

**AMA GUIDES TO IMPAIRMENT RATING  
CANADIAN MEMORIAL CHIROPRACTIC COLLEGE (CMCC)  
CANADIAN SOCIETY OF CHIROPRACTIC EVALUATORS**

**CATASTROPHIC IMPAIRMENT:  
EARLIER DETERMINATION, FACTORING-IN  
PRE-MORBID IMPAIRMENTS AND  
POST-ACCIDENT POTENTIAL DETERIORATION**

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# **CATASTROPHIC IMPAIRMENT: EARLIER DETERMINATION, FACTORING-IN PRE-MORBID IMPAIRMENTS AND POST-ACCIDENT POTENTIAL DETERIORATION**

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Courts and Arbitrators have helped us to understand how the definition of catastrophic impairment may apply to individuals who suffer very severe injuries in motor vehicle accidents. These same decisions have helped us to understand that clinical findings by treating and assessing health care professionals are integral to the process of evaluating whether a person has sustained a catastrophic impairment.

The goal of this paper is to provide health care professionals with further tools to assist them in conducting evaluations and providing detailed reports to assist in Catastrophic Impairment determination. This paper examines the definition of catastrophic impairment, legislative intent and provides a summary of all of the decisions concerning catastrophic impairment determination by the courts and by FSCO Arbitrators.

The paper analyzes key chapters in the American Medical Association Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition<sup>1</sup>. For each Chapter, we identify key information and assessments by treating and assessing health care professionals that can be used to assist in CAT Impairment designation. The paper analyses the Glasgow Coma Scale and the Glasgow Outcome Scale in light of clinicians' assessments. We then address the legal meaning of causation as it relates to accident benefit impairments.

## **A. CATASTROPHIC IMPAIRMENT**

"Catastrophic Impairment" has been with us since November 1, 1996. The post-September 1, 2010 definition of catastrophic impairment follows:

- 3(2) For the purposes of this Regulation, a catastrophic impairment caused by an accident is,
- a) paraplegia or quadriplegia;
  - b) the amputation or other impairment causing the total and permanent loss of use of an arm or a leg;

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<sup>1</sup> AMA Guides To The Evaluation Of Permanent Impairment , 4<sup>th</sup> Edition, ed. Doege, T.C. © 1995, American Medical Association

- c) the total loss of vision in both eyes;
  - d) subject to subsection (4), brain impairment that, in respect of an accident, results in,
    - (i) a score of 9 or less on the Glasgow Coma Scale as published in Jennett, B. and Teasdale, G., *Management of Head Injuries*, Contemporary Neurology Series, Volume 20, F.A. Davis Company, Philadelphia, 1981, according to a test administered within a reasonable period of time after the accident by a person trained for that purpose, or
    - (ii) a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale, as published in Jennett, B. and Bond, M., *Assessment of Outcome After Severe Brain Damage*, Lancet i:480, 1975, according to a test administered more than six months after the accident by a person trained for that purpose;
  - e) subject to subsections (4), (5) and (6), an impairment or combination of impairments that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in 55 per cent or more impairment of the whole person; or
  - f) subject to subsections (4), (5) and (6), an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioral disorder.
- (3) Subsection (4) applies if an insured person is under the age of 16 years at the time of the accident and none of the Glasgow Coma Scale, the Glasgow Outcome Scale or the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, referred to in clause (2) (d),(e) or (f) can be applied by reason of the age of the insured person.
- (4) For the purposes of clauses (2)(d),(e) and (f) an impairment sustained in an accident by an insured person described in subsection (3) that can reasonably be believed to be a catastrophic impairment shall be deemed to be the impairment that is most analogous to the impairment referred to in clause (2)(d), (e), or (f) after taking into consideration the developmental implications of the impairment.



- (5) Clauses (2) (e) and (f) do not apply in respect of an insured person who sustains an impairment which occurs as a result of an accident unless,
- (a) A physician or in the case of an impairment that is only a brain impairment, either a physician or a neuropsychologist states in writing that the insured person's condition is unlikely to cease to be a catastrophic impairment; or
  - (b) Two years have elapsed since the accident.
- (6) For the purpose of clauses (2) (e) and (f) an impairment that is sustained by an insured person but is not listed in the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th edition, 1993 shall be deemed to be "the impairment that is listed in that document and that is most analogous to the impairment sustained by the insured person".

The new SABS which came into effect September 1, 2010 contains only one substantive change. A person suffering an amputation or complete and permanent loss of use of one arm or one leg will now be deemed catastrophically impaired.

There is also one procedural change. New section 45(2)1 of the SABS limits assessment or examination in connection with a determination of Catastrophic Impairment to "a physician". New section 45(2)2 of the SABS creates an exception to the "physician only" rule "if the impairment" is only a "brain impairment". In these cases, the assessment or examination "may" be conducted by a "neuropsychologist".

The section states:

45. (1) An insured person who sustains an impairment as a result of an accident may apply to the insurer for a determination of whether the impairment is a catastrophic impairment.
- (2) The following rules apply with respect to an application under subsection (1):
1. An assessment or examination in connection with a determination of catastrophic impairment shall be conducted only by a physician.
  2. Despite paragraph 1, if the impairment is only a brain impairment, the assessment or examination may be conducted by a neuropsychologist.



As these “rules” apply with respect to an “application”, it is likely that only the “application” itself must be completed by a physician or neuropsychologist. Arbitrators and judges rely heavily on other health professionals to help with catastrophic determinations such that evidence and reports from others will continue to be essential.

With respect to when an application for catastrophic impairment can be made, new subsection 3(5) now stipulates that the whole person impairment test and the marked or extreme impairment test can only be considered prior to the 2 year post accident mark if the impairment includes a brain injury and if the impairment is “unlikely to cease to be a catastrophic impairment.”

## **B. THE DEFINITION: THE DRAFTERS’ INTENT**

Arbitrators and courts have commented on the Legislature’s definition of catastrophic impairment.

One of the seminal decisions considering the definition of catastrophic is *Desbiens v. Mordini* a decision of Justice Spiegel of the Ontario Superior Court in 2004.<sup>2</sup> In *Desbiens*, the Court commented that:

“the legislature’s definition of “catastrophic impairment” is intended to foster fairness for victims of motor vehicle accidents and ensure that victims with the greatest health needs have access to expanded medical and rehabilitation benefits.”<sup>3</sup>

It is also important in interpreting the definition to remember that:

“the SABS are remedial consumer protection legislation.”<sup>4</sup>

Typically, remedial consumer protection legislation is intended to be interpreted in a manner that assists consumers.

As the court noted again in *Desbiens* at paragraph 238 the text of the regulation itself indicates that the drafters clearly intended the definition of “catastrophic impairment” to be inclusive rather than restrictive.

As a result of *Desbiens* and a number of decisions following *Desbiens*,<sup>5</sup> when considering section (f) of the definition, Arbitrators and Judges have concluded

<sup>2</sup> *Desbiens v. Mordini*, [2004] CanLII 41210 (ON S.C.)

<sup>3</sup> *Desbiens*, *supra* para 237- 234

<sup>4</sup> *Smith v. Co-Operators General Insurance Co.*, [2002] 129 S.C.R.

<sup>5</sup> *Desbiens*, *supra*, has been subsequently followed by: *Arts v. State Farm Insurance Company*, Can LII 25055 (ON S.C.), *McMichael and Belair Insurance Company* (2006) Appeal P)5-00006; *Ms. G and Pilot Insurance Company* (FSCO A04-000446, March 16, 2006), affirmed on Appeal (FSCO P06-00004, September 4, 2007); *Augello and Economical Mutual Insurance Company*, (FSCO A07-001204, December 4, 2007 and December 18, 2008); *Pastore v. Aviva*, [2009] O.F.S.C.O. No. 24, February 11, 2009

that it is appropriate to assign a percentage rating to mental and behavioural impairments and to add that percentage, using the applicable tables, to the other percentage ratings of impairment to determine whole person impairment. More recently in *Kusnierz*, the Ontario Court of Appeal affirmed the *Desbiens* approach stating:

“The language of the *SABS*, the purpose of the *Guides*, the *Guides*’ references to combining physical and psychological impairments, and the goals of the *SABS* lead me to conclude that the combination of physical and psychological impairments is appropriate.”<sup>6</sup>

Apart from the legislative intention of the drafters, the Financial Services Commission of Ontario (FSCO) created Commission Guidelines dated October 2001 as a guide to Designated Assessment Centre’s (DAC’s) assessing catastrophic impairment.

As section 3 (2) (e) of the definition indicates that a person with a combination of impairments which results in fifty-five percent or more impairment of the whole person, it is not with any surprise that we note the Guidelines asked the CAT DAC to “ensure it evaluates the whole person”.<sup>7</sup>

The definition of catastrophic was modified for accidents occurring after September 30, 2003 by Bill 198 when it allowed clauses (f) and (g) (now (e) and (f) for accidents after September 1, 2010,) to be used as a basis for determining catastrophic impairment when two years, as opposed to three years, had elapsed since the accident.

The other modification that occurred in Bill 198 was the inclusion of sections (1.3), (1.4) and (3) (s. 3(3) and 3(4) for accidents after September 1, 2010). Sections (1.3) and (1.4) acknowledged the difficulty of using the Glasgow Coma Scale, Glasgow Outcome Scale and AMA Guides to assess the impairments of a person under the age of sixteen. Sections (1.3) and (1.4) allow assessors who reasonably believe a person under the age of sixteen years to have suffered a catastrophic impairment to analogize that impairment to the impairment referred to in clause (1.2) (e), (f) or (g) (s. 2 (d) (e) and (f) for accidents after September 1, 2010).

Section (3) (now 3 (4)) allows the assessor evaluating impairments that are not listed in the AMA Guides to deem the impairment to be the impairment in the Guides that is most analogous to the impairment sustained by the insured person.

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<sup>6</sup> *Kusnierz v. Economical Mutual Insurance Co.* 2011 ONCA 823

<sup>7</sup> Catastrophic Designated Assessment Centre Assessment Guidelines October 2001, FSCO, page 4-2 paras 4-5.

The net effect of both of these revisions is to allow greater clinical judgment to be used in the assessment of impairments, including consideration of the developmental implications of impairments.

### **C. AMA GUIDES 4<sup>TH</sup> EDITION – RULES FOR EVALUATION**

The Guides themselves recognize a significant role for physician discretion. Section 2.2 of Chapter 1 “Impairment Evaluation” indicates as follows:

“If in spite of an observation of a test result the medical evidence appears not to be of sufficient weight to verify that an impairment of a certain magnitude exists, the physician should modify the impairment estimate accordingly, describing the modification and explaining the reason for it in writing”.

### **D. ARBITRATION AND COURT DECISIONS**

Below you will find a summary of Court and FSCO arbitration decisions which address whether a person has sustained a catastrophic impairment.

#### **GCS DECISIONS**

##### **Holland v. Pilot Insurance Co., [2004] O.T.C.544, [2004] O.J. No. 2737**

The Plaintiff was a 15 year old boy who sustained injuries in a motor vehicle accident after he had been consuming alcohol and marijuana. Medical experts were divided as to whether Plaintiff’s GCS results at 7/15, 8/15 and 4/15 could be considered. Keenan J. found that the results could be considered and found that the status of catastrophic impairment is a creature of legislature. If restrictive meaning is to be assigned to the regulation, it should be clearly cited in the regulation itself.

##### **Young and Liberty Mutual Insurance Company, [2005] O.F.S.C.O. No. 76**

The Applicant was involved in a car accident in which he was trapped in his car and unable to breath. His GCS was less than 9/15 just after the accident. He suffered from seizures and medical personnel intubated him. The Insurer argued that his GCS should not be considered. Director’s Delegate Evans upheld the Arbitrator’s decision and found that the legislation only requires that there be a reading of 9 or less. As other factors are not considered in the legislation, they should not be considered when determining catastrophic impairment. Therefore, the GCS was considered. The Applicant did meet the threshold to be determined catastrophically impaired.



**Tournay and Dominion of Canada General Insurance Co.,**  
**[2006] O. F.S.C.O. No. 137**

The Applicant was injured in a motor vehicle accident during which she was trapped in her car and had to be intubated. Her GCS was less than 9/15. The Insurer took the position that because she was intubated her GCS should not be considered. Arbitrator Kominar found that the legislation is not restrictive, her GCS should be considered and therefore she met the threshold for catastrophic impairment.

**B. and RBC General Insurance Co., [2009] O.F.S.C.O. No. 5**

The Applicant was injured in a motor vehicle accident and made an application for determination of catastrophic impairment. Arbitrator Murray assessed each of the areas of impairment and found that they did not equal a WPI of 55% or more. Additionally, Arbitrator Murray found that the Applicant's failure to obtain testimony or reports from some of her attending physicians called the Applicant's credibility into question. Further Arbitrator Murray found that one of the Applicant's medical experts was evasive and unresponsive and this called his credibility into question.

