Meikle, Ben Grant, Physiatrist, Physical Medicine and Rehabilitation

CPSO#: 71476

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Yang v. Co-operators General Insurance Company, 2021 ONSC 1540 (CanLII), <https://canlii.ca/t/jdjmd

[2] In this action, Ms. Yang sues: (a) Co-operators General Insurance Company, her automobile accident insurer; (b) Vivian Poon, an employee of Co-operators; (c) Mala Leidoux, an employee of Co-operators; (d) SCM Insurance Services Inc., a.k.a. Cira Medical Services Inc., a SABs service provider; (e) SCM Insurance Services GP Inc., a SABs service provider; (f) Cira Health Solutions LP, a SABs service provider; (g) Dr. Abraham Orner, an employee of Cira Health; (h) Ariel Ang, an employee of Cira Health; (i) Ranya Ghatas, a roster occupational therapist for Cira Health; (j) Dr. Robert Brian Hines, a roster psychiatrist for Cira Health; and (k) SmartSimple Software Inc., a software developer that developed a document management computer program used in the automobile accident insurance industry.

[50] Cira Health uses a software program known as Insurer360 to draft the section 44 and 45 reports. The software was developed by SmartSimple. Insurer360 was developed for the insurance industry and for medical examiners providing reports to insurers. Cira Health used the program to manage documents and secure document retention and exchange.

[51] In 2014, Co-operators retained Cira Health to arrange the section 44 and section 45 examinations of Ms. Yang.

[52] Meanwhile in May 2014, Dr. Becker made an assessment of Ms. Yang and opined that she met the criteria for having suffered a catastrophic impairment. On May 22, 2014, Dr. Becker submitted a treatment plan for SABs catastrophic impairment.

[53] Ms. Yang pleads that around this time, Ms. Poon of Co-operators and Ms. Ang of Cira Health conspired to create false medical records for Ms. Yang.

[54] On June 3, 2014, a Dr. Meikle examined Ms. Yang. She pleads that Dr. Meikle's report was falsified by Cira Health.

[55] On June 5, 2014, Co-operators denied Ms. Yang's SABs application and required her to attend section 44 insurer examinations for the purpose of determining her entitlement to SABs benefits including a catastrophic injury determination. Co-operators required examinations to be conducted by Dr. Hines and by Ms. Ghatas.

[56] Ms. Yang pleads that Dr. Hines and Ms. Ghatas were recruited to deliver reports to diminish the seriousness of her injuries. She pleads that Co-operators had Cira Health provide falsified and incomplete information to Dr. Hines and Ms. Ghatas.

*****NOTE:**
Supreme Court of Canada 40176 Dismissed https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=40176
Celia Yang v. SCM Insurance Services Inc. (a.k.a. CIRA Medical Services Inc.), et al.
(Ontario) (Civil) (By Leave)

Summary
Case summaries are prepared by the Office of the Registrar of the Supreme Court of Canada (Law Branch). Please note that summaries are not provided to the Judges of the Court. They are placed on the Court file and website for information purposes only.
The applicant was injured in a motor vehicle accident and brought an action concerning how her automobile accident insurer administered her claims for statutory accident benefits. She sued several people including the insurance company, employees of the insurance company, health professionals and a software developer who developed a document management computer program used in the automobile accident insurance industry. Some of the respondents brought a motion to strike the claim. The motion judge dismissed the applicant's action. The Court of Appeal dismissed the appeal.

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Froghollah Sadat v. TD General Insurance Company, 2018 ONFSCDRS 6 (CanLII), <https://canlii.ca/t/jq9xt

Mr. Sadat's CAT assessors calculated his whole person impairment (WPI) rating to be 55%. TD's assessors concluded it to be 31%. For the reasons that follow, I find that Dr. Adriano Persi (chiropractor and WPI rater) did not follow the *Guides* when rating for WPI and I prefer the WPI ratings by Dr. Ben Meikle (the IE physiatrist and WPI rater).

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Dawood Akeelah v. Belair Insurance Company Inc., 2017 ONFSCDRS 213 (CanLII), <https://canlii.ca/t/jq9j2

Dr. Ben Meikle completed the catastrophic WPI Report, dated September 13, 2016.[55] A zero rating was applied for physical and psychological impairment. 3% was allowed for medication. Dr. Avi Orner completed the executive summary, dated September 13, 2016.[56] The overall impairment rating was 3%.

