



FSCO A07-001204

BETWEEN:

MARIA AUGELLO

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Arbitrator John Wilson

Heard: September 9, 2008, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Gregory Neinstein and Jamie Pollack for Ms. Augello
Lee Samis for Economical Mutual Insurance Company

Issues:

The Applicant, Maria Augello, was injured in a motor vehicle accident on September 7, 2002. She applied for and received statutory accident benefits from Economical Mutual Insurance Company (“Economical”), payable under the *Schedule*.¹

Ms. Augello was assessed for catastrophic impairment and, based on a 55% or more whole person impairment, Dr. Becker found that she met the definition of catastrophic impairment. In so doing Dr. Becker utilized the analytical approach outlined by Spiegel J. in *Desbiens v. Mordini*², assigning percentages for psychological impairments, and combining these with physical impairment ratings to reach a full body impairment rating that met the threshold for catastrophic impairment under the *Schedule*.

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

² [2004] O.J. No. 4735

The Insurer's assessors, who did not accept the formula for the assessment of whole body impairment outlined by Spiegel J., found that Ms. Augello did not meet the criteria for catastrophic impairment.

The nub of the dispute between the parties is this difference in approach between the assessors, and whether percentage impairment values could be assigned to mental and behavioural disorders to facilitate the combination of physical and psychological impairments in determining an individual's whole person impairment.

The parties were unable to resolve their disputes through mediation, and Ms. Augello applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issue in this hearing is:

1. Is Ms. Augello entitled to a finding of catastrophic impairment based on a whole body impairment rating which assigns percentage values to psychological impairments so as to facilitate the combination of physical and psychological impairments for the purposes of the calculation of whole body impairment?

Result:

1. Ms. Augello is entitled to a finding of catastrophic impairment based on a whole body impairment rating which assigns percentage values to psychological impairments so as to facilitate the combination of physical and psychological impairments for the purposes of the calculation of whole body impairment.

EVIDENCE AND ANALYSIS:

As noted above, the principal difference between Ms. Augello and Economical at this stage in the process is the method of calculating catastrophic impairment, not whether or not Ms. Augello is actually entitled to any specific benefits, should she be found to be catastrophically impaired.

Indeed, the Insurer conceded that should the approach taken by Dr. Becker in his assessment of Ms. Augello be found to be valid, then Ms. Augello would meet the threshold for a finding of catastrophic impairment.

By way of context, it is no secret that there is a profound disagreement between many medical experts in the field of disability assessment as to the exact role that the AMA Guides play in determining catastrophic impairments under the *Schedule*. The prime dissident group rallying against the interpretation taken by the courts and arbitrators to date (the *Desbiens* approach) is centred around the position taken by Dr. Brigham, a prominent American advisor on disability issues.

Dr. Ameis, whose article on *Impairment Evaluation* is cited by Economical clearly falls into the Brigham camp. Indeed, Dr. Brigham is listed as a co-author of the article.

One of Dr. Brigham's claims to fame is that he participated in the development of the original guidelines, and claims to have a special insight into what was intended by the committee which draughted the original guidelines. Dr. Ameis and Dr. Brigham have posited that the intention or original meaning of the provision was that no numeric rating could be given to psychological disorders, with the result that such disorders could not directly be added to the numerical physical rating to push the whole person impairment over the necessary threshold for catastrophic impairment.

It is clear from the Catastrophic report of the Custom Rehab team, headed by Dr. Rehan Dost, neurologist, that the Insurer's experts were firmly in the Brigham/Ameis camp, finding a 20% whole person impairment, when, as they acknowledged in their own report, the amount under a *Desbiens* approach would have been 55%.

Indeed, Economical has acknowledged that should the *Desbiens* approach be found to be appropriate, Ms. Augello would meet the criteria for catastrophic impairment.

