

1993 CarswellOnt 5058  
Ontario Insurance Commission

Banerjee v. Royal Insurance Co. of Canada

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**Anil Banerjee, Applicant and Royal Insurance Company of Canada, Insurer**

Rotter Sr. Arb.

Heard: July 14, 1992

Judgment: February 11, 1993

Docket: A-000591

Counsel: Anil Banerjee in person  
N. Kostyniuk, for Insurer

Subject: Insurance

**Rotter Sr. Arb.:**

**Issues:**

1 The Applicant, Anil Banerjee was injured in a motor vehicle accident on January 28, 1991. He applied for and received accident benefits payable under Ontario Regulation 672 (the "*No-Fault Benefits Schedule*"), under the Ontario *Insurance Act*, R.S.O. 1990, c. I.8. Every motor vehicle policy provides for the no-fault benefits set out in the *No-Fault Benefits Schedule*.

2 The Applicant received weekly income benefits under the policy until July 7, 1991. He disputed the termination of his benefits, and claimed that he should have received benefits until April 1, 1992.

3 The Applicant applied for mediation of his dispute with the Insurer. The mediation was unsuccessful, and the Applicant subsequently applied for the appointment of an arbitrator.

4 The issue to be determined at the arbitration hearing was:

(1) Was the Applicant entitled to weekly income benefits for the period from July 8, 1991 to April 1, 1992?

5 The Applicant also claimed interest on any outstanding amounts and his expenses of the hearing.

**Result:**

6 The decision is:

1. The Applicant is not entitled to weekly income benefits subsequent to July 7, 1991.

**Hearing:**

7 A hearing was held at Rexdale, Ontario, on July 14, 1992, before me, Frederika Rotter, Senior Arbitrator.

**Present at the hearing were:**

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Applicant:	Anil Banerjee
Insurer's	N. Kostyniuk
Representative:	Barrister & Solicitor
Witnesses:	Dr. Michael C. Hall Dr. M.S. Ahluwalia

***Documents before the Arbitrator:***

- 9 Application for appointment of an arbitration in Form 4, filed March 6, 1992
- 10 Response in Form 5, dated March 25, 1992
- 11 Report of Mediator, dated February 25, 1992

***Exhibits:***

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Exhibit 1: Insurer's Medical Brief, prepared by Royal Insurance

Exhibit 2: Report of Dr. Karl Massiah, Orthopaedic Surgeon

Exhibit 3: Note from City of Etobicoke

Exhibit 4: Car Damage Assessment, Invoice and Photos

Exhibit 5: Surveillance report and photographs

**Evidence:**

***Evidence of the Applicant:***

13 The Applicant, Anil Banerjee, testified that he was educated in England, where he completed his training as a metallurgical engineer. He worked as a metallurgical engineer in England and also did some management work. He emigrated to Canada in 1972. He pursued his studies in Canada, including quality control, at Ryerson Polytechnical, and feasibility studies and training in administrative law at the University of Toronto.

14 The Applicant testified that he worked as a corporate quality-control manager at ITT, and subsequently worked at American Sterilizer as a corporate manager, and at Associated Tubes in Markham, as a manager.

15 The Applicant was most recently self-employed as a freelance consultant for a number of different industries. He worked on various joint collaborations, and has travelled to India, the Middle East and England in connection with his work. The Applicant testified that for some jobs he must check furnaces and machine shops to analyze their problems. He has also done work on employment equity and race relations issues. He testified that all of his work is arduous, and he is required to be mobile.

16 The Applicant confirmed that he owned a car and could drive. However, he often used to take public transit for his work, since driving a car can be much more expensive than taking public transit. He would not normally take his car downtown, although he would take the car when it was convenient and for driving around Rexdale, his home community.

17 The Applicant testified that, in order to do his essential tasks, he had to be able to sit for significant periods, to travel, and to walk. In 1990, prior to the accident, he was developing his business by doing market research, meeting

with people, inspecting plants and production, and sometimes inspecting machines. He had to be able to move around freely, although he did not have to lift.

18 The Applicant testified that, in addition to his work, he was involved in community affairs. At the hearing, the Applicant showed various letters of appreciation for his community services, and submitted Exhibit 3 as an example of such a letter.

