Neutral Citation: 2000 ONFSCDRS 150

FSCO A99-000170

FINANCIAL SERVICES COMMISSION OF ONTARIO

BETWEEN:

STEVEN HOWARD STELZER

Applicant

and

ZURICH INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Joyce Miller

Heard: May 23 and 24, 2000, in Ottawa, Ontario.

Appearances: Karine Devost for Mr. Stelzer
Neil Colville-Reeves for Zurich Insurance Company

Issues:

The Applicant, Steven Howard Stelzer, was injured in a motor vehicle accident on April 29, 1996. He applied for and received statutory accident benefits from Zurich Insurance Company ("Zurich"), payable under the *Schedule.*[1] Zurich terminated weekly income replacement benefits on February 12, 1997 and as well, it terminated his medical rehabilitation benefits as a result of a Designated Assessment Centre ("DAC") report of July 21, 1998. Mr. Stelzer disputed the termination of his medical rehabilitation benefits.

[1] The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996,* Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94, 463/96 and 304/98.

The parties were unable to resolve their disputes through mediation, and Mr. Stelzer applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act,* R.S.O. 1990, c.I.8, as amended. The issues in this hearing are:

1. Is Mr. Stelzer entitled to his medical expenses pursuant to subsection 36(1) of the *Schedule* for the period of January 1, 1997 to June 16, 1998?
2. Is Mr. Stelzer entitled to a special award pursuant to subsection 282(10) of the *Insurance Act?*
3. Is Mr. Stelzer entitled to his expenses pursuant to subsection 282(11) of the *Insurance Act?*

Mr. Stelzer also claims interest on any amount owing.

Result:

1. Mr. Stelzer is not entitled his medical expenses for the period of January 1, 1997 to June 16, 1998.
2. Mr. Stelzer is not entitled to a special award.
3. Mr. Stelzer is entitled to his expenses in this arbitration in the amount of $3,494.67.

EVIDENCE:

Mr. Stezler is presently 41 and works as a structural engineer in Montreal. At the time of the accident, April 29, 1996, he was living in Ottawa and was working as a structural engineer. Mr. Stelzer testified that the accident happened when he was at a full stop on an exit ramp on the Queensway in Ottawa. A truck travelling at about 30 kilometres an hour hit his car from behind. When the truck struck his car his body went forward and then snapped back and his head hit the head rest. Mr. Stelzer stated that he immediately felt a pain in his head.

Mr. Stelzer testified that when he called the police he was told to go to an accident reporting centre. He stated that when he was at the centre the adrenaline rush of the accident had subsided and he began to feel ill. He was advised to go to a hospital. He remained at the hospital for a few hours and then was released.

Mr. Stelzer saw his family doctor, Dr. F. Pietrobon, the day after the accident. In his clinical notes Dr. Pietrobon noted that Mr. Stelzer had a mild cervical strain and that while Mr. Stelzer denied any significant pain, Dr. Pietrobon noted that this type of strain had a tendency to worsen after a day or two.

Mr. Stelzer testified that he felt very fatigued after the accident. He stated that he returned to work, however, within a week he began to feel tightness and a knot in the mid scapular region. He saw Dr. Pietrobon again and two weeks after the accident he began physiotherapy. He began to take Advil, Tylenol Extra Strength and Robaxisol to relieve the pain.

A month after the accident the pain was so excruciating he had to stop working. In a report to Zurich, dated November 27, 1996, Dr. Pietrobon stated that Mr. Stelzer's "...job required frequent periods of stooping over and sitting down as well as a significant amount of time drafting and being on the computer. It seems as though his sitting tolerance was clearly compromised, and work, if anything seemed to make him worse."

Dr. Pietrobon went on to state that Mr. Stelzer required "... lengthy periods of time at the computer and even with periods of rest his sitting tolerance was limited. He was simply not able to return to his computer for any reasonable period after having worked on it for an hour or two." Dr. Pietrobon further noted that Mr. Stelzer "... attempted to remain functional for as long as possible until he felt that he was clearly unable to do so."

Mr. Stelzer stopped work on June 15, 1996. He was paid disability and medical rehabilitation benefits by his personal carrier, Aetna. Zurich paid "topping up" benefits.

In August 1996 Mr. Stelzer began to feel better and resumed some of his activities such as biking and working on the computer. These activities, however, exacerbated his pain and caused a relapse. He went to see Dr. Pietrobon who recommended that he see a physiatrist, Dr. Martin Gillen.

Dr. Gillen diagnosed Mr. Stelzer with having a "thoracic facet dysfunction" at the T5-6 level and recommended a "reactivation program" as well as "manipulation therapy."

