



FSCO A13-005096

BETWEEN:

ILIR KRAJA

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Isabel Stramwasser

Heard: February 18 and 19, 2015, at the offices of the Financial Services Commission of Ontario in Toronto. Written submissions (in the form of the transcript of oral argument) were received on February 28, 2015.

Appearances: Gus Triantafillopoulos for Mr. Kraja
Kevin D.H. Mitchell for Wawanesa Mutual Insurance Company

Issues:

The Applicant, Ilir Kraja, was injured in a motor vehicle accident on August 1, 2012. He applied for, and received, statutory accident benefits from Wawanesa Mutual Insurance Company (“Wawanesa”), pursuant to the *Schedule*.¹ Mr. Kraja sought enhanced accident benefits on the basis that he sustained a “catastrophic impairment,” as defined by subsection 3(2)(d)(i) of the *Schedule*. However, Wawanesa denied enhanced benefits on the basis that Mr. Kraja had

¹*The Statutory Accident Benefits Schedule — Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

sustained a “minor injury,” as defined by the *Minor Injury Guideline*.² The parties were unable to resolve their dispute through mediation and Mr. Kraja applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The preliminary issue is:

1. Did Mr. Kraja sustain a “catastrophic impairment” within the meaning of subsection 3(2)(d)(i) of the *Schedule*?

Result:

1. Mr. Kraja sustained a “catastrophic impairment” within the meaning of subsection 3(2)(d)(i) of the *Schedule*.

EVIDENCE AND ANALYSIS:

In order to prove that Mr. Kraja sustained a catastrophic impairment within the meaning of the subsection, the Applicant must show that he sustained a “brain impairment that results in a score of 9 or less on the Glasgow Coma Scale … according to a test administered within a reasonable time after the accident by a person trained for that purpose.” The Applicant must also show that his impairment was caused by the car accident on August 1, 2012.

This means that, on the facts of this case, I must determine two things:

1. did the Applicant sustain a brain impairment; and,
2. was the impairment caused by the accident?

²Financial Services Commission of Ontario, No. 02/11: *Minor Injury Guideline*, Superintendent’s Guidelines, Bulletin A-06/11, (Toronto: FSCO, 2011).

Applicant's Position

Mr. Kraja submits that:

1. it is undisputed that he had three scores of nine on the Glasgow Coma Scale test and that all three tests were administered within a reasonable period of time after the accident by a person trained for that purpose; and,
2. the evidence is unchallenged in that, as a result of the motor vehicle accident, he sustained a brain impairment in the form of a concussion, which was the cause of his reduced Glasgow Coma Scale score.

Insurer's Position

Wawanesa argues that Mr. Kraja does not meet the test for catastrophic impairment. The Insurer concedes that Mr. Kraja had three scores of nine on the Glasgow Coma Scale and that all three tests were administered within a reasonable period of time after the accident by a person trained for that purpose. However, the Insurer submits that:

1. the evidence does not support that the Glasgow Coma Scale readings were caused by a brain impairment; and,
2. the evidence does not establish that Mr. Kraja sustained a brain impairment as a result of the accident.

Undisputed Facts

The following facts are not in dispute. At approximately 7 a.m. on August 1, 2012, Mr. Kraja was driving on the highway as the sole occupant of a passenger vehicle when he collided with a truck. Ambulance responders arrived at the scene and administered the Glasgow Coma Scale test on three separate occasions by two different ambulance personnel: at 7:22 a.m., 7:38 a.m. and

7:43 a.m. The results of all three tests were the same: nine out of 15, with two for eye opening, two for verbal response and five for motor response. Thereafter, the Applicant arrived in hospital. The emergency room physician diagnosed Mr. Kraja with a concussion after conducting a physical examination and investigation, including a normal CT scan. Mr. Kraja was discharged home at about 11 a.m., into the care of his family physician, with a final diagnosis of concussion.

Did Mr. Kraja sustain a brain impairment?

The Insurer argues that there is “absolutely no evidence of a brain impairment in this case.” It points out that no obvious head trauma was noted by ambulance or hospital personnel immediately after the accident; a CT scan taken on the day of the accident was normal; Mr. Kraja was able to actively clench his eyes, implying consciousness; his condition seemed to improve when he was assessed by the emergency room physician in that he became verbally responsive and was able to move all his extremities on command; and, he was discharged from hospital within three hours, into the care of his family physician.

