Platnick, Howard Allen – Family Physician

Platnick v Bent, 2016 ONSC 7340 (CanLII), <http://canlii.ca/t/gvx6g

[7] The intended audience for Ms. Bent's email was thus lawyers who, like her, devote the bulk of their practice to representing accident victims making claims against insurance companies, primarily in the motor vehicle area. Her email used acronyms and expressions known to practitioners in the area but less familiar to the general public or even lawyers practicing outside of the personal injury field.

[8] The email of November 14, 2014 was brief and is set forth in full below:

> "Dear Colleagues,
>
> I am involved in an arbitration on the issue of catastrophic impairment where Sibley aka SLR Assessments did the multidisciplinary assessments for TD Insurance. Last Thursday, under cross-examination the IE neurologist, Dr. King, testified that large and critically important sections of the report he submitted to Sibley had been removed without his knowledge or consent. The sections were very favourable to our client. He never saw the final version of his report which was sent to us and he never signed off on it.
>
> He also testified that he never participated in any "consensus meeting" and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.
>
> This was NOT the only report that had been altered. We obtained copies of all the doctor's file and drafts and there was a paper trail from Sibley where they rewrote the doctors' reports to change their conclusion from our client having a catastrophic impairment to our client not having a catastrophic impairment.
>
> This was all produced before the arbitration but for some reason the other lawyer didn't appear to know what was in the file (there were thousands of pages produced). He must have received instructions from the insurance company to shut it down at all costs on Thursday night because it offered an obscene amount of money to settle, which our client accepted.
>
> I am disappointed that this conduct was not made public by way of a decision but I wanted to alert you, my colleagues, to always get the assessor's and Sibley's files. This is not an isolated example as I had another file where Dr. Platnick changed the doctor's decision from a marked to a moderate impairment."

(ii) Context of the email

[9] The arbitration in question was in respect of a claim lodged by Ms. Bent's client Dr. Carpenter seeking benefits from what was alleged to have been a catastrophic injury sustained in a 2007 automobile accident. Her catastrophic injury claim was initially denied by the insurer and proceeded to arbitration before the Financial Services Commission of Ontario.

[10] In the course of assessing the claim, the insurer had engaged the services of an assessment company named "Sibley SLR" to co-ordinate the process of obtaining independent medical assessments from various medical professionals selected by them in order to determine whether the claim of Dr. Carpenter satisfied the criteria for a finding of catastrophic impairment within the meaning of the Statutory Accident Benefits Schedule (or "SABS") regulations enacted pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8.

[11] Dr. Platnick was engaged by Sibley to prepare an "Executive Summary Report" (or "ESR") of the several individual assessments prepared by each of the other Independent Medical Examiners (or "IME's"). According to Dr. Platnick, such a report is prepared after the IME's have conducted their assessments and delivered their reports to Sibley on behalf of the insurer. An ESR is essentially a paper review process and does not require Dr. Platnick to meet the claimant or even necessarily to speak with any of the expert IME's who perform the actual assessments. By training, Dr. Platnick is a general practitioner and as such does not have the specialist qualifications of the various experts whose reports he summarizes. He has for the past decade or longer devoted himself almost exclusively to performing the role of medical expert with a client base consisting primarily of insurance companies or the assessment companies hired by them to evaluate claims. He has however done some work for plaintiff law firms in the past.

[12] Although characterized as an "Executive Summary Report", it is clear, at least in the case of the two ESR's of Dr. Platnick at issue in this case, the reports are *not* an objective summary of the underlying medical reports themselves so much as a summary of the conclusions reached by Dr. Platnickhimself, applying their expert observations to his own understanding of the operation of the SABS regulations and the criteria incorporated therein. The underlying medical reports in the two cases commented upon by Ms. Bent contained very significant observations from the IME's that were favourable to the claimant but were omitted in Dr. Platnick's summary report.

[13] The ESR prepared by Dr. Platnick in the Carpenter case concluded:

> "It is the *consensus conclusion* of this assessment that [the claimant Dr. Carpenter] does not achieve the catastrophic impairment rating as outlined in the SABS and utilizing the OCF-19 Form due to impairments/injuries as a result of the April 12, 2007 motor vehicle accident" (emphasis added).

[14] The characterization of Dr. Platnick's *personal* conclusion as a "consensus conclusion" in the ESR was most certainly false and misleading. The conclusion stated was not a "consensus conclusion" of any other expert. It was Dr. Platnick's own conclusion. Dr. Platnick had not spoken to or even contacted any of the other physicians whose reports formed the basis of his own report. He did not ever see the patient. His review was strictly a desk review. When submitting his report, he testified that he expected that Sibley would contact the other experts *afterwards* to secure their agreement with his "consensus conclusion". In other words, he hoped that his conclusion would *become* a consensus conclusion – it clearly was not a consensus conclusion at the time he submitted his report.

[15] It is undisputed that the conclusions in the report were his and his alone, even if based *entirely* upon the observations and conclusions of others. One of the other experts categorically refused to sign on to Dr. Platnick's report and Sibley appears to have abandoned the effort to secure the signatures of the others as a result. The report of Dr. Platnick was not amended or withdrawn in consequence. It formed part of the basis for the insurance company's determination to deny the claim and was submitted as supporting evidence justifying that decision in the claims process before FSCO.

[16] Prior to the hearing of the arbitration, Ms. Bent had taken the step of obtaining an order requiring the production of the complete claim file including that of Sibley and of all of the IME's. Dr. Platnick claimed to have neither notes nor drafts and thus produced no documents. The IME's who had actually seen the patient did have notes and drafts and these were produced. Ms. Bent was able to demonstrate instances where material information favourable to her client's case had failed to make its way into the final reports submitted to the arbitrator. Dr. King, who testified at the hearing, was unable to explain changes made to his report that he said he had not made himself nor had he ever seen Dr. Platnick's report that purported to be an executive summary of, among others, his own report and had not concurred in its conclusions.

[20] Dr. Platnick did not testify at the Carpenter Arbitration. His attendance became unnecessary as a result of the swift settlement of the case that intervened following Dr. King's testimony. In agreeing to the settlement, TD Insurance ultimately chose to disregard Dr. Platnick's opinion as expressed in his ESR and accept the catastrophic impairment claim of Dr. Carpenter.

[21] Although Dr. Platnick's affidavit emphasized in the most emphatic terms possible the purely passive nature of his role in preparing ESR's, cross-examination revealed that the claimed level of isolation from the process of preparing the underlying IME reports was actually quite case-specific.

[22] The "other" case of Dr. Platnick mentioned in the last paragraph of Ms. Bent's email (discussed further below) was also an instance of an ESR prepared by Dr. Platnick in the context of a catastrophic impairment claim. However, despite the categorical assurance that he does *not* contact the assessing IME in preparing such reports, in this other case he did exactly that at the request of the assessment company and succeeded in persuading the IME in question (Dr. Dua) to produce an amended "final" report that happened to correspond to the economic interest of his client and resulted in a changed recommendation from that physician. I shall review the circumstances of this second case below. In that other case as well, Dr. Platnick's client ultimately disregarded his opinion and accepted the catastrophic impairment claim.

