

BETWEEN:

MOHAMED GARAD

Applicant

and

TRADERS GENERAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Shari Novick

Heard: January 24, 25, 26, 27 and March 10, 2000, at the Offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Louis Mostyn for Mr. Garad
David Zarek for Traders General Insurance Company

Issues:

The Applicant, Mohamed Garad, was injured in a motor vehicle accident on October 5, 1996. He applied for statutory accident benefits from Traders General Insurance Company (“Traders”), payable under the *Schedule*.¹ Traders rejected his application for benefits. The parties were unable

¹The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94, 463/96 and 304/98.

to resolve their disputes through mediation, and Mr. Garad applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

1. Is Mr. Garad entitled to other disability benefits for the two-year period following the accident, pursuant to section 19 of the *Schedule*?
2. Is Mr. Garad entitled to his expenses of this arbitration pursuant to subsection 282(11) of the *Insurance Act*?

Result:

1. Mr. Garad is not entitled to other disability benefits.
2. The parties are encouraged to resolve the issue of Mr. Garad's entitlement to expenses on their own.

The Applicant's evidence was translated by Tadele Lemi of All Languages.

EVIDENCE AND ANALYSIS:

Background:

Mr. Garad was involved in two motor vehicle accidents in 1996. The first accident occurred while he was a passenger in a taxi on January 7, 1996 and caused soft tissue injuries to his neck and back. Mr. Garad was paid other disability benefits ("ODBs") by Halifax Insurance Company

(“Halifax Insurance”) until August 16, 1996 as a result of that accident, and subsequently applied for mediation when these benefits were terminated. That matter was ultimately settled in April 1998, and while much of the evidence at the hearing focussed on the Applicant’s abilities at various stages after that accident, his entitlement to benefits arising out of that accident is not before me.

Mr. Garad was involved in a second car accident on October 5, 1996. He claims to have sustained injuries to his back and neck, as well as to his right knee, as a result of that accident. He applied for accident benefits from Traders in January 1997. As noted above, the application was rejected and no benefits were paid. The Explanation of Assessment sent by Traders states that the application was rejected “as per medical, not substantially disabled”.

Mr. Garad was unemployed at the time of the second accident.

Preliminary Issues:

The Applicant raised two preliminary issues at the outset of the hearing. Counsel argued that the Insurer had breached section 62 of the *Schedule* by not responding to Mr. Garad’s Application for Accident Benefits within the 14 days mandated by that provision. He took the position that by not communicating its refusal to pay benefits within 14 days, Traders’ decision to ultimately reject the application was void and led to the application of section 64 of the *Schedule*. Counsel noted that section 64 obliges an insurer to continue paying benefits until a DAC finds that the insured no longer suffers from a disability resulting from the accident, and argued that since no such DAC had been arranged, Traders is obliged to pay the full amount of the ODBs claimed by Mr. Garad.

I heard submissions from both parties on these issues and after taking a brief recess to consider the matter, I dismissed the Applicant’s objections and denied the relief sought. I provided brief

oral reasons at the time, and indicated to the parties that I would set out my rulings with full reasons in my final decision. These are those reasons.

(i) Section 62 argument:

The relevant parts of section 62 are reproduced below:

- (1) An insurer shall mail or deliver a weekly benefit that is payable under Part...V to the insured person within fourteen days after the insurer receives an application for the benefit.
- (8) If the insurer refuses to pay weekly benefits under Part ...V, it shall give the insured person notice of the reasons for the refusal,
 - (a) within 14 days after receiving an application for the benefits, if the refusal occurs before the application is approved;

It was agreed that the Application for Accident Benefits was received by the Insurer on January 15, 1997, and that the Explanation of Assessment sent by Traders denying the benefits claimed was dated February 5, 1997.

Counsel for the Applicant argued that the language in the above provisions was mandatory, and that the Insurer's refusal to pay benefits was void as it was not provided within the required 14 days.

The relevant provision in this instance is subsection 62(8). While an insurer's obligation to respond to an application within 14 days is expressed in mandatory language, I cannot accept the Applicant's contention that a breach of this obligation must result in Traders being required to pay benefits for the full period claimed. In my view, the *Schedule* would have to contain clear and specific wording to signify the drafters' intention that an applicant would, in effect, be

automatically entitled to any benefits claimed in the event that an insurer exceeded the 14 days specified. Section 62 addresses details of the payment of weekly benefits, such as the timing of payments and an insurer's duty to explain the amount of the benefit calculated. It does not address an applicant's entitlement to benefits, which in this case is determined by section 19. I find there is no basis for concluding, as the Applicant argues I should, that a breach of these procedural provisions of the *Schedule* gives rise to an automatic entitlement to benefits under that or any other section.

