

BETWEEN:

BIBI MOHAMMAD

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

REASONS FOR DECISION

Before: David Evans

Heard: On the record by way of written submissions completed on February 18, 2020

Appearances: Mr. Naresh Misir, solicitor for Ms. Bibi Mohammad
Mr. Eric K. Grossman, solicitor for Allstate Insurance Company of Canada

Issues:

The Applicant, Ms. Bibi Mohammad, was injured in a motor vehicle accident on November 20, 2010 and sought accident benefits from Allstate Insurance Company of Canada (“Allstate”), payable under the *Schedule*.¹ Ms. Mohammad had a long history of medical problems, including debilitating rheumatoid arthritis (RA) and injuries arising from an earlier accident on March 30, 2009. Disputes arose as to Ms. Mohammad’s claims. The parties were unable to resolve their disputes through mediation, and Ms. Mohammad applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

This hearing on the record follows an earlier arbitration hearing before Arbitrator Smith, whose decision dated December 19, 2016 awarded some benefits to Ms. Mohammad and denied her others, as set out further below. Both parties appealed, and in a decision dated December 19, 2017, Delegate Rogers partially rescinded the Arbitrator's order and remitted the issues of whether Ms. Mohammad sustained a catastrophic impairment and was entitled to non-earner benefits (NEBs) for a re-hearing. The re-hearing was conducted on the record.

The issues in this re-hearing are:

1. Did Ms. Mohammad sustain a catastrophic impairment within the meaning of the *Schedule* as a result of the accident?
2. Is Ms. Mohammad entitled to receive a non-earner benefit from May 20, 2011 to date and ongoing, as a result of the accident?
3. Is Allstate liable to pay Ms. Mohammad's expenses in respect of the arbitration?
4. Is Ms. Mohammad liable to pay Allstate's expenses in respect of the arbitration?
5. Is Ms. Mohammad entitled to interest for the overdue payment of benefits?

Result:

1. Ms. Bibi Mohammad's claims are denied.

EVIDENCE AND ANALYSIS:

As noted above, this re-hearing follows earlier arbitration and appeal decisions. However, this is not a complete re-hearing but rather focuses on catastrophic impairment and non-earner benefits. Because the Arbitrator made certain findings of fact on other issues that are relevant to this case, I will first go through the earlier decisions to illustrate what is left to be decided.

The Arbitration proceeded on the basis that Ms. Mohammad met the test for catastrophic impairment, with the only issue being causation. The Appeal proceeded on the same basis. My understanding of the Delegate's order is that the same applies to this hearing, so the only issue is causation.

On that point, both adjudicators devoted a number of pages to causation. It is now settled law that in accident benefit cases, the only relevant test is the "but for" test. The material contribution test might be relevant in a very few cases, but the Delegate already held that this is not one of those, and I am bound by his decision. With respect to causation, Ms. Mohammad had significant impairments before the accident that included rheumatoid arthritis, back surgery, and injuries from a previous accident. Ms. Mohammad's impairments only meet the "but for" causation test if it was necessary to have both the pre-existing conditions and the accident for Ms. Mohammad's impairments to occur.

The issues before the Arbitrator that were later appealed were as follows:

- **Catastrophic Impairment:** Ms. Mohammad claimed that the accident caused her to sustain a marked impairment due to mental or behavioural disorder and she therefore met the definition of catastrophic impairment under s. 3(2)(f) of the *Schedule*.
- **Non-Earner Benefits:** Ms. Mohammad claimed that the accident caused a complete inability to carry on a normal life and she was therefore entitled to payment of NEBs from May 20, 2011 and ongoing.
- **Housekeeping:** Ms. Mohammad claimed that the accident caused an inability to engage in her pre-accident housekeeping and home maintenance activities and that she incurred expenses for replacement services. She claimed that she was therefore entitled to payment of HK for the 2 years following the accident.

- **Attendant Care Benefits:** Ms. Mohammad claimed that the accident caused an inability to engage in her self-care activities and that she incurred expenses for replacement services. She claimed that she was therefore entitled to payment of ACBs for the 2 years following the accident.

As described by the Arbitrator, on November 20, 2010, Ms. Mohammad was a passenger of an automobile being driven by her daughter, Alyssa. They were travelling through a strip plaza when another car reversed from a parking space into their vehicle. She later went to a hospital emergency department but left before seeing a doctor. On November 22, 2010, Ms. Mohammad visited her family physician, Dr. Tam. Ms. Mohammad complained of back pain, shoulder pain, knee pain and headaches. Dr. Tam prescribed Tylenol 2 and referred Ms. Mohammad for physiotherapy. A couple of days after the accident, Ms. Mohammad began a course of physiotherapy, massage and chiropractic treatment. The treatment continued for approximately six months.

