Appeal P18-00010

OFFICE OF THE DIRECTOR OF ARBITRATIONS

CINDEE MILAN

Appellant/Respondent on Cross-appeal

and

AVIVA CANADA INC.

Respondent/Appellant on Cross-appeal

BEFORE: David Evans

REPRESENTATIVES: Randy Knight for Ms. Cindee Milan
Derek Greenside for Aviva Canada Inc.

HEARING DATE: September 7, 2018

APPEAL ORDER

Under section 283 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. With respect to the appeal by Ms. Cindee Milan of the Arbitrator's Order dated January 4, 2018, it is allowed in part. Paragraph 2.d. thereof is revoked and replaced with the following:

   2.d. I find that the Applicant is entitled to $1,100 for orthotics devices pursuant to the treatment plan dated July 26, 2013.

2. With respect to the cross-appeal by Aviva Canada Inc. of the Arbitrator's order dated January 4, 2018, it is allowed. Paragraph 4 thereof is revoked and replaced with the following:

   4. I find that the Applicant is entitled to interest for these overdue amounts, at the rate of 1% compounded monthly in accordance with the *Schedule*.

3. The Order is otherwise affirmed.

4. With respect to Arbitrator Morris's Expenses Order dated May 2, 2018, it is rescinded and the matter of arbitration expenses is returned to arbitration, but only on the issue of whether the $5,000 she awarded to Aviva Canada Inc. should be revised to take into account the success by Ms. Milan on this appeal.

5. A party may seek an order of legal appeal expenses, as set out below.

David Evans
Director's Delegate

February 7, 2019
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Ms. Cindee Milan appeals Arbitrator Matheson's order dated January 4, 2018, wherein he refused her claims for income replacement benefits and an orthotics treatment plan under the *SABS–2010.*[1] She also appeals his denial of a special award claim.

However, the Arbitrator provided reasons for denying the IRB claims. He also did not find Aviva unreasonably withheld payments, so he was not required to grant a special award. The appeals on those points are denied. Conversely, with respect to the orthotics claim, the Arbitrator failed to follow Commission case law that a denial notice must be valid. Since the denial notice in this case was not valid, Aviva is required to pay for the orthotics, and the appeal on that point is allowed. The issue of expenses in Arbitrator Morris's Expenses Order dated May 2, 2018 is therefore returned to arbitration, in light of this success, but only on the issue of whether the $5,000 she awarded to Aviva Canada Inc. should be revised to take into account this success.

Aviva Canada Inc. cross-appeals the Arbitrator's order that it is liable to pay interest on overdue amounts at two percent compounded monthly. Both parties agree that the Arbitrator erred in law, in light of the Divisional Court decision in *State Farm Automobile Insurance Co. v. Kulaveerasingam*, 2017 ONSC 6278. Accordingly, the cross appeal is allowed, and interest is only payable at the one percent rate set out in s. 51 of the *2010 SABS*.

II. BACKGROUND

Ms. Milan was injured in a motor vehicle accident on May 17, 2011. She alleged that this disabled her from working and thus entitled her to weekly income replacement benefits.

[1] The *Statutory Accident Benefits Schedule — Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

To give context to the following recital, the Arbitrator found he had no jurisdiction to consider any IRB entitlement during the first 104 weeks after the accident.

Rather, the issue before the Arbitrator was entitlement after 104 weeks: that is, whether Ms. Milan was entitled to IRBs after the first 104 weeks of disability on the basis that the accident caused her to suffer a complete inability to engage in any employment or self-employment for which she was reasonably suited by education, training or experience.[2] In the end, the Arbitrator found she was not entitled to weekly IRBs after July 3, 2013, when she returned from maternity leave. While he accepted that Ms. Milan suffered chronic pain due to the accident, he found that at most she suffered a "substantial inability" but not "a complete inability" to work.

