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Appeal P17-00006

OFFICE OF THE DIRECTOR OF ARBITRATIONS

BIBI MOHAMMAD

Appellant/Respondent

and

ALLSTATE INSURANCE COMPANY OF CANADA

Respondent/ Appellant

BEFORE:	Delegate Jeffrey Rogers
REPRESENTATIVES:	Mr. Naresh Misir, solicitor for Ms. Mohammad Mr. Eric K. Grossman, solicitor for Allstate
HEARING DATE:	November 6, 2017

APPEAL ORDER

Under section 283 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. Allstate's appeal is allowed.

2. Ms. Mohammad's cross-appeal is allowed as it relates to her claim for NEBs.

3. Ms. Mohammad's cross-appeal is denied as it relates to ACBs and HK.

4. Paragraphs 1 and 4 of the Arbitrator's order are rescinded.

5. The issues of whether Ms. Mohammad sustained a catastrophic impairment and her entitlement to NEBs are remitted for re-hearing by a different Arbitrator.

6. If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers
Director's Delegate

December 19, 2017
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Both parties appeal the Arbitrator's order of December 19, 2016. Allstate appeals the Arbitrator's ruling that Ms. Mohammad sustained a catastrophic impairment as a result of the accident. Allstate submits that the Arbitrator erred in applying the "material contribution" test and not the "but for" test, and that the Arbitrator erred in any event because he incorrectly applied the "material contribution" test. Ms. Mohammad appeals the Arbitrator's denial of her claim for Non-Earner Benefits (NEBs), Housekeeping and Home Maintenance Benefits (HK), and Attendant Care Benefits (ACBs). She submits that the Arbitrator misapprehended or failed to consider relevant evidence in ruling that she was not entitled to these benefits and he failed to provide adequate reasons for his conclusions.

For the reasons that follow, I conclude that the Arbitrator should have applied the "but for" test and not the "material contribution" test. Although claiming to apply the "material contribution" test, the Arbitrator actually engaged in the "but for" analysis. However, the Arbitrator misapprehended critical evidence in his analysis and therefore his finding that Ms. Mohammad sustained a catastrophic impairment cannot stand. Allstate's appeal is therefore allowed. I further conclude that the Arbitrator misapprehended the evidence and he did not give an adequate explanation for his determination that Ms. Mohammad is not entitled to NEBs. I am not satisfied that the Arbitrator erred in making the factual findings to support his denial of HK and ACBs. Ms. Mohammad's appeal is therefore also allowed with regard to NEBs, but it is denied with regard to HK and ACBs.

II. BACKGROUND

Ms. Mohammad was injured in a motor vehicle accident on November 20, 2010. She applied for and was paid accident benefits, payable by Allstate under the *Schedule*.[1] She applied for arbitration after mediation did not resolve disputes about some of the accident benefits she claimed. The issues that came for hearing before the Arbitrator were as follows:

- **Catastrophic Impairment:** Ms. Mohammad claimed that the accident caused her to sustain a marked impairment due to mental or behavioural disorder and she therefore met the definition of catastrophic impairment under s. 3(2)(f) of the *Schedule.*

- **NEBs:** Ms. Mohammad claimed that the accident caused a complete inability to carry on a normal life and she was therefore entitled to payment of NEBs from May 20, 2011 and ongoing.

- **HK:** Ms. Mohammad claimed that the accident caused an inability to engage in her pre-accident housekeeping and home maintenance activities and that she incurred expenses for replacement services. She claimed that she was therefore entitled to payment of HK for the 2 years following the accident.

- **ACBs:** Ms. Mohammad claimed that the accident caused an inability to engage in her self-care activities and that she incurred expenses for replacement services. She claimed that she was therefore entitled to payment of ACBs for the 2 years following the accident.

- **Assessments or Examinations:** Ms. Mohammad claimed payment of $3,100 for the cost of examinations.

The Arbitrator found that Ms. Mohammad is entitled to the cost of the examinations she claimed. That ruling has not been appealed.