Applicant's Review of Insurer's Catastrophic Impairment Reports

Drs. Lisa and Harold Becker of Omega Medical Associates reviewed the Insurer's reports in a Review Report, dated December 19, 2016.[57] Of particular note in my view is Drs. Beckers' disagreement with Dr. Meikle's assignment of a zero rating for cervical and lumbar spine impairment. It appears to me from Dr. Jaroszynski's report discussed above that he anticipated his clinical finding with respect to musculoskeletal impairment would be rated in the executive summary. He also deferred issues pertaining to an apparent abnormality on the EMG to the appropriate assessor. Instead, Dr. Meikle, who did not examine the Applicant, concluded that the Applicant's "perceived widespread chronic pain and symptoms do not follow anatomic pathways for radiculopathy and cannot be properly categorized as radiculopathy-like complaints." He did not assign any rating with respect to Dr. Jaroszynski's clinical findings. This was pointed out at p. 4 of the Review Report by Drs. Becker and I agree with their

comments in this regard. I also agree with their comments about Dr. Meikle's failure to categorize the Applicant's complaints as radiculopathy-type complaints given the findings of Dr. Savelli, a treating neurologist, who conducted EMG studies and who documented her findings in 2014 as discussed above. Drs. Becker also noted that Dr. Meikle had assigned a zero rating for mental and behavioural impairment. They noted (at p. 6) that Dr. Tuff's opinion was that he could not determine the level of impairment, not that there was No Impairment. They also indicated (at p. 4) that an increased rating for L5 radiculopathy might apply.
[]
I acknowledge Dr. Tuff's position with respect to the validity of psychometric testing and his perceived inability to provide an impairment rating because of invalidity. Dr. Tuff did not, however, say that the Applicant was not impaired. He said he was unable to provide a rating. Therefore, the zero impairment assigned by Dr. Meikle for neuropsychological and psychological impairment was inappropriate.

If I were to accept the 3% overall rating provided by the Insurer, I would have to conclude that there is nothing wrong with the Applicant, or at least nothing besides the effects of medication. I have reviewed all of the evidence, however, including the Applicant's demeanor at the Hearing, and I am not persuaded that there is nothing wrong with him, or even that medication is his only difficulty. There are multiple reports of underlying problems with depression and other diagnosed psychological conditions, including those discussed above.
[]
I find that there is liability for a special award. It was unreasonable for the Insurer to maintain the Applicant within the MIG following the report to the Insurer by the Acquired Brain Injury Program in April 2014. The Applicant, as discussed earlier, was diagnosed with concussion by a treating emergency room doctor and referred by that doctor to the Acquired Brain Injury Program for treatment, which the Insurer denied. The Insurer continued to deny treatment even when its own psychologist, Dr. Salerno, indicated in his report of January 6, 2015 that the Applicant's injuries from the November 2013 accident took him outside the MIG. There appears to have been some confusion as the Insurer assessments at this time gave opinions on the February 2014 accident,[74] but they referred to the November 2013 accident, and the Insurer should not have relied on these reports to make decisions about the November 2013 accident. The Insurer's conduct was not reasonable and a special award will follow.

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16-003144 v Cumis General Insurance Company, 2017 CanLII 22315 (ON LAT), <https://canlii.ca/t/h3b4w

15. In response to the applicant's catastrophic impairment application, the respondent stated that they did not accept that her injuries met the catastrophic definition, and requested that she attend five in-person insurer's examinations with the following health professionals:

i. a physiatry assessment by Dr. A. Oshidari, physiatrist;

ii. an in-home ADL functional assessment by M. Lee, occupational therapist;

iii. a community functional assessment by M. Lee, occupational therapist;

iv. a psychiatry assessment by Dr. H. Rosenblat; and

v. a cardiology assessment.

In addition, an integrated impairment rating by another physiatrist, Dr. B. Meikle, would take place, but the attendance of the applicant was not required for this assessment.

21. Despite the applicant's refusal to attend some of the requested examinations, the respondent carried out its catastrophic impairment assessment, which was compiled in a report dated December 8, 2016 authored by Dr. Meikle in his capacity of clinical coordinator. Three in-person assessments were completed: a psychiatry assessment by Dr. Rosenblat, an ADL (activities of daily living) functional assessment by M. Lee, and a community functional assessment, also by M. Lee. As part of the assessment, Dr. Meikle also provided an Integrated Impairment Analysis report, which included a summary of the findings of the various examiners. He notes in this "final consensus report" that the applicant did not meet the criteria for catastrophic impairment in any of the applicable categories. With respect to category 7, under which Dr. Marciniak found the applicant to be catastrophically impaired, Dr. Meikle reports that the applicant is rated at 11- 14% WPI with respect to her psychiatric impairments, but that he was unable to determine the applicable physical impairment rating because she declined to attend the physiatry and cardiology assessments.

22. Dr. Meikle testified at the hearing. He has been a physiatrist since 2002 and has extensive experience in assessments such as catastrophic impairment assessments. He works mainly on behalf of insurance companies. There was no dispute about his expertise in this field, and he was accepted as an expert witness by the Tribunal.

23. Dr. Meikle explained that he had recommended an in-person physiatry examination in order to respond to the physical conditions claimed by the applicant, including musculoskeletal issues and chronic pain. He stated at the hearing that an orthopaedic surgeon could also carry out the assessment, but noted that they deal more often with issues such as broken bones. The recommended physiatry examination would include document review, a 45 minute clinical interview, and a physical examination, including looking at range of motion, strength, palpation for tenderness, and sensation testing. He explained that he usually recommends an in-person examination and interview as part of the assessment to permit the applicant to provide more information to the physiatrist, and to allow for a physical examination.

