



Neutral Citation: 2008 ONFSCDRS 84

FSCO A06-001588

BETWEEN:

LISA FAIZ

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Jeffrey Rogers

Heard: November 19, 20, 21 and 22, 2007 and February 6 and April 4, 2008,
in Toronto, Ontario.

Appearances: Mr. Jack Parsekhian, solicitor for Ms. Faiz
Mr. Neil Colville-Reeves, solicitor for Wawanesa Mutual Insurance
Company

Issues:

The Applicant, Lisa Faiz, was injured in a motor vehicle accident on July 10, 2003. She applied for statutory accident benefits from Wawanesa Mutual Insurance Company (“Wawanesa”), payable under the *Schedule*.¹ Wawanesa denied that she was entitled to the benefits claimed on the grounds that her impairment was not caused by the accident. The parties were unable to resolve their dispute through mediation, and Ms. Faiz 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 November 1, 1996*, Ontario Regulation 403/96, as amended.

The issues in this hearing are:

1. Is Ms. Faiz entitled to receive a weekly income replacement benefit of \$220.60 from July 2004 to present and ongoing, pursuant to section 4 of the *Schedule*?
2. Is Ms. Faiz entitled to receive a medical benefit of \$1,815.61 for treatment by Dr. Hue-Fah as set out in a treatment plan dated March 16, 2004, pursuant to section 14 of the *Schedule*?
3. Is Ms. Faiz entitled to interest for the overdue payment of benefits pursuant to section 46(2) of the *Schedule*?
4. Is Wawanesa liable to pay a special award pursuant to subsection 282(10) of the *Insurance Act* because it unreasonably withheld or delayed payment of the claimed benefits to Ms. Faiz?
5. Is either party liable to pay the other's expenses in respect of the arbitration, pursuant to section 282(11) of the *Insurance Act*?

Result:

1. Ms. Faiz is not entitled to receive a weekly income replacement benefit of \$220.60 from July 2004 to present and ongoing, pursuant to section 4 of the *Schedule*.
2. Ms. Faiz is not entitled to receive a medical benefit of \$1,815.61 for treatment by Dr. Hue-Fah as set out in a treatment plan dated March 16, 2004, pursuant to section 14 of the *Schedule*.
3. Ms. Faiz is not entitled to interest for the overdue payment of benefits pursuant to section 46(2) of the *Schedule*.

4. Wawanesa is not liable to pay a special award pursuant to subsection 282(10) of the *Insurance Act*.
5. The decision on expenses is reserved, to be resolved pursuant to Rules 75 to 79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

Ms. Faiz was riding her bicycle along Bloor Street on July 17, 2003 when she was struck by the door of a parked car. She was taken by ambulance to St. Michael's Hospital where she was treated and released. She has long since recovered from the injuries she suffered in the accident. She was diagnosed with Multiple Sclerosis (MS) in July 2004. She says that her MS was triggered by the trauma of the accident. Her position is that since July 2004 she has been unable to work at the job she did at the time of the accident and she is currently unable to work at any job, because of her MS symptoms.

According to the medical records, the first time Ms. Faiz went to see a doctor after getting emergency treatment at St. Michael's was in February 2004, when she went to see Dr. Hue-Fah, a chiropractor, complaining of leg and ankle pain. Dr. Hue-Fah submitted the treatment plan in dispute in this arbitration, in March 2004. Although she did not know it at the time, the symptoms Ms. Faiz was experiencing when she went to see Dr. Hue-Fah were caused by MS. Therefore, to succeed in her claim for both the IRBs and the treatment in dispute, Ms. Faiz must prove that the accident triggered her MS.

Wawanesa says that the accident did not trigger MS, and if it did, Ms. Faiz was not disabled from her pre-accident job within 104 weeks of the accident, as required by section 4 of the *Schedule*. Wawanesa also disputes that Ms. Faiz is currently disabled from working at any job. Wawanesa further submits that the treatment in dispute was not reasonable and necessary.

