



Neutral Citation: 2006 ONFSCDRS 177

FSCO A03-001634

BETWEEN:

MARIA ONYSZKIEWICZ

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Arbitrator Denise Ashby

Heard: October 24, October 25, October 26 and October 27, 2005, at the offices of the Cindy Jones Verbatim, in Hamilton and January 10, January 11 and January 12, 2006, at the offices of the Financial Services Commission of Ontario in Toronto. The hearing concluded on February 10, 2006 with the cancellation of submissions scheduled for March 2, 2006

Appearances: M. Claire Wilkinson for Mrs. Onyszkiewicz
Neil Colville-Reeves for Economical Mutual Insurance Company

Issues:

The Applicant, Maria Onyszkiewicz, was injured in a motor vehicle accident on July 10, 2001. She applied for and received statutory accident benefits from Economical Mutual

Insurance Company ("Economical"), payable under the *Schedule*.¹ Economical terminated income replacement and housekeeping benefits. The parties were unable to resolve their disputes through mediation, and Mrs. Onyszkiewicz applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.1.8, as amended.

The issues in this hearing are:

1. Is Mrs. Onyszkiewicz entitled to receive a weekly income replacement benefit after December 23, 2001, and ongoing to July 9, 2003 at a rate of \$281.76 per week, claimed pursuant to section 4 of the *Schedule*?
2. Is Mrs. Onyszkiewicz entitled to receive a weekly income replacement benefit from July 10, 2003, and ongoing at a rate of \$281.76 per week, claimed pursuant to subsection 5(2)(b) of the *Schedule*?
3. Is Mrs. Onyszkiewicz entitled to payments for housekeeping and home maintenance services after December 23, 2001, and ongoing at a rate of \$100 per week, claimed pursuant to section 22 of the *Schedule*?
4. Is Economical liable to pay a special award pursuant to subsection 282(10) of the *Insurance Act* because it unreasonably withheld or delayed payments to Mrs. Onyszkiewicz?
5. Is Economical liable to pay Mrs. Onyszkiewicz' expenses in respect of the arbitration under section 282(11) of the *Insurance Act*, R.S.O. 1990, c. 1.8?
6. Is Mrs. Onyszkiewicz liable to pay Economical's expenses in respect of the arbitration under section 282(11) of the *Insurance Act*, R.S.O. 1990, c. 1.8?
7. Is Mrs. Onyszkiewicz entitled to interest for the overdue payment of benefits pursuant to section 46(2) of the *Schedule*?

Result:

1. Mrs. Onyszkiewicz is entitled to receive a weekly income replacement benefit after December 23, 2001, and ongoing to July 9, 2003 at a rate of \$281.76 per week, pursuant to section 4 of the *Schedule*.
2. Mrs. Onyszkiewicz is entitled to receive a weekly income replacement benefit from July 10, 2003 and ongoing at a rate of \$281.76 per week, pursuant to subsection 5(2)(b) of the *Schedule*.

¹ The *Statutory Accident Benefits Schedule* — Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.

3. Mrs. Onyszkiewicz is entitled to payments for housekeeping and home maintenance services from December 24, 2001 to July 9, 2003 at a rate of \$100.00 per week, pursuant to section 22 of the *Schedule*.
4. Economical is not liable to pay Mrs. Onyszkiewicz a special award pursuant to subsection 282(10) of the *Insurance Act*.
5. In the event the parties are unable to resolve the issue of expenses under section 282(11) of the *Insurance Act*, R.S.O. 1990, c. I.8 they may seek an expense hearing pursuant to the *Dispute Resolution Practice Code*.
6. Mrs. Onyszkiewicz is entitled to interest on overdue income replacement benefits and housekeeping and home maintenance benefits, commencing December 24, 2001 and ongoing, pursuant to section 46(2) of the *Schedule*.

EVIDENCE AND ANALYSIS:

On July 10, 2001, Mrs. Onyszkiewicz was involved in a motor vehicle accident. Mrs. Onyszkiewicz claims that as a consequence of the accident she has been unable to return to her pre-accident employment. She submits that neck stiffness, bi-lateral shoulder pain, back pain extending to the lumbar sacral region and pain increased with activity resulting from the accident prevented her from performing the essential tasks of her pre-accident employment and housekeeping and home maintenance duties for the 104 week period following the accident. Further, Mrs. Onyszkiewicz submits that as a result of the accident related injuries noted above she developed chronic pain syndrome. This disorder resulted in a complete inability to engage in any employment for which she is suited by education, training or experience. As well, Mrs. Onyszkiewicz submits that because Economical has unreasonably withheld and delayed payment of her income replacement and housekeeping and home maintenance benefits she is entitled to a special award.