31. In his testimony, Dr. Meikle stated that he recommended an in-person physiatry examination as the "most optimal" means of assessment in light of the physical complaints raised by the applicant, including musculoskeletal issues, chronic pain and medication side-effects. He testified that occupational therapists are fine to observe the patient, and in this case had observed many of the same activities that a physiatrist would, but that they are unable to comment on diagnoses or causation. In Dr. Meikle's view, general practitioners have less training and expertise on issues such as chronic pain than physiatrists. A physiatrist is able to do a paper review of a case like the applicant's, but again, an in-person examination would be optimal. Under cross examination, Dr. Meikle conceded that professionals other than physiatrists are able to do the WPI assessment. He testified further, however, that he believed an assessment by a physiatrist would better because they can provide an assessment that will "stand up in court". He stated that general practitioners can do assessments of catastrophic impairments, but that he was asked to do an "ideal" assessment.

32. I found the testimony of both experts to be forthright and based on significant experience and expertise. They both agreed that anyone with expertise in the rating system can conduct a WPI assessment, but disagreed on the type of assessors that were appropriate to conduct an assessment of the applicant's impairments. I prefer Dr. Marciniak's opinion for the following reasons.

"Optimal" vs. "reasonably necessary" assessments

33. First, Dr. Meikle testified that he recommended an in-person physiatry assessment because it was the "optimal" assessment to assess the applicant's impairments. The *Schedule* provides, however, that the insurer has a right to insurer's examinations that are "reasonably necessary". It does not provide a right to "optimal" assessments. In this case, the applicant had attended three in-person examinations, including two separate in-person occupational therapy examinations. As conceded by Dr. Meikle in cross-examination, the occupational therapist would have assessed many of the same activities that a physiatrist would, and a physiatrist would be able to conduct a paper assessment by using the occupational therapist results as well as other medical documentation. In addition, it should be noted that the focus of the two occupational therapy assessments was on assessing the applicant's level of functional independence in accordance with the AMA Guides, which form the basis of the WPI ratings. Dr. Meikle's opinion, however, was that a paper review would be sub-optimal. But this is not the test set out in the *Schedule.* The test is what is "reasonably necessary". Given the wealth of relevant information provided in the in-person occupational therapy assessments, I do not agree that an in-person physiatry examination is reasonable or necessary in this case.

Purpose of insurer's examinations – not primarily for litigation

34. Part of the reason that an in-person physiatry examination was viewed as "optimal" by Dr. Meikle was, as he testified, because this type of examination would have a stronger chance of "standing up in court". This is not the purpose of insurer's examinations. These examinations are supposed to be aimed at assessing a claim, not for the purpose of litigation. Examinations are required when "reasonably necessary". The type of examination chosen should not be on the basis of ensuring that the insurer has a stronger case. Dr. Marciniak testified that despite not believing it would be necessary or even useful, he included an in-person element in his assessment so that he would be able to respond to further assessments done by the respondent. It should also be noted that, despite her concern about the impact of numerous in-person assessments, the applicant was willing to attend an additional in-person examination by a general practitioner as an alternative to an in-person physiatry examination. This was because she was concerned that attending a physiatry examination would contribute to the escalation of the process, as she believed she would then be required to provide her own physiatry rebuttal report, as her own assessment had been done by a general practitioner.

35. It is concerning when all participants in the accident benefit application process must tailor their approach based on the spectre of looming litigation, and if insurer's examinations result in a need for further reply reports by additional specialists. This in turn can lead to escalation of the proceedings[11], which may cause delay and also increase the cost of accident benefit dispute resolution. This appears to thwart the very purpose of this process, which is aimed at being as expeditious and accessible as possible.

Intrusiveness of insurer's examinations

36. A request for unnecessary examinations is especially concerning because insurer's examinations are inherently intrusive and an invasion of privacy.[12] In this case, the applicant had already agreed to participate in an in-person psychiatry examination and two separate in-person occupational therapy examinations. Three in-person examinations, one of which took place in the applicant's home, are significantly intrusive. An in-person physiatry examination was also ordered by Dr. Meikle because it

was deemed “optimal”, even though it appears that it would overlap considerably with the occupational therapy examinations, and that a paper review would have been possible instead. There does not seem to have been any consideration of the intrusive nature of the examinations and the impact on the applicant of being subjected to five in-person insurer’s examinations in the assessment of which specialists to use, and how many examinations to order, especially when the applicant had only relied on two examinations for her own catastrophic impairment report.

37. It should be noted that the applicant is an elderly woman who requires an interpreter to communicate in English during her assessments. Both psychiatric assessors, Dr. Milenkovic and Dr. Rosenblat (the respondent’s examiner) agree that she has a mental health diagnosis. According to the report of M. Lee, occupational therapist, the applicant cried during her ADL Functional Assessment and asked to terminate the assessment, and “appeared agitated” and reported she was “afraid to continue with the assessment” during her Community Functional Assessment.

