



FSCO A10-004057

BETWEEN:

RODA EGAL

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Judith Killoran

Heard: March 5 and 6, 2012, at the offices of the Financial Services Commission of Ontario in Toronto

Appearances: Neritan Ciraku for Ms. Egal
Nicholaus de Koning for Economical Mutual Insurance Company

Issues:

The Applicant, Roda Egal, was involved in a motor vehicle accident on April 29, 2009. She applied for statutory accident benefits from Economical Mutual Insurance Company ("Economical"), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Ms. Egal applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The issues in this hearing are:

1. Is Ms. Egal entitled to caregiver expenses of \$250 weekly for 104 weeks after April 29, 2009?
2. Is Ms. Egal entitled to housekeeping expenses of \$100 weekly for 104 weeks after April 29, 2009?
3. Is Ms. Egal entitled to a medical benefit of \$2,354.12 for an outstanding account at Global Rehab Clinics Ltd. and \$1,007.82 for assistive devices provided by Queens Medical Assessment Centre?
4. Is Ms. Egal entitled to interest on unpaid amounts of benefits?
5. Is Ms. Egal entitled to a special award?

Result:

1. Ms. Egal is entitled to caregiver expenses of \$250 weekly for 52 weeks after April 29, 2009.
2. Ms. Egal is entitled to housekeeping expenses of \$100 weekly for 104 weeks after April 29, 2009.
3. Ms. Egal is entitled to a medical benefit of \$1,630 for treatment at Global Rehab Clinics Ltd.
4. Ms. Egal is entitled to interest on unpaid benefits.
5. Ms. Egal is entitled to a special award fixed at \$5,000, inclusive of interest.

BACKGROUND

Ms. Egal was a front seated passenger who was involved in an accident at the intersection of Kipling and Rexdale on April 29, 2009.² She was travelling with two friends when their rental vehicle was struck on the passenger side. Ms. Egal was examined by paramedics and taken by ambulance to Humber River Regional Hospital. She had injured her neck and head and her knees were swollen. She testified that she was put in a hallway in the hospital for 2 to 3 hours and left before receiving any treatment as she had to pick up her son. Although she continued to be in pain, she was unable to move and did not have someone who could take her to the hospital. She was unable to get out of bed for approximately 6 days other than to go back and forth to the washroom.

Ms. Egal works as an intake worker at a multi-service settlement agency which assists newcomers to Canada. Some were refugees who needed assistance getting housing, a social insurance number and health care.

Ms. Egal's past medical history includes a slip and fall in 2000 when she missed a step in the hall of her apartment building and fractured her ankle. She testified that she healed completely from that accident.

Ms. Egal originally sent her application for accident benefits in error to American Home Assurance Company. As a result, Charlene Tuzi, an adjuster at Crawford Adjusters Canada Inc., was assigned to Ms. Egal's file. In correspondence dated August 11, 2009, she acknowledges receipt of Ms. Egal's Application for Accident Benefits on August 10, 2009 and a treatment plan from Dr. M. Kretz of Global Rehab Clinics on June 8, 2009. The treatment plan was approved in full.³ Another letter of the same date from Charlene Tuzi confirms receipt of an Application for Approval of an In-Home Assessment which was partially approved. On August 25, 2009,

²Police Motor Vehicle Accident Report, Exhibit 1, Tab B2

³Exhibit 1, Tabs C1 & C2

Ms. Egal's counsel forwarded correspondence to Economical with an Application for Accident Benefits and an Authorization and Direction.⁴

On September 2, 2009 and September 18, 2009, Economical requested an explanation for the delay in reporting Ms. Egal's claim.⁵ On September 28, 2009, Ms. Egal's counsel forwarded an explanation for the delay to Economical stating that Economical failed in explaining Ms. Egal's rights to her and did not provide her with an accident benefits package. Therefore, her application was not forwarded until after she retained counsel.⁶

Economical submits that it did not deal with Ms. Egal's claims as there was a delay between the accident and her application for benefits. Ms. Egal submits that Economical was not prejudiced by the delay and in fact, contributed to the delay by failing its responsibilities and not requesting her file from the original insurer.

