

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



Neutral Citation: 2015 ONFSCDRS 140

FSCO A12-001230

BETWEEN:

IVETA CERVENAKOVA

Applicant

and

TD GENERAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Jessica Kowalski

Heard: September 30, October 1-3, November 24-28, 2013, and February 18-20, 2014, at the offices of the Financial Services Commission of Ontario in Toronto. Written submissions received to April 4, 2014.

Appearances: Gary Mazin for Mrs. Cervenakova
Thomas J. Hudak and A. Sandy Williams for TD General Insurance Company

Issues

The Applicant, Iveta Cervenakova, was injured in a motor vehicle accident on May 11, 2010. She applied for and received statutory accident benefits from TD General Insurance Company

(“TD General”), payable under the *Schedule*.¹ TD General terminated Mrs. Cervenakova’s benefits. The parties were unable to resolve their disputes through mediation. Mrs. Cervenakova 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. (“SABS 1996”)

The issues in this hearing are:

1. Is Mrs. Cervenakova entitled to non-earner benefits of \$185.00 per week from December 22, 2010 to date and ongoing?
2. Is Mrs. Cervenakova entitled to attendant care benefits of \$1,160.81 per month from January 31, 2011 to May 10, 2012?
3. Is Mrs. Cervenakova entitled to housekeeping and home maintenance benefits of \$100.00 per week from December 22, 2010 to May 10, 2012?
4. Is TD General liable to pay a special award because it unreasonably withheld or denied payments to Mrs. Cervenakova?
5. Is Mrs. Cervenakova entitled to interest on unpaid benefits?
6. Is either party liable to pay the other's expenses of the arbitration hearing?

Result

1. The application for arbitration is dismissed.
2. The issue of expenses may be resolved in accordance with Rules 75 through 79 of the *Dispute Resolution Practice Code*.

Background

On May 11, 2010, Mrs. Cervenakova was a back seat passenger in a 1996 Chevrolet Cavalier when it was struck from behind while attempting to make a right turn. Mrs. Cervenakova says

that the entire lower half of her body, up to her waist, went under the front seat.² Mrs. Cervenakova did not need medical attention at the scene, and there was no emergency response to the accident. She visited her family doctor³ the next day complaining of pain along the entire right side of her body, including her head, arm and leg.

Mrs. Cervenakova's position

Mrs. Cervenakova claims that the accident caused psychological and physical injuries, including a meniscus tear in her right knee that have resulted in chronic pain, have limited her ability to look after herself and her home, and to enjoy her life in the way that she did before.

Mrs. Cervenakova denies that she had any physical disabilities before the accident, save for flat feet⁴ and occasional headaches.

Although she qualified for disability benefits before the accident, Mrs. Cervenakova says that her health was improving. She says that any pre-existing conditions she did have did not interfere with an otherwise happy, sociable life. Before the accident, Mrs. Cervenakova says she enjoyed long walks with her husband, went dancing, enjoyed dressing up for social outings, and hosting guests at her home, where she says she did the cooking and cleaning.

Mrs. Cervenakova submits that that the trauma caused by the accident aggravated her schizophrenia and the pre-existing pain she did have, and caused new injuries that have resulted in a severe decline in her function and quality of life.

² There was no evidence of damage to the seat or that it was dislodged.

³ Mrs. Cervenakova's primary treating doctor was Dr. Reginald Gorczynski. Although he works out of a clinic where Mrs. Cervenakova sometimes saw other physicians, Dr. Gorczynski saw her most frequently and consistently. For all intents and purposes, he acted as her family doctor and is referred to as such throughout these reasons.

⁴ *Pes planus*, a condition that can affect gait.

TD General's position

TD General submits that the accident did not cause Mrs. Cervenakova's pain or injuries and that she has a long-standing pre-accident history of the very complaints she seeks to attribute to the accident. TD General says that Mrs. Cervenakova has not been candid about her pre- and post-accident level of function and that she misled all assessors who examined her for accident benefits, she diminished or failed to disclose her significant pre-accident medical history and exaggerated her pre-accident health and post-accident limitations.

TD General submits that Mrs. Cervenakova blames limitations on the accident that pre-date the accident and for which Mrs. Cervenakova was already receiving a disability pension, and that she is not entitled to benefits beyond those it has already paid.⁵

Conclusions regarding credibility

This case turns on my assessment of the credibility of Mrs. Cervenakova's evidence and that of her husband, Ladislav Cervenak, regarding Mrs. Cervenakova's pre- and post-accident function.

