2020 ONSC 2226
Ontario Superior Court of Justice (Divisional Court)

Wawanesa Mutual Insurance Company v. Renwick

2020 CarswellOnt 5073, 2020 ONSC 2226, 150 O.R. (3d) 65

Wawanesa Mutual Insurance Company (Applicant) and Marjorie Renwick and Financial Services Commission of Ontario (Respondents)

H. Sachs J., Backhouse J., and Charney J.

Heard: March 11, 2020
Judgment: April 16, 2020
Docket: Toronto 294/18

Proceedings: refusing application for judicial review *Renwick and Wawanesa Mutual Insurance Co., Re* (2018), 2018 CarswellOnt 7017, Maggy Murray Dir. Delegate (F.S.C.O. App.); reversing *Renwick v. Wawanesa Mutual Insurance Co.* (2017), 23 F.S.C.O.A.D. 263 (note), 2017 CarswellOnt 6589, Barry S. Arbus Member (F.S.C.O. Arb.)

Counsel: Paul Omeziri, for Applicant
Ryan Naimark, Alex Nikolaev, for Respondent, Marjorie Renwick
Kari Chan, for Financial Services Commission of Ontario

Headnote

Insurance --- Automobile insurance — No-fault benefits — Practice and procedure on claim for benefits — Miscellaneous

Claimant applied for statutory accident benefits from insurer, with respect to injuries from motor vehicle accident that had led to chronic pain, anxiety and depression influencing her decision to close accounting business after period of part-time work — Dispute arose between claimant and insurer over claimant's entitlement to income replacement benefits and medical benefits — Financial Services Commission Arbitrator dismissed claimant's claims — Claimant's appeal was allowed by delegate of Director of Arbitrations on basis that arbitrator's reasons were inadequate — Insurer applied for judicial review — Application dismissed — Provision of inadequate reasons raised question of law entitling delegate to overturn arbitrator's decision — Delegate's finding that arbitrator did not engage with issues and evidence on question of income replacement benefits was reasonable — In concluding that claimant had worked

successfully in sedentary position and could continue to do so, arbitrator did not identify what evidence supported this view and did not deal with evidence that did not support it — Arbitrator made no comments or findings on claimant's credibility but, where not all aspects of her evidence were accepted by all medical assessors or experts, arbitrator's assessment of claimant's evidence was necessary for meaningful weighing of medical evidence — Arbitrator's opinion that claimant had reached maximum therapeutic benefit such that treatment plan was not reasonable and necessary was conclusory and based on report that did not explain meaning of "maximum therapeutic benefit" — Claimant was not arguing that treatment would help her improve, which was one possible meaning of term, but if assessor was disputing that treatment was helping control her pain, it was not clear why arbitrator preferred such view to those of claimant and treating experts — It was not clear if arbitrator was rejecting case law establishing that pain relief was legitimate rehabilitative goal — Deficiencies in arbitrator's reasons precluded meaningful appellate review and rendered reasons inadequate.

Table of Authorities

Cases considered by *H. Sachs J., Backhouse J., Charney J.*:

Belair Direct Insurance Company v. Green (2018), 2018 ONSC 2782, 2018 CarswellOnt 7103, 80 C.C.L.I. (5th) 44 (Ont. Div. Ct.) — referred to

Burgess v. Pembridge Insurance Co. (2014), 2014 CarswellOnt 8414 (F.S.C.O. Arb.) — considered

Canada (Minister of Citizenship and Immigration) v. Vavilov (2019), 2019 SCC 65, 2019 CSC 65, 2019 CarswellNat 7883, 2019 CarswellNat 7884, 59 Admin. L.R. (6th) 1, 441 D.L.R. (4th) 1, 69 Imm. L.R. (4th) 1 (S.C.C.) — considered

Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd. (2002), 2002 CarswellOnt 1759, 214 D.L.R. (4th) 121, *(*sub nom. *MacDonald v. BF Realty Holdings Ltd.)* 160 O.A.C. 72, 35 C.B.R. (4th) 197, 26 B.L.R. (3d) 180, [2002] O.T.C. 503 (Ont. C.A.) — referred to

Crossey v. Farmers' Mutual Insurance Co. (2005), 2005 CarswellOnt 5289 (F.S.C.O. Arb.) — referred to

Diamond Auto Collision Inc. v. Economical Insurance Group (2007), 2007 ONCA 487, 2007 CarswellOnt 4196, 50 C.C.L.I. (4th) 213, 227 O.A.C. 51 (Ont. C.A.) — referred to

Dunsmuir v. New Brunswick (2008), 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125, D.T.E. 2008T-223, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 372 N.R. 1, 329 N.B.R. (2d) 1, 844 A.P.R. 1, 2008 CSC 9, 2008 C.L.L.C. 220-020, 291 D.L.R. (4th) 577, 170 L.A.C. (4th) 1, 95 L.C.R. 65, [2008] 1 S.C.R. 190 (S.C.C.) — followed

