

Dr. Rocco Guerriero - chiropractor

[Keyes and Personal Insurance](#) Arbitration, 2006-07-21

Ms. Keyes contends that the North York DAC is in violation of the FSCO DAC Assessment Guidelines and is a nullity. In particular, it is alleged that the fact the DAC rendered two reports both of which are signed by the two assessors, is in violation of the Guidelines. It is also submitted that the DAC assessors erred in relying almost exclusively on Jessica Keyes' responses to questions in a structured verbal interview in the Keyes' home and conducted no demonstrative testing to verify the responses she gave. In particular, despite well documented concerns about Jessica Keyes' difficulties functioning in an unstructured environment, the DAC conducted no testing of the Applicant in such an environment or any environment other than her home.

It is also submitted by Ms. Keyes that the DAC has breached the Guidelines in failing to avail themselves of an assessment by an appropriate specialist such as a psychologist, neurologist or psychiatrist where there is "concern about a brain-injured claimant's ability to exercise appropriate judgement without supervision." It is also alleged that the report of the DAC reveals that they have gone beyond assessment to become advocates for a point of view. By way of example, Ms. Keyes alleges that the DAC misquotes reports of treating practitioners and without foundation accuses them of conflicts of interest.

There is little doubt that there are significant issues with the North York DAC assessment. The assessment was conducted on March 13, 2006. A report, signed by both assessors, was released on March 31, 2006 with attached Form 1 indicating that no attendant care was required. A second report appeared on April 13, 2006. The clinic coordinator, Dr. Rocco Guerriero, in a cover letter, indicates that the first report was issued in error and contained only the views of one assessor, as well as lacking an executive summary. Here is the salient text of Dr. Guerriero's letter:

As part of our quality assurance measures, we recognized that this Attendant Care DAC Assessment report recently released was done so in an incomplete manner. The report that was released dated March 31, 2006, only included the Registered Nurse's component (pages 1 to 34). It did not include the Occupational Therapist's component by Lyn Cook. It also did not include the Executive Summary by Lyn Cook. We are releasing the corrected report.

We apologize to all parties for this oversight. This does not change the outcome of this Attendant Care DAC Assessment report.

It is clear that the cover letter underplays the extent of the problem with the DAC assessment reports. It might have been more accurate to describe the portion that was initially released as a partial draft. It is manifestly not the same report as was issued later and, rather than being incomplete in the sense of parts of the true report of the assessors being inadvertently not included, even those portions that are largely reproduced in the so called erratum report (the April 13th report) have been changed. To cite just one example, the description of an incident where Jessica Keyes found herself fighting a small fire in a trailer is quite different from one report to the other. In particular, the first description of the incident has Jessica Keyes in the trailer with a friend, who put a hat over the candle causing the fire. In the second description, it is said that Jessica Keyes is alone in the trailer. Both cannot be accurate, of course. The fact that

both versions of the report purport to carry the signatures of both assessors calls into serious question whether or not the DAC complied with Part 4 of the Attendant Care DAC Assessment Guidelines.

The North York DAC report also contains significant errors. For example, despite the assertion to the contrary, Jessica Keyes' pre-accident conditions are acknowledged by several of her treating personnel and other assessors. Dr. McKinnon, for example, deposed that when she first assessed Ms. Keyes in September 2004, she was aware of the diagnosis of ADHD. This is confirmed in her various reports predating the North York DAC. Indeed, it is simply not accurate to claim as the North York DAC assessors do, that most of Jessica Keyes' treating practitioners ignore or downplay her pre-existing conditions. The documents are replete with comments on these pre-existing difficulties, in particular the diagnosed ADHD, but for many assessors the pre-existing diagnoses could well mean that Jessica Keyes would have even greater difficulties as a consequence of her brain injury.

By way of another example, whether this is an error, or an attempt to mislead, I will leave to the hearing arbitrator, however it is suggested in the report that Ms. Maria Hren who conducted an assessment on behalf of the Personal questioned the need for attendant care. This is simply not the case, as is evident from a fair reading of Ms. Hren's July 9, 2004 report...

