

ZABIELIAUSKAS, Raymond J-Physiatrist

Thevaranjan and Personal Insurance Arbitration, 2006-08-24

Requested by the Insurer

Dr. R. J. Zabieliauskas

The Personal ordered physiatrist and psychological insurer's examinations pursuant to section 42 of the *Schedule* that were conducted by AssessMed on August 12 and August 20, 2004 respectively. Dr. Raymond Zabieliauskas, a physiatrist, and Dr. Peter Marton, a psychologist, conducted evaluations and testified for the Personal at the hearing.

Dr. Zabieliauskas has practised as a physician since 1982 and began specializing in physical medicine in 1989, during which year he took an appointment as a lecturer at the University of Toronto. He is a member of the medical staff at various hospitals and at a rehabilitation facility in Toronto. Dr. Zabieliauskas has experience as a Designated Assessment Centre ("DAC") assessor, and as an assessor with the Workers' Safety and Insurance Board, the Toronto Transit Commission, Air Canada and a nursing home.

On cross-examination, the Applicant's counsel questioned Dr. Zabieliauskas about his professional background and medical practice and attempted to elicit evidence of Dr. Zabieliauskas' bias in favour of insurers in preparing assessments. The Applicant's counsel established that AssessMed principally performed DAC assessments as well as medical evaluations for insurers and employers. The Applicant's counsel questioned Dr. Zabieliauskas about his income from AssessMed. Dr. Zabieliauskas' evidence was that for the last six years he conducted on average four to six assessments per week at an average cost of \$1,000 to \$2,000 per report. Dr. Zabieliauskas testified that AssessMed pays any expenses associated with the assessments and that he earned approximately \$300,000 in 2004 from preparing assessments for AssessMed.

Dr. Zabieliauskas prepared a report dated August 12, 2004 and a brief follow-up report dated February 16, 2006. The latter report primarily commented on Mr. Balaban's August 8, 2005 FCE report. Dr. Zabieliauskas interviewed the Applicant on August 12, 2004 and concluded that the Applicant did not suffer from any objective physical impairments as a result of the accident. On cross-examination, he testified that if a person complains of pain, but displays no clinical or objective signs of pain, then he would conclude that the person is able to return to her pre-accident employment and household tasks. That is, according to Dr. Zabieliauskas, if there are no muscle spasms, limitations of movement, or any objective x-ray findings in the person's medical picture, then the person can return to their pre-accident activities.

The Applicant's counsel questioned the reliability, accuracy and completeness of the findings in Dr. Zabieliauskas' report. A registered nurse conducted the testing of the Applicant's functional abilities. The nurse conducted numerous tests and recorded measurements for cardiovascular fitness, the Applicant's abilities and her performance times for various physical tasks and movements such as the ability to stoop, to lift, to push a cart, to reach, to grasp, to turn, and to walk. The Applicant's counsel questioned Dr. Zabieliauskas about the nurse's training to observe and assess a person's bio-mechanical limitations in performing the assigned functions.

Dr. Zabieliauskas answered, "I don't know. She's an R.N., Sir."

Regarding the background material to and preparation of his reports, Dr. Zabieliauskas stated that he did not have the family doctor's clinical notes and records when he prepared his more comprehensive August 12, 2004 report. Dr. Zabieliauskas testified he read Mr. Balaban's report, but did not recall whether Mr. Balaban commented on the Applicant's bio-mechanical limitations. The Applicant's counsel pointed out that Dr. Zabieliauskas did not produce his written background notes with his reports and questioned the reason for this. Dr. Zabieliauskas responded that he dictated the report from the notes and subsequently destroyed the notes. Dr. Zabieliauskas hastened to add that he developed this policy to avoid being cross-examined about his notes by a "lawyer of your ilk" (referring to the Applicant's counsel) and to avoid being asked to interpret every "squiggle" and "jotting." Rather than be faced with that, Dr. Zabieliauskas stated, his practice is to destroy the notes. Dr. Zabieliauskas agreed that the accuracy of his report cannot be verified by any contemporaneous background notes.

The Applicant's counsel also questioned the accuracy of the testing data outcomes recorded by the nurse and the divergence illustrated between some of the nurse's observations during intake and testing, and her and Dr. Zabieliauskas' written conclusions.

