Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Neutral Citation: 2016 ONFSCDRS 260

FSCO A14-001824

BETWEEN:

PATRICK MATTHEWS

Applicant

and

DUMFRIES MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Sudabeh Mashkuri

Heard: May 5, 6, 7 2015 in Kitchener, and June 29, 2015 in Toronto. Written submissions were received on July 28, August 17, September 14, 2015 and May 30, 2016.

Appearances: Georgiana Sirbu for Mr. Matthews
Neil Colville-Reeves for Dumfries Mutual Insurance Company

Issues:

The Applicant, Patrick Matthews, was injured in a motor vehicle accident on August 13, 2011. He applied for and received statutory accident benefits from Dumfries Mutual Insurance Company ("Dumfries"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mr. Matthews applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The issues in this hearing are:

1. Did Mr. Matthews sustain a catastrophic impairment within the meaning of section 3(2)(e) of the *Schedule* as a result of the accident; specifically, whether Mr. Matthews suffers from an impairment or combination of impairments that, in accordance with the American Medical Association's *Guides to the Evaluation of Permeant Impairment* ("the *Guides*"), results in 55 percent or more Whole Person Impairment ("WPI")?

2. Whether Mr. Matthews is entitled to attendant care benefits in the amount of $1,462.45 per month from January 18, 2013 and ongoing?

3. Is Mr. Matthews entitled to a special award?

4. Is Mr. Matthews entitled to interest on overdue payments?

5. Is Mr. Matthews entitled to the expenses of the hearing?

Result:

1. Mr. Matthews did not sustain a catastrophic impairment within the meaning of section 3(2)(e) the *Schedule* as a result of the accident; specifically, Mr. Matthews does not suffer from an impairment or combination of impairments that, in accordance with the *Guides*, results in 55 percent or more WPI.

2. Mr. Matthews is not entitled to attendant care benefits.

3. Mr. Matthews is not entitled to a special award.

4. Mr. Matthews is not entitled to the expenses of the hearing.

EVIDENCE AND ANALYSIS:

Background

Mr. Matthews was in a motorcycle accident on August 13, 2011. The circumstances of the accident are undisputed. While riding his motorcycle, at approximately 40 KM an hour, Mr. Matthews lost control and hit the guard rail at the side of the road. According to the medical records he did not lose consciousness. One of his riding companions called an ambulance and Mr. Matthews was taken to the hospital. His injuries included multiple fractions of bones in his face, injury to his right shoulder, fracture of ribs on his right side, lacerations to his right knee, and lower back soft tissue injury. The medical records indicate that Mr. Matthews did not sustain any other significant musculoskeletal or abdominal injuries at the time of the accident.[2]
Mr. Matthews had several operations because of his facial fractures prior to his release from the hospital.

Mr. Matthews was released from the hospital on August 24, 2011 with diagnoses including facial and mandibular fractures, haemoptysis, and right ear bleeding. After his release from the hospital, Mr. Matthews had further jaw and dental surgery. Subsequent to his release, Mr. Matthews began to see Dr. Charbonneau, chiropractor. On October 16, 2012, Mr. Matthews had a right rotator cuff surgery on his shoulder. He continued to have physiotherapy after the rotator cuff tear was repaired. The medical history of the Applicant indicates that he has a family history of colon carcinoma and he has had extensive diverticular disease prior to the accident.

At the time of the accident Mr. Matthews had been working as a receiver for Samuel Steele for 29 years. Mr. Matthews completed Grade 7 in Newfoundland. He has not been able to return back to work because his job entails manual labour. Prior to the accident his hobbies included playing horse shoe, fixing cars and trucks, and socializing with friends and family. Prior to the accident, Mr. Matthews duties at home were restricted to mowing the lawn, shovelling snow,

[2]Exhibit 1, Tab 41 Page 118

home maintenance and barbequing. He has been married to his wife for 27 years. Mrs. Matthews has been and continues to be the primary person who prepares all meals, cleans the home and takes care of the day to day maintenance and housekeeping of the house.

Catastrophic Impairment (CAT)

It is not disputed that Mr. Matthews suffered both physical and mental/behavioural impairments as a result of his accident. The issue I am deciding is whether these impairments together are sufficiently severe that it can be found that Mr. Matthews has suffered a catastrophic impairment as defined under the *Schedule.*

After careful consideration of the totality of the evidence before me, I find that on a balance of probabilities, Mr. Matthews does not suffer from catastrophic impairment. The test that I must apply is the following. I must decide whether Mr. Matthews is catastrophically impaired based on a combination of impairments that in accordance to the *Guides* results in 55% or more impairment of a whole person. The *Guides* are a reference source used by physicians in evaluating the extent of impairments. The combined value chart at the end of the *Guides* allows physicians (and arbitrators) to combine impairment ratings from different chapters in order to arrive at a whole person impairment rating. Therefore, I have rated each impairment with respect to the *Guides*. I have also taken into consideration the test as delineated in *Desbiens v. Mordini*[3] in combining the psychological impairment ratings with the physical impairment ratings.

OMEGA, on behalf of Mr. Matthews, provided a summary of findings by Dr. Harold Becker, physician, which stated that Mr. Matthews is catastrophically impaired because his combined physical and psychological impairments are 34% -64% WPI. MDAC, on behalf of Dumfries, provided a summary prepared by Dr. Ben Meikle, a physiatrist, which found that Mr. Matthews had a total impairment of 49% which even if I round out 50%, as per the *Guides*, the rating still falls short of 55% WPI.