38. Dr. Marciniak testified that the applicant suffers from numerous health conditions, and is often confused and crying during her appointments with him. As a result, I find that it is likely that additional in-person examinations would cause at least some form of discomfort or distress to the applicant. While I do not find that medical reasons alone would be enough to make the in-person physiatry examination unreasonable, I do find that this is a factor that should have been considered. In balancing the interests of both parties, and weighing the necessity of an in-person examination against the intrusiveness and impact on the applicant, I find that the intrusiveness of this additional examination is not outweighed by its necessity or reasonableness, especially given the fact that other, overlapping examinations were requested.

Use of judgment in determining which assessments are reasonably necessary

39. Even though the insurer can delegate the design of the assessment process, they should use judgment in determining the number and nature of the examinations requested. There should not be a process of rounding up the “usual suspects”.[13] In this case, however, there seems to be an element of this approach. Dr. Meikle testified that he ordered the occupational therapy examinations to support the psychiatric examination. In doing so, he testified that he was following the process under the former DAC system, which has long been discontinued. He candidly admitted that two occupational assessments were ordered rather than one to permit billing for each.

40. I find this approach to determining the type and number of assessors seems to be based on considerations that are not valid, rather than on what would be the most appropriate and least intrusive means of assessing the applicant’s impairments.

41. The insurer should make reasoned decisions regarding which examinations it requests, and should be particularly cautious when ordering multiple insurer’s examinations. In this case, there is no question that some type of in-person physical examination would have been appropriate in assessing the impact of the applicant’s physical health conditions. It is not clear, however, why three different in-person physical examinations, two by an occupational therapist and one by a physiatrist, would be required. Requesting three overlapping physical examinations is certainly not the least intrusive approach.[14]

No prejudice to the insurer

42. Denying the respondent an in-person physiatry examination does not prejudice the respondent. The applicant participated in two in-person physical assessments by an occupational therapist. As Dr.

Marciniak testified, these assessments would provide more than enough information for a physiatrist or other health professional to complete a WPI analysis through a paper review. Dr. Meikle also agreed that a physiatrist could use the occupational therapy findings to complete their assessment. He was just concerned that this would not be "optimal". Neither expert testified that an in-person physiatry examination would be "necessary".

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Tammy Keck v. Sovereign General Insurance Company, 2016 ONFSCDRS 338 (CanLII), <https://canlii.ca/t/jq9cg

EVIDENCE OF DR. BEN MEIKLE, M.D.

Dr. Ben Meikle gave expert evidence as a psychiatrist experienced in performing catastrophic assessments. He authored the catastrophic assessment report prepared on behalf of Sovereign General upon his review of the information submitted to him by those health professionals who assessed Ms. Keck on behalf of Sovereign General.[29]

Dr. Meikle has never met, and thus never medically examined, Ms. Keck.

With respect to section 3(2)(e) of the *Schedule* (Criteria 7), Dr. Meikle opined that Ms. Keck's accident-related impairments corresponded to an overall 30-34% impairment rating of the whole person that does not thereby meet the 55% threshold necessary to establish catastrophic impairment.
With respect to section 3(2)(f) of the *Schedule* (Criteria 8), that requires an assessment of mental and behavioural impairment, Dr. Meikle opined that Ms. Keck did not meet the criteria for a Class 4 (Marked) or Class 5 (Extreme) mental and behavioural impairment within any of the four spheres of function.

With respect to Criteria 7, Dr. Meikle stated that the AMA *Guides* (14th ed.) relate to objective findings only and do not relate to subjective findings with few exceptions.

Dr. Meikle referred in his opinion to the AMA *Guides* Newsletter for July-August 2006: 1-9 where it states: "There is no notable impairment for controversial or ambiguous disorders such as myofascial pain syndrome, fibromyalgia and disputed neurogenic thoracic outlet syndrome." Dr. Meikle wrote that as a result of the accident Ms. Keck suffered the following conditions:

- Head injury / Concussion
- Post-traumatic migraine
- Posttraumatic vestibulopathy
- Soft tissue injury to the cervical spine (WAD I to II)
- Myofascial strain to the thoracolumbar spine
- Temporomandibular joint soft tissue injury

- Pre-existing Chronic Pain Syndrome / Fibromyalgia syndrome with increased symptoms post-accident

- Adjustment Disorder with depressed mood

With respect to the headaches that Ms. Keck suffers from, Dr. Meikle stated that the AMA *Guides* do not permit an impairment rating to be applied to headaches in the absence of associated impairments to the spinal nerves.

Dr. Meikle wrote: "In summary our assessment team determined that Ms. Keck has accident related mental and behavioural impairment, which is unlikely to be related to brain injury and is predominantly (if not solely) due to psychiatric illness." He noted that Ms. Keck's neurological assessment determined that Ms. Keck sustained a mild head injury/concussion as a result of the accident and that this degree of brain injury would not be expected to result in persistent mental or behavioural impairment and could be considered to be a "minor contributing factor" to Ms. Keck's persistent mental and behavioural impairment.
[]
In cross-examination Dr. Meikle stated that in making assessments under chapter 14 of the AMA *Guides* assessors should have full knowledge of an applicant's mental and behavioural disorders. A clear, accurate and complete report is essential to support a rating under these guidelines. An evaluation of mental and behavioural impairment must take into account variations in the level of function throughout time. It is important to get information over a sufficiently long period of time prior to the date of the chapter 14 assessment. This information includes treatment notes, hospital records, evaluations, work evaluations and progress notes, work related assessments, as well as the results of standardized psychological testing.