However, the Insurer’s bald assertion is unsupported by the evidence. The emergency room physician’s diagnosis of concussion was based on medical examination and investigation and is consistent with findings from the ambulance responders, namely, that Mr. Kraja had three Glasgow Coma Scale readings of nine and a “decreased level of consciousness.” The attending physician was aware of the lack of obvious head trauma, normal CT scan, verbal responsiveness and motor skills when diagnosing concussion and recommending discharge. Further, Dr. Harold Becker, general practitioner, testified that there was no reason to question the concussion diagnosis. Dr. Becker explained that a normal CT scan does not rule out a brain impairment, pointing out that a person may be dead and still have a normal CT scan. The Insurer argued that Dr. Becker did not confirm the concussion diagnosis, but I have reviewed Dr. Becker’s testimony and I disagree with the Insurer’s characterization of the evidence.

Dr. Robert Yufe, neurologist, also testified at the hearing, but he gave conflicting evidence. At first, Dr. Yufe said that the emergency physician’s diagnosis of concussion could not be supported by the physician’s own notes. However, he did not explain that statement. Later, he

agreed that the Applicant may have sustained a concussion. By the end of his cross-examination, Dr. Yufe stated that the diagnosis of concussion was valid and that he had never challenged it.

Dr. Yufe explained that whether or not the Applicant had a concussion was not the issue. Rather, the issue according to Dr. Yufe, was whether the Applicant had a Glasgow Coma Scale score of nine due to brain injury. Specifically, Dr. Yufe expressed the opinion that the Applicant could not be said to have sustained a significant or serious head injury or brain impairment and that, based on the recorded symptoms, the Applicant's Glasgow Coma Scale score should have been properly recorded as a 13 or 14, rather than a nine. Dr. Yufe added that there was a possibility that the Applicant's Glasgow Coma Scale scores were due to factors other than a brain injury.

The Insurer conceded that Mr. Kraja had three Glasgow Coma Scale scores of nine. Therefore, that fact is not in dispute. As a result, I disregard that portion of Dr. Yufe's testimony, which disputes the fact that the Applicant had three valid scores of nine on the Glasgow Coma Scale.

To the extent that Dr. Yufe's testimony questions the seriousness of the Applicant's head injury or brain impairment, I am bound to disregard it. The case law is clear that an investigation into the severity of brain impairment is not relevant to a determination of catastrophic impairment. Specifically, in *Security National v. Hodes*, 2014 ONSC 3627,³ the Ontario Divisional Court said:

We agree with the Director's Delegate that an inquiry into the patient's prognosis or the seriousness of the actual brain injury is irrelevant for the purposes of the SABS. The GCS score is a proxy for that determination and it is conclusive with respect to the definition of catastrophic impairment.

Although the term "catastrophic impairment" may imply, in everyday speech or in medical terminology, a serious injury of catastrophic proportions, such implications may not be read into subsection 3(2)(d)(i) of the *Schedule*. At paragraph 21, *Hodes* stated that "... any notion of catastrophic impairment other than the specific meaning ascribed to that term by SABS must be discarded when considering whether a claimant meets the statutory test." In doing so, *Hodes*

³Leave to appeal denied: Ontario Court of Appeal file #M44078, November 14, 2014, at paragraph 19.

echoed the Court of Appeal in *Liu v. 1226071 Ontario Inc. (c.o.b. Canadian Zhorong Trading Ltd.)*, [2009] O.J. No. 3014, 2009 ONCA 571, which stated, at paragraph 30:

Any notion of catastrophic injury, other than the specific meaning ascribed to that term by the legislation, must be discarded when considering whether a claimant meets the statutory test. The statutory scheme creates a bright line rule which is relatively easy to apply. This enhances the ability of those looking to the definition to know what injuries will and will not be considered catastrophic. Having the same definition for both no-fault and third-party liability claims avoids inconsistency. The ease with which the rule can be applied adds an element of predictability which will facilitate the settlement of claims.

The Divisional Court in *Liberty Mutual Insurance Company v. Young*, 2006 CanLII 7286 (ON SCDC) addressed an insurer's similar dissatisfaction with the use of the Glasgow Coma Scale and stated that, “[i]f the use of the Glasgow Coma Scale in s.2(1.1)(e)(i) is problematic as the applicant's witness suggests, the proper recourse is to the Legislature and the Lieutenant-Governor-in-Council with fully-documented concerns” (para. 7).

I have noted the Insurer's argument that I ought not to follow *Hodges*. The Insurer points to *Liu*, which was decided five years earlier at the Court of Appeal, and submits that *Liu* is the higher authority because it is the higher court. I do not read *Hodges* as contradicting *Liu*. In any event, the Insurer is incorrect: the principle of *stare decisis* binds this tribunal. The Divisional Court in *Hodges* has spoken and leave to appeal was denied.

