Appeal P09-00008

OFFICE OF THE DIRECTOR OF ARBITRATIONS

AVIVA CANADA INC.

Appellant

and

ANNA PASTORE

Respondent

BEFORE:	Delegate Lawrence Blackman
REPRESENTATIVES:	Mr. Robert H. Rogers for the Appellant, Aviva Canada Inc. Mr. Joseph Campisi Jr. for the Respondent, Mrs. Anna Pastore
HEARING DATE:	October 15, 2009 Additional submissions were received by December 15, 2009

APPEAL ORDER

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

1. The February 26, 2009 Notice of Appeal is dismissed and the Arbitrator's February 11, 2009 decision is confirmed.

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

December 22, 2009

Lawrence Blackman
Director's Delegate

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

The Respondent, Ms. Anna Pastore, was a pedestrian when injured in a November 16, 2002 motor vehicle accident. Sustaining, amongst other injuries, a fracture of her left ankle that required a number of surgeries, the Respondent sought statutory accident benefits from her first-party motor vehicle insurer, the Appellant, Aviva Canada Inc.

A five-day arbitration hearing was held in April 2008 before Arbitrator Nastasi (the "Arbitrator") to determine whether the Respondent had sustained a catastrophic impairment as defined in clauses 2(1.1)(f) or (g) of the *Schedule*.[1]

Under the *Schedule*, a finding of catastrophic impairment allows an insured person to claim a higher, more expansive range of first-party statutory accident benefits. As an example, under subsection 19(1) of the *Schedule*, instead of the $100,000 non-catastrophic limit, an insured who sustains a catastrophic impairment may claim up to $1,000,0000 in medical and rehabilitation benefits. However, as stated by the Ontario Court of Appeal in *Liu v. 1226071* Inc., 2009 ONCA 571 (CanLII), "simply meeting the statutory definition [of catastrophic impairment] does not automatically mean entitlement" to payment of any benefits under the *Schedule*.

The Arbitrator's February 11, 2009 decision found that the Respondent had not sustained a catastrophic impairment under clause 2(1.1)(f) of the *Schedule*, in that the Respondent's combination of impairments did not result in 55 per cent or more impairment of the whole person in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th Edition (the "*Guides*"). That finding is not appealed.

The Arbitrator, however, did find that the Respondent had sustained a catastrophic impairment as defined by clause 2(1.1)(g) of the *Schedule*, having a class 4, marked impairment, in one of the four areas or aspects of functioning set out at page 14/301 of the *Guides*.

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

Clause 2(1.1)(g) of the *Schedule* states that:

> (1.1) For the purposes of this Regulation, a catastrophic impairment caused by an accident that occurs before October 1, 2003 is,
>
> . . .
>
> (g) subject to subsections (2) and (3), an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in ***a*** class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) ***due to mental or behavioural disorder***. [emphasis added]

The Appellant submits that:

(a) The Arbitrator erred in law in finding that it was sufficient for the Respondent to have suffered a marked impairment in only one of the four areas of functioning on page 14/301 of the *Guides*. Rather, to meet the clause 2(1.1)(g) definition of catastrophic impairment the Respondent must have suffered, overall in the four assessment areas, a class 4 or 5 impairment; and/or,

(b) the Arbitrator erred in law in finding that the Respondent suffered a marked impairment in the one area of assessment, the Arbitrator having erred in including physical impairments with mental or behavioural impairments.

Succinctly, the first ground of appeal concerns the word "a" in clause 2(1.1)(g), highlighted above. The second ground of appeal is about the words "due to mental or behavioural disorder."

II. DID THE ARBITRATOR ERR IN FINDING THAT THE RESPONDENT REQUIRED A CLASS 4 IMPAIRMENT (MARKED IMPAIRMENT) IN ONLY ONE OF THE FOUR AREAS OF FUNCTIONING?

The four areas or aspects of functioning listed at page 14/301 of the *Guides* are activities of daily living, social functioning, concentration and adaption. The Appellant submits that the use of the word "a" in front of the words class 4 or 5 impairment in clause 2(1.1)(g) of the *Schedule* is not ambiguous, that it clearly means that the overall level of impairment in all four listed spheres of functioning identified in the *Guides* must be class 4 or 5. If the Legislature had wanted only one single area of impairment, it would have so stipulated.

