

the injury to be a “permanent serious impairment of an important, physical, mental or physiological function”.

[5] The interpretation of the phrase is to be guided by Sections 4.1, 4.2 and 4.3 of *Ontario Regulation 381/03* as amended.

[6] Briefly, Mr. Cami testified and his 2013 Income Tax Summary, the Employer’s Confirmation of Income form and a spreadsheet of his earnings from IBX Services (marked as Exhibits 8, 9 and 11 respectively) identified him as a warehouse manager with that employer at the time of the accident. Mr. Cami testified this was a physically demanding job involving restoration of properties damaged by flood or fire. The job involved emergency response and working outside regular business hours. The evidence at trial about how demanding the job was undermined by Mr. Cami’s pre-accident and health. Subsequent to coming to Canada in 2004, he had worked as a Roger’s cable technician installing cable until a heart attack in 2006. His employment in his native Albania previously was as a mechanic. He was off work following the heart attack until obtaining the IBX Services job commencing June 13, 2012. The family doctor had completed a form supporting his ongoing disability and being unemployable as a recently as February, 2011.

[7] The only witness that testified with knowledge of his duties at IBX Services was a co-worker who was only employed by IBX Services for the first two months of Mr. Cami’s employment. This witness was a fellow Albanian and the father of one of his trial counsel.

[8] It is clear Mr. Cami did not return to this job. He did return to work in August, 2014 with an aluminum railing company for one week but stopped because it was too difficult. He made a second attempt in April, 2015 but again testified being unable to continue. In 2017 Mr. Cami began working as a handyman and admitted as of August he was able to climb a ladder and work a full day. He was able to squat and to change a tire on a vehicle. He was able to use the jack and jack up the vehicle. He was able to do his personal care.

[9] Mr. Cami continued at this line of work until October 7, 2017 when he fell down the stairs at his home and suffered fractures to both legs, the right leg requiring open reduction and internal fixation. The subsequent neurological assessment in January, 2018 described ongoing right leg peroneal nerve damage.

[10] The *viva voce* medical evidence at trial for the plaintiff was from Dr. Steve Blitzer, a medical doctor with certification by the American and Canadian Academies for Pain Management. The defendants relied on the evidence of Dr. David Lipson, a physiatrist working at the Providence Clinic which has recently merged with Sunnybrook Hospital.

Analysis

[11] In my view, as suggested by the cases referred to by the parties, and particularly the reasons of Justice Firestone in *Malfara v. Vukojevic*, 2015 ONSC 78, the questions to be answered are:

- 1) has the injured person sustained permanent impairment of a physical, mental or psychological function?

- 2) if yes, has the function which is permanently impaired and an important one? and;
- 3) if yes, is the impairment of the important function serious?

[12] It is clear that permanent impairment, here of a physical function, must be considered to have started with the tortious act being the motor vehicle accident. It must continue to the time of trial and not be expected to substantially improve. It is also clear there need not be objective findings in this regard and chronic pain is a recognized condition which can meet the requirement of permanence for the purpose of the threshold. Mindful of the jury verdict, it is difficult to accept the evidence of Mr. Cami and Dr. Blitzer that the soft tissue injury from the motor vehicle accident of November 1, 2013 resulted in significant or substantial chronic pain in the right shoulder and low back on the right side. More precisely, and mindful of Mr. Cami's work as a handyman as of August 2017, to quote from section 4.2(1)i of *Ontario Regulation 381/03* as amended, the impairment from Mr. Cami's chronic pain did not "substantially interfere with person's ability to continue his or her regular or usual employment despite reasonable efforts to accommodate the person's impairment".

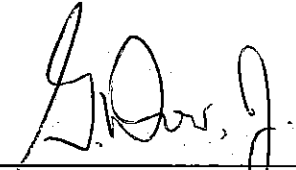
[13] Dr. Blitzer examined Mr. Cami on April 21, 2017 or 3.5 years after the accident. This was a sufficiently lengthy period of time to conclude the pain level would not suddenly or naturally subside. It was therefore indefinite.

[14] To the contrary, Dr. Lipson, who examined Mr. Cami on November 29, 2016, found Mr. Cami to be inconsistent in his both complaints and examination. Further, he found the medical records relating to Mr. Cami's pre-accident health to be inconsistent with Mr. Cami's complaints and examination. To that end, Dr. Lipson concluded Mr. Cami had suffered no more than soft tissue injuries that would normally have resolved in three months. Mr. Cami was not disabled from working. The motor vehicle accident had not caused a serious or permanent injury. This conclusion was reinforced by subsequent knowledge that Mr. Cami had returned to work as a handyman.

[15] I have the same concerns identified by Dr. Lipson and accepted by the jury. I conclude Mr. Cami has not sustained permanent impairment of a physical, mental or psychological function.

[16] As a result, it is not necessary to answer the second or third questions.

[17] I conclude the plaintiff has failed to discharge his onus of proof on a balance of probabilities that his claim for general damages surpasses the requisite verbal threshold and is thus dismissed.


Mr. Justice G. Dow

CITATION: Cami v. Shankar 2018 ONSC 3756
COURT FILE NO.: CV-14-51282
DATE: 20180704

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

BESNIK CAMI

Plaintiff

- and -

SHAKIL SHANKAR and SHIU NARAIU

Defendants

REASONS ON THRESHOLD MOTION

Mr. Justice G. Dow

Released: July 4, 2018