Causation:

The parties agree that Mrs. Onyszkiewicz must establish, on a balance of probabilities, that the accident caused or materially or substantially contributed to her impairment.²

² Transcript of Proceedings January 12, 2006, pages 75 and 76

Economical submits that Mrs. Onyszkiewicz' disabling chronic pain disorder, which is the basis of her CPP pension, was caused by pre-existing psychiatric and pain disorders. Further, the accident did not either materially or substantially contribute to the development of those disorders. Economical relies on the psychiatric opinion of Dr. John C. Farewell, who testified at the hearing and was qualified as an expert in adult psychiatry. In his opinion, Mrs. Onyszkiewicz suffered a major depression prior to the accident which has not resolved. Her medical history suggested a pre-existing pain disorder due to the somatization of pain. In his opinion, the accident was an insignificant player in Mrs. Onyszkiewicz developing chronic pain syndrome. Mrs. Onyszkiewicz relies on the medical opinions of her family physician, Dr. Gerald Taylor, Dr. Scott Garner, physiatrist, and Dr. Stephen Swallow, psychologist, that the etiology of the chronic pain disorder was a general medical condition caused by the accident and psychological factors. Dr. Garner was qualified as an expert in psychiatry and chronic pain syndrome. Dr. Swallow was qualified as an expert in psychology with a particular focus on depression and anxiety disorders.

As well, Mrs. Onyszkiewicz, together with her daughter, Sherri, sister, Stefania Kis and her former employer, Jason Thornton testified on behalf of Mrs. Onyszkiewicz. All of these lay witnesses testified in a candid and forthright manner. However, Mrs. Onyszkiewicz' recollection of events and their dates were vague. As well, she has an unsophisticated appreciation of her medical and psychiatric history. Therefore, where her evidence conflicts with either the medical evidence or historical documentation I have preferred the latter. Mrs. Stefania Kis' evidence, while honestly and forthrightly given, did not assist me as she had little contact with her sister immediately pre or post accident.

After leaving school, Mrs. Onyszkiewicz worked as a clerk typist and receptionist. She left the workforce following the birth of her second child. In March 1986, shortly after the birth of her third child, Mrs. Onyszkiewicz began to provide palliative care to both her husband's mother and grandmother. They died within months of one another in 1989. Her husband began to suffer from debilitating periodic depression following their deaths. Mrs. Onyszkiewicz resumed her career outside the home.

The evidence of Dr. Taylor, who has treated Mrs. Onyszkiewicz for 25 years, established that she had a difficult marriage and a significant pre-accident medical history. Dr. Taylor attributed the marital stress to her husband's disabling depression and controlling behaviour. Mrs. Onyszkiewicz and her husband separated following the accident and were divorced in 2005. In the month preceding the accident Dr. Taylor saw Mrs. Onyszkiewicz four times for insomnia resulting from marital stress and adjustment of cholesterol medication. The sleep disruption was treated with various medications and intermittent counselling sessions. Dr. Taylor testified that Mrs. Onyszkiewicz obtained "nil relief" from the medications. Dr. Taylor further testified that notwithstanding the stress, Mrs. Onyszkiewicz was functional.

Dr. Taylor's medical notes and records make numerous references to treatment of cervical and lumbar spasm from 1990 to 1994. This pain was treated with muscle relaxants, heat and a brief course of physiotherapy. Throughout this period Mrs. Onyszkiewicz was working outside the home. Dr. Taylor does not record either thoracic cervical or lumbar pain from January 18, 1996 until June 18, 2001 when Mrs. Onyszkiewicz complains of thoracic cervical pain. He did not prescribe pain medication. In the six months preceding the accident Mrs. Onyszkiewicz visited Dr. Taylor fourteen times.³

In May 2000, Mrs. Onyszkiewicz was hired as a clerk typist at a senior citizens' home. This position required Mrs. Onyszkiewicz to type doctors' notes and schedule the nursing staff. Both Mrs. Onyszkiewicz and Mr. Jason Thornton testified that the job was much more than the usual clerk typist position. The scheduling duties required the consideration and application of the terms of two collective agreements. Grievances would result if staff were improperly scheduled. Mr. Thornton described Mrs. Onyszkiewicz as a good worker who maintained good relations with fellow workers. However, she was out of her depth in the scheduling position. In February 2001, Mrs. Onyszkiewicz' employment was terminated.

³ Exhibit 9, Arbitration Brief Supplement, Clinical Notes and Records of Dr. Taylor, pages 30 to 34

Mrs. Onyszkiewicz testified that in the months following her termination she conducted an extensive on-line job search and applied to many businesses.⁴ Her only success was obtaining two days of temporary employment through an agency.⁵ Mrs. Onyszkiewicz' daughter, Sherri Onyszkiewicz, testified that she recalled her mother needed a new résumé because their computer malfunctioned. She assisted her mother in its redrafting which was subsequently sent to prospective employers.⁶

Dr. Taylor testified that he was aware that Mrs. Onyszkiewicz worked at the seniors' home. He recalled that she left that position because she was unable to deal with its complexity. Although Dr. Taylor saw her frequently following her termination, there is no mention of the job loss or anxiety related to employment noted in his records. He believed that between losing the job and the accident she continued to look for work. He concurred with Mrs. Onyszkiewicz' evidence that work and family were discrete elements of her life. Work provided a refuge from the stresses of her family life.

I accept the evidence of Dr. Taylor and Mrs. Onyszkiewicz that work was a refuge from her familial strife. As well, I accept Mrs. Onyszkiewicz' and her daughter's evidence that following Mrs. Onyszkiewicz' termination at the seniors' home she conducted an active search for employment. I find it plausible that Mrs. Onyszkiewicz was unable to find full-time employment in the six months between her termination and the accident due to circumstances beyond her control. Having been unsuccessful, she turned to temporary work with an agency with whom she was employed at the time of the accident.