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

The Arbitrator ruled that Ms. Mohammad sustained a catastrophic impairment as a result of the accident. He found that her accident-related impairments were "a material contributing factor" to her mental disorder and her resulting loss of function. The dispute regarding catastrophic impairment was about causation and not about impairment. Allstate's position is that the accident did not cause Ms. Mohammad's catastrophic impairment. Rather, the causes were her pre-existing medical conditions and a previous accident. Allstate submits that the Arbitrator erred in two ways when he found otherwise. First, he should have applied the "but for" test and not the "material contribution" test. Second, he improperly applied the "material contribution" test.

Allstate raised a new issue at the hearing. Allstate proposed to argue that the Arbitrator also erred by using the "holistic" approach to determining whether Ms. Mohammad sustained a catastrophic impairment. Allstate proposed to argue that the Arbitrator should only have determined whether Ms. Mohammad sustained a catastrophic impairment after first identifying her various functional impairments and ruling on which of them the accident caused. Allstate did not take this position at the arbitration and did not identify it as an issue in the Notice of Appeal or written submissions. Ms. Mohammad had no notice that Allstate would make this argument. She was therefore unprepared to address it and she objected on those grounds. I ruled that it would be unfair in the circumstances to allow Allstate to pursue the new argument.

The Arbitrator found that Ms. Mohammad is not entitled to the claimed NEBs. He found that Ms. Mohammad did not satisfy her burden of proving that the accident caused a complete inability to carry on a normal life and she was therefore not entitled to the claimed NEBs. Ms. Mohammad submits that the Arbitrator failed to consider all of the evidence, misapprehended the evidence, and he failed to give adequate reasons for his conclusion.

The Arbitrator ruled that Ms. Mohammad is not entitled to the claimed HK and ACBs because the expenses were not "incurred" as defined and some of the services were not provided. Ms. Mohammad submits that the Arbitrator also failed to consider all of the evidence and misapprehended the evidence on this issue, and he failed to give adequate reasons for this conclusion.

III. ANALYSIS

Allstate's Appeal

As noted above, Allstate submits that the Arbitrator erred when he applied the "material contribution" test in determining whether Ms. Mohammad's accident-related impairments caused her to sustain a catastrophic impairment. Allstate submits that the Arbitrator should have applied the "but for" test.

Allstate further submits that, even if the correct test is "material contribution" the Arbitrator incorrectly applied it. I have concluded that, although he said he was applying the "material contribution" test, the Arbitrator's analysis shows that he really applied the "but for" test. Nevertheless, the Arbitrator's order cannot stand because he erred in making critical factual findings.

Until recently, it was generally believed that the "material contribution" test is to be applied in accident benefits cases while the "but for" test applies to tort claims. That belief found authority in the Court of Appeal decision in *Monks v. ING Insurance Co. of Canada.*[2] There, the Court endorsed the trial judge's use of the "material contribution" test, noting that the appellant could hardly complain when it had urged the trial judge to use this test, and that this test had been used for some time in arbitral decisions dealing with accident benefits.

At this arbitration hearing, Allstate urged the Arbitrator to consider that *Monks* had been misread. Allstate relies upon the most recent decision on the issue by the Court of Appeal, in *Blake v. Dominion of Canada General Insurance Company.*[3] In *Blake,* the situation in *Monks* was somewhat reversed. Here, the trial judge applied the "but for" test to a claim for accident benefits. The plaintiff did not object. The plaintiff appealed, arguing that *Monks* required the trial judge to apply the "material contribution" test. The Court disagreed, citing failure to raise the issue earlier as the "primary reason" for rejecting the submission. However, the Court also

[2]2008 ONCA 269

[3]2015 ONCA 165

appeared to endorse the "but for" test as the test of general application in accident benefits cases. The Court stated:

> The primary reason for not accepting Ms. Blake's submission is that she is raising the issue for the first time on this appeal. At trial she did not make submissions on which causation test should be applied. That distinguishes this case from the circumstances in *Monks v. ING Insurance Company of Canada*, in which this court held that having advocated at trial for the adoption of the material contribution test in a statutory accident benefits case, the insurer could not fault the trial judge for applying the test.
>
> Here, Ms. Blake did not ask the trial judge to depart from the general "but for" test of causation as described by the Supreme Court of Canada in *Clements v. Clements*[4], at para. 46. Under those circumstances, I see no error in the trial judge's having applied the "but for" causation test to the facts of this case.[5]

The Arbitrator decided that this statement by the Court did not erode the established approach. He stated:

> Regarding the effect to be given to the decision in *Blake*, I see no clear direction from the Court in that decision that the material contribution test is no longer applicable to statutory accident benefits disputes.[6]

The Arbitrator went on to refer to his similar conclusion in *Sabadash and State Farm Mutual Automobile Insurance Company.*[7] Delegate Evans has since rescinded the Arbitrator's decision in *Sabadash.*[8] Delegate Evans ruled that *Blake* means that the correct causation test in accident benefits cases is "but for" and not "material contribution". He ruled that "material contribution" is only available where it is not possible to apply the "but for" approach. I agree with Delegate Evans.

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[4]2012] 2 S.C.R. 181

[5]At paragraphs 71 and 72

[6]At page 24

[7](FSCO A14-001839, March 7, 2016)

[8](FSCO P16-00029, September 18, 2017)

I will not repeat Delegate Evans' entire analysis. At the heart of it is the reference in *Blake* to the Supreme Court's decision in *Clements. Clements* is the most recent pronouncement on causation by the highest Court. *Blake* cited *Clements* as the current authority on causation in accident benefits cases. Delegate Evans agreed, and he described the interplay between "but for" and "material contribution" as follows:

> However, I believe that, pursuant to *Clements*, the primary causation test is the "but for" test because, even if it is appropriate to apply the "material contribution to risk" test as discussed in *Clements*, the plaintiff or insured still has to pass the "but for" test. So if an applicant fails the "but for" test, there is no fallback position to turn to a "material contribution" test. The Supreme Court found that the "but for" test was applied in *Athey* as well.
>
> In *Clements*, the Supreme Court re-examined cases like *Athey*[9] and *Resurfice.*[10] In doing so, it clarified what "material contribution" means and when it is appropriate to apply that test: "While the cases and scholars have sometimes spoken of 'material contribution to the injury' instead of 'material contribution to risk,' the latter is the more accurate formulation. As will become clearer when we discuss the cases, 'material contribution' as a substitute for the usual requirement of 'but for' causation only applies where it is impossible to say that a particular defendant's negligent act in fact caused the injury."

Delegate Evans also noted as follows:

- Simply failing to meet the burden of establishing "but for" causation on the evidence does not meet the impossibility requirement, because then in any difficult case the plaintiff would be able to claim impossibility of proof of causation[11].

- While accepting that it might be appropriate in "special circumstances" to apply the "material contribution" test, the Supreme Court has never in fact done so. The court thus narrowed the scope of the "material contribution" test beyond what it said in *Resurfice*[12].

- In its analysis of *Athey*, the Court in *Clements* addressed Major J.'s use of the phrase "material contribution" and concluded that nonetheless the "but for" test was applied.

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[9] [1996] 3 S.C.R. 458

[10] 2007 SCC 7

[11] At page 6

[12] At page 8

- The circumstances in which the "but for" test was applied in *Athey* exactly parallel a typical accident benefits claim where there are pre-existing conditions before the accident.