Ms. Egal relies on 3 cases in her brief of authorities, *S.R. and State Farm Mutual Automobile Insurance Company*⁷, *Coseco Insurance Co./HB Group/Direct Protect and Novakovic*⁸, and *Allstate Insurance Company of Canada and Kuronen*.⁹

In *S.R. and State Farm*, the arbitrator interpreted section 32 of the *Schedule* which requires that an applicant must notify her insurer within seven days of the circumstances which gave rise to the claim for statutory accident benefits, "***or as soon as practicable afterwards,***" and also the saving provision found in section 31 which provides that, despite late notice, a person is not disentitled from proceeding with a claim if the applicant has a reasonable explanation. She held that the question of "as soon as practicable" and the question of "reasonable explanation" for

⁴Exhibit 1, Tab C3

⁵Exhibit 1, Tab C4

⁶Exhibit 1, Tab C6

⁷(FSCO A09-002171, June 24, 2011)

⁸(FSCO P05-00016, June 22, 2006), Appeal

⁹(FSCO P96-000026, January 31, 1997), Appeal

failure to comply the time limits are two distinct questions. She relied on earlier arbitral decisions to conclude that the legislative intent of section 31 is to authorize a broad assessment of an applicant's explanation for a delay, including objective and subjective factors; that is, it should be interpreted remedially in accordance with its purposes.

In *Coseco Insurance Co./HB Group/Direct Protect and Novakovic*, the Director's Delegate held that the interpretation of "reasonable explanation" in subsection 31(1) of the *Schedule* must include the following criteria:

- It must be credible or worthy of belief
- The onus is on the insured person to establish a "reasonable explanation"
- Ignorance of the law alone is not a reasonable explanation
- The test of "reasonable explanation" is both a subjective and objective test that should take account of both personal characteristics and a "reasonable person" standard
- The lack of prejudice to the insurer does not make an explanation automatically reasonable
- An assessment of reasonableness includes a balancing of prejudice to the insurer, hardship to the applicant and whether it is equitable to relieve against the consequences of the failure to comply with the time limit.

In *Allstate Insurance Company of Canada and Kuronen*, the Director's Delegate found merit in the arbitrator's focus on the lack of prejudice to Allstate by the delay in applying for benefits.

Economical relied on the cases of *Stranges and Allstate Insurance Company of Canada*¹⁰ and *Turner and State Farm Mutual Automobile Insurance Company*¹¹ to argue that if there was an inadequacy to its refusal notice it did not entitle the respondent to payment of benefits.

¹⁰2010 ONCA 457 (CanLII)

¹¹2005 CanLII 2551 (ON CA)

I find that Ms. Egal, may have put American Home Assurance Company on notice about her accident as soon as was practicable. If not, I find that, on a balance of probabilities, she has satisfied the test of providing a reasonable explanation for any delay in notifying Economical. First, there was the confusion about who the proper insurer was and then there was Economical's refusal to accept its responsibilities by forwarding an accident benefits package to her. This was followed by Economical's refusal to reimburse American Home Assurance Company for the benefits it had paid, its failure to schedule an examination under oath, its failure to schedule medical assessments, and its failure to follow up expeditiously to obtain Ms. Egal's file.

WITNESSES

Ms. Egal, the applicant, Atila Balaban, an exercise physiologist who was qualified as an expert in functional assessments, and Chris Metcalf, Economical's adjuster, testified at the hearing.

MEDICAL BENEFITS

Section 14 of the applicable *Schedule* specifies that the insurer shall pay a medical benefit to an insured person who sustains an impairment as a result of an accident.

