



All Four Areas of Function Must Be Assessed Under Section 2(1.1)(g) - CAT Impairments

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The Divisional Court has just released its decision in *Pastore and Aviva Canada Inc.*

Anna Pastore was involved in a car accident on November 16, 2002. She suffered a fractured left ankle. She had numerous surgeries and ultimately applied for a catastrophic determination. The issue in dispute was whether Ms. Pastore was catastrophically impaired due to a mental or behavioural disorder, under subsection 2(1.1)(g) of the SABS.

Ms. Pastore was assessed by a CAT DAC. The assessment found she had a Class 4 impairment (marked impairment) in ADL due to a mental or behavioural disorder. She had a Class 3 impairment (moderate impairment) in the three remaining areas of functioning.

The application proceeded to an arbitration. The Arbitrator accepted that the assessment of a Class 4 impairment in one area of function was sufficient to meet the definition of “catastrophic impairment”. This was the only area of function she reviewed in detail. On this basis, she concluded Ms. Pastore had suffered a catastrophic impairment.

At arbitration, a second issue was raised. The psychologist as part of the DAC team concluded it was not possible to “factor out” the impact of discrete physical impairments and the associated pain limitations. Thus, the impairment rating incorporated the cumulative effect of both pain as a symptom of physical injury and as a symptom of a mental or behavioural disorder. The Arbitrator found that the combination of physical limitations and associated pain were intertwined and both played an integral part in how Ms. Pastore’s life had changed. She found it was not possible to “factor out” the impact of the discrete physical impairments and the associated pain limitations.

The Director’s Delegate dismissed the appeal and agreed with the Arbitrator that a Class 4 impairment was required in only one of four areas of functioning to establish a CAT impairment.

The decision was the subject of an application for judicial review. The Court was asked to decide:

1. Is a Class 4 (marked impairment) in only one area of functioning sufficient for a catastrophic impairment designation?
2. Should an impairment assessed under s. 2(1.1)(g) of the SABS distinguish and exclude impairments that are due to physical injuries from impairments that are due to mental or behavioural disorder?

The principal argument made on behalf of Ms. Pastore was based on the wording of s. 2 (1.1)(g) in that the section referred to “**a** class 4 impairment”. It referred to a single assessment, meaning an assessment in only one of four areas of function. This analysis ignored a consideration of the AMA Guides as a whole. Section 2(1.1)(g) contains the wording “in accordance with the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993”. The Guides require an overall assessment of all four areas of function. Determining catastrophic impairment based on an assessment of only one area of function is not in accordance with the Guides.

The Court found that the Director's Delegate had failed to properly appreciate the effect of the incorporation of the Guides into the *SABS*. The Guides are incorporated into the *SABS* and must be treated as part of the legislative scheme. A plain reading of the words in s. 2(1.1.) (g) bearing in mind the context and purpose of the legislation and taking into account the FSCO Guidelines makes it clear that all four areas of function are to be accounted for in an assessment of catastrophic impairment.

The Court set aside the Director's Delegate decision on the basis that it failed to take into account all four areas of function identified in the Guides.

With respect to the issue of excluding impairments due to physical injuries, the Court concluded that the Guides acknowledged the difficulty in separating out pain as a symptom of a mental impairment and provided a suggested analytical process. An assessment failing to separate pain as a symptom of physical injury was not in accordance with the Guides because it failed to do what the Guides require.

The Court granted the application for judicial review and directed the matter be re-heard by a different Director's Delegate or Ms. Pastore could file a fresh application for a CAT determination.

Justice Matlow disagreed in part. He found there was nothing in the Guides which required more than a single finding and there was no requirement that every assessment allot a mental impairment class to each of the four areas of functional limitations before an impairment can be found to qualify. He held that the Guides are not "part of the legislation" and are only guidelines.