As Delegate Evans noted, this analysis brings us back to applying the principles *Athey* described, for when the "but for" test applies, and when the "material contribution" test applies. As Major J. stated:

> The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the "but for" or material contribution test. Future or hypothetical events can be factored into the calculation of damages according to degrees of probability, but causation of the injury must be determined to be proven or not proven. This has the following ramifications:
>
> 1. If the disc herniation would likely have occurred at the same time, without the injuries sustained in the accident, then causation is not proven.
>
> 2. If it was necessary to have both the accidents and the pre-existing back condition for the herniation to occur, then causation is proven, since the herniation would not have occurred but for the accidents. Even if the accidents played a minor role, the defendant would be fully liable because the accidents were still a necessary contributing cause.
>
> 3. If the accidents alone could have been a sufficient cause, and the pre-existing back condition alone could have been a sufficient cause, then it is unclear which was the cause-in-fact of the disc herniation. The trial judge must determine, on a balance of probabilities, whether the defendant's negligence materially contributed to the injury.[13]

I now turn to the Arbitrator's analysis and findings in this case. Ms. Mohammad had significant impairments before the accident. They included rheumatoid arthritis and injuries from a previous accident. The Arbitrator described them as follows:

> Ms. Mohammad has a long-standing history of rheumatoid arthritis ("RA") going back to the 1990s. As a result, she was approved for Canada Pension Plan disability benefits in 1995. The Applicant was also involved in a previous motor vehicle accident on March 30, 2009, which caused injury to her neck, lower back, and shoulder, as well as headaches.

[13]At paragraph 41

> The Applicant has had two surgeries performed by Dr. Stephen Lewis because of the RA, a C1-C2 fusion of her neck vertebrae in July 2009 and a further procedure in November 2011. The surgeries were an attempt to correct a condition described as basilar invagination, or the gradual protrusion of the bones at the base of the skull cap up into the skull. This condition was diagnosed when the Applicant was referred to Dr. Lewis in May 2009. Ms. Mohammad received physiotherapy treatment after the 2009 operation which continued until five days before the accident.

After reviewing the evidence, the Arbitrator noted that there appeared to be no dispute that Ms. Mohammad met the definition of catastrophic impairment due to mental or behavioural disorder, but the real issue was causation. The Arbitrator went on to note that the parties disagreed about the applicable causation test and he rejected Allstate's submission that he should apply the "but for" test. Applying what he described as the "material contribution" test, he found Ms. Mohammad to be catastrophically impaired as a result of the accident. However, the Arbitrator's findings describe circumstances that required both the accident and the pre-existing conditions for the resulting impairments. He stated:

> Allstate submits that the accident had "no impact whatsoever" on Ms. Mohammad's degree of impairment. However, I find that a review of the evidence leads to the conclusion, on a balance of probabilities, that the accident was a material contributing factor.
>
> The Applicant herself testified that there was a significant change to her life after the accident. This assertion was at least partially supported by the testimony of her daughter and brother.
>
> When questioned as to whether the effect of the accident was beyond trivial, Dr. Salmon responded "absolutely". He noted in his report that the multiple impairments he identified would not have occurred without the accident.
>
> Dr. Lewis testified that MRIs done before the accident revealed Ms. Mohammad's midcervical region was stable. He also testified that because Ms. Mohammad's upper neck was fused prior to the accident, any force from a trauma would dissipate to the mid-cervical region. The medical imaging conducted on Ms. Mohammad's cervical spine after the accident revealed a slip of the discs at the C5-6 level, a 3rd degree ligament tear and instability at the C4-5 level, an increased disc bulge also at the C4-5 level, and mechanical discopathy in the mid-cervical region. Importantly, Dr. Lewis also testified that mechanical discopathy was in his opinion in relation to a mechanical cause such as a trauma. Dr. Lewis also testified that Ms. Mohammad did not have inflammatory discopathy, which would have been in relation to RA. I therefore agree with the Applicant that

> Allstate's contention that the impairments to Ms. Mohammad's neck caused by RA cannot be supported.[14]

In other words, although the Arbitrator said that he was applying the "material contribution" test, he in fact applied the "but for" test as described in *Athey.* Since the Arbitrator found that it was necessary to have both the pre-existing conditions and the accident for Ms. Mohammad's impairments to occur, he effectively found that they would not have occurred but for the accident.

Even though he used the wrong term in applying it, the Arbitrator's factual finding would ordinarily attract deference. Nevertheless, I find that the Arbitrator's order cannot stand because he later went on to erode the findings he made with regard to Ms. Mohammad's catastrophic impairment. I will first take a closer look at the facts that the Arbitrator effectively found when he determined that Ms. Mohammad sustained a catastrophic impairment, and then I will contrast these findings with his conclusion on her entitlement to NEBs.