[3][2004] O.J. No. 4735

Positions of the Parties

Chapter 2 of the *Guides to the Evaluation of Permanent Impairment*,[4] 4th edition, 1993, (hereinafter referred to as the "*Guides*") explains the method in assessing impairments. The rating impairment is a simple number. Therefore the ranges given by Dr. Becker are not helpful in evaluating or rating an impairment. Generally, I prefer the method used by Dr. Meikle to Dr. Becker in assessing the various impairments. I find that Dr. Becker's analysis of ranges is not helpful since there are vast differences between the ranges provided. For example the rating of 1-14% for mental status impairment and 15-29% for psychological impairment by Dr. Becker, does not indicate whether Mr. Matthews' impairment is closer to 1 or 14; or 15 or 29. Those ranges are very wide and difficult to understand. According to Dr. Becker, it is impossible to pick a number since various indicators during examination could change from one assessment to another. Dr. Becker testified that the Applicant could have a full range of motion in his neck one day and limited range of motion another day, or that the Applicant can self-report pain which may be different from one day to the next. Giving a wide range percentages to a trier of fact instead of a number is not helpful to an arbitrator, because I am not the physician examining the patient. Therefore, I prefer the method used by MDAC to the method used by OMEGA in assessing Mr. Matthews' impairments.

Dr. Harold Becker authored the OMEGA CAT summary report and testified at the arbitration hearing. The OMEGA assessments were conducted by a physiatrist (Dr. Lisa Becker), a psychologist (Dr. Hanna Rockman), and a Neuropsychologist (Dr. Lara Davidson). The CAT assessment of OMEGA did not include a review of Mr. Matthews' medical history. Dr. Harold Becker testified at the hearing that he did not have Mr. Matthews' physician's notes and records ("CNR") when assessing and writing the CAT report and that he did not request the CNRs from the Applicant's counsel. The *Guides* specifically require that medical assessors review the whole medical history of the patient in reaching their conclusion with regards to impairment. According to the *Guides*, the first key to an accurate evaluation is a review of office and hospital records of

[4]At Page 8.

physicians, including notes on surgeries (this would be with regard to Mr. Matthews' shoulder operation as well as his several bowel operations post MVA), and discharge summaries.[5] Because Dr. Becker did not review the medical history and the available CNRs of Mr. Matthews, I put less weight on his assessment of Mr. Matthews' impairments.

I have reviewed each individual report and I have found MDAC's reports to be more persuasive than OMEGA's reports. There were 9 assessments conducted by the MDAC team.

- Occupational Therapist, Tracie Shaw
- Orthopaedic Surgeon, Dr. Paul Marks
- Neurologist, Dr. Manu Mehdiratta
- Neuropsychologist, Dr. Konstantine Zakzanis (2 Reports)
- Plastic and Reconstructive Surgeon, Dr. Selig Krajden
- Psychiatrist, Dr. Mitchell Spivak
- Otolaryngologist, Dr. James Haight
- Dentist, Dr. Jeff Glaizel

Ms. Sirbu, counsel for the Applicant, in her closing arguments, combined various assessments from OMEGA and MDAC to arrive at several different results. I do not find that method to be persuasive. I have reviewed each teams' assessments and find the MDAC methodology and assessments to be more thorough and in line with what is required in the *Guides*. According to the various assessments, Mr. Matthews provided different answers with regard to his limitations depending on the day he met with the assessors; and therefore, it is difficult to mix the assessors' ratings to come up with new ratings as Ms. Sirbu suggests.

In reaching my decision that Mr. Matthews' impairments are not catastrophic, I have considered the totality of Mr. Matthews' life since the accident and I have contextualized his daily physical

[5]Page 3 and page 11 of the *Guides*

activities as well as his psychological and mental impairments. In reaching my conclusion that Mr. Matthews is not catastrophically impaired within the definition of the *Guides*, I did not review each individual assessor's ratings of each part of Mr. Mathew's body and the psychological and emotional ratings in a vacuum. I also analyzed the totality of his physical and psychological limitations and whether he met the threshold for the 55% WPI. Therefore, I find that Mr. Matthews' physical and mental/psychological impairments do not add up to at least 55% WPI.

The Ratings of Each Side

Under the *Schedule* the determination of catastrophic impairment is ultimately an adjudicative function, not a medical opinion. I agree with Dr. Harold Becker that it is my job to weigh the assessments provided by the medical experts and to determine whether Mr. Matthews has sustained catastrophic impairment. Below is the table comparing OMEGA and MDAC ratings for various impairments.

IMPAIRMENT	OMEGA RATING (WPI)	MDAC RATING (WPI)
Right shoulder/ upper extremity impairment	5%	1%
Neck/Cervico-thoracic spine	5%	0%
Back/Lumbo-sacral spine	5%	0%
Facial paresthesia/ impairment	5 – 10%	9%
Facial disfigurement/ cosmetic impairment	0 – 5%	8%
Right knee	Not Rated	0%
Headache	Not Rated	0%
Nasal impairment	Not Rated	0%
Tinnitus	Not Rated	0%
Scarring	0 – 9%	0%
Sleep/Fatigue	1 – 9%	5%
Medication	1 – 3%	0%
Dizziness	Not Rated	5%
Oral impairment	Not Rated	9%
Speech impairment	Not Rated	3%
Mental Status impairment	1-14%	

Psychological impairment	15-29%	22%
Total Combined WPI	**34 – 64%**	**49%**

I have focused my analysis on the ratings that are more problematic, namely chapters 4 and 14 of the *Guides*. As noted by both Dr. Meikle and Dr. Becker these two chapters basically assess impairments that are very much interrelated and therefore assigning a number can be difficult. The other impairment ratings are similar to each other. MDAC provided a more comprehensive assessment of Mr. Matthews' impairments. MDAC had six more expert assessors than OMEGA. I found the comprehensiveness of the MDAC's reports more compelling. According to Dr. Meikle's testimony, MDAC's assessments and ratings were more generous than needed to be, giving ratings based on self-reporting rather than diagnostic assessment. However, I have accepted MDAC's ratings because the reports explained clearly how they arrived at the ratings assigned to Mr. Matthews.

