

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



FSCO A14-010039

BETWEEN:

EFIM TCHERTOK

Applicant

and

ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A MOTION

Before: Arbitrator Jeff Musson

Heard: In person at ADR Chambers on August 2, 3, 4, and 5, 2016

Appearances: Ms. Supriya Sharma for Mr. Efim Tchertok
Mr. Nestor E. Kostyniuk and Mr. Arthur Rozumek for Royal & SunAlliance Insurance Company of Canada

Issues:

The Applicant, Mr. Efim Tchertok, was injured in an accident on November 10, 2013 and sought accident benefits from Royal & SunAlliance Insurance Company of Canada ("RSA"), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Mr. Tchertok 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 September 1, 2010*, Ontario Regulation 34/10, as amended.

The issues in this Motion are:

1. Is Mr. Tchertok entitled to interim non-earner benefits from May 10, 2014 and on-going?
2. Is Mr. Tchertok entitled to interim attendant care benefits from February 25, 2014 to September 15, 2015 by Alert Best in the amount of \$24,592.19?
3. Is Mr. Tchertok entitled to interim attendant care benefits from September 15, 2015 and on-going by AGTA Health in the amount of \$8,857.68?
4. Is Mr. Tchertok entitled to interim assessment and medical benefits from Success Rehab in the amount of \$21,487.75?
5. Is Mr. Tchertok entitled to an interim catastrophic impairment assessment from Omega Medical in the amount of \$16,272.00?
6. Is Mr. Tchertok entitled to an interim assessment benefit from Dr. Kurzam in the amount of \$4,950.00?
7. Is Mr. Tchertok entitled to an interim transportation expense in the amount of \$65.00 for parking, dated October 28, 2015?
8. Is Mr. Tchertok entitled to interest for the overdue payment of benefits?
9. Is either party liable to pay expenses in respect of the Interim Benefits Motion?

Result:

1. Mr. Tchertok is not entitled to interim non-earner benefits from May 10, 2014 and on-going.
2. Mr. Tchertok is not entitled to interim attendant care benefits from February 25, 2014 to September 15, 2015 by Alert Best in the amount of \$24,592.19.
3. Mr. Tchertok is not entitled to interim attendant care benefits from September 15, 2015 and on-going by AGTA Health in the amount of \$8,857.68.
4. Mr. Tchertok is not entitled to interim assessment and medical benefits from Success Rehab in the amount of \$21,487.75.
5. Mr. Tchertok is not entitled to an interim catastrophic impairment assessment from Omega Medical in the amount of \$16,272.00.
6. Mr. Tchertok is not entitled to an interim assessment benefit from Dr. Kurzam in the

amount of \$4,950.00.

7. Mr. Tchertok is not entitled to an interim transportation expense in the amount of \$65.00 for parking, dated October 28, 2015.
8. Mr. Tchertok is not entitled to interest for the overdue payment of benefits.
9. The issue of expenses in respect of the Interim Benefits Motion will be left to the Hearing Arbitrator.

EVIDENCE AND ANALYSIS:

The Law

Section 279(4.1) of the *Insurance Act* gives Arbitrators the authority to make interim orders regarding accident benefits pending a final decision at an Arbitration Hearing to be conducted at a later date. While Arbitrators have significant discretionary power, the *Insurance Act* provides minimal guidance to Arbitrators as to what circumstances must be present in order for an Arbitrator to award interim benefits. As a result, it is important to rely on prior case law in this area to provide some guidance.

In *Ananthamoorthy and TD*, Arbitrator Feldman quoted prior cases in his decision to deny interim benefits to the Applicant. “As part of this analysis, arbitrators have given some consideration to the apparent merits of the application, the majority of arbitrators finding that the applicant must at least demonstrate a *prima facie* case. Arbitrators have not always agreed on what this means.”²

In the case before me, I relied on the evidence presented to determine if the Applicant’s treatment would be adversely affected if interim benefits were not awarded. In other words, were there extenuating reasons for the Insurer to be ordered to pay benefits before a final decision was made at a Hearing for entitlement? By denying entitlement, would the Applicant’s health be irreparably harmed and recovery be adversely affected?

²*Ananthamoorthy and TD Home and Auto Insurance Company* (FSCO A06-001533).