Dr. Meikle did not consider the full length report prepared by Dr. Scott Garner, psychiatrist, on behalf of Ms. Keck.

Similarly, Dr. Meikle did not receive or review the report of Dr. Velikonja, the clinical neuropsychologist, or the situational assessment prepared by Ms. Keck's catastrophic assessment team. He likewise was unaware of the information that the Insurer's catastrophic team obtained from Ms. Keck's husband which, he conceded, may be significant in determining lack of and severity of functioning.

Ms. Keck's counsel referred Dr. Meikle to the various factors that go into an assessment of each of the four domains as found in chapter 14 of the AMA *Guides*[30] with which Dr. Meikle concurred subject to the caveat that chronic pain is not a psychiatric disorder, but, in some circumstances, may be used to assess pain under chapter 14.

Dr. Meikle did not remember seeing the worksite assessment report prepared for Ms. Keck by Melissa Murphy.[31] He knew in general terms the number of hours Ms. Keck worked per week and that she used to drive a truck.
[]
Dr. Meikle wrote the Insurer's catastrophic report from the information he received from the health professionals on the Insurer's catastrophic assessment team. He did not interview Ms. Keck nor did he consider the reports of Drs. Garner and Velikonja.
[]

Ms. Keck is critical of the manner in which the Insurer's catastrophic report was completed. In writing the executive summary report, Dr. Meikle considered the assessments prepared by Dr. Spivak (psychiatrist), Dr. Soon-Shiong (orthopaedic surgeon), Dr. Mehdirata (neurologist), Ms. Cagampan (occupational therapist) and Dr. Holland (chiropractor) (FAEs). Ms. Keck's criticism of the Insurer's report goes to the weight to be given by the Arbitrator to the report.

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Patrick Matthews v. Dumfries Mutual Insurance Company, 2016 ONFSCDRS 260 (CanLII), <https://canlii.ca/t/jq96j

OMEGA, on behalf of Mr. Matthews, provided a summary of findings by Dr. Harold Becker, physician, which stated that Mr. Matthews is catastrophically impaired because his combined physical and psychological impairments are 34% -64% WPI. MDAC, on behalf of Dumfries, provided a summary prepared by Dr. Ben Meikle, a physiatrist, which found that Mr. Matthews had a total impairment of 49% which even if I round out 50%, as per the *Guides*, the rating still falls short of 55% WPI.

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Wawanesa Mutual Insurance Company v. Georgios Apostolidis, 2016 ONFSCDRS 216 (CanLII), <https://canlii.ca/t/jq99t

First, regarding the 55 per cent WPI issue, the Arbitrator noted that neither party's assessors assigned a WPI of greater than 55%: Dr. Gerber found Mr. Apostolidis' WPI would be in the range of 40 – 43%, based solely on the psychiatric issues; Dr. Ben Meikle, physiatrist and lead in the CAT IE, assigned an overall rating of 22 – 29% based solely on the leg and nose injuries (since Dr. Hines found no MBD impairment). A point of contention discussed below is whether the Arbitrator decided the WPI under (f) in combination with the MBD under (g) in the page he devoted to the WPI issue.

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Patricia Galloway v. Echelon General Insurance Company, 2016 ONFSCDRS 139 (CanLII), <https://canlii.ca/t/jq982

Dr. Ben Meikle, the physiatrist who reviewed Dr. Waisman's report in assessing Mrs. Galloway's assessment considered that her accident-induced impairments met the requirements for catastrophic impairment according to the *Schedule* criteria. He noted that a single "Marked" impairment in any of the spheres of function is sufficient to meet criteria, and she had two spheres "Markedly" impaired plus two spheres "Moderately" impaired.[18]
[]
With respect to her eligibility under subsection (f), the parties have agreed that her level of physical impairment is 29%. This was the level assessed by the panel from SIMAC, including Dr. Paitich, the orthopaedic surgeon who examined Mrs. Galloway. In the case of *Kusnierz v. Economical*, the court decided that a claimant can combine the physical impairment with psychological impairment in order to reach the total of at least 55% WPI.

How does one translate "Marked impairment" into a percentage that can be combined with the agreed 29% physical impairment? In this case, Dr. Waisman had found a 35 to 40% impairment on the psychological side. Using Table 3 (Emotional and Behavioral Impairments) of chapter 4 of the AMA *Guides* as a yardstick, Dr. Meikle, the physiatrist, working with his own conclusion of a 27% physical impairment, equated Dr. Waisman's 35-40% (conservatively set in the middle of the "marked" range) to

a WPI of 55%. For the reasons alluded to earlier, I leave aside Dr. Derry's outlying assessment of 7% impairment.