Kanareitsev v. TTC Insurance Co. (2008), 2008 CarswellOnt 3154, 240 O.A.C. 21, 66 C.C.L.I. (4th) 46, 297 D.L.R. (4th) 373 (Ont. Div. Ct.) — considered

Lawson v. Lawson (2006), 2006 CarswellOnt 4789, 214 O.A.C. 94, 29 R.F.L. (6th) 8, 81 O.R. (3d) 321 (Ont. C.A.) — considered

R. v. Sheppard (2002), 2002 SCC 26, 2002 CarswellNfld 74, 2002 CarswellNfld 75, 162 C.C.C. (3d) 298, 210 D.L.R. (4th) 608, 50 C.R. (5th) 68, 284 N.R. 342, 211 Nfld. & P.E.I.R. 50, 633 A.P.R. 50, [2002] 1 S.C.R. 869 (S.C.C.) — referred to

Terry v. Wawanesa Mutual Insurance Co. (2001), 2001 CarswellOnt 5226 (F.S.C.O. Arb.) — referred to

VIA Rail Canada Inc. v. Canada (National Transportation Agency) (2000), 2000 CarswellNat 2531, 261 N.R. 184, 193 D.L.R. (4th) 357, 26 Admin. L.R. (3d) 1, [2001] 2 F.C. 25, 2000 CarswellNat 3453 (Fed. C.A.) — considered

Violi v. General Accident Assurance Co. of Canada (1999), 1999 CarswellOnt 5193 (F.S.C.O. Arb.) — referred to

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8

s. 283(1) — considered

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8

Statutory Accident Benefits Schedule — Effective September 1, 2010, O. Reg. 34/10

Generally — referred to

s. 6(2) — considered

ss. 14-16 — referred to

***H. Sachs J., Backhouse J., and Charney J.*:**

Overview

1 This application for judicial review arises of out of a statutory accident benefits dispute between Marjorie Renwick and her first-party automobile insurer, Wawanesa Mutual Insurance Company ("Wawanesa") over income replacement benefits and medical benefits.

2 On March 20, 2017 Financial Services Commission of Ontario ("FSCO") Arbitrator Barry Arbus (the "Arbitrator") dismissed Ms. Renwick's claims. She appealed the Arbitrator's decision to the Director of Arbitrations pursuant to s. 283(1) of the *Insurance Act*, R.S.O. 1990, c. I.8, which allows for appeals on questions of law.

3 On January 30, 2018 Maggy Murray, the Delegate of the Director of Arbitrations (the "Director's Delegate") allowed Ms. Renwick's appeal on the basis that the Arbitrator's reasons were inadequate. Wawanesa now seeks relief from this

decision, arguing that the Director Delegate's conclusion was unreasonable and should be quashed.

4 For the reasons that follow I would dismiss the application. The Director's Delegate's decision that the Arbitrator's reasons were inadequate is reasonable.

Factual Background

5 Ms. Renwick was involved in a car accident on December 17, 2011 when a large truck rear-ended her vehicle. She experienced immediate pain in her neck, shoulders and lower back and went to Humber River Hospital right after the accident. She subsequently applied for statutory accident benefits from her insurer, Wawanesa, pursuant to the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 ("*SABS*").

Ms. Renwick's Health After the Accident

6 Ms. Renwick had been in two prior car accidents. According to her, prior to the accident at issue, she suffered from uncomplicated neck, back and knee pain for which she never missed any time from work. She had no history of shoulder pain or any psychological issues and had no issues with operating a car.

7 After the accident Ms. Renwick began to experience significant pain in her neck, back and shoulders. In April of 2012 she was diagnosed with chronic neck pain and in May of 2012 she was diagnosed with a chronic left shoulder injury (known as "frozen shoulder"). Her shoulder injury was confirmed by an MRI in 2014. In January of 2014, the orthopaedic surgeon retained by Wawanesa diagnosed Ms. Renwick with chronic neck strain, chronic back strain and a left shoulder injury.

8 In 2012, Ms. Renwick started receiving 20 to 25 nerve block injections every week. She also started receiving an infusion every 6 weeks from the same doctor, Dr. Segal. For further pain management Ms. Renwick received treatment from Dr. Drayton (a chiropractor) at Health Max. In 2016 Ms. Renwick went to the Wasser Pain Clinic at Mount Sinai Hospital. They confirmed that the treatments she had been receiving were appropriate for her condition.

9 Since the accident, Ms. Renwick has been under the regular care of Dr. Slyfield, a psychiatrist. On October 24, 2012, Dr. Finkel, a psychiatrist retained by Wawanesa, diagnosed her with an adjustment disorder with mixed anxiety and depressed mood. On December 17, 2013, a multidisciplinary assessment from the Centre for Addiction and Mental Health ("CAMH") indicated that she presented with chronic pain, anxiety and depression. Since the accident Ms. Renwick has had to take large amounts of opioids and antidepressants. She attended at CAMH on two occasions, in December of 2013

and in June of 2016. She has attended at Humber River Hospital on at least 10 occasions for pain and anxiety.

