pre-accident) notes the Respondent as "depressed but active." Notwithstanding her stress and sleep problems, he had not taken her off work nor restricted any of her activities and she was functional. Notwithstanding the prescription for Halcion, "there was no reason why . . . she wasn't a functioning individual." The Appellant submits that Dr. Taylor was in an excellent position to assess her condition.

While there is a note of neck and back pain on June 18, 2001, the last prior mention of neck pain was more than two years before, on January 7, 1999, and the last previous mention of back pain was on January 18, 1996, more than five years before. There was no suggestion that the neck or back pain was then disabling or chronic. The Arbitrator found that Mr. Thornton and the Respondent's daughter gave their evidence in a "candid and forthright manner."

(d) Regarding the pre-accident history of emotional turmoil, the Respondent states that Dr. Taylor testified that the pain depression cycle started after the accident.

(e) Regarding the Respondent's credibility, the Respondent replies:

- her failure to note Dr. Lau's prescription was an oversight;
- just because a pool is broken does not mean one can avoid closing the pool;
- regarding what she related to doctors, the Respondent looked at her disability as due to physical health issues, and hence, when speaking to an orthopaedic surgeon such as Dr. Weinberg, she did not "think the emotional part ever came into it;"

- the errors or inconsistencies on her part, if any, were due to her poor memory and unsophisticated appreciation of her own medical and psychiatric history. They were made inadvertently, were minimal, did not suggest an intention to deceive, and none of these so-called inaccuracies had any real relevance to the issues in dispute and would not have changed the decision. In any event, the Arbitrator had access to the complete pre-accident medical records and heard the evidence regarding the Respondent's pre-accident employment.

(f) Although counsel suggested the referral to Dr. Garner, it was Dr. Taylor who decided to proceed with the referral.

The Respondent also submitted that:

(a) Regarding disability, the Respondent's condition worsened when her IRBs were terminated in late 2001. She was referred to Dr. Marshall, a physician and osteopath, whose June 18, 2002 treatment plan was approved by the Appellant. In the summer of 2002, Dr. Taylor started the Respondent on Percocet. Dr. Taylor testified that "the pain was overtaking her whole life."

Notwithstanding his August 15, 2002 letter that the Respondent was fit to return to progressive work duties (excluding heavy lifting, pushing or shoving or repetitive use of her arms), possibly with frequent change of position, Dr. Taylor's September 26, 2002 letter stated that the Respondent "was not capable of working from December 23, 2001 [the cutoff date of benefits] to the present time."

Dr. Taylor's oral evidence confirmed the Respondent had been unable to work from December 23, 2001 to the present due to a "Depression and pain circle." The Arbitrator confirmed in her decision that Drs. Garner, Swallow and Farewell agreed that the Respondent was unable to engage in employment as a consequence of her disability.

(b) Regarding housekeeping, the Arbitrator concluded that pool maintenance was not a significant element of the housekeeping and home maintenance claim. The Arbitrator

found that the large family home required at least twelve hours a week of work beyond the light assistance provided by the Respondent, whom she found suffered a substantial inability to perform her pre-accident duties due to her pain disorder.

IV. ANALYSIS

1. Causation

The Appellant states that regardless of the Supreme Court of Canada decision in *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7 regarding causation, in the specific circumstances of this case, the "but for" test and the "material contribution" test are distinctions without a difference. The Appellant agrees that the Commission's position regarding causation is set out in the decision of Arbitrator Makepeace in *Correia and TTC Insurance Company Limited* (FSCO A00-000045, October 27, 2000), upheld on appeal (P00-00061, July 16, 2001), that:

> I conclude that the extent of coverage for the consequences of an accident is governed by the "as a result of" test, which requires proof that the accident materially or significantly contributed to the disability or impairment that gives rise to the claim for benefits.

In the case law, there has been discussion regarding causation when there is a pre-existing disability. In *Pineda v. Co-operators Group Ltd.* (1985), 51 O.R. (2d) 787, Cromarty J. stated that: "so long as the motor vehicle accident would be sufficient in and by itself to cause substantial inability to perform the essential duties of occupation and employment within 30 days from the date of that accident, this provision is complied with and an insured is entitled to no-fault benefits." In *Frezludeen v. Safeco Ins. Co. of Canada* (1984), 47 O.R. (2d) 258, however, Matlow J. stated that: "Once a person is totally disabled, a further injury cannot render him again totally disabled even if the subsequent injury by itself would have been sufficient to cause total disability."

