

BETWEEN:

KEITH ANTHONY WILLIAMS

Applicant

and

GUARANTEE COMPANY OF NORTH AMERICA

Insurer

REASONS FOR DECISION

Before: Joyce Miller

Heard: July 25, 2000, at the Offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Kelly Campbell for Mr. Williams
Doug Wallace for Guarantee Company of North America

Issues:

The Applicant, Keith Anthony Williams, was injured in a motor vehicle accident on December 23, 1998. He applied for and received statutory accident benefits from Guarantee Company of North America (“Guarantee”), payable under the *Schedule*.¹ Guarantee terminated weekly income replacement benefits on June 30, 1999. The parties were unable to resolve their disputes through

¹The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96 and 303/98.

mediation, and Mr. Williams 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. Williams entitled to receive a weekly income replacement benefit from July 1, 1999 until January 5, 2000 pursuant to section 4 of the *Schedule*?
2. Is Guarantee entitled to payment by Mr. Williams for the cost of the cancellation fee it incurred for the late cancellation of the Psychological DAC scheduled for June 25, 1999, pursuant to section 24 of the *Schedule*?
3. Is Guarantee liable to pay Mr. Williams' expenses in respect of the arbitration pursuant to subsection 282(11) of the *Insurance Act*?

Mr. Williams also claims interest on any amounts owing.

Result:

1. Mr. Williams is not entitled to receive a weekly income replacement benefit.
2. Guarantee is not entitled to payment for the cost of the cancellation fee for the Psychological DAC scheduled for June 25, 1999.
3. If needed, the parties can now make submissions to me regarding expenses.

EVIDENCE AND ANALYSIS:

Background:

Mr. Williams is 38 years old. He was born in England and came to Canada with his family when he was four years old. He has a grade 10 education. Since he left school he has worked on a steady basis, first in construction and then as a warehouse material handler.

On the day of the accident Mr. Williams was on his way to work. He was sitting in the side seat at the back of a bus in Mississauga travelling along Eglinton Avenue towards Dixie Road. Mr. Williams testified that when the bus was stopped a tractor trailer travelling at about 50 or 60 miles an hour ran into the back of the bus. Mr. Williams stated that he was shaken up by the impact. His first reaction was shock. He was also worried about being late for work. As he was only a 10 minute walk away from work, he got off the bus and went straight to work.

Mr. Williams testified that when he arrived at his job he attempted to work the forklift but he felt terrible. He was shook up, fatigued and had pain in his back, neck and arms. He advised his supervisor of the accident, who told him to go see a doctor immediately. As he did not know any doctors he went to a local doctor in his neighbourhood. There he saw Dr. B. Nanar who prescribed Robaxacet for his back pain and then sent him to Credit Valley Hospital for x-rays.

Mr. Williams testified that he continued to have a sharp pain in his lower back so Dr. Nanar sent him for physiotherapy. He stopped working and started a course of physiotherapy in January 1999. Mr. Williams stated that although the physiotherapy was helpful he was only able to lift materials weighting up to 15 pounds, whereas at work he was required to lift materials up to 60 pounds.

On April 29, 1999 his weekly income replacement benefits were terminated on the basis of an Insurer's Examination (IE).

Mr. Williams requested a DAC and his weekly income replacement benefits were reinstated until the report of the DAC. His benefits were again stopped on June 30, 1999 because he did not attend the psychological component of the DAC assessment scheduled for June 25, 1999. Eventually, he did attend a psychological DAC assessment on August 10, 1999.

In a report dated August 30, 1999, the DAC assessment team, which consisted of a doctor of sports medicine, a psychologist, a physiotherapist, an occupational therapist, and a kinesiologist, unanimously concluded that Mr. Williams was no longer substantially disabled from the essential duties of his pre-accident occupation as a result of the injuries he sustained in his motor vehicle accident on December 23, 1998.

Essential Tasks of Employment:

At the time of the accident Mr. Williams was employed by Superior Staffing Services, an employment agency, which sent him out on assignments. His assignment at the time of the accident was as a warehouse helper/shipper/receiver/forklift operator with a company called RV Storage. Mr. Williams had been working at this job for about eight months prior to the accident.

Mr. Williams' job, as described in the Physical Demands Analysis on May 27, 1999 was rated as "Medium-Heavy (safe lifting of up to 60 lb.)" His job required him to handle containers with items ranging from watches to cast iron stoves. Heavier items, i.e., weighting more than 60 pounds, were shared among the other workers in the warehouse.

The essential tasks of Mr. Williams' employment required frequent standing, walking, stooping, crouching, reaching below shoulder height, pushing/pulling while operating forklift/pump truck; frequent to constant lifting/carrying up to 60 pounds from floor to waist level; occasional lifting/carrying up to 60 pounds from waist to eye level; constant grasping/handling; and occasional fingering.

Mr. Williams testified that he was still in pain when his benefits were terminated after the DAC report and that he could not lift anything weighing more than 20 pounds. He stated that, as a result, he was unable to return to work until January 6, 2000.² He is therefore claiming weekly income replacement benefits for the period of July 1, 1999 to January 5, 2000.

Findings on issue #1 - Weekly Income Replacement Benefit:

Subsection 4(1) of the *Schedule* provides that:

4. The insurer shall pay an insured person who sustains an impairment as a result of an accident an income replacement benefit if the insured person meets any of the following qualifications:

1. The insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment.

The burden of proof rests with Mr. Williams to prove on a balance of probabilities that as a result of the December 23, 1998 motor vehicle accident he was substantially disabled from performing

²Mr. Williams did not return to his pre-accident job. He is presently employed by Grenhall Chemicals, a glue factory. His job is to unload bags weighing 52 pounds from a shipment container, stack them on skids and then move them to another location with a forklift.

the essential tasks of his employment from July 1, 1999 to January 5, 2000. His own testimony and subjective opinion, unless supported by reliable objective medical evidence, is insufficient.