10 According to Ms. Renwick, after the accident her anxiety prevented her from driving. As a result, she gave her car to her daughter.

Changes in Her Employment After the Accident

11 At the time of the accident Ms. Renwick owned and operated her own bookkeeping and accounting business. Her evidence was that prior to the accident she worked 40 to 50 hours per week in the business, which she had taken over from her former employer when he died in 1992.

12 Following the accident, she returned to work on a part-time basis, working an average of 8 hours per week and relying on significant help from her daughter. She also moved the location of her business to a smaller location.

13 In April of 2016 Ms. Renwick shut down her business. She testified that this was because her health following the accident had deteriorated to the point that she could no longer function in her business.

The Issues Before the Arbitrator

14 The Arbitrator was required to determine two issues:

> (1) Whether Ms. Renwick was entitled to receive an income replacement benefit in the amount of $185.00 per week from May 2016 onwards. To succeed on her application for this benefit Ms. Renwick was required to demonstrate that as a result of the accident she was suffering from a "complete inability to engage in any employment or self-employment for which . . . she was reasonably suited by education, training or experience" (*SABS*, s. 6(2)); and
>
> (2) Whether Ms. Renwick was entitled to receive a Medical Benefit for a Medical Treatment Plan with Health Max Physiotherapy Clinics (for chiropractic services), dated June 5, 2013, in the amount of $2,972.30. To succeed on this issue Ms. Renwick was required to demonstrate that the treatment plan in dispute was both reasonable and necessary (*SABS*, ss. 14-16).

The Hearing Before the Arbitrator

15 The hearing before the Arbitrator took place over 6 days in September and November of 2016. The Arbitrator released his decision in March of 2017.

16 My review of the hearing before the Arbitrator will include some detailed reference to the evidence that was before the Arbitrator, most of which was not referred to in his decision. My purpose in providing this detail is that some familiarity with this evidence is necessary to understand my conclusion that it was reasonable for the Director's Delegate to conclude that the Arbitrator's reasons were inadequate because they failed to meaningfully address the major points in issue.

17 Both parties filed extensive multidisciplinary assessments directed at the issues before the Arbitrator.

18 The October 2014 assessment filed by Ms. Renwick (which was based on a five-day study and included a two-day situational assessment) concluded that she suffered from a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience. The report is 105 pages long and includes opinions from Dr. Salmon, a neuropsychologist, Dr. Farhadi, a neurosurgeon, Dr. Getahun, an orthopaedic surgeon and Heather Picken, an occupational therapist. In addition to providing his opinion in the assessment report, Dr. Salmon testified extensively at the hearing.

19 On June 9, 2016, Dr. Segal opined that Ms. Renwick was not able to work anymore, and on June 11, 2016, Ms. Renwick presented with worsening symptoms of depression and chronic pain at CAMH. Dr. Segal also testified at the arbitration hearing.

20 On October 24, 2012, Dr. Finkel, the psychiatrist retained by Wawanesa stated:

> Ms. Renwick is felt to suffer a substantial inability to perform the essential tasks of her pre-accident employment as a result of the subject motor vehicle accident from a psychiatric perspective. Given her current level of psychiatric symptomatology compounded by pain symptoms, it is felt she cannot work efficiently at her job, which requires prolonged focus and concentration as well as deadline pressures [emphasis added].

21 On December 9, 2013, Dr. Lawrie Reznek, a psychiatrist retained by Wawanesa, examined Ms. Renwick. Dr. Reznek has been found by other arbitrators and judges to be biased in favour of insurance companies. However, even he found that Ms. Renwick was not a malingerer, had objective evidence of psychological impairment, was disabled from working full time at her pre-accident job and did everything she could to return to work:

> . . . Ms. Renwick is prevented from working full-time as a result of her pain disorder. She can work part-time in her business . . .

> Ms. Renwick does have a chronic pain disorder. She does have objective evidence of being in pain, and emotional factors (stress) does significantly increase her pain levels, qualifying her for a diagnosis of Pain Disorder.
>
> Ms. Renwick has not exploited her problems and retreated into the sick role. She has made every attempt to return to the workforce, and has continued working, albeit part-time, in spite of her problems. I think she deserves whatever help that is reasonable and necessary to improve her chronic pain disorder, and assist in her return to work on a full-time basis.

22 Dr. Gallimore, the orthopaedic expert retained by Wawanesa, testified that Ms. Renwick's condition had deteriorated between his report in December of 2013 (when he focused on her entitlement to income replacement benefits) and his subsequent report of March, 2015 (when his focus was on her Medical Treatment Plan claim). In 2013, he noted her shoulder injury. In 2015 he testified that in addition to her prior injury, Ms. Renwick presented with irritation of the nerve root, which was causing decreased function in her fingers and weakness in her neck and shoulder area.