I agree with Arbitrator Feldman's comment that "the power to grant interim benefits is discretionary, the arbitrator hearing the motion must simply exercise his or her discretion in a reasonable manner. That discretion extends not only to whether or not to grant interim benefits, but also to the amount and duration of those benefits."³

Motions Prior to the Commencement of the Interim Benefits Motion

Prior to the start of the Motion, the Applicant filed three separate motions. The first Motion addressed a request by the Applicant to allow Dr. Davison and Dr. Becker to testify at this Interim Benefits Motion. The Insurer opposed this Motion because both doctors were retained by the Applicant as part of his catastrophic impairment ("CAT") determination. This Motion was requested to address interim benefits, not a CAT determination. I agreed with the Insurer's position, therefore I ruled that both doctors' testimony was not relevant to this Motion. Their testimony would be better served at the actual Arbitration Hearing. The Motion to allow Dr. Davison and Dr. Becker to testify at the Interim Benefits Motion was denied.

The second Motion by the Applicant requested that Ms. Grace Bach, the RSA Adjuster, make herself available to testify at this Interim Benefits Motion. The Applicant wanted Ms. Bach to testify in order to provide details as to how RSA adjusted his file. Since this was a Motion to address interim benefits only, the Insurer was not intending on calling its adjuster to testify because the Insurer argued an interim benefits order should be based on medical and benefit need, not how the file was adjusted. I agreed with the Applicant's position and therefore, I ruled that the Insurer make Ms. Bach available to testify at this Interim Benefits Motion.

The third Motion by the Applicant related to document productions. The Applicant submitted a list of documents he had requested of the Insurer but had yet to receive. The Applicant requested all surveillance, a complete summary of benefits paid to date, the complete notes of all Insurer Examination assessors, including the amount that each assessor invoiced the Insurer,

³ *Ibid.*

and a list of all adjusters who were assigned to the Applicant's file. I ruled that the Insurer must hand over all surveillance to the Applicant, which the Insurer confirmed that it did. I ordered the Insurer to produce a summary of all benefits paid to date. In addition, I ordered the Insurer to provide a list of all adjusters from RSA who have handled the Applicant's file. In terms of the assessors' notes and invoices, I found little to no value in allowing an Insurer assessor's notes to be produced, if in fact they even existed, which according to the Insurer they did not. With the assessors' invoices, the invoiced amounts are capped at a rate listed in the *Schedule*. If there is a problem with invoiced amounts, this is not the forum in which that discussion should take place. Therefore, I denied the request of the Applicant for the Insurer Examination notes and invoiced amounts.

Background

The Applicant was travelling on Sheppard Ave. in Toronto on November 10, 2013 when he was rear-ended. The police did not attend the accident scene nor did an ambulance. The Applicant self-reported the accident to the Police Reporting Centre. He went to the emergency department at Sunnybrook Hospital that evening at approximately 19:00 hrs.⁴ The Applicant filed an OCF-1 in December of 2013. His injuries were initially treated within the Minor Injury Guideline ("MIG"), however after reviewing the file, the Insurer as of February 4, 2014 removed the Applicant from the MIG because of psychological issues.

The purpose of this Motion is to determine if the Applicant is entitled to interim benefits while waiting for the Arbitration Hearing to take place. It is important to note that the Applicant confirmed in his testimony that his current medical clinics have not stopped treating him. They are allowing the Applicant to receive treatment while his accident benefits claim is in dispute. The treatment providers are just adding the cost of the Applicant's treatment to his outstanding bill.

⁴ Exhibit 2, Tab 6, pg. 1.

The Applicant

The Applicant is a 67 year old man born in Belarus. The Applicant currently lives by himself in a subsidized apartment. He was divorced from his first wife in 1995 and divorced from his second wife in 2010. I found the Applicant to be a personable gentleman; however, I also found his testimony to not be credible and to be highly suspect.

At the Motion, evidence was submitted showing that the Applicant had a significant pre-existing history of health issues. The Applicant confirmed in his testimony that prior to the accident of November 10, 2013, he suffered from diabetes, hypertension, high blood pressure, and pain in his back, arms and legs.⁵ According to his OHIP summary,⁶ the Applicant has had over 160 visits to medical professionals dating back over the past decade, with the vast majority of these visits occurring prior to the accident.