The Arbitrator decided that the accident caused Ms. Mohammad to sustain a catastrophic impairment due to mental or behavioural disorder. That assessment is carried out by reference to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*). Chapter 14 of the *Guides* sets out a three-stage process for evaluating catastrophic impairment based on mental disorder using four categories of functional limitation and five levels of dysfunction.

The levels of dysfunction range from no impairment to extreme impairment. The Arbitrator accepted the evidence of Dr. J. Douglas Salmon that the accident caused Ms. Mohammad to sustain a marked impairment in all four categories of function. Although there was evidence to contradict Dr. Salmon's opinion, it was open to the Arbitrator to accept it. I find no error there.

A marked impairment is defined as an impairment that significantly impedes useful functioning. The categories of function to be assessed are Activities of daily living, Social functioning, Concentration, persistence and pace, and Deterioration or decompensation in work or work-like

[14] At pages 25-26

settings. The Arbitrator therefore found that the accident significantly impeded Ms. Mohammad's useful functioning in these areas.

To be entitled to NEBs, Ms. Mohammad had to prove that the accident caused her to suffer a complete inability to carry on a normal life. To meet that test, she had to prove that her accident-related impairments continuously prevented her from engaging in substantially all of the activities in which she engaged before the accident. The analysis required a comparison of Ms. Mohammad's ability to function before the accident and after the accident. However, when it came to deciding whether Ms. Mohammad was entitled to NEBs, the Arbitrator ruled that there was almost no evidence to support that claim, and he denied it.

He stated:

> In my view, Allstate is correct that there was almost no evidence presented at the Hearing regarding the claim for NEB. It is particularly unfortunate that both occupational therapists, who provided evidence mistakenly, used the 2009 accident as their baselines, and hence their reports and testimony are of little use in determining causation.
>
> The only substantial evidence proffered by the Applicant in support of the NEB claim was the testimony of the Applicant herself along with her statements contained in some assessment reports. I find that the Applicant's perceptions are not of sufficient evidential weight to meet her onus of proof.[15]

As I see it, this statement by the Arbitrator shows a misapprehension of critical evidence. Admittedly, the disability test for NEBs is stricter than the relevant one for catastrophic impairment. But the Arbitrator had already accepted evidence about the effects of the accident on Ms. Mohammad's functional abilities when he decided that she sustained a catastrophic impairment. It is not accurate that there was "almost no evidence" about how the accident affected Ms. Mohammad's post-accident ability to function. Further, the parties now agree that the Arbitrator's statement that the occupational therapists did not use the right baseline is inaccurate. In reading the decision, it is not possible to know whether the Arbitrator concluded that the accident significantly impeded Ms. Mohammad's ability to function, or that she failed to prove that it did. The Arbitrator's misapprehension of critical evidence in making findings of fact is an error of law.

[15]At page 34

Therefore, his finding that Ms. Mohammad sustained a catastrophic impairment cannot stand. Accordingly, I have rescinded his order in this regard and remitted the matter for re-hearing. I now turn to Ms. Mohammad's appeal.

Ms. Mohammad's appeal

Non-Earner Benefits

The Arbitrator denied Ms. Mohammad's claim for NEBs based upon his findings of fact.
The Arbitrator found that Ms. Mohammad did not satisfy her burden of proof. Ms. Mohammad alleges many errors by the Arbitrator in arriving at this conclusion. I find it necessary to address only two of them.

The Arbitrator started his analysis by pointing out the lack of evidence in support of the NEB claim. As noted above, he found "almost no evidence" in support, and he found it "particularly unfortunate" that the occupational therapists who testified used the wrong date for assessing pre-accident function. He therefore found this critical evidence to be of "little use". As I noted above, this analysis ignores the evidence the Arbitrator had already accepted in determining that Ms. Mohammad sustained a catastrophic impairment. That was an error of law.

