Neutral Citation: 1998 ONICDRG 98

OIC A96-001230

ONTARIO INSURANCE COMMISSION

BETWEEN:

ESTERINA REDA

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

DECISION

Issues:

The Applicant, Esterina Reda, was injured in a motor vehicle accident on December 31, 1994. She applied to Wawanesa Mutual Insurance Company ("Wawanesa") for caregiver benefits and housekeeping expenses payable under the *Schedule.*[1] Wawanesa paid housekeeping expenses until January 31, 1996 and caregiver benefits until March 10, 1996. Ms. Reda claimed entitlement to housekeeping expenses and caregiver benefits or other disability benefits after these dates and ongoing. The parties were unable to resolve their disputes through mediation, and Ms. Reda applied for arbitration under the *Insurance Act,* R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

[1] The *Statutory Accident Benefits Schedule —Accidents after December 31, 1993, and before November 1, 1996,* called "the *Schedule"* in this decision. The *Schedule* is Ontario Regulation 776/93, as amended by Ontario Regulation 635/94.

1. Was Ms. Reda entitled to caregiver benefits under Part IV of the *Schedule* for the period commencing one week after her accident of December 31, 1994 to March 10, 1996 and beyond?
2. Is Ms. Reda entitled to other disability benefits under Part V of the *Schedule* beyond March 10, 1996?
3. Is Ms. Reda entitled to housekeeping expenses under section 55 of the *Schedule* beyond January 31, 1996?
4. Is Wawanesa entitled to repayment under section 70 of the *Schedule* of the difference between the caregiver benefits she received and the other disability benefits to which, it is not disputed, she was entitled for the period commencing one week after her accident of December 31, 1994 to March 10, 1996?

Ms. Reda also claims interest on any amounts owing and her expenses incurred in the hearing.

Result:

1. Ms. Reda was not entitled to caregiver benefits under Part IV of the *Schedule.*
2. Ms. Reda is not entitled to other disability benefits under Part V of the *Schedule* beyond March 10, 1996.
3. Ms. Reda is entitled to housekeeping expenses up to March 10, 1996 in the amount of $144.00.
4. Wawanesa is not entitled to any repayment under section 70 of the *Schedule.*

Hearing:

The hearing was held at the offices of the Ontario Insurance Commission in North York, Ontario, on September 30, October 1 and December 12, 1997, before me, David Leitch, Arbitrator.

Present at the Hearing:

Applicant:	Esterina Reda
Mrs. Reda's Representative:	Ian Little Barrister and Solicitor

Wawanesa's Representative:	Neil Colville-Reeves Barrister and Solicitor
Witnesses:	Esterina Reda Susie Reda Maria Minici
Exhibits:	A list of exhibits filed at the hearing appears in the Appendix to this Decision.

Evidence and Findings:

1. Caregiver benefits

At the time of the accident, on December 31, 1994, Ms. Reda was residing with her husband, Antonio senior, her son, Pat, her daughter-in-law (Pat's wife), Susie, her two grandchildren (Pat and Susie's children), Antonio, born April 13, 1993, and Jessica, born August 6, 1994, and her daughter, Luisa. Ms. Reda claimed caregiver benefits in respect of her two grandchildren, Antonio and Jessica. The evidence discloses that the following circumstances gave rise to Ms. Reda's claim.

Pat and Susie had been married in August, 1991 and were living with Susie's parents when Antonio was born in April, 1993. In November, 1993, they all moved to Pat's parents,' the Redas' home at Pat's request. Initially, since both Ms. Reda and Susie were working, Susie usually drove Antonio to her own parents to be cared for at least part of the day. But when Jessica was born in August, 1994, Susie took maternity leave and was still on maternity leave at the time of Ms. Reda's accident in December, 1994. Ms. Reda also stopped working in September, 1994. On the date of the accident, therefore, neither Susie nor Ms. Reda was required by work obligations to be outside the home or away from the care of the children. However, Ms. Reda alleges that there was an additional factor which made it necessary for her, rather than Susie, to become the children's primary caregiver.