19 The Applicant was questioned about his voluntary community activities. He testified that his work with the Etobicoke Committee involved just a few meetings, which he was able to attend between January and July 1991. However, the attendance at meetings was not a strenuous activity or similar to the work that he had to do to earn a living. His attendance at meetings was voluntary. The Applicant testified that he was able to attend meetings even though he was walking with a cane. He testified that he usually did not drive himself; either his wife or his neighbour would drive him.

20 The Applicant confirmed that he is married and that his wife works as a Canada Customs officer. Before the accident, he used to work around the home; he used to jog, garden and swim. He stated that, for the year after the accident, he did none of these activities.

21 The Applicant does not remember suffering significant back or neck pain before the accident. In the years before the accident, he saw Dr. R. Harrison, his family doctor, for the usual colds and flus. Dr. Ahluwalia had been his family doctor until he moved.

22 The Applicant described the accident. He testified that he was driving down Martingrove Road at around 7:30 in the morning of January 28, 1991. He was stopped between Rexdale Avenue and Bethridge Road waiting while the car in front of him completed a left turn. The car behind him bumped into him with quite an impact.

23 The Applicant did not call the police, although he exchanged telephone numbers and license plate numbers with the person who hit him. His car sustained more than \$1,200.00 worth of damage.

24 The Applicant testified that at the time of the impact he felt some slight pain; however, he did not realize right away that the accident was serious.

25 The Applicant saw his doctor and reported the accident the same afternoon. After one day, he started to feel pain in his neck and spine, in his back and in his knee. At first the pain was not very severe. However, two or three days later, he began to feel worse. At that point he consulted his doctor again and medications were prescribed for him. As well, he was advised to do a hot water treatment at home.

26 Within two weeks, the Applicant found that he could not move or sleep properly. He was feeling considerable discomfort and had problems negotiating stairs. His family physician, Dr. Harrison, advised him to take it easy and not to drive. The Applicant accordingly avoided driving where possible. He testified that he stopped travelling on the subway because one day, while riding on the subway, he felt very sick. Dr. Harrison sent him for physiotherapy.

27 The Applicant testified that his condition persisted for more than one year. At times, he tried to exert himself, but whenever he tried, especially in winter, he felt worse the next day. After two days of exertion, he would be disabled for six or seven days. The Applicant testified that his disability persisted from January 1991 until April 1992, and that he was "very crippled" throughout this period.

28 The Applicant testified that he was walking with a cane throughout the latter part of the winter of 1992. He mostly stayed home, reading, writing and watching television. The Applicant's wife and his son did the shopping and the groceries. He only started going out in April 1992 to do shopping and similar errands.

29 To keep busy, the Applicant stated that he worked on articles on various subjects such as multiculturalism, or quality control. However, he could not do full-time writing because he was in too much pain to go to the reference library.

Although he has earned money from writing articles, during the period of his disability, he did not do any writing that earned him money.

30 The Applicant testified that the Insurer sent him to see Dr. Hall on May 30, 1991. Dr. Hall examined him and advised him to be careful about his right side.

31 The Applicant testified that his family doctor, Dr. Harrison, had an accident himself and was away from February 1992 until June 1992. The Applicant therefore saw Dr. Ahluwalia instead of Dr. Harrison during this period. Dr. Ahluwalia referred him to Dr. Massiah, an orthopaedic specialist.

32 Dr. Massiah examined the Applicant on May 14, 1992, and prescribed medications and cervical traction. Dr. Massiah also advised the Applicant to do exercises. The Applicant was walking with a cane when he first saw Dr. Massiah. He testified that the therapy prescribed by Dr. Massiah helped him a great deal.

33 The Applicant testified that his biggest problem after the accident was with his neck. The discomfort prevented him from sleeping. His condition improved gradually after Dr. Massiah started treating him. With therapy and medication, he is currently quite well.

34 The Applicant testified that he was feeling better from April 1992 on and he returned to his full-time work at the end of May or the beginning of June 1992. He reiterated that he was disabled from resuming his work or recreational activities from January 1991 until April 1992, and stated "I was half dead almost."