...Returning to a consideration of the DAC assessment at issue here, it is significant in my view that the North York DAC expressly declined to consider whether or not Jessica Keyes' noted vulnerabilities pre-accident have been exacerbated by the injuries sustained in the accident. This is at the heart of the controversy in this case and the failure of the North York DAC to address the "thin skull" issue, leaving it rather to the "court or arbitrator" to grapple with, is remarkable in the circumstances.

Nguyen, H.N. and State Farm Arbitration, 2005-12-22

Likewise, I do not find the conclusions of Dr. Guerriero concerning the proposed treatment plan to be determinative of the issues. His report speaks only to musculo-skeletal assessments, a restriction that is repeated throughout the report. He does acknowledge some physical sequelae but downgrades their importance. Given the psychological context of the recommendations for a work transition programme, his finding that "there is no residual physical impairment resulting from the motor vehicle accident" is not highly probative, especially since his report is not designed to address the criteria for income replacement benefits.

Amoa-Williams and Allstate - Expenses Arbitration, 2001-10-24

Preparation and expert witness testimony of Dr. Rocco Guerriero, chiropractor

\$2,125 claimed

\$1,400 allowed

Dr. Guerriero's invoice indicates he billed his services for preparation and attendance as an expert witness at the arbitration hearing on two days, November 25 and 29, 2000 at \$250 per hour.

Dr. Guerriero testified on November 29 only, for three and a half hours. I accept the Applicants' submission that the fact that Dr. Guerriero made himself available to testify on both days meant that he put aside other professional commitments in order to be at the disposal of the parties. I find that this flexibility on the part of expert witnesses greatly contributes to the efficient conduct of a hearing and avoids unnecessary delay. Nevertheless, however unwilling I may be to subject witnesses who so make themselves available to a financial penalty, the Schedule does not specifically provide for losses incurred by expert witnesses who must cancel other commitments to attend an arbitration hearing.

Subsection 5(3) provides that the maximum that may be awarded for the attendance of an expert witness is \$200 per hour of attendance, up to a maximum of \$1,600 per day. The wording of this section is sufficiently broad to allow for time spent by an expert witness waiting to testify, or, conceivably, time an expert spends in attendance even if he or she does not eventually testify. Arbitrators have in the past awarded amounts for waiting time in such circumstances. [See note 8 below.] The overriding criterion, of course, is whether such an expense is reasonable in any given circumstance. In this case, I find that Dr. Guerriero is entitled to \$200 per hour for the three and a half hours he spent testifying at the hearing (\$700). Provided he actually attended at the hearing on November 25, I find it would be reasonable to compensate him for the equivalent of an hour spent waiting, or \$200. Dr. Guerriero is entitled to \$500 for his time spent preparing for the hearing in accordance with subsection 5(4). The total allowed is \$1,400.

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Fimiani and Liberty Mutual [+] Arbitration, 2000-01-11

The medical rehabilitation DAC was conducted, in part, over three days in March 1996. The conclusions of the DAC are set out in summary report authored by Dr. Guerriero, who also conducted a physical examination of Mrs. Fimiani. The report is dated April 7, 1996 although that date does not mean anything in particular, as Dr. Guerriero conceded that he did not know when he completed the report. The date of the report is significant because important parts of the DAC assessment were conducted after April 7, 1996.

Dr. Guerriero's opinion was that Mrs. Fimiani had suffered no permanent physical injuries in the accident, subject to confirmation by a dentist. Dr. Guerriero's report notes on several occasions that there ought to be a dental examination of Mrs. Fimiani to consider her complaints of TMJ dysfunction and pain. Dr. Guerriero does provide his own diagnosis of Mrs. Fimiani's TMJ

complaints. His conclusions are in marked contrast with the views of the dentist who did examine her, Dr.Cox. [See note 14 below.] ...