23 The surveillance conducted by Wawanesa over a three-day period in April of 2016 corroborated Ms. Renwick's evidence on many key points:

> (a) Ms. Renwick gave evidence that prolonged sitting is a problem for her. She is seen throughout the surveillance standing in a window and is seen eating her lunch while standing.
>
> (b) Ms. Renwick gave evidence that using a phone is difficult for her because she has difficulty holding it up to her ear. On the surveillance she is seen using a headset.
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> (c) The surveillance only showed Ms. Renwick working on a part-time basis. On April 12, she is not seen working. On April 13 she is seen at work for about 2 hours and then she leaves.
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> (d) Ms. Renwick gave evidence that her daughter helped her at work. Her daughter is seen on the surveillance attending at her workplace.
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> (e) Ms. Renwick gave evidence that she receives nerve block injections every Wednesday. On the surveillance she is seen leaving her workplace for treatment on Wednesday afternoon, April 13.
>
> (f) Ms. Renwick gave evidence that she no longer drives and had given her daughter her car. On the surveillance Ms. Renwick's daughter is seen driving Ms. Renwick's car.

(g) Ms. Renwick gave evidence that she closed her business. The surveillance report stated that the sticker advertising the business on the window were seen being removed.

24 Wawanesa highlighted the following evidence:

(a) A report dated February 9, 2012 from Dr. Tepperman noting restricted movement in Ms. Renwick's neck, shoulders and low back as a result of myofascial strain, but stating that the injuries were of a moderate degree and noting no neurological impairment. He also noted that Ms. Renwick was under considerable stress at work because of tax season.

(b) A psychological report from Dr. Saunders noting that Ms. Renwick had been in two prior accidents and that in his opinion, Ms. Renwick had not suffered a significant psychological impairment as a result of the accident.

(c) A multi-disciplinary report dated October 4, 2012 by Dr. Hummel (an orthopaedic surgeon) and Dr. Finkel (a psychiatrist). This report stated that Ms. Renwick's physical condition had deteriorated since August of 2012, but that it was difficult to estimate the duration of Ms. Renwick's disability "due to the various associated numerous previous motor vehicle accidents." The report opined that Ms. Renwick could resume her previous employment with restrictions as it was her left side that was affected, not her right and she is right-handed. Dr. Finkel diagnosed an adjustment disorder and stated that her prognosis depended on her physical recovery. As noted above, he found that Ms. Renwick did have a substantial inability to perform the essential tasks of her previous employment, but also that she was working part-time, and it would likely benefit her to work as much as she could.

(d) A chiropractic report from Dr. Rajwani dated July 9, 2013 noting that according to his review of the documentation, Ms. Renwick had been involved in two prior motor vehicle accidents, one in 1992 and one in 1997. The report also noted that Ms. Renwick had received "an extensive course of rehabilitation services" and "although she continues to have limitations, in my opinion, at this stage in recovery, she has likely reached maximum therapeutic benefit". Therefore, he concluded that ongoing chiropractic treatment was not reasonable and necessary.

(e) A report from Dr. G. Moddel, a neurologist, dated December 2, 2013, noting that Ms. Renwick was working 3 hours per day and was able to do her activities of daily living, including cooking, cleaning and driving. He therefore concluded that from a neurological perspective, Ms. Renwick did not suffer from a complete

inability, as a result of the car accident at issue, to engage in employment for which she is reasonably suited by education, training or experience.

(f) A report dated December 2, 2013 from a vocational specialist stating that Ms. Renwick qualified for a number of vocational alternatives, including being a bookkeeper, receptionist, switchboard operator, or a clerk such as a payroll clerk.

(g) A report from Dr. Gallimore dated December 5, 2013 in which he noted that Ms. Renwick lived in an apartment and was independent in most of her activities of daily living. Therefore, he opined that she did not suffer from a complete inability to engage in employment and could perform the jobs identified by Wawanesa's vocational specialist.

(h) A psychiatric report from Dr. Reznek dated December 9, 2013 noting that Ms. Renwick had been able to return to work full-time after her previous motor vehicle accidents. After the subject accident she suffered from neck and back pain and struggled to work full time, receiving help from a girlfriend and her daughter. However, she did not suffer from a complete inability to return to work and was capable of performing any of the jobs identified by the vocational specialist, providing that the job was low stress.

(i) A report dated December 12, 2013 from a kinesiologist, Pearl Monk, concluding that Ms. Renwick's physical strength level at that time was limited, but substantially met the level required for her pre-accident job as an accountant/bookkeeper.

(j) Ms. Renwick's income tax returns from 2010 (before the accident) to 2015 which showed that between 2010 and 2014 Ms. Renwick's gross income from employment was between $27,500.00 and $28,500.00. In 2015 it dropped to $17,800.00. Her net income during 2010 and 2014 varied between $6500.00 (2010) and $9200.00 (2012). In 2015 her net income dropped to $3470.00.

(k) Excerpts from the surveillance report noting that Ms. Renwick was observed walking with a strong gait, bending and leaning forward from the waist, moving her head from side to side and holding a broom and sweeping. She was also observed attending her place of employment.

(l) Evidence from Dr. Gallimore's testimony that Ms. Renwick suffered from long-standing arthritis and that this could explain the weakness in her hand and other muscles.

