

1994 CarswellOnt 4981  
Ontario Insurance Commission

Ahmed v. Royal Insurance Co. of Canada

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**Ubah Abdullahi Ahmed, Applicant and Royal  
Insurance Company of Canada, Insurer**

Rotter Sr. Arb.

Heard: December 13, 1993  
Judgment: October 13, 1994  
Docket: A-004411

Counsel: Nestor Kostyniuk, for Insurer

Subject: Insurance

**Headnote  
Insurance**

***Rotter Sr. Arb.:***

**Issues:**

1 The Applicant, Ubah Abdullahi Ahmed, was injured in a motor vehicle accident on February 2, 1991. She applied for and received statutory accident benefits from the Insurer, payable under Ontario Regulation 672<sup>1</sup>. Weekly income benefits were terminated by the Insurer on November 7, 1992. The Applicant claims ongoing benefits. The Insurer claims that it is entitled to a repayment, on the grounds that it miscalculated the amount of benefits to be paid.

2 The parties were unable to resolve their disputes through mediation and the Applicant applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

3 The issues in this hearing are:

1. Is the Applicant entitled to weekly income benefits from November 8, 1992 onwards?
2. Is the Insurer entitled to a repayment of the alleged overpayment?

**Result:**

4

1. Ms. Ahmed is not entitled to receive weekly income benefits from November 8, 1992 onwards.
2. Ms. Ahmed is entitled to weekly income benefits at \$185.60. She received benefits in the amount of \$263.55 weekly. She must therefore repay the overpayment to the Insurer, together with interest, pursuant to sections 27(1) and 27(4) of the *Schedule*.

**Hearing:**

5 The hearing was held at the Ontario Insurance Commission in North York, Ontario, on December 13, 1993, before me, Frederika Rotter, Senior Arbitrator.

6 Present at the Hearing:

Applicant:	Ubah Abdullahi Ahmed
Insurer's	Nestor Kostyniuk
Representative:	Barrister and Solicitor
Witnesses:	The Applicant, Ms. Ahmed Dr. Yemisrach Hailemeskel, Ms. Ahmed's family physician

7 The proceedings were interpreted by Darwit Tseggai of Global Interpretation Services, an interpreter fluent in Amharic and English.

8 The proceedings were recorded by Brad Van Alstyn of Legal Transcript Services.

***Documents Before the Arbitrator***

9 Report of Mediator, dated May 15, 1993

10 Application for Appointment of an Arbitrator, dated August 12, 1993

11 Response by Insurer, dated September 1, 1993

12 Pre-hearing letter dated October 8, 1993

13 The exhibits are listed in Appendix A.

**Evidence and Findings:**

***Ongoing Weekly Income Benefits***

14 The Applicant is a young woman, born in Ethiopia on October 7, 1969. She immigrated to Canada on March 27, 1990 and has resided in Metropolitan Toronto since that date. Her first language is Amharic. She testified that when she arrived in Canada, she enrolled in English classes, but quit her classes in October 1990, to take a job at the Big Slice pizza restaurant.

15 From her evidence, which was rather vague, it appears that Ms. Ahmed worked at the restaurant for a few weeks, until some time in November, 1990, when the business went bankrupt. Ms. Ahmed testified that she left her job before the bankruptcy, and does not know the present owner. She was unable to remember the dates she worked and when she left her job.

16 The Insurer produced a letter indicating that it had contacted the present owner of the restaurant, Joe Mazzaferro, who stated he bought the business in November, 1990. Ms. Ahmed was not working there at the time, and he has no records of her employment. Ms. Ahmed did not dispute this information.

17 Ms. Ahmed was involved in an accident on February 2, 1991. She was the front-seat passenger in the car of a friend. Ms. Ahmed testified that the car rolled and turned upside down, and she subsequently lost consciousness. She regained consciousness in hospital.

18 It is not disputed that Ms. Ahmed suffered soft tissue injuries as a result of the accident. She complained of pain in her neck and back, and the medical evidence confirms she sustained strains in the cervical and thoracic area.

19 Ms. Ahmed received weekly income benefits until November 7, 1992. The Insurer's medical examiner recognized that, for some time, her neck and back pain would prevent her from resuming her job at the pizza restaurant, a job that demanded considerable physical exertion.