35 The Applicant was questioned about what was described as his congenital right leg deformity. He responded that he has had some trouble with both legs because he is bow-legged. Sometimes he used to feel pain in his legs from jogging or too much exertion. However, he does not remember seeing a doctor for this condition.

36 The Applicant testified that his prior problems with his right leg never interfered with his mobility, and he was always fit. He sometimes would feel pain after a long tour, when his legs were tired.

37 The Applicant confirmed that he had a second car accident, of which he advised the Insurer, on March 12, 1992. Someone hit him from the rear while he was driving. His wife was in the car with him at the time.

**Insurer's Evidence:**

***Evidence of Dr. Ahluwalia:***

38 The Applicant's former family physician, Dr. N.S. Ahluwalia, is a medical doctor licensed to practice in Ontario. He first saw the Applicant in September 1979. He saw him quite frequently after that, until the Applicant moved.

39 The doctor testified that the Applicant had problems with his knees dating back to March 1981. He complained of pain in his left knee from jogging and playing badminton. The doctor confirmed that the Applicant suffers from a congenital deformity in his legs, which he described as "bow-legs." He testified that this condition puts pressure on the knee and eventually would cause osteoarthritis.

40 The doctor reviewed his notes of the Applicant's office visits from 1979 onwards. He confirmed that in September 1983 the Applicant complained of pain in his right knee following a football game. At that time, the doctor observed some swelling, but this condition was "nothing new". An x-ray of the right knee, taken at that time, showed some osteoarthritis.

41 In August 1986, the Applicant complained of occasional morning headaches. He complained of headaches again in June 1989. The doctor confirmed that a note of an office visit in December 1989 indicated "still painful knee...gave medication."

42 On August 6, 1991, the doctor saw the Applicant for a throat complaint. At that time, he did not mention the accident of January 1991.

43 Two days later, on August 8, 1991, the Applicant attended for a complete physical examination. The physician testified that he examined the Applicant and took a full history. The Applicant reported that he was taking Tylenol as necessary for his headaches. He did not complain of neck problems. The physician testified that he questioned the Applicant about recent problems, including any trauma, operations or accidents, and the Applicant reported nothing.

44 The physician testified that in February 1992 the Applicant complained of pain in his knees and back. He was limping at that time, something which the doctor testified he had not seen the Applicant do previously. The Applicant then advised the doctor that he had been hit by a car the year before. The Applicant indicated that his back problem was connected to the accident, but not the problem with his knees.

45 The doctor testified that he thought the Applicant's complaints were probably not related to the car accident, because he had not mentioned the accident in August 1991. However, he confirmed that it is possible that a back problem resulting from an accident can flare up, and it is possible that the Applicant experienced good and bad days.

46 The doctor confirmed that in February 1992 the Applicant did not complain of neck pain. The Applicant complained of painful knees until March 1992 and, at that time, the doctor arranged a consultation with Dr. Massiah.

47 The doctor testified that, when he next saw the Applicant in April 1992, the Applicant complained of neck and back pain which, he claimed, resulted from the accident of 1991. He did not mention the more recent accident of March 1992. It was the doctor's view that the Applicant's pain was probably related to the more recent accident. The doctor testified that he prescribed medications such as muscle relaxants and analgesics.

48 Dr. Ahluwalia was asked whether, as of August 8, 1991, the Applicant was capable of doing his essential tasks. The doctor's opinion was that the Applicant could do a desk job. The Applicant's knee problem was something that was on and off; his knees could flare up from time to time, but the doctor doubted that this was related to the accident. He felt that, as of August 1991, nothing seriously affected the Applicant's ability to do his essential tasks. Dr. Ahluwalia confirmed, however, that he was not necessarily aware of the Applicant's essential tasks.

***Evidence of Dr. Michael C. Hall:***

49 Dr. Hall testified that he is a specialist in orthopaedic surgery and graduated in England in 1952. He was accredited by the Royal College of Surgeons of Canada in 1960 and has practised in Ontario since that time. He examined the Applicant at the request of the Insurer on May 30, 1991. At that time, the Applicant was suffering from a "whiplash" type of injury which affected the muscles and ligaments of his neck. Dr. Hall confirmed that such an injury would usually cause pain.