Summary of the Positions of the Parties Before the Arbitrator

Income Replacement Benefits

25 Ms. Renwick's position before the Arbitrator was that her own testimony and the weight of the medical evidence, both written and oral, established that the psychological and physical effects of the accident rendered her completely unable to engage in any employment or self-employment for which she was reasonably suited. Before the accident, she was able to work full-time and did not suffer from chronic pain or anxiety. However, after the accident, she experienced both and required constant treatment and medication. In spite of this, she tried to work as much as she could. The income she earned after the accident was only possible with the help of her daughter. Eventually, despite her efforts, she could no longer keep working.

26 According to Ms. Renwick, the evidence from Wawanesa's own witnesses supported her case. In particular, the evidence of Dr. Reznek, the psychiatrist retained by Wawanesa, confirmed that she had a pain disorder, was not a malingerer and could only work in low-stress jobs. Additionally, the evidence of Dr. Finkel, another psychiatrist retained by Wawanesa, confirmed that she was disabled from working from a psychiatric perspective and could not work efficiently at her job, which required concentration and focus. The evidence of Dr. Gallimore confirmed her physical injuries and that her physical condition had worsened between 2013 and 2015. Finally, the surveillance evidence confirmed many crucial aspects of her testimony.

27 Ms. Renwick's counsel relied on prior arbitral jurisprudence to make two significant points about the case Ms. Renwick had to meet. First, the fact that she had continued to work for over 4 years after the accident did not disentitle her from claiming at a later date that she was now completely disabled from working (*Crossey v. Farmers' Mutual Insurance Co.* [2005 CarswellOnt 5289 (F.S.C.O. Arb.)], 2005 FSCO A03 B 001643; *Terry v. Wawanesa Mutual Insurance Co.* [2001 CarswellOnt 5226 (F.S.C.O. Arb.)], 2001 FSCO A00-000017). Second, in considering whether an applicant is reasonably suited for particular employment an arbitrator must not only look to the applicant's education, training or experience, but also to whether the applicant is "able to engage in any such employment in a competitive real world setting, taking into account employer demands for reasonable hours and productivity" (*Burgess v. Pembridge Insurance Co.* [2014 CarswellOnt 8414 (F.S.C.O. Arb.)], 2014 FSCO A11-001160). Counsel for Ms. Renwick argued that given Ms. Renwick's limited ability to work efficiently and under stress and the time demands of her medical appointments, she could not engage in employment in a competitive real-world setting.

28 Wawanesa, on the other hand, argued that Ms. Renwick had not demonstrated that she met the test for the benefits in question. This was clear from the fact that she continued to work for over four years after the accident and that for most of those years she earned income that was comparable to the income she earned in the year preceding

the accident. According to Wawanesa, both the medical evidence and the surveillance evidence confirmed that Ms. Renwick had the physical and mental abilities to engage in employment. With respect to any observed deterioration in her physical condition between 2013 and 2015, that deterioration was due to pre-existing arthritis, not to the injuries attributable to the accident in question.

Medical Benefit

29 With respect to Ms. Renwick's claim for medical benefits, Wawanesa relied on a report written by Dr. Rajwani, a chiropractor, stating that Ms. Renwick had reached maximum therapeutic benefit and that further treatment was neither reasonable nor necessary. Ms. Renwick, on the other hand, submitted that she needed these services to control her pain so that it did not get worse. The Wasser Pain Clinic at Mount Sinai Hospital had confirmed that the treatment Ms. Renwick was getting (including the chiropractic treatment) was appropriate for her condition. According to Ms. Renwick's counsel, arbitral jurisprudence was clear that treatment to control pain could be considered reasonable and necessary (*Violi v. General Accident Assurance Co. of Canada* [1999 CarswellOnt 5193 (F.S.C.O. Arb.)], 1999 FSCO A98-000670).

The Arbitrator's Decision

30 The Arbitrator began his decision by briefly summarizing the evidence and the positions of the parties. He also set out the issues he had to decide and the relevant sections of the *SABS*.

31 With respect to the issue of whether Ms. Renwick was entitled to income replacement benefits, the Arbitrator's analysis consisted of the following three paragraphs:

> In this case, the Applicant has been assessed several times by numerous assessors from a functional, orthopaedic, vocational and psychological perspective. Although the Applicant has a serious, ongoing impairment, I do not feel that she has met the complete inability test. Given the Applicant's history in working successfully in a sedentary position, and the wide range of employment options that the vocational assessor suggested are available to her by reason of her education, training and experience, I am satisfied that she has not been able to establish that she meets the complete inability test.
>
> In examining the financial results of the business for the six-year period covering the pre-accident through 2015, the Applicant's income in any given year never exceeded $9,200. In fact, her income for the two years after the accident exceeded that of the two years before the accident. Any of the jobs suggested by Ms. Agostino

would, in fact, provide a higher income to the Applicant than she was earning prior to the accident.

