



A12-003310
A12-003311
A12-005353

BETWEEN:

ANTHONIDAS ALOYSIUS

Applicant

and

ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA

Insurer

**REASONS FOR DECISION
ON ISSUE OF CATASTROPHIC IMPAIRMENT**

Before: Anne Morris

Heard: By way of transcripts of the hearing which took place on September 4, 5, 27, 28 2018, at the offices of the Financial Services Commission of Ontario in Toronto and by way of submissions on a legal issue completed on November 28, 2019.

Appearances: David S. Wilson for Mr. Aloysius
Jonathan Schrieder for Royal & SunAlliance Insurance Company of Canada.

Issues:

The Applicant, Anthonidas Aloysius, was injured in three motor vehicle accidents on January 31, 2003, December 10, 2005, and May 8, 2006. He applied for and received statutory accident benefits from Royal & SunAlliance Insurance Company of Canada ("Royal"), payable under the *Schedule*.¹ Disputes arose as to Mr. Aloysius' claims. The parties were unable to resolve their

¹The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.

disputes through mediation, and Mr. Aloysius applied for arbitration at the Financial Services Commission of Ontario, now Dispute Resolution Services, under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

1. Has Mr. Aloysius sustained a catastrophic impairment as a result of either or both of the accidents which took place on December 10, 2005 and May 8, 2006?
2. Is Mr. Aloysius entitled to attendant care benefits arising from the accidents of December 10, 2005 and/or May 8, 2006?
3. Is Royal liable to pay a special award because it unreasonably withheld or delayed payments to Mr. Aloysius?
4. Is Royal liable to pay Mr. Aloysius' expenses in respect of the arbitration?
5. Is Mr. Aloysius liable to pay Royal's expenses in respect of the arbitration?
6. Is Mr. Aloysius entitled to interest for the overdue payment of benefits?

Result:

1. Mr. Aloysius did not sustain a catastrophic impairment as a result of either or both of the accidents which took place on December 10, 2005 and May 8, 2006.
2. The remaining issues will be dealt with in a separate decision.

EVIDENCE AND ANALYSIS:

Procedural History

Initial Arbitration Decision

The Arbitrator heard the claims from all three accidents jointly and rendered a decision dated September 30, 2015. The Arbitrator's decision encompassed both procedural and substantive issues. He determined that the claims for attendant care arising out of the 2005 and 2006 accidents were barred by the operation of s. 32 of the *Schedule*. He also determined that the claims for housekeeping and home maintenance benefits arising from the 2005 and 2006 accidents were barred by the limitation periods set out in the *Insurance Act* and *Schedule*.

The Arbitrator determined with respect to the 2003 accident, that housekeeping and home maintenance benefits were not barred by the limitation period. He determined that Mr. Aloysius was entitled to these benefits from the two year mark after the accident to date and ongoing. In order to make that decision, the Arbitrator was required to make a determination of catastrophic impairment with respect to that accident. Housekeeping and home maintenance benefits are available after two years only to catastrophically impaired claimants.

The Arbitrator found that Mr. Aloysius was catastrophically impaired within the meaning of subsection (g) of section 2 (1.1) of the *Schedule* as a result of the 2003 accident. He determined in accordance with the *American Medical Association's Guides to the Evaluation of Permanent Impairment*,² that Mr. Aloysius had a marked impairment (Class IV) due to mental or behavioural disorder.

The Arbitrator determined with respect to the 2003 accident that Mr. Aloysius' claim for attendant care benefits arising from that accident were not statute-barred. He heard the claim on the merits and dismissed the claim on the facts as he found them.

²4th Edition, 1993

The Arbitrator did not consider it necessary to determine whether Mr. Aloysius had sustained a catastrophic impairment as a result of the 2005 and/or 2006 accidents. A finding of catastrophic impairment is a threshold finding as to a category of enhanced benefits and the arbitrator had already determined that the benefits claimed from those accidents were statute-barred.

The Arbitrator denied a medical benefit for a treatment plan in the amount of \$1,852.00, finding that it was not reasonable and necessary in the circumstances. He also dismissed the claim for a special award. He awarded interest on the housekeeping and home maintenance benefits payable.