FINDINGS

I find that the Applicant sustained a concussion. I give significant weight to the evidence of medical professionals who treated him in the hours after the accident. They were in the best position to assess and diagnose him. Moreover, their findings, including the diagnosis of concussion, are consistent with the medical definition of “concussion” by the two experts who testified in these proceedings. Dr. Becker defined “concussion” as an impairment in brain function and Dr. Yufe defined it as a transient disturbance in brain function or impairment of consciousness. I have noted that Dr. Yufe’s testimony regarding whether the Applicant sustained a concussion was self-contradictory. As a result, I do not give his evidence significant weight on

that point. Absent specific reasons for doubting the validity of the emergency room doctor's diagnosis of concussion, I agree with Dr. Becker that there is no reason to question it.

The law requires that I determine whether the Applicant sustained a "brain impairment." However, the term "brain impairment" is not defined in the *Schedule*. The term "impairment," on its own, is defined in subsection 3(1) of the *Schedule* as "a loss or abnormality of a psychological, physiological or anatomical structure or function."

I have compared the definition of "concussion" by the American Association of Neurological Surgeons to the definition of "impairment" in the *Schedule* and I am satisfied that the Applicant sustained a brain impairment. On cross-examination, Dr. Yufe agreed with the definition of "concussion" by the American Association of Neurological Surgeons, namely: "an injury to the brain that results in temporary loss of normal brain function." In the *Schedule*, "impairment" is defined as "a loss or abnormality of a psychological, physiological or anatomical structure or function." The overlap between these definitions persuades me that a concussion may be fairly defined as an impairment of the brain. Having found that the Applicant sustained a concussion, I also find that he sustained a brain impairment.

Causation

Given the proximity in time between the car accident, the Glasgow Coma Scale readings and the diagnosis of concussion, I find it reasonable to conclude that the readings and diagnosis were more likely than not caused by the motor vehicle accident of August 1, 2012. In any event, the evidence before me suggests no other cause. Consequently, I am satisfied that the Applicant has established causation.

While the Insurer theorizes that Mr. Kraja's low Glasgow Coma Scale scores could have been caused by factors unrelated to the accident, that theory is not borne out by the facts. The Insurer relies for this argument on Dr. Yufe's opinion. However, I do not understand Dr. Yufe's evidence to support the Insurer's submission. Dr. Yufe gave evidence that Glasgow Coma Scale readings of nine or less could have numerous causes (such as: drug or alcohol intoxication;

epileptic seizure; shock; voice problems; stroke; hearing disability; inability to understand the English language; and, stubborn refusal to cooperate). However, Dr. Yufe agreed that there were no such collateral factors in this case. The Insurer did not introduce evidence to support the suggestion that any collateral factors actually existed in this case. In the absence of such evidence, the Insurer's argument is speculative.

Lastly, I note that the legislation has changed since *Hodges*. Specifically, the words "in respect of an accident" in section 3(2)(d)(i) of the *Schedule* were replaced by the words "caused by an accident." However, the parties did not make submissions on this point. I do not see how this change in wording could alter my reasoning or my decision.

CONCLUSION

I conclude that Mr. Kraja sustained a catastrophic impairment within the meaning of subsection 3(2)(d)(i) of the *Schedule*. There is no dispute that he had the requisite Glasgow Coma Scale results. In addition, I have found that he sustained a brain impairment. I have also found that causation is established.

The only issue before me at this preliminary hearing was whether Mr. Kraja met the statutory definition of catastrophic impairment. This is a threshold test with a low bar. The purpose of this threshold test is, as the Divisional Court states in *Hodges*,

... simply to allow a person to make a claim for enhanced benefits. ... The legislative intent in providing GCS scores as a proxy measurement of injury is simply to weed out the weakest claims at an early stage (para. 20).

To be clear, although I have found that Mr. Kraja is catastrophically impaired, he is not automatically entitled to benefits for that impairment. Mr. Kraja must still prove his entitlement to benefits at the arbitration of this matter.

EXPENSES:

Given Mr. Kraja's success, I award him the expenses of this preliminary issue hearing. If the parties are unable to agree on the amount of expenses, one or both must request an expense hearing within thirty days of this decision, accompanied by a bill of costs and written submissions, pursuant to Rule 79 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated — August 2011).

Isabel Stramwasser
Arbitrator

August 19, 2015

Date



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BETWEEN:

ILIR KRAJA

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

PRELIMINARY ARBITRATION ORDER

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

1. Mr. Kraja sustained a catastrophic impairment within the meaning of subsection 3(2)(d)(i) of the *Statutory Accident Benefits Schedule - Accidents on or after September 1, 2010*, O. Reg. 34/10, as amended;
2. Mr. Kraja is entitled to his expenses of this preliminary issue hearing; and,
3. If the parties are unable to agree on the quantum of legal expenses associated with this preliminary issue hearing, an expense hearing shall be requested within 30 days, pursuant to Rule 79 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – August 2011).

Isabel Stramwasser
Arbitrator

August 19, 2015

Date