Ms. Egal visited Dr. Elizabeth Tham, her family doctor for 17 years, on May 5, 2009.¹² Prior to the accident, there were few notations in Dr. Tham's clinical notes and records. After the accident, Dr. Tham noted that there was swelling of the right knee and pain in the left arm, back of the neck, and lower back together with sprain and swelling of the ankle. Ms. Egal was also suffering from headaches. Dr. Tham also noted that Ms. Egal stated that she hit her forehead and her knee in the accident. She referred Ms. Egal to a physiotherapist and a chiropractor after the accident. One of Ms. Egal's problems was her headaches which were constant, resulting in the need to taking many breaks from her work.

¹²Dr. Tham's clinical notes and records, Exhibit 1, Tab A1

The first medical benefit which Ms. Egal is claiming is \$1,007.82 for assistive devices from Queens Medical Assessment Centre. An invoice dated December 9, 2010 for in home assistive devices with a remaining balance of \$1,007.82 was filed from Queens Medical Assessment Centre.¹³ However, no treatment plan or evidence from Ms. Egal or the service provider was presented with respect to the invoice. Consequently, I find that Ms. Egal is not entitled to payment of \$1,007.82.

The second medical benefit which Ms. Egal is claiming is payment of an outstanding account of \$2,354.12 from Global Rehab Clinics Ltd.¹⁴ The invoice itemizes for payment the 2 amounts of \$1,630 and \$724.12 respectively. After reviewing the evidence, I am confident that the first amount of \$1,630 is linked to a chiropractic treatment plan of Dr. Raymond Chu's dated May 17, 2010.¹⁵ However, as no one appeared from the clinic and I received no other evidence correlating the amount of \$724.12 to treatment, I cannot consider it for payment by the insurer.

On July 16, 2010, Ms. Egal saw Dr. Natalia Lishchyna, a chiropractor, at Economical's request. Dr. Lishchyna concluded that Dr. Raymond Chu's treatment plan dated May 17, 2010 for \$1,630 was not reasonable and necessary.¹⁶ The treatment plan proposed a reassessment, 10 sessions of active exercise, 10 sessions of electrotherapy, 12 sessions of massage and 10 sessions of mobilization over a 6-week period.

Dr. Lishchyna diagnosed mild residual lumbar sprain/strain and mild residual left knee sprain/strain. She concluded that the goods and services contemplated by the treatment plan were not reasonable and necessary as "the provision of ongoing passive therapies including electrotherapy, heat, ice, massage and manipulation was no longer clinically indicated."

Dr. Lishchyna opined that Ms. Egal had reached maximal therapeutic benefit from clinic-based interventions. The flaw in Dr. Lishchyna's report is that she does not provide a foundation for

¹³Exhibit 1, Tab C26

¹⁴Exhibit 1, Tab C27

¹⁵Exhibit 1, Tab A7

¹⁶Dr. Lishchyna's Report, Exhibit 1, Tab A8

her conclusions. She offers no basis for finding that maximum therapeutic benefit had been attained. Consequently, I place no weight on her report. I prefer the evidence of Ms. Egal with respect to her need for the treatment in dispute.

Ms. Egal testified that she was away from work for approximately 2 weeks after the accident as she could not turn her neck left or right, her chest was hurting, and she had back pain, knee pain and headaches. The headaches became constant. A massage therapist assisted her in dealing with her neck problem and the burning sensation in her back. Her leg stiffened after sitting for long periods of time. She continued to wake in the middle of the night and suffered from disturbed sleep.

Ms. Egal testified that as part of her efforts to deal with pain and discomfort, she attended Global Rehab Clinics Ltd. for treatment and she saw a chiropractor every day until the summer of 2010. I found Ms. Egal's testimony to be compelling and detailed about the benefits to her of receiving treatment which assisted her in dealing with pain and improved her function at work and at home. I find that Ms. Egal has established on the balance of probabilities that the treatment in dispute is reasonable and necessary. Consequently, Ms. Egal is entitled to payment of \$1,630 for the medical treatment.

