



FSCO A16-004285

BETWEEN:

SAMANTHA BLACK

Applicant

and

SECURITY NATIONAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Arbitrator Jeff Musson

Heard: In person at St. Catharines, Ontario June 21, 22, 23 and August 18, 21, 22, 2017

Appearances: Mr. Andrew Kerr for Samantha Black
Mr. Derek Greenside for Security National Insurance Company

Issues:

The Applicant, Ms. Samantha Black, was injured in an accident on February 1, 2013 and sought accident benefits from Security National Insurance Company ("Security"), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Ms. Black, through her representative, 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 - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

The issues in this Arbitration Hearing are:

1. Is Ms. Black entitled to income replacement benefits from May 3, 2015 and on-going?
2. Is Ms. Black entitled to a special award?
3. Is Ms. Black entitled to interest for the overdue payment of benefits?
4. Is either party liable to pay expenses in respect of the Arbitration Hearing?

Result:

1. Ms. Black is not entitled to income replacement benefits from May 3, 2015 and on-going.
2. Ms. Black is not entitled to a special award.
3. Ms. Black is not entitled to interest for the overdue payment of benefits.
4. Security National is entitled to its expenses in respect of the Arbitration Hearing. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

BACKGROUND

The onus is on the Applicant to prove entitlement to benefits. The Applicant is claiming entitlement to post-104 income replacement benefits (“IRBs”) as a result of the accident.

The car that the Applicant was a passenger in was involved in a head on collision. It was being driven by the Applicant’s co-worker as they were coming back from Sturgeon Falls. The Applicant was taken by ambulance to the hospital after the collision. Once at the hospital, she was examined and discharged the same day. When the Applicant went home, she was not feeling well and ultimately a couple of days after the accident she went to North Bay Hospital.

The emergency doctor at the hospital examined the Applicant for a concussion based on the Applicant complaining of dizziness, headaches along with pain in her back and neck. The Applicant filed for accident benefits on February 15, 2013 with the submission of her OCF-1. She has subsequently received both physical and psychological treatment as a result of her injuries.

The Applicant was employed at the time of the accident by the Children's Aid Society. She began working there 6 months prior to the date of the accident. The Applicant elected to claim IRBs as part of accident benefits instead of filing a WSIB claim. Ms. Black was still within the probationary period at the Children's Aid Society since she was a new hire. She was eventually terminated from the position June 19, 2015 when she did not return to work.²

THE APPLICANT – MS. BLACK

The Applicant testified on her own behalf at the Hearing. She currently resides in Niagara Falls and is married with 5 kids ranging in age from 12 to 23 years old. The Applicant has an extensive post-secondary school education having graduated with a couple of university degrees. She continued to work, take care of her family and attend university at various times prior to the accident.

The Applicant testified that prior to the accident, she didn't have any health problems or pain in her body. She was very active, going for walks, hiking and enjoying the outdoors. She also volunteered with the parent council at her children's school and played an active parental role in raising her family. The Applicant testified that she has experienced ongoing numbness and pain as a result of the accident. Her main complaints were soreness in her neck as well as her lower back. She said standing is worse than sitting in terms of pain levels. Her memory has been affected by this accident and she continually forgets things or has to be told the same thing multiple times.

The Applicant testified that she sustained a head injury as a result of the accident which has led

² Exhibit 1, Tab 2.

her to have problems focusing and concentrating since that time. Due to her injuries sustained as a result of the accident, she stated from a psychology perspective, that she suffers from depression, anxiety, PTSD among other psychological ailments. The Applicant confirmed that she was treated by a psychologist, Dr. Phillips, after the accident. She continued treatment 1-2 times per month until she moved from the North Bay area where the psychologist's practice was located. Since she moved to the Niagara region, she has not received any psychological treatments.

After the accident, from a physical perspective, the Applicant testified that she received massage therapy treatment. She also went for physiotherapy sessions 5 days a week. As part of her treatment, she would do exercises in a pool and did a lot of neck exercises as well. The Applicant testified that she paid out of pocket for these expenses when the Insurer denied her benefits. As for her current physical condition, she testified that she is seeing an orthopaedic surgeon in Niagara Falls for her back and hip.

The Applicant testified that as much as she wanted to return to work, both her doctors, Dr. Phillips and Dr. Hamilton, would not fill in her return to work papers because as the Applicant stated, "both doctors felt she was not in a good enough condition to return to work". When she was working at the Children's Aid Society, it was a demanding job. Her position entailed crisis intervention among other things as well as assisting law enforcement on calls involving children. After the accident, she tried to return to work on a trial basis and modified duties. Ultimately, she testified that she would get headaches and have to take a daily nap. She has trouble looking at computer screens, bright lights and other light emitting objects, which causes her headaches to this day.

