



FSCO A08-001275

BETWEEN:

Mrs. S

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: William J. Renahan

Heard: November 2,3,4 and 5, 2009, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Michael Rubin for Mrs. S
Nicholaus de Koning for Economical Mutual Insurance Company

Issues:

The Applicant, Mrs. S, was injured in a motor vehicle accident on November 22, 2006. She applied for and received statutory accident benefits from Economical Mutual Insurance Company, payable under the *Schedule*.¹ Economical paid for certain assessments and treatment but refused to pay weekly income replacement benefits and housekeeping expenses. Among other things, Economical was not satisfied that Mrs. S had worked in the three months prior to the accident as she claimed. The parties were unable to resolve their disputes through mediation, and Mrs. S 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.

The issues in this hearing are:

1. Is Mrs. S entitled to income replacement benefits pursuant to section 4 of the *Schedule* from November 29, 2006, and if so, in what amount?
2. Is Mrs. S entitled to housekeeping expenses pursuant to section 22 of the *Schedule*, and if so, in what amount?
3. Is Mrs. S entitled to a special award pursuant to section 282(10) of the *Insurance Act*?
4. Is either party entitled to expenses of the arbitration proceeding pursuant to section 282(11) of the *Insurance Act*?

Result:

1. Mrs. S is not entitled to income replacement benefits.
2. Mrs. S is not entitled to housekeeping expenses.
3. Mrs. S is not entitled to a special award.
4. The issue of expenses of the arbitration proceeding is deferred.

EVIDENCE AND ANALYSIS:

Background:

At the time of the accident, Mrs. S was 44 years old. She lived with two of her four children. They were 19 and 17 years old. They shared a two bedroom apartment with another family. Mrs. S separated from her husband shortly after arriving in Canada in 1993.

The accident occurred on November 22, 2006 when Mrs. S and one of her daughters were in a vehicle driven on the highway by Mrs. S's husband. The vehicle struck the rear end of another vehicle when it suddenly stopped. She struck her right arm, shoulder and the right side of her head against the interior of the vehicle. Mr. S reported at a collision reporting centre that neither he nor his passengers were injured. The damage to the vehicle was repaired at a cost of \$1,511. Mrs. S claims that her current limitations are that she cannot move her arms freely, cannot sit for long periods and that she cannot get out of bed without crawling first.

INCOME REPLACEMENT BENEFITS:

Overview:

Mrs. S claimed that she obtained employment and started to work as a kitchen helper in a restaurant the first week of September 2006 and worked until the time of the accident three months later. Economical was not satisfied that Mrs. S was employed. By itself, the documentary evidence I saw did not establish employment. In determining the issue of whether Mrs. S was employed at the time of the accident, I consider the plausibility of this claim having regard to her financial and medical history and the circumstances of the job itself.

Financial and medical history:

Except for a few weeks in 2001 and a few weeks in 2003, when Mrs. S did factory work through a temporary employment agency, Mrs. S has not worked. Her family doctor, Dr. A. Lam, has supported Mrs. S's application for social assistance since she fell and injured her back in 2004. In July 2005, he certified that Mrs. S could not participate in an employment/school related program due to sciatica and lower back pain. In February 2006, a CT scan of the lumbar spine revealed two small disc herniations. Dr. Lam referred Mrs. S to an orthopaedic surgeon and surgery was scheduled but cancelled because Mrs. S responded to medication and therapy. In June 2006, three months before Mrs. S started work, Dr. Lam certified to social assistance that Mrs. S was limited in her ability to participate in activities of daily living with respect to heavy lifting, bending and energy/stamina. Mrs. S told her social worker that she could not work.

Mrs. S also had a history of endometrial thickening. On August 30, 2006, a few days before she started work, she filled out a hospital questionnaire with respect to upcoming day surgery to investigate that condition. The nurse noted that Mrs. S had medium to severe lower back and right leg pain which was brought on by certain movements like bending and which was relieved by Ibuprofen and Tylenol 3.

Circumstances surrounding the restaurant employment:

Mrs. S learned of the job opening through a friend named "Kumar." She did not know if that was his first or last name. She had decided to look for employment because her social assistance was insufficient. Her social assistance in 2006 had decreased \$816 to \$11,156 from \$11,972 in 2005. She was hired by "Sam," owner of a restaurant called the Eatery Sports Bar. She did not know his last name. She described her duties as dishwashing, chopping vegetables and fruit, pushing a trolley loaded with dishes and sometimes making salad. She started the first week of September 2006. Mrs. S's daughter testified that she did not know how her mother got the job.