This appeal, however, is argued predominately on the Respondent suffering, prior to the accident, from a major, worsening depression, there being little strength in the argument that before the accident the Respondent was functionally disabled from employment.

The question of causation facing the Arbitrator was a legal issue rather than a medical definition of causation. The leading case of *Quattrocchi and State Farm Mutual Automobile Insurance Company*, (OIC A-006854, September 29, 1997) confirms that disability is not a question of diagnosis, but a question of function. In that decision, Arbitrator Makepeace stated that:

> It is not necessary for an Arbitrator to accept any particular diagnosis of the Applicant's complaints, because the issue for the Arbitrator is whether the Applicant is substantially disabled from performing the essential tasks of her pre-accident job as a result of the accident. This requires a comparison of the insured person's functional ability before and after the accident. Arbitrators have shown little interest in debates between medical experts as to the legitimacy or significance of a diagnosis of "chronic pain syndrome."

In his report, Dr. Farewell addresses specific questions from the referring Appellant as to his psychiatric diagnosis in relation to the July 10, 2001 accident, and whether this "diagnosis [is] an aggravation of a pre-existing psychiatric/psychological condition or solely the direct result of this accident?" The Appellant agreed that the test put to Dr. Farewell was incorrect, that the accident does not have to be the sole cause of the impairment. Further, *Correia* does not require the accident to be the direct cause of the impairment.

In my respectful view, this case is not simply a question of, to be succinct "major depression before, major depression after, end of story." Had the Arbitrator accepted this approach regarding entitlement to weekly benefits that, in my view, would have been an error of law.

Arbitrator Makepeace also confirmed in *Quattrocchi*, that arbitrators have "recognized the 'thin skull' principle in weekly benefits cases." Arbitrator Wilson, in *Alamin and Toronto Transit Commission*, (FSCO A04-008446, April 8, 2004), stated that in the Supreme Court of Canada decision in *Athey v. Leonati et al.*, [1996] S.C.J. No. 102,

> Major J. re-affirmed the "crumbling skull doctrine" and stated:
>
> > The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway.

In its oral submissions, I asked the Appellant whether this was, in its view, a "crumbling skull" case. The Appellant responded that this was perhaps a fair way to describe it. The Appellant's theory of this case is that there was a progressive downward spiral by the Respondent over the course of six years continuing to the day of this accident.

In the recent decision of *Monks v. ING Insurance Company of Canada*, (Docket: C43857, April 14, 2008), the Ontario Court of Appeal agreed with the trial judge that "[t]here is no room for the crumbling skull theory in accident benefits cases." The trial judge appears to have based this view, in part, on my decision in *Ms. Z. v. Dominion Insurance*, (FSCO A98-000124, March 7, 2000) wherein, in the words of the trial judge, Dominion had argued that Ms. Z's "benefits should be reduced because there was a measurable risk that her pre-existing condition would have deteriorated even if the accident had not happened." In response to this argument, I stated that:

> While this submission may apply to tort compensation, which allows greater flexibility in fine-tuning appropriate compensation, the issues I must decide arise from a statutorily mandated contract of insurance. I find that the particular provisions in issue in this hearing do not allow benefits to be reduced by the percentage that non-accident factors contribute to any subsequent disability or expense. When assessing causation, the provisions in question require an "all or nothing" approach.

Respectfully, my comments regarding the concept of "crumbling skull" were limited, as stated by the trial judge ("[t]here is no scheme to reduce the amount of benefits to be awarded … it is a black and white determination of full liability.") and by the Ontario Court of Appeal (there was "no indication in the SABS of a legislative intent that an insurer's liability for the accident benefits in issue should be subject to discount for apportionment of causation due to an insured's pre-existing injuries caused by an unrelated accident").

