

2010 CarswellOnt 7684
Financial Services Commission of Ontario (Arbitration Decision)

Volante v. Royal & SunAlliance Insurance Co. of Canada

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**Rose Volante, Applicant and Royal & Sunalliance
Insurance Company of Canada, Insurer**

Richard Feldman Member

Heard: July 12, 2010
Judgment: September 23, 2010
Docket: FSCO A09-002706

Counsel: Ms Volante, for herself
Nestor E. Kostyniuk, for Royal & SunAlliance Insurance Company of Canada

Subject: Insurance

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Insurance

- XII Automobile insurance
 - XII.5 No-fault benefits
 - XII.5.g Other benefits
 - XII.5.g.iv Miscellaneous

Insurance

- XII Automobile insurance
 - XII.5 No-fault benefits
 - XII.5.i Practice and procedure on claim for benefits
 - XII.5.i.vi Costs and expenses

Headnote

Insurance --- Automobile insurance — No-fault benefits — Other benefits

Insurance --- Automobile insurance — No-fault benefits — Practice and procedure on claim for benefits

Table of Authorities

Cases considered by *Richard Feldman Member*:

Heath v. MacLeod (2009), 73 C.C.L.I. (4th) 31, [2009] I.L.R. I-4838, 2009 ONCA 391, 2009 CarswellOnt 2443, (sub nom. *Heath v. Economical Mutual Insurance Co.*) 249 O.A.C. 164, (sub nom. *Heath v. Economical Mutual Insurance Co.*) 95 O.R. (3d) 785 (Ont. C.A.) — considered

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8

Generally — referred to

s. 281(2) — referred to

s. 282 — referred to

s. 282(11) — referred to

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8

Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, O. Reg. 403/96

Generally — referred to

s. 2(4) — referred to

s. 10(1) — referred to

s. 12 — referred to

s. 12(8) — referred to

s. 46(2) — referred to

Richard Feldman Member:

Issues:

1 The Applicant, Rose Volante, was injured in a motor vehicle accident on February 20, 2004. She applied for statutory accident benefits from Royal & SunAlliance Insurance Company of Canada ("Royal"), payable under the *Schedule*.¹ Issues arose between the parties concerning the Applicant's entitlement to certain statutory accident benefits. The parties were unable to resolve their disputes through mediation and Ms. Volante applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

2 At various points during the hearing, Ms. Volante indicated that she wanted in this arbitration proceeding to deal with claims for general and special damages for herself and other family members as well as claims for various accident benefits (including a claim for attendant care benefits) arising not only from the accident on February 20, 2004 but also arising from motor vehicle accidents on May 22, 1981 (which she described as a much more serious accident) and October 2, 1997.

3 I invited submissions from Ms. Volante and from counsel for the Insurer on the scope of this proceeding. Having considered those submissions, I found that my jurisdiction in this matter was limited to the issues that proceeded to, but were not resolved by, mediation at the Commission (i.e., the issues identified in the Report of Mediator dated March 1, 2006). This jurisdictional limit is set out in subsection 281(2) of the *Insurance Act*. I advised Ms. Volante that I was restricting this hearing to those issues (i.e., her claims for non-earner benefits, interest and expenses arising out of the accident of February 20, 2004), as she had previously been advised would be the case in the pre-hearing letters of Arbitrator Killoran dated March 31, 2010 and May 26, 2010.

4 Thus, the issues in this hearing are:

1. Pursuant to section 12 of the *Schedule*, is Ms. Volante entitled to receive a non-earner benefit from August 20, 2004 onwards?
2. Is Ms. Volante entitled to interest for the overdue payment of benefits pursuant to section 46(2) of the *Schedule*?
3. Is Royal liable to pay Ms. Volante's expenses in respect of the arbitration under section 282(11) of the *Insurance Act*, R.S.O. 1990, c. I.8?
4. Is Ms. Volante liable to pay Royal's expenses in respect of the arbitration under section 282(11) of the *Insurance Act*, R.S.O. 1990, c. I.8?

Result:

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1. Ms. Volante is not entitled to receive non-earner benefits (and, therefore, no interest is owed by the Insurer).
2. The decision on expenses is deferred at the request of the parties.

Evidence and Analysis:

Non-Earner Benefits

6 Pursuant to subsection 12 of the *Schedule*, an insured person is entitled to a non-earner benefit if the person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident. In this case, Ms. Volante was already more than 65 years of age at the time of the 2004 accident (her date of birth is July 16, 1933). Therefore, if found to be entitled to a non-earner benefit, the amount of the weekly benefit would be calculated in accordance with subsection 12(8) of the *Schedule* and the table set out in subsection 10(1) and of the *Schedule*.

7 Subsection 2(4) of the *Schedule* defines "a complete inability to carry on a normal life" as follows:

For the purposes of this Regulation, a person suffers a complete inability to carry on a normal life as a result of an accident if, and only if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.