On October 3, 1996 Mr. Stelzer began to see a chiropractor, Dr. Ken Brough. In a report to Dr. Pietrobon dated October 22, 1996, Dr. Brough stated that in his opinion Mr. Stelzer was "...suffering the effects of chronic vertebral subluxation complex at the C6, T4 and T6 levels" and recommended a course of chiropractic care with "supportive exercise and soft tissue therapy over a period of 12 weeks."

After Mr. Stelzer's first chiropractic treatment he fainted and had to be taken by ambulance to the hospital. No serious problem was identified. However, Dr. Pietrobon recommended that he should not have any further neck manipulations. Mr. Stelzer continued to have chiropractic treatment for his spine.

On October 18, 1996, Zurich sent Mr. Stelzer for an Insurer's medical examination (IME) with an orthopaedic surgeon, Dr. Douglas Ritter. In his report of the same date, Dr. Ritter stated that Mr. Stelzer "...made no effort to exaggerate his symptoms or his history. He was very forthcoming in all information."

Dr. Ritter noted that Mr. Stelzer had no previous problems related to his spine but that he had an ongoing knee problem.

In his "Final Diagnosis," Dr. Ritter concluded that Mr. Stelzer had a thoracic musculo-ligamentous strain, from which he was recovering. As well he noted that Mr. Stelzer's thoracic pain "... is a direct result of his accident."

Dr. Ritter's prognosis was that the maximal time for recovery from the type of injury Mr. Stelzer had could be six months to a year and one-half. He anticipated that Mr. Stelzer could return to work on a part-time basis starting November 1, 1996 and progress to full time over that month. He stated that "... with appropriate ergonomics at his work site [Mr. Stelzer] is capable of the essential tasks of his pre-accident occupation. If pain were not a feature I would not restrict him from his essential tasks of his employment. I would not restrict him from returning to his activities of daily living."

Dr. Ritter concluded that Mr. Stelzer needed "... a good therapy programme which would work primarily on strengthening and stretching ... his spine." It was his view that

Mr. Stelzer could do this on his own but that if he had any doubt about this, then "physiotherapy or a back education course could further advise him."

On the basis of Dr. Ritter's IME, Zurich advised Mr. Stelzer that his weekly disability benefit would be terminated on December 26, 1996. At first Mr. Stelzer contemplated disputing the termination and requested a DAC. His weekly disability benefit was reinstated pending the DAC report. However, in the end, Mr. Stelzer decided to return to work and the "top-up" weekly disability benefit was terminated on February 12, 1997.

On February 5, 1997, Mr. Stelzer's chiropractor, Dr. Brough, reported to Zurich that as of "...January 15, 1997 it was determined that Steven Stelzer had reached maximum medical improvement and was discharged from active care.....We are closing his file and have ended the active component of care."

On August 22, 1997 Mr. Stelzer, who was now living in Hamilton, wrote to Zurich that since he returned to work he required regular chiropractic treatment as well as occasional therapeutic massages. Mr. Stelzer stated that he had paid $127 for these treatments and that his primary insurer had paid $88. He requested that Zurich pay the difference of $39.

On August 26, 1997 Zurich wrote to Mr. Stelzer and asked that he provide Zurich with a report from his treating health practitioner regarding the nature, duration, frequency and goals of the treatment, including "whether the treatment is required for maintenance purposes only;" as well as "copies of all consultation notes, clinical records and test results from all treating health practitioners from February 6, 1997 to present."

Mr. Stelzer testified that he signed an authorization for Zurich to obtain the requested information from his then treating chiropractor, Dr. Heather Norman. On two occasions, September 9, 1997 and October 10, 1997, Zurich wrote to Dr. Norman but there was no evidence presented that Dr. Norman provided the requested information.

Zurich submitted that despite the fact that Mr. Stelzer had not provided any updated medical support for his claim for ongoing chiropractic treatments since Dr. Brough had discharged him, it, nevertheless, as a gesture of good faith to Mr. Stelzer, reimbursed

him the amount of $130.97 for chiropractic treatments from June 25, 1997 through to December 1, 1997.

Mr. Stelzer testified that additional invoices for chiropractic treatment in January 7, 15, 30, August 27, September 8, 22, October 6 and 20, 1997 that amounted to $179.95 were provided to Zurich but were not paid. Zurich denied ever receiving these invoices.

In March 1998 Zurich sent Mr. Stelzer for a Medical-Rehabilitation DAC examination at Mount Sinai Hospital in Toronto. Mr. Stelzer attended the DAC on July 21, 1998. The report of the DAC on the same date concluded:

> Mr. Stelzer has ongoing thoracic spinal pain subsequent to his motor vehicle accident. To date he has had a reasonable course of therapy, but without complete resolution of his symptoms.
>
> At this time further, formal physiotherapy and/or chiropractic treatment will offer no benefit.