For the following impairments which were not rated by OMEGA (Right knee, headache, nasal impairments, Tinnitus, dizziness, oral impairment, speech impairment) I have read the reports and accept the MDAC ratings. I have also accepted MDAC's ratings for the following impairments: facial impairment, cosmetic impairment, and scarring. These impairments were rated in ranges by OMEGA and in percentages by MDAC. For example, the rating for scarring by OMEGA is 0-9% and 0% by MDAC. The range of 0-9% is wide enough that after reviewing both reports, I have picked 0% as the rating for scarring. I have accepted the ratings provided by MDAC for facial and cosmetic impairment of 9% and 8% respectively over OMEGA's rating of 5-10% and 0-5% respectively since MDAC's ratings are more reflective of Mr. Matthews' facial injuries.

The following is my review and assessment of the medical evidence provided by OMEGA and MDAC with regards to the impairments where there were large discrepancies between MDAC and OMEGA. It should be noted that even though I have accepted that MDAC's ratings were more persuasive, the total WPI is only 49%.

Right Shoulder

I have reviewed the assessments made by OMEGA and MDAC from Chapter 3 of the *Guides*. OMEGA gave a 5% WPI to Mr. Matthews and MDAC gave a 1% WPI for Mr. Matthews' right shoulder and upper extremities impairment.

Dr. Lisa Becker's physical evaluation of Mr. Matthews include what Mr. Matthews self-reported, a handwritten note of the examination, and a chart that gave a 5% WPI for Mr. Matthews' right shoulder. There is no explanation in her report in how she came to that conclusion. Further, Mr. Matthews had a rotator cuff surgery of the right shoulder in October 2012 which was approximately 4 or 5 months prior to the OMEGA assessment of February 2013. The amount of pain or stiffness rated by Dr. Lisa Becker did not indicate that Dr. Lisa Becker had taken into account that the Applicant had shoulder surgery within the previous 6 months.

Occupational Therapist Tracie Shaw, for MDAC, evaluated the Applicant at home and completed the following tests: Range of Motion Testing; Manual Muscle Testing, Grip Strength Testing, Functional Testing. The claimant was observed at home being able to dress himself independently, prepare a light meal, functionally squat, forward reach, and to lift light items, He was independent with self-care tasks and lighter pre-accident housekeeping. However, Mr. Matthews self-reported lack of motivation, fatigue, vertigo and inability to manage his pain or stressors on a daily basis.

Dr. Meikel for MDAC assigned a 1% WPI rating based on Dr. Mark's assessment using the range of motion testing during an orthopedic assessment, using the method recommended in Chapter 3 of the *Guides*. Dr. Mark noted the following:

> ….He had 175 degrees of forward elevation, external rotation 45 degrees and internal rotation to the level of T10.[6]

[6]Exhibit 34

I prefer the assessment of MDAC to OMEGA with regards to Mr. Matthews' right shoulder since ROM measurements were provided and therefore I accept the 1% WPI for the right shoulder.

The Neck

OMEGA gave a 5% rating for neck impairment to Mr. Matthews in that he had non-uniform loss of Range of Motion (ROM) without using a range of motion measurements. Dr. Lisa Becker assessed Mr. Matthews' neck. According to the report, she reviewed the Applicant's medical history, interviewed Mr. Matthews and gave him a medical examination. Dr. Lisa Becker's observations are in short form and handwritten, but according to Dr. Harold Becker, they indicate that Mr. Matthews self-reported that he has more pain when he rotates his neck to the right and the neck is more painful on the right than the left, and that Mr. Matthews had non-uniform range of motion. Dr. Lisa Becker gave a diagnostic-related estimate (DRE) II rating for the neck without stating a range of motion measurement. I find that Dr. Lisa Becker's 5% WPI translated from DRE II may be an inaccurate measurement since she did not indicate non-uniform loss of range motion with a number as a measurement.

MDAC gave a 0% for neck impairment to Mr. Matthews. Mr. Matthews' medical history and the notes of his chiropractor did not indicate that he complained of neck issues for 6 months after the accident or during the 39 visits he made to the chiropractor during those six months. Dr. Marks, orthopedic surgeon, examined Mr. Matthews and found that there was no evidence of cervicothoracic spine fracture, loss of motion segment integrity, spinal cord injury, radiculopathy, muscle spasm, or limitation in range of motion. However, Mr. Matthews complained of neck pain on the right side when he wakes up in the morning, but stated to Dr. Marks that rest and laser therapy relieves the pain. The *Guides* categorize self-report of pain as a DRE Category 1 impairment at 0% WPI.[7] Therefore, based on the examination of the MDAC's experts and lack of a history of neck pain, I prefer the 0% rating given by the MDAC assessors.

[7]The *Guides*, page 104 and Table 73, page 108

The Back

Dr. Lisa Becker's examination of Mr. Matthews' back/spine for OMEGA indicated that there was full range of motion, no pain, no tenderness, no spasm, and no guarding on straight leg raising test. However, she found radiculopathy going from the back through to the leg because Mr. Matthews reported that he had a tingling in his right leg when sitting for long period of time and that when he stood up and walked around, the tingling dissipated. The finding of radiculopathy by Dr. Becker is not supported by a medical diagnosis. Nevertheless, a 5% WPI rating was assigned by OMEGA for Mr. Matthews' back.