In the case now before me, I believe that the Arbitrator implicitly found that this was a "thin skull," not a "crumbling skull" case. This was based on significant and strong evidence that:

(1) Notwithstanding her pre-accident medical condition, the Respondent was, at the very least, significantly functional in the six months prior to this accident. In this regard, the Arbitrator relied on both the contemporaneous written evidence and

the sworn oral evidence of the Respondent's former employer at Sheridan Villa, her treating family doctor, Dr. Taylor, and the Respondent's daughter, whom the Arbitrator expressly found credible and whose evidence regarding her mother's pre-accident active employment search she specifically accepted; and,

(2) the expert evidence of Dr. Swallow as to the Respondent's vulnerability and Dr. Garner's opinion that the Respondent was "fertile soil" for a chronic pain syndrome. Dr. Farewell, himself, states in his report that the Respondent's:

> . . . family history of depression, and substance abuse likely predisposes her from a biological perspective to the development of both anxiety and mood problems . . .

Dr. Taylor also testified that the accident was "a compounding factor," that the chronic pain resulting from the accident "was another cog in the wheel, like I said, it is another insult to the individual."

Regarding the Appellant's specific submissions regarding causation:

(a) The Arbitrator was clear that Dr. Farewell only "may" have been correct regarding a pre-accident major depression. I am not persuaded that there was any fatal flaw in the Arbitrator's reasoning. Rather, the Arbitrator, correctly in my view, focused not on medical diagnosis but on function.

(b) I am not persuaded that Dr. Garner's opinion was, to any meaningful degree, based on who precisely made or initiated the referral. In any event, there was certainly evidence that it was Dr. Taylor who make the actual referral, and that he continued to support that decision. In addition, Dr. Garner's overall evidence made it clear that he was aware of the Respondent's pre-accident history.

(c) I am not persuaded that the evidence of Dr. Lau (a gastroenterologist) and Dr. Weinberg, who limited his expertise to orthopaedics, was determinative of the issue of chronic pain. The Appellant itself relied on the opinion of Dr. Farewell in this regard. Dr. Farewell saw the Respondent almost three years after the accident,

and after she was seen by Dr. Garner. The Appellant at no time conceded that this time span in any way undermined Dr. Farewell's opinion.

(d) There is not merely some, but significant evidence that the contribution of this accident was more than *de minimis*. Dr. Farewell himself states in his report that the most significant (but, implicitly, not the sole) contributing factors to the Respondent's mood problems (without discussing function) were her marriage and her living environment. Dr. Farewell also stated that when he saw the Respondent in June 2004 she had not recovered to her pre-accident status, which seems to suggest something other than a view of a continuing downward spiral, crumbling skull condition over the course of ten years. Further, an opinion that the marital situation was the overwhelming factor for the continuing disability would seem to run counter to the couple separating in 2005, prior to the Respondent's oral testimony in this hearing, while her pain syndrome continued.

2. Inadequate Reasons

The Supreme Court of Canada stated in *Housen* that the "standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a 'palpable and overriding error.'" The Court held that the "fundamental reason for general deference to the trial judge is the presumption of fitness - a presumption that trial judges are as competent as appellate judges to ensure that disputes are justly resolved." The Court also stated:

> It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of those advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact.

The Divisional Court in *Kanareitsev* stated that:

> Particularly when results turn on the first instance decision maker's view of the credibility of witnesses and involves a fact-driven analysis, appellate review must take "proper account of the distinct advantage" of the first-instance decision maker's assessments. The appeal judge must not try the case *de novo* or simply substitute his or her views for those of the trial judge: *R. v. G.W.* [1996] O.J. 3075 (C.A.) at paras.18 and 57.

More fundamental to the case at hand, an arbitrator's findings of fact are not subject to review by the Director, or his or her delegate, as pursuant to subsection 283(1) of the *Insurance Act*, R.S.O. 1990, c. I.8, appeals from a decision of an arbitrator are restricted to questions of law.

It is unclear where exactly the reasoning of the Court of Appeal in *Aristorenas* provides support for the standard of review on appeal at the Commission being not whether there is any evidence to support a conclusion on causation, but whether there is a sufficiency of evidence. There appeared to be an argument that not merely should an arbitrator take a "robust and pragmatic" approach to the question of causation, but that appeals should take a robust approach to arbitral review. I omit in the latter context the term pragmatic, as the inherent pragmatism of sending a matter back for a new eight-day hearing is somewhat unclear.

It may be argued that the appeals level at the Commission may have taken a somewhat robust approach to review in certain cases.