Mrs. Cervenakova and her husband denied a significant medical history and failed to report it to anyone assessing her for accident benefits. She attributed all of her physical limitations on the accident, leading assessors to report that her pre-accident medical history was unremarkable or that any pre-existing aches or pains were insignificant.

During every assessment, Mrs. Cervenakova failed to disclose that she was in receipt of a disability pension before the accident on the basis of, among other things, musculoskeletal pain

⁵ Of the benefits in dispute, TD General paid the following:

- i. Non-earner benefits at the rate of \$185.00 per week from six months after the accident (the date entitlement starts) to December 21, 2010.
- ii. Attendant care benefits of \$748.78 per month from June 3, 2010 (receipt of a Form 1 dated May 17, 2010) to July 27, 2010 and \$1,160.81 per month from receipt of the Form 1 dated November 19, 2010 to January 31, 2011 plus interest (following Mrs. Cervenakova's knee surgery).
- iii. Housekeeping and home maintenance benefits at the rate of \$100.00 per week from the date of the accident to December 22, 2010.

all over her body and on a complete dependency on her husband for the pre-accident housework and her personal care. By contrast, Mrs. Cervenakova claims accident benefits on the basis that she was independent in her self-care and did the bulk of the housework before the accident, notwithstanding that her disability pension considered that her husband did much of the family's pre-accident housework, was her caregiver before the accident, and even declined the opportunity to participate in a work program in order to stay home and care for her full time.

For the reasons that follow, I find the position that Mrs. Cervenakova and her husband took when claiming disability benefits before the accident incompatible with their testimony before me regarding Mrs. Cervenakova's pre- and post-accident function.

All of Mrs. Cervenakova's evidence about her pre-and post-accident activities and limitations is subjective and conflicts with all of the pre-accident medical records in evidence. I find that Mrs. Cervenakova's subjective accounts, as well as her husband's, are simply not reliable and cannot be believed without supporting objective medical evidence. Since this entire case turns on credibility and because I find Mrs. Cervenakova's evidence not credible, she fails on each claim.

EVIDENCE AND ANALYSIS

Mrs. Cervenakova's testimony was fraught with contradictions. I find that she minimized her significant pre-accident medical history, exaggerated her post-accident injuries, and testified that impairments which existed before the accident were caused by it. As a result, I find that her subjective accounts are unreliable unless they are supported by corroborating medical evidence.

Mrs. Cervenakova claims that the accident caused impairments associated with, among other things, trauma to her right knee. Mrs. Cervenakova claims that, before the accident, while she had schizophrenia and memory issues, her physical health was good. She says that the accident worsened her schizophrenic condition and caused new injuries. In addition to anxiety, depression, nightmares, sleep disturbance and headaches, she claims that the accident caused severe pain all along the right side of her body, her right knee and her right shoulder.

The medical evidence, meanwhile, indicates that Mrs. Cervenakova has a history of chronic pain, chronic degenerative osteoarthritis, including in her right knee, bilateral shoulder pain and rotator cuff tears, as well as a history of chronic and severe migraine headaches. She is unable to tolerate non-steroidal anti-inflammatory drugs (“NSAIDs”) to treat her osteoarthritic pain and inflammation because of gastropathy⁶, making their treatment limited and challenging. All of these conditions pre-date the accident. In fact, up to the night before the accident, Mrs. Cervenakova sought help for severe pain in her right knee.

Mrs. Cervenakova’s testimony regarding her pre-accident life

Mrs. Cervenakova says that she enjoyed a happy life before the accident. She testified that she socialized often and went to parties with her husband where she danced into the night.⁷ She testified that she took long daily walks with her husband to the plaza or to family nearby. She says that she looked after herself and was responsible for all of the housework before the accident, testifying that she did almost everything at home.⁸

Mrs. Cervenakova denied any physical problems or physical disability before the accident. She testified that her only pre-accident disability, apart from schizophrenia, related to her memory and resulted in the need for her husband to supervise her at home in case she forgot to turn off the stove or water.⁹ She testified that she injured her foot many years before, that she had flat feet as well as headaches that she described as “normal”. She expressly denied any pre-accident problems with her knees, and specifically, with the right knee.