**Liu v. 1226071 Ontario Inc. (c.o.b. Canadian Zhorong Trading Ltd.),**  
**2009 O.N.C.A. 571, [2009] O.J. No. 3014**

In this instance, the Plaintiff appealed from a trial decision that he had not sustained a catastrophic impairment as a result of a motor vehicle accident and as such was not entitled to the jury award of damages of \$865,000.00 for health care expenses. He lost consciousness; the initial GCS administered by the paramedics was less than nine (9). MacFarland J. found that the fact that there might have been other higher GCS scores also within a reasonable time after the accident was irrelevant. It was a legal definition to be met by a claimant and not a medical test. As such the Plaintiff was deemed catastrophically impaired and was entitled to the jury award of health care damages.

**Hodges v. Security National Insurance Co. 2012, Carswell Ont 15775,**  
**Appeal P12-00029 O.F.S.C.O. No. 26**

Mr. Hodges was involved in a motorcycle accident at about 10:50 p.m. on the night of August 5, 2009. Ambulance attendants arrived and took Glasgow Coma Scale readings at 11:06, 11:12 and 11:18 p.m. They were all 11 out of 15. Over the ensuing days, Mr. Hodges' GCS was obtained on a number of occasions. During this ensuing period, he was on sedatives, painkillers and other consciousness reducing medications. Mr. Hodges' claimed to suffered a catastrophic impairment.

Arbitrator Renahan ultimately held that Mr. Hodges did sustain a catastrophic impairment in the accident. In regards to the various GCS scores obtained in the days following the accident, Arbitrator Renahan commented as follows:

“I find that the GCS test is not a scientifically precise measurement of level of consciousness. Therefore, I am not required by the legislation to undertake a scientific analysis of what Mr. Hodges’ GCS score might have been had there not been complicating factors. Nor am I required to question the validity of the score because of the usual complicating factors which might affect the GCS score of a patient like Mr. Hodges. A GCS score of 9 or less is relatively easy to determine.”

On appeal to the Director’s Delegate, Delegate Blackman upheld Arbitrator Renahan’s decision that there was an evidential basis for a finding satisfying the legal test that the GCS score of 9 or less was taken within a reasonable period of time after the accident. Director’s Delegate Blackman cites Arbitrator Kilaran in Arbitration decision *M. M. and Guarantee* where Arbitrator Kilaran rejected the argument that the GCS score of 9 or less must result solely from the insured person’s brain impairment. Director’s Delegate Blackman indicates:

“the causal connection between events is established in law if either the “but for” or the material contribution test is met. That is, if the impaired consciousness measured by the GCS score would not have occurred but for the brain impairment, then causation is established. If that cannot be determined, then if the brain impairment materially contributed to the GCS score, causation is also established.”

Director’s Delegate Blackman cites *Athey v. Leonati, Monks v. ING and Clements v. Clements, 2012 S.C.C. 32 (CAN LII)*. Quoting Clements at paragraph 49:

“The cases consistently hold that scientific precision is not necessary to a conclusion that ‘but for’ causation is established on a balance of probabilities.”

**Security National Insurance Co. v. Hodges, 2014 ONSC 3627 (2014-07-14)**

In 2014, Security National Insurance sought judicial review of the decision of Director’s Delegate Blackman. The Court affirmed the Director’s Delegate’s decision.

The Court stated that the underlying assumption of Security National’s position is that a brain injury itself must cause a GCS score of 9 or less. The Court held that

this is not the way the *Statutory Accident Benefits Schedule* (“SABS”) reads. The SABS focuses on measuring brain *impairment*, not brain *injury*, and it uses a GCS score as the determinative measure. Further, the Court agreed that there is no requirement that the brain injury by itself would have reduced a GCS score to 9 or less. It is sufficient that the person claiming catastrophic impairment had *any* brain injury causing *any* impairment to make that person's GCS score relevant for the purposes of the definition in the SABS.

The Court highlighted that the purpose of the GCS threshold test in the SABS is simply to allow a person to make a claim for enhanced benefits. It does not ensure that the person will qualify for additional benefits. The person will still need to show entitlement based upon his or her subsequent medical condition and the degree of impairment sustained.

**M. M. and Guarantee FSCO A-10-00338 Sept 19/12**

Arbitrator rejected argument that GCS score of 9 or less must result solely from the insured person's brain impairment.

**Liu v. 1226071 Ont., Inc., 2009 ONCA 571 (CanLII)**

All that is required is one GCS score of 9 or less within a reasonable time period following the accident

**Mallat and The Personal O.F.S.C.O. No. 179(2011-12-16)**

The question to be answered is whether the GCS test was administered within a reasonable period of time after the accident in relation to the facts of the particular accident.

**AMA GUIDES – BASED DECISIONS**

**Snushall v. Fulsang, [2003] O.T.C. 363, [2003] O.J. No. 1493**

The Plaintiff was seriously injured in a motor vehicle accident. She advanced a claim for catastrophic impairment on the basis of impairment of 55% or more of the whole person. Conflicting medical expert evidence was given and Lax J. found that she was not entitled to damages for future health care costs, as the conflicting evidence failed to establish that her injuries resulted in 55% or more impairment of the whole person. Although she suffered significant injuries, her functional abilities were still reasonably good.



**Desbiens v. Mordini, [2004] O. J. No. 4735**

Landmark case in which Spiegel J. articulates the ‘Desbiens approach’ summed up as: **“It is in accordance with the *Guides* to assign percentages to [the Applicant’s] psychological impairments and to combine them with his physical impairments in determining whether or not he meets the definition of catastrophic impairment under clause (f)”**. Further, Spiegel J. examines the history of the legislative scheme in this area and additionally does an individual assessment of each of the Plaintiff’s impairments.

**Monks v. ING Insurance Company of Canada, [2005] O.J. No. 2526**

Susan Monks was born on September 29, 1955. She was involved in three motor vehicle accidents. In the 1993 accident, Ms. Monks suffered whiplash-type symptoms. The evidence was that her injuries were relatively minor. The symptoms arising out of the 1995 accident were also related to the cervical spine. They were more serious, longer lasting duration and had continuous impact on Ms. Monks’ life up to the last accident in 1998. The 1998 accident exacerbated the symptoms Ms. Monks had leading up to that accident. Her condition deteriorated rapidly through 1999. She underwent neck surgery in 1999 and again in 2001.

In respect of the 1998 accident, ING took the position that Ms. Monks was “catastrophically injured from the second accident, and that the third accident did not cause a catastrophic impairment”. ING therefore terminated benefits being paid following the third accident in 2002, one month after settling the earlier claim.

Justice Lalonde concluded that the 1998 accident made a material and significant contribution to the catastrophic impairment suffered by Ms. Monks. ING argued that Ms. Monks was a crumbling skull and they did not need to compensate Ms. Monks for any debilitating effects of the pre-existing condition which Ms. Monks would have experienced anyways.

Justice Lalonde held that there is no place for the crumbling skull doctrine in accident benefits. Whether the insured would have experienced certain effects in any event is not relevant. The fact is that the insured experienced those effects when he or she was an insured of the insurer and as long as the insured event made a material contribution to the condition, then the insurer must fulfill its contract. It is thus no answer in the accident benefit regime for an insurer to say that its insured would have experienced these effects in any event; the fact is that they occurred during the period of time that it insured the individual and for one of the insured risks.

**Lloyd Alison Villers and Pilot Insurance Company, [2005] O.F.S.C.O. No. 46**

The Applicant suffered from significant impairments before being injured in a motor vehicle accident. Arbitrator Bayefsky found that not enough had changed in the Applicant's health in order to indicate a catastrophic impairment caused by the accident.

**George and State Farm Mutual Automobile Insurance Company, [2005] O. F.S.C.O. No. 156**

Director Delegate Evans reaffirmed the *Desbiens* approach and stated that the *Guides* do allow adding non-structural mental or behavioral impairment to the WPI. Additionally, the Multi-Disciplinary Assessment Centre's (DAC's) assessment of the Applicant's level of impairment was found to be binding until an arbitrator determined that it was not.

**McMichael and Belair Insurance Co., [2006] O.F.S.C.O. No.17 - 8**

The Applicant was injured in a motor vehicle accident. He had a prior history of cocaine use which became cocaine addiction after the accident. Director Delegate Makepeace reaffirmed the *Desbiens* approach. She also upheld the arbitrator's decision and found that:

“whether the [cocaine use] genesis was an effect of the mild traumatic brain injury that Mr. McMichael suffered, a vain and misguided attempt to self-medicate, or some combination of these two, the addiction is a direct consequence of the injuries sustained in the car accident.”

**Lee and State Farm Mutual Automobile Insurance Co., [2006] O.F.S.C.O. No. 17**

The Applicant was in a motor vehicle accident and sustained injuries. Medical experts for the Insurer claimed that the Applicant had a pre-existing history of abusing pain medication and suffered from post-traumatic stress and thereby tried to assert that she contributed to her impairment. Arbitrator Ashby made reference to *McMichael*, in which the arbitrator found that the Applicant's pre-existing cocaine habit was not a significant pre-existing factor and that the mild brain injury from the accident, materially and substantially contributed to his post-accident addiction. In this case Arbitrator Ashby decided that there was medical evidence to support that the accident caused the Applicant's impairments.

**B.P. and Primmum Insurance Co., [2006] O.F.S.C.O. No. 202**

The Applicant was severely injured in a motorcycle accident and his lower right leg was amputated. Arbitrator L. Blackman reaffirmed the *Desbiens* approach



and found that the *AMA Guides* state that impairments should not be considered separately in a vacuum but rather it is the unique individual that should be assessed. Additionally, he rejected the argument that the Arbitrator has discretion to find an Applicant suffers a catastrophic impairment on the basis that the cost of future care exceeds the non-catastrophic limit under the schedule. The “whole person” approach was followed and the Applicant was deemed to be catastrophically impaired.

**Cordeiro and Wawanesa Mutual Insurance Co., [2007] O.F.S.C.O. No. 64**

The Applicant had a pre-existing head injury. In the subject accident, he was injured when his car rolled over him. He suffered serious orthopedic, cognitive and emotional impairments. Arbitrator Muir found that the motor vehicle accident caused the impairments and thereby determined the Applicant to be catastrophically injured.

**Ms. G. and Pilot Insurance Co., [2007] O.F.S.C.O. No. 153**

The Applicant was injured in a motor vehicle accident and suffered both physical and mental impairments. Delegate Director Makepeace upheld the previous arbitration decision and found that the WPI percentages of physical and psychological impairments should be combined. Therefore the Applicant met the threshold for catastrophic impairment. Additionally, she also found that the trier of fact, and not medical experts, have the responsibility under paragraph 2 (1)(f) of the *Schedule* to capture and accurately estimate all of the impairments. Further, she noted that an impairment that is not listed in the *Guides* shall be deemed to be the impairment that is listed that is most analogous to the sustained impairment.

**H. and Lombard General Insurance Co. of Canada, [2007] O.F.S.C.O. No. 193**

David Payne, Thomson, Rogers for Applicant

The Applicant sustained physical and mental impairments in a motor vehicle accident. Arbitrator Renahan cited Spiegel J. in *Desbiens* and held that because the *Guides* are referenced by the *Schedule*, it becomes an integral part of the incorporating instrument as if reproduced therein. The CAT DAC assigned a WPI of 1%. The arbitrator assigned a WPI of 79% based upon a rating of 52% for physical impairments and a rating of 55% for mental and behavioural disorders.

**Arts (Litigation Guardian of) v. State Farm Insurance Co. (2009), 91 O. R. (3d) 394, [2008] O.J. No. 2096**

The Plaintiff was involved in a motor vehicle accident that caused both physical and mental impairments. The Plaintiff argued that if his physical and



psychological impairment WPI percentages were combined he would qualify as catastrophically impaired. McKinnon J. accepted this argument and found that it is permissible to assign percentage ratings in respect of a person's psycho-emotional impairments and to combine them with percentage ratings in respect of the person's physical impairments for the purpose of determining whether the person is catastrophically impaired pursuant to section 2(1)(f).

**Augello and Economical Mutual Insurance Co., [2008] O.F.S.C.O. No. 189**

The Applicant was injured in a motor vehicle accident that caused both physical and mental impairments. The Applicant argued that if her physical and psychological impairment WPI percentages were combined she would qualify as catastrophically impaired. Arbitrator John Wilson found that the *Desbiens* approach of permitting the combination of the WPI percentages of physical and psychological impairments more closely corresponds with the underlying principles of the accident benefits scheme and that the approach that favours the insured should prevail.

**Knechtel and Royal & Sunalliance Insurance Co., of Canada, [2009] O.F.S.C.O. No. 70**

The Applicant sustained injuries in a motor vehicle accident. One of the medical experts for the Applicant claimed the Applicant suffered from psychological impairments. Arbitrator Sampliner concluded after considering surveillance evidence of the Applicant conducting normal daily activities that the nature and degree of psychological impairments that would lead to a determination of CAT status must be more substantial than the Applicant's.