The Arbitrator went on to note that Ms. Mohammad had a long-standing history of rheumatoid arthritis (“RA”) going back to the 1990s. As a result, she was approved for Canada Pension Plan disability benefits in 1995. She had returned to work for about two years until 2008. She was subsequently involved in a motor vehicle accident on March 30, 2009, which caused injury to her neck, lower back, and shoulder, as well as headaches.

Ms. Mohammad had two surgeries performed by Dr. Stephen Lewis because of the RA, a C1-C2 fusion of her neck vertebrae in July 2009 and a further procedure in November 2011.

The surgeries were an attempt to correct a condition described as basilar invagination, or the gradual protrusion of the bones at the base of the skull cap up into the skull. This condition was diagnosed when the Applicant was referred to Dr. Lewis in May 2009. Ms. Mohammad received physiotherapy treatment after the 2009 operation which continued until five days before the accident.

The Arbitrator set out the testimony of Ms. Mohammad, who stated she had started to recover by about seventy per cent before the second accident, was beginning to be more independent in her daily activities, and could drive short distances. She testified that the accident aggravated her previous injuries, that she could not sleep and was depressed, and that she could no longer perform activities such as going to the mosque. She testified that she needed attendant care from her daughter, Ms. Natasha Hall, and housekeeping services from her brother, Mr. Mohammad Yusuff.

The Arbitrator noted that Ms. Hall testified that she performed attendant care and housekeeping services for her mother and that her testimony generally supported her mother's evidence about the post-accident changes. However, with respect to the attendant care claims, she acknowledged that she did not keep any records of the time she spent, could not provide a breakdown of the specific tasks she completed, and claimed the same amounts even during periods when she herself was in the hospital. Further, she never provided any proof of economic loss to Allstate.

The Arbitrator ultimately dismissed Ms. Mohammad's attendant care claim because she failed to prove Ms. Hall sustained an economic loss as a result of providing services, as required by s. 3(7)(e)(iii)(b) of the *Schedule*. The Delegate upheld the Arbitrator on this point.

The Arbitrator set out the testimony of Mr. Mohammad Yusuff, Ms. Mohammad's brother, who claimed to have provided housekeeping services. With respect to his sister's condition, Mr. Yusuff testified that he saw her quite frequently and found she was not the same after the first accident in March 2009. While he testified he did notice a change in her after the second accident, in cross-examination he explained that "after the first accident she was, ah tried to recover a little bit. But hasn't that much to recover."[sic]

The Arbitrator dismissed the housekeeping claim because he found that Mr. Yusuff did not provide any services "given the lack of substantiating evidence." The Delegate found he was entitled to do so.

I have provided the factual findings with respect to the claims by these two witnesses, as they have a direct bearing on the issues before me, as will be shown.

The issues of catastrophic impairment and NEBs are before me because the Delegate found the Arbitrator made contradictory findings regarding these two issues.

With respect to catastrophic impairment, as noted above, the case proceeded on the assumption that Ms. Mohammad was catastrophically impaired, leaving only causation at issue.

The Arbitrator largely relied on the evidence of Dr. Stephen Lewis, Ms. Mohammad's treating orthopedic surgeon who had performed the surgeries mentioned above, to establish causation. Dr. Lewis had testified about various MRIs taken before and after the subject accident. Dr. Lewis testified that these MRIs showed that the upper neck was stabilized after the first surgery to fuse the C1-C2 neck vertebrae, but MRIs taken after the accident showed a further degeneration leading to the further procedure. The Arbitrator concluded that the further impairments to Ms. Mohammad's neck were not due to continued degeneration from the RA but rather due to the accident.

However, the Arbitrator rejected the NEB claim on the basis that there was almost no evidence to support it. He stated that the occupational therapists who gave evidence on Ms. Mohammad's behalf mistakenly used the 2009 accident as their baselines. He did not find the evidence of Ms. Hall or Mr. Yusuff particularly helpful in determining how Ms. Mohammad's activities that she identified as being important to her pre-accident life were affected by the accident.

On appeal, the Delegate found the Arbitrator made mutually contradictory findings. As discussed by the Delegate, the Arbitrator decided that the accident caused Ms. Mohammad to sustain a catastrophic impairment due to mental or behavioural disorder. That assessment is carried out by reference to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the *Guides*). Chapter 14 of the *Guides* sets out a three-stage process for evaluating catastrophic impairment based on mental disorder using four categories of functional limitation and five levels of dysfunction.

The levels of dysfunction range from no impairment to extreme impairment. A marked impairment is defined as an impairment that significantly impedes useful functioning. The categories of function to be assessed are Activities of daily living, Social functioning, Concentration, persistence and pace, and Deterioration or decompensation in work or work-like settings. The Arbitrator therefore found that the accident significantly impeded Ms. Mohammad's useful functioning in these areas.

