



FSCO A04-002455

BETWEEN:

CLARENCE LARRY FISHER

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: John Wilson

Heard: Friday, May 5, 2006, at the offices of the
Financial Services Commission of Ontario in Toronto.
Order originally issued May 26, 2006

Appearances: Mr. Michael Bennett for Mr. Fisher
Ian D. Kirby for Allstate Insurance Company of Canada

Issues:

The Applicant, Clarence Larry Fisher, was severely injured in a motor vehicle accident on August 31, 2002. He applied for and received certain statutory accident benefits from Allstate Insurance Company of Canada (“Allstate”).

As part of his claim for further benefits, Mr. Fisher’s litigation guardian requested that he be assessed for catastrophic impairment in accordance with section 40 of the *Schedule*.

Consequently, Allstate arranged for an assessment to be provided by a DAC headed by Dr. Lacerte, which operated out of London Ontario. The DAC conducted a paper review of Mr. Fisher's case, while Ms. Moira Hunter, an occupational therapist, met briefly with Mr. Fisher in Thunder Bay and examined Mr. Fisher in person.

The DAC assessment found that Mr. Fisher was not catastrophically impaired. Counsel for Mr. Fisher subsequently requested a re-examination of Mr. Fisher, alleging that irregularities in the DAC process compromised the report, and that Mr. Fisher was entitled to a further CAT DAC to determine whether he met the criteria of section 21(e)ii of the *Schedule* (Glasgow Outcome Scale).

The preliminary issue is:

1. Is Mr. Fisher entitled to have a further Catastrophic Assessment (CAT DAC)?

Result:

1. Mr. Fisher is entitled to have a CAT DAC assessment completed that adheres to the spirit and the intent of the guidelines covering this type of assessment.

EVIDENCE AND ANALYSIS:

The issues before me raise the questions of what is intended by the CAT DAC scheme outlined in section 40 of the *Schedule* and what constitutes the fulfilment of the obligation to provide a catastrophic DAC assessment once requested.

In this matter, there is no question that Mr. Fisher's guardian, on the advice of his treating neurosurgeon, Dr. Chaudhuri, requested a CAT DAC assessment and that Allstate undertook the necessary procedures to have it take place. An assessment did take place, undertaken by Independent Claims Evaluators Inc., an assessment group in London Ontario. For the most part, the matter was dealt with as a paper review, with only a brief Occupational Therapy assessment taking place in person in Thunder Bay. The DAC issued the following conclusion:

Based upon review of the available documentation, it is our opinion that Mr. Fisher does not meet the definition of catastrophic impairment under the SABS s. 2 (1.1) (e) (i) or (e) (ii).

Needless to say, the Applicant took exception to the DAC's conclusions.

Counsel for Mr. Fisher, Mr. Bennett, has taken exception to the manner in which the CAT DAC was conducted, alleging that it was not in conformance with the standards set by FSCO and the law for such assessments. Mr. Bennett also puts forth the notion that Mr. Fisher is not restricted to a single catastrophic assessment and that, on that basis alone, he would be entitled to further assessments as certain watersheds in time or progress were reached.

He also pointed to changed circumstances and important information that was not originally available to the DAC when it made its determination, in arguing for a new and complete CAT DAC.

The pertinent legislative provisions allowing for CAT DACs read as follows:

- 40(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 insurer shall, within 30 days after it receives the application,
 - (a) determine that the impairment is a catastrophic impairment and give the insured person notice of the determination;

- (b) determine that the impairment is not a catastrophic impairment and give the insured person notice of the determination, including the reasons for the determination; or
- (c) give the insured person notice that the insurer requires the insured person to be assessed by a designated assessment centre in accordance with section 43.

Section 43 sets out additional rules for the DAC assessments, including CAT DACs:

- 43(1) If an assessment is required to be conducted by a designated assessment centre,
 - (a) the insurer shall, within 15 days, notify the designated assessment centre; and
 - (b) the designated assessment centre shall promptly notify the insured person and arrange for the assessment.
- (2) For the purpose of the assessment,
 - (a) the insured person and the insurer shall provide the person or persons who conduct the assessment with such information as is reasonably necessary; and
 - (b) the insured person shall submit to any reasonable physical, psychological, mental and functional examinations requested by the person or persons who conduct the assessment.

What is of some note is that the legislation provides merely for the right of an insured to apply for “a determination of whether the impairment is a catastrophic impairment.” Section 40(4) further provides that “the determination by the designated assessment centre is binding on the insured person and the insurer, subject to the determination of a dispute, in accordance with sections 279 to 283 of the *Insurance Act*.”

The use of the word “determination” in the legislation is interesting. The DAC does not merely make a recommendation which either side may accept or reject, but a “determination” of the

specific issue referred to it, one that is binding on both parties, subject to what is, in effect a statutory appeal.

While the power of “determination” granted to an individual or an office by statute is often categorized as a “statutory power of decision”¹ triggering a plethora of responsibilities with regard to natural justice and fairness, it is not necessary to go as far as that to find that a DAC has a responsibility to the parties to fairly address the issue referred to it and to make any determination on the widest information available to it.