[31] I cannot find on the record before me that there is any basis to conclude that Ms. Bent could have reasonably foreseen that the confidentiality obligations undertaken by recipients of the email would be breached and that the email would make its way into the broader insurance community including the clients upon whom Dr. Platnick depended, still less that it would do so in the distorted "broken telephone" fashion claimed by Dr. Platnick in this case.

(iv) Damages alleged by Dr. Platnick

[32] Dr. Platnick alleges that his practice began to suffer in a material way very shortly after the email was sent out on November 14, 2014. Very soon thereafter, he claims existing appointments were cancelled and new mandates stopped arriving. He claims that he was told in December or early January by unnamed persons that he had been "blacklisted" in the insurance industry. He claims that despite his efforts to contact clients and explain his side of the story, his work-flow had significantly dried up by January 2015. He claims that some insurance companies had pulled all of their files in which he had been involved and demanded that he review all of his prior reports for them. He provided no particulars of any of the clients or names of individuals communicating this information to him. While some insurance companies have again begun to use his services, others have not and he estimates that his practice is now only about half of what it was beforehand.

(v) Prior proceeding involving Ms. Bent and Dr. Platnick

[33] The last paragraph of the November 14, 2014 email referenced a prior case involving Dr. Platnick. The parties filed a considerable body of evidence concerning that other case involving another client of Ms. Bent whom I shall refer to as "Frank" to preserve his privacy since he is not a party to this litigation.

[34] The controversy between the parties concerned Dr. Platnick's role in preparing an executive summary of a report dated November 4, 2011 made by Dr. Dua, an IME psychiatrist engaged by the same insurer to assess Frank's claim of catastrophic impairment arising from a 2007 motor vehicle accident.

[35] Dr. Dua's report found that Frank "sustained a catastrophic impairment under any or, a combination of any, of the criterion as the described in the Statutory Accident Benefits Schedule, Accidents (SABS) as it relates to mental and behavioural disorders". The report concluded:

> "Overall, [Frank] has Moderate impairment (Class 4), as he is able to care for himself but has problems with interpersonal relationship and difficulties with his concentration, persistence and pace. He is battling severe depression and has made serious suicide attempts. He is also having significant sleep disruption and fatigue. He is also unable to work on account of his physical and mental disorders. In my opinion, he has approximately 45% WPI impairment due to mental or behavioural disorder".

[36] Frank had reached his medical and rehabilitation benefit limits in January 2012 and required a determination of his catastrophic injury claim in order to receive further benefits. Ms. Bent's office followed up with the insurer and was given copies of the reports of all of the medical assessments that had been conducted by the insurer in October-December 2011, including that of Dr. Dua. Her clerk was informed that a determination of the claim would not be made by the insurer until a summary report had also been received.

[37] Despite being promised a decision no later than February 24, 2012, no decision was received by that date. On February 27, 2012, Ms. Bent wrote the insurer to protest the delay, noting that the delay was placing the patient at risk of considerable harm and claiming that there was no need to wait for a summary report in light of the catastrophic determination already made by Dr. Dua in the November 4, 2011 report commissioned by the insurer.

[38] On March 1, 2012, Ms. Bent filed a complaint regarding the delay of the insurer with FSCO.

[39] On March 8, 2012, the insurer accepted Frank's catastrophic impairment claim. The complaint filed by Ms. Bent was however still pending before FSCO even though Frank's claim had been accepted.

[40] On April 11, 2012, FSCO responded to the complaint of Ms. Bent with a letter indicating that her delay complaint was well founded and that a warning letter had been issued to the insurer. The letter also noted that the insurer had received the summary report on March 8, 2012 and made its determination (the fax copy of the summary report shows a transmission date of March 7, 2012 – nothing turns on the discrepancy in dates).

[41] Dr. Platnick's summary report, received by Ms. Bent from FSCO in April *after* her client's claim had already been accepted, summarized Dr. Dua' report in a manner that was quite at odds with the conclusion contained in Dr. Dua's "final" report:

> "Dr. Dua rated him overall at moderate impairment (Class 3). A value for mental and behavioural impermanent has been assigned at 40% whole-person impairment**.**
>
> Dr. Dua concludes that [Frank] does not satisfy Criterion 8 with a Class 4 (marked impairment) or a Class *5* (extreme impairment) due to mental or behavioral disorders".

[42] Dr. Platnick's explanation of the discrepancy between his summary report and the report quoted report of Dr. Dua was involved and quite unknown to Ms. Bent until after this litigation began.

[43] Dr. Platnick claimed that the assessment company asked him to contact Dr. Dua some time after Dr. Dua had already rendered her final report of November 4, 2011. It was also presumably no earlier than January 2012 given the information communicated to Ms. Bent by the insurer at that time. He was asked to contact Dr. Dua and discuss her ratings with her "because it appeared to the vendor company that she offered an opinion outside her area of expertise and one that was not compliant with the statutory/regulatory regime".

[44] It is to be recalled that Dr. Dua had been retained by the same vendor company on behalf of the same insurer and it might have been supposed that the insurer would select experts reasonably familiar with the statutory and regulatory regime to which they were requested to apply their particular expertise. Be that

as it may and following Dr. Platnick's intervention, Dr. Dua issued a *new* version of her report. Confusingly, she chose to date this second version November 4, 2011 as well and made no reference to an earlier signed and submitted version of the same report. This second version of Dr. Dua's "final" report, bearing the same date as the original, contained a changed SABS classification (that would justify rejecting Frank's claim) but continued to provide conclusions highly favourable to accepting Frank's catastrophic impairment claim.

[45] It was this second version of Dr. Dua's "final" report that Dr. Platnick summarized without reference to the first report nor his role in persuading Dr. Dua to change it. According to Dr. Platnick, Dr. Dua changed her conclusion and re-issued her report after speaking to him, but he did not *cause* her to change it. The changes, he claims, were her own. Dr. Dua provided no evidence for this motion.

[46] Whether Dr. Platnick's explanations regarding the operation of the Statutory Accident Benefit Schedule is technically accurate or not, his *summary*of Dr. Dua's report was in the nature of a selective digest of only those facts and conclusions favouring a rejection of the catastrophic claim and omitted much of the substance of her report that was to a quite different effect. It also made no mention of the earlier version of the same report or his own role in its revision.

[69] Comparing the "original" final examining physician reports with the ESR prepared by Dr. Platnick in the two cases examined in the evidence before me clearly raises very serious questions about both the independence and utility of this type of report in the determination of accident claims disputes. A report of this nature may well be of great use to insurance defence counsel or claims adjusters seeking to marshal arguments against allowing a particular claim from the various medical assessments accumulated in the course of administering a claim.

[70] The question of whether a purely derivative "expert report" arising from a paper review of specialist reports prepared by others undertaken by a general practitioner without specialist qualifications of his own and hired by the (same) insurer may be treated as anything like an independent and objective expert *summary* of the underlying reports is a serious one. It is most certainly a question that is of great public importance.

[71] A warning to members of the legal profession about the danger of failing to expend the resources to obtain and review all of the underlying files going into such Executive Summary Reports accomplishes much more than simply helping lawyers win more cases to increase their own private income – it improves the administration of justice generally and is thus in respect of a matter of great public interest.

