

BETWEEN:

RITA HARRIL

Applicant

and

PILOT INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Jeffrey Rogers

Heard: January 17 and 18, 2005, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Linda Schneider, solicitor for Ms. Harril
Kadey B.J. Schultz, solicitor for Pilot Insurance Company

Issues:

The Applicant, Rita Harril, was injured in a motor vehicle accident on December 23, 2001. She applied for and received statutory accident benefits from Pilot Insurance Company (“Pilot”), payable under the *Schedule*¹. Pilot and Ms. Harril disagree on her entitlement to housekeeping and home maintenance benefits. The parties were unable to resolve their dispute through mediation, and Ms. Harril 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.

Ms. Harril claims entitlement to housekeeping and home maintenance benefits at the rate of \$100 per week for the period April 1, 2002 to June 30, 2002. Pilot's position is that Ms. Harril is not entitled to the benefits because she failed, without reasonable explanation, to notify Pilot of her intention to apply for the benefits and, in any event, she did not suffer an impairment that resulted in her inability to perform the services as claimed and did not incur the claimed expenses.

The issues in this hearing are:

1. Is Ms. Harril precluded from receiving housekeeping and home maintenance benefits because she failed, without reasonable explanation, to notify Pilot of her intention to apply for the benefit, as required by subsection 32(1) of the *Schedule*?
2. Is Ms. Harril entitled to payment for housekeeping expenses at the rate of \$100 per week, for services provided by Deepmala Harril, for the period April 1, 2002 to June 30, 2002, pursuant to section 22 of the *Schedule*?
3. Is Ms. Harril entitled to interest for the overdue payment of benefits pursuant to subsection 46(2) of the *Schedule*?
4. Is Pilot liable to pay Ms. Harril's expenses in respect of the arbitration under subsection 282(11) of the *Insurance Act*?
5. Is Ms. Harril liable to pay Pilot's expenses in respect of the arbitration under subsection 282(11) of the *Insurance Act*?

Result:

1. Ms. Harril is not precluded from pursuing a claim for the benefits.
2. Ms. Harril is not entitled to payment for the claimed benefits.
3. If the parties cannot agree on expenses they may request a hearing within 30 days, pursuant to Rule 79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

Forfeiture of Benefit

Ms. Harril is 39 years old. She works as a head teller and customer service representative at a bank. She was injured in an accident on December 23, 2001, when the car she was driving was t-boned on the driver's side. She lives with her two daughters who were 14 and 16 years old at the time of the accident. It is not disputed that she performed most of the housekeeping duties in her household at the time of the accident.

Pilot has paid Ms. Harril housekeeping and home maintenance benefits of \$1,500 for the period December 27, 2001 to March 31, 2002. That was all that was claimed at the mediation that took place in December 2003. Ms. Harril appeared to expand her claim in the Application for Arbitration, filed on January 8, 2004, claiming "ongoing" housekeeping benefits in addition to the balance of the \$1,500 that was unpaid at the time. Pilot's Response requested particulars of the claim. When the pre-hearing was held on June 1, 2004, the claim was specified to be limited to the period ending June 30, 2002, but no particulars were provided. They were ordered produced by July 23, 2004. They were not provided until July 27, 2004, by fax from counsel for Ms. Harril to Pilot's counsel.

The only explanation offered for the delay in notifying Pilot of an intention to claim benefits for the period in dispute and for providing particulars of the claim, is the fact that Ms. Harril was initially represented by paralegals and did not retain a solicitor until August 2003. There was no evidence that she instructed the paralegals to pursue this claim. There was no explanation for the failure to raise the claim at the mediation in December 2003, where counsel represented her. There was no explanation of the failure to particularize the claim in the Application for Arbitration and not until July 2004. I find that Ms. Harril has not provided a reasonable explanation for her failure to notify Pilot of the particulars of her claim.

