Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A15-009166

BETWEEN:

HERBY GRAVELINE

Applicant

and

INTACT INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Caroline King

Heard: August 23, 24, 25, 2016 and April 4, 5, 6, 2017 in Sudbury Ontario

Appearances: Mr. Graveline, Self-Represented. Supported by his friend Mr. Don Laporte on August 23, 24, 25, 2016
Sabina Arulampalam for Intact Insurance Company

Issues:

The Applicant, Herby Graveline, was injured in a motor vehicle accident on November 11, 2009. He applied for statutory accident benefits from Intact Insurance Company ("Intact"), payable under the *Schedule*.[1] A dispute arose about the payment of the benefits. The parties were unable to resolve their disputes through mediation, and Mr. Graveline applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The issues in this hearing are:

1. Is Mr. Graveline entitled to receive a non-earner benefit, in the amount of $185.00, from May 11, 2009 to date and ongoing?

2. Is Intact liable to pay a special award because it unreasonably withheld or delayed payments to Mr. Graveline?

3. Is Intact liable to pay Mr. Graveline's expenses in respect of the arbitration?

4. Is Mr. Graveline entitled to interest for the overdue payment of benefits?

Result:

1. Mr. Graveline is not entitled to receive a non-earner benefit, in the amount of $185.00, from May 11, 2009 to date and ongoing.

2. Intact is not liable to pay a special award as it did not unreasonably withhold or delay payments to Mr. Graveline.

3. Intact is not liable to pay Mr. Graveline's expenses in respect of the arbitration.

4. Mr. Graveline is not entitled to interest as there is no overdue payment of benefits.

INTRODUCTION:

The Applicant was forty-nine years old when he was involved in a single car accident on November 11, 2009. The following facts are not disputed: EMS services and police attended the scene of the accident; the Applicant attended at St. Joseph's hospital in Elliot Lake on November 16, 2009; the Applicant had chiropractic treatment in April 2010, which according to the Applicant, included "some cracking" [of his neck]; the Applicant had an MRI scan of his cervical spine on May 4, 2010 which indicated disc herniation; on August 26, 2010, the Applicant had neck decompression and fusion surgery done for a left C6-C7 disc herniation; that the application for benefits OCF-1 is dated May 27, 2013; and that the disability certificate OCF-3 is dated October 29, 2013.

The Applicant asserts he suffered a continuous complete inability to carry on a normal life as a result of the accident and therefore is entitled to a non-earner benefit. The Insurer and its medical experts assert that the Applicant is not entitled to a non-earner benefit.

This decision will first discuss procedural aspects of this arbitration, including efforts to ensure that the Applicant was able to fully participate in the proceeding. The Applicant indicated that he was dissatisfied with many of the individuals and professionals that he came into contact with before and after his accident. A summary review of this information is provided as it helps to set up the context for the legal analysis of the issues in dispute which follows. Finally, the decision will conclude with my decision not to require the Insurer's expert witnesses to attend to provide evidence.

PROCEDURAL ISSUES RELATING TO THIS ARBITRATION:

The sole benefit in dispute in this arbitration is whether Mr. Graveline, the Applicant, is entitled to receive a non-earner benefit. As the Applicant was self-represented, care was taken to ensure that the Applicant understood that in accident benefit disputes heard at FSCO, all applicants must prove that it is more likely than not that they are entitled to the benefits claimed. The legal question to be resolved in this arbitration was explained to the Applicant. He was advised that information of his pre-accident and post-accident health and activities, and consideration of the medical and other documentation relating to his claim, would be required. Information about how to secure legal representation was provided to the Applicant, both by the pre-hearing arbitrator and myself.