[72] Dr. Platnick agreed on cross-examination that the participation of physicians in the IME process is a matter of public controversy. His own participation in the process has been commented upon in a number of reported FSCO decisions – sometimes in a negative light; sometimes not. The role of IME's and the claim assessment companies retained by insurance companies who hire them is something that has been commented upon in a number of reported cases: *Burwash v. Williams*, 2014 ONSC 6828 (CanLII) and *Macdonald v. Sun Life Assurance Company of Canada*, 2006 CanLII 41669 (ON SC). The subject has been discussed in articles in a number of trade publications including the Law Times, Canadian Lawyer as well as the *Insurance Business* Canada article cited in the statement of claim.

[102] There are two references to Dr. Platnick in the email. The first refers to his report in the Carpenter case that described the conclusion as a "consensus conclusion". The second is in the concluding sentence that refers to another report where Dr. Platnick had changed another doctor's recommendation. I find that there is credible and compelling evidence that both statements were fair and substantially true descriptions of the facts.

"consensus opinion"

[103] The second paragraph of the email took issue with Dr. Platnick having submitted a report that purported to be a consensus report when Dr. King never participated in a consensus meeting, was never shown the Executive Summary report of Dr. Platnick and indeed never even spoke to Dr. Platnick. This

statement is also objectively true. Dr. Platnick's report suggests that the opinion being conveyed was a consensus opinion. It plainly was not.

[104] Dr. Platnick has an explanation. It is not an explanation that appears on the face of the report nor even one that would be a fair inference to be drawn from his report. Dr. Platnick claims that he completed his report first and handed it over to his immediate client, Sibley. Sibley, he explained, was supposed to have taken in hand the task of collecting the signatures of the other assessing physicians – the ones who actually saw and spoke to Dr. Carpenter. He says that the bulk of the report is written in the first person and records his conclusions and opinions without attributing these to the other assessing physicians.

[105] Dr. Platnick's explanation is nonsensical and amounts to saying that he hoped the report would be true by the time it was used even though he knew it was not true when he delivered it. He knew that *none* of the assessing physicians had signed off on his conclusions when he submitted his own conclusions as consensus conclusions and admitted as much on cross-examination.

[106] The fact that the report was written in the first person does not alter the fact that it impliedly sought to enhance the credibility of Dr. Platnick's personal opinion by portraying it as reflecting the consensus view of those who had the first-hand experience and specialized expertise that he did not. Dr. Platnick admitted the obvious fact that a "consensus report" would bear greater weight than one that was not.

[107] In fact, Dr. Platnick's report was not shown to Dr. King at all, a fact he testified to at the arbitration. Dr. Platnick's "consensus" report failed to include material aspects of Dr. King's report that were favourable to Dr. Carpenter's claim. Indeed, one of the other assessing experts pointedly refused to endorse the report as a consensus report when asked to do so by Sibley and characterized Sibley's communications with him as "profoundly offensive and insulting".

[108] Dr. Platnick's report was on its face misleading.. It reasonably likely that Ms. Bent would succeed at a trial in demonstrating that the report sought to attribute to itself the weight of a consensus opinion that it did not have and was thus fairly described by Ms. Bent in her email communication to the OTLA Listserve membership.

[109] Dr. Platnick suggested that, had he testified at the arbitration, any confusion as to whether his report was a consensus report or his own personal opinion alone would easily have been cleared up and explained. That may be so but entirely misses the point. Dr. Platnick delivered his report to be used by the insurance company for whom he prepared it in determining Dr. Carpenter's compensation claim. To suggest that the "confusion" would have been cleared up at a hearing presupposes that a hearing would have ensured. Dr. Carpenter might have been disheartened and accepted the outcome; her lawyer might have neglected to request the full file. Ms. Bent's email contained an object lesson in the perils of that course.

[110] Ms. Bent submitted that even if email were determined to carry the pleaded implication that Dr. Platnick had engaged in professional misconduct, the implication would be found to be fully justified. Signing or issuing in his professional capacity a document that he knew or ought to have known is false or misleading is defined as professional misconduct under paragraph 1(1)(18) of the regulations made under the *Medicine Act, 1991*, S.O. 1991, c. 30. There is credible and compelling information before me that leads me to believe that Ms. Bent has a reasonable likelihood of establishing such misconduct. Dr. Platnick has provided admissions that would readily lead to the implication that his report was provided in his professional capacity and was misleading for the reasons indicated. The explanations offered, even making all possible allowances for the summary nature of the procedure, have done nothing to diminish that reasonable conclusion.

"Dr. Platnick changed the doctor's decision"

[111] I have reviewed the circumstances surrounding "Frank" and Dr. Dua's two "final reports" in some detail above. Firstly, the description of Ms. Bent is quite accurate at least in the narrow sense. Dr. Dua did change her recommendation after the intervention of Dr. Platnick. She may well have had good and honourable reasons for doing so. Ms. Bent's warning to her colleagues would nevertheless be valuable and

useful since a review of the file history would reveal the undisclosed (by Dr. Platnick) fact of the changed recommendation, a useful fact in and of itself for any counsel representing a claimant. That may be a nuanced description to a member of the general public but would not be so to a lawyer representing accident victims reading it. Secondly, Ms. Bent had no reason to know about the existence of a second version of the "final" report when she composed her email on November 14, 2014. Dr. Platnick on the other hand was in a position to have known of the confusion two competing "final" versions would create. He chose to omit any reference to it. The choice was not without implications. His summary report gave a claimant's lawyer no reasonable to suspect the existence of an earlier and very helpful version of the final report of Dr. Dua.

[112] There is compelling and credible evidence for me to form the belief that Ms. Bent reported fairly and accurately on the facts reasonably known to her. If her report in the email omitted Dr. Platnick's involved explanation it was because Dr. Platnick's report omitted any references that would have suggested a need to obtain one.

[113] There is therefore credible and compelling evidence before me (and considering Dr. Platnick's explanations) to justify my conclusion that it is reasonably likely that Ms. Bent would succeed in establishing the truth of the two references to Dr. Platnick in the email.

[121] The evidence before me as to the "harm likely to be or have been suffered by the [plaintiff] as a result the [defendant's] expression" is quite general and imprecise. While Dr. Platnick claims that his lucrative insurance practice was very severely impacted, he has provided little in the way of concrete examples of how and through what means or the evidentiary foundation to attribute such harm to the plaintiff.

[122] The IME practice that Dr. Platnick claims was lost was that of representing insurance companies (directly or indirectly through assessment firms). There is a relatively small number of insurance companies and assessment firms operating in Ontario. Dr. Platnick has every reason to know in detail who his clients were by name and what volume of business he had done with them, which clients had left him and why. His affidavit provides no particulars of how and by what means the email caused any of these clients to desert him, whether they were impacted by other "broken telephone" gossip communications or even why he was unable to provide the explanations provided to this court to them.

[123] Dr. Platnick's affidavit also discussed the damaging effect of gossip and rumour that he claims was circulating about Ms. Bent's email. However, the gossip and rumour he purported to quote was manifestly not contained in Ms. Bent's email and is something for which she cannot reasonably be expected to be held responsible (at least not based on the pleadings and evidence presented).