⁶ According to her family doctor, Dr. Gorczynski, NSAIDs are the go-to treatment to medically manage osteoarthritic pain and the inflammation associated with pain in the joints. In Mrs. Cervenakova’s case, NSAIDs have caused gastric distress and gastrointestinal bleeding.

⁷ DVD recordings entered into evidence contain limited footage of Mrs. Cervenakova seated at a party and of some slow dancing or swaying to music.

⁸ The two youngest of her children were teenagers and living at home at the time of the accident. They tidied their rooms. Mrs. Cervenakova and her husband testified that her husband helped with heavy tasks from time to time.

⁹ In the past she caused a kitchen fire and a bathroom flood.

She says it was the accident that caused the severe knee pain, leg pain and pain throughout the right side of her body that she continues to experience. She claims the accident also caused TMJ pain, dizziness and headaches, anxiety, depression, nightmares and difficulty with sleep – all of which she denied existed before, even when shown contradictory documents on cross-examination.

Pre-accident disability pension

Mrs. Cervenakova has been in receipt of a disability pension, as “a person with a substantial disability as defined in the Ontario Disability Support Program Act”, since December 4, 2006.

In mid-2006, with the help of her treating psychiatrist at the time, Dr. Lawrence Gotkind, Mrs. Cervenakova applied to the Ontario Disability Support Program (“ODSP”) for disability benefits. She identified three reasons for her disability, which became the basis for the decision granting her benefits:

- i. severe chronic anxiety disorder with panic attacks and irrational behaviour (possible schizophrenic paranoid type)
- ii. hypertension, and
- iii. musculoskeletal pain all over.

While the receipt of a disability pension would not disentitle Mrs. Cervenakova from accident benefits, in this case, the disability pension is important because Mrs. Cervenakova went to great lengths in her testimony to attribute limitations in her function to the accident, but which long pre-date the accident and for which she was already receiving disability benefits. Similarly, the attendant care and housekeeping functions that she says her husband had to take on as a result of the accident were, according to the ODSP file, services Mr. Cervenak was already providing long before. While counsel for Mrs. Cervenakova submits that schizophrenia would have been sufficient to qualify Mrs. Cervenakova for disability benefits but still allow her to engage in her usual housework and social activities (like dancing and parties), the fact is that Mrs. Cervenakova neither applied nor qualified for ODSP benefits on the basis of her schizophrenia alone and identified substantial and limiting pain as one of the reasons for her disability.

In a self-report form¹⁰ submitted with her application for ODSP benefits, Mrs. Cervenakova reported that she was in “a lot of pain” and that her pain prevented her from completing her daily activities “A lot.”¹¹ She claimed that her disability affected her both mentally as well as physically. She claimed that she had pain all over her body, that she could sometimes not brush her hair or shower without assistance, and that, but for her family’s help, she would not be able to do any daily household chores. She reported that she could not handle life by herself and that her family had to watch over her.

Mrs. Cervenakova also reported to ODSP that she could not walk, that her condition was continuous, had been ongoing for at least a year and was likely to deteriorate. She told ODSP that her pain was so severe that it rendered her unable to get up from a chair “most of the time.” She endorsed mild or slight limitations¹² with walking three or more blocks on level ground without needing to rest, climbing up or down a flight of six steps, and doing housekeeping.¹³

She endorsed medium or moderate limitations¹⁴ with sustained physical activity, with her personal hygiene and grooming, her ability to wash all parts of her body, and with her ability to feed herself. She identified severe or complete limitations with activities involving memory, mental capacity and cognitive faculties.

¹⁰ Dated July 11, 2006.

¹¹ Mrs. Cervenakova’s daughter-in-law, Monika, completed Mrs. Cervenakova’s self-report form with her because of language issues. Mrs. Cervenakova did not deny the contents.

¹² According to the ODSP questionnaire filled out by Mrs. Cervenakova, mild or slight limitations (Class 2 of 4) were ones that may result in slightly longer time requirements to complete a task or mild exacerbation of pain, or where accommodation might be required to complete a task.

¹³ Cleaning, laundry, meal preparation, and shopping for essentials such as groceries and food).

¹⁴ According to the ODSP questionnaire filled out by Mrs. Cervenakova, medium or moderate limitations (Class 3 of 4) were ones where an individual may require considerably longer time to complete tasks and may on some occasions be unable to complete the task with or without accommodation and with or without moderate pain.