In *Barrick and General Accident Assurance Company of Canada*, (November 7, 1996, OIC P-011448), the delegate allowed the appeal in part, ordering a new hearing before a different arbitrator, on the basis that the arbitrator's decision did not adequately explain his finding. The Divisional Court quashed this decision on judicial review (Court File No. 0384/97, April 2, 1998) (leave to appeal to the Court of Appeal refused, [1998] O.J. No. 3156).

Adopting the Supreme Court's functional and pragmatic approach, the Divisional Court recognized that it "should be very loathe to interfere with decisions made by administrative officers and tribunals in the exercise of a statutory duty in the context of a privative clause of the sort found in section 20 of the *Insurance Act*, particularly when what is involved is a series of questions of fact or mixed law and fact." Nonetheless, the Divisional Court found the Delegate's decision patently unreasonable, there being no foundation for his saying the arbitrator should have "said more" about "other conceivable views that might have been part of the submissions on behalf of the insured."

In *Movahedi and State Farm Mutual Automobile Insurance Company*, (FSCO P96-00050, September 1, 1999), the delegate, stating that she was following the Divisional Court in *Barrick*,

allowed the appeal and remitted the matter to a new hearing before a different arbitrator on the basis that the arbitrator did not adequately explain why he rejected innocent explanations for discrepancies in the evidence. In *State Farm Mutual Automobile Insurance Co. v. Movahedi*, [2001] O.J. No. 5099, the Divisional Court reversed the Delegate's decision, stating that:

> The Delegate criticized the arbitrator's findings of credibility on the basis that some of the findings were based on factual errors or failed to consider all the evidence. Not reciting all of the evidence does not mean the arbitrator failed to consider it. We find there was ample evidence before the arbitrator to support his findings of credibility as described in his decision.

In *Kanareitsev*, the delegate also allowed the appeal and remitted the matter to a new arbitration hearing, based on "gaps in the arbitrator's reasoning on the underlying causation question." The Divisional Court set aside the decision of the delegate, restoring the arbitrator's decision from the seventeen-day hearing, stating that:

> The Arbitrator's decision reviewed much of the evidence that had been placed before her and offered conclusions as to which evidence she accepted and why. In our view, it was well-reasoned and addressed the factors relevant to the issue in dispute. While she may not have engaged in a detailed analysis of each and every aspect of the major points in issue, her reasons refer to the principal evidence she relied upon and provide a justification for her conclusion.

The *Sohi* decision, upon which the Appellant relies in favour of a robust appellate approach, did not come before the Divisional Court.

On the other hand, Delegate McMahon, in the *Lombardi* decision cited by the Appellant, distinguished between a finding of fact made in the complete absence of supporting evidence, and a finding of fact made with insufficient evidence. In "the first case, the error is properly characterized as an error of law, and hence reviewable. In the second, it is no more than an error of fact, that is not reviewable."

The recent decision of the Supreme Court of Canada in *R. v. Dinardo*, 2008 SCC 24 (Can LII) reinforces the above. The Court, following *R. v. Sheppard*, [2002] 1 S.C.R. 869, states that:

> An appeal based on insufficient reasons will only be allowed where the trial judge's reasons are so deficient that they foreclose meaningful appellate review … there is no general requirement that reasons be so detailed that they allow an appeal court to retry

> the entire case on appeal. There is no need to prove that the trial judge was alive to and considered all of the evidence, or answer each and every argument of counsel …

With respect, it would be disingenuous for the Appellant if it were to assert that it is at a loss as to why it lost on the issue of causation. The Arbitrator followed the correct "functional analysis" and clearly found that the Respondent, notwithstanding her well documented and extensive pre-accident medical history, complaints and medication, was functional prior to the accident and set out the basis for that finding. The Arbitrator found, in essence, with no disrespect meant to the Respondent, that the latter was a "thin skull" rather than a "crumbling skull." The Arbitrator states at page 18 of her decision that the restrictions imposed by the Respondent's accident-related injuries, together with her "pre-accident psychological vulnerability" led to a disabling cycle of "increased inactivity, depression and focus on pain."

This appeal appears not to be about inadequate reasons but, rather, disagreement with the Arbitrator's reasons and findings of fact, and her preference for the opinion evidence of the Respondent's experts over that of the Appellant's expert, Dr. Farewell.

