

## **Dr Nestor Ariel Zielinsky, Psychiatrist**

**D.C. v N.A.Z., 2012 CanLII 71139 (ON HPARB), <<https://canlii.ca/t/fttl0>**

The Applicant sought accommodation for Seasonal Affective Disorder at his workplace and was required by his employer to obtain an Independent Medical Examination before returning to work. The Respondent is the psychiatrist who completed the examination. The Applicant complained that the Respondent was late for his appointment with the Applicant and failed to conduct an adequate medical assessment.

The Board confirmed the Committee's decision to take no action on the issue of the Respondent being late for the appointment because this was a result of an administrative error and the Respondent had already apologized and attempted to make alternative arrangements. However, in explaining the administrative error to the Applicant, the Respondent showed the Applicant his appointment book. The Board agreed with the Committee's finding that revealing names of other patients breached patient confidentiality. The Board confirmed the Committee's decision to counsel the Respondent on this issue. Regarding the adequacy of the Respondent's assessment of the Applicant, the Committee found that the questions asked were standard and the content of the report was objective and relevant. The Committee did find, however, that the Respondent used language that was inappropriately colloquial and profane when communicating with the Applicant. On this basis, the Board found reasonable the Committee's decision to counsel the Respondent on the need to choose words that maintain a professional demeanor when speaking with patients.

Decision Confirmed.

6. Concerning the lateness, the Applicant stated that he was given a note from Sibley & Associates (which organized the IME) that set out a 12:00 p.m. appointment time. On arrival at the appointed time, he was informed by the Respondent that his appointment was not until 2:00 p.m., and he had to wait two hours as a result.

7. As to the assessment itself, the Applicant stated that the Respondent asked questions that were personal and irrelevant and made inappropriate comments to him. For example, the Respondent called him a "whistle-blower", a "troublemaker" and a "shit disturber", and advised him to return to work at Royal Bank or become a politician or an activist.

9. The Respondent replied to the complaint in a letter dated September 19, 2011. The Respondent indicated that the Applicant's appointment was scheduled for 2:00 p.m., but that an administrative error occurred at Sibley Associates. The Respondent acknowledged that he was provided with a confirmation indicating an appointment time of 00:00 a.m. to 2:00 p.m., but said that he overlooked it and that Sibley had provided incorrect information to the Applicant. The Respondent stated that he apologized for the misunderstanding and showed the Applicant his appointment book when he returned at 2:00 p.m.

24. Concerning the scheduling of the interview, the Committee concluded that there was an inadvertent error in communications between Sibley, the Respondent, and the Applicant. The Committee accepted that the Respondent had apologized and attempted to make alternative arrangements. This is a reasonable conclusion and is supported by the information in the Record. The Committee's decision to take no further action on this aspect of the complaint is reasonable.

25. In addition, the Committee addressed a matter not raised by the Applicant. It expressed

concern that the Respondent had shown his appointment book to the Respondent, given that this breached the confidentiality of other patients, and counselled him in this regard. The Respondent accepted that this was reasonable and the Board finds that the Committee's decision to counsel the Respondent in this regard to be reasonable.

26. Concerning the examination itself, the Committee explained that a complete psychiatric assessment requires a great deal of personal information. It reviewed the questions asked by the Respondent and found them to be standard questions. The Committee reviewed the Respondent's notes and report and found nothing to criticize. The questions were appropriate, and the tone and content of the report were objective, and addressed the relevant issues including depression.

27. However, the Committee sustained the Applicant's complaint concerning the use of inappropriate language. The Committee accepted that the Respondent was trying to establish a rapport with the Applicant, but stated that physicians should not be overly colloquial and should not use profanity. The Committee counselled the Respondent to choose his words carefully in order to maintain appropriate professional distance and demeanour.

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## **Z.R. v Gore Mutual Insurance Company, 2020 CanLII 34430 (ON LAT),**

<https://canlii.ca/t/j7t13>

[34] Both Dr. Zielinsky and Dr. Watson indicated in their reports that they could not formulate an opinion on [The Applicant's] mental and behavioural disorder for the purpose of his catastrophic impairment designation because of validity issues encountered in their testing. Despite this, Dr. Zielinsky opined that [The Applicant] had a mild impairment in all four spheres.

[35] The validity issues imply that [The Applicant] exaggerated his performance in order to get favourable results. As discussed in further detail in the section on "Concentration, Persistence, and Pace" in this decision, these concerns are not consistent with the evidence as a whole before the Tribunal. This evidence consisted of what the Tribunal found to be credible testimony on the part of [The Applicant]. It was further supported by the psychological diagnoses that are acknowledged by Dr. Zielinsky, Dr. Waisman, and the treatment providers who worked with [The Applicant] for approximately two years after the accident.

[36] Furthermore, while Dr. Watson refers to validity issues in testing, he also notes that [The Applicant] reported to him that he was "never a school person." The Tribunal accepts that [The Applicant's] education level and ADHD diagnosis may have contributed to how he performed on these tests. Furthermore, Dr. Watson's findings with respect to validity conflict with the other psychological assessors and diagnoses in evidence. Dr. Watson also states that there is "little doubt" that [The Applicant] suffered a traumatic brain injury. The Tribunal questions what the impact of [The Applicant's] injuries is on the validity results that were identified, and this question was not conclusively answered.