HOUSEKEEPING BENEFITS

Section 22 of the applicable *Schedule* specifies that the insurer shall pay for reasonable and necessary additional expenses incurred by an insured person as a result of an accident for housekeeping and home maintenance services if, as a result of the accident, the insured person sustains an impairment that results in a substantial inability to perform the housekeeping and home maintenance services that he or she normally performed before the accident.

Ms. Egal testified that following the accident she paid her sister, Sainab Issak, for 4 months of housekeeping at \$100 weekly, as reflected in the Expense Form.¹⁷ Her sister continued to help her with her housekeeping for a year after the accident and then her son began helping her.

¹⁷Exhibit 1, Tab C12 – Expense Form

Ms. Egal claimed that her son continues to help her with her housekeeping tasks as she is on her way to recovery but has not completely recovered. He helps with the laundry, taking the garbage out and cleaning the bathroom. He is “my other hand”, as she expressed it. Although on July 16, 2010, Dr. N. Lischyna released her report which claimed that as of that date, Ms. Egal was doing her housekeeping tasks herself, I prefer Ms. Egal’s evidence about her need for housekeeping.

Atila Andrew Balaban, an exercise physiologist, testified as an expert on functional capacity assessments. He assessed Ms. Egal on September 29, 2011.¹⁸ He relied on the Isernhagen Work Systems protocol for his functional capacity evaluation (FCE) and noted the more salient features of her pre-accident and post-accident medical and treatment histories. In his report, he notes Ms. Egal’s physical impairments in the neck and shoulder together with an imbalance in the right and left sides. Ms. Egal’s issues were decreased function and lack of stability. She had little strength in her lower back with less endurance in the neck and shoulder. Ms. Egal demonstrated poor tolerance and fatigue when performing the tests administered by Mr. Balaban. In Mr. Balaban’s opinion, the fatigue of her muscles together with the changes in body mechanics were indicators of physical impairment and stressing of the neck/shoulder region.

Mr. Balaban had confidence in the reliability of Ms. Egal’s effort which was consistent in the face of cross testing and repetition in testing which had the same types of movement and results. He concluded that Ms. Egal could perform sedentary tasks with difficulty. In his opinion, this was not consistent with the physical demands of housekeeping. Ms. Egal demonstrated poor tolerance for work tasks with fatigue in her neck and shoulder muscles which was consistent with reports of doing sedentary work with difficulty. He reached his conclusions by looking at the results of his tests, Ms. Egal’s body mechanics and comparing her abilities to the physical demands required by work related tasks. Mr. Balaban looked for consistency of effort and observed muscle imbalances, lack of coordination, decreased and unequal weight bearing, decreased strength and endurance. The purpose of the evaluation was not to simulate tasks but to note the physical impairments that would result in functional limitations. At the time of the FCE, his conclusion was that Ms. Egal would not be able to perform the majority of housekeeping tasks.

¹⁸Mr. Balaban’s Functional Capacity Evaluation Report, Exhibit 1, Tab A9

Mr. Balaban's evaluation was more than 2 years following the accident. He relied on the pain reports directly from Ms. Egal as well as the medical reports such as Dr. Michael Kretz's disability certificate, to assume that her impairment was caused by the accident. Mr. Balaban conducted a 4 hour evaluation and took a thorough history. His understanding was that although housekeeping assistance from Ms. Egal's sister was discontinued after 4 months, her son offered a substantial amount of assistance, mopping, ironing, and helping with the laundry. He found that Ms. Egal could not stand or bend for long periods of time. He noted she could not go to yoga or the gym due to pain although she could take out a small bag of garbage and she could wash a few dishes.