[124] Dr. Platnick has laid no credible foundation for attributing the leak of the email to Ms. Bent. I cannot, for example, conclude on any credible or compelling evidence that Ms. Bent knew or ought to have known that the email would be leaked to non-members contrary to the confidentiality obligations of the Listserve members. The audience to whom the email was sent was subject to confidentiality obligations and none of the members of that audience are alleged to have been material clients of Dr. Platnick.

[125] The harm to Dr. Platnick's practice appears to have largely already been suffered *before* the *Insurance Business* magazine article appeared in late December 2014. Whether or not Ms. Bent might have succeeded in persuading the magazine not to run the story it decided to run, I can see little evidence of damages tied to that story in particular nor any credible and compelling information that Ms. Bent can be held responsible for the story or its consequences.

[126] For the foregoing reasons, I have grave doubts that the plaintiff would be able to demonstrate material *pecuniary* damages as against the moving party. I do not exclude the prospect of non-pecuniary or general damages. However such damages would also be subject to the same causation issues: were they the result of the gossip and rumour arising from unexpected leak or the result of a private email to a group composed largely of non-clients with whom Dr. Platnick is normally in an adversarial relationship?

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https://www5.fsco.gov.on.ca/AD/4829

Morrison and State Farm

Decision Date: **2016-02-04**, **Arbitration, Final Decision, FSCO 4829**.

Overall, I find the analysis conducted by Dr. Sangha was more convincing and probative. I accept his conclusion that Mr. Kong has WPI of 34% of the lower extremity.

First, Dr. Sangha's observations were more complete than those of Dr. Platnick. In manual muscle testing, Dr. Sangha rated the hip impairment. Dr. Paitich also identified a hip impairment and rated it with the range of motion model to obtain a WPI of 4%[29] but Dr. Platnick, when compiling the final report, appeared to disregard hip impairment in his final calculations.

Second, Dr. Platnick concluded that Mr. Kong's lower extremity rating had to be rated analogously to a "below the knee amputation, less than 3 inches." By so doing, he limited the maximum rating available to this impairment to 28% WPI.[30]

Dr. Sangha rebutted Dr. Platnick's suggestion in the following manner. Dr. Sangha diagnosed Mr. Kong with impairments involving the hip, thigh/quads, and knee and concluded that the appropriate impairment level would be *more analogous to a hip articulation, not a knee amputation*. He stated, "For his knee extension impairment of grade 4/5 strength as a result[s] of the quads plasty (the rectus is a bi-articular muscle and it's [sic} impairment has resulted in both hip and knee impairment)…"[31]

I agree with Dr. Sangha's opinion. He personally examined Mr. Kong and concluded there was a hip impairment. Dr. Paitich, also of the IRSI team, rated a hip impairment of 4% WPI. It was unclear why Dr. Platnick disregarded the findings of Dr. Paitich.

Finally, I also find Dr. Sangha's rating for the neurologic component of the impairment more convincing than that of Dr. Platnick. Both he and Dr. Platnick reviewed the impairment to the common peroneal nerve using Table 68 at page 3/89, and agreed that the motor impairment of the nerve was 15%. Dr. Sangha then applied the other columns of that *same* table and rated 2% for sensory loss and 2% for dyesthesia.

In contrast, Dr. Platnick turned from Table 68 (which referenced lower extremities), and applied Tables 11 and 12 at pages 3/48 and 3/49 respectively. Yet Tables 11 and 12 refer specifically to impairments of the *upper extremity, not the lower* (even more confusing,

given Dr. Platnick's previous conclusion that the entire injury was more analogous to a "below the knee amputation"). No explanation was given by Dr. Platnick for his use of these tables, and why he did not apply the percentage impairment ratings for sensory deficit and dysesthesia mentioned in Table 68 at page 3/89, *the very table he initially used to rate this impairment*.

In conclusion, Dr. Sangha's opinion in regard to the lower extremity was more coherent and comprehensible than the one prepared by Dr. Platnick. Overall, I found Dr. Sangha's report was more probative, complete, and better reasoned. I accept the conclusions drawn by Dr. Sangha in regard to the impairments of the lower extremity. I find Mr. Kong has an impairment of 34% WPI for the lower extremity.

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https://www5.fsco.gov.on.ca/AD/4865

li and Ferozuddin and Certas

Decision Date: **2016-03-23**, **Arbitration, Final Decision, FSCO 4865**.

Dr. Platnick, in his report of March 6, 2012 addressed Mr. Ferozuddin's entitlement to an income replacement benefit. Dr. Platnick noted in his report that Mr. Ferozuddin reported being able to drive only short distances and felt nervous doing so. Despite this, Dr. Platnick stated that Mr. Ferozuddin had an essentially normal physical examination and he did not identify any accident related impairment that would cause him to suffer a substantial inability to perform the essential tasks of a full-time short haul truck driver. Dr. Platnick did not reconcile the complaints documented by Mr. Ferozuddin at the assessment with his conclusions that there were no valid indicators to support ongoing accident-related injury or impairment. In addition, he was not available to testify as he was not called as a witness. Further, in light of my finding that Mr. Ferozuddin in fact went on to develop chronic pain, I assign little weight to Dr. Platnick's report.

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https://www5.fsco.gov.on.ca/AD/4558

Baldassi and Primmum

Decision Date: **2015-07-06**, **Arbitration, Final Decision, FSCO 4558**.

Primmum's Denial: Section 44 Assessment

On receipt of an OCF-18, dated August 27, 2012, signed by the family doctor, Dr. Bremermann, the Insurer advised the family on January 3, 2103 that they required a second opinion to determine if the request for private school funding was reasonable and necessary in relation to the injuries sustained in the motor vehicle accident. The letter also stated that the Insurer had arranged for an assessment to be conducted by Dr. Platnick, general practitioner.

Dr. Platnick carried out a paper review and on the basis of Dr. Platnick's assessment, the Insurer determined, on February 4, 2013, in a letter to the Claimant, the OCF-18 was not reasonable and necessary to treat the impairment arising out of the March 5, 2008 motor vehicle accident. For specific details of the denial, the Applicant was referred to "a report of examination under Section 44 dated January 15, 2013, and completed by Dr. Howard Platnick, Physician".

Before I proceed to my analysis, I have to comment on the assignment of a general practitioner by Primmum to conduct this Section 44 Assessment. The Insurer's denial, and the origin of this dispute, was based on Dr. Platnick's conclusions that the cost of the private school funding was not reasonable and necessary. Dr. Platnick's reports are found in the Joint Brief at Tab 31(e) and 31(f). The reports in the Joint Brief are described, incorrectly, as "Physiatry" Paper File Review Report of Dr. Platnick, MD.

Dr. Platnick's reported expertise, as set out in the preamble of his report, has no relation to the expertise required to assess the Applicant's OCF-18. His expertise, as a family physician, as stated in his "Assessor Qualifications", is described as having a special interest in neuromusculoskeletal disorders, disability management and rehabilitation. He treats adult, pediatric, and geriatric populations and is involved in the treatment of chronic pain (chronic non-malignant pain – musculoskeletal and neuropathic) and headache patients including narcotic and adjunct medication prescribing/monitoring.