I am satisfied that even if the tests suggested by the Applicant's counsel as set out in the *Crossley, Terry* and *Burgess* cases applied, then the Applicant would still be able to consistently attend and sustain a reasonable number of hours in a competitive real-world setting.

32 On the claim for a medical benefit in relation to Ms. Renwick's medical treatment plan, the Arbitrator found as follows:

It is incumbent upon the Applicant to establish that the Treatment Plan in dispute is reasonable and necessary, as set out in Sections 15 and 16 of the *SABS*. The 2013 report of Dr. Rajwani found that the Applicant had reached maximum therapeutic benefit, that the Treatment Plan would not benefit her and accordingly was not reasonable and necessary. Dr. Drayton gave evidence that the Applicant started working with him in January 2012 and provided a multi-disciplinary therapy for her; however, he failed to establish that the Treatment Plan was reasonable and necessary and at no time challenged the evidence of Dr. Rajwani.

The Director's Delegate's Decision

33 The Director's Delegate found that the Arbitrator erred in law by failing to provide adequate reasons for his decision. Relying on the Divisional Court's decision in *Kanareitsev v. TTC Insurance Co.* (2008), 297 D.L.R. (4th) 373 (Ont. Div. Ct.), the Director's Delegate stated that:

(i) reasons must set "out the findings of fact and the principal evidence upon which those findings were based";

(ii) reasons must also "address the major points in issue";

(iii) "the reasoning process followed must set out and reflect consideration of the main relevant factors"; and

(iv) "it is insufficient for the decision-maker to summarize the parties' positions and 'baldly state its conclusions'" (*Kanareitsev*, *supra* at para. 28).

34 The Director's Delegate found that Ms. Renwick was unable to determine from the Arbitrator's decision what "factors the Arbitrator considered relevant to the issues of entitlement, how they were applied, and which of [her] submissions he accepted." Thus, his decision did "not provide the basis for meaningful appellate review and she has been denied her right to natural justice and procedural fairness."

35 With respect to the income replacement benefits the Director's Delegate found that the Arbitrator erred in law in "failing to summarize, analyze or consider important evidence that was not supportive of the insurer's position". This included Dr. Gallimore's evidence about Ms. Renwick's deterioration between 2013 and 2015; Dr. Finkel's evidence that Ms. Renwick could not work efficiently at her job; the evidence of Heather Picken (the occupational therapist retained by Ms. Renwick) that Ms. Renwick was not competitively employable or capable of consistently performing the essential tasks of her pre-accident occupation or any occupation for which she is suited by education, training or experience; the surveillance evidence that corroborated Ms. Renwick's testimony about her condition; and the evidence of Dr. Reznek that Ms. Renwick was prevented from working full-time because of her pain disorder, that she was not a malingerer and that she could only do any of the alternate jobs identified by the vocational specialist if that job was low-stress.

36 The Director's Delegate also found that the Arbitrator misinterpreted evidence. In particular, the Arbitrator found that Ms. Renwick received 20 to 25 nerve block injections every 6 weeks, when in fact she received them every week.

37 The Director's Delegate found the Arbitrator's conclusion that Ms. Renwick had worked successfully in a sedentary position "surprising" given the evidence that she only worked 8 hours per week, received significant help from her daughter and received 20-25 nerve block injections every week and an infusion every six weeks.

38 The Director's Delegate noted that it was not her role to weigh the evidence and that not reciting all the evidence does not mean that the Arbitrator failed to consider it. However, in her view, the Arbitrator's analysis on the claim for income replacement benefits was so inadequate as to amount to an error of law.

39 With respect to the claim for medical benefits, the Director's Delegate found that the Arbitrator "briefly summarized two reports on the issue and then made a bald conclusion without any analysis". Further, in coming to his conclusion the Arbitrator ignored the evidence about the steps that Ms. Renwick was taking to control her pain and ignored the FSCO case law that established that pain relief was a legitimate rehabilitative goal.

40 The Director's Delegate also found that the Arbitrator erred when he faulted Dr. Drayton, the chiropractor who completed the Treatment Plan in issue, for failing to challenge the evidence of Dr. Rajwani (Wawanesa's assessor). The Director's Delegate found that it was not the role of an expert to directly "challenge" the evidence of another expert. Rather, according to the Director's Delegate, "[e]xperts provide evidence to a tribunal and answer questions."

41 The Director's Delegate concluded her reasons in the following manner:

> I find that the Arbitrator failed to give adequate reasons for his decision, and failed to fairly consider the evidence from both parties. This is an error of law.

Standard of Review

42 There are two standards of review that are relevant — the standard of review to be applied by the Director's Delegate to the Arbitrator's decision and the standard of review to be applied by this court to the Director's Delegate's decision.

43 The Director's Delegate was sitting on appeal from the Arbitrator's decision. Her jurisdiction was restricted to questions of law and the standard that she had to apply to those questions was correctness.

44 We are judicially reviewing the Director's Delegate's decision. Pursuant to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.), the presumption of reasonableness continues to apply when a court is reviewing the merits of an administrative decision-maker's decision, even when the question at issue is a question of law. The exception to this presumption is when "respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions", including "general questions of law of central importance to the legal system as a whole" (*Vavilov* at para. 53).

