

Neutral Citation: 2017 ONFSCDRS 197

Appeal P16-00078

OFFICE OF THE DIRECTOR OF ARBITRATIONS

PATRICK MATTHEWS

Appellant

and

DUMFRIES MUTUAL INSURANCE COMPANY

Respondent

BEFORE: David Evans

REPRESENTATIVES: Georgiana Masgras for Mr. Patrick Matthews
Neil Colville-Reeves for Dumfries Mutual Insurance Company

HEARING DATE: June 27, 2017

APPEAL ORDER

Under section 283 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 Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The appeal of the Arbitrator's order dated September 29, 2016 is allowed in part. Paragraphs 1 and 4 thereof are rescinded. Paragraph 1 is replaced with the following:
 1. Mr. Matthews did sustain a catastrophic impairment within the meaning of section 3(2)(e) of *The Statutory Accident Benefits Schedule — Effective September 1, 2010* as a result of an automobile accident.
2. The issue of expenses of the arbitration is referred back for determination by an arbitrator.
3. If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

July 12, 2017

David Evans
Director's Delegate

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Mr. Patrick Matthews appeals Arbitrator Mashkuri's order that he did not sustain a catastrophic impairment within the meaning of section 3(2)(e) of the *SABS-2010*¹ as a result of an accident.

The Arbitrator found that Mr. Matthews had not sustained a 55 percent Whole Person Impairment (WPI), so he was not catastrophically impaired.

The Arbitrator only included the neurological and not the psychological component of Mr. Matthews' impairments in calculating the WPI.

For the reasons set out below, I find this was an error. Once that psychological component is included in calculating the WPI, it totals 59 percent and passes the minimal threshold for a determination of catastrophic impairment under s. 3(2)(e). Accordingly, the appeal is allowed. Mr. Matthews is catastrophically impaired.

II. BACKGROUND

Mr. Matthews was in a single-vehicle motorcycle accident on August 13, 2011. He suffered numerous fractures and lacerations, and required several surgeries. He was not able to return to his work as a manual labourer.

Mr. Matthews claimed benefits from his insurer, Dumfries. At arbitration, he sought a finding that he was catastrophically impaired. He also sought ongoing attendant care benefits and a special award.

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

While Mr. Matthews suffered a psychological impairment from the accident, it was not enough to be considered a catastrophic impairment for a mental or behavioural disorder under s. 3(2)(f) of the *SABS*: he did not have a class 4 (marked) or class 5 (extreme) impairment due to mental or behavioural disorder under Chapter 14 of the *Guides*.² However, pursuant to *Desbiens v. Mordini*, 2004 CanLII 41166 (ONSC), psychological impairments that are not marked or extreme may be combined with physical impairments to calculate the WPI.

Therefore, Mr. Matthews claimed that, pursuant to s. 3(2)(e) of the *SABS*, he had suffered from an impairment or combination of impairments that, in accordance with the the *Guides*, resulted in a 55 percent WPI. These physical impairments included one to his brain, and he sought to include the psychological impairment in the WPI as well.

The main issue was whether physical impairments to the nervous system can be combined with psychological impairments in arriving at a WPI.

The insurer's assessors said no. MDAC Medico-Legal Services, on behalf of Dumfries, provided a summary prepared by Dr. Ben Meikle, a psychiatrist, finding that Mr. Matthews had a total impairment of 49%. Even if rounded to 50%, as per the *Guides*, this still fell short of 55% WPI. Only the score relating to the physical impairment to Mr. Matthews' nervous system was included in the overall assessment, as it was higher than the score for psychological impairment.

The Arbitrator accepted MDAC's analysis. Mr. Matthews disputes how the Arbitrator arrived at the final WPI figure when she dealt with the scores for physical nervous system impairment under Chapter 4 of the *Guides*, entitled *The Nervous System*, with those for mental and behavioural disorders under Chapter 14, entitled *Mental and Behavioural Disorders*.

In that regard, the Arbitrator stated:

²American Medical Association's *Guides to the Evaluation of Permanent Impairment* (hereinafter referred to "the *Guides*")

Chapter 4 of the *Guides* rate[s] 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* 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 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). [Footnote omitted.]