The Delegate went on to note that to be entitled to NEBs, Ms. Mohammad had to prove that the accident caused her to suffer a complete inability to carry on a normal life. To meet that test, she had to prove that her accident-related impairments continuously prevented her from engaging in substantially all of the activities in which she engaged before the accident. The analysis required a comparison of Ms. Mohammad's ability to function before the accident and after the accident. However, when it came to deciding whether Ms. Mohammad was entitled to NEBs, the Arbitrator ruled that there was almost no evidence to support that claim, and he denied it.

However, the Delegate found it was not accurate to say that there was "almost no evidence" about how the accident affected Ms. Mohammad's post-accident ability to function. Further, the parties agreed that the Arbitrator's statement that the occupational therapists did not use the right baseline was inaccurate. The Delegate found it was not possible to know whether the Arbitrator concluded that the accident significantly impeded Ms. Mohammad's ability to function, or that she failed to prove that it did. He therefore allowed Allstate's appeal regarding the catastrophic impairment determination and Ms. Mohammad's regarding the denial of NEBs.

This leads to the current re-hearing. However, with respect to the NEBS, the issue with which I will start, I find that in fact there is indeed little evidence to support this claim. First, I find neither Mr. Yussuf nor Ms. Hall credible witnesses in general. It has been found as a fact that Mr. Yussuf never provided the claimed housekeeping services. Further, Ms. Hall's testimony regarding the claimed attendant care services was unreliable as well, and I note in particular she made claims for services provided during periods when she was herself in the hospital. While it is true that witnesses may be found not to be credible in one area but credible in another, in this case their evidence spoke directly to the claimed changes in Ms. Mohammad's activities.

The one area I do find Mr. Yussuf credible is his testimony that, in effect, he could see no difference in his sister before and after the second accident. I find this credible because it goes against his sister's interest.

As for the occupational therapists, their conclusions relied on accurate input from parties such as Ms. Hall.

I am also not persuaded that the subject accident caused the further deterioration leading to the second, debilitating surgery. Ms. Mohammad saw Dr. Lewis on December 6, 2010, so just after the subject accident, but she did not mention it to him. Further, his report of that date suggesting the further surgery was based on a CT scan taken July 5, 2010, so well before the accident. As for his evidence at the hearing, Dr. Lewis was never asked if, nor did he ever opine that, the accident contributed to the deteriorating condition of Ms. Mohammad's spine. Rather, he testified that the further disease he identified after the accident was degenerative.

I am further not persuaded that Ms. Mohammad's condition was improving just before the second accident. The medical evidence suggests the complete opposite. The records show that in the period before the second accident, Ms. Mohammad was still complaining of pain and stiffness in her neck even after the first surgery, pain that limited her household chores, difficulty sleeping, restricted range of motion in all directions, significant hand and elbow deformities due to her rheumatoid arthritis, headaches, numbness in the back of her head, back pain related to the March 30, 2009 accident, and shoulder, arm and elbow pain. These complaints continued until days before the second accident.

I am also not persuaded that the subject accident affected Ms. Mohammad's function after the accident. On several occasions she did not even mention her accident to practitioners, such as at her first visit with Dr. Lewis after the accident, and her complaints continued to be the same as before the accident. For instance, shortly after the accident, Ms. Mohammad made a further CPP disability claim, but did not mention the accident. There is even a handwritten letter by her dated December 1, 1994, that details many of the same problems. She also did not mention the 2010 accident to Dr. John J. Acker, who prepared a report on her behalf for CPP Disability.

On February 3, 2011, Ms. Mohammad saw Dr. Shelly M. Dunne, but only reported the March 30, 2009 accident to her. On July 29, 2013, Ms. Mohammad was assessed by Dr. Myra Sourkes, where again she failed to mention the November 20, 2010 accident, but instead related her ongoing pain and worsening arthritis to the March 30, 2009 accident.

Accordingly, I find that it was not necessary for the accident, in combination with the pre-existing conditions, for Ms. Mohammad's impairments to occur, and therefore I find that the "but for" test is not met. Ms. Mohammad has therefore failed to prove that the accident caused her to suffer a complete inability to carry on a normal life. Her claim for NEBs is therefore denied.

Further to the order of the Delegate, it follows that her claim to be catastrophically impaired is also denied, on the same grounds laid out above.

Ms. Mohammad's claims are therefore denied.

EXPENSES:

There will be no time to determine expenses in accordance with Rule 79.1 of the *Dispute Resolution Practice Code*. On July 1, 2020, s. 20(6) of O. Reg. 664 comes into effect, which provides that where an order has previously been issued but costs have not been determined, either party may apply to the Licence Appeal Tribunal under section 280 of the Act on or before December 1, 2020 to decide that outstanding issue.



David Evans
Arbitrator

May 28, 2020
Date



A13-006712

BETWEEN:

BIBI MOHAMMAD

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

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 Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. Ms. Bibi Mohammad's claims are denied.

Handwritten signature of David Evans in black ink.

David Evans
Arbitrator

May 28, 2020

Date