45 In *Kanareitsev*, *supra*, the Divisional Court found that "[t]he issue of the adequacy of reasons involves the application of general principles of law." (para. 23). Therefore, pursuant to the contextual approach for selecting the standard of review mandated by *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.), the applicable standard of review was held to be correctness.

46 *Kanareitsev* was decided before *Vavilov*. In addition to doing away with *Dunsmuir*'s contextual approach in favour of the presumption of reasonableness, *Vavilov* provides considerable guidance on the issue of what is a general question of law that is of central importance to the legal system. Essentially, it is a question that requires a uniform and consistent answer because of its impact on the administration of justice as a whole. Examples of such questions include the appropriateness of limits on solicitor-client privilege and the scope of parliamentary privilege.

47 As the Court of Appeal noted in *Lawson v. Lawson* (2006), 81 O.R. (3d) 321 (Ont. C.A.), determining the adequacy of reasons is a contextual exercise. Similarly, in *VIA*

Rail Canada Inc. v. Canada (National Transportation Agency) (2000), [2001] 2 F.C. 25 (Fed. C.A.), the Federal Court of Appeal commented that:

> What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A. "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons" (citing J. M. Evans, *Administrative Law: Cases, Text and Materials* (4th ed.), (Toronto: Emond Montgomery, 1995), at p. 507).

48 Whether reasons are adequate is not a question that is amenable to a single and determinate answer. Thus, while delivering adequate reasons plays a central role in the administration of justice, whether reasons are adequate is not a general question of law of central importance to the legal system as a whole that would attract the standard of correctness.

49 For these reasons, I find that the standard that this Court must apply to the Director's Delegate's decision is reasonableness.

Is the Director's Delegate's Decision Reasonable?

50 Wawanesa submits that the Director's Delegate's decision is unreasonable as her jurisdiction was limited to questions of law, and there was no error of law in the decision of Arbitrator Arbus. The Director's Delegate's purported rationale for overturning the Arbitrator's decision (inadequacy of reasons) was simply a disguised justification for reweighing the evidence that was heard by the Arbitrator. However, absent a question of law, the Director's Delegate could not overturn the Arbitrator's decision, even if the Arbitrator made what she viewed to be a palpable and overriding error in a finding of fact.

51 I agree with Wawanesa that arguments about adequacy of reasons can easily become a vehicle for litigants to induce appellate courts to reengage in a reweighing of facts. This is something that must be resisted, particularly in a situation where the appellate court's jurisdiction is limited to questions of law. Furthermore, the temptation to set aside a decision that contains what the appellate court views to be palpable and overriding errors of fact can be particularly strong. Yet, errors of fact, even palpable and overriding ones, will not justify intervention by an appellate court whose jurisdiction is limited to errors of law (*Belair Direct Insurance Company v. Green*, 2018 ONSC 2782 (Ont. Div. Ct.) at paras. 24-25).

52 Wawanesa does not dispute that whether a first instance decision maker provides inadequate reasons is a question of law (see *R. v. Sheppard*, 2002 SCC 26 (S.C.C.); *Diamond Auto Collision Inc. v. Economical Insurance Group*, 2007 ONCA 487 (Ont. C.A.); *Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd.* (2002), 214 D.L.R. (4th) 121 (Ont. C.A.). Reasons serve a very important purpose — they justify and explain the result so that the losing party knows why they have lost and interested members of the public can satisfy themselves that justice has been done. Reasons must also be sufficient to allow for meaningful appellate review. (*Sheppard*, *supra* at paras. 24-25).

53 As found by the Director's Delegate, to be adequate reasons must set out the findings of fact and the principal evidence upon which those findings were based. They also must address the major points in issue and set out the reasoning process that the decision-maker followed so that it is apparent that the decision-maker engaged with and considered the major points in issue. It is not enough for a decision maker merely to summarize the evidence and the positions of the parties and then to state a conclusion (see *Via Rail Canada*, *supra* and *Kanareitsev*, *supra*). However, this does not mean that the decision maker must refer to every bit of evidence or argument before him. To be adequate, reasons do not have to be long or perfect.

The Arbitrator's Reasons with Respect to Income Replacement Benefits

54 According to Wawanesa, while the Arbitrator's analysis with respect to Ms. Renwick's claim for income replacement benefits is short, his reasons meet the standard of adequacy. First, his summary of the evidence and the position of the parties, while not detailed, makes it clear that the Arbitrator reviewed all of the evidence before him. Second, his conclusion that Ms. Renwick did not satisfy the test for income replacement benefits is based on factual findings that are rationally connected to his conclusion. The Arbitrator found that Ms. Renwick had a history of working successfully in a sedentary position; there were a wide range of employment options available to her by reason of her education, training and experience; her income tax returns showed that her income pre-accident was lower that her income in the some of the years post-accident; and based on the evidence of the vocational specialist, the Arbitrator was satisfied that Ms. Renwick could earn more if she took one of the jobs suggested by that specialist. Wawanesa asserts that there was evidence to support each of these factual findings and that this is all that is needed to satisfy the standard of adequacy.