Dr. Meikle gave 0% for back pain since the only indicator of impairment was Mr. Matthews' self-reported pain complaints. Dr. Meikle testified that complaints of pain is only a Category 1 impairment. Dr. Marks, Orthopedic Surgeon, and Dr. Mahdiratta, neurologist, examined Mr. Matthews' spine. Dr. Marks found the following in his examination

> He was non-tender in the lumbar spine. There was no evidence of any muscle spasm or lower extremity wasting. He had normal lordosis. He was able to forward flex with his fingertips to within four inches of the floor. He had full extension, side bending and rotation, He was able to heel and toe walk. He demonstrated a full squat with no support upon rising. He was able to long sit on the examination table in no apparent distress.
>
> His hips demonstrated a full range of motion and he had negative acetabular rotation findings.[8]

Dr. Mehdiratta's report for MDAC states that Mr. Matthews did not report radiation of symptoms of back pain to his legs. Dr. Mehdiratta's examination showed normal alignment of thoracic and lumbar spine and that Mr. Matthews' back range of motion was 65-70% of normal in terms of flexion, extension and rotation.[9]

[8]Exhibit 34, Tab 8

[9]Exhibit 34

Based on the report of the experts of MDAC, I find Dr. Meikle's rating of 0% WPI to be more persuasive than Dr. Becker's rating of 5% WPI concerning Mr. Matthews' back.

Medication

The evidence demonstrates that Mr. Matthews had numerous medical visits concerning sigmoid diverticulitis, hemorrhoids, gall stones, and hernia since 2001 and prior to the accident in 2011.[10] The medical records for one year post accident speak of slight pain of right shoulder and knee. In examining the CNR of the Applicant in 2012, the majority of the medical issues are based on the chronic diverticulitis which was an issue prior to the August 2011 accident. The *Guides* instruct that the simple taking of medication does not garner a rating. The only time that a physician can increase the impairment is when a treatment of an illness "may result in apparently total remission of the patient's signs and symptoms".[11]

Dr. Lisa Becker assessed the impact of medication on Mr. Matthews' diverticulitis. As stated above Dr. Harold Becker did not review Mr. Matthews' CNRs and did not know that Mr. Matthews had a history of severe diverticulitis prior to the accident. Therefore, I put little weight on the assessment of the effects of post-accident medications on Mr. Matthews' diverticulitis. Furthermore, I find that there was no medical opinion provided to me that indicated that Mr. Matthews' post-accident diverticulitis is caused by using medication needed for his accident induced injuries. The lack of analysis of prior medical history taints the assessment of whether medication affected the diverticulitis or not. Therefore, I give little weight to the assessment of effect of medication and the diverticulitis being exacerbated by the accident.

[10]Exhibit 9 and Exhibit 13

[11]The *Guides* Chapter 14 and Chapter 2

Sleep/Fatigue

Mr. Matthews' sleep pattern and fatigue was rated as 1- 9% WPI by OMEGA and 5% WPI by MDAC. Mr. Matthews testified that he wakes up in middle of the night and watches TV until he falls asleep again. Dr. Mehdiratta rated Mr. Matthews to have mild brain injury.[12] Dr. Meikle and Dr. Mehdiratta gave a 5% WPI, assigning a middle range from 1 to 9. Dr. Meikle testified that Mr. Matthews has many non-neurological factors contributing to his fatigue, and found that neurological factors are one contributing factor for Mr. Matthews' fatigue. I find MDAC's rating of 5% WPI to be more persuasive than OMEGA's rating of 1-9% since MDAC's rating is the middle point of 1-9%.

Chapter 4 Neurological/Mental Impairment

Chapter 4 of the *Guides* rate the nervous system, which evaluates dysfunction of the brain and the nerves in layperson's terms. However, as the *Guides* state, neurologic impairment is closely related to mental and emotional processes; therefore the ratings between Chapter 4 and 14 can become intertwined. Also, according to *Desbiens*[13] there may be a significant amount of overlap between Chapter 4 and 14. The symptoms of an impairment may be common in both chapters but the cause of the impairment may be be different. Therefore, it is important not to double count for the same impairment in the two chapters. Further, according to the *Guides*, the doctor must pick the higher of the two ratings from Chapter 4 and 14 (neurological and psychological issues respectively).

<u>OMEGA's Cognitive Screening by Dr. Lara Davidson, PHD</u>

Dr. Davidson's report states that Mr. Matthews is borderline impaired 1-14% whole person impairment.[14] Chapter 4, Table 2 rates the mental status impairments. According to Table 2,

[12]Table 6, Page 143

[13]See Footnote 3, supra

[14]Exhibit 31

Page 142 of the *Guides* describes a rating impairment of 1-14% as "impairment exists, but ability remains to perform satisfactorily most activities of daily living". Dr. Davidson gave a percentage of 0-14% for emotional or behavioural impairments which is described in table 3 of chapter 4 as "mild limitation of daily social and interpersonal functioning". Dr. Davidson reached these conclusions by interviewing Mr. Matthews and his wife and conducting a cognitive test. Dr. Davidson indicated in her report that she is unsure of how Mr. Matthews' pre accident cognitive and learning abilities may contribute to the assessment of mental status impairments and recommended that Mr. Matthews' pre-accident mental status should be investigated. However, there is no indication in the OMEGA reports that such investigation took place. OMEGA used the ratings of 1-14% since it was a higher number than 0-14% for emotional or behavioural impairments in the final rating for Chapter 4.