The Applicant and her husband opened a holistic business after the accident when they moved from North Bay to St. Catharines. She registered the business in June of 2014 and she testified that the business, as of the date of this Hearing, is still a going concern. Her husband is responsible for the administrative aspects of the business while she handles all other aspects.

The Applicant testified that the business focuses on healing people through pain management,

coaching, holistic nutrition, intuitive readings and nordic pole walking. In June 2015, the Applicant testified she was certified as a life coach and now she teaches and certifies students to become life coaches as part of her business suite of services. In addition, the Applicant confirmed that she is a psychic reader as well as a motivational speaker. As part of her community outreach, the Applicant testified that she is active in the group Spiritual Niagara where she does coaching and is actively networking to generate clients for her business. She confirmed in September 2016, that she and her husband expanded the holistic business which required them to lease a building in which to operate the business. Up until this point, the business was run out of the Applicant's residence.

As part of outreach and marketing her business, the Applicant confirmed that she currently hosts a radio show every week. With the radio show, she takes calls from people looking for healing suggestions to their ailments. The Applicant testified that the radio show is conducted remotely from her home and in her opinion, "it's like talking to a friend". In addition to hosting the radio call ins to her show, she also has guest speakers from time to time talking about various topics. The Applicant testified that she hasn't made any money from the business and her unpaid financial obligations are growing as a result.

When shown surveillance by the Insurer, the Applicant confirmed that it was her working at the front desk at her holistic business.³ The Applicant also has a large social media footprint including posting of YouTube videos of her coaching and speaking sessions in front of large crowds.⁴ She also confirmed that it was in fact her who was on the YouTube videos giving motivational talks in front of large groups. In terms of the business website, the Applicant also confirmed that there were testimonials from clients on her website attesting to help that the Applicant gave them as clients of her business. With the website it lists coaching packages that she sells as well as the social media feeds where she promotes these packages.

The Applicant has certified at least 25 people to be life coaches since becoming a certified master coach/instructor in June 2015. In terms of the business financial records, the Applicant

³ Exhibit 3, Surveillance of the Applicant April 12, 13, 2017.

⁴ March 9, 2017 YouTube Video Niagara Speaking event.

confirmed that she charges between \$879.00 to \$979.00 to certify each of her students as coaches. The net income she receives is anywhere between \$400.00 to \$500.00, after fees and expenses. The Applicant also offers 60 minute introductory coaching sessions for \$185.00, packages of two 60 minute coaching sessions for \$250.00, and has various other packages ranging up to \$4000.00.

In terms of household duties, the Applicant was asked about household chores and who does them around the house post-accident. She testified that her husband takes care of them. He also takes care of the household finances. In terms of outside maintenance around the house, the Applicant's husband does these chores as well. When it comes to doing chores inside, she testified that her husband does the cleaning and laundry. The Applicant stated that they order take out the majority of the time rather than cook.

In terms of driving, the Applicant testified that driving for her is a problem now. She gets driven everywhere. She went 2 years without having her licence and would take taxis everywhere. However, she also testified that she went on a few road trips since the accident to Boston and to North Bay as well as to the Muskoka area.

Prior to the accident, the Applicant had an active social life. She testified that she is trying to be more engaged socially after the accident. She confirmed that she wrote a script for a play in February, 2017. It was a murder mystery play as part of a dinner for a local group. She also confirmed that as part of her social life engagement, she periodically gives psychic readings to people for money. She travels for these psychic readings and has done them in London, Ontario, Regina, Vancouver as well as the Niagara region. The Applicant testified that these activities are not making her money and that they are only happening on a sporadic basis, not on a continual basis, which she says is one reason why they are part of her social life.

DR. JEFFREY PHILLIPS

Dr. Phillips is a psychologist from North Bay and has been in solo practice since 1996. He testified that he has been working with people injured in motor vehicle accidents since 1992.

He conducted various tests on the Applicant as part of his initial client intake. He confirmed that the information on the Applicant's intake was all self-reported. Dr. Phillips assessed the Applicant using learning focused tests, reality tests as well as visual and working memory tests. He found the Applicant to not suffer from hyperactivity, however he did conclude that she had difficulty in getting her motivation levels up. As a result, he concluded that the Applicant has become more introverted, depressed and anxious as a result of the accident.

Under cross-examinations, Dr. Phillips was not aware that Ms. Black was not taking a full course load at Nipissing University prior to the accident as he was led to assume. In fact, he stated that he was not aware that she had deferred the start of her Master's program at the time of the accident. Dr. Phillips was asked to explain the test results that the Applicant scored on the test he administered.⁵ He said the Applicant's score on the Rey Complex Figure Test and Recognition Trial (a memory test), was the same score one would expect from a patient with dementia at an advanced stage. His only explanation for this could be a conscious intention, on the part of the Applicant, to make it appear as though her memory was worse than it was.