If, however, there is any ambiguity in clause 2(1.1)(g), the Appellant submits that, in accordance with *Bapoo v. Co-operators General Insurance Company*, 36 O.R. (3d) 616 as follows, one should look at admissible external aids, namely the *Guides*, and the consequences of the proposed interpretations:

> The modern approach to statutory interpretation calls on courts to interpret a legislative provision in its total context. The court's interpretation should comply with the legislative text, promote the legislative purpose and produce a reasonable and just meaning. Professor Sullivan described the modern approach in the following passage in *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 131, which was cited by Kiteley J.:
>
> > There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

The Appellant argues that the Arbitrator's decision leads to an absurd result and must, therefore, be wrong in law, as:

(a) The Arbitrator found that the Respondent's physical impairments, by themselves, were not catastrophic;

(b) The Arbitrator found that the Respondent's physical and psychological impairments, when combined, were not catastrophic; yet,

(c) The Arbitrator found that when the Respondent's psychological impairments were considered by themselves, the Respondent was catastrophically impaired.

The Appellant further submits that clause 2(1.1)(g) of the *Schedule*, by directing that the impairment be rated in accordance with the *Guides*, incorporates the *Guides* into the *Schedule*.

The *Guides* should thus inform and guide the interpretation of the *Schedule*. In this regard, the Appellant notes the example provided at page 14/302 of the *Guides* that looks at the overall mental or psychiatric impairment rather than a rating from a single area of functioning.

The Appellant argues that such an approach of combining impairments is used with physical impairments. Further, when combining psychological with physical impairments under clause 2(1.1)(f) of the *Schedule*, the psychological impairment rating used is an overall rating. To be consistent and to avoid illogical results, in addressing clause 2(1.1)(g), one should also look to the overall assessment of the level of impairment across the four areas of functioning, rather than each area individually.

The Appellant further submits that "the uncontested expert evidence was that an assessment in accordance with Chapter 14 of the Guides, like the SSAGs [Social Security Administration Guidelines] upon which it was based, must deal with an overall rating." The Appellant relies in this regard on Dr. S. Leclair as an accepted expert in conducting assessments under the *Guides*. The Appellant submits that the historical information in Chapter 14 regarding mental and behavioural disorders indicates that one overall impairment rating is to be used.

The Appellant also argued that the CAT DAC (Catastrophic Designated Assessment Centre) Guidelines are clear that two marked impairments are required to render a catastrophic determination under the (g) criterion. While the Arbitrator was strictly correct that she was not bound by the CAT DAC Guidelines, she should have given them greater deference.

The Respondent submits that on a plain reading of clause 2(1.1)(g) of the *Schedule*, using the ordinary meaning of "a" as a singular indefinite article, only one class (marked) impairment rating is necessary for a catastrophic designation.

The Respondent cites, in support, the arbitration decisions in *H and Lombard General Insurance Company of Canada*, (FSCO A06-000209, October 4, 2007) and *McMichael and Belair Insurance Company Inc.*, (FSCO A02-001081, March 2, 2005),[2] and the decision of Spiegel J. in

[2] Upheld on appeal (FSCO P05-00006, March 14, 2006), application for judicial review dismissed, (2007), 86 O.R. (3d) 68 (Div. Ct.).

Desbiens v. Mordini [2004] O.J. No. 4735. The Respondent submits that there has been no other interpretation of clause 2(1.1)(g).

Arbitrator Muir, in *McMichael*, stated that:

> Following my conclusion that Mr. McMichael has suffered Class 4 impairments in three of the spheres of assessment under Chapter 14, I find that he has met the standard of paragraph (g) of the definition of catastrophic impairment, however, were I required to decide this question, I would agree with the approach adopted, but not decided, by the court in *Desbiens* [that a Class 4 or marked impairment in any one area of assessment was sufficient to meet the standard of paragraph (g)].
>
> The Mental and Behavioural Impairments Assessment Guidelines found on the FSCO web site, but never precisely identified beyond that, indicates that at least two findings of Class 4, Marked Impairment were required to meet the standard of paragraph (g). Whatever the import of this document, it is not binding on me, and I cannot find support for the need for at least two scores of Marked Impairment in the language of paragraph (g).

The Respondent argues that the Arbitrator took this same remedial approach, consistent with the objective of consumer protection in automobile insurance stated by the Supreme Court of Canada in *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. 129.

The Respondent also submits that the Arbitrator's approach was consistent with Arbitrator Wilson's statement in *Augello and Economical Mutual Insurance Company*, (FSCO A07-001204, December 18, 2008), that "if a determination of the threshold to allow a higher level of coverage in catastrophic cases is a coverage issue, then given competing interpretations of the provisions, any confusion or discrepancy in the legislative scheme, and hence in the contract should be interpreted in a manner that favours the insured."