Pre-accident medical records

Mrs. Cervenakova's extensive pre-accident medical records contradict her testimony and her representations to the assessors who examined her after the accident.

While Mrs. Cervenakova denied during her testimony that she had anxiety or depression and testified that the accident caused difficulties with sleep, Dr. Gotkind diagnosed her before the accident with severe chronic anxiety disorder with panic attacks and irrational behaviour. On June 10, 2006, as part of the ODSP application, Dr. Gotkind reported that Mrs. Cervenakova's impairments included insomnia, nightmares, dizziness, irritability and headaches. He reported that as far back as 2004, Mrs. Cervenakova suffered from chronic anxiety disorder with panic aspects, depression and severe somatic musculoskeletal pains. Later, in or around 2009, Mrs. Cervenakova began seeing psychotherapist Dr. David Slyfield for, among other things, anxiety.

Although she denied taking pre-accident anti-depressants, Mrs. Cervenakova's medical records show that, by June 2005, she was taking prescription medication for depression.

As for physical problems, Mrs. Cervenakova's medical records disclose that:

- since at least 2003, Mrs. Cervenakova had significant back pain and had been diagnosed with mild lumbar scoliosis, convex to the right¹⁵
- by 2003, she had right knee complaints with x-rays revealing early mild osteoarthritis. She continued to have issues with her right leg and attended at her family doctor for chronic leg swelling
- in 2005, Mrs. Cervenakova was referred to a rheumatologist, Dr. Amba, for discomfort from her shoulders to her neck ongoing for eight years
- in 2005, she was referred to Dr. Zeman following complaints of right leg pain
- in 2005, rheumatologist Dr. Sharon Kreidstein diagnosed Mrs. Cervenakova with fibromyalgia.

¹⁵ A curvature of her spine.

The year before the accident

In the year before the accident, Mrs. Cervenakova's medical records disclose frequent medical visits, and that her complaints of pain persisted or worsened and included musculoskeletal issues relating to her right knee and leg, as well as migraines, TMJ complaints, and anxiety. For example:

- Mrs. Cervenakova attended at Dr. Gorczynski's clinic with continued complaints of "chronic leg pain/swelling" and myalgia (muscle pain) in her legs¹⁶
- Mrs. Cervenakova attended at Dr. Gorczynski's clinic with complaints of TMJ and/or jaw pain¹⁷
- Mrs. Cervenakova was admitted to Humber River Hospital for headache complaints on a 10/10 scale that over-the-counter painkillers had failed to relieve. She was discharged with a diagnosis of migraine and prescription medication for, among other things, pain.¹⁸
- According to a September 20, 2009 clinic note by Dr. Gorczynski, Mrs. Cervenakova attended with complaints of chronic migraines for years. She also attended with intermittent dizziness.¹⁹
- On October 16, 2009, Mrs. Cervenakova attended Yorkwoods Medical Centre with complaints of back pain for 2-3 days. She was diagnosed with mechanical back pain and prescribed Naproxen and rest.
- Four-and-a-half months before the accident, on December 23, 2009, Mrs. Cervenakova attended at Dr. Gorczynski's clinic because of chronic joint pain. She was prescribed pain medication (Elavil).
- Seven weeks before the accident, on March 24, 2010, Mrs. Cervenakova saw Dr. Gorczynski in relation to chronic leg and arm pain.

¹⁶ On June 18 and July 16, 2009.

¹⁷ On November 5 and 20, 2009 and January 7, 2010.

¹⁸ Stemetil, Tylenol and Ketorolac.

¹⁹ March 18, 2010.

The day before the accident, on March 10, 2010, Mrs. Cervenakova made an after-hours visit to Dr. Gorczynski's clinic with complaints of bilateral knee pain. Dr. Gorczynski diagnosed chronic degenerative osteoarthritis. Dr. Gorczynski again referred Mrs. Cervenakova to rheumatologist Dr. Sharon Kreidstein for chronic osteoarthritis in both knees and chronic inflammation in her jaw (TMJ) and for help because of the inability to treat Mrs. Cervenakova with NSAIDs.