Did Trauma from the Accident Trigger MS?

To be clear, Ms. Faiz does not claim that the accident caused her MS. No one knows what causes MS. Ms. Faiz's position is that the injuries she sustained in the accident triggered the disease

which was latent but until then, asymptomatic. The theory that trauma can trigger MS is unproven. It is not generally accepted in the medical community. Several studies have suggested a link between certain kinds of trauma and the onset or acceleration of the disease. Other studies have found no link. The issue has been litigated before, with applicants having mixed success.² My decision must be based on the evidence introduced in this hearing.

Dr. Paul Marchetti is Ms. Faiz's treating neurologist. He has extensive experience in the diagnosis and treatment of MS. In a report dated March 2, 2006, he gave the opinion that it is probable that the trauma Ms. Faiz sustained in the accident triggered her MS.³ Dr. Rehan Dost is a neurologist that Wawanesa retained to review the medical records and give an opinion on the issue of causation. He has a practice in Paris, Ontario, where he spends 2 days per week. The rest of his time is spent in his practice in Toronto, which is devoted to doing medical/legal evaluations, and medical examinations and assessments. He agrees that Dr. Marchetti is more qualified than he is in the diagnosis and treatment of MS. His opinion is that the accident played no role in Ms. Faiz's MS.⁴ Both testified at the hearing.

Neither Dr. Marchetti nor Dr. Dost has specific training in the causes of MS. Neither has conducted studies on the subject. Neither has experience in identifying causation in specific cases. Their expertise is in treating the disease. Their opinions on causation are based on their review of the available literature. They were equally familiar with the theory. Nothing turns on any divergence in their clinical experience.

To put it simply, MS is a disease of the autoimmune system. The brain is insulated from the rest of the body by the blood-brain barrier. Every visitor to the brain must have an escort through this barrier. In MS patients, a breach of this security occurs. It is unknown precisely how or why. The result of the breach is an attack on the central nervous system by the body's immune system. Specifically, the immune system attacks the white matter of the brain. Attacks usually start and

²See *York v. Johnston* (1997), 148 D.L.R. (4th) 225 (B.C. C.A.); *Shabbits v. Ryant*, [1989] B.C.J. No. 1939, (B.C. S.C.); *Haney v. Malischewski*, [1997] B.C.J. No. 1894, (B.C. S.C.); *Jackson v. Calgary Exhibition and Stampede Ltd.*, [1985] A.J. No. 829, (Alta. Q.B.); *Chriqui v. Duke*, [2004] A.J. No. 697, (Alta. Q.B.); *Oijen v. Seib*, [1999] B.C.J. No. 1595, (B.C. S.C.)

³Exhibit 21-Exhibit B, Tab C-7A

⁴Exhibit 57-Exhibit G, Tab 56

cease, for unknown reasons. Thus, most cases follow a relapsing and remitting course.

Ms. Faiz's position is based on the theory that trauma to the central nervous system can cause a disruption of the blood-brain barrier, thus triggering latent MS.

Dr. Marchetti and Dr. Dost essentially agree on the validity of the trauma theory. Dr. Marchetti called the theory a "legitimate opinion". He said that "the nub of it is to say that there is a possible association between trauma and MS", that "the theory that trauma either causes or exacerbates MS is a plausible one", that "my opinion is trauma cannot be excluded as a cause of MS, in contrast to the opinion of others." Dr. Dost testified that "the trauma theory is an interesting theory that seems to fit the facts" and that he accepts that "it is possible, but not medically probable."

Their evidence is similar to that given in earlier cases. The analysis has sometimes focused on whether it is proven that trauma can trigger MS. But that is not what must be proven. Ms. Faiz must prove that her MS was triggered by the trauma of the accident. To satisfy that onus, the first step is proving that trauma is a possible trigger. She must then prove that trauma was the probable trigger in her case. Based on the evidence of Dr. Marchetti and Dr. Dost, I am satisfied that trauma is a possible trigger of MS.