20 Ms. Ahmed claims to be entitled to ongoing weekly income benefits after November 7, 1992, on the basis that she also sustained a hearing loss as a result of the accident. She maintains that because of this hearing loss, she is now unable to perform her essential tasks as a waitress. She also claims that she still is unable to lift heavy objects, as is required in her work as a waitress but she emphasized, in her testimony, that it was the hearing loss that caused her to be substantially disabled from performing her essential tasks as a waitress. Section 12 (1) of the *Schedule* provides that an individual is entitled to ongoing weekly income benefits if:

2. He or she as a result of and within two years of the accident must have suffered a substantial inability to perform the essential tasks of his or her occupation or employment.

21 The Applicant testified that prior to the accident, she had "a little hearing loss", but in spite of this was able to hear everything perfectly. She confirmed in cross-examination that she had consulted her family doctor about this complaint in September, 1990. She claimed that as a result of the accident, she has "changed" and can no longer work.

22 However, in her testimony Ms. Ahmed indicated that she would work if she could find a job. She testified that in 1991 she worked for about 2 weeks at "Fingers Cafe". She could not remember the dates she worked. Exhibit 1, Tab 7 - a letter from her former employer at Fingers Cafe - indicates that she worked in or about September, 1991. Ms. Ahmed testified that she was fired because of her hearing problem. Customers complained because she did not get their orders right. The employer's letter confirms that Ms. Ahmed had difficulties dealing with customers because of her hearing loss.

23 Ms. Ahmed testified that she felt she could not look for work again, after losing her job at Fingers, because of her hearing problem.

24 Ms. Ahmed testified that after the accident, she was sent for an audiological consultation. The specialist prescribed a hearing aid, which she has since obtained.

25 Ms. Ahmed confirmed that she was married in 1992. At the time of the hearing, she had one child, a son born in August 1992, and she was pregnant with her second child, due in January 1994. She testified that if she could find a job, she would work and send her children to daycare. She attributed her failure to find a job to her hearing problem, which she stated resulted from the accident.

26 The Insurer called the Applicant's family physician, Dr. Yemisrach Hailemeskel to testify at the hearing. Dr. Hailemeskel confirmed that she first saw Ms. Ahmed on September 17, 1990. At that time she was suffering from a bilateral hearing loss, which she had experienced since childhood. Dr. Hailemeskel opined that it was likely that the hearing loss was a congenital condition.

27 Dr. Hailemeskel confirmed that she had referred Ms. Ahmed to Dr. M. E. McKee of St. Michael's Hospital in September, 1990, for audiometric testing. Dr. McKee reported to Dr. Hailemeskel on September 26, 1990 (Exhibit 3) that the tests revealed a "moderate to severe mixed hearing loss - this is mostly sensorineural". Dr. McKee stated that Ms. Ahmed could only be helped by a hearing aid.

28 Dr. Hailemeskel confirmed that "subjectively" Ms. Ahmed complained that her hearing was worse after the accident. However, she testified "I can't deny she had a hearing problem before".

29 I find from the medical evidence that Ms. Ahmed suffered a significant hearing loss prior to the accident. In my view, it is not at all clear that the accident exacerbated this problem to any extent.

30 Ms. Ahmed's own testimony was vague, evasive and unreliable - she was extremely reluctant to admit she was hard of hearing prior to the accident, and attributed all her present difficulties to the effects of the motor vehicle accident. Her own doctor was unable to support this claim, and the medical evidence proves that this was not so.

31 Ms. Ahmed did not claim, at the hearing, that her soft tissue injuries continued to substantially disable her from working as a waitress, although she did complain that her back still hurt and she had problems with lifting. I conclude, from the evidence, that Ms. Ahmed did not return to work as a waitress (after her brief employment at Fingers) primarily because of her hearing problems. This was compounded by her limited understanding of English, which made communication with customers extremely difficult for her.

32 I find her subsequent pregnancy and child-rearing responsibilities also affected her ability and willingness to return to work.

33 Based on these findings, I conclude that Ms. Ahmed is not entitled to ongoing weekly income benefits. She has failed to prove, on a balance of probabilities, she still suffered a substantial disability to perform her essential tasks as a waitress as a result of the accident, when her benefits were discontinued in November, 1992.