The Applicant filed several arbitration decisions for my consideration. I have reviewed each of these and do not find them to be supportive of the position asserted. I note Arbitrator Makepeace's comments in *Abarca v. Allstate Insurance Company of Canada* (A95-000140, April 17, 1996) that substantial compliance with the notice provisions of section 64 is sufficient to discharge an insurer's obligations, in the absence of any demonstrated prejudice to the applicant. In this case, some 21 days passed between the Insurer receiving the application and sending out the refusal. While that time frame exceeds the specified period by seven days, there is no evidence of the Applicant being prejudiced in any way by this delay. I find that the Insurer has substantially complied with section 62 and that no consequences flow from its failure to respond within 14 days.

(ii) Section 64 argument:

I do not accept the Applicant's contention that section 64 applies in this case. That provision is entitled "Stoppage in Weekly Benefits", and sets out the rules and time frames that apply when an insurer who has been paying weekly benefits decides to terminate these payments on the basis that the insured no longer suffers from a disability as a result of the accident in respect of which

weekly benefits are being paid.² In this case, the Insurer refused the Application for Benefits submitted outright, and no payments were ever made. Accordingly, section 64 has no application.

Evidence relating to disability:

Mr. Garad testified at length about his level of disability both prior to and during the two-year period following the second accident. While he claimed to still be suffering from various symptoms at the time of the hearing, he conceded that he did not satisfy the post-104 week test requiring a “complete inability to carry on a normal life”, as defined in section 3 of the *Schedule*. The Applicant also relied on the clinical notes and records of his family doctor, Dr. H. Obaji, and those of Dr. Otto Veidlinger, a neurologist.

Mr. Garad was born and raised in Ethiopia. He came to Canada in 1987, and worked at various jobs for short periods of time. Mr. Garad was not employed prior to the accident. The evidence relevant to his entitlement to other disability benefits is that regarding his abilities to perform the six types of activities set out in section 2 of the *Schedule*. These are - personal care activities, mobility activities, household activities, activities requiring the exercise of cognitive powers, as well as those requiring the ability to control emotions and communication.

Mr. Garad lives on his own in a studio apartment in downtown Toronto. He testified that there were no restrictions in his abilities prior to the accidents in 1996. He stated that he used to run and play soccer on a regular basis, and also did calisthenics. When asked about his abilities to perform the activities set out in section 2 after the October 1996 accident, he outlined difficulties he claimed to have experienced with each type of activity. With regard to his personal care, Mr. Garad stated that he was unable to actively wash himself while taking a shower, and that he had difficulty bending over to put on his socks and shoes. He testified that his mobility was

²Section 64(1)

compromised in that he could not walk for long periods due to the pain in his back and his knees. He also stated that he experienced difficulty getting up from a seated position and felt pain after standing for five or ten minutes.

When asked about his ability to perform household activities, Mr. Garad stated that he had problems preparing meals because he was not able to go grocery shopping, and that he experienced neck pain after standing for awhile. He testified that he had difficulty cleaning his apartment due to pain he experienced in his neck and back when he bent over, and that he found doing laundry difficult because he was unable to carry a large load.

With respect to his cognitive abilities and the ability to control his emotions, Mr. Garad testified that he experienced some difficulty remembering some of his appointments and that he felt irritable and angry in the two-year period following the second accident. He stated that the medication he had been prescribed calmed him down and controlled his anger. Finally, he explained that while he had been quite sociable and had not had any communication difficulties prior to the accidents, he had become socially withdrawn and was unable to express his thoughts afterwards.

Dr. Obaji's notes of her consultations with the Applicant throughout the relevant period refer to complaints of neck pain and back pain radiating down to his legs, as well as headaches. These complaints are also reflected in Dr. Veidlinger's notes of the six times Mr. Garad consulted him during the relevant period.

Mr. Garad participated in a disability DAC assessment at Mount Sinai Hospital in early November 1996, approximately one month after the second accident, as a result of his dispute with Halifax Insurance over their decision to terminate the benefits they were paying him as a result of the first accident. He reported to the physiatrist at that time that he was "independent with respect to all

aspects of personal care”. In addition to being assessed by a physiatrist, an occupational therapist conducted a Functional Abilities Evaluation (“FAE”). The assessors concluded that the Applicant was not disabled from returning to his pre-injury activity level.

Test for entitlement:

In order to be entitled to ODBs within 104 weeks of an accident, an applicant must demonstrate that he suffers an impairment that results in a substantial inability to engage in at least one of the types of activities that comprise the definition of a “partial inability to carry on a normal life” set out in section 2 of the *Schedule*, during the relevant period. The matter does not end there, however. The provisions specify that the inability relied on must result from the accident in question. The difficulty in Mr. Garad’s case is that the second accident occurred approximately nine months after the first one. Given that the issue of his entitlement to benefits arising out of the first accident has been settled, he must prove that his inability during the period between October 1996 and October 1998 results solely from the second accident. Accordingly, the evidence regarding his condition prior to that accident must be reviewed closely.