The last time that the Applicant saw the doctor was February 2015 and he had been completely unaware of how she had been doing since that time.⁶ Dr. Phillips confirmed that all of the testing that was performed was in April and May of 2013. Typically, test results are considered valid for a period of only two years after the tests were taken.

As a result, the reliability of the test results, which Dr. Phillips based his medical opinion on, had expired after two years. When asked if he knew that the Applicant was a motivational speaker as well as an owner of a holistic business, he was surprised that the Applicant had progressed so well from the time she was under his care.

CHRIS BLACK

Chris Black is married to the Applicant and has known her since 1999. He testified that he has

⁵ Exhibit 1, Tab 35.

⁶ *Ibid*, Tab 53.

2 university degrees in addition to 2 college degrees. At one time he had worked at a group home with foster children back when he and the Applicant were living in North Bay. He confirmed that after North Bay, he and the Applicant opened their own business. Mr. Black confirmed that he handles the administrative aspects of the business. This includes advertising, bookkeeping and leasing of equipment. Since the business is not making money, he has had to take on a second job as a server in a restaurant in order to make ends meet.

He testified that the Applicant had no prior psychological issues before the accident. The Applicant was self-sufficient and fully capable of raising their kids, attending school and maintaining a job. Now, in his opinion, the Applicant is a shell of her former self. Mr. Black confirmed some of the same details as to how the Applicant was feeling in the days after the accident. He said that he had taken her to the hospital the following day after the accident. She complained about headaches and overall pain.

Mr. Black also confirmed that 6 months after the accident, she was showing no improvement in her pain or condition. In addition she now had low stamina and had trouble coping. He also testified that the Applicant attempted to return to work at the Children's Aid Society after 1 year, but since she never completed her 6 months' probation period with them, they didn't allow her to return. As a result, the Applicant attempted to find work in other areas and ultimately he and the Applicant settled on the Niagara region where they opened their own holistic business.

DR. HAMILTON

Dr. Hamilton is a neuropsychologist who was put forward as an expert in the area of neuropsychology by the Applicant. She conducted an assessment of the Applicant on November 1 and 22, 2015 and concluded on December 9, 2015.⁷ Dr. Hamilton testified that when she assesses a patient, she takes a holistic approach which includes mood, effort and engagement. As part of her assessment she reviews formal test results. She also interviews the

⁷ Exhibit 1, Tab 40.

patient and completes a document review as well.

Dr. Hamilton testified that the Applicant had trouble with retention and processing speed, based on her test results. However, she found that the Applicant performed adequately for the most part. She also noted that the Applicant worked slowly, but accurately. After her assessment, Dr. Hamilton testified that the Applicant's symptoms reflect the conclusions in her report, mainly that the accident materially contributed to the Applicant's current condition and her reduced functioning.

Dr. Hamilton assessed the Applicant a second time on September 3, 2015.⁸ The reason for the second assessment was to comment on the findings of the Insurer's assessor, Dr. Dowhaniuk. Dr. Hamilton updated her report as well after the 2nd assessment. She noted that the Applicant was still having issues and suffered from a low depressed mood. As part of this assessment, Dr. Hamilton was asked to assess the Applicant as it related to catastrophic impairment as well as post-104 IRBs. Dr. Hamilton testified that the Applicant would have been found marked in the areas of daily living because she could not hold down employment or work like activities. Ultimately, she found the Applicant would have a difficult time working in a competitive work environment. It was interesting to note that Dr. Hamilton did not say that the Applicant had a complete inability to work, just that in her opinion, it would be difficult.

When Dr. Hamilton was asked by the Insurer if she knew that the Applicant opened a business, spoke in front of groups of over 200 people, hosted a weekly radio show and has been a life coach since June of 2015, she said no and that she was surprised to learn that fact. This reality was at odds with the findings of Dr. Hamilton's assessments.

DR. DOWHANIUK

Dr. Dowhaniuk is a neuropsychologist who conducted a neuro psych assessment of the

⁸ Exhibit 1, Tab 52.

Applicant on February 12, 2015 on behalf of the Insurer.⁹ He testified he also administered the Greenwood Memory Test, to check the Applicant's answers for validity. Dr. Dowhaniuk confirmed that the validity testing is key to a proper diagnosis. He indicated that the measurement of effort carries greater weight than the actual trauma. He concluded that the Applicant's effort was lower than expected. In fact, he found that the Applicant's performance was lower than someone with a traumatic brain injury. When assessing the Applicant's working memory, it was found to be lower than expected. In summary, he testified that the Applicant's answers were all over the map. Some areas were better than individuals with traumatic brain injuries, while others were below.