Pilot framed its position as a breach of Ms. Harril's obligation to notify Pilot of her intention to apply for a benefit as required by subsection 32(1) of the *Schedule*, but the facts do not support that position. Pilot did not and could not claim that Ms. Harril failed to give prompt notice of her intention to claim housekeeping benefits. In January 2002, Ms. Harril delivered an OCF-12 (Activities of Normal Life)² setting out her need for housekeeping assistance. Pilot assessed her housekeeping needs in February 2002. Ms. Harril delivered an Application for Expenses upon which Pilot paid \$880 before mediation, and Pilot did not request a further application, as it was entitled under subsection 32(4) of the *Schedule*.

In any event, subsection 32(6) does not prescribe a sanction for accidents before October 1, 2003 or for applications for housekeeping and home maintenance benefits under section 22 of the *Schedule*.

Pilot's real position appears to be that Ms. Harril failed to promptly provide "information reasonably required to assist the insurer in determining the person's entitlement to a benefit" as required by paragraph 1 of subsection 33(1) of the *Schedule*.

Pilot's submission that this conduct precludes Ms. Harril from receiving the claimed benefits was addressed in the Appeal decision in *Iankilevitch and CGU Insurance*.³ Director's Delegate Makepeace ruled that the remedy for breach of section 33 is delay in the insurer's obligation to pay, not forfeiture.

Since Ms. Harril provided the required information in July 2004, I find that she is not barred from pursuing her claim for the benefits in dispute.

² Exhibit 8

³ (FSCO P03-00013, August 31, 2004)

Entitlement to Benefits

To succeed in her claim for entitlement to the benefits, Ms. Harril must prove that the expenses claimed were reasonable and necessary additional expenses she incurred because the accident caused a substantial inability to perform the housekeeping services that she normally performed before the accident, as required by subsection 22(1) of the *Schedule*.

Ms. Harril sought treatment from Dr. W. Chan, her family doctor, on December 24, 2001. He diagnosed “cervical spine sprain, lumbar spine sprain and left shoulder contusion.”⁴ He prescribed an anti-inflammatory, muscle relaxants and pain killers.

Except for a visit on June 11, 2002, Ms. Harril did not see Dr. Chan for her injuries during the period of the claimed benefit. She sought no other treatment during that period. She had not seen Dr. Chan since February 10, 2002, about six weeks before the claimed benefit. Dr. Chan does not report any objective findings on June 11, 2002. He reports only Ms. Harril’s complaints. Consequently, there is no evidence, except for Ms. Harril’s, on the extent of her disability during the critical period. Therefore, my findings on disability and on whether she incurred the claimed expenses, turn entirely on Ms. Harril’s credibility and the credibility of her sister-in-law Deepmala Harril, the only other witness.

Because of numerous anomalies in the evidence of the witnesses, contradictions in their versions of the events and exceptionally poor recall by Ms. Harril, I find the witnesses to be unreliable and I do not accept their evidence.

⁴ Exhibit 1, Tab 5, Page 3

I will start with the way in which the claim developed. Although the late revelation that Ms. Harril had incurred expenses for housekeeping beyond March 2002 does not bar the claim, that fact must be taken into account in assessing the likelihood that the expenses were incurred as claimed. The analysis is also informed by the fact that the original claim for services provided from January to March has also undergone a metamorphosis.

The paralegal firm that Ms. Harril retained, delivered an Application for Expenses claiming housekeeping expenses for the period December 27, 2001 to March 23, 2002 in the amount of \$1,100.⁵ Pilot paid \$880 upon the recommendation of the In-Home Assessment conducted on its behalf on February 19, 2002.⁶ Ms. Harril filed an application for mediation, claiming the difference of \$230. When the mediation took place in December 2003, the claim was changed to \$620, being the difference between the amount Pilot had paid and \$1500 that Ms. Harril now claimed to have incurred for the period December 27, 2001 to March 31, 2002.

There should be a reasonable explanation as to why, long after Ms. Harril claims to have paid the expenses claimed, the amount paid and the period of the claim remained uncertain. As noted above, there is none. A closer look at the evidence only raises further unanswered questions.

Ms. Harril was paid housekeeping benefits to March 31, 2002, for services claimed to have been provided by Zaheeda Mamadues, upon supplying copies of three cheques payable to Zaheeda Mamadues dated January 31, 2002, February 28, 2002 and March 31, 2002. She testified that only the first cheque was cashed. She produced the others in 2004 when she was asked to provide proof of payment. These cheques were created solely for the purpose of providing proof of payment.