The exact wording of the provision bears reading. Section 2(1.1) of the *Schedule* sets out various definitions of catastrophic impairment:

2. (1.1) For the purposes of this Regulation, a catastrophic impairment caused by an accident that occurs before October 1, 2003 is,

- (a) paraplegia or quadriplegia;
- (b) the amputation or other impairment causing the total and permanent loss of use of both arms;
- (c) the amputation or other impairment causing the total and permanent loss of use of both an arm and a leg;
- (d) the total loss of vision in both eyes;
- (e) 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;
- (f) subject to subsections (2) and (3), 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
- (g) subject to subsections (2) and (3), an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder. O. Reg. 281/03, s. 1 (5).

The inclusion of the AMA Guides in the *Schedule* does not happen in a vacuum. Section 121 of the *Insurance Act*, indeed provides for such adoption by reference "...with such changes as the Lieutenant Governor in Council considers necessary..." That provision reads as follows:

121.(2.2) A regulation made under subsection (1) may adopt by reference, in whole or in part, with such changes as the Lieutenant Governor in Council considers necessary, *any code, standard or guideline, as it reads at the time the regulation is made or as amended from time to time*, whether before or after the regulation is made.

Spiegel J. in *Desbiens v. Mordini* provided the pioneering analysis of the interaction of the AMA Guides with the balance of the *Schedule* to which it is incorporated by reference. It is this interpretation which Dr. Brigham, Dr. Ameis, and their acolytes now challenge. Spiegel J. began his analysis with an examination of the general purposes of the Guides themselves:

The stated purpose of the Guides was to achieve a greater degree of objectivity in estimating the degree of permanent impairments by providing a standard framework and method of analysis. There are various definitions of “impairment” in the Guides, including: “an alteration of an individual’s health status” and, “a deviation from normal in the body part or organ system and its functioning”. It is defined in the Guides’ Glossary as “the loss, loss of use, or derangement of any body part, system, or function.” The editors state that the Guides definition of impairment closely parallels that of the World Health Organization (WHO) that has defined impairment as “any loss or abnormality of psychological, physiological or anatomical structure or function.” The definition of impairment in the Regulation is virtually identical to the WHO definition.

He continued, pointing out:

As Lax J. pointed out in *Snushall v. Fulsang* the insurance legislation in Ontario appears to require precisely what the Guides themselves discourage. It has also been pointed out that the Guides are not designed to assess treatment or rehabilitation service requirements. Therefore under Bill 59 we have the anomalous situation that the determination of entitlement to recovery of healthcare expenses in a tort action is governed by a set of guidelines that do not address the need for healthcare or the estimated costs thereof.

Spiegel J’s approach to the guidelines was to treat them as part and parcel of the legislation which incorporated them³, rather than as a free-standing text. As legislation, the Guides are then subject to the well-known principles of legislative interpretation that govern any legislation in a common law context.⁴

³ In the case of *R. v. Collins*, the B.C. Court of Appeal examined the question of the validity of certain guides that had been incorporated by reference into a regulation but had not been published in the Gazette.

⁴ *Rizzo & Rizzo Shoes Ltd. (Re)* 154 D.L.R. (4th) 193

As Spiegel J. noted:

Legislative purpose should be taken into account in every case and at every stage of interpretation, including the determination of a text's meaning. In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided... Even in a case where the plain meaning of the words of the provision appear to dictate a particular interpretation this is not determinative; context and purpose are equal guides to statutory interpretation along with the words themselves.

The question of whether something is “in accordance” with the Guides also requires an interpretation of the Guides. Non-statutory instruments that have been incorporated into a regulation by reference are considered part of the regulation. The principle that a referenced instrument is considered part of the Regulation is further supported by the maxim *verba relata hoc maxime operantur per referentiam rit it eis inesse videntur* which means “words to which reference is made in an instrument have the same operation as if they were inserted in the instrument referring to them”. This maxim has been applied in recent caselaw where the court has found that the effect of incorporation by reference is that the material incorporated is considered to be part of the text of the legislation.⁵

I see no reason to disagree with Spiegel J.'s approach to interpretation and his application of the rules of statutory interpretation generally used in Canada in understanding the meaning of the AMA Guides in this context.