Mrs. S's income and hours of work is variously described. She testified that her gross income was \$625 per week and after deductions she made about \$500 per week and that she was paid in cash. In February 2007, she obtained two pay slips from Sam which showed that for each of eleven weeks she was paid \$625 gross and \$484.90 net. She testified that she usually worked eight hours and sometimes nine hours a day and usually five and sometimes six days a week. In her Application for Accident Benefits she wrote that she worked 55 to 60 hours per week and earned gross income of approximately \$21,100 per year. She testified that she was paid about \$12 per hour. At an examination under oath she said she was paid \$8.75 per hour. She told a psychologist that she earned \$10.50 per hour. She asked for, but never received an income tax T-4 slip. In his Employer's Confirmation of Income, Sam Chella wrote that Mrs. S earned \$625 per week. At the examination under oath, she said that she started at 8 a.m. and finish around 4:00 or 4:30 p.m.

Mrs. S testified that she started work the first week of September 2006. In the spring and summer of 2006 she was assessed for significantly increased thickening of the endometrial lining and

stress incontinence. At the end of August 2006 she attended hospital on two occasions in preparation for an operative hysteroscopy and dilation and curettage. On September 1, 2006, Dr. Lam reported that Mrs. S was stressed, anxious and suffering insomnia in anticipation of the upcoming dilation and curettage. On September 14, 2006, she underwent day surgery. She underwent an operation described as an operative hysteroscopy and dilation and curettage.

Betty Smith is an investigator for Economical and testified. On September 7, 2006, before Mrs. S made her claim for accident benefits, Ms. Smith visited the All Star Eatery to investigate a claim by another unrelated insured that he was employed by the All Star Eatery. Ms. Smith was there for 20 to 30 minutes around 1:00 p.m. and spoke with a man by the name of Sam Luxmikanthan. He was the only person she saw on the premises and he said that he was the only person there. Sam produced an income tax T-4 slip in connection with the other insured. When Ms. Smith left, another man arrived at the restaurant who joined Sam.

Ms. Smith did a corporate search which revealed that the owner of the business was Shamuganathan Chelliah. The Confirmation of Income for Mrs. S was signed by Sam Chella. Ms. Smith phoned the contact number on the Confirmation of Income several times and had difficulty reaching the employer. Ms. Smith went back to the restaurant on March 14, 2007 and found that the business was closed. The convenience store owner next door said that the restaurant had no customers.

On August 1, 2007, Ms. Smith spoke to Sam on the telephone and he said that Mrs. S was an assistant cook and that he had eight employees. Ms. Smith arranged to meet Sam again on August 8, but when she called to confirm the appointment, no one answered the phone.

Analysis:

Dr. Romeo Vitelli is a psychologist who assessed Mrs. S. He found that her intellectual abilities fell in the deficient range, much below the 5th percentile. He found that she had very poor reasoning, analytical and problem solving skills. He found that she was slow, depressed and

pain-focused. I consider whether the implausible evidence I heard was due to Mrs. S's low intellect or because she made up the story of her employment.

I find the following particular evidence implausible:

- that she was looking for work because of the decrease in social assistance when her social assistance changed very little;
- that she was looking for work after a long period of unemployment when she was just about to have an operation which she was worried about;
- the lack of details of how she got the job through a friend she did not describe, with an employer that she could barely describe;
- an inconsistent hourly rate;
- the lack of details describing her work;
- that she was working and earning \$625 per week at a small restaurant which had no customers; and
- that she was not at the restaurant the day the investigator was there investigating another claim.

Individually, I might explain parts of the implausible evidence by Mrs. S's poor intellect, but collectively, the evidence was not believable. I find that Mrs. S made up the story and that her intellect is such that she does not recognize that her story makes no sense.

HOUSEKEEPING EXPENSES:

Mrs. S, her daughter and her daughter's friend testified with respect to the housekeeping claim. Mrs. S and two of her children shared a two bedroom apartment with another family.

Mrs. S, the daughter and the housekeeper testified that the day after the accident, the daughter asked her friend to perform housekeeping tasks for her mother. The daughter testified that she

and her teenaged brother were too busy with school to help with housekeeping. Mrs. S agreed to pay the housekeeper \$10 per hour.

Mrs. S testified that at first her pain was moderate and that it became worse after time which prompted her to see her family doctor three weeks after the accident. The housekeeper testified that at first, Mrs. S was in bed for about a month and that she helped her get to the washroom.