Information withheld from assessors

Apart from denying her pre-accident physical problems during the hearing, Mrs. Cervenakova failed to disclose any of them to a single one of her post-accident assessors. At examination after examination, she withheld all information relating to pre-accident physical impairments. When she disclosed a pre-accident history, it was that she had high blood pressure and high cholesterol. She occasionally reported her memory problems and told Dr. Zarnett (her orthopaedic expert) that she had schizophrenia. She consistently denied, however, any pre-accident impairments related to pain or headaches. She denied treatment for anxiety, depression or pain.

Mrs. Cervenakova never told assessors about pre-accident headaches that warranted hospitalization. She never disclosed multiple referrals to rheumatologists because of severe knee pain and chronic degenerative osteoarthritis. She did not tell assessors that she had been diagnosed with chronic pain, fibromyalgia, rotoscoliosis or migraines. She never disclosed that she was receiving a disability pension before the accident for, among other things, musculoskeletal pain all over her body that left her allegedly unable to function without help. She told no one about her after-hours visit to Dr. Gorczynski the evening before the accident for severe knee pain.

Among her repeated omissions are the following:

- She admitted to chiropractor Dr. Bereznick on August 24, 2010 that she only had high blood pressure and high cholesterol before the accident, leading Dr. Bereznick to conclude that her pre-accident history was “entirely unremarkable.” She did not correct her representations during subsequent visits when asked.
- She told Dr. Dost on August 29, 2010 that she was not taking any medications before the accident
- She told occupational therapist Sofia Balanovsky on September 23, 2010 that she considered herself to be in good health before the accident and never needed any medical help or medications
- When asked about her mental health history during an insurer psychological assessment on November 18, 2010, Mrs. Cervenakova told Dr. Cowman that she did not suffer from depression, anxiety or any other type of mental health problems before the accident. She denied ever seeking out the services of a mental health professional or ever being prescribed medication for anxiety or sleep. Mrs. Cervenakova also denied any history of chronic pain when she met with Dr. Cowman
- When asked by psychiatrist Dr. Ansari on March 30, 2011 about her previous medical history, Mrs. Cervenakova told him that she was fine and specifically denied any pre-accident problems with her knees
- She told Dr. Rick Zarnett (the orthopaedic surgeon who assessed her on August 13, 2010 and whom she called as an expert witness) that she had no pre-accident neck or back pain and failed to disclose pre-accident diagnoses or investigation related to her right knee, leading him to conclude that her aches and pains that were not significant.²⁰

²⁰ A position he revised during cross-examination, although he maintained that the accident caused her knee injury.

Mrs. Cervenakova's explanation

Mrs. Cervenakova testified that she did not disclose her mental illness because she was embarrassed. However, she gave no credible explanation for the wholesale omission of relevant details associated with her chronic musculoskeletal pain or any of pre-accident disability except to concede during cross-examination that what she did say depended on the doctor.

There is insufficient evidence of a language barrier to explain the omissions because she attended assessments with an interpreter and with her husband who, although he often waited outside, was nevertheless available in the event of a difficulty with communication (of which there is no record). In the worst case, if Mrs. Cervenakova misunderstood all of the questions put to her during each assessment and answered inaccurately, by the time of the hearing, and when faced with the inconsistencies, she still made no effort to correct her omissions, instead maintaining steadfastly that she had no physical pre-accident problems.

I am also not satisfied that this is a case where Mrs. Cervenakova simply forgot to mention a pre-accident diagnosis or vague health concern. Mrs. Cervenakova was selective in what she disclosed and she withheld details related to physical problems during her assessments. By contrast, she was able to recall specific accident details, the location of many assessments, and details of the assessments themselves when she testified.

While I recognize that Mrs. Cervenakova may have had memory issues that left her forgetful during her day-to-day tasks (like turning off the stove) I heard no evidence that she had memory deficits that would leave her forgetting years of ongoing pain complaints and limitations and only recalling them as having originated after the accident.

Finally, even if it were true that Mrs. Cervenakova would forget her entire pre-accident medical history – and there is no objective evidence that she did – Mr. Cervenak made no effort to correct his wife's representations to assessors when he attended with her or when he testified. I heard no evidence or suggestion that he had memory problems that would prevent him from recollecting

his wife's pre-accident medical problems, especially since he accompanied her to her medical appointments.

The medical evidence is simply not consistent with Mrs. Cervenakova's and Mr. Cervenak's testimony. Furthermore, Mrs. Cervenakova's ODSP entitlement was subject to periodic review. Although both she and Mr. Cervenak testified that after 2007 Mrs. Cervenakova's health was improving, there is no evidence that either of them told ODSP that Mrs. Cervenakova was feeling better, becoming more active, taking an active role in her personal care, or undertaking all of the housework, as they each testified was the case during this hearing.

