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Ontario

April 17, 2018

Mr. Ryan Naimark
Ryan Naimark Professional Corporation
Barristers and Solicitors
141 Adelaide Street West, Suite 330
Toronto ON M5H 3L5

Mr. Darrell March
Barrister & Solicitor
Beard Winter LLP
130 Adelaide Street West, Suite 701
Toronto ON M5H 2K4

Dear Mr. Naimark and Mr. March:

RE: Marjorie Renwick and Wawanesa Mutual Insurance Company
Commission Appeal File №: P17-00027
Claim №: 876459

Enclosed please find a copy of the decision of the Director's Delegate, Maggy Murray, in the above matter.

Yours truly,

Charlene Lobo
Appeals Administrator

Encl.

Copies to:

Ms. Marjorie Renwick
646 Oakwood Avenue, Apartment 304
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Mr. Mike De La Haye
ADR Coordinator
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Appeal P17-00027

OFFICE OF THE DIRECTOR OF ARBITRATIONS

MARJORIE RENWICK

Appellant

and

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

BEFORE:	Maggy Murray
REPRESENTATIVES:	Ryan Naimark for the Appellant Ms. Renwick Darrell March for the Respondent Wawanesa
HEARING DATE:	January 30, 2018

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The appeal of the Arbitrator's order dated March 20, 2017 is allowed in full. The decision is rescinded, the matter is returned to arbitration, and a fresh hearing will be held before a different arbitrator.

2. If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code* – Fourth Edition.

Maggy Murray
Director's Delegate

April 16, 2018
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Ms. Renwick appeals the order of Arbitrator Arbus ("the Arbitrator") dated March 20, 2017 ("the Order"), in which he dismissed her claims of entitlement to: (i) Post-104 week income replacement benefits ("IRBs") from May 2, 2016 and ongoing; and (ii) A medical benefit for a treatment plan by HealthMax Physiotherapy Clinics dated June 5, 2013 in the amount of $2,972.30 under the *SABS-2010*.[1] A six-day arbitration hearing was heard in 2017 by Arbitrator Arbus (the "Arbitrator"). The parties also completed written submissions after the hearing.

II. BACKGROUND

Ms. Renwick was injured in a motor vehicle accident on December 17, 2011 when her car was rear-ended. As a result, she sought statutory accident benefits under the *2010 Schedule* from her first-party automobile insurer, Wawanesa. At the time of this accident, Ms. Renwick was self-employed by her own business as a bookkeeper.

Before the accident, Ms. Renwick had a history of minor neck, back and knee pain, but she never missed any time from work. After the accident, she had the additional problem of shoulder pain and psychological issues and suffered from pain, depression, sleep disturbances and anxiety.

The Arbitrator accepted that after the accident, as a result of her inability to carry on her business at the same level as prior to the accident, Ms. Renwick moved her business to a smaller space. And, because of her deteriorating health conditions, she closed her business in April 2016. The Arbitrator did not make any adverse findings with respect to Ms. Renwick's credibility and concluded that she suffered "a serious, ongoing impairment."[2]

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[1] *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

[2] *Renwick*, QL at paragraph 20 (FSCO A13-008822, March 20, 2017)

According to Ms. Renwick:

i. There was a denial of natural justice and procedural fairness and the Arbitrator's order should be set aside because he failed to provide adequate reasons for his decision. Specifically, under the subheading "analysis": (a) the issue of IRBs was six sentences, contained in three paragraphs;[3] and (b) the medical benefit issue was three sentences, contained in one paragraph;[4] and

ii. The Arbitrator did not adequately summarize, address or analyze the *viva voce* evidence called by Ms. Renwick, including her own testimony, Dr. Segal (pain doctor), or Dr. Salmon (psychologist).

According to Wawanesa:

i. Ms. Renwick has not raised any credible argument that the Arbitrator made an error of law; and

ii. The Arbitrator provided detailed reasons for his decision.

III. ANALYSIS

Appeals from an Arbitrator's order are restricted to questions of law.[5] A failure to give adequate reasons is a breach of natural justice and procedural fairness that mandates setting aside a decision.[6] An Arbitrator's reasons must refer to the principle evidence relied upon and provide a

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[3]*Renwick and Wawanesa Mutual Insurance Company*, QL at paragraphs 20-23 (FSCO A13-008822, March 20, 2017)

[4]*Renwick and Wawanesa Mutual Insurance Company*, QL at paragraph 24 (FSCO A13-008822, March 20, 2017)

[5]Subsection 283(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 and Rule 50.1 of the *Dispute Resolution Practice Code* — Fourth Edition

[6]*Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 2 S.C.R. 817 at paragraph 43

justification for the conclusions.[7] And, an Arbitrator's reasons need to resolve serious conflicts in evidence.[8]

As stated in *Kanareitsev v. TTC Insurance Co.*,[9] the factors to be considered in determining the adequacy of an adjudicator's reasons include:

> ...[T]he decision-maker setting out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue; it is insufficient for the decision-maker to summarize the parties' positions and "baldly state its conclusions"; and the reasoning process followed must be set out and reflect consideration of the main relevant factors.