The question of suitable employment under the post-104 test depends upon employment background. In that regard, Ms. Milan was born in the Philippines and educated in English. She was fluent in the four major dialects of the Philippine language. Prior to obtaining a Bachelor of Commerce degree in business management in 2001, she worked at a family grocery store as a shelf stocker and cashier. After graduation, she worked as a receptionist, assistant to a sales manager, appointment booker in a medical clinic, and service representative for authors in a publishing company. In 2006, she moved to Norway to work as a nanny.

Ms. Milan immigrated to Canada in 2008 and worked as a nanny until 2011. Once she was a permanent resident, she started working at a manufacturing facility until an elderly Norwegian couple, Mr. and Mrs. C, needed a full-time personal support worker (PSW). Ms. Milan quit the manufacturing job and started to work as an unlicensed PSW for the couple. She planned to work in the health care industry as a licensed PSW and eventually as a Registered Nurse.

These plans were interrupted when, on May 17, 2011, a car struck Ms. Milan in her left thigh and hip area while she was crossing a street. She did not believe that she lost consciousness. X-rays confirmed she sustained a torn meniscus ligament in her left knee, and an MRI confirmed that she suffered from a pinched nerve in her spine. Ms. Milan testified that she has continued to

[2] This is the post-104 test under s. 6(2)(b) of the *SABS*.

suffer from aches and pain in her arms and shoulders with pins and needles in her arms and hands.

Ms. Milan also has weight problems. The Arbitrator noted that the family doctor's clinical notes and records showed that she weighed 190 pounds just prior to the accident, and in 2017 she self-reported that she was 270 pounds. Ms. Milan testified that every health professional she has seen since the accident has recommended weight loss to ease the pain she is experiencing.

About five weeks after the 2011 accident, Ms. Milan, using first crutches and later a knee brace, returned to lighter duties looking after Mrs. C. She kept working for Mr. C after his wife passed away until she took maternity leave to give birth to her son on July 31, 2012.

During her maternity leave, Ms. Milan successfully completed her PSW certification at Cornerstone College.

In June 2013 Ms. Milan learned her position working for Mr. C was no longer available. Ms. Milan claimed IRBs from July 2013 as her pregnancy leave was over. She tried returning to work at a local Tim Horton's but quit after a week due to the pain from standing and bending. In 2014, she started to work for a PSW placement agency "Right-At-Home" but had limited hours and pay as she could only try light duty positions. Ms. Milan also started working for a second PSW placement agency known as "Enhancing Lives" in 2016. In addition, she failed at several on-line business opportunities, but not because of her accident-related disabilities.

Ms. Milan was in a second accident on June 19, 2014, for which she has received medical benefits from a second insurer.

Also in 2014, Ms. Milan started courses at Conestoga College to pursue a registered nurse degree. She then switched to a diploma program in human resources starting in September 2016 and completed five courses. Her son's biological father assisted with childcare while she attended classes.

The Arbitrator noted that Ms. Milan had declined both cortisone shots for and surgery to her left knee and that she had been in counselling at various points.

By way of general principles regarding the assessment of IRB entitlement, the Arbitrator wrote:

> The Applicant submits that the *Schedule* and case law make it clear that the mere fact that the Applicant's return to work on very modified duties after the accident until her maternity leave, followed by periodic and sporadic employment and/or schooling after that, does not disentitle the Applicant to IRBs. They submit that the total hours of worked and level of remuneration factor into the determination. I agree.

In determining that Ms. Milan was not entitled to post-104 week IRBs, the Arbitrator discussed the evidence of three assessors: Dr. Lydia Hatcher, member of interdisciplinary pain clinic assessment, Mr. Jeffery Cohen, vocational assessor, and Dr. Mohamed Khaled, family doctor.

Dr. Hatcher was a member of the Michael G. DeGroote Pain Clinic's Interdisciplinary Initial Assessment, dated June 22, 2017. The Arbitrator accepted Dr. Hatcher's diagnosis of "myofascial pain in her back and neck with overlying probable fibromyalgia" as of the date of her report. He also agreed that Ms. Milan suffers from chronic pain. However, he noted that Dr. Hatcher was unaware of the 2014 accident but reviewed and used post-2014 accident medical records to come to her conclusions. Further, he noted that Dr. Hatcher testified that she believed and maintained that the Applicant lost consciousness in the 2011 accident despite Ms. Milan's evidence otherwise. He also noted that Dr. Hatcher testified Ms. Milan's weight issue was not accident-related.