**Fournie and Coachman, [2010] O.F.S.C.O. No. 15**

The Applicant suffered a comminuted injury to left ankle. The Applicant required two canes or crutches to ambulate outside home. The insurer examiner indicated that pain disorder was associated with the foot injury and not with psychological factors. The assessing psychiatrist used Chapter 15 page 310 pain intensity frequency grid and assessed him as having a marked impairment under Chapter 14, finding that the four aspects of functioning (ADL, social functioning, concentration and adaptation) were significantly affected by pain.

**Ramalingam and State Farm, FSCO A08-001571, June 4, 2010**

The insured was injured in a motor vehicle accident on January 9, 2002. In July of 2007 the insured applied for a determination that he was catastrophically impaired. The Arbitrator held that there was no limitation period defence in regards to a claim for a determination of catastrophic impairment.

**M.R. and Gore Mutual Insurance Company [2010], O.F.S.C.O. No. 149**

The Applicant applied for a catastrophic impairment designation based on a mental and behavioural disorder. The Arbitrator rejected the insurer's assessment because it failed to follow the procedures mandated in the AMA Guides. In particular the assessors failed to gather and review the clinical records of the applicant's treating professionals. However, on the strength of other assessments, the applicant was found markedly impaired with respect to three of the four spheres of functioning (activities of daily living, social functioning and adaptation to work or work-like settings), but only moderately to markedly impaired in concentration, persistence, and pace. The applicant was therefore found to have suffered a catastrophic impairment within the meaning of Clause 2(1.2)(g) of the SABS.

**Jaggernaut and Economical Mutual Insurance Company [2010], O.F.S.C.O. No. 140**

The applicant applied for catastrophic impairment determination on the basis of a psychological condition arising from an accident. The Arbitrator disregarded one assessor's opinion because the assessor failed to follow the procedures required under the AMA Guides for a valid assessment (failure to gather and evaluate the complete medical history and review the applicant's complete clinical record). The Arbitrator disapproved of another assessors downgrading of impairment classifications because of concerns of exaggeration indicated by surveillance evidence. The Arbitrator also disapproved of an assessor's refusal to assess any impairment that was not static (i.e., unchanging and recorded consistently by virtually every assessor). The applicant was found to be only moderately impaired and therefore not suffering from a catastrophic impairment.

The Applicant also applied for catastrophic impairment determination based on a Whole Person Impairment (WPI) rating. The Arbitrator determined that the applicant's mental and behavioural impairments using percentage ratings from Chapter 4, Table 3, when combined with the WPI rating for all other impairments (in line with *Desbiens*), rendered him catastrophically impaired. Importantly, the Arbitrator stated that the *Mrs. G. and Pilot Insurance Co.* decision continues to govern the approach at FSCO (i.e., mental or behavioural impairments are to be combined with other impairments).

**C. and Coachman Insurance Company, [2011] O.F.S.C.O. No. 167**

As in *Pastore*, the Applicant sought catastrophic impairment status pursuant to clause 2(1.2)(g) of the Schedule which provides that a catastrophic impairment includes an impairment that, in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioral disorder.



The two experts who provided reports for Coachman testified at the arbitration. Arbitrator Miller found that these physicians “clearly appeared to be strong advocates for Coachman” and gave their evidence “very little weight”. Dr. Rosenblat testified on behalf of the Applicant and following an analysis of his testimony, Arbitrator Miller indicated “I will only be focusing on and discussing Dr. Rosenblat’s assessment ratings”. Dr. Rosenblat testified that the Applicant had a clear marked impairment in only one of the four aspects of the functional abilities considered under the *Guides*, namely deterioration or decompensation in work or work-like settings (4). Dr. Rosenblat’s rating for the domain of social functioning was “moderate to marked” (2). In arriving at a decision, Arbitrator Miller stated as follows:

“...I am guided by paragraph 61 of the Judicial Review decision in *Aviva* and *Pastore*. That is, I am not relying solely on the one marked impairment noted in Dr. Rosenblat’s report dated November 2, 2009. I am following the direction of the majority decision having found that one marked impairment without considering the other areas of functioning is insufficient for a finding of catastrophic impairment.”

**McLinden v. Payne, 2011 ONCA 439**

The Applicant was injured in a motor vehicle accident and made an unsuccessful application for catastrophic impairment status in first instance. This Appeal raised the issue of whether the Statutory Accident Benefits Schedule precludes a person from making more than one application for a determination that he or she has suffered a catastrophic impairment. At the outset, counsel for the insurer conceded that a person may bring a further application provided that the application is not brought under the same sub-paragraph of the definition of catastrophic impairment as the previous application.

The motions Judge not only endorsed the insurer’s concession but went on to find that a person could also bring a subsequent application based on the same sub-paragraph as a previous application provided that there was a material change in the condition of the Applicant. The Ontario Court of Appeal concurred stating:

“there must be a material change in the condition of the applicant. If there is no change, a further application is not permitted as it would amount to a reconsideration of the earlier decision”.

**Kusnierz v. Economical Mutual Insurance Co., 2011 ONCA 823**

Seven years after Justice Spiegel released his decision in *Desbiens*, the Court of Appeal in *Kusnierz* affirmed that the SABS permit an assessor to assign a Whole Body Impairment percentage value to Chapter 14 Mental and Behavioural



Impairments in order to determine whether they, in combination with physical impairments, result in a 55% Whole Person Impairment.

At the outset, the Court noted that impairment was defined as a “loss or abnormality of a psychological, physiological or anatomical structure or function.” Thus, on a plain reading of the language of 2(1.1)(f) a combination of both kinds of impairment is possible. Next, the Court considered the purpose of the *Guides* and held that not permitting the combination of physical and psychiatric impairments ignores the *Guides’* aim of assessing the total effect of a person’s impairments on his or her everyday activities. Thirdly, the Court made specific reference to five scenarios in the *Guides* which specifically recommended that physicians refer to Chapter 14 in assessing the total impairment of persons suffering from both physical and behavioural/mental impairments. Lastly, the Court in looking at the SABS and the *Guides* as a whole indicated that it would be unfair to deny persons with combined physical and psychiatric impairments the enhanced benefits that are available to persons with similarly extensive impairments that fall entirely into the physical or psychiatric realm.

**Pastore and Aviva Canada Inc., 2012 Carswell Ont 11864**

The Applicant was injured in a motor vehicle accident and sustained both physical and mental impairments. The assessment found that the Applicant had a class 4 impairment (marked impairment) in her activities of daily living due to a mental or behavioral disorder. Arbitrator Nastasi accepted that the assessment of a class 4 impairment in just one of the areas of functional limitation was sufficient to meet the definition of catastrophic impairment. Also, she heard evidence on the question of whether all physically based pain can and should be factored out of the assessment of impairment due to mental disorder, or whether physically and mentally based pain that are intertwined can be considered cumulatively in a mental disorder assessment. She concluded that it was not essential to try to factor out all physically based pain, and that in fact it would not be possible to do so. Rather, treating both pain sources cumulatively did not derogate from the directive of the *Guides*.

The insurer exercised its right to appeal to the Director’s Delegate. The Director’s Delegate upheld the Arbitrator’s decision. The insurer then sought judicial review of the Delegate’s decision to the Divisional Court. The Divisional Court reversed the decision of the Delegate, on both grounds.

The Ontario Court of Appeal reaffirmed that the Arbitrator’s approach. On the issue of whether one function at the marked impairment level (Class 4) was sufficient for qualification as catastrophic impairment, the Ontario Court of Appeal stated:

“In reaching the opposite conclusion, the Divisional Court did not have the benefit of this court’s decision in *Kusnierz v. Economical*

Mutual Insurance Co., 2011 ONCA 823, 108 O.R. (3d) 272 (Ont. C.A.), the majority relying instead on the trial judge's decision which was reversed by this court. In that case, this court (at para. 25) approved the view expressed by Spiegel J. in *Desbiens*, that the definition of 'catastrophic impairment' was intended by the legislature to be inclusive and not restrictive. In *Kusnierz*, the issue was whether psychological impairments could be quantified under cl. (g) and combined with physical impairments under cl. (f) to reach a 55 per cent whole person impairment. This court held that there was nothing preventing such a combination and that it would meet the intent of the SABS to do so.

In my view, the decision of the delegate, in which he concludes that the use of 'a' in the definition of 'catastrophic impairment' in cl. (g) refers to a single, functional impairment due to mental or behavioural disorder at the marked level, constituting a catastrophic impairment, is a reasonable decision."

On the issue of if it was necessary to remove from consideration all physical sources of pain in conducting the assessment for the purposes of Section 2(1.1)(g), the Ontario Court of Appeal held:

"In my view, the assessors and adjudicators applied the Guides in their approach to determining whether Pastore's functional impairments were due to her diagnosed mental disorder. The Guides acknowledge how difficult it is to separate out pain from physical causes and they suggest a multi-disciplinary approach. That approach was taken, but the assessors were not able to factor out physical causes of pain and therefore took a cumulative approach.

In his decision, the delegate approved that approach. In my review, his decision to do so was a reasonable one; it was within a range of reasonable, acceptable outcomes. The diagnosed mental disorder was 'Pain Disorder Associated with Psychological Factors and a General Medical Condition'. Because the mental disorder itself involves pain and includes pain associated with a general medical condition, in this case it is certainly reasonable to include pain from the general medical condition to the extent that such pain is connected with the diagnosed mental disorder.

A further argument that was raised on this issue was that there could be double counting of the pain impairment under clauses (f) and (g) in certain cases because, following this court's decision in *Kusnierz*, the impairments under cl. (g) can be put together with physical impairments for a whole body impairment total under cl. (f).



Since that did not occur in this case, the possibility of double counting under cl. (f) does not change the reasonableness of the delegate's conclusion. In a case where that is a concern, the assessors and adjudicators may have to address the issue directly."

**Dominion of Canada General Insurance Co. v. Chambers, 2013 Carswell Ont 14878**

This application was commenced by Dominion for a determination of whether Ms. Chambers was permitted to apply once for a finding of catastrophic impairment relying upon three separate car accidents, which she says cumulatively caused a catastrophic impairment or must she proceed by way of separate Applications for each accident.

Ms. Chambers was involved in three car accidents occurring on May 18, 2003, June 20, 2003 and February 3, 2005. She sustained soft-tissue injuries in all three accidents. On April 18, 2012, she submitted an Application for Determination of Catastrophic Impairment. On the Application, the physician listed the dates of all three accidents. Dominion returned the Application and requested a separate Application for each accident. Ms. Chambers declined to do so.

Following the Arbitrator's review of Section 3 of the *Statutory Accident Benefits Schedule*, he also noted that the Application for Determination of Catastrophic Impairment itself "clearly refers to a single accident".

Although the Judge found that an Application for Determination of Catastrophic Impairment is required for each accident, the decision makes clear that the cumulative effect of a number of accidents may well be relevant to determining whether an applicant has sustained a catastrophic impairment.

"In my view, the SABS instead contemplate that an application for the determination of catastrophic impairment will focus on a single identified accident, and an inquiry whether that particular accident transformed a claimant's situation into one of catastrophic impairment. The cumulative effect of the claimant's injuries may well be relevant to the determination of that inquiry, to the extent that the identified accident may have served as a 'tipping point' to render the claimant catastrophically impaired. But looking at the added impact of that accident being superimposed on pre-existing injuries possibly sustained in earlier accidents, should not effectively render each accident liable to a retroactive catastrophic impairment determination."



**B. (D.) v. Economical Mutual Insurance Co., 2013 Carswell Ont 14123**

D.B. applied for a catastrophic designation.

Economical took the position that D.B. required a below knee amputation. Economical insisted that D.B. be rated as the equivalent of an amputee, as she declined to follow medical advice in proceeding with the below knee amputation. As a result of not proceeding with the amputation, D.B. remained dependant on a wheelchair. The amputation of a lower limb equals 28% WPI. A wheelchair dependent applicant qualifies under the Gait Derangement Table for an 80% WPI rating.

Arbitrator Killoran made reference to Chapter 2 of the Guides which specifies that whether someone does or does not have surgery should not affect their rating. In concluding that D.B. was deserving of a catastrophic impairment designation, Arbitrator Killoran stated as follows:

“Omega’s creativity best reflected the case law from the courts and FSCO which has emphasized that a large and liberal interpretation of the Guides is justified, based both on the underlying philosophy of the Guides themselves and given that the *Schedule* is consumer protection legislation.

I do not agree with Economical’s position that D.B. must be either paraplegic or quadriplegic to qualify as wheelchair dependent. No such requirement can be found in the Guides.

I endorse the Omega approach which was to assess D.B. as she presented herself rather than speculate about the effect of an amputation.”