I also accept Spiegel J.'s findings that the result of the application of these principles of statutory interpretation is that one is entitled to assign “percentages to Mr. Desbiens' psychological impairments and to combine them with his physical impairments in determining whether he meets the definition of catastrophic impairment under clause (f).”

Spiegel J. concluded:

In my opinion this interpretation does not offend the legislative text and it gives effect to the purpose of the legislation.⁶

⁵ I note that many American jurists approach statutory interpretation very differently, often striving to find the “original” meaning of a text or provision. Coincidentally this seems to be exactly the approach urged by Economical in this matter, with its emphasis on what the authors of the AMA guide may have intended when drafting the original guideline. See Scalia A. *A Matter of Interpretation* Princeton University Press 1997.

⁶ *Desbiens supra*

It is more than just a question of whether or not I accept Spiegel J.'s approach in this matter. It is my understanding that, faced with consistent decisions on that very issue at the superior court level, I am bound to follow their lead. As then Director Draper noted:

This is not a situation where FSCO jurisprudence is either internally inconsistent or out of step with judicial decisions. The recent court and FSCO decisions have carefully considered the definition of catastrophic impairment and have consistently concluded that mental and behavioral impairments can be considered under clause (g). As a result, insurers are not facing inconsistent decisions that make it impossible to determine how to adjust claims involving both physical and psychological impairments.

While there may be a slightly greater diversity of opinion concerning catastrophic impairment at the level of arbitration, all the most recent decisions at both arbitration and in the courts have consistently accepted the approach enunciated by Spiegel J. in *Desbiens*.

It is the decisions in the superior courts which are important from the point of view of binding precedent. While potentially persuasive, arbitration decisions are not binding on me. As Borins J.A. observed:

Moreover, there is a well-accepted principle of administrative law that stare decisis does not apply to administrative tribunals. A tribunal is not bound to follow its own decisions on similar issues, although it may consider an earlier decision persuasive and find that it is of assistance in deciding the issue before it. See, e.g., *Evans v. Public Service Commission Appeal Board; Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*.⁷

It is a different situation, however, in relation to the decisions of superior courts created under section 96 of the *Constitution Act 1867*.

One of the consequences of a decision by a section 96 court is that because of the doctrine of stare decisis, it is binding upon all inferior courts and tribunals.

As has been noted many times, "(U)nder the Constitution Act, 1867, only a section 96 judge (a superior court judge) has the supervisory jurisdiction at common law and equity..."⁸

⁷ *TransCanada Pipelines v. Beardmore (Township)*[2000] O.J. No. 1066

⁸ *Nolan v. Ontario (Superintendent of Financial Institutions)*. [2006] O.J. No. 960

Although arbitrators and courts deal with the same subject-matter, they are not clothed with the same jurisdiction.

That same supervisory jurisdiction of the courts is still exerted over statutory tribunals, such as, in this case, arbitrators appointed under the *Insurance Act*.

The importance of the rule of stare decisis to our court system cannot be underestimated. As Rinfret J. observed in *Woods*:

It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.⁹

This principle of stare decisis is a key attribute of the court system, and one that distinguishes it from alternative systems of adjudication. In creating the arbitration system “The Legislature of Ontario does not have jurisdiction to usurp the historical function of a s. 96 judge.” And so cannot clothe an arbitrator with the same jurisdiction as a section 96 judge.

The principle that a tribunal must respect the decisions of the courts which have supervisory jurisdiction is long established. As Rothstein J.A. noted:

The principle of stare decisis is, of course, well known to lawyers and judges. Lower courts must follow the law as interpreted by a higher coordinate court. They cannot refuse to follow it: *Re Canada Temperance Act, Re Constitutional Questions, Re Consolidated Rules of Practice*, [1939] 4 D.L.R. 14 at 33 (Ont. C.A.), *aff’d* [1946] 2 D.L.R. 1 (S.C.C.); *Woods Manufacturing Co. v. Canada (Attorney General)*, [1951] S.C.R. 504 at 515. This principle applies equally to tribunals having to follow the directions of a higher court as in this case. On redetermination, the duty of a tribunal is to follow the directions of the reviewing court.¹⁰

⁹ *Woods Manufacturing Co. v. Canada (Attorney General)* [1951] S.C.R. 504

¹⁰ *Canada (Commissioner of Competition) v. Superior Propane Inc.* [2003] F.C.J. No. 151, Rothstein J.A.