Applying the AMA *Guides'* Combined Values Chart, Dr. Meikle's calculation yields a combined WPI of 55% to 56%, or slightly higher if one replaces Dr. Meikle's own assessment of the physical impairment with the slightly higher agreed figure of 29%.

There are other ways of approaching the conversion,[40] none of them especially consecrated by the approval of the courts. In Mr. Pollack's post-Hearing brief, he suggests the use of the California Method for Conversion of GAF to WPI.[41] Looking at the GAF scores given by Dr. Rossy (55), Dr. Waisman (50), and Dr. Lee (50), and citing the California Method Combined Values Chart, Mr. Pollack arrives at a psychological WPI of between 23% and 30%, yielding a maximum combined WPI score of 50%, below the 55% minimum. However, given that doctors called by both parties used the AMA *Guides*, and that the use of the California Method was never discussed during the Hearing, either between counsel or with the medical witnesses, I see no reason for invoking it now. Neither Dr. Waisman, Dr. Meikle nor Dr. Derry used it in their calculations. Given the admonition of the Court of Appeal to give the concept of catastrophic entitlement an inclusive and not a restrictive meaning, it is appropriate in a case of slightly differing results to use the more generous calculation.

As a result, I find on a balance of probabilities that the combined impact of the physical and psychological impairment of Mrs. Galloway resulting from the accident is between 55% and 57%, which is sufficient to satisfy the criteria set out in subsection (f) of the *Schedule.*

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Carla Cristina Lima v. Wawanesa Mutual Insurance Company, 2013 ONFSCDRS 158 (CanLII), <https://canlii.ca/t/jq8h7

The relevant background to the motion is as follows. On February 14, 2012, Dr. Mamelak, a psychiatrist, submitted an Application for Determination of Catastrophic Impairment (an OCF-19 form). In Part 4 of the Form, of the 8 possible criteria for catastrophic impairment applicable to Ms. Lima, Dr. Mamelak checked off Criterion 8 (an impairment that, in accordance with the AMA Guides, results in a Class 4 or Class 5 impairment due to mental or behavioural disorder). The Insurer did not accept that Ms. Lima was catastrophically impaired and scheduled assessments with Riverfront Medical Services (which later became Cira Medical Services) to make this determination. On May 28, 2012, Riverfront issued its reports (authored by Drs. Meikle, Hines, Ghatas and Orner), finding that Ms. Lima did not "meet the threshold for Catastrophic Impairment under Criterion 8…." The Executive Summary of the reports states as follows with respect to the parameters of the assessment:

This Catastrophic Impairment determination is directed specifically towards Criterion 8. As such, multidisciplinary assessments were arranged in order to provide a comprehensive Catastrophic Impairment determination with respect to this criterion….

Roughly a year later, at the request of her counsel, Ms. Lima underwent further catastrophic impairment assessments at Kaplan Psychologists. On April 3, 2013, the clinic issued its reports (authored by Drs. Kaplan, Levitt, Henriques and Garner), finding that Ms. Lima satisfied both Criterion 7 (an impairment or combination of impairments that, in accordance with the AMA Guides, results in 55 percent or more impairment of the whole person) and Criterion 8. With respect to the parameters of the assessments,

the Executive Summary of the reports states that the assessment team "addressed all relevant catastrophic impairment criteria."

In response to these reports, the Insurer sought further comments from Cira Medical Services. Dr. Hines and Dr. Meikle conducted paper reviews of the new information and issued reports dated June 10 and 17, 2013, respectively. Dr. Hines reported that the additional documentation did not cause him to alter his original conclusions. Dr. Meikle noted Dr. Hines' findings and stated that, since his colleagues had not initially performed assessments with respect to Criterion 7, it was not possible to comment on whether Ms. Lima satisfied that category of catastrophic impairment. Dr. Meikle also indicated that, if requested, further assessments could be conducted "in order to provide an opinion regarding any/all of the other Catastrophic Impairment criteria."
[]
For the following reasons, I find that the Insurer has discharged its onus of showing that the proposed examinations are reasonable and necessary.

While there was some delay between the Insurer's receipt of Ms. Lima's assessment reports and the request for the new examinations, I do not find that the delay was unreasonable. The Insurer reasonably sought further opinions on the significance of Ms. Lima's reports, and, as a result of the responses received from Drs. Hines and Meikle, reasonably sought further assessments directed specifically at Criterion 7. I accept the submission of counsel for the Insurer that the delay between receipt of the paper reviews and the request for the examinations was likely a combination of the adjuster's workload and the intervening summer holidays. In any event, I do not find that the adjuster unduly delayed. The requested examinations were originally scheduled for October and November 2013, roughly two to three months before the arbitration was to commence. I do not find that the Insurer was engaging in "trial brinksmanship", but was rather reasonably trying to assess the nature and extent of Ms. Lima's impairments in light of the new reports she obtained, and only once it became apparent that Drs. Hines and Meikle would not be addressing Criterion 7.