8 The Ontario Court of Appeal has recently considered these provisions in *Heath v. MacLeod*² and has adopted the following general principles as being part of a proper approach to claims for non-earner benefits:

1. Generally speaking, the starting point for the analysis will be to compare the claimant's activities and life circumstances before the accident to his or her activities and life circumstances after the accident.
2. This requires more than taking a snap-shot of the claimant's life in the time frame immediately preceding the accident. It involves an assessment of the person's activities and circumstances over a reasonable period prior to the accident, the duration of which will depend on the facts of the case.
3. In order to determine whether the claimant's ability to continue engaging in "substantially all" of his or her pre-accident activities has been affected to the required degree, all of the pre-accident activities in which the claimant ordinarily engaged should be considered. However, in deciding whether the necessary threshold has been satisfied, greater weight may be assigned to those activities which the claimant identifies as being important to his/her pre-accident life.
4. It is not sufficient for a claimant to demonstrate that there were changes in his or her post-accident life. Rather, it is incumbent on a claimant to establish that those changes amounted to him or her being continuously prevented from

engaging in substantially all of his pre-accident activities. The phrase "continuously prevents" means that a claimant must prove "disability or incapacity of the requisite nature, extent or degree which is and remains uninterrupted."

5. The phrases "engaging in" should be interpreted from a qualitative perspective. The manner in which an activity is performed and the quality of performance post-accident must be considered. If the degree to which a claimant can perform an activity is sufficiently restricted, it cannot be said that he or she is truly "engaging in" the activity.

6. In cases where pain is the primary factor that allegedly prevents the insured person from engaging in his or her former activities, the question is not whether the insured can physically do these activities, but whether the degree of pain experienced, either at the time, or subsequent to the activity, is such that the individual is practically prevented from engaging in those activities.

9 For the reasons that follow, I find that Ms. Volante is not entitled to non-earner benefits. She has failed to prove, on a balance of probabilities, that she suffered a complete inability to carry on a normal life as a result of and within 104 weeks after the accident of February 20, 2004 (i.e., she has failed to prove, on a balance of probabilities, that as a result of the accident of February 20, 2004 she sustained an impairment that has continuously prevented her from engaging in substantially all of the activities in which she ordinarily engaged before this accident).

10 The first step in this analysis is to assess Ms. Volante's activities and life circumstances over a reasonable period of time prior to the accident and then to compare those to her activities and circumstances after the accident. I invited Ms. Volante to describe her typical activities in the year or so before the 2004 accident and then to compare them to the activities in which she has engaged since that accident and to explain to me any activities that she has been continuously prevented from doing.

11 In the year or so before the 2004 accident, Ms. Volante described her usual activities as: caring for her husband, doing light housework, doing some cooking, taking occasional walks, driving or taking the bus, going shopping, playing bingo several times per week, talking on the telephone and going to church regularly. Ms. Volante testified that, prior to this accident, she was already in very bad shape because of the injuries she sustained in the earlier accidents.

12 Based upon the testimony of Ms. Volante, I find that although the 2004 accident may have increased her level of pain, that pain did not actually prevent her from meaningfully engaging in virtually all of the activities in which she had been engaged before this accident. According to Ms. Volante, the 2004 accident exacerbated her existing symptoms (chronic pain) and created a new problem (pain in her left hip). As a result of this hip pain, she stopped walking (for recreation and exercise) for about one year and, instead, did exercises at home from a sitting or kneeling position. Following the 2004 accident, however, Ms. Volante continued to care for her husband, to do light housework, to do some cooking, to drive, to go shopping, to play bingo, to talk on the telephone and to go to church regularly. By about 2005, she was walking again for exercise and recreation except on days when the pain was too great.

13 There is no medical or other evidence to substantiate that Ms. Volante suffered the requisite level of disability as a result of the 2004 accident to qualify for non-earner benefits. Ms. Volante called no lay witnesses (such as family members) or medical experts to testify. She adduced no documentary medical evidence to demonstrate that, as a result of the accident of February 20, 2004, she sustained an impairment that has continuously prevented her from engaging in substantially all of the activities in which she ordinarily engaged before this accident. The disability certificate dated December 1, 2004 from her own family doctor (Dr. T.R. Tatzel) indicates that Ms. Volante did *not* meet the requisite level of disability to qualify for non-earner benefits (see Ex. 1, Tab 2). This was also the opinion of all of the assessors who examined Ms. Volante at the request of the Insurer.³

14 In conclusion, Ms. Volante has failed to prove, on a balance of probabilities, that she suffered a complete inability to carry on a normal life as a result of and within 104 weeks after the accident of February 20, 2004. Therefore, her claim for non-earner benefits (and interest thereon) must be dismissed.

Expenses

15 I have deferred the issue of entitlement to expenses of this arbitration. If the parties cannot agree on the issue of entitlement or amount, they may make submissions on both issues in accordance with Rule 79 of the *Code*.

Richard Feldman Member:

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

1. This application is dismissed.

2. If the parties cannot agree on the issue of entitlement or amount of expenses of this arbitration proceeding, they may request a determination of these issues in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Footnotes

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

2 (2009), 2009 CarswellOnt 2443, 2009 ONCA 391, 73 C.C.L.I. (4th) 31, [2009] I.L.R. I-4838, (sub nom. *Heath v. Economical Mutual Insurance Co.*) 249 O.A.C. 164, (sub nom. *Heath v. Economical Mutual Insurance Co.*) 95 O.R. (3d) 785 (Ont. C.A.).

3 See the report of Carolin Catani (kinesiologist) and Julie Fox (registered nurse) who examined Ms. Volante on March 28, 2005 (Ex. 1, Tab 4), the report of Dr. Ali T. Ghouse (physiatrist) who examined Ms. Volante on April 4, 2005 (Ex. 1, Tab 5), and the report of Dr. S. Soriano (orthopaedic surgeon) who examined Ms. Volante on April 15, 2005 (Ex. 1, Tab 6).