Care was also taken to ensure that the Applicant was given the opportunity to have French language services and support. Shortly before the arbitration proceeding was set to commence, the Applicant requested a French language hearing. Unfortunately, a French speaking arbitrator was not available for the hearing. In her letter dated August 22, 2016, Senior Arbitrator Macey determined that the Applicant had waived his right to a bilingual hearing. Notwithstanding this determination, at the commencement of the hearing on August 23, 2016, with the assistance of a French/English interpreter, I confirmed to the Applicant that in my opinion he had a right to a

French language hearing. The Applicant indicated that he understood his rights, but that he was able to proceed with an English hearing and wanted to proceed. The Applicant was given the opportunity to determine how the French/English interpretation services were provided. The Applicant did not request simultaneous interpretation services, but requested from time to time that translations be provided. I received a letter from the Applicant on March 24, 2017 in which the Applicant stated that he no longer required a French/English interpreter. Consequently, no French/English interpreter was provided for the April 4, 2017 hearing. Arrangements were made for an interpreter to attend the April 5, and April 6, 2017 hearing.

The Applicant was given breaks upon request to support his participation in the arbitration process. He was given an opportunity to call witnesses to testify on his behalf. He confirmed on April 6, 2017 that he did not have any witnesses that he was going to call to testify. He confirmed that he understood that he had to prove that it was more likely than not that he was entitled to the non-earner benefit as claimed.

EVIDENCE AND ANALYSIS:

I accept and acknowledge that the Applicant is distressed about his health and that he attributes the issues with his health to the accident. This, however, is not the same as finding that the Applicant has provided sufficient, reliable, and persuasive evidence to establish that the Applicant is entitled to the non-earner benefit claimed.

The Applicant's Experience with Medical and Legal Professionals before and after the accident.

The Applicant provided information throughout the hearing that he was dissatisfied with many of the professionals that he interacted with before and after the accident. The dissatisfaction related to how the professionals treated him and/or what information was included or left out of certain reports. The Applicant specifically indicated that he was not satisfied with:

- the EMS service providers and police who attended the accident scene on November 11, 2009. The Applicant stated that EMS should have taken him directly to the Hospital.

The Applicant stated that the police should not have issued him a ticket for failure to control his car and that the police should not have abandoned him by the road without a car;

- the hospital where he attended for medical care on November 16, 2009, which according to the Applicant did not properly investigate his neck injury. It was the Applicant's position that his neck was broken in the accident, that the hospital should not have let the Applicant leave with a broken neck, and further that the hospital records which recorded that the Applicant has refused treatment from the EMS were inaccurate;[2]

- his chiropractor where he first sought treatment from April 6, 2010 to April 26, 2010. The Applicant stated that the chiropractor treated him with acupuncture, ultrasound, and did "some cracking" of his neck. The Applicant stated that he felt worse after the chiropractic treatment and not better;

- Dr. Chow, his family doctor from 1984 to 2011, including within the 104 week period after the accident, who stopped taking the Applicant's calls, and who according to the Applicant "dropped [him] as a patient";

- Dr. McLean, the Applicant's next family doctor. The Applicant stated that he got this doctor in 2012. Dr. McLean, filled out the OCF-3 dated October 29, 2013.[3] Section 5 of this form, was left blank. This is the section where the health practitioner is to list any injuries and sequelae that are the direct result of the car accident. The Applicant stated that he asked Dr. McLean to fill out this part of the form, but the doctor left this section blank.

- Dr. Adegbite, the Applicant's neurosurgeon who made the statements in his November 10, 2010 report[4] which the Applicant did not agree with (e.g. statement that the Applicant's upper extremity pain had resolved, that the Applicant only has discomfort on the right side of

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[2]Exhibit #2, Tab 18 p. 59

[3]Exhibit #1, Tab 3

[4]Exhibit #2, Tab 13, p. 4

his neck occasionally; that "[The surgeon was] very pleased with the [Applicant's progress] and that follow-up visits were not required.");