The Arbitrator correctly considered the evidence of the occupational therapists to be critical to proving entitlement to NEBs. They are the experts in assessing function. The Arbitrator erred when he discounted their evidence because he thought that they used an earlier accident as the baseline for comparison with Ms. Mohammad's function at the time of their assessment.

Three occupational therapists testified at the hearing. The Arbitrator appears to refer to Ms. Heather Pickin and Ms. Ranya Ghatas when he says that they used the wrong baseline. In its oral submissions before me, Allstate conceded that the Arbitrator was wrong about Ms. Pickin. She used this accident and not the earlier accident in 2009 as her baseline. With regard to Ms. Ghatas, I can find nothing in her evidence or her report to support the Arbitrator's conclusion that she used the wrong baseline.

As with his determination on catastrophic impairment, it is not possible to know what the Arbitrator's ruling on NEBs would have been, had he not misapprehended critical evidence.

Therefore, his determination cannot stand. Accordingly, I have rescinded his order in this regard and I have remitted the issue for re-hearing.

Housekeeping and Attendant Care

To be entitled to the claimed HK and ACBs, Ms. Mohammad had to prove that she met the relevant disability tests, that replacement services were provided, and that the claimed expenses for replacement services were "incurred" as defined in s.3(7)(e) of the *Schedule.* The Arbitrator found as a fact that Ms. Mohammad did not prove that the expenses were incurred.
The Arbitrator therefore did not make a finding on whether she met the disability tests.

On the issue of "incurred" the Arbitrator rejected the evidence Ms. Mohammad tendered to prove that Ms. Natasha Hall (Ms. Mohammad's daughter) sustained an economic loss as a result of providing services, as required by s.3(7)(e)(iii)(b). The Arbitrator also was not satisfied that Mr. Mohammad Yusuff (Ms. Mohammad's brother) provided any services through Moe's Cleaning, a company he worked for. The Arbitrator stated:

> In sum, I find that the Applicant, on a balance of probabilities, has failed to demonstrate that regarding Ms. Hall, the provisions of Section 3(7)(e) of the *Schedule* have not been satisfied. I am also not satisfied, given the lack of substantiating evidence, that Moe's Cleaning provided housekeeping and home maintenance services to the Applicant. The claim for Housekeeping and Home Maintenance Benefits must therefore be dismissed.[16]

I find no error by the Arbitrator in these findings of fact. It was the Arbitrator's role to assess the evidence. In my view, the Arbitrator's findings satisfy the test set out in *Truong and Lumbermens Mutual Casualty Company/Kemper Group*,[17] where Delegate Makepeace held that:

> … the test for error of law 'is whether the decision was based on a material finding of fact that was not supported by the evidence such that a reasonable tribunal acting judicially and properly directed in law could not have made the finding in question.'

[16]At page 31-32

[17](FSCO P03-00007, March 9, 2004)

There was no documentary evidence to support Ms. Mohammad's claim. It was open to the Arbitrator to conclude that documentary evidence should reasonably have been provided and to take the lack of documentary evidence into account in weighing the evidence. The Arbitrator was not required to follow the approach he had taken in previous cases where he accepted oral evidence on this issue, without corroboration. The Arbitrator's change of approach does not raise an issue of procedural fairness, as Ms. Mohammad submits. She could not have decided to rely on a strategy of not providing documentary corroboration because of the Arbitrator's rulings in earlier cases.

The Arbitrator did not address Ms. Mohammad's alternate theory that she was entitled to payment by operation of s. 3(7)(e)(iii)(a), because Mr. Yusuff provided services "in the course of the employment, occupation or profession in which he…would have been engaged, but for the accident". However, I find no error. The Arbitrator found that Mr. Yusuff did not provide any services "given the lack of substantiating evidence". He was entitled to do so. That finding rendered irrelevant the capacity in which the services might have been provided. For the above reasons, Ms. Mohammad's appeal regarding ACBs and HK is denied.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

______________________________	December 19, 2017
Jeffrey Rogers Director's Delegate	Date