



FSCO A15-001693

BETWEEN:

GARY SOPHER

Applicant

and

PRIMUM INSURANCE CO.

Insurer

REASONS FOR DECISION

Before: David Snider

Heard: September 10, 2017, at the offices of the Financial Services Commission of Ontario in Toronto

Appearances: Josh Nisker for Mr. Sopher
Nestor E. Kostyniuk for Primum Insurance Company

Issues:

The Applicant, Gary Sopher, was injured in a motor vehicle accident on August 14, 2012. He applied for and received statutory accident benefits from Primum Insurance ("Primum"), payable under the *Schedule*.¹ Primum denied Mr. Sopher's entitlement to catastrophic impairment benefits. The parties were unable to resolve this dispute through mediation, and Mr. Sopher applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The issues in this hearing are:

1. Is Mr. Sopher catastrophically impaired as a result of the motor vehicle accident of August 14, 2012?
2. Is Primmum liable to pay Mr. Sopher's expenses in respect of the arbitration?
3. Is Mr. Sopher liable to pay Primmum's expenses in respect of the arbitration?

Result:

1. Mr. Sopher is catastrophically impaired as a result of the subject motor vehicle accident.
2. Mr. Sopher is entitled to his full expenses in respect of the arbitration.
3. Mr. Sopher is not liable to pay Primmum's expenses in respect of the arbitration.

EVIDENCE AND ANALYSIS:

This hearing involved nine days of evidence from the applicant, two of his daughters and a number of expert witnesses for each side. The Applicant called 4 expert witnesses – Dr. Kevin Jones, Dr. Lisa Becker, Dr. Lara Davidson and Dr. Harold Becker. The Insurer called 3 expert witnesses – Dr. Kerry Lawson, Dr. Alborz Oshidari and Ms. Laura Youm, O.T. There were allegations by the Insurer that Mr. Sopher had engaged in symptom magnification from early on in his treatment when he was assessed by a neuropsychologist while at West Park until right up into his testimony during the hearing. There were significant problems identified with the testimony of a number of the expert witnesses as well. In the end, however, the Insurer conceded that Mr. Sopher is significantly and seriously impaired at this point in his life – but maintained its theory that a pre-existing back injury contributed greatly to the Applicant's level of impairment.

Briefly, the motor vehicle accident in question occurred when Mr. Sopher was riding his Harley-Davidson motorcycle on Highway 403 on August 14, 2012. Mr. Sopher was a very experienced motorcycle rider and motorcycling was an important part of his enjoyment of life. On this occasion, though, he was interfered with by another motor vehicle in such a way that he lost control of the motorcycle, rolled it a number of times along the highway, and ended up lying on his back on the roadway with the Harley-Davidson on top of him. He was initially rendered substantially immobile by the accident and spent significant time in hospitals and a rehabilitation facility as a consequence. His mobility subsequently returned but at a greatly reduced level of capability and he suffers from a number of other ongoing symptoms and impairments.

Based upon the testimony given by Mr. Sopher, his family members and the broad selection of pre-accident medical information provided to me concerning Mr. Sopher, I have concluded that he was a very high-functioning individual prior to the accident. He did have pre-existing lower back pain with occasional pain shooting down one leg at various times over approximately 5 years prior to the date of this accident. I find, however, that there is no reason to conclude that he had a significant back or spinal injury prior to the accident. He was clearly active both at work and socially and he greatly enjoyed life with his family and riding his motorcycle.

Both parties completed catastrophic impairment assessments with regard to Mr. Sopher and the numerical results were markedly different. The Applicant's results described a Whole Person Impairment (WPI) rating of 77% whereas the Insurer's results determined that Mr. Sopher suffered a 24% WPI. Subsection 3.1(6) of the *Schedule* defines a catastrophic impairment as "a physical impairment or combination of physical impairments that, in accordance American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, ("the Guides") results in a 55 per cent or more physical impairment of the whole person.