By the time of Dr. Platnick's report in January 2013, almost five years had elapsed since the motor vehicle accident in 2008. The medical reporting, the exchange of letters between the Applicant's counsel and Primmum, and prior Section 44 assessments during this timeframe indicated that the impairment symptoms in this very young Applicant were related to anxiety and its interaction with her learning disability, socialization and mood related issues and sleep disturbances. The school records at the time of his assessment reported early

learning and fine motor skills development delays as well as below grade level academic performance.

With the exception of a more recent report from a treating psychologist, the Joint Brief indicates that the Insurer had access to most of the medical and school records as I have before me at the time Dr. Platnick completed his assessment.

By contrast, all prior Section 44 assessments – six are listed in the Joint Brief – were conducted by Dr. Amena Syed, an assessor with more relevant expertise. Dr. Syed states her qualifications in the preamble, as a registered psychologist with areas of competence in clinical, rehabilitation and neuropsychology. Her resume states she is qualified to provide these services to children, adolescents and adults. She has experience working with genetic, neurological, developmental and psychiatric/psychological illnesses providing consulting, assessment and treatment services.

The Insurer had to be aware of the required Section 44 assessment expertise when the OCF-18 Treatment Plan of August 2012 was submitted to the Insurer by Dr. Bremermann. The doctor made it clear in the Form that her patient:

> is having learning difficulties and anxiety arising from the motor vehicle collision on March 5, 2008 which is affecting her studies at school. She is requiring private school funding to support her learning needs.

From the statements made by Dr. Bremermann on the submitted OCF-18 and the prior reporting history, showing the nature of the impairment and the numerous assessments of Dr. Syed, (seven are listed as having been reviewed by Dr. Platnick) it had to be evident to Primmum what the required Section 44 assessment expertise was to be. But for some reason, the Insurer selected a family physician.

Dr. Platnick concluded from the paper review that the treatment plan was not reasonable and necessary. The medical documentation in his view did not support a "head-trauma-acquired brain injury as a result of the MVA", consequently, there was no organic-based, cognitive, accident-related impairment that would require the proposed "goods and services", i.e., the tuition fees for Tall Pines School. Included in this conclusion, Dr. Platnick reviewed a neuropsychological assessment report prepared by Dr. Janine Hay, C. Psych., Clinical Neuropsychologist.

Dr. Hay's report was not an assessment of a neuromusculoskeletal disorder. Prior to Dr. Platnick's assignment in January 2013, the Insurer agreed to fund a neuropsychological

assessment on the Applicant and her report was not available to Dr. Platnick at the time so his conclusions were delayed until he completed his review of Dr. Hay's report.

Again, as with Dr. Syed, Dr. Hay's expertise is more in keeping with the assessment requirements. Dr. Hay works at Holland Bloorview Kids Rehabilitation. Her expertise, as stated in her testimony at this Hearing, is carrying out neurological assessments to assess cognitive functioning with respect to brain behaviour relationships and to understand the cognitive profiles, learning profiles and make recommendations for academic planning and rehabilitation.

It has to be questioned then, why the Insurer assigned a family doctor, with an interest in neuromusculoskeletal disorders, to review, comment, and making findings on a neuropsychological assessment report. It also has to be noted that the history of the claim in this case did not centre on a neuromusculoskeletal disorder but rather the interaction of anxiety and behavioural concerns with developmental learning skills.

Other documents in the Joint Brief show that the Insurer was aware that the Applicant's anxiety and related issues were interrelated with the Applicant's learning and educational development.

On August 9, 2012, five months prior to Dr. Platnick's assessment, Ms. Edmonds wrote that in her view, the force of the impact "were sufficient to cause brain injury whether or not Kristen exhibited any signs of it immediately after the collision". She goes on to write: "Your Neuropsychologist has already commented that there is evidence of symptoms of post-traumatic stress disorder and anxiety as well as developmental and cogitative impairments". Again, in a letter to Primmum, dated October 9, 2012, Ms. Edmonds wrote: "The purpose of Dr. Hay's Assessment is to determine the nature and etiology of Kristen's cognitive impairment, learning difficulties and anxiety". In explaining the hoped for outcome of Dr. Hay's assessment Ms. Edmonds stated:

> I must determine whether her assessment, which is directed to cognitive problems and learning disabilities, will focus sufficiently on emotional and anxiety issues, as it is my understanding that the purpose of the Psychological assessment was not only to assess Kristen's difficulties and determine their relationship of them to the collision, but to formulate a treatment plan.

On October 22, 2012, the prior Section 44 assessor, Dr. Syed, wrote Primmum a clarification letter to show the difference between Neuropsychological assessment and a Psychoeducational assessment. Writing about the investigation of Kristen's symptom

aetiology, she stated: "The aetiology of her symptoms need to be understood from a brain behaviour perspective and investigated as such".

From the history of the Applicant's symptoms in the intervening almost 5 years, as documented in the Joint Brief; the medical reporting; and the investigations and assessments by the Insured, it is reasonable to infer that the Insurer was in error by assigning Dr. Platnick and accordingly, his conclusions can not to be relied upon.
Dr. Platnick has neither the qualifications to review the submitted OCF-18, dated August 27, 2012, nor the qualifications to review Dr. Hay's Neuropsychological Assessment Report. The reasons Primmum relied on in denying the Applicant's claim have to be removed from consideration.
[]
Mr. Krueger in his submissions has requested the dismissal, with expenses, of the Applicant's Arbitration. The Insurer did not call Dr. Platnick or offer any evidence on behalf of the Respondent, instead, relied on challenging the evidence of the witnesses.

[]
It is clear from the subsequent actions by the Respondent on receipt of the OCF-18 that they had waived non-compliance. The correspondence in the Document Brief shows that the Respondent continued to correspond and work on the application. The Applicant had already been attending Tall Pines since September 2012, the prior year to when the OCF-18 was acknowledged in writing by the Insured on January 3, 2013. The correspondence in the Joint Brief confirms the Insurer assigned an assessor for a Section 44 assessment about five months after the Applicant commenced Grade 3 at Tall Pines. The Respondent received the report of Dr. Hay in January 2013 and was then sent on to Dr. Platnick for an assessment. Eventually the treatment plan was denied on February 4, 2013. Given the exchange of correspondence after the Applicant started Tall Pines, it cannot be said that the Insurer was not aware that she had started at her new school. The Respondent was aware that Kristen was attending Tall Pines by this time. The correspondence, dated July 25, 2013, between Ms. Edmonds and the Insurer, over the private school funding continued for the next 2013/2014 school year. At no time prior to this Hearing has the Respondent made reference to Section 38(1.1). I find that by its actions, the respondent waived compliance with Section 38(1.1).
[]
As for the rejected of OCF-18 by the Insurer without a reasonable explanation, I agree with Ms. Edmonds' position in that Dr. Platnick does not fairly assess Dr. Bremermann's OCF-18 for Private School Funding. This is an understatement of the situation in my view. As I had earlier determined, Dr. Platnick was not the correct choice of an assessor given the issues and therefore it was beyond his expertise to render an opinion with regard to the submitted OCF-18. I find that the opinions of Dr. Hay are preferable to those of Dr. Platnick.