⁵ Exhibit 3

⁶ Exhibit 9

They were not even presented to Zaheeda Mamadues. She did not say why she did not simply obtain a receipt from Ms. Mamadues.

I do not accept that Ms. Harril believed this fabrication to be acceptable, particularly in view of her job as a bank teller. She also offered no explanation for the claimed refusal of Ms. Mamadues to accept cheques, after the first one. She has provided no hard evidence of the payments to Ms. Mamadues in February and March, except for the fabricated cheques.

When she was interviewed by the adjuster in January 2002, Ms. Harril told him that Deepmala (“Mala”) Harril was assisting her. In February 2002, the In-Home Assessor reported that her daughters were helping. But it was Ms. Mamadues who was allegedly paid for housekeeping during that period.

Both Ms. Harril and Deepmala Harril testified that Deepmala was indeed helping with housekeeping from January to March of 2002. They offered no explanation for Ms. Harril’s failure to pay for these services, when she claims that she was paying Deepmala for babysitting during the same period.

When pressed to provide evidence of payment to Deepmala, Ms. Harril supplied Housekeeping Expense forms⁷, signed by Deepmala, for the months January to June 2002. The forms are dated in 2004. Each testified that they had personally filled in the details on the forms. Ms. Harril admitted that she had no recall of the details when she completed the forms. Deepmala claimed that she transcribed the information from detailed notes on a calendar that she must have retained from 2002 to 2004. She has since disposed of the calendar.

⁷ Exhibit 7

Neither could explain why the housekeeping expense forms show that Deepmala was providing extensive housekeeping services from January to March 2002 [the period for which Pilot has paid for services provided by Ms. Mamadues on the strength of the fabricated cheques] when they both testified that she had provided little housekeeping assistance during that period. They also could not explain the existence of duplicate forms for April and May, dated 2002, but admitted to have been produced in 2004, containing different details of the services provided.⁸ The differences between the duplicates also call into question the existence of Deepmala's calendar. If there was indeed a record, and if Deepmala did prepare the forms, one would expect the duplicates to be identical.

The forms indicate that Deepmala provided services for 64 hours each month. Both testified that the agreed rate of pay was \$10 per hour. Neither claimed that \$640 was paid for any month. Neither offered an explanation for the discount. They were not even consistent on how much was paid. Ms. Harril claimed payment of \$500 to \$550 per month in cash. Deepmala recalled \$400 to \$500.

On many other matters, Ms. Harril had little to no recall. Those matters include a previous complaint to Dr. Chan of shoulder pain, the date that Ms. Mamadues ceased providing housekeeping services, how much time she took off work, how long she attended for physiotherapy treatment, exactly when the housekeeping expense forms were requested and prepared and why duplicates were prepared.

I could accept that Ms. Harril would not recall all of the details surrounding the accident, but her repeated answers of "I don't know" in cross-examination left the impression of a witness refusing to be pinned down so as to avoid further anomaly or contradiction.

As noted above, I do not accept the evidence of the witnesses.

⁸ Exhibit 1, Tab 7.

Having rejected the evidence tendered to support her claim, I find that Ms. Harril has not proven that the expenses claimed were reasonable and necessary additional expenses she incurred because the accident caused a substantial inability to perform the housekeeping services that she normally performed before the accident. She is therefore not entitled to the benefit claimed.

EXPENSES:

If the parties cannot agree on expenses they may request a hearing within 30 days, pursuant to Rule 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers
Arbitrator

February 14, 2005

Date

BETWEEN:

RITA HARRIL

Applicant

and

PILOT 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. Harril is not precluded from pursuing a claim for the benefits in dispute.
2. Ms. Harril is not entitled to payment for housekeeping and home maintenance benefits for the period April 1, 2002 to June 30, 2002.
3. If the parties cannot agree on expenses they may request a hearing within 30 days, pursuant to Rule 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers
Arbitrator

February 14, 2005

Date