2017 Appeal Decision by Director's Delegate

Mr. Aloysius appealed the Arbitrator's order of September 30, 2015. He submitted that the Arbitrator erred in denying his claims for (1) attendant care benefits, (2) the cost of treatment by Dr. Hoff, and (3) a special award. Royal cross-appealed the same order. Royal submitted that the Arbitrator erred in awarding Mr. Aloysius post-104 week housekeeping and home maintenance benefits and interest. Later, Royal amended its cross-appeal and submitted that the Arbitrator also erred in finding Mr. Aloysius was catastrophically impaired.³

The Director's Delegate allowed the appeal in part. The relevant part of the Order of September 15, 2017 is as follows:

1. The appeal of the Arbitrator's order of September 30, 2015 is allowed in part. Paragraph 2 thereof is rescinded and replaced with the following:
 - 2a. The Applicant is not entitled to Attendant Care Benefits arising from the accident of January 31, 2003.
 - 2b. The claims for Attendant Care Benefits arising from the accidents of December 10, 2005 and May 8, 2006 are not barred by the operation of section 32 of the Schedule.
 - 2c. These issues, if re-heard, must be re-heard by an arbitrator other than Arbitrator Mutch.

³The request to amend was granted by Director's Delegate Richard Feldman in a decision issued on July 25, 2016.

2. The cross-appeal is dismissed in its entirety.

Catastrophic Impairment

The hearing Arbitrator did not consider the issue of catastrophic impairment arising from either or both of the 2005 and 2006 accidents because he found that the benefits claimed for those accidents were statute barred as discussed above. He determined that Mr. Aloysius was catastrophically impaired as a result of the accident of January 31, 2003. The Director's Delegate upheld that determination. The Director's Delegate found that the benefits claimed from the 2005 and 2006 accidents were not statute barred. Mr. Aloysius therefore requests a determination as to whether or not he is catastrophically impaired as a result of either or both of the accidents of 2005 and 2006.

The arbitrator determined that, as a result of the January 31, 2003 accident, Mr. Aloysius was catastrophically impaired within the meaning of subsection (g) of section 2(1.1) of the *Schedule*:

- (1.1) For the purposes of this Regulation, a catastrophic impairment caused by an accident that occurs before October 1, 2003 is,

.....

- (g) subject to subsections (2) and (3), an impairment that, in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder. O. Reg. 281/03, s. 1 (5).

He determined that Mr. Aloysius had demonstrated a marked impairment in one of the domains of function set out in the *Guides*, specifically the domain of deterioration or decompensation in work or work-like setting (sometimes referred to as adaptability).

He considered the catastrophic impairment opinions provided by Mr. Aloysius' experts and by the Insurer's experts. He preferred the opinions of Mr. Aloysius' experts, in essence because the opinions of Mr. Aloysius' experts were more consistent with the evidence as a whole.⁴

Mr. Aloysius' application for determination of catastrophic impairment (OCF-19) dated August 31, 2009, attached the report of Dr. Rosenblat dated May 13, 2009.⁵ In his report, Dr. Rosenblat opined that all three accidents contributed to the catastrophic impairment. He stated⁶ that it "appears from the client's history that each of these accidents have played a material role in the client's diagnosis as well as impairment levels."

The arbitrator, as noted above, concerned himself only with causation in relation to the accident of January 31, 2003. He stated in his decision⁷ that because "the CAT opinions were rendered **after** all three accidents, it is important to look at the medical opinions rendered after the 2003 but before the 2005 accident in order to assess the impact of the first accident." The arbitrator then reviewed the evidence referred to and determined that Mr. Aloysius had sustained a catastrophic impairment specifically as a result of the accident of January 31, 2003.

Thiruchelvam Decision

The Director's Delegate issued an appeal decision on April 12, 2019 in the case of *RBC General Insurance Company and Stalin Thiruchelvam*.⁸ That case, which deals with the issue of causation, was heard after the appeal in this case. In *Thiruchelvam*, the insured had been involved in several accidents prior to the subject motor vehicle accident. The Director's Delegate stated as follows:⁹

⁴See Conclusion Regarding CAT, pp 27 and 28 of decision

⁵Medical Brief of the Insured, Tab 39, Vol 1, Exhibit 1A

⁶At 21st page of unnumbered pages under the heading "Causality".

⁷At p. 23 of the decision

⁸(FSCO P18-00032, April 12, 2019)

⁹At p. 8 of the decision

The biggest issue on this appeal is causation, in particular because the Arbitrator refused to apply the “but for” test. On that point, the Divisional Court recently confirmed that the predominant test in accident benefit cases is “but for,” as discussed below.