Mr. Cervenak

Mr. Cervenak received modest benefits²¹ from ODSP as Mrs. Cervenakova's caregiver and for doing the housekeeping, yet in his testimony before me he swore that she was without limitation before the accident. Mr. Cervenak testified that:

- Before the accident, he and Mrs. Cervenakova led an active life socializing, dancing, taking long walks and doing things together
- If Mrs. Cervenakova did have any pain before the accident, it did not interfere with her day-to-day life and she was not suffering before the accident. He denied that she had complaints of a physical nature
- Mrs. Cervenakova did the majority of the housework.²²

In the few years before the accident, Mr. Cervenak testified that Mrs. Cervenakova's health started to improve. He says she was able to go out more and that she was cooking, cleaning and shopping. Although he says Mrs. Cervenakova took medication for blood pressure, for her stomach and psychiatric medications, he denies she took anything for pain except Tylenol and Advil occasionally. When presented with his wife's lengthy pre-accident prescription history,

²¹ He was part of her disability unit for ODSP purposes and received a special diet allowance, certain medical benefits, as well as an allowance for travel to medical appointments.

²² He monitored her to ensure she turned off the stove or water.

and after he testified that he himself had no medical issues, he claimed that Mrs. Cervenakova's prescription pain medications were actually for him.

After the accident, Mr. Cervenak testified that the need for him to supervise his wife increased, and that he now has to perform all of the household chores and help Mrs. Cervenakova with her personal care and grooming.²³

Meanwhile, three years before the accident, in 2007, Mr. Cervenak was added to Mrs. Cervenakova's disability pension as her full-time caregiver. A doctor's note dated February 26, 2007 confirmed that Mr. Cervenak needed to stay home with Mrs. Cervenakova. He declined the opportunity to participate in a work program offered through Ontario Works on the grounds that he needed to stay home with his wife due to her disability.

I also find that Mr. Cervenak showed little concern for the accuracy of the invoices he submitted for housekeeping. For example, like his evolving testimony regarding Mrs. Cervenakova's prescription pain medication, he also changed his testimony regarding housework while on a vacation with his wife in Cuba: from initially testifying that he did not do housekeeping to making the improbable statement that he continued to dust and launder towels because their room was only turned once a day.

Knee injury

In October 2010, five months after the accident, Mrs. Cervenakova had surgery on her right knee for the meniscus tear. If the accident caused the meniscus tear (on which the experts disagreed), or aggravated a pre-existing knee condition (i.e. the chronic, degenerative osteoarthritis), I cannot rely on Mrs. Cervenakova's subjective evidence that it impaired her function after the accident. I find that it did not.

²³ He testified that he has to help her with showering, wash her hair, applying lotion and nail trimming.

TD General called orthopaedic surgeon Dr. Gallimore to give expert evidence. When he assessed Mrs. Cervenakova for accident benefits, he concluded that the accident caused lumbar strain, cervical strain, and a right knee meniscal tear with medial condyle defect. His conclusion was made without the benefit of Mrs. Cervenakova's pre-existing medical history and after she had denied any pre-existing physical concerns, including with her knee, when she met with him.

After reviewing Dr. Heller's post-operative report dated October 12, 2010, which stated that there was no clear through-and-through tear of the anterior horn lateral meniscus, and based on the areas Dr. Heller debrided, Dr. Gallimore changed his opinion to say that the surgery was not related to the accident but addressed a degenerative condition (the osteoarthritis). He testified that, had he been aware of Mrs. Cervenakova's chronic history of back and knee problems, combined with the degree of functional overlay he observed when he saw her, he would have concluded that the knee problems pre-dated the accident.

Mrs. Cervenakova's treating family doctor, Dr. Gorczynski, testified that Mrs. Cervenakova had pre-existing osteoarthritis that degenerated over time and that would continue to degenerate in the future regardless of the accident. Dr. Gorczynski's opinion regarding the knee surgery was consistent with Dr. Gallimore's. He testified that the surgery was necessitated not by the accident but by the downward progression of Mrs. Cervenakova's degenerative osteoarthritis that was hastened by her inability to tolerate traditional treatment with non-steroidal anti-inflammatories.