50 The accident occurred on January 28, 1991. The Applicant complained of headaches, pains in the back of the neck and shoulder blades, and low back pain: all typical complaints for a soft tissue injury. Dr. Hall also indicated that the Applicant suffered from long-standing degenerative changes in the cervical spine. Such degenerative changes are an inevitable part of the aging process. It is unusual for an individual not to show some degeneration by age 50. Dr. Hall commented that a wide set, shorter-necked person, such as the Applicant, is more prone to disc degeneration than are slimmer individuals.

51 The doctor confirmed that he understood that the Applicant is a metallurgical engineer who is self-employed as a consultant, and, in connection with this work, is obliged to travel quite frequently. The doctor understood that the Applicant did not do manual labour, but was required to be mobile.

52 Dr. Hall reviewed his notes of his examination and confirmed that the Applicant suffers from a congenital abnormality in his right knee. However, this problem does not appear to be related to the motor vehicle accident and would not affect the Applicant's ability to travel by car or by airplane.

53 Dr. Hall considered that the Applicant's neck and back problems would probably not stop him from travelling, attending meetings or doing any of his other essential tasks. The doctor indicated that he believed that the Applicant's neck and back were uncomfortable for him; however, he felt that this discomfort was not of such a degree that it would be disabling. It was his view that by May 1991 the Applicant was capable of doing his essential tasks. There was no reason to foresee a downturn in the Applicant's condition. Normally, with an injury such as the Applicant's, one would expect to see progressive improvement.

54 The doctor confirmed that the Applicant would not have been aware of the degenerative changes shown on the x-ray and that these changes would not necessarily cause any symptoms. He stated that these changes are not related to the accident and that the injury would not accelerate the degenerative process.

55 In cross-examination, Dr. Hall confirmed that he has no instrument or method for measuring pain and must accept what a patient tells him. However, he indicated, that if someone came to see him, he would be able to say what treatment he thought was appropriate. In the Applicant's case, it was the doctor's view that no treatment would be beneficial and that no therapy was required.

***Submissions of Applicant:***

56 The Applicant stated that, during the period from July 1991 to April 1992, he required treatment for his injuries, including physiotherapy, medication and exercises. With the help of his doctors, he has now recovered and has returned to his former way of life. However, he submitted, from July 1991 until April 1992, he was really crippled. He submitted that during some of that time he was well, but afterwards he became sick again. It was not possible for him to return to work in that situation. He was limping, with a cane, and he could not do business like that. He therefore submitted that he should have been entitled to weekly income benefits from the period from July 8, 1991 to April 1, 1992.

***Submissions of Insurer:***

57 The Insurer's counsel submitted that, in this case, the Applicant's essential tasks related to his ability to be mobile and to attend meetings. It was his submission that the medical evidence did not indicate that the accident caused a flare up or a worsening of the Applicant's congenital leg condition.

58 Counsel submitted that the impact of the collision was moderate and caused a whiplash injury. The medical evidence, however, indicated that the Applicant was able to do his essential tasks by April 1991. During the period from July 1991 to April 1992, the Applicant was attending meetings and travelling. Dr. Ahluwalia saw the Applicant twice in August and found that the Applicant had no problems. Counsel submitted that the medical evidence does not justify paying weekly benefits after July 8, 1991.

***Findings:***

59 The Applicant claims entitlement to ongoing weekly income benefits under section 12 of the *No-Fault Benefits Schedule*. The Applicant's benefits were terminated effective July 7, 1991, following the Insurer's receipt of a medical report from Dr. Michael Hall (Exhibit 1-4).

60 Section 12(1) of the *No-Fault Benefits Schedule* provides as follows:

The insurer will pay with respect to each insured person who sustains physical, psychological or mental injury as a result of an accident a weekly income benefit during the period in which the insured person suffers substantial

inability to perform the essential tasks of his or her occupation or employment if the insured person meets the qualifications set out in subsection (2) or (3).

61 In this case, I must determine whether the Applicant continued to suffer a substantial inability to perform the essential tasks of his occupation or employment subsequent to July 7, 1991.

62 The Applicant was self-employed as a consultant in various fields prior to the motor vehicle accident. He stressed that the duties and requirements of his job were such that he needed to be mobile and active, since his work required a good deal of travel.