The Respondent further argues that the Arbitrator's decision does not lead to an absurd result. Rather, each of the provisions under subsection 2(1.1) of the *Schedule* are to be considered independently when determining catastrophic impairment. Clause 2(1.1)(f) of the *Schedule*, as stated by Spiegel J. in *Desbiens*, is a "catch-all provision for the benefit of those who were likely in the greatest need of health care."

The *Guides* do not state anywhere that one must look at all four spheres of functioning together. Nor, submits the Respondent, do they provide any guidance on how one should combine all four spheres to arrive at an overall rating. As confirmed by Dr. Leclair in his oral testimony, while two marked impairments are found in the American Social Security Administration regime, the *Guides* did not include such a requirement in the materials it took from the Social Security regulations.

The Respondent cites Arbitrator Wilson in *Augello* that:

> Spiegel J's approach to the guidelines was to treat them as part and parcel of the legislation which incorporated them … rather than as a free-standing text. As legislation, the Guides are then subject to the well-known principles of legislative interpretation that govern any legislation in a common law context.

Arbitrator Wilson further stated that:

> Whatever the original creators may have intended when they developed the AMA Guides, the Guides, as included in the *Statutory Accident Benefits Schedule* have developed a life of their own, independent of the wishes and opinions of their creators.
>
> Since the Guides, as included in the *Schedule*, are necessarily seen as part of subsidiary legislation, the courts judges and arbitrators have, through their decisions over time, added a gloss, or an interpretation that is helpful in integrating them into the scheme as a whole. This is exactly how jurisprudence in the common law provinces of Canada is meant to develop. There is no reason why the AMA Guides, as incorporated, should be subject to any different rule.

Thus, the Respondent argues that the testimony of the Appellant's experts, Drs. Brigham and Leclair, regarding the *Guides* was provided in a vacuum and that they do not offer authoritative insights into the interpretation of catastrophic impairment in Ontario.

The Respondent notes that Drs. Leclair and Brigham agreed that the CAT DAC assessors had a better understanding of the *Schedule* than themselves. Dr. Leclair conceded that he was not an expert in the *Schedule* or in Ontario law. The Arbitrator was correct to prefer the evidence and the conclusions of the CAT DAC assessors over those of Drs. Leclair and Brigham. The Respondent argues that the interpretation of the *Schedule* provided by her retained medical

expert, Dr. H. Becker, was that one class four, marked impairment, is sufficient under clause 2(1.1)(g) of the *Schedule* for a finding of catastrophic impairment.

Lastly, the Respondent submits that the Arbitrator correctly found that she was not bound by the CAT DAC Guidelines.

As noted above, the first issue in this appeal is whether clause 2(1.1)(g) contemplates "a" single class 4 or 5 impairment or "a" combined or overall class 4 or 5 impairment.

The *Concise Oxford Dictionary*, (Clarendon Press, Oxford, 1990) defines "a," in part, as an indefinite article, as follows:

> **1** (as an unemphatic substitute) one, some, any … **3** one single (not a thing in sight) …

Consistent with these definitions, the word "a" in clause 2(1.1)(g) of the *Schedule* means any or one single marked or extreme impairment out of the four areas of functioning, each of these specific areas being addressed in accordance with the *Guides*. It might still be argued that even if the Legislature had used the words "one single" marked impairment, this meant "one single overall across the board" impairment. I am persuaded that if the Legislature had meant one "overall" or "across the board" marked impairment, it would have said so.

However, to the extent that there is any ambiguity in the meaning of the word "a," I would give it in this context the same interpretation, for the reasons that follow.

In *Desbiens*, Justice Spiegel stated that:

> To be charitable, I will assume that the government intended that the catastrophic impairment threshold would be interpreted in a manner that would not deprive an innocent victim of much needed health care expenses.

In *McMichael,* Arbitrator Muir stated that:

> Significantly there is nothing in the language of paragraph (g) to suggest that the approach taken by the Court in *Desbiens*, is incorrect. If the provision is ambiguous and I find that it is, that ambiguity ought to be resolved, in the absence

> of anything pointing elsewhere, in a liberal manner having regard to the ultimate remedial purpose of the legislation.

This approach is consistent with the *Legislation Act*, 2006, S.O. 2006, c. 21, that states that:

> 64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

Laskin J. in *Bapoo*, cited above, stated that "[a]voiding unjust or unacceptable results is an essential part of the court's task in interpreting statutory language." I am persuaded that narrowly interpreting the word "a" in clause 2(1.1)(g) of the *Schedule* to mean an overall rating from all four areas of functioning noted on page 14/301 in the *Guides* would result, contrary both to the intent and to the plain wording of the *Schedule*, in an unjust or unacceptable result of depriving much needed enhanced health care benefits to accident victims most likely in greatest need.