In a case that analysed the function of DACs, (albeit from the point of view of liability in tort for their actions), J.M. Simmons J.A. observed:²

In my view their legislatively created decision-making function distinguishes DACs from expert witnesses, court-appointed assessors, and types of investigators considered by the motion judge, and creates a close and direct relationship to the persons they assess.

She continued:

Further, the legislative directives relating to conflict of interest and the administrative guidelines relating to professional experience underline the importance the legislature ascribes to neutrality and competence in conducting DAC assessments.

While agreeing with the judge of first instance that “DAC assessors are experts, not to be equated with judges, arbitrators or quasi-judicial decision-makers who decide issues based on discretionary factors, after hearing submissions, and in accordance with principles of

¹*Statutory Powers Procedure Act (SPPA)* 1.(1) “statutory power of decision” means a power or right, conferred by or under a statute, to make a decision deciding or prescribing, (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person is legally entitled thereto or not; (“compétence légale de décision”)

² *Lowe v. Guarantee Co. of North America* [2005] O.J. No. 2991 Ont. C.A.

natural justice”, she found that “a common and significant feature of their respective roles is the duty of neutrality.”

Among the legislative directives and administrative guidelines referred to by Simmons J.A. is the *Catastrophic Impairment Designated Assessment Centre Assessment Guidelines* issued by the Financial Services Commission, and revised April 2002.

As its title indicates, this document sets out appropriate procedures for intake and performance of a catastrophic assessment. It also sets out the professional requirements for assessors. As a road map to the assessment process, it charts the flow of the procedure from start to finish and notes watersheds in the assessment process.

In Mr. Fisher’s case the DAC report states at page 2 that this assessment was intended to be “a clinical records review (CRR).” From the report it is clear that it proceeded as such.

While the DAC had in its possession and, indeed, quoted a report from Dr. Hawryluk, a neuropsychological assessment dated February 27, 2004 which reported serious cognitive and functional disabilities, as well as the determination of incapacity finding, issued by Ms. Helen Hamilton, an assessor under the *Substitute Decisions Act*, that Mr. Fisher “is incapable of personal care in respect of Health Care and Safety”, upon intake, the DAC chose to restrict itself to a record review.

The Guidelines point out that as part of the intake process a DAC is mandated to ensure that “the appropriate assessment team and assessment process are selected.” DACs are also advised that “following file review, should the claimant require a full assessment, an assessment plan is sent to the insurer and the claimant.”³

³ Intake step 9 instructs DACs to “determine whether clinical record information is sufficient to establish catastrophic status on file review alone ... or whether further clinical assessment will be required.

Intake Step 11 cautions that “DACs must note that a decision of ‘not catastrophic’ cannot be rendered without conducting a clinical assessment of the claimant.”⁴

Section 2.2.2 of the Guidelines, which deals with the Core Team of assessors, states that where there are “Mental and Behavioural Disorders” the assessment team must be composed of a psychiatrist, a psychologist and either of an occupational therapist or a physiotherapist.

As noted, it should have been clear and obvious from the materials provided to and reviewed by the DAC that Mr. Fisher’s case involved “Mental and Behavioural Disorders.”

The assessment team assembled by Independent Claims Evaluators Inc. consisted of Dr. Michael Lacerte, a specialist in physical medicine and rehabilitation, Dr. Paul Cooper, a neurologist, and Ms. Moira Hunter, an Occupational Therapist. There was no psychiatrist. As well, there is no dispute that, of this team, only Ms. Hunter met with and assessed Mr. Fisher.

A second, perhaps even more serious problem with the approach taken by the DAC is their failure to conduct an in-person assessment of Mr. Fisher. While the protocol clearly allowed a record review only where the records clearly supported a finding of catastrophic impairment, and the DAC so found, a negative finding demanded an in-person assessment.

While Mr. Kirby pointed to the participation of the occupational therapist as satisfying any mandate for an in-person assessment, I do not agree that the assessment by one member of the

⁴“Nothing in the Guidelines suggests the drafters contemplated a wholesale exception to the clinical assessment requirement where the ‘not catastrophic’ determination is based on the causation question. This could too easily be used to withhold a clinical assessment from the most seriously injured claimants, like Mr. Villers, for whom the complex medical-legal question of causation is the only real dispute. I do not accept this was intended by the drafters of the *SABS* and the Guidelines.” Director’s Delegate Makepeace in *Villers and Pilot* (supra)

DAC team, who is not a mandatory discipline for such an examination, constituted the necessary in-person examination for the purposes of the guidelines.⁵

Having found that the record review would likely lead to a finding of not catastrophically impaired, the assessment team should have moved on to an in-person assessment. Apart from sending Ms. Hunter to Thunder Bay, it did not take this step. Indeed, its own characterization of the assessment was as a “paper review.”

Consequently, whatever the conclusion reached by the DAC team assigned to Mr. Fisher’s case, the process of assessment was doubly flawed.