I find that Ms. Renwick is unable to determine from the Arbitrator's decision what factors the Arbitrator considered relevant to the issues of entitlement, how they were applied, and which of Ms. Renwick's submissions he accepted. The Arbitrator's decision does not provide the basis for meaningful appellate review and she has been denied her right to natural justice and procedural fairness, contrary to *Baker v. Canada (Minister of Citizenship & Immigration)*[10] and *Kanareitsev*.[11]

Income Replacement Benefits

I find that the Arbitrator erred in law by ignoring, failing to summarize, analyze or consider important evidence that was not supportive of the insurer's position, such as:

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[7] *Kanareitsev v. TTC Insurance Company Limited* (2008), 66 C.C.L.I (4th) 46, 297 D.L.R. (4th) 373 QL at paragraph 32 (Ont. Div. Ct.)

[8] *Lyons v. Metropolitan Insurance* (FSCO, P-009824, December 16, 1996), Tab 6, paragraph 11

[9] (2008), 66 C.C.L.I. (4th) 46, 297 D.L.R. (4th) 373, QL at paragraph 28 (Ont. Div. Ct.)

[10] [1999] 2 S.C.R. 817, at paragraph 43

[11] QL at paragraphs 24-28

i. The evidence of Dr. Gallimore (orthopaedic surgeon, retained by the insurer), the only witness who testified on behalf of the insurer. Dr. Gallimore stated on cross-examination that Ms. Renwick deteriorated between his two assessments conducted in December 2013 and March 2015;[12]

ii. The evidence of Dr. Finkel (psychiatrist, retained by the insurer), who found that Ms. Renwick met the pre-104 week IRB test. Specifically, the Arbitrator did not consider Dr. Finkel's conclusion that because of Ms. Renwick's psychiatric symptomatology, she could not work efficiently at her job;[13]

iii. The evidence of Heather Picken (occupational therapist, retained by Ms. Renwick), who concluded that:

> Ms. Renwick is clearly not competitively employable in the identified occupations or any occupation at this time from a functional perspective
>
> ...
>
> [Ms. Renwick] is not capable of consistently performing the essential job tasks of her pre-accident occupation or any occupation for which she is suited by education, training or experience.[14]

iv. Surveillance evidence which corroborated Ms. Renwick's evidence that: (a) Since the accident, she does not drive her car and in fact gave it to her daughter; (b) Prolonged sitting is a problem for Ms. Renwick, who was seen on surveillance eating breakfast while standing;[15] and (c) Ms. Renwick has difficulty holding a phone due to her shoulder issues and uses a headset instead.[16]

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[12]Transcript, Applicant's Appeals Submissions, Tab G, November 18, 2016, pp. 101-107

[13]Insurer's Examination Report dated October 24, 2012, Applicant's Appeals Submissions, Tab I, at 15

[14]Post 104-week Multidisciplinary Rebuttal Assessment, October 20, 2014, Applicant's Appeals Submissions, Tab J, at 103

[15]Transcript, Applicant's Appeals Submissions, Tab L, September 27, 2016, p.30

[16]Transcript, Applicant's Appeals Submissions, September 27, 2016, Tab L at 34-35

v. The evidence of Dr. Reznek (psychiatrist, retained by the insurer), who found that:

> Ms. Renwick is prevented from working full-time as a result of her pain disorder.
>
> ... (she) has not exploited her problems and retreated into the sick role. She has made every attempt to return to the workforce, and has continued working, albeit part-time, in spite of her problems. I think she deserves whatever help that is reasonable and necessary to improve her chronic pain disorder, and assist in her return to work on a full-time basis.[17]

The Arbitrator stated that Dr. Rezneck found that Ms. Renwick was "capable of performing any of the jobs listed in the Transferable Skills Analysis."[18] However, this was an unfair characterization of Dr. Reznek's evidence and the Arbitrator neglected to mention that:

i. Dr. Reznek also found that Ms. Renwick could only do those jobs if they are "low stress";[19] and

ii. Dr. Reznek concluded that Ms. Renwick is prevented from working full-time as a result of her pain disorder.[20]

An adjudicator cannot cherry pick though the evidence and ignore other evidence that does not support their decision. Despite (i) and (ii) above, however, Dr. Reznek also stated that Ms. Renwick does not suffer a complete inability to engage in any employment for which she is suited by education, training or experience.[21] The Arbitrator's statement that Dr. Reznek found that Ms. Renwick is "capable of performing any of the jobs listed in the Transferable Skills Analysis" and that she has a "wide range of employment options ... available to her"[22] does not

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[17]Insurer's Examination Post-104 week Disability, January 3, 2014, Applicant's Appeals Submissions, Tab H, at 16-17

[18]*Renwick*, QL at paragraph 17; Dr. Reznek's report dated January 3, 2014, Applicant's Appeals Submissions, Tab H, at 16

[19]Dr. Reznek's report dated January 3, 2014, Applicant's Appeals Submissions, Tab H at 16

[20]Dr. Reznek's report dated January 3, 2014, Applicant's Appeals Submissions, Tab H at 16