Having noted all of his pre-existing health issues, he testified that these health issues had been exacerbated by the accident. In addition, the Applicant testified that his new health issues were a direct result of the accident, mainly his psychological issues. He also testified that he attempted to commit suicide on two occasions post-accident and was admitted to Sunnybrook and Baycrest Hospitals. As part of his psychological issues post-accident, he testified that his cognitive skills were directly affected because of the accident. For these reasons, he now requires a personal support worker for 24-hour care.

Evidence was submitted that showed prior to the accident the Applicant received assistance, both financial and non-financial, because of his poor health. The Applicant testified that he applied for and was approved for the Ontario Disability Support Program (“ODSP”). Due to his medical issues with his back, he started receiving ODSP prior to the accident. The Applicant also received assistance from Community Care Access Centre (“CCAC”) because of his medical issues.⁷ After his divorce, the Applicant lived at the Circle of Care subsidized

⁵ Exhibit 2, Tab H7, pg. 1.

⁶ Exhibit 2, Tab H5, pg. 3.

⁷ Exhibit 3, pg. 1.

home. His family doctor, Dr. Portnoi, wrote a letter of support in getting him into this residence because of his medical condition in 2012. As part of his Application for subsidized housing in January of 2013 (10 months prior to the accident), the Applicant requested a two-bedroom apartment because he required a personal support worker. In addition, the Applicant also testified that he checked off on the Application that he had a terminal illness as a means to improve his chances of receiving the requested apartment. This residence also included some attendant care support as part of his monthly rent.

Since the Applicant is over 65 years old, in addition to ODSP, the Applicant is also receiving Old Age Security ("OAS"). The Applicant was asked if he worked in any capacity anywhere. The Applicant submitted a letter from Rabbi Eli Mandel and testified that he volunteers sporadically at the temple he worships at, however he receives no money for this work and since the accident, he hasn't been volunteering. He confirmed no other sources of income.

The Applicant testified that despite receiving ODSP and old age pension monthly, he was not able to pay for services required for a personal support worker and the cost of his medication. As a result, while proceeding through the Arbitration process, the Applicant testified that he applied for and received a \$5,000.00 loan to supplement his monthly income in order to pay for attendant care services and his prescription medication.⁸

Medical Treatment

Physical

The Applicant's medical issues can be divided into two categories: physical and psychological. It was interesting to note that in 2012, the Applicant listed his current medical ailments, which coincidentally were almost identical to the medical ailments that he testified that he suffered from because of the accident on November 10, 2013.

⁸ Exhibit 1, Tab B5.

The Applicant testified that prior to his motor vehicle accident, he was receiving medical treatment at the Willowdale Clinic. According to the Applicant's clinical notes and records, he had been receiving treatment since 2007 on his lower back. At Willowdale, they diagnosed the Applicant with chronic pain in September 2008, which was approximately five years pre-accident. In addition, in the clinical notes and records from Willowdale on March 23, 2010, it stated that the Applicant's pain is permanent. This was over three years prior to the accident. Under cross-examination, the Applicant confirmed that prior to the accident, he was also receiving treatment from his family doctor for a number of ailments that he suffered from, including reflux disease, glaucoma, hypertension, prostate issues, coronary disease, hernia, impaired hearing and sleep issues, as listed in his doctor's notes. The most recent entry prior to the accident at the Willowdale Clinic, dated October 20, 2013, confirmed that the Applicant had problems walking because of lower back issues.

At the Motion, the Applicant was asked if he had any cuts, scrapes or bruises as a result of the accident. The Applicant replied that he didn't know. After the accident, he continued to receive treatment at Willowdale and then started receiving medical treatment at Success Rehab. His treatment after the accident included continued treatment of his lower back. In addition, at Success Rehab, he was treated for pain in his spine and lower back along with pain that radiated through his left leg and left hand. He also testified that he uses medicinal marijuana to treat his pain currently. Based on all of the medical evidence submitted, the Applicant's medical issues were all present prior to his accident. There was minimal credible evidence submitted by the Applicant to directly show that the accident either caused new medical issues or caused his existing medical issues to be exacerbated.