Mr. Jeffery Cohen authored a Vocational Evaluation and Transferable Skills Analysis Report dated August 28, 2015. The Arbitrator noted that Mr. Cohen was guarded for Ms. Milan's prospects of employment because she was educated in her second language (at a level not compatible with Canadian standards) and because she required some accommodation as to her tolerance in sitting, standing and walking. He stated that all of her work experiences are stale or more than 5 years old. Mr. Cohen testified that further educational upgrading was required for Ms. Milan to pursue work as her restrictions put her at a disadvantage in a competitive workplace.

However, the Arbitrator noted that Mr. Cohen stated in his report that since Ms. Milan showed no functional impairments in using her arms or hands, her motor coordination and dexterity skills were considered to be intact and commensurate with the potential to, for example, perform mechanical assembly tasks, operate equipment, mix and bake pastries, stock shelves and sort mail. The Arbitrator went on to note that, while Mr. Cohen discarded the previous work history and education as foreign and stale, he did not explain why Ms. Milan's physical disabilities prevented her from finding entry level positions within the sedentary or light work vocations that fall within her physical abilities.

The Arbitrator also noted that neither Ms. Milan nor Mr. Cohen had considered Ms. Milan's language skills, which fall into the light or sedentary vocational slot:

> The evidence shows that the Applicant has only pursued or tried to pursue full-time accommodated versions of her pre-accident job as a personal support worker. To this point, the totality of the Applicant's own testimony shows that her only attempt at finding employment other than that of a personal support worker is when she attempted to be an on-line sales person for several pyramid-type schemes, where she was unsuccessful. The Applicant testified that she failed in these on-line ventures because of her inability to sell or to be an influencer, not because of her disabilities.

The Arbitrator also referred to Dr. Khaled's March 27, 2014 insurer's examination for a disputed treatment plan, where the doctor noted that Ms. Milan's arms were normal and she had normal muscle tone and normal reflexes in the upper and lower extremities bilaterally. There was some back and hip tenderness noted.

The Arbitrator concluded that these assessors agreed Ms. Milan can do sedentary or light work.

He also noted that Ms. Milan was able to complete all of her own house and self-care requirements of her daily living including those specific requirements of her son since his birth in 2012, independently with little or no outside help. Further, after the accident Ms. Milan attended Cornerstone College and completed her Personal Support Workers certificate, and then attended Conestoga College where she started a two-year program and successfully completed 5 courses in the first year for a Human Resources Management Diploma.

The Arbitrator therefore concluded that Ms. Milan failed to meet the test for post-104 week IRBs.

Ms. Milan also appeals the Arbitrator's denial of $1,100 for orthotics devices. She had initially submitted an OCF-18 dated May 10, 2013, proposing $500 in orthotics. This was approved, although Ms. Milan testified she did not know it had been and had not received the approved orthotics. (This was a rare case where I allowed evidence to show that, in fact, the first OCF-18 was not paid.) Ms. Milan then submitted an OCF-18 for the orthotic devices and also two orthotic shoes and chiropody for $1100 on July 26, 2013. Aviva requested an explanation for the duplication but did not receive an answer. Only that second treatment plan was in dispute.

The Arbitrator noted the duty of the applicant to provide information set out in s. 33(1)1 of the *SABS*, namely within 10 business days after receiving a request provide "Any information reasonably required to assist the Insurer in determining the Applicant's entitlement to a benefit." Subsection 33(6) goes on to provide that an insurer is not liable to pay a benefit in respect of any period during which the insured person fails to comply with s. 33(1).

The Arbitrator found the request was reasonable, so in the absence of an answer to the reasonable question, s. 33(6) applied and Aviva was not required to pay for the $1,100 orthotics claim.