D.M. and Portage La Prairie **[+]** Arbitration, 2014-08-15, Reg 403/96.
Final Decision

Dr. Cote deferred final catastrophic determination in respect of D.M. to the Catastrophic Impairment Calculation/Determination Report, which was prepared by Dr. Platnick. Dr.Platnick did not personally assess D.M. He relied exclusively on the opinions of Drs. Cote and Watson, and on a partial file review. Neither did he express his own opinion in respect of D.M.'s level of impairment due to a mental or behavioural disorder as a result of the accident.

Burgess and Pembridge **[+]** Arbitration, 2014-06-06, Reg 403/96.
Final Decision

Ms. Burgess proceeded with the assessment notwithstanding Pembridge's refusal to fund it. The assessment revealed cervical facet joint involvement at the left C2-5 levels. This formed the basis of the recommendation for the rhizotomies that were performed by Dr. Faclier in September 2008 and again in March 2010. In each case, Ms. Burgess enjoyed significant, although not complete or permanent, symptom relief.

Pembridge refused to fund the cervical facet joint assessment on the basis of a paper review by Dr. Platnick, M.D. In his very brief report of May 5, 2008, Dr. Platnick concluded that there was "no convincing rationale" for the assessment, although it does not appear from his summary of documents reviewed that he had the three reports of April 18, 2008 available to him. In any event, I find that, given the chronic headaches and neck and shoulder pain that Ms. Burgess was continuing to experience at the time, and the limited results she was receiving from active and passive therapies, it was reasonable and necessary to investigate the possibility of cervical facet joint involvement as recommended by Dr. Shapero in his OCF-22 dated April 22, 2008. Ms. Burgess is therefore entitled to payment in the amount of $2,513.72 for the cost of the assessment.

Tam and Wawanesa Mutual - 2 **[+]** Arbitration, 2010-05-20, Reg 403/96.
Final Decision

Dr. Platnick's report was based upon a "paper review" that Dr. Platnick conducted on behalf of Seiden Health Management Inc. He testified that he did not deal directly with Wawanesa or the Applicant and he could not answer whether this had been set up as either an insurer's examination or a DAC. Dr. Platnick did not know what notice, if any, had been given to the Applicant. I have no other evidence on this issue to indicate whether

Dr. Platnick's assessment was or was not done in accordance with the requirements of the *Schedule* (as it read at that time).

Dr. Howard Platnick is a family physician with knowledge and experience in musculoskeletal issues, disability management and rehabilitation. Based upon his review of the documentation that was provided to him, Dr. Platnick concluded as follows:

…Mr. Tam sustained uncomplicated soft tissue injuries to his neck, back and chest. He has had conservative treatment including physiotherapy, chiropractic, and pharmacotherapy with improvement in his overall condition. By September 2003, he had returned to all of his pre-accident activities of daily living including personal care, homemaking, community mobility, and transfer activities. The occupational therapist did not identify the need for any form of assistance.

Based on the soft tissue injuries sustained, it would have been appropriate to provide analgesic medication for up to three-months post-accident. Dr. Wong prescribed Vioxx and Percocet and the use of these medications would be supported for 12 weeks post-accident or until approximately the end of October 2003. His uncomplicated soft tissue injuries would have resolved by the end of October 2003 and there would not have been the need for further analgesic medication.

Dr. Platnick disapproved of the use of narcotics for the type of injuries sustained by Mr. Tam and concluded that the use of Oxycet, Oxycodone, Hyromorphinecontin and Dilaudid during the period November 2003 through May 2004 was not reasonable and necessary to treat accident-related injuries. Dr. Platnick also found no justification for the prescription of Baclofen (a muscle relaxant) or Cialis (used for erectile dysfunction) for any accident-related injuries. He concludes that:

Based on review of the documentation, there is no need for the ongoing use of any form of medication as a result of the accident.

Based upon this single report of Dr. Platnick in September 2004, Wawanesa denied the initial claim and all subsequent claims by Mr. Tam for expenses related to prescription medication.

On cross-examination, Dr. Platnick acknowledged that he did not examine Mr. Tam and could not assess his credibility. He stated that he has no reason to doubt Dr. Rod's diagnosis of chronic pain. He confirmed that in some cases of chronic pain, it is appropriate to prescribe narcotics (including Oxycontin) if it provides pain relief and a return of function. Dr. Platnickacknowledges that he did not have the clinical notes and records of Dr. Wong or Dr. Rod when he prepared his own report.

On re-examination, Dr. Platnick explained his reasoning. According to Dr. Platnick, in the case of uncomplicated soft tissue injuries, the tissue damage will heal within a few months. If a person complains of ongoing pain (after the tissue ought to have healed), that is subjective and, according to Dr. Platnick, it is difficult to know what is causing that pain.

It appears to me that Dr. Platnick tends to discount complaints of pain related to soft tissue injuries. This may explain why, in his report, Dr. Platnick fails to mention the numerous references contained in the records that he did possess of Mr. Tam's complaints

of pain or the existence of objective evidence (for example, the CT scan, bone scan, report of Dr. Glickman) of problems with Mr. Tam's spine that tended to support his pain complaints.

Dr. Platnick testified that he generally avoids the use of narcotics because there is a risk of side-effects and habitualization. According to Dr. Platnick, once people start taking narcotics, it is hard to get them to off the drugs; consequently, Dr. Platnick tries to avoid prescribing narcotics. After explaining his philosophy, Dr. Platnick acknowledged that other doctors have a different philosophy.

Indeed, Dr. Rod indicated that in his philosophy that every person is entitled (as a human right) to receive relief from pain. Dr. Rod agreed that therapy, counselling, analgesics and even surgery should be considered before long-term use of narcotics but that there are cases where such long-term use is necessary and appropriate and this is such a case.

It therefore appears to me that Dr. Platnick and Dr. Rod are at opposite ends of a philosophical spectrum when it comes to the use of narcotics for management of chronic pain. On the one hand, Dr. Rod may be a bit too cavalier about prescribing narcotics, accepting uncritically whatever he is told by his patients. On the other hand, Dr. Platnick may be too sceptical or dismissive of subjective complaints of pain. Also, Dr. Platnick's characterization of Mr. Tam's injuries as being uncomplicated soft tissue injuries may have been an oversimplification of the facts in this case.

Counsel for Wawanesa appeared to be challenging both the opinion and the methodology of Dr. Rod. I must confess that I am not entirely comfortable with a course of treatment that requires a relatively healthy young man to remain on high dosages of narcotics for many years. Wawanesa has suggested that the Oxycontin may be doing Mr. Tam more harm than good. There is, however, no persuasive medical evidence to support this assertion.

At the end of the day, I am forced to accept either: (1) the opinion of a doctor who was looking at one "snapshot" in time, who never even examined the Applicant, who had limited information available to him and who ignored the evidence of subjective but consistent complaints of pain and objective evidence (of disc bulges and large spinal cysts) that would tend to support the subjective complaints of low back pain; or (2) the opinion of a doctor who specializes in treating patients with chronic pain, who has been treating the Applicant since a few months after the accident and who has seen the Applicant every four to six weeks (on average) for the last six and a half years. In the circumstances, I find that I must give greater weight to the opinion of Dr. Rod than to that of Dr. Platnick. As a result, I find that the expenses incurred by Mr. Tam for the Oxycontin and Hydromorphcontin are reasonable and necessary. Since Dr. Rod did not testify about Baclofen, Oxycocet, Dilaudid, Cialis, Trazodone or Gabapentin, I am not allowing the expenses claimed for these medications.