**R.J. and Dominion of Canada General Insurance Company, FSCO A12-001233 (2011-12-16)**

The Applicant was injured in a motor vehicle accident on July 23, 2007. Disputes arose over the ongoing payment of benefits. More particularly, the question of whether the Applicant met the criteria for catastrophic impairment became an important issue. The Applicant brought a motion for interim benefits to be paid to her pending the resolution of her dispute with Dominion.

In order to be successful on an interim benefit motion, an insured in a general sense must be able to demonstrate urgency and necessity. One of the benefits claimed in the context of the interim benefit motion was for the payment of the cost of a catastrophic assessment rebuttal report. Nonetheless, the arbitrator granted the interim order for payment of a catastrophic rebuttal report finding that interim benefits must be examined in the context of the social policy behind the

accident benefit system, and whether a grant of interim benefits will favour those goals. Given that the *SABS* is remedial, that is to be interpreted in a broad and liberal way, and one of the main objectives is consumer protection, the rebuttal report was ordered to be paid by the insurer. In particular, the arbitrator held as follows:

“In this case, I accept that Ms. J and her counsel have consistently pointed out the weaknesses and improbabilities of the CAT report that backs up Dominion’s determination on the issue of catastrophic impairment, and requested that Dominion reconsider its determination, but to no avail.

This refusal to reconsider its determination is adequate justification to move to a formal rebuttal report by the appropriate experts. Indeed, such will be necessary to advance this dispute to the hearing stage as well.”

**Guarantee Company of North America v. Dong Do, Appeal P12-0037 (2013-01-29)**

In December of 2006, Dong Do applied to Guarantee Company of North America for a determination that as a result of his accident he sustained a catastrophic impairment. The insurer sent Mr. Do to an insurer’s examination and advised by way of letter and OCF-9, on May 2, 2007, that Guarantee Company of North America determined that Mr. Do did not sustain a catastrophic impairment.

Mr. Do applied for mediation on February 19, 2010 and for arbitration on March 14, 2011. Guarantee Company of North America took the position that the limitation period was triggered by its letter and OCF-9, dated May 2, 2007.

The arbitrator in first instance found that Mr. Do’s claim was not out of time. On appeal, Delegate Blackman agreed indicating that the limitation period under Section 281.1(1) of the *Insurance Act* does not commence upon “any refusal by an insurer” but rather by “the insurer’s refusal to pay the benefit claimed”. He noted that the May 2, 2007 OCF-9 did not deny any stated benefit under the *SABS*, nor deny any monetary payment or amount. Delegate Blackman confirmed that a CAT determination is not a benefit, but a prerequisite upon which a benefit may be based.

Thus, if the explanation of benefit only speaks to the designation, the two-year limitation period does not apply.

**Hans-Jorg Reichert and Chubb Insurance Company of Canada, FSCO A12-003518 (2014-02-05)**

Mr. Reichert was injured in a motor vehicle accident on October 1, 2007. At arbitration he sought a determination that he suffered a catastrophic impairment due to a mental and behavioural disorder pursuant to Section 2(1.2)(g) of the *Schedule*.

Chubb conceded that the October of 2007 accident contributed to Mr. Reichert's current presentation. However, Chubb also asserted that the severity of his impairment could not be attributed to the accident alone because he had some pre-existing psychological conditions which required treatment. Ultimately, the arbitrator found that Mr. Reichert sustained a catastrophic impairment despite his pre-existing medical history stating as follows:

“While there is evidence that Mr. Reichert sought medical advice and some mild treatment related to stress and difficult personal circumstances, such as the death of his mother, the test for whether the accident caused Mr. Reichert's mental and behavioural disorder is the test of material contribution. In this context, in fact, Chubb did not dispute causation. I find that the accident materially contributed to the development of Mr. Reichert's mental and behavioural disorder.”

**J.M. and State Farm Mutual Insurance Company, FSCO A10-001364 (2013-01-24)**

J.M. was injured during a motor vehicle accident on October 5, 2007. At arbitration, the sole issue was whether J.M. met the definition of catastrophic impairment in paragraph 2(1.2)(f) (55% or more impairment of the whole person) or 2(1.2)(g) (marked impairment or extreme impairment).

State Farm denied that J.M. met the definition of catastrophic impairment because the I.E. assessor, Dr. Oshidari, refused to assign a rating to J.M.'s knee impairment due to a combination of incomplete testing and unreliable test results.

State Farm called physiatrist Dr. Oshidari as a witness at the arbitration. Two MRIs of J.M.'s knees revealed that the left knee suffered tearing of the posterior medial meniscus with damage to the anterior cruciate ligament. However, Dr. Oshidari refused to attribute an impairment rating to J.M.'s left knee because of some inconsistent findings on examination and the fact that J.M. did not require knee surgery. Ultimately, the arbitrator found Dr. Oshidari's methodology flawed indicating as follows:

“The flaw in Dr. Oshidari's methodology is that no consideration is given to J.M.'s knee problems as surgery is not required. However,



the sole reason surgery is not required is because it would not correct J.M.'s impairment issues. In these circumstances, the gait derangement more accurately captures and rates J.M.'s disability. J.M.'s injuries are consistent with his experiences with instability and falling which were corroborated by his family members. As a result, he routinely relies on the use of crutches to ambulate. I prefer Dr. Sangha's approach to rating J.M.'s impairments to that of Dr. Oshidari. Even if Dr. Oshidari had inconsistent test results, I do not find it reasonable that he concluded that it was impossible to rate J.M.'s physical impairments when it was evident from all of the assessment reports that J.M. has a physical impairment."

**Cathy Roberts and Gore Mutual Insurance Company, FSCO A11-003986 (2014-04-10)**

Cathy Roberts ("Cathy") was injured in a motor vehicle accident on February 19, 2007. Cathy was involved in two other motor vehicle accidents prior to 2007. After the 2007 accident, Cathy suffered from major depression, anxiety, fear of driving, and post-traumatic stress disorder, as well as numerous physical injuries. Cathy claimed attendant care, income replacement, housekeeping, and other medical/rehabilitation benefits from her insurance company, Gore Mutual Insurance Company ("Gore Mutual"). Gore Mutual concluded that Cathy was not catastrophically impaired as a result of the 2007 accident and denied her claim. Cathy challenged the decision. The Arbitrator at the Financial Services Commission of Ontario agreed that Cathy had moderate impairments due to her mental or behavioural disorder, but he found that they were not marked; and therefore, did not amount to a catastrophic impairment.

The Arbitrator set out the test to be met for determining a catastrophic impairment as whether a person is assessed to have marked impairments in one of the four categories of functional limitation set out in the American Medical Association's *Guides to Evaluation of Permanent Impairment*, 4<sup>th</sup> edition, 1993 ("*Guides*"). These areas include:

- i. Activities of daily living;
- ii. Social functioning;
- iii. Concentration, persistence and pace;
- iv. Deterioration or decompensation in work or work-like setting.

The Arbitrator distilled this test in Cathy's case to four questions:

1. Does she suffer from a mental or behaviour disorder?
2. Was the mental or behavioural disorder caused by the accident?
3. If yes, what is the impact of the mental or behaviour disorder(s) on the person's daily life?
4. In view of the impact, what is the level or severity of impairment?

In Cathy's case, the Arbitrator was satisfied by the medical evidence that Cathy suffered from a mental or behavioural disorder either caused or exacerbated by the 2007 accident. The Arbitrator further agreed that her mental or behavioural disorder had an impact on at least one, if not more, of the four areas of function outlined in the *Guides*. Cathy's case came down to Question 4: the severity of her impairment and whether it was mild, moderate, or marked. To determine this question, the Arbitrator considered Cathy's testimony, work history, evidence of treating and examining practitioners, and her children.

The Arbitrator made his decision primarily on the medical evidence of Dr. Brian Hines, Psychiatrist, who conducted a Catastrophic Assessment on Cathy on behalf of Gore Mutual. The Arbitrator found Dr. Hines evidence most convincing because Dr. Hines:

- a) was a Psychiatrist with expertise and training in treatment of Cathy's disorders;
- b) had expertise and experience in the use and application of the *Guides*;
- c) reviewed and considered Cathy's pre-accident condition; and
- d) had conducted a full-fledged assessment of catastrophic impairment, including mental status evaluation through clinical evaluation of objective current indicators of the patient.

Dr. Hines diagnosed Cathy with Mild Adjustment Disorder with Mixed Anxiety and Depressed Mood; Mild Panic Disorder with Agoraphobia; and Mild Claustrophobia. Doctor Hines emphasized that post-2007 accident, Cathy regularly left the house to drive her children to school, was independent in self-care, able to take care of pets, and showed no objective signs of significant difficulty with her concentration. Dr. Hines felt that these results were inconsistent with someone who was catastrophically impaired because of a mental or behavioural disorder. The Arbitrator agreed with Dr. Hines assessment. (Appeal pending)

**M.D. and Aviva [2013] O.F.S.C.D. No. 237**

M.D. suffers a panic disorder, agoraphobia and major depression from the accident and cannot meaningfully engage with new people or strangers or cope in a stressful environment.

The applicant cannot work and vomits daily. However the applicant could take children to school, feed them and cook for them but was unable to attend parent/teacher interviews, organized extracurricular activities, nor initiate activities with other parents.



The Arbitrator found M.D. to have a Class 4 marked impairment with respect to adaptation to work environments because impairment levels significantly impede useful functioning.

Using Chapter 4 Table 3 the Arbitrator found the marked mental and behavioural disorder equivalent to 40% whole person impairment. WPI of 60% in total.

**Mujku and State Farm [2013] O. F. S. C. O. No. 5**

The applicant had a pre-accident history of mental health issues having been diagnosed with and treated for depression, panic attacks. She had attended emergency departments and family doctor with complaints of pain. However, she remained physically active and socially engaged and was the primary caregiver of her husband. She had remained independent for self-care, did housekeeping and attended to gardening.

The accident caused modest repair costs of \$703.00. She did not attend hospital but attended upon her family doctor five (5) days after the accident. In her evidence at arbitration Ms. Mujku indicated that following the accident she suffers lack of motivation to take care of herself and doesn't take care of her husband, housekeeping or home maintenance. She was diagnosed after the accident with fibromyalgia, rotator cuff syndrome, severe major depression, pain disorder, adjustment disorder, anxiety disorder.

The Arbitrator found Ms. Mujku to be markedly impaired, having suffered a severe deterioration or decompensation in work or work-like settings due to her mental and behavioural disorders.

**Morelli and State Farm [2014] O.F.S.C.O. No. 48**

Arbitrator found insurer responsible to pay for rebuttal reports costing \$12,000.00. On appeal, Order rescinded in part and insurer found liable to pay reasonable cost of rebuttal report.

**Waldock and State Farm FSCO A13-001725 (2014-11-10)**

A preliminary issue hearing proceeded on the question of whether Mr. Waldock had sustained catastrophic impairment. The insurer was denied its motion at the outset of the hearing requesting an orthopaedic Section 44 catastrophic assessment due to its delay in requesting same.

Mr. Waldock had permanent impairment to his right leg and knee, fractures of his right tibia and fibula, injury to his neck, fracture to his back and psychological injuries, including difficulty coping, depression, loss of concentration and other cognitive dysfunctions. His right leg had required numerous surgeries.

He attempted a return to work as a professor but was unable to handle the driving or any concentration requirements. He had five (5) severe falls due to his right knee collapsing and was a potential candidate for surgical replacement of his right knee. Dr. Kliman, his orthopedist, indicated that he would likely require knee replacement surgeries and because of progressive arthritis his knee would likely stiffen further.

Dr. Waisman evaluated his emotional and psychological impairments and found a GAF of 55, severe depression and pain disorder. He evaluated Mr. Waldock as suffering only moderate impairments of all four domains under Chapter 14 of the Guides.

A Section 44 catastrophic assessor Dr. Cushman found Mr. Waldock's condition to be worsening.

Dr. Meikle determined his accident induced physical impairments corresponded to a 21% to 32% whole person impairment where current findings led to 21% and inevitable progression of post traumatic osteoarthritis would lead to 32% whole person impairment. Dr. Ameis opined that Mr. Waldock did not presently have a catastrophic impairment however it is inevitable he will deteriorate so as to eventually meet and exceed the catastrophic impairment threshold set out under clause (f).

The Arbitrator found that based upon the report and testimony of Dr. Ameis that a minimum WPI rating of 55% would be appropriate after combining the previous moderate rating of his Chapter 14 impairments with the 32% whole person impairment related to future deterioration of his current orthopaedic injuries, the Arbitrator found him catastrophically impaired, sustaining at minimum a 55% whole person impairment.