Before his testimony concluded, Dr. Dowhaniuk was asked to comment on Dr. Phillips' assessments. He stated that he didn't agree with Dr. Phillips' assessment findings because there was no performance validity testing. Therefore, the results of that assessment can not be considered in his expert opinion. Dr. Phillips was asked directly, does the Applicant suffer a complete in ability to work as a result of the accident? He replied from a psychological perspective, no.

EVIDENCE AND ANALYSIS

INCOME REPLACEMENT BENEFITS

The Applicant is claiming entitlement to post-104 IRBs. Therefore the issue at this Hearing is, does the Applicant meet the test for post-104 IRBs. In the *Schedule*, the post-104 test is defined in section 6(2)(b).¹⁰

I found the testimony of the Applicant to lack complete credibility. There were numerous contradictions between her testimony and the evidence presented at the Hearing. I found that the

⁹ Exhibit 2, Tab I.

¹⁰ Section 6(2)(b) of the *Schedule* lists out the relevant test: "(2) The insurer is not required to pay an income replacement benefit, (b) for any period longer than 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience."

impression that the Applicant attempted to portray to those of us in attendance at the Hearing was not supported by her testimony or the medical evidence presented and most of all was not supported by overall common sense.

The Applicant is claiming that she has a complete inability to work, yet she opened a business, did motivational talks in front of 200 people, did psychic readings and continues to run an established business in the Niagara region. This was all occurring in the period where she is claiming a complete inability to work which continues up until today. There was YouTube evidence presented and confirmed by the Applicant that it is her in the videos giving life coaching talks and instruction to people. I agree with the Insurer when it says "The level of disability which the Applicant has suggested as still being present does not coincide with her presentation in the YouTube video."¹¹

From the financial and operational evidence, the Applicant's business was a going concern during the time period she is claiming post-104 IRBs, which is from May 3, 2015. For example, she attended courses and was certified by the Coaches Federation as a master coach and instructor in June 2015. This certificate allowed her to teach others to become life and executive coaches. According to the financial evidence, she spent \$4,536.93 on advertising in 2015 as well as \$2,382.79 on telephone and utility expenses in 2015. These entries all demonstrate that the business was operating, filing tax returns and although the business wasn't making a profit, it was still a business, the operation of which the Applicant was actively involved in. One only need to refer back to the definition of section 6(2)(b) that the Applicant is in fact engaged in employment and therefore does not qualify for post-104 IRBs.

Putting aside the above evidence, in the alternative, if one considers the medical evidence on its own merit, the Applicant still does not qualify for post-104 IRBs. I found the tests conducted and the conclusions from the assessments of Dr. Dowhaniuk to be more reliable than the assessments and test conducted by Dr. Phillips or Dr. Hamilton. Drs. Phillips and Hamilton had not seen Ms. Black since February and September of 2015 respectively. In addition, when both Drs. Phillips

¹¹ Insurer's written submissions.

and Hamilton were presented with evidence related to the Applicant's current employment status, each of them was surprised to learn that the Applicant is operating a business. This evidence was showing the Applicant functions at a level that neither doctor's assessment concluded was possible. Therefore, based on the medical evidence, the Applicant fails to meet the post-104 test for IRBs.

CONCLUSION

The Applicant failed to meet the onus of proof to show that she was entitled to the benefits in dispute. The evidence submitted by the Applicant did not withstand the defense presented by the Insurer. Additionally, even though the onus was not on the Insurer to prove entitlement to benefits, it still had its expert testify. When comparing the evidence of the Insurer's expert to that of the Applicant, I felt that the Insurer's evidence was far more credible in determining the Applicant's entitlement to post-104 IRBs. However, the Applicant's case was doomed the moment that she admitted that she has been operating a business at a fixed address during the period in which she was claiming post-104 IRBs. The Applicant was completely brazen in promoting this business and proceeded to leave a trail of evidence on YouTube, Facebook and her website which shows that she fails to meet the test for entitlement to post-104 IRBs. Therefore, all issues in dispute are denied.

SPECIAL AWARD

Since I've determined that no benefits are payable, there is no special award payable.

INTEREST FOR THE OVERDUE PAYMENT OF BENEFITS

Since I've determined that no benefits are payable to the Applicant, no interest is payable.

EXPENSES:

If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter,

the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.



Jeff Musson
Arbitrator

November 15, 2017

Date



FSCO A16-004285

BETWEEN:

SAMANTHA BLACK

Applicant

and

SECURITY NATIONAL INSURANCE COMPANY

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. Ms. Black is not entitled to income replacement benefits from May 3, 2015 and on-going.
2. Ms. Black is not entitled to a special award.
3. Ms. Black is not entitled to interest for the overdue payment of benefits.
4. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.



Jeff Musson
Arbitrator

November 15, 2017

Date