[21]Dr. Reznek's report dated January 3, 2014, Applicant's Appeals Submissions, Tab H at 16

[22]*Renwick*, QL at paragraph 20

resolve the internal conflict[23] within Dr. Reznek's report where he opined that Ms. Renwick was prevented from working full-time.[24]

The Arbitrator also misinterpreted evidence. For example, he stated that Ms. Renwick received 20-25 nerve block injections every six weeks.[25] However, Ms. Renwick was receiving 20-25 nerve block injections every week, in addition to an infusion every six weeks.[26]

The Arbitrator found that Ms. Renwick worked "on average 8 hours per week" and relied on "significant help from her daughter."[27] The Arbitrator then concluded that:

i. "Given the Applicant's history in working successfully in a sedentary position, (he was) satisfied that she has not been able to establish that she meets the complete inability test;"[28] and

ii. The Applicant would still be able to consistently attend and sustain a reasonable number of hours in a **competitive real-world setting** [emphasis added].[29]

I find (i) and (ii) above surprising considering that Ms. Renwick:

i. Only worked 8 hours per week;

ii. Relied on significant help from her daughter; and

iii. Received 20-25 nerve block injections every week[30] and an infusion every six weeks.

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[23]*Lyons v. Metropolitan Insurance* (FSCO, P-009824, December 16, 1996), Insurer's Appeals Submissions, Tab 6, paragraph 11

[24]Dr. Reznek's report dated January 3, 2014, Applicant's Appeals Submissions, Tab H at 16

[25]*Renwick*, QL at paragraph 6

[26]Transcript, Applicant's Appeals Submissions, September 29, 2016, Tab K at 13

[27]*Renwick*, QL at paragraph 5

[28]*Renwick*, QL at paragraph 20

[29]*Renwick*, QL at paragraph 22

[30]*Renwick*, QL at paragraph 6

It is not my role to weigh the evidence. And, not reciting all the evidence does not mean an Arbitrator failed to consider it. However, the Arbitrator's analysis is inadequate and constitutes an error of law.

Medical Benefits

Ms. Renwick claimed entitlement to a treatment plan from HealthMax Physiotherapy for the purpose of pain reduction. The Arbitrator explained that Dr. Rajwani (the insurer's assessor) found that Ms. Renwick "had reached maximum therapeutic benefit (and) that the Treatment Plan in dispute would not benefit her."[31] The Arbitrator then summarized Dr. Drayton's evidence (the chiropractor who completed the treatment plan in dispute) "that the Applicant started working with him in January 2012 and (he) provided a multi-discipline therapy for her." The Arbitrator then concluded that Dr. Drayton (the Applicant's chiropractor) did not establish that the Treatment Plan for physiotherapy was reasonable and necessary.[32]

The Arbitrator acknowledged that Ms. Renwick is experiencing pain and discomfort.[33]

On the issue of the medical benefit, I find that the Arbitrator briefly summarized two reports on the issue and then made a bald conclusion without any analysis, such as not referring to Ms. Renwick:

i. Receiving 20-25 nerve block injections every week, in addition to an infusion every six weeks; [34]

ii. Receiving regular treatment for pain relief in between the regular nerve block injections;[35]

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[31]*Renwick*, QL at paragraph 23

[32]*Renwick*, QL at paragraph 23

[33]*Renwick*, QL at paragraph 24

[34]Transcript, Applicant's Appeals Submissions, September 29, 2016, Tab K at 13

[35]*Renwick*, QL at paragraph 6

iii. Attending the Wasser Pain Clinic at Mount Sinai Hospital;[36]

iv. Taking opioids and anti-depressants;[37]

v. Being under the regular care of Dr. Slyfield, psychiatrist, in addition to attending the Centre for Addiction and Mental Health (CAMH) on two occasions in December 2013 and June 2016.[38]

vi. FSCO case law that establishes that pain relief is a legitimate rehabilitative goal.[39]

The Arbitrator also stated "at no time (did Dr. Drayton, the chiropractor who completed the treatment plan in dispute) challenge the evidence of Dr. Rajwani (the insurer's assessor)."[40] Experts provide evidence to a tribunal and answer questions. Experts can contradict one another. However, it is not the role of an expert to "challenge" the evidence of another expert.

III. CONCLUSION

I find that the Arbitrator failed to give adequate reasons for his decision, and failed to fairly consider the evidence from both parties. This is an error in law. The appeal is therefore allowed and the matter returned to arbitration for a fresh hearing before a different Arbitrator.

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[36] *Renwick*, QL at paragraph 6

[37] *Renwick*, QL at paragraph 6

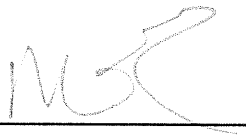
[38] *Renwick*, QL at paragraph 6

[39] *Violi v. General Accident Assurance Co. of Canada*, QL at paragraph 17 (FSCO, A98-000670, August 20, 1999)

[40] *Renwick*, QL at paragraph 23

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code* — Fourth Edition.



Maggy Murray
Director's Delegate

April 16, 2018
Date