MDAC's Assessment by Dr. Konstantine Zakzanis

According to Dr. Zakzanis' reports for MDAC, Mr. Matthews' mental status or cognitive impairment is due to a combination of brain injury and psychological factors. Dr. Zakzanis thoroughly reviewed Mr. Matthews' medical history, conducted several tests, and interviewed Mr. and Mrs. Matthews extensively. Dr. Zakzanis' reports state that Mr. Matthews has had several post-accident incidents that have made an impact on his psychological wellbeing. Dr. Zakzanis also reports that the post-accident physical pain in Mr. Matthews' face contributed to the deterioration of Mr. Matthews' emotional and psychological well-being. According to Mr. Matthews' interviews with Dr. Zakzanis, Mr. Matthews has had one sibling pass away in 2011 or 2012 and that 5 of his siblings have been diagnosed with cancer and another sibling has experienced two heart attacks since 2011. These events are contributing to Mr. Matthews' lack of focus and anxiety. Mr. Matthews' difficulty in literacy and his pre-accident cognitive or learning issues have to also be taken into consideration in rating his cognitive abilities. Dr. Zakzanis' opinion that Mr. Matthews sustained a traumatic brain injury as the result of the August 12, 2011 accident, was arrived at after reviewing OMEGA's assessments, interviewing Mr. Matthews, and conducting cognitive tests. Dr. Zakzanis found that Mr. Matthews' cognitive difficulties are at least materially related to the 2011 accident, which is only *one* causative factor.

Dr. Zakzanis gave a rating of 0% based upon table 3 of Chapter 4 of the *Guides* for emotional and behavioural impairment since there were no vast emotional fluctuation, or socially unacceptable behaviour as a result of neurotraumatic sequelae such as psychiatric features as the result of brain injury. Dr. Zakzanis also gave 0% for impairment of consciousness and awareness for Table 4 of Chapter 4, since he did not find any altered state of consciousness that limits Mr. Matthews' ability to perform his usual activities. I agree with Dr. Zakzanis' assessment of Table 3 and Table 4 of Chapter 4 of the *Guides*, in that the evidence before me does not indicate that Mr. Matthews has psychiatric impairment as the result of the brain injury.

Dr. Zakzanis, however, rated Mr. Matthews on Mental Status Impairments based on Table 2 of Chapter 4 at 22% WPI since Mr. Matthews requires some direction and supervision (such as taking his medicine, and needing reminders for medical appointments) but not in all of his daily living activities. I have considered that Mr. Matthews is able to drive his wife, shop, carry beer containers, socialize with neighbours, cut grass, shovel snow, and work on cars. In reviewing Dr. Zakzanis' opinion and reading Chapter 4 of the *Guides*, I find the rating of 22% WPI to be more accurate than the range of 1-14% by Dr. Davidson. Therefore, I accept the rating of Dr. Zakzanis of 22% for Chapter 4 of the *Guides*.

Psychological Impairment Chapter 14

To be catastrophically impaired, Mr. Matthews needs to suffer a marked or extreme impairment in only one of the four areas or aspects of functioning listed at page 301 of Chapter 14 of the *Guides*. These four areas of functioning are:

- activities of daily living
- social functioning
- concentration/persistence/pace
- adaptation

Mr. Matthews did not garner a marked impairment in any of the areas of his functioning from OMEGA or MDAC. Therefore, under mental/behavioural impairment alone Mr. Matthews is not catastrophically impaired. Since Mr. Matthews does not suffer from an impairment that results in a marked or extreme impairment in any of the four areas of functioning due to mental or behavioural disorder, Mr. Matthews was evaluated for WPI, under Section 3(2)(e) of *Schedule* by OMEGA and MDAC to see whether a combined assessment of his mental and physical impairments would amount to 55%[15] or more. In finding whether an applicant meets the definition of whole person impairment, it is important to look at the applicant's activities of daily living and compare these activities to his pre accident activities.

The surveillance tapes entered as evidence at the hearing demonstrate that the applicant is mobile, working on his car, carrying beer and transferring the beer from one hand to another, carrying groceries, doing errands, and being able to carry out his daily activities. In coming to the conclusion that Mr. Matthews is not catastrophically impaired I have looked at the ratings of the experts, but I have also considered the description of the life Mr. Matthews led prior to the accident in 2011 and his life post-accident.

Post-accident, Mr. Matthews is still driving his wife to errands and to babysitting, he is still working on cars, although not with the same ease. He is not working in a manual job because of his shoulder problem but he is receiving income replacement benefits. Mr. Matthews' evidence concerning whether he cuts the grass at his home in the summer and shovels snow in the winter was inconsistent. He testified that he shovelled snow and cut the grass since the accident (although he said he could not "run" with the lawnmower after the accident). He also testified at the hearing that he would be "sore" after physical work, as anyone would if they had not worked physically for some time. At the same time, Mr. Matthews told some of the CAT assessors that he was unable to cut the grass or shovel snow since the accident. The CNR of Dr. Charbonneau, Mr. Matthews' chiropractor, indicates that he cut the grass (June 5, 2013) and shovelled snow (February 2013). Based on the inconsistent evidence provided by Mr. Matthews, I find that Mr. Matthews is able to conduct his pre-accident home duties. I find that Mr. Matthews'

[15]See footnote 3, *Desbiens, supra*.

impairments are not to a degree that can be rated as not being able to conduct his activities of daily living.

I agree that since the accident, Mr. Matthews has some limitations in his daily activities and that he is not able to continue to work as a manual labourer presently. Impairment of function due to mental or behavioural impairments is measured in four areas as stated above. Mr. Matthews' activities of daily living such as self-care, personal hygiene, ambulation, and travel were not impaired at all according to his oral testimony as well as the assessments conducted. Mr. Matthews testified that he does not have a sexual relationship with his wife because they sleep in separate bedrooms since the accident. His sexual functioning was not assessed by either of the assessors. However, both assessments found mild to moderate ratings in the four areas as seen below.