I am not persuaded by the Appellant, who has the onus in this appeal, that the Arbitrator simply baldly stated her conclusions. I find that there was a fulsome approach to the evidence. I find that her reasons referred to the principal evidence upon which she relied and provide a justification for her conclusion. I am not persuaded that her failure to recite all of the evidence means that she failed to consider it, if that indeed is a consideration on appeal as noted above.

Turning to the Appellant's specific arguments as to the sufficiency of reasons:

(a) Regarding the contention that in October 2001 the Respondent had recovered from any accident-related injuries, the Arbitrator notes, at page nine of her decision, Trafalgar's October 22, 2001 report regarding residual symptoms. At page ten of her decision, the Arbitrator notes assessments on October 5 and November 14, 2001 by Rehability Occupational Therapy Inc. ("Rehability") retained by the Appellant. The Respondent reported "continuing neck pain, right shoulder pain, low back pain and headaches," as well as little tolerance for activity, little energy, low mood and the fingers of her right

hand becoming painful after 45 minutes of keyboarding. Rehability found neck and right shoulder restriction of movement.

(b) Regarding the Respondent failing to seek treatment between the fall of 2001 and June 2002, Dr. Taylor's notes record 18 visits by the Respondent between November 5, 2001 and June 4, 2002. While noting Dr. Taylor's evidence that there had been "a window of improvement," the Arbitrator notes Dr. Taylor's November 22, 2001 entry that the Respondent complained of back pain, trouble lifting and muscle spasm. Dr. Taylor reinstituted anti-inflammatory medication and recommended the use of heat.

(c) Regarding the six month period before the accident and her longer history of emotional turmoil, from page five to page nine of her decision, the Arbitrator details the Respondent's pre-accident history back to 1986. The Arbitrator, in my view, was fundamentally concerned with and properly addressed pre-accident functionality, for which there was significant evidence. The Arbitrator specifically stated that "Dr. Taylor further testified that notwithstanding the stress, [the Respondent] was functional."

(d) Regarding the Respondent's credibility, on page five of her decision, the Arbitrator acknowledged and agreed that there were concerns regarding the reliability of the Respondent's evidence. Accordingly, she preferred the medical or historical documentation wherever it conflicted with the Respondent's evidence. Regarding pre-accident function, the Arbitrator specifically relied on the evidence of third parties, namely the Respondent's employer and daughter, both of whom she specifically found "candid and forthright," and Dr. Taylor, the family doctor, who of all the medical witnesses, was in the best position to assess the pre and post-accident condition of the Respondent.

(e) Regarding Dr. Garner, the Arbitrator, at page 15 of her decision, makes it clear her view that Dr. Garner had an understanding of the Respondent's pre-accident condition. She states Dr. Garner's opinion that the accident "initiated a complex reaction which might have been related to pre-accident vulnerability," that "her pain behaviour has become mal-adaptive and grossly disproportional to any underlying stimulus." As Dr. Garner

believed that there was a psychological element that he was not qualified to assess, he recommended she be psychologically assessed, which was done by Dr. Swallow.

Regarding the findings of disability:

(1) As to IRB entitlement, there was hardly a complete absence of evidence. At page 19 of her decision, the Arbitrator accepts the agreed opinions of the expert witnesses (which would include Dr. Farewell) and Dr. Taylor that the Respondent "is unable to engage in employment due to chronic pain." This finding, specifically regarding Dr. Farewell's opinion on the issue of disability, was not challenged by the Appellant.

(2) Regarding housekeeping, at page 20 of her decision, the Arbitrator made a finding of fact "that pool maintenance was not a significant element of the family's housekeeping and home maintenance requirements," and that her large house, with three teenagers, would require twelve hours a week of assistance beyond the light duties the Respondent completed, justifying the maximum weekly benefit of $100, ending July 9, 2003 in accordance with section 22 of the *Schedule*.

Accordingly, the Arbitrator's November 10, 2006 decision is confirmed.

V. EXPENSES

If the parties are unable to agree on the legal expenses of this appeal, a hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

I wish to note and sincerely thank both counsel for their most thorough, well argued, considerate and professional submissions throughout.

Lawrence Blackman Director's Delegate	May 20, 2008 Date