Guarantee submitted that Mr. Williams has not presented any cogent or probative medical evidence to support his claim that he was substantially disabled from working between July 1, 1999 and January 5, 2000. I agree.

The only medical evidence that Mr. Williams presented on his behalf is a one line note dated November 3, 1999 from his family physician, Dr. Nanar, which stated that “Mr. Williams is fit to start work on light duties - no lifting over 20 lbs.”

I give little weight to this note. In my view, it is insufficient to support Mr. Williams’ claim that he was substantial disabled from working. I note from Dr. Nanar’s clinical notes and records that the last time he saw Mr. Williams before he wrote this note was on May 10, 1999. There was nothing in Dr. Nanar’s clinical notes and records to indicate that, between May 10, 1999 and November 3, 1999, he had seen, examined or tested Mr. Williams to conclude what his capabilities were. I can only presume that Dr. Nanar based his opinion on the self reporting of Mr. Williams.

In contrast I find that the multidisciplinary DAC assessment, which was detailed and thorough, should be given greater weight. As noted above, the assessors were unanimous in their opinion that Mr. Williams was no longer substantially disabled from performing the essential tasks his pre-accident employment.

It should be noted, however, that while the DAC physiotherapist and kinesiologist, who administered the functional abilities test on June 17, 1999, concluded that Mr. Williams was not substantially disabled from performing his pre-accident occupation, regarding his lifting ability

they did so on the basis that, in their opinion, Mr. Williams did not put out a fair effort. In their conclusion they stated:

Based on the functional abilities evaluation, Mr. Williams put forth fair effort during the majority of the testing, with the exception of the lifting and carrying component. Mr. Williams did not demonstrate the ability to lift/carry at the Very Heavy strength level. However, given that **there was no biomechanical strain or significant signs of physiological challenge** during the lifting and carrying tests, it is likely that Mr. Williams has greater lifting/carrying ability than what he chose to demonstrate during testing. Furthermore, no significant physical/functional impairment has been identified to account for his limited lifting/carrying performance during the evaluation. Therefore, it appears that Mr. Williams is not substantially disabled from performing his pre-accident occupation as a Warehouse helper. [emphasis added]

I accept this conclusion. I note that it is similar to the findings of the Functional Capacity Evaluation (FCE) performed on March 18, 1999 prior to the Insurer's Medical performed on March 23, 1999 by Dr. John Zeldin, an orthopaedic surgeon. The FCE report came to a similar conclusion about Mr. Williams lack of consistency. The FCE report concluded that:

Mr. Williams did not demonstrate any consistent behaviour that would indicate pain felt in his low back. Rather Mr. Williams would report fear of re-injury as a reason for not attempting dynamic lifting tests. This reported back pain did not hinder Mr. Williams' performance on the unweighted tasks of this evaluation that require low back durability. **Mr. Williams' demonstrated level of performance on this evaluation was his chosen level and does no reflect a physical impairment.** [emphasis added]

In conclusion I find that Mr. Williams has not presented any cogent, reliable, objective medical evidence to support his claim that he was substantially disabled from performed the essential tasks of his employment from July 1, 1999 to January 5, 2000. Accordingly, I find that, pursuant to section 4 of the *Schedule*, Mr. Williams is not entitled to a weekly income replacement benefit from July 1, 1999 to January 5, 2000.

Findings on Issue #2 - Payment of Cancellation Fee:

As noted above Mr. Williams did not attend an appointment for a psychological examination as part of his DAC assessment scheduled for June 25, 1999. Guarantee is claiming \$1,150, incurred for the late cancellation fee.

For the following reasons I find that Mr. Williams is not required to pay the cost of the cancellation fee.

The letter sent by Guarantee to Mr. Williams advising him of the appointment was dated June 18, 1999. This letter stated that "Cancellations with less than five (5) working days notice prior to the assessment date are subject to a cancellation fee of 50 per cent per assessment."

Mr. Williams' representative responded on his behalf on June 24, 1999 stating that Mr. Williams will not attend the examination as it was "...unreasonable and unnecessary at this time, since our client's injuries are from a physiological perspective, not psychological."

Mr. Williams, however, eventually agreed to attend a psychological assessment by the DAC on August 10, 1999. This was only after Guarantee had received a psychological assessment report which was undertaken by Mr. Williams on June 5, 1999.

Mr. Williams' submitted that, at the time of his refusal, the psychological component was not an issue and therefore it was not unreasonable to refuse the appointment. Moreover, Mr. Williams submitted that he was not given sufficient time to notify Guarantee of his refusal. I agree with this latter submission.

I note that the letter sent to Mr. Williams was dated June 18, 1999, which was a Friday. I received no evidence as to when the letter was in fact mailed out.

Even if I were to presume the letter was mailed on the day it was dated, Friday, June 18, 1999, and that Mr. Williams received it as early as Monday, June 21, 1999, this would still not be sufficient time for Mr. Williams to comply to the required five working day cancellation notice. Accordingly, I find that Guarantee is not entitled to the \$1,150, incurred for the late cancellation fee.

EXPENSES:

If needed, I may be spoke to on the issue of expenses.

Joyce Miller
Arbitrator

October 24, 2000

Date

FSCO A00-000020

BETWEEN:

KEITH ANTHONY WILLIAMS

Applicant

and

GUARANTEE COMPANY OF NORTH AMERICA

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 Arbitration is dismissed.

Joyce Miller
Arbitrator

October 24, 2000

Date