It is unfortunate that Mr. Balaban's Functional Capacity Evaluation occurred so long after the accident. However, his assessment and his testimony were thorough and balanced. While I agree that in these circumstances, an issue of causation may be of concern, no plausible explanation or countervailing evidence was offered to oppose Ms. Egal's claim that her impairment was due to the accident. At the conclusion of the hearing, Ms. Egal's counsel requested that her claim for housekeeping be reduced to 52 weeks from the original claim of 104 weeks. However, at the outset of the hearing, I took jurisdiction for determining Ms. Egal's entitlement to 104 weeks of housekeeping. I find that, on the balance of probabilities, Ms. Egal is entitled to 104 weeks of housekeeping at \$100 weekly.

CAREGIVER BENEFITS

Ms. Egal testified that she is the primary caregiver for her son who was 12 years old at the time of the accident.

Ms. Egal's son finished school from 3:15 to 3:30 p.m. each day but he participated in a number of teams until 5 to 5:30 pm. She had difficulties picking up her son from school and driving him to a tutor as driving caused her knee to stiffen and lock. She promised more payments to Ms. Issak, the substitute caregiver, for assisting in caring for her son when she had the money. Ms. Egal testified that she suffered from a fear of driving and for short drives, such as the drive

to work of 8 to 10 minutes, her abilities were not as affected. Ms. Egal found she could not help her son with his homework, as she was exhausted and in pain after returning home from work. I disagree with Economical's position that, on the balance of probabilities, there was a complete lack of evidence to support the caregiver claims as Ms. Egal continued to be able to provide transportation to her son. I agree that there was no in-home assessment and little medical evidence to support the caregiver claim but I attribute much of the responsibility for that to Economical which should have arranged for an assessment. Economical made no inquiries when it received Ms. Egal's disability certificate of June 8, 2009, which was not filled out properly. In the caregiver section, the question about a need for caregiver assistance was not answered "yes" or "no". I also disagree with Economical's assertion that it was not believable that Ms. Egal could drive to work but could not drive her son to his activities. There is little comparison between a 10 to 20 minute drive to work as compared to a drive to many different places to accommodate her son's activities, while waiting in pain after a full work day. The nature of the impairment identified in the Mr. Balaban's chiropractic report supported a service provider for caregiving, who was her sister. I draw no negative inference from the non-appearance of her sister at the hearing as she was at home with a newborn baby.

At the conclusion of the hearing, Ms. Egal's counsel attempted to reduce her claim for caregiving to 52 weeks. Although I took jurisdiction at the outset of the hearing to determine Ms. Egal's claim for caregiving for 104 weeks, I do not find that her 104 week claim is supported by the evidence. Based on Ms. Egal's testimony, her sister assisted with housekeeping and caregiving for 52 weeks after the accident. Consequently, I find, based on the balance of probabilities, that Ms. Egal is entitled to \$250 weekly for caregiving for 52 weeks following the accident.

SPECIAL AWARD

Subsection 282(10) of the *Insurance Act* provides that if an arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator 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*.

Chris Metcalf, an adjuster at Economical for 5-1/2 years who handled accident benefit claims, testified that on October 19, 2010, he was appointed the adjuster for Ms. Egal's file.

Mr. Metcalf was possibly the 12th adjuster who had dealt with Ms. Egal's file. Ms. Egal filed her first application with American Home Assurance, which was the wrong insurer. On October 2, 2009, Ms. Tuzi, the Crawford adjuster for American Home Assurance, filed a Notice of Dispute with Economical and on October 8, 2009, Economical assured Ms. Tuzi that it would be handling the accident benefit claim for Ms. Egal.

On November 26, 2009, an Application for Expenses from Ms. Egal was submitted to Economical which requested caregiver and housekeeping benefits. In an Explanation of Benefits form, Economical denied both caregiver and housekeeping benefits as Ms. Egal supposedly had not submitted the information requested under subsection 31(6) and section 33 of the *Schedule*. Section 33 requires a person applying for a benefit to provide any information reasonably required to assist the insurer in determining the person's entitlement to a benefit. Economical also stated "Further requests for payments of this benefit will not [be] considered or responded to."¹⁹ However, as noted earlier in my decision, on September 28, 2009, Ms. Egal's counsel had forwarded an explanation for the delay. Further, Economical was aware that Ms. Egal had not only applied to the wrong insurer but that insurer had been handling her claim and paying medical benefits. Economical had remedies, such as requesting a statement or an examination under oath for Ms. Egal, if it lacked sufficient information to adjust her claim. Also, an even more apparent remedy would have been to obtain Ms. Egal's file from Crawford as soon as possible.