The Applicant cross-examined Dr. Zabieliauskas on various aspects of the findings in the August 12, 2004 report. The report stated that the Applicant was inconsistent on 38% of the tests performed which would mean a consistency rate of 62%. Dr. Zabieliauskas concluded that in 9 of the 24 tests administered, the Applicant's performance exceeded standard consistency rates. The Applicant's counsel questioned Dr. Zabieliauskas' oral evidence that the person's performance must meet the standard of being consistent in about 75% to 80% of the tests, or conversely, have an inconsistency rate of no higher than 20 to 25%. On questioning, Dr. Zabieliauskas conceded that the consistency/inconsistency standard is mentioned nowhere in his report or its appendix. He went on to say, without being specific, that the standard is contained somewhere "in the literature."

The Applicant's counsel also challenged the 38% inconsistency rate recorded by the nurse and relied upon by Dr. Zabieliauskas. AssessMed uses certain measures purported to be standardized for functional testing. The tests use universal characteristics of work ("Methods-Time Measurement") such as grip, turn, move, walk and stoop, etc. The tests then compare the performance of the person being tested to an Industrial Standard, or the time it takes the average worker with average skill and judgement to perform a task over an 8 hour day, with appropriate rest periods and without undue fatigue or stress. The tests also purport to contain a measure ("Coefficient of Variance") that discriminates between average and poor effort and measures the variation in the times it takes a person to do the same task several times. If there is too much variation in the times, the person's performance will be found to be too inconsistent. The Applicant's counsel reviewed the scores on some tasks and, using the AssessMed assessment tools, pointed out that AssessMed had miscalculated the Applicant's rate of inconsistency. That is, rather than a 38% inconsistency rate, it ought to have been calculated at 12.5% (a score well below the 20 to 25% rates to which Dr. Zabieliauskas referred) with only 3 of the 24 test scores reflecting inconsistency, rather than 9 out of 24, as stated in the report. The Applicant's counsel pointed out that Dr. Zabieliauskas erred by using a 10% Coefficient of Variance rather than 15% and this error resulted in the incorrect 38% inconsistency rate.

I found Dr. Zabieliauskas was unable, to my satisfaction, to refute the Applicant's interpretation of the Applicant's performance data and to coherently explain the basis of the AssessMed scores. When responding to the Applicant's counsel's questions about the 10% rate versus the 15% rate, Dr. Zabieliauskas asserted that the Applicant's counsel was "looking at numbers that are not that important." I find this response unacceptable since AssessMed's assessment of the Applicant's abilities was based on these very scores.

I also found troublesome AssessMed's treatment of the signs of pain displayed by the Applicant during the assessment. The nurse recorded that during testing and intake, the Applicant frequently squirmed in her chair and frequently changed her position in her chair.

Dr. Zabieliauskas acknowledged that those behaviours could be legitimate expressions of pain and that the nurse failed to repeat those observations in the narrative portion of her report. Nor does Dr. Zabieliauskas' report mention those behaviours, because according to his evidence, he made no such observation during his assessment. Counsel for the Applicant pointed out that Dr. Zabieliauskas noted in his report that the Applicant "showed no overt signs of discomfort" while also stating that she held her neck during the assessment. Dr. Zabieliauskas conceded that the neck holding behaviour could also be a genuine and objective sign of pain and discomfort. He conceded on questioning that access to his background notes might have been of assistance in clarifying this area of evidence.

I note throughout each day of the hearing, whether she was testifying or not, the Applicant regularly squirmed and changed positions in her seat, stood up for periods of time, grimaced and rubbed her right shoulder and neck.

Overall, I found Dr. Zabieliauskas' evidence of little value in determining the Applicant's entitlement to accident benefits. He did not appear to be balanced and objective in his assessment of the Applicant. I also find he displayed a lack of understanding of the assessment tools used by the nurse to arrive at her conclusions, and upon which he relied to find the Applicant capable of returning to her pre-accident activities. He had no knowledge of whether the nurse who conducted the testing had the appropriate training to conduct an assessment. I found Dr. Zabieliauskas, on many occasions throughout his testimony, to be uncooperative, sarcastic and flippant, which in my view further devalued his evidence.

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