Psychological

Prior to the accident, it was documented that the Applicant had significant psychological issues. As an example, on September 16, 2008, the Applicant was assessed by a social worker named Kira Tram. In her assessment, she stated that the Applicant was suffering from fear, anger and depression. These psychological issues continued for another two years. In September 2010, it was documented in the Applicant's family doctor's notes that he was living

with friends because of his separation. In the notes it stated that the Applicant was suffering from anxiety and fear; specifically, Dr. Portnoi's clinical notes and records stated that the Applicant's wife threatened to kill him in his sleep. When asked about this, the Applicant responded that this is how people in his home country talk. The Insurer's counsel then asked the Applicant if this was how his wife expressed her love. The Applicant replied that his wife loved him right up until the divorce. The Applicant confirmed with his testimony that all of these factors affected his mental health. Based on the dates of these issues, none of them were caused by the accident since they all pre-date the accident of November 10, 2013.

Post-accident, the Applicant submitted his medical records from Baycrest⁹ and his follow up psychological exam.¹⁰ His clinical notes and records from Baycrest documented his suicide attempts, including his ultimate discharge. The Applicant testified that he would leave Baycrest periodically because he wanted to "hang around normal people." After the accident, the Applicant testified that he suffered from nightmares, ringing in his ears and sleep apnea. He also stated that his cognitive skills are weak. Again, similar to his physical issues, the Applicant's psychological issues pre-date the accident. There was no credible evidence submitted to support that the Applicant's accident directly caused his psychological issues.

Dr. Portnoi

Dr. Galina Portnoi is the Applicant's family doctor. She testified that she has a busy practice with over 2,500 patients. At times, I found her testimony did not align with the Applicant's clinical notes and records. Dr. Portnoi stated on the record that based on her interaction with the Applicant over the years, that he is an intelligent man with good cognitive skills. She confirmed that the Applicant had numerous chronic medical conditions prior to the accident. Dr. Portnoi also confirmed that the Applicant was prescribed significant medication prior to the accident. The Applicant's pre-existing medical conditions allowed him to qualify for ODSP prior to the accident.

⁹ Exhibit 3, Tab H19, pg. 1.

¹⁰ *Ibid.*

In terms of determining what effect this accident had on the Applicant's health, there were very few areas that Dr. Portnoi could point to. She did testify that she has found the Applicant's cognitive skills have decreased in the past two years, but from a medical standpoint, she could not say with certainty that this was directly related to the accident. When asked, Dr. Portnoi also confirmed that by nature, all of the Applicant's chronic medical issues have gotten worse as more time has passed based on his age. In addition, these physical issues have played a role in his psychological issues as well.

Attendant Care Benefits

As part of the Applicant's claim for interim benefits, he is claiming attendant care benefits. Prior to the accident, the Applicant received assistance for attendant care from CCAC and AGTA Home Health Care because of his pre-existing health condition. The Applicant testified that his personal support worker would help him shower, dress and undress and other related attendant care tasks. He testified that he is not independent with any of these activities. In fact, prior to his accident, one of the reasons why he selected his place of residence was that they provided some moderate level of attendant care.

Once the Applicant's injuries were deemed to be out of the MIG, then he was able to apply for attendant care benefits, but he still is required to prove entitlement.¹¹

Ms. Grace Bach – RSA Adjustor

I found Ms. Grace Bach's testimony to be truthful and straight-forward. She was able to confirm that there were other adjusters in charge of the Applicant's claim prior to her being assigned the claim. She was only assigned this claim around the time that the Applicant was removed from the MIG. Ms. Bach confirmed that the Insurer had received the Applicant's Form 1 requesting attendant care benefits once his injuries were determined to be outside of the MIG.

¹¹ Exhibit 1, Tab B6.

Ms. Bach testified that when the Applicant's Form 1 was submitted, it lacked significant details. The Insurer continually requested the Applicant's service provider to submit the necessary details. Specifically, the Insurer requested sign-in sheets, a breakdown of hours, and details of the claim because the service provider combined housekeeping and attendant care duties and never specified separate details for each task. It should be noted that housekeeping is not covered under the Applicant's accident benefits claim because at this time his injuries are not considered catastrophic, and the Applicant did not purchase optional coverage for housekeeping and home maintenance benefits.

What was interesting to note is that Ms. Bach confirmed that if the Applicant's service provider, Alert Best, and by extension the Applicant, filled in the paperwork properly for his attendant care claim, that there is a high probability that he could receive financial compensation from February 2014 until August 2014 for attendant care benefits.¹² But the requested documentation has never been forwarded, so the Insurer proceeded to deny the Applicant's claim for attendant care benefits as of June 9, 2014.