Mr. Metcalf did not know why no statement or examination under oath from Mr. Egal was taken by Economical. There was an ongoing dispute about the issue of reimbursement between American Assurance and Economical. Ms. Egal's file was not obtained from Crawford for more than 2 years following the accident.

¹⁹Exhibit 1, Tab C13

The ongoing dispute between American Assurance and Economical resulting in the delay in obtaining Ms. Egal's file was prejudicial to Ms. Egal. It is obvious that one of many reasonable explanations was that Ms. Egal's documentation was sent to the wrong insurer and Economical made no timely efforts to obtain her file. A disability certificate was sent on June 8, 2009 by Dr. Michael Kretz. Also, the Crawford file was not included in productions although it was received by Economical on September 20, 2011. This determination to refuse benefits to Ms. Egal was made by Economical on December 21, 2009 before Economical received the Crawford file and could review the documentation and history of her claim.

It was not until March 21, 2011 that Economical sent a letter to Ms. Egal, almost two years after the accident, claiming that her file was incomplete without the police report.²⁰ However, on December 13, 2010, Ms. Egal's counsel's office forwarded the police report, Global Rehab invoices and Queens Medical invoices.²¹ A copy of the police report was sent again on May 26, 2011.²² Economical took the position that until receiving an explanation for Ms. Egal's delay in applying for benefits, it was not necessary to schedule insurer's examinations.

Mr. Metcalf conceded there was no record of follow up with Ms. Tuzi, and no conversation or letters to her. On May 27, 2011, he asked for Ms. Egal's file from Ms. Tuzi and it was not until approximately August 23, 2011 that he had a complete copy of Ms. Egal's file.

I find no merit in Economical's position that it had no responsibility to adjust Ms. Egal's file until receiving a reasonable explanation for her delay in applying. Economical received a reasonable explanation for the delay. Economical was also aware that documentation had been sent to the wrong insurer and persisted in refusing Ms. Egal's claims long before it had received her file.

²⁰Exhibit 1, Tab C28

²¹Exhibit 2, Tab 3

²²Exhibit 1, Tab 31

I find that Economical failed egregiously in its responsibilities to its first party insured, Ms. Egal. It did not follow up expeditiously in obtaining her file from American Assurance and it made decisions about her entitlement in its absence. No attempts were made to evaluate the merits of Ms. Egal's claims. I find that Economical unreasonably withheld the payment of benefits to which Ms. Egal was entitled. Consequently, I find that Ms. Egal is entitled to payment of a special award fixed at \$5,000, inclusive of interest.

EXPENSES:

I heard no submissions on expenses. I encourage the parties to resolve this issue. If they are unable to do so, they may apply for an expense hearing under the *Dispute Resolution Practice Code*.

Judith Killoran
Arbitrator

May 25, 2012
Date



FSCO A10-004057

BETWEEN:

RODA EGAL

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

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

1. Ms. Egal is entitled to caregiver expenses of \$250 weekly for 52 weeks after April 29, 2009.
2. Ms. Egal is entitled to housekeeping expenses of \$100 weekly for 104 weeks after April 29, 2009.
3. Ms. Egal is entitled to a medical benefit of \$1,630 for treatment at Global Rehab Clinics Ltd.
4. Ms. Egal is entitled to interest on unpaid benefits.
5. Ms. Egal is entitled to a special award fixed at \$5,000, inclusive of interest.

Judith Killoran
Arbitrator

May 25, 2012
Date