The theory is based on retrospective studies of small groups of MS patients. Dr. Marchetti described this as "class 3 evidence". He agreed that the theory could be better investigated in a prospective study of a large population over a long period of time. That would be class 2 evidence. Class 1 evidence is obtained from a "double blind" study. That kind of study is thought to produce objective results. However, the theory will never be proven with that degree of certainty because a double blind study would require subjecting one group of patients to specific trauma. Nevertheless, in the hierarchy of medical studies, the theory is considered speculative. Because the theory is not well established, the evidence must be closely scrutinized to ensure that Ms. Faiz's circumstances fit precisely within its parameters, before finding that the trauma she suffered in the accident probably triggered her MS.

There are three necessary elements to the theory:

- First, a history that contains no pre-accident symptoms of MS;

- Second, a close temporal link between the accident and the onset of symptoms, and;
- Third, trauma to the central nervous system significant enough to cause a disruption of the blood-brain barrier.

I find the evidence on each of the elements of the theory unconvincing. I am not satisfied that the trauma she suffered in the accident probably triggered Ms. Faiz's MS.

I find that Ms. Faiz experienced symptoms consistent with MS, before the accident. In his report⁵, Dr. Marchetti indicated that Ms. Faiz had experienced "vague possible neurological symptoms over the previous years". He discounted them as "nothing that would make for a good historical description of an MS attack". Under cross-examination he agreed that, although for medical purposes they would not be considered attacks, some of Ms. Faiz's pre-accident symptoms were possible symptoms of MS. No explanation of what else might have caused these symptoms was offered.

That explanation was critical because Dr. Marchetti relied on a post-accident history of neurological symptoms to establish a temporal link to the accident. He based his opinion on Ms. Faiz's report of tingling in the right leg that started within days of the accident. Ms. Faiz testified that she first noticed tingling that lasted about 5 minutes a day, three weeks after the accident. She could not recall whether it happened every day. She testified that the tingling got worse, but she was unclear as to how it progressed. She testified that she started feeling "jolts" and her knee started locking around the time she went to see her family doctor for the first time. But that was not until March 2004.

Because his primary interest was in treating Ms. Faiz, it is understandable that Dr. Marchetti would not have focused on taking a history aimed at establishing causation. His focus was probably also blurred by his admitted interest in assisting her in getting insurance coverage when he gave his opinion on causation. But a better investigation of Ms. Faiz's pre-accident symptoms and some other explanation for them, or clear evidence distinguishing them from her post-accident symptoms, is required for the focus of the trigger of her MS to be shifted to the trauma

⁵Exhibit 21, Exhibit B, Tab 7A.

theory. The evidence does not adequately explain why her pre-accident symptoms can be discounted, while fleeting symptoms post-accident can establish a link.

Because Ms. Faiz had suffered neurological symptoms for years before the accident, her reported post-accident symptoms could have been triggered by pre-accident events. Therefore, even though Ms. Faiz has consistently reported that she started feeling a tingling sensation in her right leg shortly after the accident, that alone does not establish a close temporal link to the accident for the onset of MS.

The evidence that Ms. Faiz suffered trauma to her central nervous system in the accident is also tenuous. The basis for Dr. Marchetti's conclusion that she did was Ms. Faiz's reported post-accident neurological symptoms. However, he found no physical evidence to clearly link those symptoms to the accident. There is nothing in the Ambulance Report⁶ or the Emergency Report⁷ that suggests trauma to the central nervous system. Dr. Marchetti testified that Ms. Faiz's symptoms could have been caused by a whiplash injury, but she reported no back pain or cervical pain at the time of the accident, or at any time after it. She testified that she had a stiff neck after the accident, but that quickly resolved. By the time she returned to work, between five days and three weeks after the accident according to her various reports, her only ongoing complaint was her leg. She has consistently reported that the neurological symptoms started after she returned to work. Thus a temporal link is not established between the stiffness in her neck and her neurological symptoms.