Non-Earner Benefits

In order to qualify for non-earner benefits, the Applicant must suffer a complete inability to function as he did prior to the accident. There was surveillance entered into evidence at the Motion that showed the Applicant was able to drive, taking small trips to the store after the accident, and generally proceed about his daily living routine, albeit slowly. The Applicant confirmed in his testimony that he did all of these tasks prior to the accident as well.

The Applicant testified that he still attends his synagogue on a regular basis, similar to before the accident. He also testified that he assists where he can at the synagogue but that is rare if at all. Prior to the accident, the Applicant stated that he liked to socialize with his friends. After the accident, he testified that he still interacts with his friends and limited family in Toronto,

¹² *Ibid.*

similar to what he did pre-accident, however he stated that his circle of friends is shrinking.

Ultimately, the only activity that seems to be different post-accident versus pre-accident is that the Applicant now does not go to the cottage like he did before. In addition, the Applicant also stated that prior to the accident, he was active and participated in activities such as dancing; however, based on the documents submitted, the testimony of the Applicant, and his family physician, I am not convinced based on the evidence that this is true. At the end of the day, Dr. Portnoi confirmed in her testimony that the Applicant can function in his day-to-day activities. Therefore, based on the evidence presented, the Applicant's life from a functionality standpoint is at the same level as he was prior to the accident.

Conclusion

An Arbitrator can order interim benefits, such as they did in *Nguyen and State Farm*, when there is a matter of urgency.¹³ Interim benefits are meant to provide a lifeline for an Applicant where there is strong financial need with a sense of urgency and risk of irreparable harm to the Applicant if they do not receive benefits. After analyzing the totality of the evidence presented at this Motion, I do not find this is the case for Mr. Tchertok.

The Applicant testified that he received a loan for attendant care benefits, however this loan is not in default. Other than interest continuing to be incurred, evidence was not presented that repayment was being demanded by the issuer of the loan. The Applicant is also continuing to receive treatment from his clinic, and there was no evidence presented that the clinic will stop treatment without interim benefits being awarded.

In *Henry and Aviva*, Arbitrator Killoran stated that many considerations have been relied on by Arbitrators to determine entitlement to interim benefits. Principally, Arbitrators have applied the *prima facie* test and that of urgency/necessity. A *prima facie* case is one in which a party provides evidence, which if unanswered and believed, is sufficient to render a reasonable

¹³ *Nguyen and State Farm Mutual Automobile Insurance Company* (FSCO A05-000305).

conclusion in favour of entitlement. In *Nguyen and State Farm*, Arbitrator Wilson embraced a “look at the whole case” approach to awarding interim benefits.¹⁴

Based on the evidence, in my opinion, the Applicant did not demonstrate a compelling need or urgency for interim benefits to be awarded. The Applicant has access to medical treatment. In addition, he has some assistance, albeit limited, for his day-to-day attendant care needs. Therefore, there is no order for interim benefits at this time.

EXPENSES:

The issue of expenses of this Interim Benefits Motion will be left to the Hearing Arbitrator to address.



Jeff Musson
Arbitrator

October 17, 2016

Date

¹⁴ *Henry and Aviva Canada Inc.* (FSCO A11-000191).



FSCO A14-010039

BETWEEN:

EFIM TCHERTOK

Applicant

and

ROYAL & SUNALLIANCE INSURANCE COMPANY of CANADA

Insurer

ARBITRATION ORDER

Under section 282 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 Ontario *Regulation 664*, as amended, it is ordered that:

1. Mr. Tchertok is not entitled to interim non-earner benefits from May 10, 2014 and on-going.
2. Mr. Tchertok is not entitled to interim attendant care benefits from February 25, 2014 to September 15, 2015 by Alert Best in the amount of \$24,592.19.
3. Mr. Tchertok is not entitled to interim attendant care benefits from September 15, 2015 and on-going by AGTA Health in the amount of \$8,857.68.
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8. Mr. Tchertok is not entitled to interest for the overdue payment of benefits.
9. The issue of expenses in respect of the Interim Benefits Motion will be left to the Hearing Arbitrator.



Jeff Musson
Arbitrator

October 17, 2016

Date