With respect to the other medical and rehabilitation claims, the Arbitrator disallowed two treatment plans totaling $4,814.45, but did allow three treatment plans totaling $3520.48.

The Arbitrator dismissed Ms. Milan's claim for a special award in these terms:

> I agree with the Applicant that constant misstatements within an explanation of benefits letters are more than an inconvenience to an applicant, and as such the passive-aggressive actions of a "sophisticated party" strays too far from an insurer's obligation of utmost good faith in a first party system and the standard of consumer protection as set out by cases such as *Smith v. Co-operators General Insurance Co.*[3] It is quite distasteful and should not happen. However, regarding the circumstances in this case, I am unable to

[3] *Smith v. Co-operators General Insurance Co.*, (2002), 2002 SCC 30 (SCC). [Footnote in the original.]

> hold the Insurer to a level of perfection, and as such the discrepancies do not rise to the level of an unfair or deceptive practice.

Finally, with respect to interest, the Arbitrator found that Ms. Milan was entitled to interest at two percent compounded monthly, even though the accident happened after September 1, 2010, on the basis that it was a "transitional policy" entered into before that date. However, as noted above, in *State Farm Automobile Insurance Co. v. Kulaveerasingam*, 2017 ONSC 6278, the Divisional Court found this interpretation to be incorrect. Rather, it stated that the legislative intent is clear: the interest provision in the *2010 SABS* was to apply for accidents after September 1, 2010, regardless of the date the parties entered into the insurance contract.

An arbitration expenses hearing was issued by Arbitrator Anne Morris on May 2, 2018. She found that Aviva was entitled to its expenses but in an amount reduced to reflect the degree of success of the Applicant and to reflect principles of reasonableness, consumer protection and access to justice. She found both parties should bear the expense of their own disbursements. Ultimately Arbitrator Morris fixed expenses at $5,000 payable by Ms. Milan to Aviva.

With respect to the appeal in this case, Aviva did not object to staying the expense decision. On July 3, 2018, I wrote to the parties as follows:

> I will consider the expense issue simply rolled into the overall appeal, and the expense decision is stayed pending the main appeal. If Ms. Milan is successful, then the issue of the arbitration expenses will be returned to arbitration to re-assess based on the change in degree of success.

III. ANALYSIS

As the Divisional Court stated in *Belair Direct Insurance Company v. Green*, 2018 ONSC 2782, my limited jurisdiction to review errors of law does not entitle me to review findings of fact just because I might believe an arbitrator's findings were palpably and overridingly wrong unless the arbitrator committed an identified error of law. It can be an error of law to find a fact based on a misapplication of a legal principle or with no supporting evidence as noted above.

Ms. Milan's submissions therefore focus on trying to show that the Arbitrator misapplied legal principles or made findings with no supporting evidence. However, in their totality, her submissions really invite me to reweigh the evidence, which is not my role.

For instance, she submits that the Arbitrator misapplied and misinterpreted the post-104 IRB "complete inability" test and applied that test too literally without a "real world" application contrary to the prevailing case law. She also submits that the Arbitrator misapprehended the evidence, especially that of Mr. Cohen, and failed to apply that evidence to what the applicant is reasonably suited for by way of training, education, or experience.

However, the Arbitrator adequately set out in his reasons why Dr. Khaled, Dr. Hatcher and Mr. Cohen agreed that no physical disability prevented Ms. Milan from completing work within the sedentary or light work sphere of vocations. He also had evidence that Mr. Cohen identified a number of occupations that were suited for Ms. Milan, such as entry level clerical tasks, applied vocational activities such as routine mechanical assembly, or work involving quality assurance, editing photos, operating cash or filling out requisitions or preparing sales slips.

Mr. Cohen also agreed that Ms. Milan would have more job opportunities if she upgraded her English, for which she could do short-term intensive language courses. As the Court of Appeal noted in *Burtch v. Aviva Insurance Co. of Canada*, 2009 ONCA 479, a job for which an insured is not already qualified may be a suitable alternative under the post-104 week test if substantial upgrading or retraining is not required. Implicitly, the Arbitrator found that a short-term intensive language course did not represent substantial upgrading or retraining.