Pat, Ms. Reda's son, had developed a serious substance abuse problem. He was admitted to a live-in treatment facility in January 1994 but dropped out in July or August, 1994. He came back to the Reda home, supposedly to be there for the birth of his

second child and to go back to work. In fact, he started doing drugs again. Susie testified that the consequences of this setback were that she "was with him (Pat) the majority of the time," that she had to leave the bathing or the feeding of the children "to chase Pat," and that while there was no pattern, she was out of the house as much as three or four days a week, day or night, hours at a time, driving Pat around or looking for him. Ms. Reda testified that to help her daughter-in-law, she would "pick up the slack," changing diapers, feeding and watching the children when Susie was not there or too tired or nervous. However, Susie testified that the amount of care provided by Ms. Reda to the children was about the same before and after the accident.

Ms. Reda and Susie also testified that the plan was for Ms. Reda to take care of the children when Susie went back to work at the end of her maternity leave.

The term "primary caregiver" is not defined in the *Schedule.* However, both counsel referred me to the following observation about how these words should be interpreted:

> Where there are a number of caregivers, a determination of who is the primary caregiver may involve considerations of relative amounts of time, energy and efforts spent in caregiving and the significance, importance and relative results of those efforts.[2]

Applying this approach, I find that Ms. Reda's contribution to child-care was not so important that she had become the children's primary caregiver by the date of the accident. While Ms. Reda played an essential role during this unfortunate period in her family's history, her own evidence only establishes that she did so as Susie's helper, filling in as required rather than taking over the primary role. The evidence as a whole does not persuade me either that Ms. Reda consistently performed more child-care functions than Susie before the accident or that the amount of care she provided after the accident was substantially different from the amount she had provided before the accident. The fact that Ms. Reda may have provided more care than Susie on any given day or even on any given series of days does not mean that she had become the children's primary caregiver on a comprehensive basis. In my view, the evidence must be viewed in a comprehensive way in order to avoid the absurd result of denying

[2] *Henry and Allstate Insurance Company of Canada* (January 12, 1996), OIC A-011487

benefits to a primary caregiver who is only temporarily away from his/her caregiving duties at the moment or on the day of the motor vehicle accident.

I accept the evidence that Ms. Reda was going to assume the primary caregiver role when Susie returned to work. However, since the accident happened before the new arrangement came into effect, the existence of a plan to put it into effect cannot be relied upon in support of Ms. Reda's claim for caregiver benefits.

2. Other disability benefits after March 10, 1996

To be entitled to other disability benefits in the two-year period after the accident, sections 19 and 2 of the *Schedule* require Ms. Reda to establish that as a result of the accident, she suffered an impairment that resulted in a substantial inability to engage in at least one of six kinds of activities in which she ordinarily engaged before the accident. The six kinds of activities are: personal care, mobility, household activities and activities requiring cognitive powers, emotional or behavioural control and communication abilities. To be entitled to other disability benefits for more than two years, sections 19 and 3 of the *Schedule* require Ms. Reda to establish that as a result of the accident, she suffered an impairment that continuously prevented her from engaging in substantially all of the activities in which she ordinarily engaged before the accident.

From a medical point of view, all the reports filed accept that Ms. Reda injured her neck in the motor vehicle accident of December 31, 1994. There is, however, insufficient medical evidence to support her claim as it relates to the cause and duration of any impairments or inabilities she experienced after March 10, 1996.

The report of her main family doctor, Dr. E. L. Kirsh, dated June 3, 1996, diagnosed chronic neck pain syndrome and prognosticated little improvement. Dr. Kirsh identified the following activities as being limited: making the bed, carrying laundry, looking after grandchildren, gardening, vacuuming and doing heavy housework. However, referring to the disabling effects of a previous work injury to the lower back, Dr. Kirsh writes: "She estimates that her current limitations are 80% related to her neck injury and 20% related to her previous back problems" (my emphasis).

Having reviewed Dr. Kirsh's clinical notes and records, I find that he underestimated the complicating effects of the previous work injury. In my view, the opinion of Dr. C. Martin, a family physician who replaced Dr. Kirsh briefly, is to be preferred. He commented as follows in his report dated April 25, 1996:

> Ms. Reda's clinical picture is complicated by a previous history of right-sided back and leg pain dating back to 1990. These early symptoms were apparently triggered by a pulling injury at work.
>
> Between 1990 and late 1994, prior to the MVA, Ms. Reda's back and leg symptoms had worsened to the point that, by December 14, 1994, she was having considerable difficulty carrying out household chores.
>
> …
>
> It would seem, from Dr. Kirsh's notes, that Ms. Reda was already considerably impaired prior the [sic] her accident of December 31, 1994. Her leg and back pain had increased to the point that she left her job on September 9, 1994. At an office visit on December 14, 1994, Esterina [Ms. Reda] stated that she could not perform her household chores due to her chronic pain. Certainly her injuries from the MVA have not helped matters any. However, it would seem that her "caregiving activities" were already seriously limited prior to the accident.