The last two lines in that quote are the source of dispute. Section 4.1 of Chapter 4 of the *Guides* requires that the most severe of five listed categories of cerebral dysfunction listed in *that Chapter* be used to represent the physical cerebral impairment. The highest rating in those categories determines the WPI under Chapter 4. The five categories include Mental Status Impairments, rated at Table 2, and Emotional or Behavioural Disturbances, rated at Table 3. It is only with respect to Table 3 that the *Guides* note that the criteria listed there relate to the criteria for mental and behavioural impairments in Chapter 14.

Under Chapter 4, MDAC's assessor, Dr. Konstantine Zakzanis, gave a 0% rating to Table 3. The highest Chapter 4 rating was for Table 2, Mental Status Impairments, at 22%. Dr. Zakzanis identified the cause of the impairment under Table 2 to be a neurocognitive physical disorder.

Chapter 14 does not provide percentages for the classes of impairments listed in the table at p. 301. There are various ways of determining the percentages (see the discussion of the *Desbiens* method below). The Arbitrator agreed with the assessment by Dr. Mitchell Spivak, psychiatrist for MDAC, of 20% impairment of WPI for mild to moderate global mental/behavioural impairment. Significantly, Dr. Spivak specifically noted at page 7 of his report that his rating excluded impairments due to physical disorders, chronic pain, environmental barriers, or factors other than psychological disorders. Dr. Spivak identified the cause of the impairment under Chapter 14 to be psychological.

However, the Arbitrator accepted the view of Dr. Meikle of MDAC that only the higher number *between the two chapters* should be used in calculating the WPI to avoid double counting. She stated: "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.” The higher rating between the chapters was for Chapter 4 at 22 per cent. However, in her last sentence on the topic on p. 20, the Arbitrator confusingly states: “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.” Nonetheless, it is apparent that she did **not** include the Chapter 14 impairments with the physical impairments; had she, the WPI would have been 59% and above the threshold.

As for the attendant care benefit claimed, this was denied because the Arbitrator found that Mr. Matthews had been independent in self-care since December 2012, the medical evidence did not support a need for attendant care, and Mrs. Matthews incurred no economic loss in providing any care for her husband.³ The Arbitrator also denied a special award, and assessed \$17,310.47 in expenses payable by Mr. Matthews to Dumfries.

III. ANALYSIS

I find the Arbitrator erred in not combining the scores from both Chapters 4 and 14 to arrive at a total WPI. The necessity to consider and combine WPIs from both chapters was already set out in *Desbiens*. As Spiegel J. noted at para. 257, the classification table at page 301 of the *Guides* – the Chapter 14 table that includes verbal descriptions of the different classes of impairment – makes clear that psychological impairments can seriously impede virtually every area of a person’s functioning, so they should be considered along with the physical dysfunctions in Chapter 4:

If a mental impairment caused by a dysfunction of the brain or nervous system can be included in the calculation of whole person impairment, but a similar psychological impairment under Chapter 14 is excluded, then some people with psychological impairments would be denied much needed benefits, not because they were less seriously impaired, but simply because their impairment is attributed *to a different cause*. This would be an unreasonable outcome. [Italics added.]

³ Section 19(1) of the *SABS* requires that expenses have to be incurred and that there has to be a demonstrated economic loss by a non-professional for attendant care.

Delegate Blackman comprehensively reviewed this area of law in *Allen and Security National Insurance Co./Monnex Insurance Mgmt. Inc.*, (FSCO P15-00018, July 6, 2016).⁴ He considered the situation where an insured suffers both a physical brain injury (Chapter 4) and a separate psychological mental and behavioural disorder (Chapter 14), just like Mr. Matthews in this case. He held that if both the organic brain injury and the psychological disorder separately result in emotional or behavioural impairments, both the physical brain injury and the psychological disorder are each to be rated for such impairments and then combined as provided for in the American Medical Association's *Guides*.

He further held that it is incumbent upon an arbitrator to rate both aspects of an insured's brain impairment, providing separate ratings under both Table 2 and Table 3, and then use the most severe rating to combine that rating, using the Combined Values Chart, with the other impairment ratings. These other ratings would include those from Chapter 14.

Arbitrator Mashkuri did not even have to determine the ratings in either chapter, as Dr. Zakzanis provided the ratings for Chapter 4's Tables 2 and 3 (22% and 0%, respectively), and Dr. Spivak determined the rating for Chapter 14 (20%).

Nonetheless, Dumfries submits that the biggest issue in this case is the possibility of double counting, which would overestimate the impairment rating.