55 The problem with this argument is that it ignores the thrust of the Director's Delegate's decision. She did not find that the Arbitrator made factual errors. What she

found is that the Director's Delegate did not engage with the issues and evidence before him on the question of income replacement benefits.

56 I find that the Director's Delegate's conclusion in this regard is reasonable. One of the issues before the Arbitrator was whether Ms. Renwick had been able to work successfully in a sedentary position after the accident. Her position was that she had not and that any income she earned was due in large part to the help that she received from her daughter. The other issue was whether Ms. Renwick, having done her best to work in spite of her injuries, now met the complete inability test. Her position was that she did. According to Ms. Renwick, the fact that she had worked beyond the 104-week period did not disentitle to her to claim at a later date that she was completely disabled from working. Further, the complete inability test required her to show that she had a complete inability to engage in employment in a competitive real-world setting, rather than an abstract ideal setting.

57 The Arbitrator did not conduct a meaningful analysis with respect to these issues. He simply concluded that Ms. Renwick had worked successfully in a sedentary position and that she could continue to do so even if this required her to compete in a real-world setting. He did not say what evidence he was relying on to support this view (except for income tax returns which were not in dispute) and he made no attempt to deal with the evidence that did not support this view, evidence that I have reviewed and that the Director's Delegate reviewed.

58 Further, the Arbitrator made no comment or findings on Ms. Renwick's credibility. Certainly, as the Director's Delegate noted, he made no "adverse findings with respect to Ms. Renwick's credibility." Her evidence and his view of this evidence was crucial to any further factual findings. No one disputed that she had suffered injuries as a result of the accident — both physical and psychological. The question was the extent to which those injuries disabled her from working. One of the key sources for the effect of the injuries on her, both for the medical experts and the Arbitrator, had to be Ms. Renwick. According to Wawanesa's factum, Ms. Renwick testified for over two days of the six-day hearing. Engaging with the issues before him required the Arbitrator to make assessments regarding Ms. Renwick's evidence, including assessments about her credibility. This would then allow him to meaningfully weigh the medical evidence before him. In other words, if he accepted Ms. Renwick's evidence on a point and the medical assessor did not, then he could discount that opinion accordingly. Similarly, if he did not accept Ms. Renwick's evidence on a point and the medical assessor did, this would also affect his view of that expert's evidence.

59 Thus, I find that it was reasonable for the Director's Delegate's to decide that the Arbitrator's reasons on the issue of income replacement benefits was inadequate.

The Arbitrator's Reasons with Respect to the Medical Benefit

60 On this issue the Applicant's position was that the Medical Treatment Plan at issue was reasonable and necessary because it helped to control her pain. Wawanesa's expert opined that Ms. Renwick had reached maximum therapeutic benefit and therefore the Treatment Plan at issue was not reasonable and necessary. In his reasons the Arbitrator accepted this opinion.

61 The problem with this is that the opinion is conclusory and does not resolve the issue between the parties.

62 The report relied upon did not explain what the assessor meant by maximum therapeutic benefit. Did he mean that the treatment would not help Ms. Renwick improve? If he did, this is not what Ms. Renwick was arguing. Was the assessor disputing that the treatment was helping to control Ms. Renwick's pain? If he was, why did the Arbitrator prefer this evidence over Ms. Renwick's evidence and those of the professionals who were helping her cope with her pain (including the Pain Clinic at Mount Sinai Hospital)? Did the Arbitrator reject the case law referred to by the Director's Delegate that pain relief is a legitimate rehabilitative goal? If so, this may be an error of law. None of these questions are answered in the Arbitrator's reasons. These deficiencies preclude meaningful appellate review and render the reasons inadequate.

63 I find that it was reasonable for the Director's Delegate to decide that the Arbitrator's reasons on Ms. Renwick's claim for the medical benefit were inadequate.

Conclusion

64 For these reasons the application for judicial review is dismissed.

65 I would, however, vary the order of the Director's Delegate in one respect. The Director's Delegate remitted the matter for a fresh hearing before a different arbitrator. Since this proceeding was commenced, legislative amendments have transferred disputes over *SABS* entitlement from the FSCO to the Licence Appeal Tribunal ("LAT"). Under the transitional provisions any dispute commenced under the previous regime that has not been determined by July 1, 2020 will be "extinguished". In view of the current situation with COVID-19, it is very unlikely that this dispute could be completely determined by July 1, 2020. Therefore, I am varying the Director's Delegate's order to provide that this matter is to be determined by the LAT. if I have no jurisdiction to make this referral, then one of the parties must apply to the LAT before December 1, 2020 to have the matter determined.

66 As agreed by the parties, Ms. Renwick, as the successful party, is entitled to her costs of this application fixed in the amount of $13,000.00, all inclusive.

I agree _____

I agree _____

Application dismissed.