- Ric Thomson, the Applicant's paralegal representative for the period between May 2013 and August 17, 2015. The Applicant disagreed with statements his paralegal made in the May 24, 2013 letter to the Insurer.[5] The Applicant disagrees that he spoke with the Insurer in November 2009 as was indicated in the May 24, 2013 letter to the Insurance Company. The paralegal indicated that the Applicant spoke with his Insurance Broker and then with the Insurance representative after his attendance at the Elliot Lake hospital). Further, the Applicant was dissatisfied with his paralegal and stated that his paralegal quit representing him on August 17, 2015 so that the paralegal could thwart the Applicant's claim; and

- The Insurer, who the Applicant asserted had fabricated evidence regarding contact between the Applicant and the Insurer in November 2009[6] and whom the Applicant asserted had not done enough to investigate the accident and his claims.

Non-Earner Benefit - The Test:

The legislature has set a very high threshold for any applicant who seeks to prove that he or she is entitled to receive non-earner benefits. Numerous FSCO and Ontario Court decisions have commented on the strictness of this test.[7] In practical terms, it means that it is difficult to prove entitlement to this benefit.

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[5]Exhibit #1, Tab 9

[6]While I am not required to make a finding about the Applicant's assertion that the Insurer fabricated evidence, the assertion is serious. I find that it is more likely than not that the Insurer and the Applicant had contact in November 2009 as this was confirmed in the Applicant's prior paralegal's letter dated May 24, 2013, and because the Insurer's records contain detailed information which would not otherwise have been available to the Insurer.

[7]*Heath v. Economical Mutual Insurance Company* [2009] 95 O.R. (3d) 785 (Ontario Court of Appeal); *Morelli and Zurich Insurance Co.*, (FSCO A97-001997, January 14, 2000), *Nguyen and Economical Mutual Insurance Company* (FSCO A11-002508, August 28, 2013), affirmed on Appeal (FSCO P15-00029, May 15, 2015)

In this case, the Applicant must prove that it is more likely than not that: i) as a result of the accident, he suffered a *complete inability* to carry on a normal life within the two years following the accident (which is November 11, 2011)[8] and: ii) further that any impairment from the accident *continuously* prevented him from taking part in *substantially all* of the applicant's pre-accident activities.[9]

Evidence and Analysis:

The evidence introduced at the hearing included the Applicant's testimony and testimony from Ms. Justine Robertson who is an adjuster for Intact. For reasons unknown to the Applicant and to Intact, there are no clinical notes from the Applicant's family physician before the accident and in the two years after the accident. Moreover there are no clinical notes for Dr. McLean, the Applicant's next family physician, who began to care for the Applicant from 2012 and who completed the OCF-3 Disability Certificate almost four years after the accident on October 29, 2013. Dr. McLean has subsequently retired. The Applicant did not bring forward any corroborating lay or professional witnesses.

At the hearing, the Applicant was invited to describe his pre-accident health and activities, and his post-accident health and activities. The following is a summary of the Applicant's testimony pertaining to his health and activities before and after the accident:

Pre-Accident Activities:

At the time of the accident the Applicant was not working. He stated that he used to 'drive a lot', was involved in competitive sports, lifted heavy weights, was very physical, and that he could go to the grocery store and do some light dusting and vacuuming. The Applicant described himself as being "in perfect health" just before the accident, that he had no nerve damage before the accident, and that he was "on his way" to getting a job before the accident. The Applicant stated

[8] s. 12(1) of the *Schedule*

[9] s. 2(4) of the *Schedule*

that he had helped to install security alarms prior to the accident. The Applicant stated that in the period just before the accident he was not having problems with depression and that he had 'good relations with everyone' at the time of the accident.

Post-Accident Activities:

The Applicant stated that pain from his accident related injuries wears him down and that he is "reduced to one percent". He stated that he goes to the grocery store once a month and can only do five minutes of housekeeping before he has pain. He stated that he is depressed, does not go out with his children and his grandchildren, is withdrawn, and his relationship with his common-law wife has deteriorated.