In *Arts v. State Farm*¹¹, another matter involving issues surrounding the assessment of catastrophic impairments, Mackinnon J. opted for Spiegel J.'s approach, including consideration of all impairments, however caused, and where appropriate, adding them together to determine whole body impairment.

In a ruling on a motion for leave to appeal the decision of Mackinnon J., J. E. Ferguson J. concluded simply:

There is no good reason to doubt the correctness of Mackinnon J.'s decision. It was well reasoned and consistent with the existing law.

Spiegel J.'s approach to the assessment of catastrophic impairment has now been adopted by the courts in Ontario.¹² In the absence of conflicting jurisprudence emanating from the superior courts of this province I am bound to accept that the approach enunciated by Spiegel J. is the correct way to proceed in the assessment of catastrophic impairment based on whole body impairment.

In the event that I am incorrect and I am not bound by stare decisis to accept the reasoning of Spiegel J. in *Desbiens*, there are other cogent reasons for not accepting Economical's position in this matter.

The controversial nature of the dispute over the appropriate means of assessing catastrophic impairment has meant that this same dispute has been aired many times in many forums. Indeed, for Ms. Augello this is the second time that the question has been raised at the Financial Services Commission. In the first round, Economical requested that the then Director state a case to the Divisional Court on this same issue.

Indeed, Director Draper characterized the issue as follows:

¹¹ 91 O.R. (3d) 394

¹² The important thing that differentiates this case from others is the total consistency of judicial opinion to date on the evaluation of catastrophic impairment. It goes without saying that in the event of disparate judicial views or inconsistent *obiter* comments from a superior court, a statutory decision maker is not so restricted.

The issue in dispute is whether mental and behavioural disorders can be assigned a percentage and included in the determination of whole person impairment in clause (f). This “combining” approach was accepted by Justice Spiegel in *Desbiens v. Mordini*, [2004] O.J. No 4735 and has found support in a number of subsequent decisions from the Financial Services Commission of Ontario (“FSCO”), most directly in *Ms. G and Pilot Insurance Company* and *B.P. and Primmum Insurance Company*.¹³

Although the recourse requested by the moving party before the Director was different, there is no question that the issue addressed was the same.

As Binnie J. noted in *Danyluk*¹⁴ the courts are loathe to allow parties to re-litigate issues that have already been addressed by a court or tribunal and have been the subject of a final determination. He outlined the rationale for this policy as follows:

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.¹⁵

The importance of the *Danyluk* decision was that it reaffirmed the application of issue estoppel to administrative tribunals as well as courts. Although it was apparent as early as the mid 1800’s that elements of the doctrine could be applied to administrative agencies operating in an adjudicative context,¹⁶ there was always some difficulty in applying the doctrine uniformly to a variety of administrative environments.

¹³ *Ms. G and Pilot Insurance Company*, (FSCO A04-000446, March 16, 2006), aff’d on appeal (FSCO P06-000004, September 4, 2007); *B.P. and Primmum Insurance Company*, (FSCO A05-001608, December 21, 2006). See also, *McMichael and Belair Insurance Company Inc.*, (FSCO A02-001081, March 2, 2005), aff’d on appeal (FSCO P05-000006, March 14, 2006), appl’n for judicial review dismissed, (2007), 86 O.R. (3d) 68 (Div. Ct.).