Further, I accept the evidence of Mrs. Onyszkiewicz and her daughter that in the year preceding the accident Mrs. Onyszkiewicz was fully functional in respect of her housekeeping and home maintenance activities.

Mrs. Onyszkiewicz had a significant history of abdominal pain. Dr. Taylor testified that Mrs. Onyszkiewicz suffered from two types of abdominal pain: stress-related chronic gastric irritation, which was treated with medication, and beginning in July 1999, pain in

⁴ Transcript of Proceedings October 24, 2005, page 51

⁵ Exhibit 1, Supplementary Arbitration Brief, Volume III, Tab 2

⁶ Transcript of Proceedings October 27, 2005, page 675

the right upper quadrant.⁷ As a consequence of this development, Dr. Taylor referred Mrs. Onyszkiewicz to Dr. A.J. Byrne and Dr. Helen Lau, gastroenterologist, for assessment. Dr. Byrne found that Mrs. Onyszkiewicz had an "enlarged liver suggestive of fatty infiltration or hepatocellular disease."⁸ Dr. Lau conducted further investigations including a liver biopsy. She recommended various changes to Mrs. Onyszkiewicz' treatment over the next year which led to a resolution of the acute problems with the inflamed liver. In October 2000, Dr. Lau concluded that the enlarged liver was not due to underlying liver disease and the pain was functional.⁹

Dr. Taylor defined functional pain as pain which has no physically identifiable cause.¹⁰

He testified that Mrs. Onyszkiewicz' liver continues to be enlarged and stress, in the absence of other aggravating factors, can cause functional pain.¹¹

On July 12, 2001, Mrs. Onyszkiewicz consulted Dr. Taylor regarding injuries she sustained in the accident on July 10, 2001. She complained of neck stiffness, bi-lateral shoulder pain, back pain extending to the lumbar sacral region and pain increased with activity. Dr. Taylor prescribed Flexeril, a muscle relaxant and Viox, an anti-inflammatory. He saw her again on July 23, 2001 and notes that physiotherapy and massage therapy are progressing. He had completed a disability certificate indicating that pain is tolerable with inactivity. Her insomnia is persistent.

On September 6, 2001, Dr. Taylor notes cervical muscle spasm. On October 1, 2001, physiotherapy and massage treatment at Trafalgar Physiotherapy and Rehabilitation Centre was concluded. Its reporting letter to Dr. Taylor dated October 22, 2001, notes that Mrs. Onyszkiewicz had regained full mobility in her neck and back. However, there was mild deep joint tenderness at the L5 with no spasm. As well, she experiences

⁷ Transcript of Proceedings held January 10, 2006, page 29

⁸ Exhibit 14, Dr. Helen Lau's Clinical Notes and Records, copies of Dr. Byrne's letter to Dr. Taylor dated November 10, 1999 and Oakville-Trafalgar Memorial Hospital, Consultation Record, November 4, 1999

⁹ Exhibit 14, Dr. Helen Lau's Clinical Notes and Records, Transjugular Liver Biopsy report November 29, 1999, Oakville Diagnostic Imaging, Abdominal Ultrasound, November 18, 1999, Dr. Lau's reporting letters to Dr. Taylor dated December 23, 1999 and October 24, 2000

¹⁰ Transcript of Proceedings held January 10, 2006, page 42

¹¹ Transcript of Proceedings held January 10, 2006, pages 46 and 47

"residual fatigue discomfort in neck."¹² The report concludes that the residual symptoms could be dealt with through daily stretching. On November 22, 2001, Dr. Taylor notes that Mrs. Onyszkiewicz complains of back pain and has trouble lifting. He also notes muscle spasm. He treats her by reinstating an anti-inflammatory and recommending heat. Dr. Taylor described the period between September 6 and November 22, 2001 as a window of improvement, in respect of accident related pain.¹³

The prescription records indicate that from the date of the accident, until June 14, 2005, there are regular purchases of muscle relaxants and the following analgesics: Vioxx, Tylenol #3, Oxycocet.¹⁴

On August 22 and September 13, 2001, Rehability Occupational Therapy Inc. conducted an In-home assessment and a job site analysis on behalf of the Insurer. Mrs. Onyszkiewicz participated in the In-home assessment. The assessor determined that some housekeeping assistance was necessary together with two occupational therapy educational sessions. As well, assistive devices were recommended. The assessor noted that Mrs. Onyszkiewicz was frustrated by her limitations and tended to overdo work on good days and under participate on bad days.¹⁵ There were two subsequent sessions on October 5 and November 14, 2001. The assessor noted that Mrs. Onyszkiewicz had improved range of motion in the neck but extension was restricted by 25 per cent. Further, there was 20 per cent limitation of the right shoulder's range of motion. Mrs. Onyszkiewicz reported continuing neck pain, right shoulder pain, low back pain and headaches. She described her right hand as feeling different than the left and her fingers of the right hand becoming painful after 45 minutes of keyboarding. Mrs. Onyszkiewicz indicated that she was preparing the majority of the meals and doing laundry but does little else because she has little tolerance for activity, has little energy and has "low mood." The assessor concluded that ongoing housekeeping support was not required because "the client has demonstrated a sufficient understanding of the