63 The Applicant testified that, as a result of the accident, he had trouble moving, sitting and sleeping comfortably. Any physical exertion subsequently led to more discomfort. As a result, the Applicant testified he was obliged to curtail both his professional activities and his voluntary community work.

64 However, the Applicant also testified that he continued to travel and attend at meetings in connection with his voluntary community work.

65 The Applicant failed to present convincing evidence that he was substantially physically disabled from performing his essential tasks subsequent to July 7, 1991. The reports of his family physician, Dr. Harrison, set out at Exhibits 1-2 and 1-3, are not helpful. In an accident benefits medical form dated February 2, 1991 (Exhibit 1-2), under the section headed "Duration of Disability", Dr. Harrison indicated "No loss of work time".

66 Exhibit 1-3 is a letter from Dr. Harrison dated April 26, 1991. In that letter, the physician confirms that, when he examined the Applicant on January 28, 1991, he found no external signs of injury. The Applicant's range of movement and neurological condition were normal. The doctor concluded that the Applicant had sustained a myofascial sprain to the soft tissues around his spine, and prescribed heat, rest, and analgesics.

67 The report indicates that the Applicant subsequently complained of pain in the mid-thoracic region, with pain occasionally radiating into his left arm. He had pain in the interscapular area, and complained that he was unable to bend, lift, jog, or travel by public transportation. He also experienced some intermittent numbness in his right buttock and leg. His sleep was disturbed, and he complained of headaches and depression.

68 The doctor's report concludes by indicating that "his ability to perform his normal duties has been impaired". He further states "I do not, however, anticipate any long-term or permanent sequelae of his injury and confidently expect a complete return to his pre-accident level of fitness".

69 The Applicant was seen by Dr. Hall, the Insurer's expert, on May 30, 1991. At that time, Dr. Hall considered that the Applicant was capable of performing his essential tasks, such as travelling, sitting, and attending meetings.

70 Dr. Ahluwalia saw the Applicant on August 6 and 8, 1991. I find it telling that, at that time, the Applicant did not refer to his automobile accident, nor complain of any back or neck-related pain. On August 8, Dr. Ahluwalia did a complete physical examination and took a history from the Applicant. It was Dr. Ahluwalia's view that in August 1991 the Applicant was capable of performing his essential tasks.

71 Exhibit 1-6 is a report from Dr. Harrison dated June 15, 1992. In it, Dr. Harrison lists the Applicant's office visits and medications prescribed during the period from May 1991 onward. The report indicates that the Applicant saw Dr. Harrison on May 27, 1991, June 25, 1991, September 14, 1991 and December 14, 1991, and on January 4, 1992, February 6, 1992, May 9, 1992 and June 9, 1992.

72 This report is noteworthy because, in my view, it does not reflect the frequency of visits to the doctor that would ordinarily be expected in an individual who was so severely disabled as to be incapable of performing his essential tasks. I also note that the Applicant saw the doctor no less frequently after April 1992, when he claimed to have recovered from the effects of his injuries.

73 In short, the weight of the medical evidence before me does not support the Applicant's claim of ongoing disability. I conclude that, by July 8, 1991, the Applicant was, in fact, capable of performing his essential tasks. The evidence of Dr. Ahluwalia suggests that by August 8, 1991 the Applicant was not even suffering from residual discomfort as a result of his injuries — otherwise he would have mentioned the accident during the course of the physical examination.

74 Dr. Ahluwalia speculated that in the winter of 1992 the Applicant might have suffered a "flare up" of back pain, which might have been connected to his previous injuries. However, in my view, insufficient evidence connects the Applicant's back complaints of February and March 1992 to the accident. I am not able to award weekly income benefits based on a mere possibility or speculation.

75 Accordingly, I find that the Applicant is not entitled to ongoing weekly income benefits past July 7, 1991.

76 The Applicant is entitled to his expenses as set out in Schedule 1 of the Dispute Resolution Practice Code.

**Order:**

77

1. The Applicant is not entitled to weekly income benefits from July 7, 1991, onwards.
2. The Applicant is entitled to the expenses that he has incurred in respect of this arbitration hearing, in accordance with Regulation 664 of the Revised Regulations of Ontario.