Pre-accident condition:

Mr. Garad testified about his health and level of functioning in the months leading up to the second accident in October 1996. Ample medical evidence from Dr. Obaji, as well as from several other health care practitioners who assessed or examined him during this time frame, also assists in determining his condition.

When asked to recall how he had been feeling one month prior to the second accident, Mr. Garad responded that the physiotherapy he had received had been very helpful, and that he no longer had any back pain. He also stated that his neck pain had resolved and that, while his activity level may

have been somewhat less than usual, he was “otherwise normal and had nothing to worry about.” When asked how long he had been feeling that way, he could not remember precisely but estimated that that had been the case for one or two months prior to the October 1996 accident.

This evidence is in stark contrast to a plethora of reports and recorded observations of several health care practitioners that Mr. Garad consulted in the few months prior to the second accident. On July 5, 1996, exactly three months prior to the accident, Mr. Garad attended an Independent Medical Examination (“IME”) arranged by Halifax Insurance with Dr. Ernest White, an orthopaedic surgeon. Dr. White noted in his report that the Applicant reported that his neck hurt every night, and that he complained of “pain in the lumbar area diffusely and the lower thoracic area which radiates all the way up to the neck on a daily basis”. One week later, Mr. Garad saw Dr. R. Curkowskyj, another orthopaedic surgeon that Dr. Obaji had referred him to. Dr. Curkowskyj reported that, “He doesn’t feel good. He is experiencing steady pain in the neck, low back and headaches and he would like to go for physiotherapy”. Dr. Curkowskyj also recommended that Mr. Garad be assessed at the Chronic Pain Clinic.

Dr. Obaji’s notes confirm that Mr. Garad continued to complain of back pain and that his movements were restricted due to pain throughout the month of July.

Dr. Veidlinger, the neurologist, saw Mr. Garad on July 25, 1996. He noted the Applicant’s complaints of headaches and sleeping difficulties due to pain. Dr. Veidlinger reported that his back and neck were very tender and produced “a lot of pain” during movement. He also noted significant muscle spasm and recommended “another course of therapy as there is extensive muscle spasm. In fact the main problem is persistent muscular and ligamentous pain”.

Mr. Garad began physiotherapy at Rosedale Physiotherapy and Sports Injury Centre around that time. Steven Chin, his treating physiotherapist at that facility, testified at the hearing and his notes

tracking the Applicant's progress over the subsequent months were filed into evidence. He stated that the Applicant reported cervical pain, lumbar pain and headaches during the initial assessment in late July. His notes indicate that Mr. Garad attended treatment three or four times each week through August and September, and that he complained consistently of acute soreness and stiffness in his neck and back. Mr. Chin's notes also contain several references to tenderness and muscle spasm throughout that period.

Dr. Obaji's notes of his visits with Mr. Garad in August and September also refer to complaints of back and neck pain radiating down both legs, headaches, and restriction of active movement due to pain. On October 1, a few days before the accident, Dr. Obaji recorded that Mr. Garad continued to suffer from back pain.

These records paint a drastically different picture of Mr. Garad's condition prior to the second accident than what he outlined in his evidence. In the face of clear evidence that he was visiting his family doctor every few weeks during this period and complaining of headaches as well as neck and back pain radiating down his legs, I have trouble accepting his claim that he was pain free and functioning normally for "a month or two" preceding the second accident. In addition, Mr. Chin's records evidencing the Applicant's almost daily attendances at Rosedale Physiotherapy during August and September belie Mr. Garad's statement that he had been functioning in a normal manner and had "nothing to worry about" during this time frame. Aside from the frequency of his attendances, Mr. Chin's records contain many references to Mr. Garad experiencing soreness and tenderness in his back and neck in the month preceding the accident of October 5. I note specifically that Mr. Garad attended physiotherapy treatment on each of the four days preceding the accident, and that Mr. Chin recorded on October 3, two days prior to the accident, that his back and neck were stiff and very sore and that he was experiencing tenderness in his lumbar spine.

Mr. Garad did not offer any response nor attempt to reconcile his statements about his pre-accident condition with this evidence. His evidence was generally quite vague and he was unresponsive to many questions posed to him during both examination-in-chief and cross-examination. He also had difficulty recalling several basic facts and assessments that he had undergone. For these reasons, but especially in light of the glaring inconsistencies between his evidence regarding his pre-accident condition and that of the medical professionals outlined above, I do not find Mr. Garad to be a credible witness and therefore do not accept his evidence in this regard.