With respect to the drug expenses, the claim for a special award is related to the manner in which these claims were denied (i.e., Wawanesa's reliance upon Dr. Platnick's report). It was alleged that Dr. Platnick's report was not obtained in accordance with the

provisions of the *Schedule* and/or that there is no evidence that Mr. Tam explicitly authorized the release of his personal information to Dr. Platnick.

Since the Applicant failed to raise these issues prior to the cross-examination of Dr. Platnick (i.e., towards the end of this hearing) [See note 17 below], the Insurer was not aware that this was an issue and it did not produce any records from Seiden Health Management Inc. or relevant correspondence or other documents that might have shed more light on this issue. I am not satisfied that the Applicant could accurately recall any details about what procedures were or were not followed since he left such matters to his former solicitors. He did not call his former solicitors to testify on this matter nor did he produce any records related to this issue. Also, counsel for the Applicant did not make clear exactly which provisions of which version of the *Schedule* were allegedly breached by Wawanesa.

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Note 17: Prior to the cross-examination of Dr. Platnick, the Applicant never indicated that he would be seeking a special award.

Poblete and Wawanesa [+] Arbitration, 2009-06-18, Reg 403/96.
Final Decision

Dr. H. Platnick, M.D., who conducted an IE on December 21, 2006 to determine if Botox injections recommended by Dr. J. Mathoo, a physiatrist, were reasonable and necessary (finding they were not), also concluded the disk bulge at L5/S1 was not caused by the accident, and there was no clinical correlation between the MRI findings and Mr. Poblete's complaints: "for example, he does not have radicular-like symptoms radiating down the left lower extremity." [See note 12 below]
The fact that Drs. Jaroszynski and Platnick did not find objective signs of nerve root symptoms when they examined him in May and December 2006 is not a sufficient basis on which to conclude the accident did not contribute to Mr. Poblete's pain or impairment. Both Dr. Vadasz and Dr. Shteynberg in fact noted complaints of pain radiating down the left leg shortly after the accident, as noted above.

This was a request for an assessment with a social worker or an occupational therapist "to determine whether an admission is indicated to a cognitive behavioural multidisciplinary pain program" – in fact, the programme at Chedoke Hospital recommended by Dr. Tunks. Wawanesa refused to pay for this assessment on the basis of a paper review by Dr. Platnik on May 9, 2007. Dr. Platnik had examined Mr. Poblete on December 21, 2006. That report is discussed above. Despite extensive medical evidence to the contrary, Dr. Platnik was still of the view that Mr. Poblete's case was one of uncomplicated soft tissue injuries with no objective evidence to support ongoing musculoskeletal, neurological or orthopaedic accident-related injury, and, as there had been numerous assessments and long-term passive and active physiotherapy and psychological therapy, an assessment to determine if Mr. Poblete should be admitted to a multidisciplinary pain programme was not reasonably required. There is no indication that he at any time, ever considered the possibility that Mr. Poblete was suffering from a chronic pain condition, despite the opinions of Dr. Sheinbaum, Dr. Tunks and Dr. Vadasz, which is completely unreasonable given the medical evidence available to him

and even considering that he is a general medical practitioner and not a specialist in chronic pain. As submitted by counsel for Mr. Poblete, this chronic pain assessment by Dr. B. Kirsh, a physician, and potential admission to the Chedoke programme, could have made all the difference to Mr. Poblete. I find it was unreasonable for Wawanesa to rely on Dr. Platnik's opinion to refuse to pay for this assessment.

I find Wawanesa ought to have been aware that Mr. Poblete was suffering from chronic pain and significant psychological sequelae of the accident at least from its own IE report (Dr. Sheinbaum) in May 2006, and, in the face of considerable evidence to the contrary it was not reasonable for it to rely selectively on the IEs of health practitioners who ignored or downplayed Mr. Poblete's pain complaints, to deny benefits.

Mr. Poblete's case was not a straightforward one by any means. Mr. Poblete underwent an inordinate number of assessments at the behest of Wawanesa, his own doctors, and no doubt on the advice of his counsel. Many of his requests were initially denied by Wawanesa, only to be subsequently approved by IEs. The clear impression left is that Wawanesa was more interested in minimizing its exposure and papering its file than it was in attempting to see Mr. Poblete's case for what it was – a chronic pain condition – and properly funding appropriate treatment. I find this conduct was inflexible and imprudent, and resulted in denial of timely and appropriate treatment which could have made all the difference to Mr. Poblete.

I further find that Wawanesa's initial denial of IRBs, although later acknowledged to be premature and eventually reversed, left Mr. Poblete without income for a period of time and imposed unnecessary financial uncertainty and hardship on him, which Wawanesa had sufficient information to have foreseen.

Tharmalingam and TD Home and Auto **[+]** Arbitration, 2009-02-03, Reg 403/96. Final Decision

In April 2005, Mr. Tharmalingam underwent a multidisciplinary post-104 week disability DAC assessment. The primary evaluator, Dr. H. Platnick, reported that Mr. Tharmalingam sustained "uncomplicated soft tissue injuries to his neck…and back" as a result of the accident, that the mechanism of the accident did not support a "fracture to the sacrum" and that there was no evidence of musculoskeletal or neurological accident-related injury. Dr. Platnick stated that he did "not identify any accident-related injury that would restrict standing, walking, bending, stooping, crouching, reaching, gripping, lifting, carrying or pushing/pulling." Dr. Platnick concluded that Mr. Tharmalingam did not suffer a complete inability to engage in any occupation for which he was reasonably suited by education, training or experience.

The medical evidence supports the view that Mr. Tharmalingam credibly reported the nature and extent of his impairment. Only a few of the medical practitioners who examined Mr. Tharmalingam questioned the veracity of his complaints, and of these, their opinions either failed to consider the non-organic nature of Mr. Tharmalingam's condition or acknowledged the legitimacy of Mr. Tharmalingam's pain and limitations.

There is some disagreement in the medical opinions about the severity of the impact, with Drs. Lipson and Platnick suggesting it was relatively minor, and with Drs. Alpert and Davila indicating it was quite significant. While the accident did not involve significant property damage to Mr. Tharmalingam's vehicle, and while he did not suffer pain immediately, I find that Mr. Tharmalingam was subjected to considerable force in the initial impact and that he was emotionally shaken as a result of the accident. I accept that he began to experience pain the following morning, as both he and his wife testified. I do not attribute any significance to the apparent discrepancy in Mr. Tharmalingam's evidence regarding the onset of his neck pain following the accident. I am satisfied that, at the very least, he suffered sufficient back pain to require him to stop work the day following the accident.

I find that, as a result of his accident-related injuries, Mr. Tharmalingam was rendered completely incapable of engaging in any employment for which he was reasonably suited by education, training or experience.

I find that the medical reports that found that Mr. Tharmalingam was capable of returning either to his previous job as a welder or to an alternative position did not give sufficient weight to the non-organic nature of Mr. Tharmalingam's disability and to the general credibility of his complaints. For example, Dr. Lipson found that Mr. Tharmalingam was capable of returning to his pre-accident job, but on the basis that there was no organic explanation for the majority of his symptoms. Dr. Silverman questioned Mr. Tharmalingam's credibility, but acknowledged the general veracity of his pain complaints and suggested a diagnosis of adjustment disorder as a result of the accident. Dr. Silverman did not clearly conclude that Mr. Tharmalingam could return to employment; he merely suggested that Mr. Tharmalingam should return to work as part of his rehabilitation. Dr. Platnick's findings regarding Mr. Tharmalingam's employability were based on a purely organic assessment of his injuries.