In March 2007, Mrs. S submitted housekeeping expense forms to Economical. For the first four months she claimed that the housekeeper provided services one or two hours a day for every day but one. The daughter testified that the housekeeper came about five days a week, sometimes more. In 2008, Mrs. S and her daughter and son moved into the housekeeper's two bedroom apartment which they now share with the housekeeper and her husband. The housekeeper continues to perform all the housekeeping tasks.

All three testified that the housekeeper keeps a diary which from the day following the accident to today, outlines the tasks she performed every day and which Mrs. S and the housekeeper sign every day. The day she testified, the daughter offered to bring the diary to the hearing the next day. The hearing adjourned that day at 1:00 p.m. as the next witness was not scheduled until the following morning. Mrs. S, the daughter and the housekeeper went home to find the diary but they were unable to locate it.

The evidence concerning the housekeeping claim is inconsistent and lacks any believable detail. Mrs. S is not entitled to any housekeeping expenses.

INSURER'S CONDUCT:

Mrs. S claims that she is entitled to benefits because Economical failed to comply with time limits set out in the *Schedule*.

The report filed at the collision reporting centre indicated that no one was injured in the accident of November 22, 2006. Economical first learned of any potential claim for accident benefits on

March 12, 2007 when it received an Application for Approval of an In-Home Assessment, which it approved. Under section 32(2) of the *Schedule*, the insurer is obliged to promptly provide the insured with certain information. On April 5, 2007, it advised Mrs. S who her contact person was and provided a description of available benefits.

Economical received Mrs. S's Application for Statutory Accident Benefits on April 5, 2007. Pursuant to section 32(6) it could delay determining whether a person was entitled to benefits for 45 days, or in this case, until May 21, 2007. Where the insurer makes a request for further information pursuant to section 33 of the *Schedule*, the 45-day period is extended to ten business days after the person complies with the request. On June 2, 2007, Economical advised Mrs. S that it was setting up medical examinations to determine her eligibility for income replacement benefits and housekeeping expenses. On June 7, 2007, it advised Mrs. S's counsel that it required the employer's file pursuant to section 33 of the *Schedule*.

Economical admits that it missed the section 32(6) deadline by about 15 days.

Economical referred me to the Superior Court of Justice case *Gray v. Pilot Insurance Company*.² In that case, the insurer failed to respond to the insured's Application for Determination of Catastrophic Impairment within the legislated 30-day time period. Lederman, J.: wrote:

The SABS is silent as to the consequences of missing the timelines set out therein. The SABS imposes no sanctions for failure to meet the timelines. There is nothing in the Schedule to suggest that failure to adhere to the 30 day period, for example, results in a claimant being deemed to be catastrophically impaired.

Timelines are important for the purpose to ensure that claims are dealt with expeditiously.

Errors, however, will inevitably occur. Whether they amount to mere procedural irregularities which should be relieved against, or matters of substance, must depend on the circumstances of each case.

² 39 C.C.L.I. (4th) 223, QL at para.'s 34-36 (Ont. S.C.J.)

I agree and would add that the remedy that is authorized by statute where the insurer's conduct is unreasonable is a special award.

This is not a case, such as *Kong and Personal*³, where the insurer had determined that the insured was entitled to benefits and then improperly terminated them without giving the insured her right to elect an assessment at a Designated Assessment Centre. In this case, the insurer never made a determination that Mrs. S was entitled to benefits and Mrs. S never suffered any prejudice.

I find that the one month it took for Economical to advise Mrs. S of the benefits as it was required to do under section 32 of the *Schedule* and the 15 day delay in responding to Mrs. S's application were procedural irregularities which did not prejudice Mrs. S and which are not grounds for awarding her income replacement or housekeeping benefits.

EXPENSES:

If the parties cannot resolve the issue of entitlement to expenses of the arbitration hearing, the party requesting expenses may make written submissions to me within 30 days. The other party will have 15 days to serve and file a response. If the parties cannot resolve the issue of amount, they may make written submissions after complying with rule 79.2 of the *Dispute Resolution Practice Code*.

William J. Renahan
Arbitrator

February 12, 2010

Date

³ *Kong and Personal Insurance Company of Canada*, (FSCO A04-001188, July 21, 2005)

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



FSCO A08-001275

BETWEEN:

Mrs. S

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and

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Insurer

ARBITRATION ORDER

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

1. The Application for Arbitration is dismissed.
2. The issues of entitlement to and amount of expenses of the arbitration proceeding are deferred.

William J. Renahan
Arbitrator

February 12, 2010

Date