Post-accident Condition:

Mr. Garad claimed that the second accident involved a much greater impact than the first one in January 1996 and resulted in injuries that were more significant. Accordingly, I find it puzzling that he did not mention anything about having been involved in an accident to Steven Chin, who he continued to see on an almost daily basis after October 5. Mr. Chin's notes of Mr. Garad's visits on October 7, 8, 9 and 10 also contain references such as "still sore ...back & neck" and "tenderness remains", suggesting that his post-accident condition mirrored his status prior to the accident.

The failure to advise Mr. Chin of his involvement in the October 5 accident seems to have been the first example of a pattern of non-disclosure for Mr. Garad. He attended a medical/rehabilitation DAC assessment on October 22, 1996 with respect to his claim from Halifax Insurance for treatment arising out of the first accident. He was assessed by an orthopaedic surgeon and a physical therapist and despite having been questioned about his "current situation" and "past history", there is no mention anywhere in the report of his having been involved in an accident approximately two weeks earlier. I note that an Amharic translator was provided for Mr. Garad's assistance during this assessment.

Similarly, Mr. Garad failed to mention that he had been involved in the second accident when he attended a disability DAC assessment a few weeks later to determine his continued entitlement to weekly benefits arising out of the first accident. The Applicant was assessed by Dr. Rajka Soric, a physiatrist at Mount Sinai Hospital, and by Trisha Kuhne, an occupational therapist who conducted an FAE, over the course of two days in early November 1996. A history was taken from Mr. Garad and a translator provided to assist him in communicating with the assessors. Again, there is no mention in the report of his having been involved in an accident one month prior to the assessment. Dr. Soric and Ms. Kuhne also both testified at the hearing, and each confirmed that they had not been informed by Mr. Garad of his involvement in a recent accident.

Finally, a copy of Mr. Garad's social assistance file was filed into evidence. It indicates that in the course of his application for welfare benefits in March of 1997, five months after the accident, he advised that he was not able to work "due to neck, leg and back pain because of car accident January 7, 1996". I note that the same entry appears in documents relating to an application, signed by Mr. Garad in September 1998, for exemption from the new requirement to work in exchange for social assistance benefits. When questioned about the above entries, the Applicant responded that he did not recall providing this information to anyone.

There are two possible explanations for Mr. Garad's failure to mention the fact that he had been involved in a second accident - either the injuries he sustained were insignificant and did not impact upon his condition resulting from the first accident, or, he intended to conceal the second accident from Halifax Insurance, the insurer responsible for paying benefits as a result of the first accident, in an attempt to maximize the amount of benefits he could potentially receive.

The fact that Mr. Garad attended Dr. Obaji's office a few days after the second accident complaining of headaches, back and cervical pain, as well as pain in his right knee, leads me to conclude that the latter explanation is more likely. I also note a medical legal report prepared by Dr. Obaji, solicited by the agent representing Mr. Garad in his claim for benefits arising out of the

first accident. The report, dated March 24, 1998, clearly paved the way for the settlement reached the following month with Halifax Insurance. It outlines the symptoms the Applicant was experiencing at the time, but omits any mention of the fact that he had been involved in a second accident. While the evidence indicated that the claims adjuster from Halifax Insurance had received Dr. Obaji's clinical notes and records, which refer to the second accident, prior to negotiating a settlement of the claim arising from the first accident, he testified that he had only glanced at them briefly and was not aware of Mr. Garad's involvement in the subsequent accident when he agreed to the settlement. He further testified that after the settlement was finalized, he received a call from the Applicant's agent who apologized for the fact that he had not mentioned the second accident, explaining that he had only found out about it himself after the settlement had been completed.

The evidence indicated that Mr. Garad was paid a lump sum of \$10,000 in full settlement of his claim against Halifax Insurance. While the propriety of that settlement is not an issue before me, I note that the amount paid out approximates one year of ODB payments at \$185 per week.

Based on the overwhelming evidence that Mr. Garad remained impaired up to the date of the second accident, and his failure to mention his involvement in the second accident to several health care practitioners he saw in its aftermath, I conclude that Mr. Garad has not proven on a balance of probabilities that he is entitled to ODBs as a result of injuries sustained in the accident of October 5, 1996.

His application is therefore dismissed.

EXPENSES:

I encourage the parties to resolve the question of Mr. Garad's entitlement to expenses of the arbitration on their own. If they are unable to do so, they should advise the Commission, in

writing, within 60 days of the date of this decision and the hearing will be reconvened either by teleconference or by way of written submissions to determine this issue.

Shari L. Novick
Arbitrator

September 29, 2000

Date

FSCO A98-000336

BETWEEN:

MOHAMED GARAD

Applicant

and

TRADERS GENERAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. Garad's application for arbitration is dismissed.

Shari L. Novick
Arbitrator

September 29, 2000

Date