Dr. Spivak, Psychiatrist for MDAC

Dr. Mitchell Spivak, psychiatrist for MDAC, assessed Mr. Matthews for activities of daily living. Based on the symptoms described by Mr. Matthews, Dr. Spivak concurred with the previous diagnoses of a major depressive disorder as a result of the 2011 accident. However, Dr. Spivak did not find any evidence of PTSD. Dr. Spivak rated Mr. Matthews' impairments using the charts in Chapter 14 as follows:

- A class 2 mild rating in activities of daily leaving;
- A class 2 mild rating in social functioning;
- A class 3 moderate rating in concentration persistence/pace;
- A class 3 moderate rating in adaptation; and
- A class 3 moderate rating in global impairment (this rating is a general assessment with regards to Mr. Matthews' global mental impairment by Dr. Spivak and is not rated in the table in Chapter 14)

According to Dr. Spivak's report, Mr. Matthews is able to look after most of his ADLs without difficulty. As far as socialization is concerned, Mr. Matthews keeps in close contact with his family in Newfoundland and is able to enjoy the company of his wife and his grandchildren. He occasionally socializes with his friends and watches sports with his nephew or friends on television. Mr. Matthews has moderate deficiencies in remembering appointments, and concentrating on reading or watching television. Further, Mr. Matthews reported that he does not engage in some of the activities such as horse shoe due to pain and that he cannot engage in manual labour as an occupation any longer. I agree with Dr. Spivak's assessment of 20% impairment of WPI given the demonstrated global mental/behavioural impairment,[16] because although there has been some changes in Mr. Matthews' psychological behaviour, they are mostly mild to moderate and they do not amount to more than 20% WPI.

Dr. Hanna Rockman, psychologist for OMEGA

Dr. Hanna Rockman for OMEGA found the following in assessing Mr. Matthews:

- A Class 3 moderate impairment in activities of daily leaving;
- A Class 3 moderate impairment in social functioning;
- A Class 3 moderate impairment concentration, persistence and pace; and
- A Class 3 moderate impairment in decompensation in work or work like settings (Adaptation).

Dr. Rockman did not give an overall rating for impairment under Chapter 14 but there was no marked rating in any of the 4 areas. However, Dr. Harold Becker in his CAT summary[17] interpreted Dr. Rockman's assessment as the following:

[16]Exhibit 34

[17]Exhibit 34

> Dr. Hannah Rockman, psychologist, diagnosed Major Depressive Disorder, chronic, moderate to severe in severity. A Global Assessment of Function (GAF) score of 51-60 in analogous to an impairment score of **15-29% whole person impairment,** using the California Methodology (and consistent with *AMA Guides 4th Ed*, Chapter 4, Page 142, Table 3). This rating, expressed as whole person impairment can be used in combining impairments under Criteria 7 and 8.
>
> With regard to the four areas of Functioning, Dr. Rockman identified Moderate (class3) impairment in Activities of daily Living, Social Functioning, Concentration, Persistence and Pace, and Adaptation to Work or Work-Like Settings.[18]

I find the range of 15-29% WPI to be too wide in range for me to assess the Applicant's impairment under Chapter 14. A 15% rating is very different than a 29% rating. I find Dr. Spivak's methodology and rating of 20% to be more persuasive and accurate.

Table 2 and 3 of Chapters 4 and 14 deal with ratings of psychological as well as emotional impairments. Assessors use the converted ranges in Chapter 14 by using Chapter 4 tables. As stated by Dr. Harold Becker and Dr. Meikle at the hearing, Chapter 4 neurological impairments may lead to emotional problems. Chapter 14 rates psychological impairments which can be caused by the accident. The major dispute in this case is whether the ratings provided by various assessors are properly engaged with regard to mental/psychological impairments in combination with the physiological impairments.

OMEGA assessors rate and include percentages from Chapter 4 and 14 for the same impairments whether they are based on physiological/neurological impairments or psychological/behavioural impairments. However Dr. Meikle from MDAC picked the higher number of the two chapters and therefore he does not double count. He picked 22% from Chapter 4 rather than 20% from Chapter 14. Dr. Harold Becker uses table 3 of Chapter 4 to convert Dr. Rockman's rating in Chapter 14. In the final ratings, OMEGA uses two different ranges (1-14% in Chapter 4 and 15-29% for Chapter 14 – still using Chapter 4 tables) to arrive in combination with physical

[18]Exhibit 34

impairments to a range of 34-64% WPI. This leads to double counting. I find the methodology used by OMEGA to be problematic in that it can lead to double counting in chapters 4 and 14. Chapters 4 and 14 rate psychological/mental/behavioural impairments. Chapter 4 rates physiological impairments affecting psychological symptoms. Therefore, I find that it is more persuasive to use only the higher rating from Chapter 4 and/or 14 in final calculation of the whole person impairment.

In conclusion, OMEGA's ratings with respect to physical impairments under criterion 7 was 22-49% WPI which included the rating for mental and behavioural impairments under chapter 4. OMEGA rated Mr. Matthews' mental and behavioural impairment under criterion 8 without one marked (class 4) impairment at 15-29% WPI. The combined criteria 7 and 8 by Omega is a 34-64% WPI rating, which as I discussed previously is a range so wide that it can become impossible to find a proper WPI for an Applicant. As can be seen from the above analysis I agree that adding up the WPI percentage for the physical impairments and combining chapter 14 ratings of psychological impairments gives Mr. Matthews a 49% WPI.

