Complicated scoring on catastrophic impairment

Adjudicators still grappling with rating system: lawyer

BY MICHAEL MCKIERNAN
For Law Times

A Financial Services Commission of Ontario arbitration appeal shows adjudicators are still struggling with the rating system for determining if an injured person has sustained a "catastrophic impairment" under the province's Statutory Accident Benefits Schedule, according to a London, Ont. insurance lawyer.

In a July 6 decision, director's delegate Lawrence Blackman sent Miguel Allen's claim for a catastrophic designation back for redetermination after finding the original arbitrator had confused symptoms for "impairments" and failed to determine the cause of Allen's mental impairments as part of his rating calculation.

Hermina Nuric, a lawyer with Miller Thomson LLP's insurance litigation group in London, Ont., says it's far from the first time she's seen an arbitrator get the complicated scoring system wrong.

"Here, the arbitrator seems to have misunderstood the process by which you assign percentages to impairments," Nuric says. "For whatever reason, there is still confusion, and we keep having to have these clarifying decisions."

The SABS allows for a catastrophic designation in cases where a combination of permanent mental and physical problems result in at least a 55-per-cent rating under its whole-person-impairment test. In Allen's case, he turned to his first-party insurer Security National Insurance Company for coverage after his involvement in a 2008 head-on collision that killed his friend, and the case ended up at FSCO for arbitration.

As part of a decision pegging Allen's WPI at 52 per cent, agonizingly short of the catastrophic threshold, arbitrator Alan Smith of ADR Chambers refused to assign Allen any rating for his emotional or behavioural impairments under chapter 4, table 3 of the American Medical Association's guide to evaluating permanent impairments, which deals with problems arising as a result of neurological damage.

Smith expressed concern that doing so could result in "double counting" of impairments already taken into consideration under chapter 14 of the guide, which covers mental and behavioural disorders more generally. It made "no sense," Smith found, "to rate the appellant twice for the same set of symptoms, each obtained in isolation from the other."

However, in an appeal, Allen's counsel, Andrew Murray, a personal injury partner in Lerners LLP's London office, argued that his client deserved a score for both chapter 4 and chapter 14, since his accident had caused a physical brain injury, as well as a separate psychological mental and behavioural disorder that could have been acquired without the damage to his brain.

"If both the organic brain injury and the psychological disorder separately result in emotional or behavioural impairments, are both the physical brain injury and psychological disorder each to be rated for such impairments and then combined? My answer is yes," wrote Blackman, siding with Allen. "It was incumbent upon the arbitrator to determine what, if any, emotional or behavioural disturbances were 'the result of neurological impairments.' I find the arbitrator erred in law in failing to do so."

In addition, Blackman found it was appropriate to give the impairment guidelines a "larger and more liberal" interpretation, since a determination of catastrophic impairment does not guarantee access to extra healthcare funds. Instead, each individual claim for goods or services must be found to be reasonable and necessary.

Andrew Murray says arbitrators' jobs will only get more complicated as they begin hearing cases concerning the province's new definition of catastrophic impairment in the Statutory Accident Benefits Schedule.

"You don't get anything for a finding of catastrophic impairment. There's no prize or T-shirt that comes with it," Murray says. "It simply gives you the opportunity to make applications for other things you might need. You always have to meet that test."

"I think this comes up a lot, where impairments are not properly quantified, because you can imagine a number of situations where you have a series of overlapping impairments," Murray adds.

And Murray says arbitrators' jobs will only get more complicated as they begin hearing cases concerning the province's new definition of catastrophic impairment in the SABS, which plaintiffs' lawyers have criticized as more confusing and restrictive than ever.

The new definition, which came into force this year for claimants under insurance policies issued or renewed after June 1, controversially scrapped the Glasgow Coma Scale as a method for determining whether a brain injury meets the threshold for catastrophic impairment.

Typically administered by frontline health workers, the coma test took observations about a patient's consciousness and brain function and turned them into a score out of 15. Any insured person who scored less than 10 during a test administered within a reasonable period of time after the accident qualified as catastrophically impaired.

The plaintiffs' bar loved the scale for its simplicity, but FSCO reports raised persistent doubts about its long-term accuracy.

The new definition also tightened up the rules for when psychological impairments will qualify as catastrophic, with claimants now having to show a mental or behavioural disorder had caused "marked impairment" in at least three of the four categories listed by the AMA. Existing case law previously required a finding in just one of the four:

- Activities of daily living
- Social functioning
- Concentration, persistence and pace
- Deterioration or decompensation in work or work-like settings

"There is no question they've made it more difficult, which is kind of unfortunate, because there always seems to be a sort of minimization of disability due to mental health problems," Murray says. "I don't think that's right. In my practice, I can see they are every bit as devastating, if not more . . . serious than a physical impairment."

For WPI ratings, the changes mean arbitrators will have to switch between the fourth and sixth editions of the AMA guidelines, depending on which type of impairments they are assessing or combining.

"There is a lot of uncertainty with the new regime. They are certainly not a set of claimant-friendly changes," Murray says.

Even claimants who achieve a catastrophic designation now face smaller benefits caps, with a combined $1-million limit on attendant care and medical and rehabilitation benefits, down from the previous $2-million maximum.

Despite the changes to the catastrophic definition, Murray says Allen's case offers useful guidance to arbitrators appointed to make determinations about impairments sustained by insureds in the future.

The new system has moved the process out of FSCO and into the Licence Appeal Tribunal. However, Murray says he worries that the lack of binding precedents at the LAT will limit the impact of Blackman's decision. Provincial guidelines encourage LAT adjudicators to "strive for consistency and predictability," but he emphasizes that each decision "will be made on the merits of the case" before them.

But Murray will get a chance to bolster Blackman's findings at the Divisional Court after Security National applied for judicial review of the decision.

According to Nuric, Allen's victory at FSCO, even if upheld by the Divisional Court, will not necessarily mean he ends up with a catastrophic designation after his case is reviewed. Because of the intricacies of the WPI test and the way scores are added, she says it's possible that the score assigned to his chapter 4, table 3 impairments will be too small to alter his existing overall rating of 52 per cent.

"It was sent back to arbitration, so he gets to spend more money going through that all over again. Maybe it gives him some leverage in settlement negotiations, but it's not necessarily a victory," she says. **LT**