

## INSURANCE LAW BULLETIN

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### RECENT TOP DECISIONS FROM THE LAT & FSCO

#### CAT AT THE LAT

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#### Wide Ranges/Top Number

*Applicant v. Peel* (16-000013/AABS, April 27, 2017)

*Applicant v. Wawanesa* (16-000005/AABS, July 4, 2017)

*Applicant v. Unica Insurance Inc.* (16-002234/AABS, December 12, 2017)

Three decisions released by the LAT found that arbitrarily choosing the highest number in a range was an abdication of the exercise of clinical judgment required under the *Guides*. In *Applicant v. Wawanesa*, Adjudicator Susan Sapin added that “choosing the number at the top of a given range is no method at all” and stated that “such an approach renders the use of ranges within a class of impairment meaningless.”<sup>1</sup>

*Shaw and TD General Insurance Company* [2017] OFSCD No. 324

FSCO took a different view from the LAT in *Shaw and TD General Insurance Company* [2017] OFSCD No. 324 (“*Shaw*”). TD relied on the decisions of Adjudicator Sapin in *Applicant and Peel Mutual Insurance Company*,<sup>2</sup> and Arbitrator Lee in *Moser and Guarantee Company of North America*,<sup>3</sup> both of whom held that providing a range and/or choosing the highest number within a range was not helpful to adjudicators. In *Shaw*, Dr. Becker argued that because the *Guides* provided no method for choosing a percentage WPI within a class of impairment, his solution was to choose the highest percentage rating in a range on the basis that a person was no better than his or her worst impairment (precisely the same argument he made in *Applicant v. Wawanesa*). Dr. Becker’s methodology was accepted by arbitrator Lynda Tanaka who found that Dr. Becker “applied his best judgment to the issue of the impairments within the structure of the AMA Guides”.<sup>4</sup> Arbitrator Tanaka appeared to be satisfied that as the severity,

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<sup>1</sup> *Applicant v. Wawanesa* (16-000005/AABS, July 4, 2017) at paras 78 and 80

<sup>2</sup> (16-000013/AABS, April 27, 2017)

<sup>3</sup> [2014] OFSCD No. 270

<sup>4</sup> *Shaw and TD General Insurance Company* [2017] OFSCD No. 324 at para 63

frequency and persistence of mental impairments and sleep impairments could fluctuate, Dr. Becker's methodology was sound. To date, this is the only decision that has accepted Dr. Becker's latest methodology.

### **GCS 9/Confounding Factors**

*EW v. Primmum* (16-003891/AABS, November 9, 2017)

The applicant was involved in a single-vehicle accident when he drove his car into a tree, resulting in multiple fractures to his legs. The applicant was intoxicated at the time of the collision. His GCS score at the scene was 13/15. On arrival at the hospital ER, his GCS score rose to 15. The applicant underwent surgery to repair the fractures. Following the operation, his GCS score in the recovery room was 8T ("T" indicating intubation). Thereafter, the applicant's scores remained above 9T. Adjudicator Flude found no evidence of a brain injury as a result of the accident, but clarified that only a brain impairment resulting in a GCS score of 9 or less was required for a determination of catastrophic impairment. Referencing *M.M. v. Guarantee Company of North America*, [2012] OFSCD No. 123, Adjudicator Flude accepted that any factor that affected brain functioning, even temporarily, could cause the requisite "brain impairment". However, in the case of the applicant, there was no evidence that his low GCS score in the recovery room was the result of anything other than sedation.

### **Mental/Behavioural Impairments**

*A.R. v. Allstate* (16-003415/AABS, January 5, 2018)

The issue in dispute was marked impairment under the 2010 legislation. The applicant, a 47-year-old PSW, sustained soft tissue injuries in the accident which resulted in chronic pain and psychological impairments. She had attempted to return to work on one occasion following the accident. The evidence established that the applicant had never missed a medical assessment, she attended appointments regularly, completed driver therapy sessions, used strategies such as lists and a day planner, completed brain activity exercises, worked within a budget and did her own banking. The adjudicator rejected complaints of cognitive impairment as the latter was not substantiated by objective evidence such as CT scans. The adjudicator also rejected the evidence of Dr. Levitt that poor performance on validity tests was the result of pain and emotional factors, indicating that if this was indeed the case, testing should have been terminated and resumed another day. The adjudicator further rejected Dr. Levitt's finding that one failed attempt to return to work equated with an inability to function at work, given the Guides' requirement for repeated failures to adapt to stressful circumstances. Overall, the adjudicator applied a disciplined approach to the analysis of marked impairment, including a preference for objective evidence over subjective reporting.