I found it significant that the Insurer's expert, Dr. A. Oshidari, who compiled the executive summary in their catastrophic assessment, testified that he agreed (approximately) with the 77% rating described by the Applicant's author of their executive summary (Dr. H. Becker) concerning the degree to which Mr. Sopher is now disabled. However, Dr. Oshidari relied heavily on one physical finding relating to upper body hyper-reflexivity to opine that Mr. Sopher

had a pre-existing condition which accounted for 38% of the total 77% WPI rating that Dr. H. Becker found and which therefore had to be deducted from the 77% rating. Thus, by Dr. Oshidari's calculations, which were somewhat modified during his testimony, even utilizing the numbers from Dr. H. Becker's Executive Summary in the Applicant's Catastrophic Assessment Report, Mr. Sopher had no more than a 39% WPI as a direct result of the accident in question.

The entire hearing came down to this one point, to my mind. Did Mr. Sopher have a pre-existing back injury which accounted for a 38% portion of his post-accident disability? The Insurer conceded, during Dr. Oshidari's testimony and in its final submissions, that Mr. Sopher is now seriously disabled. It remained strong in its position, though, that the accident did not result in a significant enough injury, in and of itself, to justify a finding of a greater than 55% WPI for Mr. Sopher for purposes of qualification for catastrophic level benefits pursuant to the *Schedule*.

I respectfully disagree. I find that, on balance of probabilities, Mr. Sopher suffered injuries in this motor vehicle accident which directly left him with impairments which exceed the 55% WPI level set out in the Guides. I have concluded that the catastrophic impairment assessment carried out at his behest by Omega Medical Associates was accurate in its determination that his overall WPI rating exceeded the 55% threshold by a considerable margin. I found there were real problems with the testimony and expert opinions of two of the Insurer's experts – Dr. A. Oshidari and Dr. K. Lawson – which far outweighed any concerns I may have had with the exact accuracy of the impairment percentages set out in the opinion(s) of the Applicant's experts. As a result, I prefer the evidence of the Applicant's catastrophic impairment team over those of the Insurer. Put simply, I cannot find as a fact that Dr. Oshidari's conclusion that there was a 39% pre-existing impairment is valid. His testimony on this point dissolved entirely under cross-examination. He could not explain why numerous medical opinions, treatments and advice given to Mr. Sopher concerning his pre-existing back pain did not at any time describe or diagnose him with having the DRE category VI level of injury to his spine (at any level) which Dr. Oshidari was relying on for his pre-existing injury diagnosis. The pre-accident medical evidence clearly proved that Mr. Sopher was given strong pain killers and other medications as a consequence of his pre-existing back pain, which serves to demonstrate that Mr. Sopher has, perhaps, a low pain

threshold, but the most apparent diagnosis available from those pre-accident medical records clearly sets out that he was suffering from sciatica. Sciatica is not mentioned as a cause of any percentage of Mr. Sopher's WPI in either of the catastrophic impairment assessments and therefore has not been diagnosed as a significant factor in, or component of, Mr. Sopher's present impairments.

As well, Dr. Oshidari could not explain why he failed to find Hoffman's signs during his examination of Mr. Sopher when two prior doctors had found them prior to his examination of the Applicant. He had already testified in response to a clarifying question that a Hoffman's sign cannot fail to be found in a subsequent exam after it has been identified in a medical examination on a prior date, because it is permanent and involuntary. When this was pointed out to him he had to concede that "he may have missed them". He became progressively more defensive under cross-examination and eventually his opinion on the pre-existing condition came to mean very little, in my view.

I believe it is appropriate to comment briefly on the evidence given by Dr. Lawson on behalf of the insurer as well. Dr. Lawson performed a dual role on the Insurer's catastrophic impairment assessment team and wrote reports as both a psychologist and a neuropsychologist. I found that Dr. Lawson demonstrated a problematic attitude toward his role as an expert witness in this matter with regard to his testing and report(s). There were many areas of concern with his testimony and I will outline just a few of them here. Firstly, he stated that he had personally trained his daughter, a second or third year university student in an unrelated field, to act as his psychometrist, and that he was confident that she was properly conducting the full range of tests and obtaining valid results. However, he could not disagree with testimony from Mr. Sopher's daughter that when the psychometric testing was being conducted by Dr. Lawson's daughter she was actively engaged in conversation with Mr. Sopher's daughter about entirely irrelevant matters and that Mr. Sopher had to continue with the testing while the two young women were in the room with him having a conversation. This factor alone calls into question any and all results that this particular psychometrist may have obtained with regard to Mr. Sopher. Dr. Lawson was clearly not aware that his psychometrist had engaged in this behaviour, and despite his testimony that he "must have approved" it, it was clear that he knew nothing about what had happened.