Dr. Zarnett (the orthopaedic surgeon whom Mrs. Cervenakova called as an expert) did agree that rotator cuff tears in Mrs. Cervenakova's shoulders likely pre-dated the accident. He opined, however, that the accident caused the meniscus tear. He did not see Mrs. Cervenakova until more than three years after the accident (on August 8, 2013). When he saw her, he was not given a complete medical brief and had not seen all of her medical records on file. He was not told about her pre-accident difficulties with the right knee. Mrs. Cervenakova described her pre-accident symptoms to him as aches and pains without limitation, so he did not consider them to

be significant. She told him that she was on disability before the accident because of schizophrenia but that she was unrestricted with respect to her housekeeping and physical tasks.

Based on the evidence that he had, Dr. Zarnett concluded after his visit with Mrs. Cervenakova, that, as a result of the accident, her injuries resulted in the development of chronic pain in her neck, shoulders, back and/or right knee. Meanwhile, Dr. Gorczynski, her treating doctor for years, had already diagnosed her with chronic pain well before the accident. Dr. Zarnett relied on a flawed self-report from Mrs. Cervenakova and conceded that Dr. Gorczynski's May 10, 2010 referral to Dr. Kreidstein (the rheumatologist) would suggest chronicity or pre-existing injuries.

The primary difference between the pre-and post-accident medical evidence is that the health practitioners that concluded that the accident caused Mrs. Cervenakova's impairments did so on the basis of Mrs. Cervenakova's selective self-reports that overlooked significant relevant details. For reasons already set out, her evidence about her function and limitations was not credible. I find that the best and most consistent evidence came from Dr. Gorczynski, her treating physician, who, having the benefit of Mrs. Cervenakova's history, did not attribute the knee surgery to the accident. Rather, he testified that it was a part of her overall decline, made worse by the inability to treat with NSAIDs, regardless of the accident.

Benefits in dispute

In addition to concerns with the credibility of Mrs. Cervenakova's evidence, I find that she has failed to prove that she meets the statutory requirements for the benefits she claims in this arbitration.

Non-earner benefits

An insurer shall pay an insured person who sustains an impairment as a result of an accident a non-earner benefit ("NEB") if the insured person suffers a complete inability to carry on a

normal life as a result of and within 104 weeks of the accident.²⁴ A person is considered to suffer a complete inability to carry on a normal life as a result of an accident if, and only if, as a result of the accident, the person sustains an impairment that prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.²⁵

The test for NEBs is particularly strict.²⁶ In *Cook and Pilot Insurance Co.*,²⁷ the Arbitrator held that NEBs are not intended to compensate an insured person for having to engage in post-accident activity with pain and discomfort. Rather, they are designed to compensate when the pain becomes “disabling in its own right.”

While Mrs. Cervenakova likely continues to have pain, it is clear from the medical evidence that she suffered pain in her pre-accident life and was already substantially restricted. According to the medical evidence, all of the restrictions that she and her husband claim began after the accident existed long before. The only evidence of further functional decline is Mrs. Cervenakova’s and her husband’s subjective accounts, which, for reasons set out above, are not credible.

Mrs. Cervenakova has also failed to establish not only that she met the test at the date of the onset of her alleged disability, but that she continued to meet the test through the initial 26 weeks and beyond, to date, without interruption. Although she testified that she was not dancing or socializing at the time of the hearing, Mrs. Cervenakova did not give evidence that she could not do so within the 104 weeks after the accident. Her Facebook photographs posted to her account after the accident show her socializing with friends and family, at parties, and vacationing in Cuba where she was even photographed on a horse.

²⁴ Section 12(1), paragraph 1. SABS 1996.

²⁵ Section 2(4), SABS 1996.

²⁶ *Nguyen and Economical Mutual Insurance Co.*, [2013] FSCO A11-002508, August 28, 2013. Confirmed on appeal (P13-00029, October 3, 2014).

²⁷ [2005] FSCO A03-B001085, May 9, 2005.

Finally, her disability certificates (dated May 19, September 8 and November 11, 2010) were submitted by Osler Rehabilitation Centre and each prognosticated a disability of nine to 12 weeks' duration.²⁸

Attendant care benefits

I find that Mrs. Cervenakova has failed to establish that, on balance, she is entitled to attendant care benefits to May 10, 2012.