Ms. Milan submits that the Arbitrator erred when he found that Ms. Milan refused knee surgery because surgery was never recommended nor was it offered to her. However, the Arbitrator only referenced knee surgery in his findings with respect to a denial of a treatment plan that was not appealed. The same applies to his comment about her refusal of cortisone treatments: it did not play a part in the IRB refusal.

Ms. Milan submits that the Arbitrator erred when he did not find her weight gain was due at least in part to the accident, and the weight gain affects her chronic pain. However, the Arbitrator had

evidence before him that the major factor in weight gain is caloric intake, so he was not bound to find that the weight gain was due to the accident.

Ms. Milan submits that the Arbitrator misapprehended the evidence when he stated that Ms. Milan "has evidenced that she possesses language skills in five languages" that were not taken into account in assessing vocations. She submits that this is speculation as "Nowhere in the evidentiary record does it say that she is 'skilled' in 5 languages." Rather, she is fluent in several dialects of the Filipino language only, speaks some Norwegian and has English fluency issues. I fail to see an error of law, as there was evidence to show that she had language skills.

With respect to Ms. Milan's ability to work, she submits that she has not been able to find employment with her disabilities other than at a very minimal remuneration level since July 2013. She submits that she honestly tried and failed and there is no better evidence of incapacity to perform a task than the failure of an honest and sustained attempt to do it. She submits that the injuries sustained in the accident prevented her from implementing her plan to transition to the more sedentary Human Resources Program at Conestoga College. Ms. Milan submits that unless she overcomes her chronic pain, which she has not to date as found by the Arbitrator, it will be extremely difficult for her to present herself as competent and reliable to an employer, even on a part-time basis. She submits that any jobs she could do would require physical and/or mental demands, and a degree of stamina and/or irregular work hours beyond her capabilities.

However, the Arbitrator had evidence before him to support his conclusion that Ms. Milan's chronic pain did not represent a "complete inability" to work. This included the evidence that she has been able to complete all of her own house and self-care requirements of her daily living, including looking after her son. He also pointed to the fact that she had successfully pursued post-secondary education on at least two occasions. Ms. Milan had also returned to work shortly after the accident, albeit with reduced duties, and she only stopped working to have a baby. The evidence also showed that Ms. Milan had worked as a PSW while studying at Conestoga College, and at one point she was attending class in the morning and working four hours a day in the afternoon. As for the attempted return to work that had failed, Ms. Milan had tried to work in various pyramid schemes, but the evidence showed these failed due to her lack of salesmanship and not because of the accident.

Ms. Milan submits that the Arbitrator misapprehended the evidence when he found that she successfully completed five courses in the first year of her Human Resources Program because she had low scores and did not complete the program. However, she did pass the courses, so the Arbitrator did not err in saying she was successful in that regard.

Ms. Milan submits that the Arbitrator erred in relying on the evidence of Dr. Hatcher and Dr. Khaled to deny her benefits, as they did not speak to IRBs, and erred in finding Mr. Cohen's evidence not persuasive. However, that submission cuts both ways, as then the evidence supporting Ms. Milan's claim consists mainly of her testimony and that of Mr. Cohen. However, as noted already, the Arbitrator had evidence from both Ms. Milan and Mr. Cohen upon which he could conclude that Ms. Milan is not as disabled as she submits. For instance, the Arbitrator had evidence before him to show that Ms. Milan was able to work in modified and alternative capacities. This therefore supported his conclusion that Ms. Milan was not entitled to IRBs.

Therefore, I find the Arbitrator did not err in finding that Ms. Milan did not meet the post-104 week IRB test. The appeal on that point is therefore denied.