Attendant Care Benefit

I have determined that Mr. Matthews is not catastrophically impaired. Section 20 of the *Schedule* states that if the insured is not deemed to be catastrophically impaired, he is not entitled to attendant care benefits beyond 260 weeks post-accident. Further, based on Section 19 of the *Schedule*, I also find that Mr. Matthews is not entitled to attendant care benefits from January 2013 to the date of the arbitration hearing. Mr. Matthews is not entitled to attendant care benefits based on the following as discussed below: evidence provided by Mr. and Mrs. Matthews; the medical assessments; and lack of evidence that Mrs. Matthews incurred an economic loss in providing care for her husband.

Mr. Matthews' attendant care benefits were terminated in January 2013. According to Mr. and Mrs. Matthews' testimonies at the hearing, by December 2012, the Applicant could dress himself, feed himself, carry his plate to the sink, and shower; and therefore there was no need for attendant care benefits. Mrs. Matthews testified that she has to remind her husband to take his

medication and to make sure he remembers his medical appointments. She further testified that she tells her husband to move and do things. I do not think this particular assistance can be categorized as the Applicant needing attendant care benefits. According to the oral evidence at the hearing, Mrs. Matthews was responsible for all the housework, cooking, cleaning and general running of the household prior to Mr. Matthews' accident in August 2011 and continues to run the household after the accident. Furthermore, the surveillance evidence demonstrated that Mr. Matthews drove his car, did errands independently, and carried a 24 pack of beer which he transferred from left to his right hand.

According to an intake questionnaire for the OMEGA catastrophic impairment assessment[19] completed on May 27, 2013 by Mr. Matthews and his wife Brenda Matthews, Mr. Matthews is independent in self-care, in driving, and stair climbing post MVA as he was pre-accident. Mrs. Matthews stated in that particular questionnaire that Mr. Matthews is doing "great" and that he can do "everything for himself". She stated in the same form that Mr. Matthews does not need supervision for cooking. Both Mr. Matthews and his wife testified at the hearing as well as through the in-home assessments that Mr. Matthews has been independent in his daily self-care since December 2012.

The medical evidence also does not support the need for attendant care benefits. The first in-home assessment was completed in October 2011 in which the Applicant was paid $1,159.00 in attendant cares services per month. A further in home assessment was conducted in July 2012, where the applicant required $884.14 per month in attendant care services. Dumfries paid the benefit at the reduced rate. Mr. Matthews underwent a procedure on August 8, 2012 on his colon and further corrective surgery for drainage of intra-abdominal abscesses on August 15, 2012.

A further in home assessment by Cheryl Hannah on October 9, 2012 concluded that no attendant care benefit was required based on any impairments caused by the accident. This in home assessment is consistent with the testimony of Mr. and Mrs. Matthews at the arbitration hearing that Mr. Matthews did not require attendant care benefits after his last colon surgery in 2012. However, Dumfries paid for attendant care benefits even when the in-home-assessment stated

[19]Exhibit 11

that there was no need for attendant care benefits after Mr. Matthews' bowel surgery. Meanwhile there was no indication that the colon surgery had any link to the motorcycle accident. As stated above, Mr. Matthews has had a long history of diverticulosis prior to the motorcycle accident.

The In-Home Assessment report dated November 8, 2012, concluded that the Applicant, after his shoulder surgery; should receive $1,462.45 per month for attendant care benefits. This amount was provided to the Applicant. In January 2013, an assessment by Cheryl Hanna, at the request of Dumfries, concluded that attendant care services were no longer required.

Section 19(1) of the *Schedule* requires that expenses have to be incurred and that there has to be a demonstrated economic loss for attendant care. Mrs. Matthews testified that she worked part time prior to Mr. Matthews' accident at Dollarama for a brief period. She was not able to recall when she exactly worked at Dollarama. While it is true that a family member can be the caregiver for the Applicant, even if they are not professional caregivers, there has to be an economic loss and a demonstrated need for attendant care benefits. The Applicant failed to prove that Mrs. Matthews incurred an economic loss during the time she provided attendant care services for Mr. Matthews. Mrs. Matthews could not demonstrate any economic loss since she could not recall when she worked prior to the accident and that, at most, she may have worked on a part time, occasional basis for a few months after the accident at Dollarama. Despite the lack of incurred economic loss for Mrs. Matthews, Dumfries still provided payments for attendant care for Mr. Matthews until end of 2012. Based on the forgoing analysis, I find that Mr. Matthews is not entitled to attendant care benefits.

Special Award

I find that Mr. Matthews is not entitled to a special award. Section 282(10) of the *Insurance Act* gives me discretion to make an award against the insurer if I find that an insurer has unreasonably withheld or delayed payments. The section also authorizes me to give a special award which is a percentage of benefits owed to the Applicant. I have reviewed the evidence and I find that Dumfries did not unreasonably withhold benefits. In fact, Dumfries gave attendant care benefits to the applicant when he was not entitled to them. Further, since I did not award any

of the benefits in dispute in the arbitration to Mr. Matthews I cannot designate a percentage of the award towards special award.

In any case, I find that Dumfries has been reasonable in providing and assessing benefits which includes almost $54,000 in medical benefits, attendant care benefits for approximately two years, and ongoing income replacement benefits. As stated above, the test for awarding special award is whether the insurer withheld or delayed payment of benefits unreasonably. I do not agree with the Applicant's submissions that it is unreasonable or in bad faith to ask the insured to attend further CAT assessments. During the hearing, Ms. Sutton, a representative from Dumfries, testified that this case was Dumfries first CAT arbitration, because Dumfries has always agreed with applicants' CAT assessments and has not denied other applicants. I do not agree with the Applicant's assertions that Dumfries is acting in "bad faith" or unreasonably in the present case by not finding the Applicant to be catastrophically impaired as they had done with other insured. I do not find that the adjuster's notes or the behaviour of Dumfries, in general, demonstrates that they delayed or withheld a benefit unreasonably. Therefore, the Applicant is not entitled to a special award.