**State Farm and P.B. Appeal Decision P13-00036 and P13-00037 (2014-07-30)**

This is a decision by the Director's Delegate Blackman concerning the method by which percentage of whole person impairment is assigned to Chapter 14 Mental and Behavioural Disorders. The Arbitrator at first instance, Fadel exercised discretion when choosing between ranges provided in Table 3 of Chapter 4 and using the AMA Guides 2<sup>nd</sup> Edition.

Director's Delegate Blackman found authority for using 4<sup>th</sup> Edition Chapter 4 Table 3, from sub-section 2 (3) of the 1996 SABS Schedule which provides that if the impairment is not listed in the 4<sup>th</sup> Edition, the impairment shall be deemed to be the impairment that is listed in the 4<sup>th</sup> Edition that is most analogous to the impairment sustained by the impaired person. He noted:



“Mental and Behavioural Impairments are listed in Chapter 14 of the 4<sup>th</sup> Edition. They are not, however, given WPI percentages by that Edition. The most analogous impairment in the 4<sup>th</sup> Edition having approved the WPI percentages is Table 3 of Chapter 4.”

**Ghabn and Dominion FSCO A12-002238 (2014-12-04)**

The Applicant was born in 1985 and had suffered an intellectual handicap since early childhood. An accident occurred in 1999. CAT Insurer Examinations indicated WPI of “0” and Class II or moderate impairment in each domain in Chapter 14, combined score 11% to 14%. Applicant’s assessors found marked impairment in social functioning, moderate to marked impairments with ADL’s and moderate impairment in concentration pace and persistence. Applicant submitted causation was to be dealt with in a material contribution test basis (Monks). The “but for” test imposed by the SCC was, the Applicant’s position, to be applied to negligence cases but not SABS cases.

Arbitrator Smith accepted the Applicant’s position imposing a material contribution test. The Applicant was found catastrophic. The decision is under Appeal. (The material contribution test was applied in the following decisions: *Monks, Desbiens, McMichael* and *Reichert* FSCO and Court Decisions)

**Cooke and RBC FSCO A13-015449 (2014-09-18)**

The Applicant brought an interim motion for payment of rebuttal CAT reports. The Applicant had already received more than \$50,000.00 for Medical Rehabilitation benefits. Arbitrator found the cost of the second CAT assessment is a reasonable and necessary expense for conduct of Arbitration hearing; however, in light of the insurer having paid over \$50,000.00 for Medical Rehabilitation benefits, the sum was not payable.

**Cook and RBC, Appeal P14-0038, (2015-05-04)**

The Appellant, Mr. John Cook, was injured in a motor vehicle accident on March 4, 2011. The parties came before Arbitrator Mutch for a determination of the Appellant’s motion for an order that the Respondent pay the Appellant the sum of \$12,960 to fund a catastrophic impairment (CAT) assessment. Arbitrator Mutch dismissed the Appellant’s motion and held that the funding of a rebuttal CAT assessment was most properly characterized as an interim expense rather than an interim benefit.

Director’s Delegate Blackman was not persuaded that Arbitrator Mutch erred in finding the relief sought to be interim legal expenses under subsection 282(11.1) of the *Insurance Act* and not interim benefits under subsection 279(4.1). However, he held that upon an arbitrator adding catastrophic impairment as an issue in the arbitration proceeding, RBC Insurance Company was to pay the

Appellant \$6,780 as interim legal expenses under subsection 282(11.1) of the *Insurance Act* to cover the cost of the CAT assessment.

With regard to the determination of catastrophic impairment, Director's Delegate Blackman noted that:

"Catastrophic impairment, by itself, is a threshold, not a benefit. As I stated in *Bains and RBC General Insurance Company*, (FSCO P09-00005, June 3, 2010): A finding of catastrophic impairment, by itself, provides no compensation to an insured person. It simply opens the door to a higher threshold of possible benefit entitlement. An insured found catastrophically impaired must still meet the entitlement criteria to each benefit claimed."

**Taylor and Pembridge FSCO No. A12-004886 (2014-06-11)**

Applicant was injured in 2009, suffering a pelvic fracture requiring internal fixation, acetabular fracture, a right ankle fracture as well as psychological issues. Pre-accident the Applicant was actively employed with Parks Canada full time as an archeologist requiring many physical activities. Post Accident the Applicant returned to work five (5) hours per day of her previous seven and one half hours. Her left hip developed arthritis leaving her with constant pain and limited range of motion, affecting her walking. Her right ankle swells. She suffers stomach issues from medication and suffers depression and anxiety for which she received counselling.

In light of the development of arthritis Insurer I.E. Addendum Report was completed to determine "worst case scenario and maximum values for severe hip arthritis with minimum cartilage interval and for hip replacement with poor results."

Omega assessors determined WPI of 31% - 60% initially and 44% - 71% WPI on rebuttal report.

The Arbitrator cites *Jaggernaut* approach to assign percentage to mental and behavioural disorders (Chapter 4 Table 3). IE assessors found physical impairments totalling 39% WPI and mental and behavioural impairments totalling 8% WPI leading to a total value of 44% WPI. The Arbitrator found it inappropriate to rate impairments based upon future or worst case scenarios.

Having considered the Omega approach of providing a range of 37% - 62% Whole Person Impairment, the Arbitrator of no assistance in determining the central issue in the case, not persuasive and having no probative value as to whether or not the applicant meets the 55% Whole Person Impairment and gives the Omega team determination "no weight in that respect".



Matter appealed then settled pending appeal.

**Valente and Primmum FSCO No. A13-000614 (2014-02-19)**

Insurer arranged a catastrophic assessment in 2010. Insurer received additional information touching on catastrophic issue through the period 2010 – September 2013. Insurer entitled pursuant to Section 42 (1) of previous SABS and Section 44 (1) of current SABS to request further catastrophic determination assessments in appropriate circumstances.

**Kidder and Economical FSCO No A12-006704 (2014-12-19)**

Motor vehicle accident 2009, Applicant applied for CAT impairment due to mental and behavioural standpoint as a result of the accident. Applicant had some psychological difficulties pre-existing the accident. Applicant's credibility suffered due to difference between Applicant's self-report of impairments to medical assessors and what was revealed in surveillance. Applicant indicated that he did not drive and surveillance showed him driving on numerous occasions. Applicant had returned to work and after with no explanation as to why he left employment. Arbitrator found that employment was terminated due to shortage of work.

**Boyd and St. Paul Fire & Marine, FSCO A14-005186, (2014-11-13)**

The Applicant, Carole Boyd, suffered serious injuries to her left shoulder and arm on April 20, 2011, when the London Transit bus in which she was riding stopped suddenly, causing her to be thrown from her wheelchair. As a result of the accident, Mrs. Boyd lost the use of her left arm.

Before the accident, Mrs. Boyd received attendant care and housekeeping assistance from her husband, a paid housekeeper, and CCAC. Sadly, Mrs. Boyd's husband passed away in March 2013 and Mrs. Boyd was faced with inadequate access to attendant care through CCAC.

Under the *Schedule*, Mrs. Boyd was entitled to additional attendant care and housekeeping benefits more than 104 weeks after the accident only if she was found to be catastrophically impaired, and she could establish that the expenses were reasonably required as a result of the accident. Mrs. Boyd brought a motion for Interim Benefits until it could be decided whether the loss of use of her arm amounted to a catastrophic impairment.

The Arbitrator held that whether Mrs. Boyd's accident-related impairments qualify as catastrophic under s. 3(2)(b) of the *Schedule*, on the grounds that they have resulted in the "total and permanent loss of use" of her left arm, was a novel issue, as there are no cases on point interpreting that particular provision. The Arbitrator held that what is a total and permanent loss of use – is a question of

law; however, it cannot be answered in a vacuum, and requires applying the law to the facts in any particular case, which would require a full hearing.

The Arbitrator concluded that Mrs. Boyd was entitled to interim benefits on the grounds that:

“Her living situation at the moment is precarious; her options very restricted. The risk of harm to her of an irreversible change in living conditions, not to mention the hardship in the form of stress and uncertainty associated with her immediate future, which could be avoided by the provision of in-home attendant care pending a final determination of entitlement, outweighs the risk of harm faced by St. Paul in having to pay for attendant care on an interim basis.”

**Maude and State Farm, FSCO A12-003997, (2014-09-30)**

The Applicant, Ms. Maude, was born on October 18, 1954, had been married for 40 years to Richard Maude, and had two children in their mid-thirties. On December 26, 2009, at approximately 1:30 a.m., Ms. Maude was a passenger in the family automobile driven by her husband. The vehicle, in rainy conditions, hit a patch of ice, rolled into a ditch and hit a tree. As a result of the accident, Ms. Maude suffered from chronic pain syndrome, back pain, shoulder pain, hip pain, fatigue, and significant driving anxiety in inclement weather and longer trips.

The evidence of Ms. Maude, Mr. Maude, and their children was that she had an inability to complete routine tasks correctly, to communicate effectively with co-workers and suppliers, and to adapt to changes in the workplace. She also had an inability to concentrate, multi-task and to complete certain work tasks. The Arbitrator found that Ms. Maude sustained a catastrophic impairment as a result of the accident.

**Moser and Guarantee Company, FSCO A13-000812, (2014-09-26)**

The Applicant, Jennifer Moser, was injured in a motor vehicle accident on August 11, 2009. As a result of the accident, she suffered from mental and behavioural disorders, closed-head injury/cognitive and neuropsychological findings, and orthopedic injuries to her upper and lower body.

The Arbitrator found that Ms. Moser was not catastrophically impaired. The Arbitrator took issue with the Applicant's medical expert evidence. Specifically, the Arbitrator criticized the Applicant's medical expert, who rated Ms. Moser's closed-head injury with a WPI of 1-14%, because she did not indicate whether the number was closer to 1% or 14%. The Arbitrator rejected the assertion that it was not possible to obtain a more precise figure, stating that:



“the *Guides* suggest that clinical observation, training, judgment, experience, skill, and thoroughness of evaluation should be used to derive as precise a rating for impairment as possible. These factors may indeed narrow a wide range of values.”

**All State and T.S., Appeal P11-00032, (2014-09-25)**

The Applicant, T.S., was injured in a motor vehicle accident on November 21, 2001. At arbitration, T.S. was found to have suffered a catastrophic impairment. All State appealed the decision. The Appeal was allowed. The Director’s Delegate found that the evidence presented by T.S. could not support a finding of catastrophic impairment because the medical evidence she led did not address the criteria in the AMA Guides, and due to issues of credibility, T.S.’ uncorroborated testimony alone was insufficient to prove catastrophic impairment.

**D.M. and Portage La Prairie, FSCO A12-005533, (2014-08-15)**

On February 22, 2008, D.M. was injured in a single vehicle automobile accident. She lost control over her car on an icy road. Before the accident, D.M. had a remarkable medical history for ADHD, personality disorder, alcohol abuse, heart murmur, head injury with concussion, migraines, bilateral pleural effusions, obesity, polyps, gastritis, GERD, asthma, pyloric sphincterotomy and cholecystectomy. Despite her physical and emotional problems, D.M. was working full-time as a manager at McDonalds before the accident.

After the accident, D.M. was easily cognitively and emotionally overwhelmed. She had difficulties interacting and participating consistently in group activities. The Arbitrator concluded that D.M. was catastrophically impaired. In his reasons, the Arbitrator set out that:

“She is not required to prove that the accident was the only cause of her mental or behavioural disorders; rather, D.M. is required to show only that the accident was a cause of the mental or behavioural disorders and not the sole cause.”

...

“I find that both accident and non-accident related factors, including D.M.’s pre-accident medical condition and post-accident stressors, contributed to D.M.’s mental or behavioural disorders. However, the accident was of causative significance, which means more than a minimal or insignificant aspect of D.M.’s mental or behavioural disorders. I find that the accident was a material or significant aspect thereof.”

**Fernandes and Western, FSCO A13-001614, (2014-09-30)**

The Applicant, Joao Fernandes, was injured in a motor vehicle accident on January 17, 2007. Western Assurance Company sought a further psychiatric examination of Mr. Fernandes in relation to his claim that he sustained a catastrophic impairment due to the death of the psychiatrist, Dr. Shapiro, who conducted the earlier insurer examination.

Despite the intrusive nature of a psychiatric assessment, the Arbitrator found that given Dr. Shapiro's death, a further examination is reasonably required in the interest of fairness. The cost of a rebuttal report was to be covered by the insurer and not limited to \$2000. The Arbitrator found that the *Schedule*, under which Mr. Fernandes claimed benefits, provided him with a right to obtain a rebuttal assessment to respond to an insurer examination and to have the cost paid by Western. The Arbitrator agreed that this was a substantive right that crystallized at the time the contract was made, or at the latest, at the date of the accident.