¹² Exhibit 1, Supplementary Arbitration Brief, Volume IV, Tab 28

¹³ Transcript of Proceedings October 26, 2005, pages 536 to 540

¹⁴ Exhibits 5,6, 7 and 8(a) and (b)

¹⁵ Exhibit 1, Supplementary Arbitration Brief, Volume IV, Tab 18, pages 79 and 80

information provided, but has chosen not to incorporate it into all parts of her pre-accident daily tasks."¹⁶

The job site analysis was conducted with Mr. Jason Thornton, Supervisor of Administrative Services, Sheridan Villa Home for Senior Citizens. Mrs. Onyszkiewicz was not present at the assessment. Mr. Thornton signed the report as a fair estimate of the essential duties and relevant demands of the position previously filled by Mrs. Onyszkiewicz. Mr. Thornton explained the qualification as being necessary because it was only a recollection and the essential duties had been changed since Mrs. Onyszkiewicz held the position.¹⁷ I place little weight on this report preferring the oral evidence of Mrs. Onyszkiewicz and Mr. Thornton.

Mrs. Onyszkiewicz also participated in insurer's examinations through Merit Assessment Centres Inc. Lara McKay, kinesiologist, conducted a Functional Abilities Evaluation and Dr. Howard Weinberg, orthopaedic surgeon, conducted an orthopaedic assessment. Both assessors described Mrs. Onyszkiewicz as co-operative and using maximal effort but somewhat pain focussed. Ms McKay formed the opinion that Mrs. Onyszkiewicz could return to her pre-accident employment and housekeeping and home maintenance duties.¹⁸

Dr. Weinberg reported that Mrs. Onyszkiewicz was experiencing a lot of stress, having difficulty sleeping and was suffering from depression. Dr. Weinberg's examination revealed Mrs. Onyszkiewicz was able to bend forward and touch her ankles; her range of lateral bending was limited by 50 per cent and rotation by 2/3 of normal. Mrs. Onyszkiewicz reported that the foregoing caused her pain. Dr. Weinberg recommended self-directed exercise following instruction by a physiotherapist. Dr. Weinberg concluded that his assessment was consistent with the findings of the kinesiologist that Mrs. Onyszkiewicz was not substantially disabled from resuming her pre-accident employment and housekeeping and home maintenance tasks.¹⁹ As a consequence of

¹⁶ Exhibit 1, Supplementary Arbitration Brief, Volume IV, Tab 33

¹⁷ Exhibit 1, Supplementary Arbitration Brief, Volume IV, Tab 24, page 121

¹⁸ Exhibit 1, Supplementary Arbitration Brief, Volume IV, Tab 29

¹⁹ Exhibit 1, Supplementary Arbitration Brief, Volume IV, Tab 30

these reports Economical terminated income replacement benefits effective December 2, 2001.²⁰

Dr. Weinberg reassessed Mrs. Onyszkiewicz on November 20, 2002 and determined that notwithstanding her report, her condition had deteriorated in the past year and he continued to be of the opinion that she was not substantially disabled from engaging in her pre-accident employment and housekeeping activities. He noted that he thought there was something other than a physical process operating to cause Mrs. Onyszkiewicz' complaints.²¹

On January 6, 2003, Dr. Weinberg reviewed a MRI report²² and concluded that the degenerative changes in the spine were consistent with her age. The MRI findings did not cause him to change his opinion expressed in his previous two reports.²³

On December 10, 2001, Dr. E.J. Blackmore, chiropractor, conducted a Disability DAC assessment and concluded that Mrs. Onyszkiewicz was not substantially disabled from performing the essential tasks of her pre-accident employment. The report notes that Mrs. Onyszkiewicz had full range of motion of her cervical spine with no pain reported. However, she did report cervical pain on palpation of the C1-7, T1-6, T10-12, and L1-5. The report did not comment on the specifics of Mrs. Onyszkiewicz' work and what impact the pain experienced with palpation might have on prolonged sitting and standing. As well, the anti-depressant medication was noted but there was no recommendation for a psychiatric or psychological assessment.²⁴ Therefore, I have placed little weight on this report.

Dr. Taylor testified that Mrs. Onyszkiewicz' physical condition continued to deteriorate. He was concerned about chronic pain syndrome. He prescribed Percocet to deal with her severe pain.²⁵ As well, he referred her to Dr. P.J. Marshall. Dr. Marshall is a general practitioner with a special interest in sports medicine and osteopathic treatment. Dr.

²⁰ Exhibit 1, Supplementary Arbitration Brief, Volume IV, Tab 31

²¹ Exhibit 1, Supplementary Arbitration Brief, Volume V, Tab 71

²² Exhibit 1, Supplementary Arbitration Brief, Volume V, Tab 76

²³ Exhibit 1, Supplementary Arbitration Brief, Volume V, Tab 83

²⁴ Exhibit 1, Supplementary Arbitration Brief, Volume IV, Tab 41

²⁵ Transcript of Proceedings October 26, 2005, pages 560 and 561

Marshall completed a treatment plan dated June 18, 2002 in which she recommended three months of athletic therapy, with a trainer, and osteopathic treatment with herself. Economical approved the treatment as set out in the treatment plan.²⁶