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P. B. v. State Farm Mutual Automobile Insurance Company, 2013 ONFSCDRS 139 (CanLII), <https://canlii.ca/t/jq8fg

I do not find that the applicant is feigning her symptoms. This is not supported in the medical reports or in my own assessment of the applicant's credibility based on her own testimony. Many of the inconsistencies in the various medical reports can be explained by the existence of a conversion disorder (which is supported by medical professionals, discussed below). I accept her testimony, supported by medical evidence, that as a result of the accident she now lives with physical limitations that have an effect on her ability to carry on a normal life.

State Farm's Medical Reports

The insurer only filed its medical reports. At the outset of the resumption of hearing, counsel for State Farm informed me that its experts were unavailable to attend the hearing. He stated that he was only informed on the Wednesday before the resumption that Drs. Benjamin Clark and Ben Meikle, both of whom completed the executive summaries for the two insurer catastrophic impairment assessments, were unavailable to give evidence. The applicant was only informed the Friday before the resumption. Rather than ask for an adjournment, the applicant requested that the hearing continue and that I draw an adverse inference to the non-availability of the expert witnesses. Given that this was a resumption of

hearing after a very long adjournment I was sympathetic to the applicant's request that the hearing proceed and allowed the insurer to file its reports. It should be noted that there was no request to exclude these reports.

Without the actual testimony from the expert who authored the report, I do not find these reports particularly helpful to the issues that are before me. A main issue in this hearing is whether or not the disc herniations suffered by the applicant were caused by the motor vehicle accident. On the whole, the insurer's experts concluded that there was no causal connection given the temporal lag between the two events. They seem to base this conclusion on the premise that lower back pain was not a real issue for the applicant in the relevant time following the accident. However, based on the evidence, this is not a premise that I am prepared to accept. Without testimony to further explain this finding, I do not find the insurer's examinations of great assistance to me in determining the issues.

Throughout this decision, I will refer to the insurer's experts where their reports inform my decision. The insurer conducted two catastrophic impairment assessments. The first occurred in November 2007 and the second in March and April 2011. Dr. Benjamin Clark, physiatrist, completed the executive summary for the first assessment. Assessments and reports were completed Dr. Rehan Dost, neurologist, Dr. Richard Kaminker, orthopaedic surgeon, Dr. Donald Young, psychologist and Mr. Michael Drinkwater, registered physiotherapist. For the second assessment Dr. Ben Meikle, physiatrist, completed the catastrophic rating with assessments and reports being completed by Dr. Clark, neurologist, Dr. Ken Scapinello, psychologist, and Ms. Karen Dmytryshyn, occupational therapist.
[]
Many other insurer assessors concluded that the accident could not be responsible for the subsequent disc herniations 9 months later. In the second insurer's catastrophic impairment assessment,
Dr. Meikle indicated that the assessment team had determined that there was a significant lumbosacral spine impairment, however same was not causally related to the motor vehicle accident. The applicant's WPI was rated at 0%.

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Lucille Jodoin v. Gore Mutual Insurance Company, 2013 ONFSCDRS 78 (CanLII),
<https://canlii.ca/t/jq8k2

Ms. Jodoin's initial Catastrophic Impairment Assessments

On April 27, 2009, when Ms. Jodoin was 19 years old, she submitted an application for a determination of catastrophic impairment (OCF-19) to Gore Mutual. After a paper review, Dr. Meikle, physiatrist, provided the following whole person impairment (WPI) ratings for her physical impairments:

- 24% for the complete loss of vision in Ms. Jodoin's right eye
- 10% for a cosmetic deformity

Other "persistent impairments", including injuries to Ms. Jodoin's neck and back, were identified but not rated.
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Ms. Jodoin's Further Catastrophic Assessments
On January 15, 2013, Ms. Jodoin served the following reports on Gore Mutual:

- File review based opinion of Dr. Meikle dated September 28, 2012
- Medical legal evaluation of Dr. Meikle dated December 13, 2012
- Psychiatric plaintiff medical evaluation of Dr. Waisman dated December 13, 2012
- WPI assessment and analysis – opinion regarding catastrophic impairment of Dr. Meikle dated December 13, 2012

Ms. Jodoin explains why it took the length of time it did to file these reports as follows:

- Three of the above reports were delayed in being finalized because the assessors did not have the clinical notes and records of Dr. Reesor
- Dr. Meikle's paper review was not served initially, due to a desire to serve Dr. Meikle's reports together with Dr. Waisman's report
- It was not anticipated that it would take so long to obtain the psychiatric report of

Dr. Waisman

She did not explain why it took more than one month to serve these reports on Gore Mutual.

In his file review based opinion of September 28, 2012, Dr. Meikle noted that he had been provided with updated chiropractic records and was asked to comment on whether these records "can be utilized to determine the applicable impairment rating for spine impairment." He concluded that these records were useful and that Ms. Jodoin suffered a 5% WPI relating to her cervicothoracic spine. He was unable to comment on the applicable impairment rating for Ms. Jodoin's thoracolumbar and lumbosacral spine, beyond stating that it would range from 0-5% for each region (0-10% WPI total). He also provided an impairment rating of 3% for tearing in her right eye.