The medical evidence also leaves substantial doubt about the duration of the disabling effects of Ms. Reda's December 1994 motor vehicle accident. Again, while Dr. Kirsh's report of June 3, 1996, states that she had not recovered and would not likely improve, Dr. Martin's report of April 25, 1996 states that "Dr. Kirsh's notes suggest gradual improvement in neck mobility over much of 1995 but with continued pain at the latter stages of motion."

The issue of duration of Ms. Reda's disablement is clouded by what Dr. Martin called "pain behaviour." His own clinical record for April 30, 1996, the date he last saw her, contains the following entry: "was able to turn her head without pain when I surprised her, pain behaviour." This kind of comment echoes those found in the September 8, 1995 report of Advanced Rehab Technology following Ms. Reda's functional capacity assessment: "Throughout the testing procedure, Ms. Reda displayed numerous inconsistencies which indicates [sic] less than maximal effort. Inconsistencies were also recorded in regards to Ms. Reda's extremity of motion." Similarly, when Dr. Harold

Becker examined Ms. Reda at a Disability Assessment Centre on February 26, 1996, he noted:

> Examination of the neck revealed less than 30 degrees of active movement voluntarily when initially tested in all planes. This included anterior flexion, extension, bilateral rotation and bilateral bending. On coaxing and with further passive assistance, I was able to obtain about 60 degrees of range of movement in all planes. This was accompanied by significant complaint of pain and moderate pain behaviour.

Dr. Becker concluded that Ms. Reda had no significant impairment and could undertake all of the six kinds of activities listed in the *Schedule.* I accept his opinion.

Finally, the medical evidence does not support Ms. Reda's claim beyond the two-year period. On February 28, 1997, Ms. Reda underwent a C5-6 anterior cervical discectomy and fusion at the hands of Dr. M. Fehlings. This surgical intervention was conducted following EMG studies in November, 1996 showing bilateral ulnar nerve lesions and an MRI in December, 1996 showing a large osteocartilaginous bar at C5-6 which was narrowing the right neural foramina and compressing the spinal cord anteriorly on the right. The reports of both Dr. Maureen Shandling, the referring neurologist, and Dr. Fehlings, the surgeon, describe Ms. Reda as having right arm and neck pain which developed out of the motor vehicle accident of December 31, 1994 and got progressively worse, necessitating surgery. However, the reports and records of the family physicians do not confirm a history of progressing right arm pain following the motor vehicle accident. They do reveal a history of pre-accident as well as post-accident neck complaints. Neither Dr. Shandling nor Dr. Fehling makes mention of these records or of radiological reports showing pre-existing degenerative disc disease at C5-6.

I must, therefore, rely upon the opinion of Dr. John Zeldin, the only doctor whose report, dated December 4, 1997, addresses the issue of causation in the context of Ms. Reda's pre-existing neck complaints and degenerative disc disease. Dr. Zeldin wrote:

> .....we return to the question of the issue of causation between the accident of December 31, 1994 and the C5-6 herniation with resulting surgery.

> It seems that prior to the accident, patient had degenerative disc disease of the cervical spine and had some complaints of neck pain.
>
> At the time of the motor vehicle accident, patient sustained a neck strain. This is consistent with pain and discomfort for the time frame of a few weeks or a few months. Considering patient's pre-existing degenerative disc disease, however, this would account for a more protracted course. There was, however, as far as I can ascertain, no clinical evidence of nerve root involvement following the injury.
>
> An MRI examination performed in December 1996 (two years later) reports an osteocartilaginous bar compressing the neural foramen.
>
> The question arises of whether this finding is due to degenerative changes in the neck or due to acute trauma. I am not sure that this question can be answered with certainty, but there are certain factors that help in this query.
>
> Patient had degenerative disc disease of the cervical spine and some neck complaints prior to the accident. The natural history of such degenerative changes is gradual progression with a certain percentage developing nerve root compression that may eventually require surgery. I do not think there are definite markers to enable one to predict just which of these cases will progress to requiring surgery and in what time frame.
>
> On 31 December 1994, patient sustained a strain to her neck which resulted in neck pain. She had pre-existing degenerative changes in the neck which would make her neck more vulnerable to such an injury and would account for a more protracted course. There are however, no substantial findings in my opinion to suggest that the injury was of enough severity to cause any structural damage or substantially affect the long-term natural history or natural progression of the degenerative changes in the neck.
>
> In regard to causation accordingly, taking the whole picture in balance, one would have to say that the MRI findings were degenerative in nature and that the injury of December 1994 may possibly, but not necessarily probably, have been a factor in accelerating the timetable as to when patient would eventually have required surgery.