I accept Dr. Dost's evidence that pain from a whiplash injury manifests immediately if the injury is serious. Dr. Dost and Dr. Marchetti agreed that pain would occur within a few days after the triggering event, for less serious trauma. Because of the absence of any report of neck pain, the transient nature of the reported neck stiffness, and the fact that it did not coincide with the onset of neurological symptoms, I find that Ms. Faiz did not suffer a whiplash injury in the accident. Dr. Marchetti agrees that Ms. Faiz did not suffer serious neurological trauma. He agrees that the more significant the injury, the more likely there would be a breach of the blood-brain barrier.

⁶Exhibit 13, Exhibit B, Tab C2

⁷Exhibit 14, Exhibit B, Tab C3

However, he accepts the published opinion by Dr. Poser⁸ to the effect that serious trauma is not required for a breach of the blood-brain barrier. Dr. Poser's opinion is at odds with the other published opinion upon which Dr. Marchetti relied.⁹ That opinion was based on a study of 39 patients and proposed a link between MS and acute spinal chord injury. Dr. Poser did not conduct a study and does not indicate that he has ever seen a case in which his opinion was vindicated. His opinion is based on the theory that trivial head injuries and whiplash can cause brain damage. I heard no evidence on the validity of that theory. Dr. Poser's opinion adds a further layer of uncertainty to the tenuous trauma theory, taking it into the realm of mere conjecture.

I do not accept Dr. Marchetti's opinion that major trauma to the central nervous system is not necessary for a potential breach of the blood-brain barrier. I therefore do not accept his opinion that the trauma theory comes in to play, based on the trauma that he thought Ms. Faiz might have suffered.

Although Dr. Marchetti did not base his opinion on the possibility of a head injury, Ms. Faiz suggested that she did suffer a head injury. However, the evidence does not support that suggestion. Ms. Faiz testified that she hit her head when she fell. But the only injury was an abrasion. The Ambulance Report and the Emergency Report do not record anything that would indicate concern for a head injury and there were no post-accident complaints consistent with a head injury.

In his testimony, Dr. Marchetti went further than the published opinions that were filed. He testified that brain injury is not required for the trauma theory to apply. For him, the critical element is an inflammatory response. He testified that trauma elicits a local inflammatory response. But he agreed that a flu, or systemic inflammation, also elicits an inflammatory response. In addition, stress suppresses the immune system. Dr. Marchetti therefore agreed that Ms. Faiz's MS might have been triggered by pre-accident challenges, caused by her condition of borderline personality disorder, her bouts of depression and her marijuana and alcohol abuse. Under cross-examination, Dr. Marchetti's final word on the issue was "my opinion is MS may or

⁸Exhibit 49, Exhibit C, Tab 37

⁹Exhibit 50, Exhibit C, Tab 38

may not have been as a result of the accident". I take that to mean that it is as likely as it is not, that the accident triggered MS. Therefore, even if I were to accept Dr. Marchetti's opinion at face value, I would still have no expert evidence that the accident probably triggered Ms. Faiz's MS.

Disability within 104 weeks and Disability from any employment

Because of the above finding, it is not necessary to address Wawanesa's other arguments.

CONCLUSION

Since Ms. Faiz has not proven that the accident triggered her MS, and because her claim for benefits rests on that theory, Ms. Faiz is not entitled to the claimed benefits. An order will be made accordingly.

EXPENSES

I remain seized of the issue of expenses. The parties made no submissions on the issue. If they are unable to resolve this issue, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers
Arbitrator

May 27, 2008
Date



Neutral Citation: 2008 ONFSCDRS 84

FSCO A06-001588

BETWEEN:

LISA FAIZ

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

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

1. Ms. Faiz's claim for statutory accident benefits is dismissed.
2. The decision on expenses is reserved, to be resolved pursuant to Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers
Arbitrator

May 27, 2008
Date