A subsequent treatment plan dated December 21, 2002 for Pilates and Integrated Movement therapy was denied. The plan was brought to a DAC and determined to be not reasonably necessary. The conclusion of the DAC was the weakness and imbalance of the abdomino-pelvic musculature were a result of Mrs. Onyszkiewicz' various abdominal surgeries and not the motor vehicle accident. Therefore while the treatment recommended in the Treatment Plan would benefit these problems, they were not accident related.²⁷

Weight gain and its influence on the post-accident development of diabetes was a focus of the evidence. In January 1998 Dr. Taylor had referred Mrs. Onyszkiewicz to Dr. Ronnie Aronson, an endocrinologist, due to significantly increased triglycerides. In May 2003, Dr. Aronson reassessed her and diagnosed diabetes. He notes that Mrs. Onyszkiewicz had gained 19 lbs. since she was assessed in 1998.²⁸ In his opinion letter dated December 24, 2004, Dr. Aronson stated:

Maria developed impaired Glucose Tolerance by November 2001 and by 2003, was showing a severe degree of insulin resistance and diabetes. It would appear that much of the progression to diabetes is related to her weight gain which appears to have occurred as a result of inability to exercise. Maria directly attributes the inability to exercise to injuries sustained in her motor vehicle accident on July 10th, 2001.²⁹

On November 10, 1999, Dr. Lau had noted her weight as 83.75 kg. which is equivalent to 184.46 lbs. On April 18, 2000, Dr. Lau notes her weight as 77.25 kg. which equals 170 lbs.³⁰ On June 24, 2003 and August 5, 2003, the Halton Diabetes Program's patient

²⁶ Exhibit 1, Supplementary Arbitration Brief, Volume V, Tab 64

²⁷ Exhibit 1, Supplementary Arbitration Brief, Volume V, Tab 96

²⁸ Exhibit 1, Supplementary Arbitration Brief, Volume 1, Tab 7

²⁹ Exhibit 1, Supplementary Arbitration Brief, Volume 1, Tab 10

³⁰ Exhibit 14, Dr. Helen Lau's Clinical Notes and Records, pages 2 and 3

Progress Report recorded Mrs. Onyszkiewicz' weight as 190 lbs. and 188 lbs respectively.³¹

I rely on Dr. Lau's note of April 18, 2000 noting Mrs. Onyszkiewicz' weight as 170 lbs. as her pre-accident weight and on the Halton Diabetes Program's weight assessments to find that between April 2000 and June 2003 Mrs. Onyszkiewicz had gained 20 lbs. This weight gain comports with Dr. Aronson's note of a gain of 19 lbs. between 1998 and 2003. Further, I find that the pre-accident notes of both Dr. Lau and Dr. Aronson indicate that Mrs. Onyszkiewicz was able to lose weight by increasing her activity levels and reducing her caloric intake. I find that the weight gain, to which Dr. Aronson attributes Mrs. Onyszkiewicz' development of diabetes, to her post-accident inactivity.

Dr. Garner, Dr. Swallow and Dr. Farewell agree that Mrs. Onyszkiewicz is unable to engage in employment as a consequence of her disability. They also agree that she suffers from a pain disorder. Their opinions diverge on the cause of the disabling pain disorder. Dr. A.T. Ghouse, who conducted an insurer's examination on April 1, 2005, disagreed that there was an accident related impairment. At the beginning of his report, he sets out his credentials. There is no mention of experience or expertise in dealing with patients diagnosed with chronic pain syndrome or disorder. Dr. Ghouse reviewed, inter alia, Dr. Garner's report dated January 10, 2005 and Dr. Farewell's report dated June 18, 2004. Notwithstanding both Dr. Garner and Dr. Farewell dealt extensively with what in their opinion was a chronic pain disorder, although with differing etiologies, Dr. Ghouse did not deal with this issue, save to state, that in his opinion a chronic pain program was not reasonably required as a result of the motor vehicle accident.³² He provided no reasons for his conclusion. Therefore, I attach little weight to his report.

Dr. Garner testified that his review of Mrs. Onyszkiewicz' pre-accident medical history would not support a diagnosis of chronic pain syndrome notwithstanding the reports of persistent abdominal pain and a history of back pain. He agreed with the physical assessments of Dr. Weinberg and Dr. Ghouse and their conclusion that when assessed Mrs. Onyszkiewicz' soft tissue injuries would have healed. However, in his opinion Mrs.

³¹ Exhibit 1, Supplementary Arbitration Brief, Volume 1, Tab 7

³² Exhibit 10, Arbitration Brief Volume 3, Tab 43

Onyszkiewicz suffered from persistent chronic regional myofascial pain syndrome. Dr. Garner testified that for many people, involved in an accident similar to that of Mrs. Onyszkiewicz, they might exhibit no or minor symptoms. However, for Mrs. Onyszkiewicz it initiated a complex reaction which might have been related to pre-accident vulnerability. Dr. Garner testified that this disability is not easily treated by physical approaches alone as there is usually a psychogenic element. He believed Mrs. Onyszkiewicz might have psychological problems which he was not qualified to assess. Therefore, he recommended that she be assessed by a psychologist.