¹⁴ *Danyluk v. Ainsworth Technologies Inc.* [1999] S.C.C.A. No. 47

¹⁵ *Danyluk supra*

¹⁶ see *Robinson v. McQuaid* (1854), 1 P.E.I.R. 103 (S.C.), and *Bell v. Miller* (1862), 9 Gr. 385 (U.C. Ch.),

The modern principles of issue estoppel were set out by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*,¹⁷

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.

More recently, the preconditions to the application of issue estoppel were defined by Dickson J. in *Angle*¹⁸,

- (1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel was final; and,
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Even once Dickson's preconditions have been addressed, it is still not necessarily the case that issue estoppel will be applied. There is, as identified by Binnie J., a further discretion in the tribunal as to the appropriateness of its application.

The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.¹⁹

Applying these principles to the decision of the Director would lead to the following observations:

¹⁷ [1924] 4 D.L.R. 420

¹⁸ *Angle v. Canada (Minister of National Revenue - M.N.R.)* [1975] 2 S.C.R. 248

¹⁹ *Danyluk* (supra)

1. Although Ms. Augello's claim in this forum involves substantive entitlement, the issue that I have been asked to decide is to all intents and purposes, identical to that which was heard before Director Draper.
2. Director Draper appears to have received submissions from both sides, and duly considered the law relating to catastrophic impairment before issuing an extensive, written decision in this matter. It is clearly a "judicial" decision, that is final, and has not been subject to either an appeal or a judicial review.
3. The parties to the request to state a case to the Divisional Court appear to be identical to those in this arbitration.

I find therefore that there are grounds for a finding of issue estoppel with regard to the question of whether mental and behavioural disorders can be assigned a percentage and included in the determination of whole person impairment in clause (f), since this is the self-same issue already decided by Director Draper between these same parties.

The only question remaining is whether there are grounds to exercise a discretion to refrain from applying issue estoppel. There is no confusion in the jurisprudence as to the correct procedure to be followed in calculating a whole body impairment. This has been recognized in decisions both in the courts and in arbitrations. Given Binnie J's comments that "the law rightly seeks a finality to litigation" and that "(A)n issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner," I see no compelling reason not to apply issue estoppel in this matter.

I emphasise that I have also found that as a result of the application of the normal principles of statutory interpretation that one is entitled to assign percentages to an insured's psychological impairments and to combine them with physical impairments in determining whether he or she meets the definition of catastrophic impairment under clause (f).

Although in light of the effect of stare decisis and issue estoppel, there is no need to analyze at length the arguments made for and against the "stacking" of impairments, I would have, even in the absence of any technical reasons such as outlined above, also found in favour of the

procedure outlined by Spiegel J. in *Desbiens* as the only reasonable interpretation based on the approach outlined by Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) and approved by the Supreme Court in *Rizzo v. Rizzo Shoes*.

To Iacobucci J., Driedger's approach:

... best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Using Driedger's criteria, that of discerning the meaning of the words "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament", I have no hesitation in finding that the *Desbiens* approach more closely corresponds with the underlying principles of the accident benefit scheme.

Those principles have been identified as follows:

Lane J. in *Belair Insurance Co. v. McMichael*²⁰ citing *Kennelly v. Wawanesa Mutual Insurance Co.*, noted "the statutory goal of prompt payment for necessary services."

Eberhard J., in *Gill v. Zurich*²¹, made the following comments on the purposes of the statutory accident benefit scheme:

I adopt the statement of purpose articulated by Arbitrator Mackintosh at page 12 in *Edgar v. Wellington Insurance Co.* [1994] O.I.C.D. No. 34 File A-005441 that SABS is remedial, that is to be interpreted in a broad and liberal way, and that its principal object is to provide a "fair and adequate income stream to those who are injured and disabled from work."

²⁰ [2007] O.J. No. 1972

²¹ [1999] O.J. No. 4333

In *Smith v. Co-operators General Insurance Co.*²², one of the few accident benefit cases to have made its way to the Supreme Court, Gonthier J. stated:

There is no dispute that one of the main objectives of insurance law is consumer protection, particularly in the field of automobile and home insurance.