Delegate Blackman stated that the key to ensuring that the WPI impairment ratings do not overestimate the impairment rating is to determine the cause of the impairment between Chapters 4 and 14 of the *Guides*.

Dumfries submits that this process allows the possibility for the impairments in Chapter 4's Table 3 and in Chapter 14 to be combined and so should be rejected. However, that alleged double counting is not even possible in this case, since the rating accepted by the Arbitrator for Table 3 is 0%. As to any difficulty in determining causation, it would be up the Arbitrator to determine under Chapter 4 of the *Guides* what, if any, emotional or behavioural disturbances were "the result of neurological impairments." In case of any overlap, the adjudicator could then

⁴The decision was issued shortly after the final submissions were made at arbitration in this case.

adjust the percentages, as Arbitrator Lee did in *Moser and Guarantee Company of North America*, (FSCO A13-000812, September 26, 2014).

To support its point, Dumfries cites the arbitration decision *McMichael and Belair Insurance Company*, (FSCO A02-001081, March 2, 2005) at pp. 56-57, where Arbitrator Muir stated:

In short, there is no evidentiary basis to distinguish between the Chapter 14 impairments and those properly considered under Chapter 4. So that while I agree it may be appropriate and required in certain circumstances to add different causes of impairment, i.e., add Chapter 14 impairments together with Chapter 4 impairments, it is not clear, on the evidence in this case, that this would not result in the double counting that Belair warns of.

However, this statement was based on the missing evidence in that case. In its absence, double counting was possible. This is not a general statement that Chapter 4 and 14 impairments should not be combined where the evidence warrants. That evidence was present here.

In a related manner, Dumfries submits that the way in which percentages can be assigned to the five-category scale in the Chapter 14 table suggests, in essence, that table is incorporated into Chapter 4. It refers to the *Desbiens* method: convert mental and behavioural impairments from Chapter 14 into percentages by analogy to Table 3 in Chapter 4. It submits that whether the impairment results from physical brain impairment or a psychiatric cause the impairment is measured and scored according to Table 3. It also refers to the testimony of Dr. Meikle that in reality both the physical and psychological components are all mashed up together, as he put it, so you evaluate them by the Chapter 4 system. Accordingly, since the ability to perform activities of daily living is assessed from both a neurologic and non-neurologic perspective, the score under Chapter 14 should be treated as a score under Table 3. It follows that, as the Arbitrator did in this case, only the highest of the scores between the two chapters should be used to assess the WPI.

However, I find that the *Desbiens* method simply draws an analogy and does not mean that Chapter 14 and Table 3 should be treated the same. The analogy is not even necessary, as there are other ways of arriving at percentages for the impairments listed in Chapter 14 than the *Desbiens* method. For instance, in *Kong and State Farm Mutual Automobile Insurance*

Company, (FSCO A11-001204, May 29, 2017), both experts applied the California GAF Scale to translate the verbal descriptors used in Chapter 14 of the *Guides* into numerical values. As for the components all being mashed together, Dr. Spivak specifically noted that his Chapter 14 rating was based only on psychological causes and not on any physical factors. Conversely, Dr. Zakzanis gave a 0% rating to Table 3. Therefore, there was no “mashing up” of values between Table 3 and Chapter 14. I find it does not follow that Chapter 14 should be treated the same as Table 3.

In conclusion on this point, the Arbitrator erred in failing to include the WPI assessment of Chapter 14 in reaching the total WPI. Pursuant to the Combined Values Chart at p. 322 of the *Guides*, combining the 49% for the total physical impairment with the 20% for the mental and behavioural disorder impairment leads to a combined value of 59%. That exceeds the 55% WPI threshold for catastrophic impairment, so Mr. Matthews is catastrophically impaired and the Arbitrator erred in finding otherwise. The appeal is allowed on this point.

However, the Arbitrator made factual findings regarding the need for attendant care. This aspect of the case was not the subject of any submissions. I have no basis to overturn these findings, since the Arbitrator determined that Mr. Matthews did not need attendant care and his wife suffered no economic loss. Therefore, that portion of the decision stands.

The Arbitrator also considered the evidence and found that no special award was payable. I see no basis to overturn that portion of the decision either.

However, the award of expenses of \$17,310.47 was based on the success by Dumfries. That success was based (mostly) on an error of law. Therefore, the award cannot stand and must be referred back to arbitration for a determination.

IV. EXPENSES

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

David Evans
Director's Delegate

July 12, 2017
Date