Dr. Garner concluded that the post-accident history, reflected in the medical records and reports, together with his own clinical assessment, satisfied him that Mrs. Onyszkiewicz met the AME criteria for chronic pain in that "her pain behaviour has become mal-adaptive and grossly disproportional to any underlying stimulus."³³

Dr. Swallow agrees with Dr. Garner. In his opinion the accident related physical injuries were the "catalyst" for Mrs. Onyszkiewicz' development of chronic pain disorder. The disorder resulted from the interaction between the accident related physical impairment superimposed on pre-accident vulnerability. He conducted an extensive battery of psychometric tests including the MMPI 2 and MCMI. A component of both personality inventories is a sophisticated validity scale. Mrs. Onyszkiewicz' test results were consistent and considered valid. In his opinion, Mrs. Onyszkiewicz was not attempting to create a false impression by either exaggerating or minimizing her responses.³⁴

Dr. Swallow described the MMPI 2 as a revised edition of the Minnesota Multiphasic Personality Inventory which provides a global indication of personality functioning. He testified that Mrs. Onyszkiewicz had "extremely elevated" scores on scales 1, 2 and 3. In his experience an elevated score on Scale 1 is typical of a person with chronic pain syndrome. It is less common to see an elevated score on Scale 3 which indicated that Mrs. Onyszkiewicz tends "to experience psychological emotional stress via somatic or physical channels, which is consistent with our diagnoses of pain disorder, with post-

³³ Transcript of Proceedings, October 25, 2005, page 280

³⁴ Transcript of Proceedings, October 25, 2005, page 363

psychological factors and a general medical condition."³⁵ Dr. Swallow testified that Scale 2 is the depression scale. In his opinion, her test results indicated she was very depressed when he assessed her.

Dr. Swallow testified that the MCMI-III was developed to provide a profile which reflects the Diagnostic and Statistical Manual of Mental Disorders (DSM IV). As with the MMPI 2, Mrs. Onyszkiewicz' results indicated that she was depressed and experienced psychological distress through physical symptoms. This test indicated the presence of Dysthymia, or chronic affective distress.

Dr. Swallow testified that, based on the psychometric testing, his clinical interview and review of Mrs. Onyszkiewicz' medical records, he concluded that prior to the accident Mrs. Onyszkiewicz was a vulnerable person who was functioning. The injuries suffered in the accident restricted her which resulted in a major depression. This, in combination with her pre-accident vulnerability, resulted in her developing chronic pain syndrome.³⁶

Dr. Farewell testified that he was of the opinion, as set out in his report dated June 18, 2004 and its addendum dated September 3, 2004,³⁷ that Mrs. Onyszkiewicz suffered at least two depressive episodes which were superimposed on an underlying Dysthymia. In his opinion, her first major depression was approximately 10 years prior to his assessment. The second, resulted in her leaving her job at the seniors' residence in February 2001. In his opinion, Mrs. Onyszkiewicz had not recovered from this major depression when he assessed her.

Dr. Farewell notes, as part of his diagnosis, Axis II, dependant personality traits.³⁸ Dr. Swallow testified that neither Mrs. Onyszkiewicz' test results nor his clinical assessment showed any evidence of Axis II, dependant personality traits. He testified that Mrs. Onyszkiewicz' score on Axis II, which measures personality disorders, was "remarkably clean." In his opinion, Mrs. Onyszkiewicz' family history would usually lead to some elevations on this index. For this reason, he disagreed with this aspect of Dr. Farewell's

³⁵ Transcript of Proceedings, October 25, 2005, page 364

³⁶ Transcript of Proceedings, October 25, 2005, page 384

³⁷ Exhibit 17 and Exhibit 1, Supplementary Arbitration Brief, Volume V, Tab 105

³⁸ Exhibit 17, page 19

diagnosis. As well, Dr. Swallow disagreed with Dr. Farewell's opinion that there was a major depressive episode just prior to the accident. In Dr. Swallow's opinion there was little evidence that would support a conclusion that Mrs. Onyszkiewicz met the diagnostic criteria for major depression prior to the accident. As well, while the medical records indicate prior difficulties with pain associated with medical conditions, they did not meet the diagnostic criteria for chronic pain syndrome.

Dr. Farewell believed that Mrs. Onyszkiewicz left her job at the seniors' residence due to stress in the context of a depressive episode.³⁹ However, this was not the case. Mrs. Onyszkiewicz' termination was as a consequence of her inability to do the work due to its complexity. Neither emotional distress nor physical incapacity resulted in her employer's decision. Therefore, I find that Dr. Farewell's conclusion, in this respect, is inconsistent with the facts.

Dr. Taylor's medical notes and the reports generated following the accident set out Mrs. Onyszkiewicz' consistent complaints of neck, cervical lumbar pain. The pre-accident medical record indicates that from 1990 to 1994 she experienced persistent back pain. It was treated and resolved. I find that there was no pre-existing neck or back pain which resulted in an inability to engage in either the essential tasks of her pre-accident employment or housekeeping.

Similarly, I find that Mrs. Onyszkiewicz' experience of persistent abdominal and gastric pain, while suggesting a vulnerability to experiencing emotional stress through somatic or physical channels, did not impede her functioning.