...Dr. Guerriero thought that Mrs. Fimiani was self-limiting and would not open her jaw fully. In contrast Dr. Cox found Mrs. Fimiani to be “polite, cooperative”.... truthful and honest and whose responses did not exhibit any exaggerated pain reflexes.” Dr. Guerriero found that Mrs. Fimiani was able to fit three finger breadths in her mouth (50 mm). Dr. Cox found a maximal mouth opening of 20 mm. Dr. Guerriero found no crepitus or grinding palpated over the TMJ. Dr. Cox found bilateral clicks in both left and right TMJ and fine crepitus in the left TMJ.

In short, Dr. Cox came to entirely different conclusions about Mrs. Fimiani’s TMJ condition. Despite the references in the summary report to the need for an expert dental examination of that issue, Dr. Cox’s opinions were not referred to in the DAC assessment.

As part of the assessment but well after the date of the summary report, Mrs. Fimiani was seen by Dr. Gladstone, a neurologist. [See note 15 below.] The fact that Dr. Gladstone was part of the assessment team is not apparent from the summary report. Dr. Gladstone, like Dr. Cox, is not included in the list of individuals who participated in the DAC assessment and his neurological findings and recommendations are not referred to anywhere in Dr. Guerriero’s report.

Dr. Gladstone also noted Mrs. Fimiani’s TMJ complaints and came to different conclusions than Dr. Guerriero about them. Dr. Gladstone also recommended an EEG and metabolic perfusion brain spect scan to further evaluate her “pervasive hemicrania.” These recommendations do not find their way into Dr. Guerriero’s report.

In response to that report, on June 17, 1996 the CCRI wrote to Liberty Mutual questioning its conclusions. [See note 16 below.] That critique goes far beyond my comments. Whether or not Liberty Mutual ought to have entirely accepted CCRI’s opinions at that stage, it was on notice that substantial questions had been raised about the North York Rehabilitation DAC assessment. Despite the opinions of Dr. Cox in particular as well as Dr. Gladstone which indicated that the TMJ disorder was a serious problem, Liberty Mutual again took no steps to investigate Mrs. Fimiani’s TMJ disorder.

Mike and State Farm [+] Arbitration, 1998-11-12

Neither does the report of Dr. Rocco Guerriero, the chiropractor who performed a Designated Assessment Centre assessment of his treatment needs on November 14, 1995. His report indicates that Mr. Mike complained of left knee pain, and neck and constant low back pain that was aggravated by sitting, standing and walking and that prevented him from increasing his hours of work. Dr. Guerriero was puzzled that Mr. Mike was adamant in rating his back pain as “10 out of 10” because he found that Mr. Mike presented himself in a straightforward and

cooperative manner and did not try to exaggerate or embellish his inabilities, and because his examination did not reveal any significant residual impairment that could explain Mr. Mike's back pain, except for "...mild muscular hypertonicity that may account for some degree of pain in the lower back." He concluded the soft-tissue injuries were resolving. Although it is clear he did not disbelieve Mr. Mike's back pain, he offered no explanation for it and, in fact, recommended additional chiropractic treatment for it. He offered no opinion about Mr. Mike's ability to work. I find the report unhelpful in determining whether Mr. Mike was unable to work.

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[Balcom v. MacDonald](#), 2000 BCSC 1426 (CanLII) — 2000-09-28

[104] Dr. Guerriero expressed the opinion that in order for a lumbar disc herniation to be considered clinically relevant, the main feature of the presentation is a sign of radiculopathy, i.e., compression of the nerve root. In the absence of radicular pain, a chiropractor assumes that he or she is dealing with mechanical low back pain.

[105] I did not find Dr. Guerriero's evidence very helpful. In his written report, he opined that Dr. Balcom suffered from discogenic back pain before December 2. He stated that the plaintiff's symptoms prior to that date "highly indicate and suggest a lumbar disc herniation." At trial, he stated that he had made an error and should have said "internal disc disruption" instead. Under cross-examination, he stated that internal disc disruption comes under the category of mechanical pain and disc herniation fall under the category of radicular pain but there is a continuum where internal disc disruption can lead to herniation. None of the other experts discussed "internal disc disruption" and the concept was more confusing than instructive.

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