On September 10, 1998 Zurich wrote to Mr. Stelzer and advised him that:

> As per the Medical & Rehabilitation D.A.C. no further treatment is reasonable & necessary. Funding of *ALL* treatment discontinues effective immediately, our file is now closed.

On March 16, 1999, Mr. Stelzer, who was now living in Montreal, wrote to Zurich requesting further treatment and enclosed supporting letters from his treating doctor, Dr. Barry Gamberg and his chiropractor, Dr. Denise Perron, recommending further treatment.

Dr. Gamberg's note dated December 4, 1998 stated that Mr. Stelzer has mid thoracic pain/dysfunction and he requires physiotherapy. He stated that "[t]his treatment should improve this condition. Maintenance standards have yet to be obtained."

The letter from Dr. Perron, dated March 16, 1999, stated:

> It is my opinion, due to his car accident, that [Mr. Stelzer] must continue with regular care in order to maintain optimum health. He has chronic mechanical subluxation of the thoracic spine that tends to recur with stress and fatigue.

> Mr. Stelzer did not experience this pain until after his car accident and I can only conclude that it is the causative factor for his condition today.
>
> For optimal results Mr. Stelzer would need chiropractic adjustments once every six weeks with a stretching and exercise program which would enable him to gain overall backpain stability.

Dr. Perron testified at the hearing. She stated that Mr. Stelzer's pain is acute and chronic. At times it seems to get better and then there is a relapse when he performs the prescribed exercises. She stated that while she agreed with the recommendation that Mr. Stelzer needed to exercise, nevertheless, in her opinion, unless he was supervised his injury can be exacerbated. She stated that Mr. Stelzer had undergone a specialized posture test, called a Static Biomechanical Evaluation, which indicated that his exercise program must take into consideration the asymmetry of his posture. A symmetrical exercise program can harm him. In her view it was not safe for him to do a home exercise program since he was not qualified to know where the forces of compression are.

Dr. Perron stated Mr. Stelzer has been making progress and she is optimistic that his prognosis is good. However, it was her opinion that Mr. Stelzer has still not stabilized. She noted that when Mr. Stelzer starts to feel better and he tries to exercise or exert himself in anyway he regresses. It was her view that Mr. Stelzer needs ongoing chiropractic treatment along with an exercise program in order for his condition to stabilize. It was her opinion that this treatment is required as a result of the car accident and was reasonable and necessary.

ANALYSIS AND FINDINGS:

Pursuant to subsection 36(1) of the *Schedule,* if an insured person sustains an impairment as a result of an accident, the insurer shall pay for all reasonable expenses incurred by or on behalf of the insured person as a result of the accident. These expenses are enumerated in the subsection and include chiropractic, massage and physiotherapy services.

Pursuant to subsection 37(1) an insurer may require a person claiming payment of an expense under section 36 to furnish a certificate from the person's health practitioner stating that the expense is reasonable and necessary for the person's treatment. Subsection 37(2) states that in the case of an expense that is of a continuing nature, the insurer may require a certificate to be furnished under subsection (1) as often as reasonably necessary.

The burden of proof rests with the applicant to prove, on a balance of probabilities, that the medical expense claimed is reasonable and necessary.

Zurich submits that Mr. Stelzer has not provided any medical evidence that the treatment he received during the period he is claiming his expenses was reasonable and necessary. I agree.

In January 1997 Mr. Stelzer's own chiropractor, Dr. Brough, had concluded that Mr. Stelzer "had reached maximum medical improvement and was discharged from active care." This was the same conclusion reached by the DAC when it stated in its report on July 21, 1998 that further formal physiotherapy and/or chiropractic treatment would not offer any benefit.

In my view, Dr. Perron's opinion of Mr. Stelzer's physical condition for the period for which he is claiming treatment expenses cannot be given much weight.

I accept Dr. Perron's testimony that at the present time she believes that Mr. Stelzer is still suffering from the effects of his car accident and that ongoing treatment, to stabilize him, is reasonable and necessary. However, the fact is that the first time Dr. Perron saw Mr. Stelzer was on April 10, 1998, approximately two years after accident. Her clinical notes for that date state that "back not bad" but he was "tired, stiff and sore." The next time she saw Mr. Stelzer was on November 13, 1998 — she makes no particular comment about his back but notes that Mr. Stelzer sees a chiropractor in Ontario once a month. While her notes indicate that Mr. Stelzer suffered some flare up of back pain

after November 1998 and in 1999 the treatment expenses for these flare ups were not submitted to Zurich and are not the subject of this arbitration.[2]

From a common sense perspective, I can accept that it is possible that after Dr. Brough discharged Mr. Stelzer in January 1997 and he went back to work, his back may have begun to act up under the physical stresses and strains of his job and he may have required further chiropractic treatment. Nevertheless, Mr. Stelzer did not provide any objective medical evidence to support his claim that the treatment he received at that time was as a result of the accident and was reasonable and necessary. His own opinion, however sincere, is not sufficient, especially when there is medical evidence that could have been provided.