By her own admission, Mrs. Cervenakova never advised ODSP of any change in her condition, even during periodic reviews initiated by ODSP. Both she and Mr. Cervenak continued to receive disability payments before and after the accident that were predicated in part on Mrs. Cervenakova's need for help with her self-care that she told ODSP included assistance with hygiene and grooming, and even feeding herself (which Mr. Cervenak denied he helped with after the accident). As noted earlier, Dr. Gotkind opined at the time of the ODSP application that Mrs. Cervenakova had moderate limitations with her ability to participate physically in sustained activity, with washing herself, personal hygiene and grooming, and with housekeeping.

Mrs. Cervenakova has failed to prove that the accident rendered her unable to undertake any personal care tasks after the accident that she was able to do before. On the contrary, she was collecting disability benefits before the accident for help with grooming and hygiene, and even feeding.

Housekeeping and home maintenance benefits

Mrs. Cervenakova's medical restrictions were sufficiently severe before the accident that they limited her to minimal housework and complete reliance on her family for help. On the basis of

²⁸ For housekeeping and NEBs. None of the chiropractors who allegedly authored the disability certificates (OCF-3) were called to give evidence. The September 8, 2010 disability certificate was purportedly authored by Dr. Andrew Greszczyszyn, who previously testified before Arbitrator Sampliner (in the case of *Bunjamin and York Fire and Casualty Insurance Co.*) that Osler had used his signature without approval and that Osler staff had changed his disability opinions.

her representations to ODSP, and on the fact that she never advised ODSP of any change in her condition or abilities before the accident (again, during periodic reviews of her entitlement), I find Mrs. Cervenakova's and her husband's evidence that it was because of the accident that Mr. Cervenak took on the housework to be disingenuous. I find her representations to ODSP that she relied on her husband for the pre-accident housework, and that she could barely leave her chair most days, cannot be reconciled with her testimony during the hearing that she did all the housework before the accident without restriction, save for monitoring by her husband to ensure that she shut off the stove or water.

Conclusion

Based on her evidence presented, Mrs. Cervenakova had a significant pre-existing history of chronic pain and chronic degenerative arthritis. She failed to report it to any assessors after the accident and denied it during the hearing. As a result, her assessors assumed she her pre-accident health was unremarkable and that anything she reported was caused by the accident.

Both Mrs. Cervenakova and her husband failed to provide credible and reliable evidence about her condition before and after the accident while attributing Mrs. Cervenakova's current limitations on the accident. Mrs. Cervenakova has a significant pre-accident medical history that she did not report to any assessor who examined her for accident benefits. Her and her husband's testimony is not consistent with the medical evidence.

If Mrs. Cervenakova and Mr. Cervenak were being truthful in their testimony, then they were not being truthful when they applied for ODSP. Either way, whether they were truthful to ODSP from 2006 onwards, or in their testimony during this hearing, it reflects badly on Mrs. Cervenakova's accident benefits claim. Their accounts demonstrate a willingness to tailor the facts to make as advantageous a case as possible, whether for disability benefits or accident benefits. In the circumstances, I find that their account cannot be relied on except where it is corroborated by objective medical evidence. There is simply no way to reconcile the position that Mrs. Cervenakova and Mr. Cervenak took when Mrs. Cervenakova was claiming benefits

before the accident and what they reported to ODSP, her medical records, and what they reported during the hearing. Her medical records are more consistent with Mrs. Cervenakova's representations to ODSP than with her claim that her physical impairments arose after the accident.

Further, her treating family doctor, Dr. Gorczynski, and an orthopaedic expert, Dr. Gallimore, dispute that the accident caused the meniscus tear. Even if it aggravated her osteoarthritis, I find no credible, reliable evidence that the knee surgery resulted in any limitations beyond those that Mrs. Cervenakova reported to ODSP that she already had before the accident.

For all of these reasons, the application for arbitration is dismissed.

EXPENSES

The parties made no submissions on expenses. If they are unable to resolve the issue of expenses, they may bring the issue before me in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Jessica Kowalski
Arbitrator

June 30, 2015
Date



Neutral Citation: 2015 ONFSCDRS 140

FSCO A12-001230

BETWEEN:

IVETA CERVENAKOVA

Applicant

and

TD GENERAL 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. The application for arbitration is dismissed.

Jessica Kowalski
Arbitrator

June 30, 2015

Date