After reviewing all of the medical evidence filed, I conclude that Ms. Reda has not discharged the onus upon her to establish, on a balance of probabilities, that any physical restrictions she experienced after March 10, 1996 were caused by the accident of December 31, 1994 or that any such restrictions, at least up to the two-year mark, meet the eligibility test set out in section 2 of the *Schedule.* The fact that her restrictions by reason of surgery and convalescence in early 1997 meet the eligibility test set out in

section 3 of the *Schedule* is, of course, only relevant if a causal connection can be established between the accident of December, 1994 and the surgical treatment. Dr. Zeldin's opinion denies, on the balance of probabilities, the existence of such a connection. Ms. Reda does not, therefore, qualify for other disability benefits under section 19 after March 10, 1996.

3. Housekeeping expenses after January 31, 1996

Both Drs. Becker and Zeldin were of the view that Ms. Reda was capable of housekeeping and that financial assistance in this regard could be phased out "within the next month or two." Dr. Zeldin's opinion was contained in his report dated January 3, 1996 and Dr. Becker's in his report dated February 26, 1996. I find that Ms. Reda is entitled to housekeeping expenses up to March 10, 1996, the date her other accident benefits were terminated.

Since there was evidence that housekeeping services had been provided to Ms. Reda by her daughter, Maria Minici, prior to the accident, the Insurer properly questioned whether all the housekeeping services provided by Ms. Minici after the accident could be fairly attributed to the accident. Ms. Minici's combined account for housekeeping services rendered in both February and March, 1996 was $384.00. I calculate the amount due for housekeeping expenses to the termination date of March 10, 1996 as follows: 75% of $384.00 reduced by a further 50% = $144.00.

4. Repayment of difference between caregiver and other disability benefits

Sections 70(1), (2) and (5)(a) of the *Schedule* read as follows:

> **70.-** (1) A person shall repay to the insurer any benefit received under this Regulation that is paid to the person through error, wilful misrepresentation or fraud.
>
> (2) The obligation to repay a benefit received under this Regulation that was paid to a person through error does not apply unless notice is given under subsection (5) within twelve months after the payment was made to the person.
>
> ……

(5) If a person is required to repay an amount to an insurer under this section, the insurer,

(a) shall give the person notice of the amount that is required to be repaid; and

…

The Insurer argued that if I denied Ms. Reda's claim to caregiver benefits, I should order her to repay the difference between the caregiver benefits she received until March 10, 1996 and the other disability benefits which it agrees she was entitled to until that date. A notice of claim for repayment for the entire period, January, 1995 to March, 1996, was contained in the Insurer's Response to the Application for Arbitration dated August 26, 1996 but Insurer's counsel acknowledged at the hearing that repayment could only be claimed for the period August, 1995 to March, 1996. This admission implicitly confirms that the Insurer was not alleging any fraud on Ms. Reda's part. In any event, I find no evidence of fraud on her part. I, therefore, assess the Insurer's claim for repayment as an allegation that caregiver benefits were paid to Ms. Reda "through error."

The Ontario Court of Appeal has recently commented upon the proper interpretation to be given to the words "through error" as found in the repayment provisions of accident benefits *Schedules.* The Court's endorsement in the case of *State Farm Mutual Automobile Insurance Co. v. Kong* (unreported) reads as follows:

> There is evidence to support the conclusion reached by the motions judge that the respondent cooperated fully. Since the appellant acknowledges that the test for "error" is correctly set out in Kennedy J.'s reasons, we find no "error" with the meaning of section 27(1) of the *Schedule.*

This case obviously dealt with the earlier accident benefits *Schedule* but since the words interpreted and legal context are identical, I consider that I am bound by the Court of Appeal's acceptance of Kennedy J.'s statement of the law. That statement, in any event, refers to and accepts what has become known as the *Levenson* approach to

this issue. This approach has also been endorsed by the Director's Delegate[3] and is, therefore, binding upon me.