[37] Keeping these concerns in mind, and noting the inconsistency of the validity issues with the larger body of persuasive evidence before the Tribunal that was identified above, the Tribunal assigns less weight to the validity results encountered in the two instances of testing by Dr. Watson and by Dr. Zielinsky.

[38] The Tribunal also finds that the limitations on [The Applicant's] function in the four spheres cannot be characterized as "mild impairments" under the applicable Table in the Guides.[20] In other words, it cannot be said that [The Applicant's] impairment levels are compatible with most useful

functioning, considering the impact of his physical injuries, ongoing limitations from his neck surgery, traumatic brain injury, limited employability, sleep, and chronic pain disorder. All of these impairments and factors contributed to the development of [The Applicant's] psychological diagnoses and resulting functional limitations.

[58] Conversely, the Tribunal is unable to find support for Dr. Zielinsky's opinion that [The Applicant] sustained a mild impairment in this sphere. Dr. Zielinsky testified that he observed [The Applicant] being able to complete testing without needing a break. The evidence before the Tribunal is not consistent with Dr. Zielinsky's observation. The interplay between [The Applicant's] psychological diagnoses from the accident and his ability to concentrate, maintain persistence and pace, as opined by Dr. Waisman, is much more probable on the evidence. There is an impact on some, but not all useful functioning in these areas, consistent with a moderate impairment.

[64] The Tribunal accepts that [The Applicant] is limited in his ability to cope with stressors as a result of his impairments from the accident. However, the Tribunal finds that [The Applicant's] level of impairment in adaptation is moderate, as opposed to mild (as suggested by Dr. Zielinsky) or marked (as suggested by Dr. Waisman). The Tribunal reached this finding because while chronic pain and depression interfere with [The Applicant's] ability to engage with various stressors, he is still able to engage in some lighter and different activities (within what Dr. Waisman calls a shielded environment) with the assistance of a few close family members and friends. In the Tribunal's view, this amounts to the conclusion that some, but not all useful functioning in adaptation is impacted, as opposed to the impairments causing a significant impediment in useful functioning.

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**Z.R. v. Gore Mutual Insurance, 2021 CanLII 18915 (ON LAT), <<https://canlii.ca/t/jdpx7>**

[32] The respondent argues that we made multiple errors of fact and or law in our determination that the applicant had a moderate impairment in all four spheres of functioning under Criteria 8. In particular, the respondent asserts that we erred:

- i) by accepting Dr. Waisman's psychological diagnosis as grounded in the facts; and by providing insufficient reasons for why we did not accord the opinions of Dr. Zielinsky and Dr. Watson much weight;
- ii) in our characterization of the applicant's pre-accident employment history;
- iii) by considering the applicant's pre-accident diagnosis of ADHD in discussing his validity results in relation to the neurocognitive and psychometric tests administered by Dr. Zielinsky and Dr. Watson;
- iv) by determining that the applicant had an inability to maintain a romantic relationship post-accident;
- v) in considering the applicant's "physical injuries, ongoing limitations from his neck surgery .... and limited employability" in our determination relating to a mental and behavioural impairment, which resulted in an inflated WPI for mental and behavioural disorders;
- vi) by considering the applicant's physical limitations in the sphere of Activities of Daily Living which resulted in an inflated WPI for mental and behavioural disorder; and
- vii) by selecting the highest score within the range for a moderate impairment and failing

to provide sufficient reasons for doing so.

[35] Ultimately, we determined that the applicant's assessors over-rated his impairments, while the respondent's assessors underestimated them. We accepted and rejected parts of each expert's evidence. We preferred Dr. Waisman's psychological diagnosis over Dr. Zielinsky's and in our decision we explained why. We also determined that the evidence supported that the applicant had a moderate impairment in the four spheres of functioning. Further, Dr. Waisman's evidence was more consistent with the past psychological diagnoses rendered by experts throughout the history of the claim. In paragraphs [28-37] of the decision we specifically addressed the problems we had with the opinions of Dr. Zielinsky and Dr. Watson. Therefore, the respondent's allegation that we provided insufficient reasons has no merit. Throughout the balance of our reasons we explained why we preferred Dr. Waisman's opinion and how we came to determine that the applicant had a moderate impairment in the four spheres of functioning.

[43] Finally, the respondent argued that we erred in selecting the highest number within the range for a moderate impairment under the Guides in determining the applicant's WPI% under Criteria 8. I disagree as we did not arbitrarily select the highest number in the range without providing our rationale for our decision. I find we provided a detailed explanation for how we came to the WPI% in paragraphs [67-72] of the decision. Significantly, Dr. Zielinsky used the same method in assigning 14% WPI for a mild impairment under Criteria 8. Dr. Zielinsky determined that the applicant had a mild impairment under the four spheres of functioning and consequently assigned the highest range for a mild impairment. Therefore, I find the respondent's allegation that the Tribunal erred in relation to this issue to be without merit.