More specifically, I find that:

1. The Appellant essentially conceded in oral argument that from its perspective, at best the statutory language was ambiguous, submitting that "my friend's interpretation of the definition is no more compatible with the purpose of the legislation than is our definition" and "my friend is correct that the *Guides* do not anywhere say in bold print or otherwise that they are conducting an overall assessment."

2. As stated by Mackinnon J. in *Arts v. State Farm*, 91 O.R. (3d) 394, the "Guides were clearly not designed by the AMA for the purpose directed by the Ontario Legislature."

   To the extent there is any conflict between the *Guides* on the one hand and the *Schedule* and the *Insurance Act* on the other, the *Insurance Act* and the *Schedule* take precedence, being the superior legislation. Or, to put it in other words, one might consider the *Schedule* and the *Insurance Act* as a "round stick," the *Guides* as a "square hole." To the extent that the former does not dovetail with the latter, it is the latter that must adapt and be harmonized with the legislation. That the *Guides* provide an example where an overall impairment rating is given does not mandate that the Legislature intended the word "a" in clause 2(1.1)(g) of the *Schedule* to mean an overall impairment rating.

3. The Appellant argues that to use a single marked impairment in clause 2(1.1)(g) is inconsistent with clause 2(1.1)(f) that uses an overall psychological impairment rating and would give clause 2(1.1)(g) psychological impairments undue weight. Implicit in the Appellant's argument is that if one does not meet the "catchall" clause 2(1.1)(f) definition of catastrophic impairment, one cannot meet the narrower definition of clause 2(1.1)(g). This, however, ignores (1) the individual clauses of subsection 2(1.1) are separated by the word "or;" (2) therefore, the individual clauses are disjunctive; and, (3) nowhere does the legislation state that meeting the clause 2(1.1)(f) definition is a prerequisite to meeting any of the other definitions of catastrophic impairment.

   As an example, an insured person may meet the clause 2(1.1)(e) catastrophic definition regarding brain impairment without meeting or even coming close to meeting the alternative clause 2(1.1)(f) definition. As determined by the Ontario Court of Appeal in *Liu*, in view of the plain wording of subclause 2(1.1)(e)(i) regarding suffering a brain impairment that results in a specific Glasgow Coma Scale score within a reasonable period of time, it matters not that the insured person was subsequently capable of managing a wide variety of tasks or what description was given to his head injury.

   In short, there is no "inconsistency" in an insured person meeting the "g" definition of catastrophic impairment but not the definition in "f."

4. The medical analysis in this case used the Chapter 4, Emotional or Behavioral Impairments Table 3 of the *Guides* to assess the Respondent's psychological impairment, finding a whole person impairment ("WPI") of 22%, that is, within the moderate range. If the Respondent had met the higher category of "severe limitations impeding useful action in almost all social and interpersonal daily functions" (approximating a class 4 marked impairment on page 14/301), the WPI rating would have been 30 to 49%.

   The Arbitrator found that the Respondent had a 20% WPI for her right knee and a 2% WPI for her left ankle. If a Table 3, 35% WPI was given for her psychological impairment, the Respondent's combined WPI of 49% would still not meet the 55% catastrophic impairment threshold under clause 2(1.1)(f). I am not persuaded by the

Appellant's argument that a narrow interpretation of clause 2(1.1)(g) is still preferred because there would still be fewer "inconsistencies" between clauses (f) and (g).

5. Any "inconsistency" between clause (f) and (g) is because the Legislature has chosen different wording. One combines impairments in clause 2(1.1)(f) because that is what the provision explicitly mandates. Nowhere does clause 2(1.1)(g) state, in "bold print or otherwise," that the ratings for the four areas of function are to be combined.

   Both clauses (f) and (g) speak of impairments. Clause (f) does not modify the word impairment by the adjective "physical." There is a requirement in clause (g) that the "impairment" is "due to mental or behavioural disorder." However, clause (g) does not modify the word "impairment" itself by the adjective "psychological." Thus, while the impairment in "g" must be due to a mental or behavioural disorder, the manifestation, for example, regarding activities of daily living may be multifaceted.

6. None of the medical witnesses presented by either side at the arbitration hearing were qualified by the Arbitrator in any area of expertise. This was explained by counsel as a means of short-circuiting the process to move the arbitration quickly.