However, I note that, even on a “material contribution” basis, the Arbitrator erred in her decision regarding catastrophic impairment – because Mr. Thiruchelvam was already catastrophically impaired for a mental or behavioural disorder before the MVA. As the Arbitrator noted, in the domain of Adaptation, at most his impairment had moved from a low marked range to a higher marked range, simply getting him closer to Extreme. But it cannot be said that this made him more catastrophically impaired, which is in effect what the Arbitrator found.

I say this because “Catastrophic impairment” is not an impairment in and of itself. Rather, it is a term of art for a threshold based on various criteria. Thus, in cases regarding mental or behavioural disorders where the *Pastore* rule applies, it suffices if the applicant has a marked impairment in one domain. Someone who has two or more marked impairments is not more “catastrophically impaired,” in the sense that more benefits are available. Once you cross the threshold, greater benefits are possibly available, regardless of the number of marked domains. So while the Arbitrator found that Mr. Thiruchelvam’s impairment had worsened, he could not be *more* catastrophically impaired because he was *already* catastrophically impaired for a mental or behavioural disorder. I would allow the appeal regarding catastrophic impairment on that ground alone.

In this case, Mr. Aloysius is requesting a catastrophic determination in relation to either of both of the 2005 and 2006 accidents. He submits that those accidents materially contributed to a mental or behavioural disorder, already determined to have met the definition of catastrophic impairment set out in the *Schedule*, as a result of the 2003 accident.

I asked the parties for submissions on the recent *Thiruchelvam* decision. Mr. Aloysius submitted that the principal of *stare decisis* did not apply in administrative law, that the passage quoted did not form the *ratio decidendi* of the decision, that the case was distinguishable on its facts, and that it would be unjust to apply the reasoning.

I find the reasoning in *Thiruchelvam* persuasive regardless of whether or not it is binding. Catastrophic Impairment is a threshold finding which opens an extensive category of benefits. It is not an injury to be compensated based on the extent of the injury, as in a tort case. A person who is catastrophically impaired has to meet the various tests for the various benefits claimed.

Entitlement to benefits, as opposed to eligibility for benefits, is not automatic upon a determination of catastrophic impairment.

I find that the 2005 and 2006 accidents did not make Mr. Aloysius more catastrophically impaired because of a mental or behavioural disorder resulting in a marked impairment in one of the domains of function. He was already catastrophically impaired for that reason at the time of the 2005 and 2006 accidents. The category of benefits associated with catastrophic impairment was already available to him in 2005 and 2006.

I also find that the material contribution test of causation is not appropriate in these circumstances. The “but for” test of causation and the material contribution test is discussed extensively in *Thiruchelvam*. It is established that the “but for” test and not the material contribution test is the appropriate test in *Statutory Accident Benefits* case. Material contribution to risk is the exception where “but for” is not provable. There may be cases where an injury may not have occurred without the contributions of multiple tortfeasors. In those cases, it may not be possible to prove specifically which contribution in fact caused the injury and the material contribution to risk would apply. That is not the case here. All three accidents may have contributed to Mr. Aloysius’ catastrophic impairment, but the arbitrator determined, upheld on appeal, that Mr. Aloysius was catastrophically impaired, specifically because of the January 31, 2003 accident. It cannot be said therefore that “but for” the 2005 and 2006 accidents which came later, he would not have been catastrophically impaired.

The claim for catastrophic impairment arising from either or both of the 2005 and 2006 accidents is dismissed.

Attendant care benefits at the catastrophic impairment level, however, are available as a result of the 2005 and 2006 accidents if Mr. Aloysius can show entitlement.

Attendant care benefits arising from the 2005 and 2006 accidents will be dealt with in a further decision, together with the other issues remaining in dispute, including expenses.



Anne Morris
Arbitrator

February 10, 2020

Date



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ANTHONIDAS ALOYSIUS

Applicant

and

ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

Under section 282 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. The claim for catastrophic impairment arising from either or both of the 2005 and 2006 accidents is dismissed.
2. Attendant care benefits arising from the 2005 and 2006 accidents will be dealt with in a further decision, together with the other issues remaining in dispute, including expenses.

A handwritten signature in black ink, appearing to be "Anne Morris", written over a horizontal line.

Anne Morris
Arbitrator

February 10, 2020
Date