For the purposes of his medical legal evaluation of December 13, 2012, Dr. Meikle was asked to provide an opinion "in regards to the severity of the impairments sustained in the subject accident." It does not appear that he translated this opinion into WPI ratings under the AMA *Guides*.

In his psychiatric medical evaluation dated December 13, 2012, Dr. Waisman concluded that Ms. Jodoin suffered Class 3 or "moderate" impairment in the spheres of activities of daily living and concentration, pace and persistence and Class 4 or "marked" impairment in the spheres of social functioning and adaptation. He was of the opinion that her global impairment was "marked" and that she met the threshold for a catastrophic impairment designation under subsection 2(1.1)(g) of the *Schedule*.

The last of the newly served reports is the WPI assessment and analysis of Dr. Meikle dated December 13, 2012. Contrary to his prior report of August 14, 2009, he was of the opinion that 5% WPI was applicable to her back, in addition to 5% WPI for her neck. He also attributed an additional 3% for right eye tearing, an impairment that was not noted in his prior report. Lastly, Dr. Meikle advised that Dr. Waisman had determined that Ms. Jodoin's psychological or behavioural impairment was most analogous to a 56% WPI, in contrast to Dr. Reesor's psychological impairment rating of 37.5% WPI. This resulted in an overall combined WPI score of 73-76%.

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Insurer's Submissions
Gore Mutual submits that Dr. Meikle's file review based opinion of September 28, 2012 showing a 10% WPI for Ms. Jodoin's neck and back represents a change in Ms. Jodoin's condition. In Dr. Meikle's prior report dated August 14, 2009, Dr. Meikle concluded that an impairment rating of 0% for spine pain was appropriate.
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She notes that on March 27, 2012, Gore Mutual received an insurer's examination report from Dr. Todd Norton regarding a treatment plan for chiropractic therapy. Accordingly, Gore Mutual had an opportunity to examine Ms. Jodoin in 2012.

Ms. Jodoin submits that, although in Dr. Meikle's 2012 reports his impairment ratings for Ms. Jodoin's neck (5%), back (5%) and for tearing in her right eye (3%) were new, the impairments were not.
[]
Ms. Jodoin submits that the change in her WPI related to physical impairments does not reflect new impairments or deterioration in her condition. Rather that it results from her assessing doctor rating impairments that had not previously been rated, and that there is evidence that she had previously complained of these conditions to Gore Mutual's assessors.[13] Nevertheless, when the same physiatrist (Dr. Meikle), on behalf of Ms. Jodoin, adds 13% for the physical aspect of her WPI, it is difficult to accept at face value that there has been no change in her symptoms or condition.

Ms. Jodoin argues that the difference between her psychological rating in 2009 of 37.5% WPI as opposed to a 56% WPI in 2012 are merely the result of differences in scoring methodology. I do not find this argument to be persuasive. The 2012 opinion of her own assessing psychiatrist, Dr. Waisman states that her global psychological impairment was "marked" and that she met the threshold for a catastrophic impairment designation under 2(1.1)(g). I find that that report alone is significant new evidence supporting a change in position from the "moderate" global psychological impairment found by her own assessing psychologist, Dr. Reesor, in 2009.

The change in Ms. Jodoin's higher overall WPI score of 73% to 76% under 2(1.1)(f) and change from "moderate" to "marked" psychological impairment under 2(1.1)(g) may not necessarily mean that there has been a deterioration in her condition, but it is certainly new evidence supporting a new position.

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R. P. v. Allstate Insurance Company of Canada, 2010 ONFSCDRS 92 (CanLII), <https://canlii.ca/t/jq80x

In the consensus opinion of the Multidisciplinary CAT assessment, Dr. Hershberg concluded: [18]
RP's post-accident symptoms are inconsistent with the accident. There is no evidence that the motor vehicle accident resulted in any genuine impairment. RP's condition is attributed to malingering or factitious disorder. The motor vehicle accident was the event that offered the opportunity for RP to misrepresent his condition for secondary gain.

Malingering – the intentional production of false or grossly exaggerated symptoms motivated by external incentives – is not considered a mental disorder and is, by definition, volitional behaviour. Dr. Reznek testified that malingering is not a diagnosis, but in fact the absence of one. He further testified that the determination of a diagnosis, or the existence of a mental or behavioural *disorder* in accordance with the *DSM-IV,* is an indispensable first step in assessing catastrophic impairment using

the *Guides.* If there is no diagnosable disorder, there can be no catastrophic impairment. And, submits Allstate, without an impairment, there is no entitlement to benefits.
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I find RP is entitled to maximum special award of 50% of the treatment expenses owing from the Treatment Plan discussed above, for the sessions RP attended, on the basis that Allstate should never have denied the treatment in the first place. I require Allstate to calculate and pay the amount owing in accordance with the formula set out under subsection 282(10) of the *Insurance Act*.
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[18] Multidisciplinary Consensus Summary Opinion Concerning Catastrophic Impairment and Entitlement to Benefits, December 18, 2008, Book 2, "Medicals – Insurer's Examinations," tab 11, (incorrectly labelled in the Arbitration Brief Index as Dr. B. Meikle's report)