It would seem at odds with such a consumer protection mandate that an evaluation of catastrophic impairment, the key to enhanced coverage, could take place in the absence of a means of combining physical and psychological impairments for the purposes of the calculation of whole body impairment. Patently such a denial would have left insureds who suffered psychological sequelae to a motor vehicle accident at a disadvantage when attempting to access the higher range of benefits available to a catastrophically impaired individual.

Whatever the original creators may have intended when they developed the AMA Guides, the Guides, as included in the *Statutory Accident Benefits Schedule* have developed a life of their own, independent of the wishes and opinions of their creators.

Since the Guides, as included in the *Schedule*, are necessarily seen as part of subsidiary legislation, the courts judges and arbitrators have, through their decisions over time, added a gloss, or an interpretation that is helpful in integrating them into the scheme as a whole. This is exactly how jurisprudence in the common law provinces of Canada is meant to develop. There is no reason why the AMA Guides, as incorporated, should be subject to any different rule.

I will also deal briefly with the issue of contractual interpretation as it relates to the Guides, since patently the contract of insurance is at the base of any accident benefit coverage.

Every policy of automobile insurance issued in Ontario includes coverage for up to the limits shown for catastrophic impairment subject to attaining certain access thresholds.²³ A determination of catastrophic impairment determines whether access to the upper levels of coverage is available to a claimant.

²² [2002] 2 S.C.R. 129

²³ *Holland v. Pilot Insurance Co.* [2004] O.J. No. 2737

It should also be noted in the context of interpretation that in addition to being incorporated into the *Schedule*, the AMA Guides are also incorporated into the insurance policy itself by reason of section 268. (1) of the *Insurance Act* which reads as follows:

Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*. 1993, c. 10, s. 26

In a decision dealing with the inclusion and interpretation of defence covenants in a policy of insurance, the Court of Appeal noted:

Of paramount concern among the various guides to interpreting insurance contract in this case, it is the principle that where more than one reasonable interpretation of a defence covenant is open, an interpretation which favours the insured by recognizing a duty to defend will carry the day.²⁴

Consequently, if a determination of the threshold to allow a higher level of coverage in catastrophic cases is a coverage issue, then given competing interpretations of the provisions, any confusion or discrepancy in the legislative scheme, and hence in the contract should be interpreted in a manner that favours the insured.

As noted earlier, a determination of catastrophic impairment is the key to unlocking further, enhanced benefits under the contract of insurance. Taking such an approach, where there are two or more possible interpretations of contractual wording, relevant to coverage, the interpretation which favours the insured should prevail. Under such a scenario, the *Desbiens* approach to interpreting the AMA Guides should, as well, be preferred.

For all the above reasons I find that the approach taken by Spiegel J. in *Desbiens v. Mordini*, allowing for the “stacking” of impairments, whereby mental and behavioural disorders can be assigned a percentage and included in the determination of whole person impairment in clause (f) is correct and should govern the assessment of Ms. Augello in this matter.

²⁴ *Alie et al. v. Bertrand & Frere Construction Co. et al.* 62 O.R. (3d) 345

Since Economical has acknowledged that should the *Desbiens* approach to the assessment of whole body impairment be accepted, Ms. Augello would meet the test for catastrophic impairment, I so find, and order that Ms. Augello be considered as catastrophically impaired pursuant to the *Schedule*.

EXPENSES:

If the parties are unable to agree on expenses within the 30 days following the issuance of this decision, I may be spoken to on that issue.

John Wilson
Arbitrator

December 18, 2008

Date



FSCO A07-001204

BETWEEN:

MARIA AUGELLO

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Ms. Augello is entitled to a finding of catastrophic impairment based on a whole body impairment rating which assigns percentage values to psychological impairments so as to facilitate the combination of physical and psychological impairments for the purposes of the calculation of whole body impairment.
2. Consequently, Ms Augello is found to be catastrophically impaired as defined by the *Schedule*.

John Wilson
Arbitrator

December 18, 2008

Date