These flaws in Mr. Fisher’s case are not inconsequential. The failure of the DAC to have the capacity to properly evaluate Mr. Fisher’s claimed cognitive, behavioural and psychological deficits, meant simply that he could not get either a fair or adequate assessment, something to which he had an absolute right under the *Schedule*.

Counsel for Mr. Fisher also points to the need for a new examination based on the Glasgow Outcome Scale, once Mr. Fisher’s condition was stabilized and more than three years from the date of the accident. Indeed, according to the Guidelines, a DAC should not rule on a catastrophic impairment based on the Glasgow Outcome Scale until those two pre-conditions have been met.

In this case, the DAC on its face based its conclusions as to catastrophic status on “s. 21(1.1) (e)(i)” (score of 9 or less on Glasgow Coma scale) “or (e)(ii)” (score of 2 or 3 on the Glasgow Outcome Scale).

⁵ I also accept that Ms. Hunter’s report appears to reach conclusions significantly at odds with the conclusions of other examiners without accounting for such differences. However, given my findings as to the technical shortcomings of the DAC, I need make no specific finding as to the actual conclusions made by any of the assessors.

Mr. Fisher's accident took place on August 31, 2002. The DAC report is dated July 13, 2004. As of the date of this motion, the three-year period has passed. The Application for catastrophic impairment completed by Dr. Chaudhuri indicated that Mr. Fisher's clinical condition was stabilized and that the degree of impairment was unlikely to change substantially within the next year.

It would appear from the DAC's conclusions that the DAC purported to rule on catastrophic impairment based on the Glasgow Outcome Scale. However, I find that in the context of this motion I need make no finding as to the correctness of the DAC's decision to issue a report on this issue, or the right of Mr. Fisher to have a further assessment based on this criterion.

Nor do I find it necessary to address the question of whether or not the DAC properly dealt with the analysis of Mr. Fisher's case based on the Glasgow Outcome Scale or not. While criticism might also be made of the methodology of the assessment, the examination of Mr. Fisher by the O.T. and the overall conclusions of the DAC, such an analysis is not necessary in this case. Whatever the conclusion of the DAC assessment, the assessment process itself was so flawed in its conception as to amount to no assessment at all.

Mr. Fisher was entitled to a proper catastrophic DAC. His ongoing care depends on such an assessment, since more than two years have elapsed since the accident. I note that another DAC has found a real need for further attendant care benefits, which absent a catastrophic finding may not be funded.⁶

At this stage, relatively early in the arbitration process, a new DAC could offer more than just another medical-legal opinion. It offers the possibility of a just and fair determination of the issue. On the balance, I find that another, properly directed, catastrophic DAC assessment would be both useful and appropriate.

⁶DAC at *Sudbury Physio Centre* dated November 3, 2004

While there may be some internal tension between the binding nature of the DAC and the lack of specific restriction on the number of DACs that may be requested, I do not accept that the legislation, read as a whole, creates a barrier to a second assessment under the fact situation in this case.

I note that, since the original application for assessment was completed prior to the legislative reforms eliminating DACs, and I have found that the attempted assessment fell so short of the standard expected as to be no assessment at all, Mr. Fisher remains entitled to have this assessment completed, notwithstanding any legislative change.

While I have no direct authority over the DAC assessors, nor power to order them to do or refrain from doing any action, I do have authority over the actions of the parties in relation to the issues in this arbitration. As Director's Delegate Makepeace noted:

Moreover, arbitrators have authority to adjourn a hearing pending completion of an assessment that is required for a fair hearing.⁷ Indeed, arbitrators have taken this step in a number of cases, deferring final adjudication pending a properly completed DAC assessment, with or without an interim benefits order... I conclude it was well within the arbitrator's authority to adjourn the hearing to allow a CAT DAC to be completed in accordance with the *SABS* and the Guidelines.⁸

I accept that I have jurisdiction to make the appropriate order.

On May 26, 2006, I made the following order:

While I do not accept that an insured is entitled to request multiple catastrophic assessments, I find that in this case, Mr. Fisher is entitled to have the determination of such an important issue carried out in a manner that is respectful of the spirit and the intent of the legislation.

⁷ *F.S. and Belair Insurance Company Inc.* (Appeal Order OIC P96-000039, June 11, 1996).

⁸ *Villers and Pilot Insurance Company* (Appeal Order FSCO P05-00010, January 30, 2006)

Since the Insurer is charged with the responsibility to make arrangements for all DAC assessments, the formal order will be directed at the Insurer to make the appropriate arrangements as indicated above.

EXPENSES:

In the event that the parties are unable to agree on the disposition of expenses, the parties may make brief submissions as to expenses in this matter.

John Wilson
Arbitrator

July 19, 2006

Date



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BETWEEN:

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and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

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

1. Allstate is ordered to undertake the necessary arrangements to have Mr. Fisher properly assessed for catastrophic impairment by a DAC other than *Independent Claims Evaluators Inc.*, forthwith.
2. I remain seised of the issue of expenses in the event that the parties are unable to reach an agreement on this issue.

John Wilson
Arbitrator

July 19, 2006

Date