The challenge with respect to the Applicant's testimony about his pre-accident health, is that it is undermined by significant inconsistencies with the available documentary evidence. The medical documentation contradicts the Applicant's testimony that he was in perfect health just before the accident. There is scant reliable evidence to corroborate what the Applicant describes as his pre-accident activities. All of this in turn makes it difficult to meet this strict and stringent test for entitlement. The accident occurred on November 11, 2009, in the seven years that have passed since the accident, memories can fade and perceptions about the consequences of the accident can change. I accept that by the time the hearing concluded, the Applicant's perception was that he had broken his neck in the accident and that in the two years after the accident and ongoing he had suffered a continuous and complete inability to carry on a normal life as a result of the accident. However, as will be shown, the medical and other documentation does not support a finding that the Applicant was in perfect health around the time of the accident as he claimed, or that he broke his neck in the accident, or that any resulting impairment(s) continuously prevented him from carrying on substantially all his pre-accident activities.

As stated above, the Applicant's health records are inconsistent with the Applicant's testimony about his pre-accident health. Eight months before the accident, Dr. Matthew, a neurologist, wrote to the Applicant's family doctor[10] and indicated that the Applicant had pain in his left

[10]Exhibit #2, Tab 14

trapezius muscle and pain going up the side of his neck which started "at least a couple of years ago" and that the Applicant's past medical history included depression. Seven months before the accident, the Applicant underwent a nerve connection study as he reported having "numbness" or "a feeling of falling asleep in his left arm". There is also an indication in the medical records that the Applicant had reported that his neck pain started two years before the accident.[11]

There are other records that the Applicant's health was not good before the accident. The Applicant's common law wife's ODSP file indicated that on July 31, 2008, the Applicant was in the ODSP office and that he stated that "[he] was unemployable". While the Applicant testified that he was not depressed in the period before the accident, the St. Joseph's Emergency report, taken five days after the accident, indicated that he had anxiety and depression and was on medication.[12] The Applicant's testimony about his pre-accident health is not supported by the medical and other documentation and I therefore find that he lacks credibility on this point. The Applicant's lack of credibility about his pre-accident health casts doubt on the Applicant's testimony about his pre-accident activities. Unfortunately, apart from the Applicant's testimony, there was no other document or contemporaneous evidence which corroborated his stated normal activities before and at the time of the accident.

Pre-accident and post-accident prescription summaries might provide a helpful reference point for any analysis of a marked and measurable change. However, this evidence was not provided by the Applicant. There was no plausible explanation provided for why there was no prescription summary for the time period material to this arbitration. I find that the Applicant is not credible regarding his pre-accident health as his testimony was undermined by the medical documentation. I find that it is more likely than not that the Applicant had ongoing issues with depression at the time of the accident. I find that it is more likely than not that the Applicant's issues with neck area pain and numbness in his left arm pre-dated the accident. These findings cast some doubt about the Applicant's testimony regarding his activities before the accident and in the two years after the accident. This doubt could have been mitigated by other reliable and/or

[11]Exhibit #2, Tab 20

[12]Exhibit #2, Tab 18, p. 59

persuasive evidence, but there was no such evidence to corroborate the Applicant's testimony. It is more likely than not that ongoing issues with depression and pain and numbness limited his pre-accident activities and that the Applicant has not been forthcoming with his testimony. When, as in the case here, the Applicant's pre-accident activities are not proven, it is very difficult to establish that the Applicant's post-accident activities are markedly and measurably different as a result of the accident.

Even if I were satisfied that as a result of the accident the Applicant suffered impairment(s) which prevented him from taking part in substantially all of his typical pre-accident activities, I am not satisfied that any such impairment(s) was continuous. In *Heath and Economical Mutual Insurance Company* [2009] 95 O.R. 3rd 785, the Ontario Court of Appeal stated that:

> It is not sufficient for a claimant to demonstrate that there were changes in his or her post-accident life. Rather, it is incumbent on a claimant to establish that those changes amounted to him or her being continuously prevented from engaging in substantially all of his pre-accident activities. The phrase "continuously prevents" means that a claimant must prove "disability or incapacity of the requisite nature, extent or degree which is and remains uninterrupted".