**Ellis and Guarantee, FSCO A12-001073 and A12-004644, (2015-04-13)**

The Applicant, Deborah Ellis, was injured in a motor vehicle accident on November 15, 2005. As a result of the accident, Ms. Ellis suffered an annulus tear, bulging lumbar disc, exacerbation of pre – existing degenerative disc disease and experienced persistent pain in her left buttocks, left thigh, right hip and lower back. Ms. Ellis was also diagnosed with chronic pain syndrome. The Arbitrator found that Ms. Ellis was catastrophically impaired, and stated:

“Chapter 14 of the *Guides* deals with Mental and Behavioural disorders. The authors of the *Guides* acknowledge that establishing that pain is or is not a symptom of a mental impairment may be a difficult and complex task (my emphasis). Pain that presents only as a symptom of a mental disorder is rare.

...

In this case, it is evident that Ms. Ellis did experience a significant emotional stressor (the index accident) which was the triggering agent to her pain. The evidence also supports the fact that the stressor and the pain have occurred in a reasonable sequence.”

**Sahinbay and Unica, FSCO A12-003908, (2015-03-09)**

The Applicant, Arif Sahinbay, was injured in a motor vehicle accident on April 9, 2010. The Arbitrator found that Mr. Sahinbay did not suffer a catastrophic impairment as a result of the accident. In his decision, he noted that the evidence was consistent with a very high level of suspicion on the part of the Applicant with respect to the diagnostic process. Mr. Sahinbay's testimony that



he sustained permanent physical impairments was also directly contradicted by the surveillance evidence adduced by the insurer.

**Apostolidis and Wawanesa, FSCO A12-004701, (2015-02-26)**

The Applicant, Mr. Georgios Apostolidis, was injured in a motor vehicle accident which occurred on October 30, 2009. At the time of the accident, Mr. Apostolidis was a 43-year-old cook who worked at a restaurant in Richmond Hill. As a result of the accident, Mr. Apostolidis was taken to Humber River Hospital in severe pain where he underwent surgery. Mr. Apostolidis was sent home in a wheelchair where he spent three months immobilized until physiotherapy commenced.

The evidence of both the Applicant and his wife was that he suffered from headaches which started immediately following the accident. He had pain in his right shoulder, neck pain, and lower back. His left leg and ankle, which had three fractures, also caused him pain. His nose, which was cut and stitched as a result of the accident, has continually provided breathing trouble to him since the date of the accident.

Mr. Apostolidis' life had been turned upside down since the accident; he had been unable to work and had lost contact with his friends; he was incapable of doing any of the things he formerly did such as socializing, travelling, and spending time with his friends, including playing soccer and billiards. He also lost intimacy with his wife. Mr. Apostolidis and his wife slept in separate bedrooms and had no intimacy since the date of his accident. He was concerned that his wife would leave him, creating additional anxiety and depression.

The Arbitrator found that Mr. Apostolidis was catastrophically impaired because he has a marked impairment, due to a mental or behavioural disorder, in the area of activities of daily living ("ADL"). The Arbitrator was not persuaded by surveillance that showed Mr. Apostolidis going out for a walk with his wife or doing light house work as it did not show his ADL limitations throughout the day.

**Allen and Security National Insurance Co./Monnex Insurance Mgmt. Inc., FSCO A12-003800 (2015-02-03)**

The Applicant, Mr. Miguel Allen, was born on November 3, 1988. On September 5, 2008, he was the driver of a Nissan 240, accompanied by three friends. There was a violent head-on collision, killing one of the Applicant's friends. Mr. Allen was unresponsive at the scene of the accident for between 10 and 15 minutes. He sustained a right femoral fracture, right calcaneus fracture, and pulmonary contusion. He underwent surgery in hospital.

The Arbitrator concluded that the combination of ratings pursuant to Chapter 4, Table 3 and the table in Chapter 14 in the AMA Guides constitutes double

counting and is not “in accordance with” the AMA Guides. The Arbitrator held that:

“... [I]n my view, it makes no sense to rate the Applicant twice for the same set of symptoms, each obtained in isolation from the other. This would be exactly the case if percentage impairment ratings are obtained from both Chapter 4, Table 3 and the Table in Chapter 14. Such a methodology would indeed be double counting and lead to significantly over estimating the extent of the Applicant’s psychological impairment.”

**Henderson and Wawanesa, FSCO A14-001758, (2015-07-09)**

The Applicant, Ms. Lee-Anne Henderson, was injured in a motor vehicle accident on September 18, 2011. She applied for and received statutory accident benefits from Wawanesa Mutual Insurance Company (“Wawanesa”), payable under the SABS. However, Wawanesa rejected Ms. Henderson’s application for the expense of a CAT Assessment, stating that no funds were available to carry out the assessment. Any assessment expenses were to be deducted from the \$50,000 limit, and as Ms. Henderson had exhausted her entitlement limit for Medical and Rehabilitation Benefits, there were no remaining funds available to carry out the CAT Assessment.

Ms. Henderson was allowed to access further funds to conduct a CAT Assessment. The Arbitrator found that from the medical information provided, Ms. Henderson has a reasonable chance of being determined as catastrophically impaired. The cost of the CAT Assessment, as requested in the OCF-18 of October 26, 2013, was to be provided by Wawanesa and was not subject to the limitation in section 18 of the SABS.

**Watters and State Farm, FSCO A13-006328, (2015-06-26)**

The Applicant, Denise Watters, was a pedestrian who was struck by a motor vehicle on September 29, 2011. As a result of this accident, she sustained multiple skull fractures and a significant brain injury (as well as numerous other impairments).

The Arbitrator found that Ms. Watters sustained a brain impairment that resulted in a score of 3 (severe disability) on the Glasgow Outcome Scale (“GOS”), according to a test administered more than six months after the accident by a person trained for that purpose. As a result, the Arbitrator found that Ms. Watters had sustained a catastrophic impairment.

The Arbitrator attacked the GOS score provided by the Insurer’s expert because he failed to consider or give any weight to reports (provided to him) by occupational therapists and others who observed the Applicant in the real-world



and he failed to conduct collateral interviews of the Applicant's family. The Insurer's expert focused exclusively on neurological test results. In rejecting the Insurer's approach, the Arbitrator noted that:

"Dr. Moddel, incorrectly, sees the GOS as simply a measure of the severity of any *neurological* deficits caused by brain impairment. Since he found virtually no neurological deficits (other than an impaired sense of smell), he concluded that the Applicant had not sustained a "severe disability" under the GOS and felt that no further explanation was needed. I find this interpretation and application of the GOS to be far too simplistic and I reject it."

**Nadesu and Zurich, FSCO A09-001538, (2015-05-27)**

The Applicant, Paraloganathan Nadesu, was injured in a motor vehicle accident on September 7, 2003. Mr. Nadesu was employed at two jobs at the time of the accident and he lived in a one-bedroom apartment with his wife who was pregnant with their first child. Mr. Nadesu's health and function gradually declined after the accident. His functional limitations were rooted in his mental status, and not in physical impairments. The insurer, Zurich, argued that the accident did not cause Mr. Nadesu's mental or behavioural disorder and that he actually suffered from a genetically-based mental disorder, which the accident could not have caused.

The Arbitrator found that Mr. Nadesu's sustained a catastrophic impairment. The Arbitrator accepted that Mr. Nadesu's development of mental illness as a progression after the accident. He agreed that Mr. Nadesu's chronic pain was compounded by his lack of insight into the connection between his emotions and his pain. He further agreed that these issues were fed by Mr. Nadesu's creeping loss of function and self-esteem, and loss of hope of recovery after the accident.

The Arbitrator also rejected the evidence relied on by Zurich and provided by Dr. Shapiro that Mr. Nadesu's impairments were moderate. The Arbitrator rejected two specific examples of competent function in Dr. Shapiro's report: (1) the absence of bizarre behaviour during the assessment; and (2) the ability to instruct counsel (as it is only required at the time that the instructions are given).

**E. CHAPTER 3 OF THE AMA GUIDES – MUSCULOSKELETAL SYSTEM – CATASTROPHIC IMPAIRMENT ASSESSMENT AND THE ROLE OF THE TREATING OR ASSESSING HEALTH CARE PROFESSIONAL**

Chapter 3 of the Guides includes sections which address the upper extremities, the lower extremities, the spine and the pelvis. These sections describe and recommend methods and techniques of determining impairments due to

amputation, a restriction of motion, sensory motor deficits, peripheral nerve disorders and peripheral vascular disease.<sup>8</sup>

The upper extremity, lower extremity, the spine and the pelvis are each to be considered as a unit of the whole person. The upper extremity is four parts – hand, wrist, elbow and shoulder, the lower extremity is six sections – the foot, hind foot, ankle, leg, knee and hip, the spine is twenty-four vertebrae.

As the Guides note “examinations for determining musculoskeletal system impairments are based on traditional approaches for recording the medical history and performing a physical examination.”

As Chapter 3 notes: “Evaluating the range of motion of an extremity or of the spine is a valid method of estimating an impairment.”

A Clinician’s assessment of musculoskeletal system impairments will likely include an evaluation of motion impairments and range of motion measurements. Historical range of motion measurements obtained through clinical records of treating physiotherapists and occupational therapists are of significant assistance to assessors evaluating impairment in this section.

Equally, notes with respect to vascular disorder, bone and joint deformities including crepitation in joint motion and joint swelling observations provide important information for the purposes of evaluating the degree of impairment of the musculoskeletal system. Musculotendinous impairments, tightness, grip and tension strength measurements help evaluate upper extremity impairments.

Notations of limb length discrepancy, gait derangement, muscle atrophy, joint crookedness or stiffness of joints also assists in evaluating the impairment.

In assessing persons who have suffered musculoskeletal impairments including amputations, the “whole person” approach leads to a multi system assessment of impairment. Ratings would be completed inside chapter 3 (Musculoskeletal System impairments) Chapter 13 impairments (The Skin) and Chapter 14 (Mental and Behavioural Disorders) and Chapter 4, (The Nervous System).

As the Guides note, the evaluation of an amputee’s impairments should be undertaken without the use of a prosthesis. Exacerbations caused by weather, stressful situations, humidity and sweating should also be taken into consideration. In the case of amputation, redness, rashes, blisters, skin peeling, affect a broad range of activities of daily living from the type of clothing to be worn to the ability to walk with a prosthesis.

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<sup>8</sup> Chapter 3 of the musculoskeletal system AMA Guides, fourth edition



**F. CHAPTER 4 OF THE AMA GUIDES – THE NERVOUS SYSTEM – CATASTROPHIC IMPAIRMENT ASSESSMENT AND THE ROLE OF THE TREATING OR ASSESSING HEALTH CARE PROFESSIONAL**

Chapter 4 is an extremely important chapter in evaluating whole person impairment, especially in light of the *Desbiens* decision. The *Desbiens* decision used Chapter 14 to evaluate the mental and behavioural impairments a person has. By virtue of the fact that Chapter 14 does not assign mental or behavioural impairments a percentage of whole person impairment, in accordance with the *Desbiens* methodology, assessors rely upon tables contained within Chapter 4, to assign the appropriate percentage.

Chapter 4 is also an important chapter in relation to aphasia and communication disturbances, sensory disturbances and motor disturbances. Health Care Professionals such as psychologists, speech language pathologists and social workers will be able to provide helpful comment in relation to impairments related to aphasia and dysphasia.

Table 1 from Chapter 4 provides a description of the impairment and the correlating percentage impairment of the whole person, is included below (Chapter 4, page 141).

**TABLE 1. IMPAIRMENTS RELATED TO APHASIA OR DYSPHASIA.**

Description	% Impairment of the whole person
Minimal disturbance of comprehension and production of language symbols of daily living	0 – 9
Moderate impairment in comprehension and production of language symbols of daily living	10 – 24
Inability to comprehend language symbols; production of unintelligible or inappropriate language for daily activities	25 – 39
Complete inability to communicate or comprehend language symbols	40 – 60

In relation to the *Desbiens* methodology, Chapter 4.1 (c) Emotional or Behavioural Disturbances, provides two extremely important tables to help evaluate whole person impairment. Chapter 4 itself encourages use of Table 3 in that Chapter to assign percentage whole person impairment ratings to Mental and Behavioural Impairments.

As page 4/142 of the Guides state:

“These types of disturbances illustrate the interrelationships between the fields of neurology and psychiatry. The disturbances may be the result of neurological impairments but may have psychiatric features as well which may range from irritability, outbursts of rage or panic and from aggression to withdrawal. These illnesses may include depression, manic states, emotional fluctuations, socially unacceptable behaviour and involuntary laughing or crying and other kinds of central nervous system responses. *The criteria for evaluating these disturbances (Table 3, below) relate to the criteria for mental and behavioural impairment (Chapter 14, page 291).*”

Table 3 is repeated below.