   However, as codified by O.Reg. 438/08, s. 8, effective January 10, 2010, Rule 4.1.01(1)(b) of the *Rules of the Civil Procedure* confirms that the duty of every expert engaged by or on behalf of a party to provide evidence includes providing opinion evidence that is related only to matters that are within the expert's area of expertise. The Arbitrator's error in failing to qualify witnesses and to keep qualified experts within their areas of expertise as properly established by the adjudicator augmented the problem in this case, as stated by counsel, that "witnesses are hard to control once they get rambling."

   The parties submitted that the medical witnesses were not produced to "tell us how to interpret" the *Schedule*. But, in truth, that is precisely why the witnesses were produced, by both sides, to tell us how the *Insurance Act* and the *Schedule* are to be interpreted, either directly, or indirectly through the back door of the *Guides*. This is contrary to the Supreme Court's statement in *R. v. Mohan* [1994] 2 S.C.R. 9 that:

> Experts, however, must not be permitted to usurp the functions of the trier of fact causing a trial to degenerate to a contest of experts.

7. The CAT DAC Guideline upon which the Appellant relied that required at least two areas of marked impairment could not be located at the appeal hearing. The Appellant, however, advised that this was an earlier, replaced, Guideline no longer in effect at the time of this accident. In any event, the recommendation of that Guideline that there be two marked impairments to render a catastrophic determination under clause 2(1.1)(g) was inconsistent with the Appellant's argument that there must be at least an overall marked impairment rating.

I am not persuaded that the Social Security Administration Guidelines that prevail in the United States, as advocated by medical witnesses, provide any interpretive assistance regarding the specific Ontario test and the legislative purpose, as set out in by Mackinnon J. in *Arts v. State Farm*, 91 O.R. (3d) 394, leave to appeal denied in *Arts (Litigation Guardian of) v. State Farm Insurance Co.*, [2008] O.J. No. 5740, "that accident victims with greatest needs obtain enhanced benefits."

Accordingly, I am not persuaded that the Arbitrator erred in law in finding that the Respondent required a class 4, marked impairment, in only one of the areas of functioning set out on page 14/301 of the *Guides*.

III. DID THE ARBITRATOR ERR IN FINDING THAT THE RESPONDENT HAD SUFFERED A CLASS 4 OR MARKED IMPAIRMENT IN HER ACTIVITIES OF DAILY LIVING?

The Appellant does not take issue with the Arbitrator's finding that the Respondent had significant limitations in her activities of daily living. The Appellant, however, submits that the Arbitrator erred in law in concluding that these significant limitations were the result of psychological impairments. More specifically, the Appellant argues that the Arbitrator failed to take into account that she had already assigned significant limitation of the Respondent's activities of daily living to the latter's physical pain. The Appellant notes that the *Guides* state, at page 2/9:

> In general, the impairment percents shown in the chapters that consider the various organ systems make allowance for the pain that may accompany the impairing conditions. Chronic pain, also called the chronic pain syndrome, is evaluated as described in the chapter on pain (p. 303) [found in Chapter 15].

Page 14/297 of the *Guides* states that it may be useful as a guideline in determining whether pain is a symptom of a mental impairment, to consider whether all "possible somatic causes of the pain have been eliminated by careful, comprehensive medical examinations." Dr. Brigham testified at the arbitration hearing that impairment ratings for various organ systems make allowance for the pain that accompanies the impairment.

The Appellant submits the Respondent had "real and continuing" orthopaedic injuries causing real pain and functional limitations and complaints. The Appellant detailed the Respondent's testimony as to her limitations caused by her knee and ankle injuries. The Appellant argues that depression and anxiety did not cause these limitations. Rather, depression and anxiety were the result of the impact of these limitations.

The Appellant argues that there was no evidence to refute its submission that the Respondent's physical impairments were the main cause of her limitations in her activities of daily living (described by Dr. Leclair as the "primary cause" and by Dr. D. Salmon, who was part of the CAT DAC team, as the "predominate cause" of the Respondent's limitations). Further, the Arbitrator made a factual finding that the Respondent's knee was in constant pain and this constant pain was sufficiently intense to result in extensive diminution in her ability to carry out specific activities of daily living.