Despite the Applicant's testimony that his health problems and problems with daily activities were continuous in the two years following the accident, the medical documents suggest otherwise. While the Applicant asserted that his neck was broken in the accident on November 11, 2009, he only sought out medical treatment five days later when he attended at the hospital. The hospital records indicate that he had left neck pain and some bruising on the neck but doctors did not carry out any other investigations of his neck.[13] The records include the following notations: ø c-spine tenderness, ø raccoon eyes, ø battle signs – superficial abrasion [with] ecchymosis left neck, mild tenderness [left] jaw.[14] "ø" is a mathematical symbol used to represent an "empty set". In the medical context, I understand it to be a short form for the word "no". Therefore, I understand these notes to mean that the emergency medical professionals

[13]Exhibit #2, Tab 18 p. 59

[14]Exhibit #2, Tab 18 p. 58

found that there was no c-spine tenderness, no raccoon eyes, and no battle signs, and that the Applicant had a superficial abrasion with a bruise on his neck and had mild tenderness in his left jaw. The Applicant testified that he didn't seek further medical attention until five months later when he saw the chiropractor. In the intake form with that chiropractor, he indicated that he had a car accident six months earlier and that the seat belt bruised him and that the problem began two and a half years earlier.[15] This information does not suggest that the Applicant believed he was seriously injured in the accident. The Applicant stated that the chiropractor "cracked his neck" and after his visits to the chiropractor he felt worse not better, which suggests at the very least that his neck-related problems were worse after he saw the chiropractor. Medical tests done shortly after revealed that there was degeneration in the Applicant's neck. The CMLHealthcare report dated April 21, 2010[16] indicated that:

> There is evidence of disc degeneration at C6-C7.
>
> The intervertebral foramen on the left side is narrowed due to osteophyte formation.
>
> No other significant findings are identified.

The MRI of the applicant's neck done on May 4, 2010 found that "...there was severe disc thinning and a small left posterior lateral disc herniation that effaces the left intervertebral foramen."[17]

Overall, medical reports pre-dating the accident, emergency hospital records, as well as the self-reported information provided to the chiropractor, and the post-chiropractor treatment investigations, raise questions about whether the Applicant's neck-related issues are causally related to the accident.[18] When I consider the totality and reliability of the evidence before me,

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[15]Exhibit #2, Tab 20

[16]Exhibit #2 Tab 10 p. 13

[17]Exhibit #2, Tab 10, p. 14.
Note: This service date is noted as 04/05/10 which is May 4, 2010. Page 10 of same tab may be used as a reference.

[18]This was also questioned by Dr. Cisa in the June 20, 2014 report. Exhibit 2, Tab11, pp.16, 18

including issues with the reliability/credibility of the Applicant's testimony, I am not satisfied that the accident materially contributed to his impairments. This finding is made in the context of the finding of disc degeneration in his neck, the Applicant's pre-accident complaints of numbness on his left side, and in the context of the chiropractor's post accident "cracking" of the Applicant's neck, as well as the Applicant's underlying issues with depression.

Even if I found that the Applicant's impairment(s) were related to the accident, and I am not satisfied they are, it raises questions about when the impairment started, whether it was continuous in nature in preventing the Applicant from engaging in substantially all of his pre-accident activities. While an impairment does not have to occur immediately at the time of the accident or *absolutely* continuously prevent the Applicant from engaging in substantially all of his pre-accident activities, it does require that it is essentially continuous in nature.