In my view the person who could most likely comment on the treatment provided in the period in dispute is Dr. Norman. The fact that Zurich, with Mr. Stelzer's authorization, attempted on two occasions to obtain a medical report from Dr. Norman did not negate Mr. Stelzer's obligation to provide this medical information. The burden rests with Mr. Stelzer to provide the medical evidence to support his claim, not Zurich.

Accordingly, I find that Mr. Stelzer has not discharged his burden of proof and is not entitled to his claim for medical expenses pursuant to subsection 36(1) of the *Schedule.*

SPECIAL AWARD:

Pursuant to subsection 282(10) of the *Schedule* Mr. Stelzer is claiming a special award on the basis that Zurich unreasonably denied him his medical expenses for chiropractic treatment.

A special award may be awarded only in the case where benefits have been ordered. In this case I have denied Mr. Stelzer's claim for medical benefits. Even if I am wrong in my conclusion, I do not find that a special award is warranted in this case.

Zurich based its denial for chiropractic expenses on the report of Mr. Stelzer's chiropractor, as well as the report of the DAC. In my view, based on the medical reports

[2] Mr. Stelzer testified that he stopped submitting expense claims to Zurich after he was refused payment.

it had, Zurich's actions in denying Mr. Stelzer his medical expenses was not unreasonable.

Accordingly, I find that Mr. Stelzer is not entitled to a special award.

EXPENSES:

Mr. Stelzer claims $3,494.67 for his expenses in this arbitration.

The general criteria and the underlying principle of awarding expenses was first articulated by Senior Arbitrator Naylor in October 1991 in the case of *McCormick and Economical Mutual Insurance Company.*[3] In this case she held that when awarding expenses, an applicant with a legitimate claim can expect to recover his or her expenses, win or lose, except where the applicant's conduct is unreasonable. She stated that:

> The discretion to award expenses should be exercised, having regard to the intent and purpose of the legislation scheme. The arbitration process has been established under the *Insurance Act,* as amended, in order to facilitate applicants' access to relatively inexpensive, speedy and informal adjudication of disputes regarding no-fault benefits. The discretion to award expenses should be exercised in accordance with this objective, having regard to the individual circumstances of each case.
>
> Accordingly, it is appropriate to award an applicant his or her expenses, unless, in the circumstances of the particular case, it is determined that the application for appointment of an arbitrator was manifestly frivolous or vexatious, or that the applicant's conduct unreasonably prolonged the proceedings.

In February 1992, this statement was adopted "in the main" by the Director in the appeal decision, *Calogero and The Co-operators General Insurance Company!*[4] In August 1996, in the appeal decision of *Allison and Markel Insurance Company of Canada,*[5] Director's Delegate Naylor reaffirmed the general principle in *McCormick* and pointed out that this principle had been uniformly accepted by arbitrators. However, she

[3] (OIC A-000139, October 2, 1991)
[4] (OIC P-000251, February 13, 1992)
[5] (OIC P-001231, August 21, 1996)

also pointed out that when it came to denying expenses, arbitrators have built on her three criteria set out in *McCormick.*

For example, expenses have been denied to an applicant where the claim was found to have been without merit, or in the case of fraud or dishonesty, or when documents have been fabricated. In *Allison,* Director's Delegate Naylor stated that she agreed with this case-by-case development and commented that: "...the general thrust of these decisions is reasonable and consistent with the purpose and scheme of the legislation. It balances the need for access to the system, with a relatively mild deterrent to undeserving claims or undesirable behaviour."

Applying these principles in this case I exercise my discretion to award Mr. Stelzer his expenses in this arbitration hearing. I find that Mr. Stelzer's claim was legitimate and that Mr. Stelzer was sincere in pursuit of his outstanding medical expenses. Mr. Stelzer presented his case in a timely manner. He did not unnecessarily prolong the proceedings.

I find that the amount of Mr. Stelzer's expenses, which is detailed in his Document Brief, is reasonable. The amount of these expenses was not disputed by Zurich. Accordingly, pursuant to subsection 282(11) of the *Insurance Act,* I find that Mr. Stelzer is entitled to his expenses in this arbitration hearing in the amount of $3,494.67.[6]

August 17, 2000

Joyce Miller
Arbitrator

Date

[6] These expenses include legal fees of $1,694.88 inclusive of GST and disbursements of $1,799.79.

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Insurer

ARBITRATION ORDER

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

1. This arbitration is dismissed.
2. Zurich shall pay Mr. Stelzer $3,494.67 for his expenses in this arbitration pursuant to subsection 282(11) of the *Insurance Act,*

August 17, 2000
Date

Joyce Miller
Arbitrator