The Respondent submits that she clearly articulated to the Arbitrator her level of emotional impairment. The CAT DAC team included a psychologist, Dr. Salmon, and a psychiatrist, Dr. H. Rosenblat. Dr. Rosenblat found that the Respondent met the criteria for an Adjustment Disorder with Depressed Mood. Secondary to her depressed mood, he believed that "psychological factors are playing a significant role in her chronic pain issues and therefore a diagnosis of Pain Disorder Associated with Psychological Factors was made." The Respondent submits that the Appellant is challenging the Arbitrator's finding of fact that the Respondent suffered a class 4 marked impairment in her activities of daily living.

The Respondent submits that the Arbitrator's decision was in accordance with the evidence presented and that her findings of fact ought to be accorded deference. Delegate Naylor, in *Kasap and Allstate Insurance Company of Canada,* (FSCO P96-00071, March 13, 1998), set out the standard of appellate review as follows:

> It is well established that my role on appeal is not to second guess the arbitrator's evaluation of the evidence or substitute my own view of the weight to be attributed to it. The arbitrator has the advantage of hearing and observing the witnesses in person. This gives an arbitrator the opportunity to assess the credibility of their testimony and to evaluate the documentary evidence in light of the evidence as a whole. For that reason, factual findings, particularly those that rest on an assessment of credibility, will not generally be disturbed unless the arbitrator has made some serious error, such as ignoring material evidence, considering irrelevant factors or reaching findings that are unsupported on the evidence.

The Appellant argues, however, that one "must separate the impairments that are related to pain that is the consequence of the physical impairments ... that pain has been counted so you can't count that pain again when you move into the mental and behavioural disorder." The Appellant submits that there was no expert evidence refuting Dr. Leclair's testimony that an assessment in accordance with the *Guides* must determine and exclude the effects of any physical impairments, including any related pain. In this case, as 50% of Dr. Leclair's 20% WPI for the right knee related to knee pain, a 10% WPI must be taken away from the psychological impairment. The Appellant thus argues that it was Dr. Leclair's uncontradicted evidence that the Respondent rated no greater than a class 3, moderate impairment under page 14/301 Table of the *Guides*.

This approach, it is submitted, was taken in *B.P. and Primmum Insurance Company*, (FSCO A05-001608, December 21, 2006). *Ms. G and Pilot Insurance Company,* (FSCO A04-000446, March 16, 2006), affirmed on appeal (FSCO P06-000004, September 4, 2007) also noted that the *Guides* did not support the double counting of impairments. It would be double counting to include in psychological impairment factors with physical impairments. Thus, it is submitted that the *Schedule* expressly excludes the impact of the physical impairments and associated pain limitations in arriving at an impairment rating due solely to psychological impairments.

The Appellant notes that the Arbitrator, at page 28 of her decision, states that:

> For Ms. Pastore, the combination of physical limitations and the associated pain are intertwined. They both play an integral part in having transformed her life from being a completely self-sufficient and independent individual and caregiver to her husband to becoming almost completely dependent on him and others for her most basic personal care needs. I agree with the CAT DAC conclusions that it is not possible to **factor out** the impact of any such discrete physical impairments and associated pain limitations, and that any impairment rating should incorporate both on a "cumulative basis." [emphasis in the original]

It is submitted that the Arbitrator erred in basing her assessment of marked impairment in the sphere of Activities of Daily Living based on all causes responsible for the Respondent's limitations (that is, her knee and ankle injuries, pain from these injuries as well as pain that did not have a somatic cause, depression and anxiety). The Arbitrator, rather, should have determined whether the impairment rating would have been lower when considering the impairments related "solely" to her psychological impairments.

The Appellant concedes that the word "solely" is its own word, and that "solely" does not appear in clause 2(1.1)(g) of the *Schedule*. Nor does the clause use the words "due to mental or behavioural impairment." Rather, the Legislature has chosen the words "mental or behavioural ***disorder***" (emphasis added), notwithstanding the Appellant's submission that "it seems the experts all use the word psychological impairment because that's what we're addressing."

Thus, during oral submissions, I posed the following question to the Appellant:

> There was a finding [by the Arbitrator] that there was a mental or behavioural disorder; namely pain disorder associated with both psychological factors and a general medical condition. The question I have: Why is it then necessary to dissect that mental or behavioural disorder and to tweeze – to tweeze out those parts that are purely psychological from those that are not when the pain disorder encompasses both?

The Appellant's response, in part, was that there was physical pain, chronic pain and a third type introduced by Dr. Leclair, psychogenic or a "pure" psychological diagnosis. Thus,

> … by giving it some sort of all encompassing diagnosis, psychological diagnosis, doesn't delete or detract from the need to … separate and the need to separate real pain does not fall under a psychological diagnosis … and then Leclair went through in painstaking detail why he concluded that the vast majority of Ms. Pastore's

> complaints were the result of the pain flowing … from the injury as opposed to [what] I'll call it psychological pain.