On November 10, 2010 (one year after the accident) , the Applicant's neurosurgeon reported that the Applicant's upper extremity pain had "resolved" and that the Applicant only has discomfort on the right side of his neck "occasionally" and that no follow-up was required.[19] Apart from the investigations done in April 2010 and May 2010 up to the surgery done on August 26, 2010, the Applicant's other attendances at the hospital in the critical two-year post-accident period are not related to any accident-related impairment but rather to eye complaints. This suggests that for a continuous period of time of some duration that the Applicant's impairment arising out of his neck problems was substantially resolved. There was no medical record before me which was created within that two-year period which suggests otherwise.

As stated above, the clinical notes from the Applicant's family doctor who provided care prior to the accident and up to the two year mark after the accident were not available as evidence. The Applicant's next family doctor, Dr. McLean, who did not start treating the Applicant until more than two years after the accident, has subsequently retired. I am not satisfied that this family doctor had personal knowledge of whether any impairments arising from the accident injuries were essentially uninterrupted which is a requirement for the Applicant to be entitled to a non-earner benefit. There are reports in 2012 and onward about the Applicant's neck-related pain

[19]Exhibit #2, Tab 13, page 4

and depression, but without the doctors' clinical notes, or other corroborating evidence, it is not possible to determine what knowledge these doctors had about the Applicant's pre-accident health and pre-accident activities or about the Applicant's post- accident health and activities within two years after the accident. It is not possible to determine what information these doctors relied upon, how reliable the information was, or what their knowledge was regarding the stringent medical-legal test for non-earner benefits. Therefore I am not satisfied that their reports can be given much weight.

As noted above, prescription summaries can provide a helpful reference point, but no summary was provided for the time period up to and including two years after the accident. It is not appropriate to assume that all injured persons should act in a particular way. However, if the Applicant had suffered impairment(s) which prevented him continuously from participating in substantially all of his pre-accident activities, it is reasonable to anticipate that there would be more medical or other documentation recording or referencing his difficulties. Absent reliable and contemporaneous evidence to the contrary, I rely on the report provided by the Applicant's neurosurgeon issued on November 10, 2010 cited above, which indicated that one year after the accident, the Applicant's pain had resolved and that he only had discomfort in his neck "occasionally". I find that within the two years after the accident, any impairments suffered as a result of the accident were more than just briefly interrupted and were not continuous. Therefore the Applicant does not qualify for non-earner benefits.

CONCLUSION:

As stated above, the test for entitlement for a non-earner benefit is very strict. I want to emphasize that I acknowledge and accept that the Applicant is very distressed about the current state of his health. However, I am not satisfied that the Applicant has provided sufficient, persuasive and reliable evidence to establish that he is entitled to non-earner benefit and the application is therefore dismissed.

PROCEDURAL DECISION

The Insurer's Expert Witnesses:

At the conclusion of the Applicant's evidence, the Insurer confirmed that it was prepared to introduce its experts at this hearing. I made the procedural decision not to hear from them. As the Applicant had not been successful at proving that he was entitled to the non-earner benefit, requiring the Applicant to travel the distance from his home in Elliott Lake to attend further hearing days in Sudbury and potentially expose him to unnecessary increased expenses would be inappropriate and would demonstrate a lack of respect for the Applicant.

EXPENSES:

The parties did not address the issue of expenses. If required, they may request an expense hearing in accordance with the process set out in Rule 79 of the *Dispute Resolution Practice Code.*

Caroline King
Arbitrator

July 24, 2017
Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A15-009166

BETWEEN:

HERBY GRAVELINE

Applicant

and

INTACT INSURANCE COMPANY

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 *Ontario Regulation 664,* as amended, it is ordered that:

1. Mr. Graveline is not entitled to non-earner benefits.

2. Intact is not liable to pay Mr. Graveline a special award.

3. Intact is not liable to pay Mr. Graveline's expenses in respect of the arbitration.

4. Mr. Graveline is not entitled to interest as there is no overdue payment of benefits.

Caroline King
Arbitrator

July 24, 2017
Date