However, with respect to the orthotics claim and the alleged denial for failure to provide information, the Arbitrator did not apply established FSCO appeal case law that any notice under s. 33(1) must set out the consequences for such failure: *Wahidpur and Unifund Assurance Company*, (FSCO P08-00006, March 25, 2009). The notice in question failed to do so. It did not state that an answer was required within 10 days, failing which the benefit was denied until an answer was forthcoming. Rather, the letter of August 22, 2013 simply stated "Please advise why the duplication." Pursuant to s. 38(8), Aviva was required to advise why it was not going to pay for the orthotics within 10 business days of receiving the OCF-18. After that period, it was required to pay the treatment plan pursuant to s. 38(11). The appeal is therefore allowed on that point and the orthotics for $1100 are payable, plus interest at one percent.

Ms. Milan submits that the Arbitrator erred when he did not apply the correct legal test for a special award under s. 282(10) of the *Act*. She submits that the test is not to hold the insurer to "a level of perfection" or of an "unfair or deceptive practice": Rather, the test is whether an insurer

has unreasonably withheld or delayed payments. Ms. Milan submits that the Arbitrator's finding that Aviva's straying "too far from an insurer's obligation of utmost good faith" was "quite distasteful" was akin to his finding Aviva acted unreasonably and so was bound to grant a special award given those findings.

However, an examination of the Arbitrator's reasoning regarding the medical benefits that were allowed and upon which a special award would be based does not suggest he found the payments were unreasonably withheld.

The largest claim allowed was for a vocational assessment dated February 20, 2015, for which the Arbitrator awarded $2,460.00. Ms. Milan had not attended a requested insurer's examination regarding this assessment, so Aviva had not paid it, and it also submitted that the expense had not been "incurred." Ms. Milan submitted that the notice for the IE had not provided a "medical or other reason" for the IE, citing *Augustin v. Unifund Assurance Co.* (2013), 2013 CarswellOnt 15809 (F.S.C.O. Arb.). In his reasons, all the Arbitrator stated was that he found the assessment was "incurred" and that "In regards to the question of whether or not the Insurer's medical reasons are in fact medical reasons in its notice of assessment letter, I agree with the Applicant and find that this notice is invalid and/or improper." I also note that the phrase about straying "too far from an Insurer's obligation of utmost good faith in a first party system" came from the discussion in *Augustin* about the interpretation of what must be in an IE notice. I do not find this meant the Arbitrator actually found that Aviva acted in bad faith or unreasonably denied the benefits.

With respect to the treatment plan for physical rehabilitation dated July 8, 2013, Aviva paid for most of it but its assessor deemed a passive portion was not reasonable and necessary, leaving a balance in dispute of $379.77. The Arbitrator found that removing segments of a comprehensive treatment plan must be done carefully, so he found that part of the treatment plan was reasonable and necessary.

With respect to $680.71 for an Occupational Therapy Re-Assessment dated March 7, 2014, this was again a case where the Arbitrator found the benefit was deemed incurred because he did not

accept that the reason for denial was medical. He also found Aviva's assessor did not speak to or deny this assessment, so Aviva had not properly assessed the plan.

Accordingly, in context I do not see that the Arbitrator found Aviva unreasonably withheld the payments, so he was not required to order a special award. That aspect of the appeal is denied.

With respect to the cross-appeal, since the accident occurred after September 1, 2010, and even though the contract of insurance was entered into before then, the one percent monthly rate in s. 51 of the *2010 SABS* applies. The cross-appeal by Aviva is therefore allowed.

As to the arbitration expenses that were awarded by Arbitrator Morris to Aviva, since Ms. Milan had some success on appeal, then pursuant to my order of July 3, 2018, the issue of the expenses of arbitration is returned to arbitration to re-assess based on the change in degree of success.

To be clear, I am not ordering a full re-hearing of the arbitration expenses: I am only ordering a re-assessment based on the degree of success, so the only issue is whether the $5,000 awarded against Ms. Milan should be amended in light of her success regarding the orthotics issue.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, any party seeking expenses should serve and file a Bill of Expenses within 45 days of the date of this decision, including any written submissions on entitlement and other particulars. The opposing party will then have 30 days to serve and file a response. The party seeking expenses will then have 15 days to serve and file a reply and any required documentation. The hearing will be on the record.

David Evans
Director's Delegate

February 7, 2019
Date