The Appellant submitted that "the crux of the evidence by Brigham and Leclair was that you can't in effect mix your apples and oranges," quoting Dr. Leclair's examination-in-chief where Dr. Leclair agreed with counsel that a wide band of pain that falls under non-Chapter 14 aspects of the *Guides* has to be taken out of clause 2(1.1)(g) of the *Schedule*. In oral submissions, the following questions and answers occurred:

> Delegate Blackman: If I may, I thought it was – the parties accepted that Dr. Leclair was not an expert in the *Schedule*?
>
> Mr. Rogers: That's correct.
>
> Delegate Blackman: But he seems to be asked his opinion as to what there is or should not be properly included under (g) which is part of the *Schedule*.
>
> Mr. Rogers: That's correct.

This essentially returned to my concern:

> What I'm hearing is in large measure you're saying Dr. Leclair and Dr. Brigham interpret "due to" to mean "solely." They're giving their expert advice – or expert opinion. The interpretation of "due to" in the *Schedule* means solely. What expertise either of these gentlemen might have with regard to statutory interpretation, I do not know, but what I very much wish to hear from both counsel is what the words "due to" mean … We have *Resurfice* which talks about "but for" … where there's no requirement that the negligence is solely or the sole cause. We have material [contribution] in *Correira*, and what I'm hearing is that case law is irrelevant when it comes to this section because we have these experts who say, no, no, no, this is the correct approach.

The Supreme Court of Canada, in *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7, stated that "there is more than one potential cause in virtually all litigated cases of negligence." Ultimately, at page 153 of the appeal hearing transcript, the Appellant submitted that "due to" means the same as "as a result of" and "that it doesn't require the addition of any other word because it means only emotional and behavioural disorders."

It is not disputed that the Respondent suffers a marked impairment in the sphere of activities of daily living. The dispute is whether this sphere of marked impairment is "due to mental or

behavioural disorder," which turns on what the Legislature meant by the latter words. Possibilities included:

1. Solely or only due to a psychological impairment, as argued by the Appellant;
2. Due to combined physical and psychological impairments;
3. The "but for" test reiterated in *Resurfice*, applied to mental or behavioural disorders; or,
4. The material or significant contribution test, similarly applied. [3]

In *Ms. G* and in *B.P.*, which the Appellant cites, I addressed the question of "double counting" within the context of clause 2(1.1)(f) of the *Schedule*, not in context of any relationship between (f) and (g).

I did state in *Ms. G* that "… the approach of the *Schedule* is that ultimately this is an adjudicative, not a medical determination." In *Liu*, the Ontario Court of Appeal addressed subclause 2(1.1)(e)(i) of the *Schedule*. The latter defines catastrophic impairment on the basis of a score of 9 or less on the Glasgow Coma Scale ("GCS") within a reasonable period of time. The Court of Appeal stated that:

> [26] The respondents' objection is solely based on the fact that there were GCSs following the accident, which they submit were also "administered within a reasonable period of time after the accident", which were greater than 9.
>
> [27] ***In my view the answer to the respondents' objection is the plain language of the legislation***. Provided there is a brain impairment, all that is required is one

[3] Set out by Arbitrator Makepeace in *Correia and TTC Insurance Company Limited*, (FSCO A00-000045, October 27, 2000), upheld on appeal (P00-00061, July 16, 2001). Subsequent to the Supreme Court of Canada decision in *Resurfice*, the Ontario Court of Appeal stated, in *Monks v. ING Insurance Company of Canada*, 90 O.R. (3d) 689:

> … the trial judge's application of the material contribution test conforms with a long line of arbitral decisions in which this test has been utilized to resolve causation issues in accident benefits disputes … Before this court, ING offers no authority to support its assertion that the material contribution test does not apply to statutory accident benefits cases.

The Workplace Safety and Insurance Appeals Tribunal, in *Decision No. 776/06*, 2008 ONWSIAT 2939 (CanLII), in considering the *Monks* and *Resurfice* decisions, held that it did not find it appropriate to depart from the Tribunal's longstanding "significant contribution" approach to causation that accorded, as stated in *Decision No. 915* (1989), 7 W.C.A.T.R. 1, with:

> .. the proposition that the breadth of the workers' protection for the consequences of injuries was not intended to be reduced by the conversion from the common law to the statutory system.