I accept Dr. Taylor's evidence that Mrs. Onyszkiewicz was functional notwithstanding the pre-accident insomnia. I find that familial stress was Mrs. Onyszkiewicz' norm for the decade preceding the accident. However, throughout that period she continued to work both in and out of her home. While Dr. Farewell may have been correct that Mrs. Onyszkiewicz suffered two major depressive episodes, those episodes did not result in a substantial inability to function. I find that it was the restrictions imposed on her by the accident-related injuries, her back and neck pain, together with her pre-accident

³⁹ Exhibit 17, page 25

psychological vulnerability which led to a disabling cycle of increased inactivity, depression and focus on pain. I find that as a consequence of accident-related impairments, Mrs. Onyszkiewicz developed chronic pain. I accept that the following is an apt description of Mrs. Onyszkiewicz' condition. Chronic pain is "a self-sustaining, self-reinforcing and self-regenerating process. It is not a symptom of an underlying acute somatic injury, but rather a destructive illness in its own right...behaviour becomes mal-adaptive and grossly disproportional to any underlying noxious stimulus."⁴⁰

On the basis of the foregoing, I prefer the combined evidence of Dr. Garner and Dr. Swallow. I find that accident-related impairments substantially and materially contributed to Mrs. Onyszkiewicz' development of chronic pain syndrome as a consequence of both psychological factors and a general medical condition.

Income Replacement Benefits:

The expert witnesses and Dr. Taylor agree that Mrs. Onyszkiewicz is unable to engage in employment due to chronic pain. I accept their opinion. Therefore, having found that the motor vehicle accident materially and significantly contributed to Mrs. Onyszkiewicz' development of chronic pain syndrome as a consequence of both psychological factors and a general medical condition, I further find that Mrs. Onyszkiewicz is suffering a complete inability to engage in any employment for which she is reasonably suited by education, training or experience pursuant to subsection 5(2)(b) of the *Schedule*.

I also find that the period from December 23, 2001 to July 9, 2003, was a period of steady physical decline which resulted in Mrs. Onyszkiewicz being substantially disabled from performing the essential tasks of her pre-accident employment.

Therefore, Mrs. Onyszkiewicz is entitled to a weekly income replacement benefit at the rate of \$281.76 from December 23, 2001 and ongoing.

⁴⁰ American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, 7th printing April 2004, page 307

Housekeeping and Home Maintenance Benefits:

To be entitled to a housekeeping and home maintenance benefit, pursuant to section 22 of the *Schedule*, Mrs. Onyszkiewicz must establish that she was substantially unable to perform her pre-accident housekeeping and home maintenance services due to an impairment, caused by the accident. She must also establish that she incurred additional expenses, the cost of which cannot exceed \$100.00 weekly, to replace those services.

The evidence of Mrs. Onyszkiewicz and her daughter was consistent. They testified that, prior to the accident, Mrs. Onyszkiewicz did the housekeeping and some gardening. Mr. Onyszkiewicz maintained the lawns and did the winter snow shovelling. Sherri Onyszkiewicz was equivocal as to whether her mother took care of the pool. However, I find that pool maintenance was not a significant element of the family's housekeeping and home maintenance requirements. The major tasks Mrs. Onyszkiewicz engaged in pre-accident was the cleaning of a large home, gardening, laundry and meal preparation for five people and shopping for their groceries.

The In-home assessment conducted on August 22, 2001, recommended that Mrs. Onyszkiewicz receive two occupational therapy educational sessions and three hours of housekeeping assistance. The assistance would be reduced to 1.5 hours following the first session and discontinued after the completion of the second session.⁴¹

The Occupational Therapy Discharge Report dated November 19, 2001 recommended termination of housekeeping assistance. The report noted that Mrs. Onyszkiewicz reported being unable to do the heavy housekeeping and having significant difficulty with light housekeeping including meal preparation, due to increased pain. Mrs. Onyszkiewicz reported a deterioration in her mood, an inability to complete her home exercise program and that she had been placed on blood pressure medication. The assessor observed Mrs. Onyszkiewicz sitting for 45 minutes with a pillow for support and, upon rising, she moved stiffly apparently due to low back pain. Although the assessor recommended terminating housekeeping assistance, she also recommended

⁴¹ Exhibit 1, Supplementary Arbitration Brief, Volume IV, Tab 18, pages 79 and 80

that Mrs. Onyszkiewicz participate in a structured exercise program.⁴² I accept that from December 23, 2001 to July 9, 2003, the family lived in a large home. I find that the three hours of assistance initially recommended by the Occupational Therapist was unreasonable. It was insufficient to replace the services that Mrs. Onyszkiewicz provided prior to the accident. It did not take into consideration the degree to which Mrs. Onyszkiewicz was impaired, the amount of work which had to be replaced and denied Mrs. Onyszkiewicz the possibility of obtaining outside assistance in light of the significant difficulties she was having enlisting the assistance of her husband and children. Further, I find the assessor's conclusion that housekeeping assistance should be discontinued is inconsistent with her observations of Mrs. Onyszkiewicz' physical status and Mrs. Onyszkiewicz' reports of deterioration.