Adusei-Peasah and TTC Insurance **[+]** Arbitration, 2007-02-02, Reg 403/96. Preliminary Issue

TTC sent Mr. Adusei-Peasah for an Insurer's Medical Examination with Dr. Platnick on May 11, 2004.

In his report dated May 11, 2004, Dr. Platnick stated that Mr. Adusei-Peasah "was co-operative, very pleasant and answered my questions in a straightforward manner."

In his summary, Dr. Platnick stated: "Mr. Adusei-Peasah sustained minor soft tissue injuries to his neck and back (myofascial strain), chest strain, and left knee strain." He stated that these injuries should have resolved in six weeks. He stated that "[d]uring the physical examination I did not identify evidence of musculoskeletal or neurological accident-related injury." He noted that there was pain focussed behaviour indicating symptom amplification and a number of inconsistencies. He concluded that he did not identify any accident-related injury "that would prevent Mr. Adusei-Peasah from

resuming all of his pre-accident activities of daily living, personal care, mobility and housekeeping/home maintenance activities."

It should be noted that under "Medical History", there is no mention in Dr. Platnick's letter that Mr. Adusei-Peasah had suffered a broken neck in 1978 and had reconstructive surgery in that a piece of bone from Mr. Adusei-Peasah's hip was removed and placed in his cervical spine. No mention that Mr. Adusei-Peasah suffered from a burning sensation in his feet. There is no mention of two previous car accidents, one in September 1992 and the other in January 2003. The only note of a previous car accident is in the year 2000. However, Mr. Adusei-Peasah was never involved in a car accident in 2000.

Driver and Traders General - Appeal [+] Appeal, 2003-11-18, Reg 403/96.

> In December 1999, a Med Rehab DAC assessment was conducted by Dr. H. Platnick, a medical consultant, Dr. J.S. Hummel, an orthopaedic surgeon, and Dr. S.G. Esmail, a neurologist. They examined Ms. Driver and reviewed the Treatment Plans and an extensive list of medical records, and agreed that Ms. Driver suffered WAD II soft tissue injuries. Although Dr. Hummel acknowledged that these injuries caused Ms. Driver's severe neck pain from spasm, both he and Dr. Platnick concluded that no further treatment was reasonable or necessary, on the basis that soft tissue injuries ought to resolve three months after the accident and that her aches and pains would "settle down" over time.
>
> I find these three physicians simply disregarded Ms. Driver's complaints of pain and ignored her condition at the time, including continuing spasm in her neck. The fact that the average soft tissue injury of that nature resolves on its own after three months or "with time" is no good medical reason to conclude that no treatment is necessary or reasonable for a particular patient who presents with symptoms and pain. One cannot simply ignore the particular circumstances of the person. Dr. Esmail's opinion that no treatment was necessary "from a neurological perspective" because there was no evidence of neurological damage, is equally beside the point. I find the DAC's conclusion to be flawed for these reasons, and that it was unreasonable for Traders to rely on it to support its position that *any* further treatment at all was neither reasonable nor necessary.
>
> . . . .
>
> For these reasons, I find it was not reasonable for Traders to rely on the Med Rehab DAC report to support its position that no further treatment was reasonable or necessary. The next step would have been to address the flaws in the report by requesting clarification, or, if necessary, a second opinion. (pp. 35-36).

The Arbitrator's rejection of the DAC assessors' "objective, 'one-size-fits-all' standard of treatment" is consistent with a long line of arbitral authority requiring insurers to consider the individual treatment needs of insured persons, including treatment for chronic pain. [See note 38 below.] However, the Arbitrator failed to consider the effect of s. 38(14)(b), and her reasons indicate she treated the DAC like an insurer examination report, to which no pay-pending-dispute obligations apply. This was an error of law. Further, nothing in her reasons suggests that the

deficiencies of the DAC report were sufficiently fundamental to pre-empt Traders' right to rely on the report pending resolution of the dispute. The Arbitrator's rejection of the report was within her adjudicative authority. Her failure to give effect to s. 38(14)(b) was not. For that reason, the special award cannot stand. Given the amounts at issue, it would not be cost-effective to refer the issue back to the Arbitrator. The special award is revoked.

Driver and Traders General - 2 **[+]** Arbitration, 2003-01-08, Reg 403/96. Final Decision, appeal rendered

In December 1999, a Med Rehab DAC assessment was conducted by Dr. H. Platnick, a medical consultant, Dr. J.S. Hummel, an orthopaedic surgeon, and Dr. S.G. Esmail, a neurologist. They examined Ms. Driver and reviewed the Treatment Plans and an extensive list of medical records, and agreed that Ms. Driver suffered WAD II soft tissue injuries. Although Dr. Hummel acknowledged that these injuries caused Ms. Driver's severe neck pain from spasm, both he and Dr. Platnick concluded that no further treatment was reasonable or necessary, on the basis that soft tissue injuries ought to resolve three months after the accident and that her aches and pains would "settle down" over time.

I find these three physicians simply disregarded Ms. Driver's complaints of pain and ignored her condition at the time, including continuing spasm in her neck. The fact that the average soft tissue injury of that nature resolves on its own after three months or "with time" is no good medical reason to conclude that no treatment is necessary or reasonable for a particular patient who presents with symptoms and pain. One cannot simply ignore the particular circumstances of the person. Dr. Esmail's opinion that no treatment was necessary "from a neurological perspective" because there was no evidence of neurological damage, is equally beside the point. I find the DAC's conclusion to be flawed for these reasons, and that it was unreasonable for Traders to rely on it to support its position that *any* further treatment at all was neither reasonable nor necessary.

Decision No. 436/14, 2014 ONWSIAT 1412 (CanLII) – 2014-06-26

Ontario Workplace Safety and Insurance Appeals Tribunal — Ontario

By letter dated February 24, 2012, the case manager communicated that the worker was not entitled to a NEL for a permanent impairment of the right hip and that the loss of earnings benefits that had been paid from October 20, 2010 to February 10, 2012 would be rescinded. This decision was based on an updated medical opinion from an external medical consultant, Dr. Platnick, that the worker's injury – a hip strain – would not have required a total hip replacement and that this surgery and all the consequences thereof were as a result of the worker's underlying Perthes' disease. The worker's representative objected to this decision.

(vi) Submissions

[32] The worker's representative took the position that the worker is entitled to a NEL assessment and further LOE benefits. He submitted that there was no medical basis for the Board's conclusion that the worker had a pre-accident impairment of her right hip: she had required no restrictions on her activities or modifications to her work, nor did she have any complaints, treatment or lost time from work prior to her workplace accident. The representative was of the opinion that the opinion of the medical consultant, Dr. Platnick, was unreliable, due to deficiencies in his report. The medical consultant did not list the documentation which he was provided and reviewed and provided only a brief conclusion without any discussion of its foundations.