Further to this, Dr. Lawson did not know, at the time of his testimony, any of the results from the psychometric testing which was carried out and provided completely disorganized raw data in an electronic format to Mr. Sopher's counsel at the hearing. It also became clear, through his testimony, that Dr. Lawson had not given any significant consideration to the Occupational Therapy report that his own team member had provided and that he was unaware of, and devalued in any event, the collateral evidence which was available in that report through the O.T.'s interview with Mr. Sopher's wife.

Most damaging to his testimony however, was the fact that he utilized a single, brief test result which he said was obtained as a consequence of utilizing the Structured Inventory of Malingering Symptomology (SIMS) test, to decide that Mr. Sopher was not giving valid answers in his testing and was over-reporting his symptoms. Interestingly, though, this specific test, among others, was not even listed in his own list of "Tests Administered" in his report(s). He also had no actual knowledge of the results of Mr. Sopher's testing using this, or any other, measure. He testified, at first, that this test was basically a simple yes or no determinant in terms of whether there was "symptom magnification" occurring. Then, when corrected by reference to the manual which its producers supply for the SIMS test, which clearly did indicate that a specific score was the initial cut-off point, he vaguely indicated that perhaps a score of 13 or 14 was the measure recommended by the SIMS test creators, but that "the literature" suggested a score of 22. However, he had no idea what Mr. Sopher's actual score was. Dr. Lawson stated that he used his clinical judgment to conclude that Mr. Sopher was engaging in symptom magnification based upon the SIMS test. The overwhelming problem with this purported exercise of clinical judgment is that the creator/distributor of the SIMS test states in its descriptive literature that the test is designed to detect potential malingering, rather than symptom magnification, and, even more damaging, that it is designed to be no more than a simple suggestive device which should be followed up with other forms of testing. Rather than assigning any validity to a number of larger, more sophisticated tests which were apparently administered and which did not show any significant scoring invalidity, Dr. Lawson chose instead to jump to the conclusion that he should completely invalidate many findings of significant impairment(s) to Mr. Sopher's functioning. As a consequence he simply assigned zero values to certain impairment test results and came up, not surprisingly, with very low

impairment ratings. I found all of the above to be very disturbing and conclude that Dr. Lawson was not conducting himself properly as an expert assessor of Mr. Sopher but was, instead, actively promoting the Insurer's case and chose to take the first shortcut he could see to conclude that Mr. Sopher was not catastrophically impaired.

Taken together, the expert witnesses provided by the Insurer failed entirely to invalidate the catastrophic impairment report provided by the Applicant's assessors. The only conclusion I can reach is that, given the vagaries of the *AMA Guidelines* and the wide ranges of interpretation and number manipulation that are available to the expert medical witnesses, the Applicant has demonstrated, on balance of probabilities, that the level of his impairment which can be directly attributed to this accident well exceeds the 55% WPI requirement set out in the *Schedule*.

Accordingly, I find that Gary Sopher is catastrophically impaired as a direct result of the accident which occurred on August 14, 2012.

EXPENSES:

I find that Gary Sopher is fully entitled to his expenses, disbursements and applicable taxes in this matter. If the parties cannot agree on the level of expenses to be paid they may make submissions on the issue(s) in accordance with Rule 79 of the *Dispute Resolution Practice Code, Fourth Edition* — Updated January 2014.



David Snider
Arbitrator

November 9, 2017

Date



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BETWEEN:

GARY SOPHER

Applicant

and

PRIMUM INSURANCE CO.

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. Mr. Sopher sustained a catastrophic impairment as a direct result of the accident which occurred on August 14, 2012.
2. Mr. Sopher is entitled to his full expenses in respect of the arbitration.

A handwritten signature in black ink, appearing to read "D. Snider".

David Snider
Arbitrator

November 9, 2017

Date