**TABLE 3. EMOTIONAL OR BEHAVIOURAL IMPAIRMENTS.**

Impairment Description	% Impairment of the whole person
<b>Mild</b> limitation of daily social and interpersonal functioning	0 – 14
<b>Moderate</b> limitation of some but not all social and interpersonal daily living functions	15 - 29
<b>Severe</b> limitation impeding useful action in almost all social and interpersonal daily functions	30 - 49
<b>Severe</b> limitation of all daily functions requiring total dependence on another person	50 – 70

Review of Table 2, Mental Status Impairments, below suggests the interrelationship between assessment of attendant care, activities of daily living and Whole Person Impairment. A person who suffers “impairment that requires direct daily care under continued supervision and confinement in home or at a facility” suffers a Whole Percent Impairment of thirty to forty-nine percent (30 – 49%). Table 2 is repeated on the next page.



**TABLE 2. MENTAL STATUS IMPAIRMENTS.**

<b>Impairment Description</b>	<b>% Impairment of the whole person</b>
Impairment exists, but ability remains to perform satisfactorily most activities of daily living	1 – 14
Impairment requires direction and supervision of daily living activities	15 – 29
Impairment requires directed care under continued supervision and confinement in home or other facility	30 – 49
Individual is unable without supervision to care for self and be safe in any situation	50 – 70

Chapter 4 is also the chapter which deals with impairment criteria for sleep and arousal disorders. The observations of clinicians treating and assessing the candidate for catastrophic impairment may helpfully include within their observations and narrative their comments on the degree to which fatigue interferes with the person's day-to-day activities. That information should assist catastrophic assessors in assigning appropriate percentages. Table 6 – Impairment Criteria for Sleep and Arousal Disorders is repeated below.

As the Guides note:

“The categories of impairment that may arise from sleep disorders (Table 6 below) relate to (1) the Nervous System, with reduced daytime attention, concentration and other cognitive abilities; (2) Mental and Behavioural factors including depression, irritability, interpersonal difficulties and social problems;...”.

**TABLE 6. IMPAIRMENT CRITERIA FOR SLEEP AND AROUSAL DISORDERS**

<b>Impairment Description</b>	<b>% Impairment of the whole person</b>
Reduced daytime alertness with sleep pattern such that patient can carry out most daily activities	1 – 9
Reduced daytime alertness requiring some supervision in carrying out daytime activities	10 – 19

Reduced daytime alertness that significantly limits daily activities and requires supervision by caretakers	20 – 39
Severe reduction of daytime alertness that cause the patient to be unable to care for self in any situation or manner	40 – 60

A review of the tables in Chapter 4:

- Table 1 - Impairments Relating To Aphasia
- Table 2 - Mental Status Impairments
- Table 3 - Emotional Behavioural Impairments and
- Table 6 - Impairment Criteria for Sleep and Arousal Disorders

reveals that observations by clinicians assessing all elements of physical, motor, emotional, psychological, behavioural function and activities of daily living, can provide helpful information to assist in the determination of Whole Person Impairment under Chapter 4.

Assessments by psychologists, social workers, neuropsychologists, physiotherapists, and occupational therapists may address the need for supervision, a person's ability to comprehend and communicate the degree of limitation in daily functions and the presence of fatigue. These assessments provide extremely helpful information for the purposes of evaluating catastrophic impairment and assigning Whole Person Impairment under Chapter 4.

Obviously neurological functions associated with paraplegia or quadriplegia can also be evaluated under Chapter 4 of the AMA Guides.

Impairments resulting from spinal cord injuries include those related to station and gait, use of upper extremities, respiration, urinary bladder function, and sexual function.

It is important to note that those who have sustained diagnoses of incomplete paraplegia or incomplete quadriplegia do satisfy the criteria for catastrophic impairment under Section (3)(2) (a) of the Definition of Catastrophic Impairment in the SABS. Whether the descriptor is "complete" or "incomplete", catastrophic assessors have accepted the conclusion that by virtue of the fact that there are no qualifying adjectives which modify the term "paraplegia" or "quadriplegia" within the definition of catastrophic impairment, a claimant is catastrophically impaired whether or not his or her paraplegia or quadriplegia is complete or incomplete.

Once all of the impairments have been evaluated and assigned percentage ratings, the combined values chart is used to add the percentage values of whole person impairments to arrive at a total WPI for the individual.



## G. CHAPTER 13 OF THE AMA GUIDES – THE SKIN – CATASTROPHIC IMPAIRMENT ASSESSMENT AND THE ROLE OF THE TREATING OR ASSESSING HEALTH CARE PROFESSIONAL

As the chapter indicates, the functions of the skin include providing a protective covering, participating in sensory perception, temperature regulation, fluid regulation, electrolyte balance, immunobiologic defences and resistance to trauma, and regenerating the epidermis and its appendages.

Permanent impairment of the skin is defined as any anatomic or functional abnormality or loss that persists after medical treatment and rehabilitation. In evaluating skin impairment, health care professionals can assist catastrophic impairment assessors by helping in characterization of disfigurement, ie. altered or abnormal appearance, scar, impairment of function and/or amputation. When clinicians comment on the effect that skin related impairments have upon ADL's this information can assist in determining whole person impairment.

In accordance with the Guides, there is impairment of the whole person from 0% – 10% when signs and symptoms of a skin disorder are present or are only intermittently present and there is no limitation or limitation in the performance of activities of daily living, and no treatment or intermittent treatment is required.

A person suffers a Class 2 skin impairment of the Whole Person from 10% to 24% in relation to a skin impairment when a person has signs and symptoms of a skin disorder that are present or intermittent and there is a limitation in performance of *some* of the activities of daily living and intermittent to constant treatment may be required.

A person suffers Class 3 skin impairment of Whole Person from 25% - 55% when the person has signs and symptoms of the skin disorder that are present or intermittently present, and there is limitation in the performance of *many* of the activities of daily living and intermittent to constant treatment may be required.

A person suffers a Class 4 skin impairment of the Whole Person from 55% - 85% when the person has signs and symptoms of a skin disorder that are constantly present and there is limitation in the performance of *many* of the activities of daily living which *may include intermittent confinement at home or other domicile*, and intermittent to constant treatment may be required.

A person suffers a Class 5 skin impairment of the Whole Person from 85% - 95% when the person has signs and symptoms of a skin disorder that are constantly present and there is limitation in the performance of *most* of the activities of daily living which *may include intermittent confinement at home or other domicile*, and intermittent to constant treatment may be required.

## H. CHAPTER 14 OF THE AMA GUIDES - MENTAL AND BEHAVIOURAL DISORDERS - CATASTROPHIC IMPAIRMENT ASSESSMENT AND THE ROLE OF THE TREATING OR ASSESSING HEALTH CARE PROFESSIONAL

Mental impairment must be evaluated in accordance with each of the four categories provided in the Mental and Behavioural Disorder table on page 301, Chapter 14 of the Guides, which are:

1. Activities of daily living;
2. Social functioning;
3. Concentration, persistence and pace;
4. Adaptation to work or work-like settings.

In order to qualify as having sustained a “marked impairment”, the applicant must establish that:

“impairment levels significantly impede useful functioning“.

“Significantly” does not mean “totally”. It means “more than insignificant, more than minimally. For example, a twenty five percent contribution was found to be “significant” by the Supreme Court of Canada in *Athey v Leonati* [1996], 3 S.C.R. 458.

“Impede” does not mean “totally prevent”. It is defined to mean “obstruct”, “hinder” or “delay”.

As such, if impairment levels more than minimally hinder, delay or obstruct a person’s ability to function in their ADL’s, social functioning, concentration or adaptation, the person has suffered one or more Marked impairments.

Occupational therapists, chiropractors, physiotherapists, psychologists, social workers and other health care professionals often evaluate one or more activities of daily living in the course of their assessments.

In the context of an occupational therapist’s assessment of function for a person suffering any impairment, consideration of all of the listed activities of daily living - and even those not listed - is critical to determine the extent of a person’s impairment.

Various chapters incorporate by reference the need to evaluate all ADL’s to determine impairment. Use of the ADL Table is central in evaluating Mental and



Behavioural Impairments under Chapter 14 of the Guides. The Activities of Daily Living Table from page 317 of the Guides is reproduced below.

**Table - ACTIVITIES OF DAILY LIVING, WITH EXAMPLES**

Activity	Example
Self-care, personal hygiene	Bathing, grooming, dressing, eating, eliminating
Communication	Hearing, speaking, reading, writing, using keyboard
Physical Activity	<p><i>Intrinsic:</i> Standing, sitting, reclining, walking, stooping, squatting, kneeling, reaching, bending, twisting, leaning</p> <p><i>Functional:</i> Carrying, lifting, pushing, pulling, climbing, exercising</p>
Sensory function	Hearing, seeing, tactile feeling, tasting, smelling
Hand functions	Grasping, holding, pinching, percussive movements, sensory discrimination
Travel	Riding, driving, travelling by airplane, train or car
Sexual function	Participating in desired sexual activity
Sleep	Having a restful sleep pattern
Social and recreational activities	Participating in individual or group activities, sports, hobbies

A Health Care Practitioner who considers activities of daily living in light of each of the impairments can provide helpful information for the purposes of accurate assessment of catastrophic impairment.

Narrative reports which identify the degree to which the individual is capable, or incapable, of initiating or participating in these activities or any other activities of daily living which are part of that unique individuals daily activities, independent of supervision or direction, will be instrumental in assisting counsel, evaluators, arbitrators and judges to determine whether the person has suffered impairments which significantly impede useful functioning in their activities of daily living.

In the course of their assessment, chiropractors, occupational therapists, physiotherapists, psychologists, social workers and neuropsychologists routinely

consider activities of daily living, social functioning, concentration, persistence and pace in adaptation to work-like settings.

To the extent that records and reports from these treating professionals reveal impairments in these areas, it is important for those evaluations to include an indication as to *whether the impairment levels significantly impede useful functioning together with any examples which illustrate such a conclusion*. Should that be the case, whether it be in one or more of the spheres of activity of daily living, social functioning, concentration, persistence and pace or adaptation to work-like settings, the clinician's evaluation will assist in determining that the person has suffered a *marked impairment in one or more of the four spheres*.

Should the evaluation of the four spheres result in the assessor's conclusion that the person has suffered less than a marked impairment, such an evaluation will still enable catastrophic assessors, arbitrators and judges to assign percentage Whole Person Impairment using Chapter 4, The Nervous System's Table 3 – Emotional or Behavioural Impairments. The percent will be 0% - 14% if there is a mild limitation of daily, social and interpersonal functioning. 15% to 29% if there is a moderate limitation of some but not all social and interpersonal daily functions and 30% to 49% if there is a severe limitation impeding useful action in almost all social and interpersonal daily functions.

Equally, evaluation of the attendant care requirements of a client will assist catastrophic assessors, arbitrators and judges to use Table 2 – Mental Status Impairments from Chapter 4 of the Guides, to evaluate whether the person requires direction and supervision of daily living activities, directed care or continued supervision in the home, or suffers an inability to be safe in any situation without supervision. When those determinations are made pursuant to Table 2 - Mental Status Impairments, the catastrophic assessor, judge or arbitrator may then assign the percentage of Whole Person Impairments between 1% and 70% under each of the four categories listed in Table 2.

### **Social Functioning**

As the Guides state, social functioning refers to an individual's capacity to interact appropriately and communicate effectively with other individuals. It includes the ability to get along with others, family, friends, neighbours, grocery clerks, landlords and bus drivers.

Social functioning may be demonstrated by a history -- ordinarily obtained through review of clinician's reports -- of altercations, social isolation, avoidance of interpersonal relationships and other examples of impaired functioning. It is also important to give context to the social traits which are exhibited. For instance, a hostile and uncooperative person may be tolerated by family but that person may have marked restriction and trouble functioning because antagonism and hostility are not acceptable in the work place or in a social context.



## **Concentration, Persistence and Pace**

According to the Guides, this refers to the ability to sustain focused attention long enough to permit timely completion of tasks, commonly found in work settings.

Activities of daily living and a person's ability to complete everyday household tasks should be considered. Where there are previous work attempts or observations in work-like settings, a person's concentration, persistence and pace may be evaluated in light of his or her success or impairment in the work setting.

As such, assessments and daily notes by those working closely with the injured person, including rehabilitation support workers, social workers, psychologists, attendant care providers, occupational therapists and physiotherapists, may assist in providing examples of the patient's incapacities, focus, fatigue or cognitive impairments. While psychological testing can also measure these impairments, the AMA Guides remind us that it is important to remember that concentration during psychological testing can be significantly different from the requirements for concentration in work-like settings.

## **Deterioration and Decompensation in Work or Work-Like Settings**

As the Guides indicate, this refers to a person's impairment and inability to adapt to stressful circumstances. Individuals may withdraw from the situation or express exacerbation of signs and symptoms of mental disorder – decompensation. This decompensation may come in the form of having difficulties in activities of daily living, continuing social relationships and or completing tasks. It is extremely useful to the determination of mental and behavioural disorders for clinicians to provide examples of decompensation and stresses that might have occurred.