I accept that Mrs. Onyszkiewicz engaged in some light housekeeping in the two year period following the accident. The medical reports and occupational therapy reports evidence that Mrs. Onyszkiewicz expressed frustration at the lack of work being done by her daughters and husband during this period. Mrs. Onyszkiewicz' evidence, supported by her daughter, was she did very little housework and no gardening following the accident. Notwithstanding Mrs. Onyszkiewicz' criticism of the amount of work done by her family I infer, that a large house with five people, three of whom are teenagers, would require 12 hours a week of assistance beyond the light duties which Mrs. Onyszkiewicz completed. Further, I find an hourly rate of \$10.00 reasonable. I accept the description of the tasks engaged in by her children set out in her letter dated February 10, 2001.⁴³

I have found that the accident materially contributed to the development of Mrs. Onyszkiewicz' pain disorder in or about the spring of 2002. I find that the period from December 23, 2001 to July 9, 2003, was a period of steady physical decline which resulted in Mrs. Onyszkiewicz being substantially unable to perform her pre-accident housekeeping and home maintenance services. Therefore, I find that Mrs. Onyszkiewicz is entitled to a weekly housekeeping and home maintenance benefit at a

⁴² Exhibit 1, Supplementary Arbitration Brief, Volume IV, Tab 33

⁴³ Exhibit 1, Supplementary Arbitration Brief, Volume IV, Tab 45, pages 226 and 227

the rate of \$100.00, from December 24, 2001 to July 9, 2003, pursuant to section 22 of the *Schedule*.

Interest:

Mrs. Onyszkiewicz is entitled to interest on overdue income replacement benefits and housekeeping and home maintenance benefits, commencing December 24, 2001 and ongoing, pursuant to section 46(2) of the *Schedule*.

Special Award:

Mrs. Onyszkiewicz submits that Economical unreasonably withheld and delayed payment of her income replacement and housekeeping and home maintenance benefits and therefore she is entitled to a special award.

Subsection 282(10) of the *Insurance Act* provides:

If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

The pre-accident medical history was significant. Mrs. Onyszkiewicz' family physician of more than 25 years did not begin to contemplate chronic pain syndrome until May or June of 2002. Dr. Taylor dealt with the physical symptoms by referring Mrs. Onyszkiewicz for physiotherapy immediately following the accident. She was discharged from physiotherapy in October 2001. Dr. Taylor did not recommend further physiotherapy rather, he treated Mrs. Onyszkiewicz by prescribing analgesics, including narcotics, anti-anxiety medications; anti-depressants and sleep medications. Dr. Taylor did not recommend further active treatment until June 2002 when he referred Mrs. Onyszkiewicz to Dr. Marshall. Economical authorized Dr. Marshall's Treatment Plan and paid for Mrs. Onyszkiewicz' treatment. Economical relied on the Functional Abilities

Evaluation and Dr. Weinberg's opinion and terminated both her income replacement and housekeeping and home maintenance benefits. It funded a MRI assessment in December 2001. The results of that assessment did not alter Dr. Weinberg's opinion that Mrs. Onyszkiewicz was not substantially disabled from performing her pre-accident employment and housekeeping and home maintenance tasks. Economical did not send Mrs. Onyszkiewicz for a psychological or psychiatric assessment notwithstanding Dr. Weinberg's comment that there was something other than a physical process operating to cause Mrs. Onyszkiewicz' complaints. This is not a sufficient basis upon which to require an insurer to commence a line of inquiry which her treating medical practitioner chose not to pursue.

In order to exercise the discretion to order a special award, the insurer must act in a manner that is beyond mere mistake. The experts who testified found this to be a difficult case to assess. I agree. The causal link between the accident and the chronic pain disorder that Mrs. Onyszkiewicz developed was not obvious. I find that Economical erred in adjusting the file but did not act unreasonably.

EXPENSES:

The parties made no submissions with respect to expenses. I encourage them to resolve the issue on their own, failing which they may request an expense hearing before me in accordance with the *Dispute Resolution Practice Code*.

Denise Ashby
Arbitrator

November 10, 2006
Date



Neutral Citation: 2006 ONFSCDRS 177

FSCO A03-001634

BETWEEN:

MARIA ONYSZKIEWICZ

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.1.8, as amended, it is ordered that:

1. Mrs. Onyszkiewicz is entitled to receive a weekly income replacement benefit from December 23, 2001 to July 9, 2003, at a rate of \$281.76 per week, pursuant to section 4 of the *Schedule*.
2. Mrs. Onyszkiewicz is entitled to receive a weekly income replacement benefit from July 10, 2003 and ongoing at a rate of \$281.76 per week, pursuant to subsection 5(2)(b) of the *Schedule*.
3. Mrs. Onyszkiewicz is entitled to payments for housekeeping and home maintenance services from December 24, 2001 to July 9, 2003 at a rate of \$100.00 per week, pursuant to section 22 of the *Schedule*.
4. Economical is not liable to pay Mrs. Onyszkiewicz a special award pursuant to subsection 282(10) of the *Insurance Act*.

5. In the event the parties are unable to resolve the issue of expenses under section 282(11) of the *Insurance Act*, R.S.O. 1990, c. I.8 they may seek an expense hearing pursuant to the *Dispute Resolution Practice Code*.
6. Mrs. Onyszkiewicz is entitled to interest on overdue income replacement benefits and housekeeping and home maintenance benefits, commencing December 24, 2001 and ongoing, pursuant to section 46(2) of the *Schedule*.

Denise Ashby
Arbitrator

November 10, 2006
Date