> GCS score of 9 or less within a reasonable time following the accident. ***It is a legal definition to be met by a claimant and not a medical test***.
>
> [28] I agree with the appellant's submission that the fact that there may have been other higher scores also within a reasonable time after the accident is irrelevant.
>
> [29] ***In my view the trial judge fell into error in equating the statutory test to a medical one. It is not.***
>
> [30] ***Any notion of catastrophic injury, other than the specific meaning ascribed to that term by the legislation must be discarded when considering whether a claimant meets the statutory test. The statutory scheme creates a bright line rule which is relatively easy to apply. This enhances the ability of those looking to the definition to know what injuries will and will not be considered catastrophic***. Having the same definition for both no fault and third party liability claims avoids inconsistency. The ease with which the rule can be applied adds an element of predictability which will facilitate the settlement of claims.
>
> [31] It matters not that there is some evidence - albeit disputed evidence - that the appellant is capable of managing his property, clothing, hygiene, shelter, safety and taking two trips to China. Nor does it matter that his head injury was described as "moderate to severe" or "moderately severe".
>
> [32] All that is required is a brain impairment and a GCS reading of 9 or below within a reasonable period of time after the accident. The appellant met both criteria on the trial judge's findings and is entitled to recover damages for health care costs in accordance with the verdict of the jury.
>
> [emphasis added]

The plain language of clause 2(1.1)(g) of the *Schedule* requires an impairment that, in accordance with the *Guides*, results in a class 4 (marked) impairment or a class 5 (extreme) impairment due to mental or behavioural disorder. There is no statutory requirement that the Arbitrator dissect the mental or behavioural disorder into supposed constituent parts, as advocated by Dr. Leclair. I am not persuaded that clause 2(1.1)(g) of the *Schedule* incorporates the word "solely" or uses the word "disorder" interchangeably with the word "impairment."

The Arbitrator found, at page 28 of her decision, that the Respondent's "emotional, behavioural and mental difficulties are well documented," noting, in part, Dr. Leclair's review of prior assessments.

Further, the Arbitrator, at Footnote 49 of her decision, notes that the *American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders* (Fourth Edition, Washington, DC, American Psychiatric Association, 1994) (DSM Text Revision) ("DSM-IV"), at page 499, includes as a Pain Disorder "**307.89 - Pain Disorder Associated With Both Psychological Factors and a General Medical Condition**." Both psychological factors and a general medical condition are judged to have important roles in the onset, severity, exacerbation, or maintenance of the pain.

In contrast, the DSM-IV states that the separate "Pain Disorder Associated With a General Medical Condition" is "not considered a mental disorder" and is not given a code number. It is not disputed that a "Pain Disorder Associated with Both Psychological Factors and a General Medical Condition" is a mental or behavioural disorder.

In this case, the Arbitrator found that the Respondent was diagnosed with a Pain Disorder Associated with both Psychological Factors and a General Medical Condition. There was a basis for this factual finding, being the medical report opinions of Dr. Salmon and Dr. Rosenblat within their undisputed areas of expertise.

Finally, the Arbitrator found that the Respondent's Pain Disorder Associated With Both Psychological Factors and a General Medical Condition "has caused her to suffer impairments that properly fall within Chapter 14." At page 28 of her decision, the Arbitrator stated, based on the medical documentation and the Respondent's testimony, that the impact of the Respondent's emotional, behavioural and mental disorders "significantly impede her daily living tasks and the resulting impairment falls within a Class 4 marked level of impairment."

The Appellant, at paragraph 87 of its written submissions, states that:

> Aviva does not take issue with the fact that the Respondent was diagnosed with a pain disorder that was partly attributed to psychological factors or that she has documented problems with anxiety and depression.

The *Concise Oxford Dictionary* (Oxford University Press, 1990) defines "due to" as "because of, owing to." There was ample support for the Arbitrator's finding on causation, on a "but for," "material or significant contribution," or "because of" or "owing to" (or, as ultimately put

forward by the Appellant, "result of") basis. As stated in *Kasap*, it is not my role as an appellate officer to second guess the Arbitrator's evaluation of the evidence or to substitute my own view of the weight to be attributed to it.

To paraphrase the Court of Appeal at paragraph 24 of in *Liu*, the Arbitrator having made the above-noted findings, the Respondent met the statutory definition of catastrophic impairment and the Arbitrator's ruling must stand.

I am thus not persuaded that the Arbitrator erred in law in her conclusion. Accordingly, this second ground of appeal is also rejected and the Arbitrator's February 11, 2009 decision is confirmed.

IV. EXPENSES

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

Lawrence Blackman Director's Delegate	December 22, 2009 Date