As a side note, there are several arbitration decisions that note the lack of formal occupational therapy situational assessments. These assessments assist catastrophic assessors, judges and arbitrators in determining Catastrophic Impairment. Clinicians who evaluate activities of daily living or perform situational assessments should also include within their report information which they have concerning the fall-out or effect of the assessment upon the person, emotionally, physically and behaviourally, following the situational assessment.

Consider the example of a person who is able to work four hours but then must sleep for an hour and one half in his truck before returning to work for a further two hours. On return home at the end of the day, the person is unable to perform household functions or interact with his family but instead must go to sleep to recover energy sufficient to work. The person in this example exhibits decompensation that is relevant in consideration of his adaptation in a work-like setting. Such a person, for example may even require attendant care if that

person cannot be aroused during the night as a result of the extreme fatigue caused by overexertion. That need for attendant care may be relevant when considering Chapter 4, Table 2 – Mental Status Impairments and Table 6 – Sleep Disorders to determine Whole Person Impairment.

Situational assessments and those impairments that become apparent with situational assessment of activities of daily living, social interactions and adaptation to work-like settings are central to the evaluation of the depth and degree of mental or behavioural disorder. The person may be suffering decompensation apparent in these assessments whether it be as a result of physical, cognitive and/or purely psychological impairments.

If a person has attempted a return to work, it is important to obtain an occupational therapy assessment of his or her function in the work-place through contact with co-workers and supervisors in order to determine performance in those settings. This information can be pivotal in allowing assessors to determine the extent to which the person suffers mental/behavioural impairments in the work-like setting. A physical demands analysis of the work place is also integral to this evaluation in providing a baseline to compare the extent to which a person's impairments prevent a person from fully achieving her capacity in and/or the responsibilities of her work.

If a person has pre-existing psychological symptoms, the onus is on the applicant to prove that it is more probable than not that the contribution of the accident was more than minimal and thereby made a material contribution to the development of the person's present mental and behavioural condition.

## **CHAPTER 15 AMA GUIDES – PAIN**

In the recent FSCO decision *Fournie and Coachman*, O.F.S.C.D. No. 15, 2010, the arbitrator accepted evidence by a psychiatrist, Dr. Merskey that in consideration of the Chapter 14 Mental and Behavioural Impairments an assessor could appropriately include an analysis of the degree to which pain from a physical injury was intertwined with the development of mental or behavioural impairments. Specifically, Mr. Fournie suffered depression, anxiety, plus traumatic stress disorder and a pain disorder. Dr. Merskey used the "Pain Intensity-Frequency Grid" on page 310, Chapter 15 of the Guides, which is reproduced below, to conclude that the applicant suffered marked impairments in one or more of his activities of daily living, social functioning, concentration and/or adaptation.



## Pain Intensity-Frequency Grid

		Frequency			
		Intermittent	Occasional	Frequent	Constant
Intensity	Minimal				
	Slight				
	Moderate				
	Marked				

“Marked” is defined:

“The pain precludes carrying out most activities of daily living. Sleep is disrupted. Recreation and socialization are impossible. Narcotic medication or invasive procedures are required and may not result in complete pain control.”

### I. GLASGOW OUTCOME SCALE -CATASTROPHIC IMPAIRMENT ASSESSMENT AND THE ROLE OF THE TREATING OR ASSESSING HEALTH CARE PROFESSIONAL

Six months after the accident, brain injury survivors can be assessed using the Glasgow Outcome Scale which was developed in 1975 by Jennett and Bond.

The Scale is based on overall social compatibility or dependence of the client. It takes into account the combined effect of mental and neurological deficits without listing them as part of the definition.

There are four categories of survival:

- Vegetative State
- Severe Disability
- Moderate Disability
- Good Recovery

A person is Catastrophically Impaired if his or her score on the Glasgow Outcome Scale (GOS) is 2 (vegetative) or 3 (Severe Disability).

It is relevant to note that the determination of a GOS score must be based solely on the limitations imposed by traumatic brain injury, and the evaluator must discriminate these from any imposed by age, orthopaedic impairments, pain or other non-neurological problems.

A person with GOS 3 or Severe Disability is able to follow commands but unable to live independently. This indicates that a person is conscious but needs the assistance of another person for some activities of daily living every day. This may range from continuous total dependency (for feeding and washing) to the

need for assistance with only one activity – such as dressing, getting out of bed or moving about the house, or going outside to a shop. The person cannot be left overnight because they would be unable to plan their meals or to deal with callers, or any domestic crisis which might arise. The severely disabled are described by the phrase “conscious but dependent.”<sup>9</sup>

In Chapter 13 of the text, Management of Head Injuries, by Bryan Jennett and Graham Teasdale,<sup>10</sup> the authors provide further elucidation of the meaning of Severe Disability. Comments within that definition include the following:

“The least affected of those in the category of severe disability are patients who are communicative and sensible, though usually with marked impairment of cognitive and memory function on testing, who are dependent for only certain activities on others – perhaps dressing, feeding, or cooking their meals [consider all ADL’s from previous tables] Such a person could not be left to fend for himself even for a weekend. **“He is not independent and must therefore be regarded as severely disabled on our classification.”**”

Ready knowledge of this definition by treating and assessing health care professionals and evaluation of the client in view of their ability to carry on activities of daily living, attendant care needs, and/or their complete or incomplete independence, will assist insurers, lawyers, judges and arbitrators in determining whether or not a person has suffered a Severe Disability under the Glasgow Outcome Scale.

The need which a person has for attendant care is extremely relevant to the determination of whether the person is “not independent” and as such is “severely disabled”.

It is now well accepted that the Glasgow Outcome Scale suffers from a limitation involving inter-rater reliability, or IRR. Studies have shown that there is significant potential for the same patient to receive GOS scores differing by one or two points when different evaluators see the patient even where tests are administered in the same time period. In part, these limitations are a function of the GOS scale, which provides for only four incremental categories of disability. Too small a number of categories can lead to “forced choices,” in which bias, sympathy, inexperience, or other evaluator factors become overly significant influences on scoring decisions. Studies have indicated that, optimally, a measuring device should have five to seven categories in order to reduce forced choices and any effects of bias, sympathy or inexperience. For this reason, the more recently developed GOS-Extended, or GOSE, has become a more popular

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<sup>9</sup> Jennett, B. Snoek, J. Bond Mr, Brooks N., Disability After Severe Head Injury: Observation On The Use Of The Glasgow Outcome Scale, J Neurol, Neurosurg, Psychiat 1981;44:285-293

<sup>10</sup> Jennett, B, Teasdale, Management of Head Injuries 1981, F.A. Davis Company, USA



tool in recent times, although it is not legislated for use in catastrophic impairment determination.

Researchers have found that the IRR of the original GOS can be substantially enhanced by several measures. Adequate, reliable information about the patient is essential, and must be assembled as much as possible from direct assessment complimented by interviews by family or other caregivers. As one might expect, IRR may also improve when the cohort of evaluators is restricted to those with appropriate scopes of practice, and adequate experience with traumatic brain injury. Consistent, formal training of evaluators in the use of the GOS test can further improve IRR, as can experience in its use.

Substantial improvement in IRR can, however, be achieved by simply ensuring that the discriminators of the scale are more clearly described and systematically applied. In 1998, studies by Teasdale and by Wilson<sup>11</sup> demonstrated the importance of using a standard format involving a written protocol, and taking the form of a direct structured interview.

The structured interview set out by Wilson et al incorporates the following questions and guidelines:

Q1: *Vegetative state*: does the patient have the capacity to communicate?

If not, then the patient is GOS2.

[If yes, then the GOS must be 3, 4 or 5.]

Q2: *Independence in the home*: does the patient require actual assistance with ADLs, prompting or reminding to do things, or supervision to ensure safety? Does the patient actually depend upon the assistance received (real need)? What are examples of minor domestic crisis? What would you do if a glass were dropped and broken, a tap were left running, a light went out, it begins to get cold, a stranger comes to the door...? Can the person use the telephone to report problems or summon help? Can the person be left alone for a 24-hour period?

Q3: *Independence outside the home – shopping*:

Q4: *Independence outside the home – travel*:

Can the patient plan, take care of money, and behave adequately in public? Is the person actually capable or just does not do it?

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<sup>11</sup> Wilson et al, "Structured Interviews for the Glasgow Outcome Scale and the Extended Glasgow Outcome Scale: Guidelines for Their Use", *Journal of Neurotrauma*, August 1998

[Answers to Q2 – Q4 indicate whether the GOS is serious enough to be 3; if not, the GOS must be 4 or 5.]

- Q5: *Work*: if the person was working previously, is there a reduced capacity?
- Q6: *Social and leisure activities*: has there been an important change on the basis of loss of motivation or initiative, avoidance of social involvement, loss of mobility, cognitive problems such as poor concentration, or problems such as poor temper or impatience? How many occasions per week now versus previously? Is there at least one activity outside the home each week?
- Q7: *Family and friendship*: how often is there a problem with relationships – Occasional (some problems but less than once per week, such as occasional bad temper that blows over); Frequent (problems at least weekly, with tolerable strains on relationships, such as temper outbursts resulting in modification of closeness of relationships); Constant daily problems (intolerable problems, with breakdown of relationships within family or friendship; has the family become socially isolated?)

[Answers to Q5 – Q7 indicate whether the GOS is 5 or is less than 5.]

## J. THE MEANING OF “CAUSATION” IN DETERMINING CATASTROPHIC IMPAIRMENT

At page 316 of the 4<sup>th</sup> Edition of The American Medical Association Guides to the Evaluation of Permanent Impairment, causation is defined:

“Causation means that a physical, chemical or biologic factor contributed to the occurrence of a medical condition. To decide that a factor alleged to have caused or contributed to the occurrence or worsening of a medical condition has, in fact, done so, it is necessary to verify both of the following:

- (a) The alleged factor ***could have caused or contributed to worsening of the impairment***, which is a medical determination.
- (b) The alleged factor did cause or contribute to worsening of the impairment, which is a non-medical determination.”

On June 12<sup>th</sup>, 1996 The Supreme Court of Canada released its decision in *Athey v. Leonati*.<sup>12</sup> The Plaintiff suffered a disc herniation while working out following an accident. The Court stated:

<sup>12</sup> *Athey v. Leonati*, [1996] 3 S.C.R. 458 S.C.C.



“it is not now necessary, nor has it ever been, for the Plaintiff to establish that the Defendant’s negligence was the sole cause of the injury.”

Further from *Athey*:

“As long a Defendant is part of the cause of an injury, the Defendant is liable, even though his act alone was not enough to create the injury.”

In 2001 Director’s Delegate Naylor spoke in detail about principals of causation and adopted *Athey* in the *Correia and TTC* Arbitration Appeal.<sup>13</sup> Ms. Correia suffered an injury when bus doors closed on her. After physiotherapy sessions she felt ready to return to work. Her therapist wouldn’t allow her to return to work without a functional capacity evaluation. She was injured in the functional capacity evaluation. The Arbitrator found that Ms. Correia’s original injuries had substantially resolved and were not disabling but that her treatment-related injuries disabled her from work on an ongoing basis.

On Appeal, the Director’s Delegate Naylor upheld the conclusion that the injury related to the functional capacity evaluation was directly caused as a result of the accident and that the ongoing benefits were payable in relation to the disability arising therefrom.

The Ontario Court of Appeal released the decision *Monks v. Ing*<sup>14</sup> on April 15<sup>th</sup>, 2008. The Plaintiff was injured in three accidents. After the third accident, she became a complete quadriplegic. The Defendant did not dispute that the plaintiff was catastrophically impaired but claimed that her impairment was caused by a combination of the first and second accidents and said she was “a crumbling skull plaintiff”. The phrase “Crumbling skull” is used at law to describe a person who suffers impairments before an accident which would continue to worsen whether or not the accident occurred.

The Ontario Court of Appeal noted:

“The trial judge did not err in finding that there is no room for the crumbling skull theory in accident benefit cases. Where, as here, a benefit claimant’s impairment is shown on the “but – for” or material contribution causation tests to have resulted from an accident...the insurer’s liability for accident benefits is engaged...”<sup>15</sup>

Finally the Court of Appeal noted:

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<sup>13</sup> *Correia and TTC*, [2001] O.F.S.C.O. No. 106

<sup>14</sup> *Monks v. Ing* (2008), 90 O.R. (3d) 689 C.A.

<sup>15</sup> *Ibid*, *Monks*, *supra*

“The case law related to accident benefit claims is clear – that the principals enumerated in the Supreme Court of Canada decision of ***Athey*** are equally applicable in the context of an accident benefit claim.”<sup>16</sup>

In conclusion, if the accident made a material (more than minimal) contribution to the impairment or to the worsening of the impairment, then the impairment was directly caused by the accident and should be an impairment evaluated under one or more of the categories in the definition of catastrophic impairment.

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<sup>16</sup> Ibid, *Monks, supra*