EXPENSES:

I have reviewed the parties' submissions with regards to expenses provided to me on May 30, 2016. Dumfries requested $33,043.79 inclusive of HST and disbursements. Based on the below analysis, I have ordered for the Applicant to pay Dumfries **$17,310.47** inclusive of HST.

Rule 75 of the *Dispute Resolution Practice Code*[20] deals with award of expenses. In coming to my decision to award expenses to Dumfries, I have taken the relevant criteria as enumerated in Rule 75. Dumfries has been successful in all the disputes at issue. Accordingly, they are entitled to their reasonable expenses. Further, I find that there were no novel issues raised in the proceedings.

[20] *Fourth Edition* – Updated January 2014

I do not believe that the conduct of the Applicant's counsel prolonged the proceedings by bringing an interim motion or by requesting for *viva voce* evidence of the expert witnesses. The Applicant's counsel represented her client to the best of her abilities and put forward what she believed was a proper and assertive strategy for litigating the issues in dispute. Further I do not find that asking for attendant care benefits on behalf of the applicant can be described as "improper, vexatious or unnecessary". Although the Applicant failed to prove his case, he does have the right to put forward a case for attendant care benefits. I acknowledge that the Applicant may not be able to pay the expenses in the order, because he has not been working since the accident. However I have no discretion under the *Code* to waive the expenses and according to the *Code* I must take only the above noted criteria in my decision.

With respect to the quantum of the expenses, on May 30, 2016, I received a Bill of Costs from both parties. I will not analyse line by line the various expenses in this particular case. The general approach with respect to fees is to take a pragmatic, broad strokes approach with a view to fixing an amount that is reasonable.

This was a 4 day hearing and I have accounted for 25 hours of tribunal hearing time. In addition, I allow for another 50 hours of preparation time (at 2:1) as requested by Dumfries, which I find to be reasonable. I therefore find that Dumfries is entitled to recover 75 hours of its legal fees from the Applicant with regards to Mr. Colville-Reeves. The 2015 fee structure of Legal Aid Ontario of $136.43 per hour is an appropriate fee for Mr. Colville-Reeves. Therefore Dumfries is entitled to $10,232.25 + $1,330.19 for HST totalling **$11,562.44** for Mr. Colville-Reeves legal fees and not $13,751.60.

As stated above, there is no need to examine, line by line, the expenses of the parties to arrive on a reasonable and legally sound quantum; however, I have not allowed all of the disbursements listed by Dumfries. I have not allowed costs such as preparation for the MDAC report (this is taken into consideration under expert fees), transportation provided for the Applicant to attend assessments, Carswell research, colour photocopies, obtaining clinical notes and records, producing court transcripts, and court reporter fees.

I find certain amounts such as fees for experts and witnesses to be excessive. With regards to fees for experts I have considered the *Schedule*. The *Schedule* provides for maximum amount of payment for attendance of an expert witness at $200 per hour of attendance, up to a maximum of $1600.00 per day. The maximum amount of preparation for an arbitration for a witness is $500. The maximum amount payable to an expert for the preparation of a report is $1,500.00. I find that Dr. Meikle's fees for appearing as a witness for one day at the hearing to be for 4 hours at $200 per hour for a total of $800. I have awarded $500 for preparation of Dr. Meikle for the hearing and $1,500 for the preparation of MDAC report (not $1,921).

The fee of $969.00 requested by Dumfries for preparation and attendance of Cheryl Hanna (OT) is not reasonable. As stated above, the *Schedule* allows a maximum of $500 for preparation of an expert witness for an arbitration hearing and a fee of maximum of $1600.00 for attendance at a hearing. As I recall, Ms. Hanna attended the hearing in Kitchener for 2 hours. Therefore I have awarded $400 for appearing as a witness and $400 for preparation to the total of $800 (not $969.00) Therefore I find that the following amounts are to be awarded to Dumfries with regards to fees to be paid to an expert witness:

For preparation of expert report from MDAC	$1,500.00
For one day testifying at the Arbitration Hearing for Dr. Meikle (4 hours)	$800.00
For preparation to testify at the hearing for Dr. Meikle	$500.00
Ms. Hanna's attendance at the hearing (2 hrs) (2 hours preparation)	$800.00
TOTAL ($3,600 + $468.00 HST)	**$4,068.00**

The total of disbursements when subtracting several of the expenses as mentioned above is $1,486.76 plus $193.27 for HST = $**1,680.03** which in total, including the expert fees, equals to **$5,748.03** and not $19,623.83 as requested by Dumfries.

In conclusion I award expenses to Dumfries in the amount of **$17,310.47** ($11,562.44 for legal fees and $5,748.03 for disbursements) inclusive of HST.

Sudabeh Mashkuri Arbitrator	September 29, 2016 Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Neutral Citation: 2016 ONFSCDRS 260

FSCO A14-001824

BETWEEN:

PATRICK MATTHEWS

Applicant

and

DUMFRIES MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

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. Mr. Matthews did not sustain a catastrophic impairment within the meaning of section 3(2)(e) the *Schedule* as a result of the accident; specifically, Mr. Matthews does not suffer from an impairment or combination of impairments that, in accordance with the *Guides*, results in 55 percent or more WPI.

2. Mr. Matthews is not entitled to attendant care benefits.

3. Mr. Matthews is not entitled to a special award.

4. Mr. Matthews is ordered to pay Dumfries $17,310.47 inclusive of HST for expenses.

September 29, 2016

Sudabeh Mashkuri
Arbitrator

Date