Kennedy J. states the law as follows:

> In order to constitute payment "through error" the insurer must demonstrate that responsibility for the overpayment is attributable in some material way to the actions of the applicant.[4]

The Director's Delegate states the law as follows:

> The determination of whether benefits were paid "through error" will depend on the particular facts of each case. The focus, however, should be on the situation at the time the benefits were paid. If the insured person materially contributed to the overpayment, it must be repaid. However, if the overpayment is based on information that legitimately was not available earlier, or on later arbitral or court decisions affecting the interpretation of the *Schedule,* repayment is not required, although the insured person's ongoing benefits could be affected.[5]

Applying the law to the evidence, I find that the Insurer has failed to demonstrate that the overpayment in this case was attributable in some material way to Ms. Reda's actions. It is true that she stated in the application for accident benefits and the disability questionnaire that she was the primary caregiver of two children. However, these forms did not ask Ms. Reda for a complete list of the other persons she was living with, nor for her relationship with the children (though she volunteered that information on the disability questionnaire), nor for any explanation as to why she believed that she had become her grandchildren's primary caregiver despite the fact that the children's own parents were both living in the same household and their mother was on maternity leave. Nor did the Insurer lead evidence that any of this additional information was requested, in the initial processing of the claim, by the Insurer.

I have, of course, relied upon this additional information and other evidence to determine that Ms. Reda was not her grandchildren's primary caregiver at the time of

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[3] See *State Farm Mutual Automobile Insurance Company and Lunn* (April 30, 1997), OIC P-013860 and *Royal Insurance Company of Canada and Clark* (September 26, 1997), P 97-00008.
[4] See *StateFarm Mutual Automobile Insurance Co. v. Chun Soo Kong* [1996] O. J. No. 2321 (Ontario Court of Justice-General Division) at para 17.
[5] See footnote 3 above, at page 11 of *Lunn* and page 6 of *Clark.*

the accident. However, if the "focus ... should be on the situation at the time the benefits were paid," then the fact that I, as an arbitrator, after hearing evidence and argument, ultimately disagreed with her view of the situation does not necessarily mean that she is responsible for the overpayment. My decision to deny her caregiver benefits involved an interpretation and application of the *Schedule* as well as determinations of fact. Ms. Reda should not be required to repay unless she failed, when requested, to supply pertinent information or supplied pertinent but incorrect information at the time the benefits were paid.[6] The Insurer led no evidence of this and its claim for repayment fails.

Expenses:

Although Ms. Reda has been largely unsuccessful, her claim was not entirely without merit. If the parties cannot agree on the issue of expenses, I may be spoken to.

Order:

1. Ms. Reda is not entitled to caregiver benefits under Part IV of the *Schedule.*
2. Ms. Reda is not entitled to other disability benefits under Part V of the *Schedule* beyond March 10, 1996.
3. Ms. Reda is entitled to housekeeping expenses up to March 10, 1996 in the amount of $144.00.
4. Wawanesa is not entitled to any repayment under section 70 of the *Schedule.*

David Leitch
Arbitrator

Date

[6] Ms. Reda did supply the Insurer with incorrect information about her employment history but this information was not pertinent to her claim for caregiver benefits as she was not employed or self-employed at the time of the accident.

Appendix

List of Exhibits

Exhibit 1	Letter of solicitor, Diana Morello, to Dr. Kirsh
Exhibit 2	Document Brief of Insurer
Exhibit 3	Clinical notes and records of Dr. Kirsh - January 7, 1993-January 3, 1995
Exhibit 4	OHIP summary
Exhibit 5	Letter of Dr. Martin dated April 25, 1996
Exhibit 6	Insurance Forms - Application for Expenses dated February 1, 1996
Exhibit 7	Clinical notes and records of Dr. Fehlings
Exhibit 8(a)	Paid housekeeping invoices
Exhibit 8(b)	Unpaid housekeeping invoices
Exhibit 8(c)	Receipt for housekeeping
Exhibit 9	Dr. Zeldin's report, December 4, 1997
Exhibit 10	WCB file extracts