### ***Insurer's Claim for Repayment***

34 The Insurer paid Ms. Ahmed benefits of \$253.55 per week, based on the Employer's Confirmation of Income document she submitted (Exhibit 5, Tab 8). This document indicates that Ms. Ahmed started working for The Big Slice restaurant on October 17, 1990 and that she worked for 15 weeks - that would be until January 30, 1991, almost up to the very day of the accident.

35 The Insurer states that it calculated Ms. Ahmed's benefits using the figures on the document showing Ms. Ahmed's earnings for the last 4 weeks preceding the accident. However, from the evidence at the hearing, it is apparent that Ms. Ahmed was not working during the 4 weeks preceding the accident. She herself confirmed that she left the Big Slice at some time in November, 1990, and she provided no evidence to indicate that she was employed elsewhere at any time during the period between November, 1990 and the accident date, February 2, 1991.

36 I conclude that Ms. Ahmed had no earnings during the 4 week period preceding the accident. Accordingly her weekly income benefit must be determined by averaging her earnings over the 52 week period prior to the accident, as provided under section 12 (7) 1 of the *Schedule*. That section states:

(7) The following rules apply to the calculation of gross weekly income:

1. A person's gross weekly income shall be deemed to be the greatest of,

i. his or her average gross weekly income from his or her occupation or employment for the four weeks preceding the accident,

ii. his or her average gross weekly income from his or her occupation or employment for the fifty-two weeks preceding the accident,

iii. \$232.

37 Ms. Ahmed's income tax return for 1990 (Exhibit 2) indicates that she earned \$3644. I conclude, therefore, that Ms. Ahmed was entitled to benefits based on a deemed weekly income of \$232. The *Schedule* provides that the amount of the weekly benefit is 80% of the weekly income, or \$185.60.

38 I conclude that Ms. Ahmed did receive an overpayment of benefits. This overpayment was created through the erroneous reporting of Ms. Ahmed's income from her employment, and I find that she should repay it.

### *Expenses*

39 Ms. Ahmed was unrepresented at her arbitration hearing and did not explicitly claim her expenses. I have the authority to award Ms. Ahmed her expenses under section 282(11) of the *Insurance Act* which provides:

(11) The arbitrator may award to the insured person such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations to the maximum set out in the regulations.

40 In this case, however, I find that Ms. Ahmed's claim for additional benefits was completely without merit. She has attempted to portray her hearing loss as the result of the accident, when it was clearly a pre-existing condition.

41 In addition, I find that she misstated her earnings and employment to the Insurer. The Insurer overpaid benefits, based on the inaccurate employment information provided. It was also put to the additional expense of this arbitration hearing. In all the circumstances, I conclude that Ms. Ahmed should not be awarded her expenses.

### **Order:**

42

1. Ms. Ahmed is not entitled to receive weekly income benefits from November 8, 1992 onwards.
2. Ms. Ahmed is entitled to weekly income benefits at \$185.60. She received benefits in the amount of \$263.55 weekly. She must therefore repay the overpayment to the Insurer, together with interest, pursuant to section 27(4) of the *Schedule*.

### **Appendix A**

Exhibit 1 Letter to the Ontario Insurance Commission from Nestor Kostyniuk dated October 21, 1993

Exhibit 2 Federal Income Tax Return and Assessment - Ubah Hassan Ahmed, 1990

Exhibit 2A Federal Income Tax Return and Assessment - Ubah Hassan Ahmed, 1991

Exhibit 3 Letter from Dr. McKee to Dr. Hailemeskel dated September 26, 1990

Exhibit 4 Medical Assessment for Metropolitan Toronto Housing Authority made by Dr. H. Getu dated October 6, 1992

Exhibit 5 Insurer's Document brief

Exhibit 6 Ontario Automobile Insurance Summons to a Witness for Osmond Hassan, dated December 3, 1993

Exhibit 7 Report of A.I.S. Services to Nestor Kostyniuk dated September 7, 1993

### Footnotes

- 1 Prior to January 1, 1994, Ontario Regulation 672 was called the *No-Fault Benefits Schedule*. After that date it became the *Statutory Accident Benefits Schedule - Accidents Before January 1, 1994*. In this decision, the term "*Schedule*" will be used to refer to Regulation 672.