Financial Services Commission of Ontario

Ontario

Commission des services financiers de l'Ontario

Appeal P15-00008

OFFICE OF THE DIRECTOR OF ARBITRATIONS

RONALD KIDDER

Appellant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

BEFORE:	David Evans
REPRESENTATIVES:	Georgiana Sirbu for Mr. Ronald Kidder Nicholaus de Koning for Economical Mutual Insurance Company
HEARING DATE:	November 3, 2015

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The Arbitrator's order of December 19, 2014 is confirmed, and this appeal is dismissed.

2. Mr. Kidder shall pay Economical Mutual Insurance Company its legal expenses of this appeal in the amount of $3,000, inclusive of disbursements and HST.

David Evans
Director's Delegate

January 28, 2016
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Ronald Kidder appeals Arbitrator Marshall Schnapp's order of December 19, 2014. The Arbitrator found that Mr. Kidder did not, as a result of an accident, suffer a catastrophic impairment due to a mental or behavioural disorder as defined in s. 2(1.2)(g) of the *SABS–1996.*[1] He also appeals the denial of his other claims for attendant care, housekeeping expenses, and a special award.

II. BACKGROUND

Mr. Kidder was injured in a motor vehicle accident on February 7, 2009. He was working as a flag man when a car approached, stopped, then suddenly advanced, hit his left knee, and threw him on the hood. The driver assaulted him and fled. Mr. Kidder finished his shift, did not miss time from work, and kept working for another two years until his employment was terminated due to work shortage.

Seven weeks after the accident, Mr. Kidder's family doctor completed a Disability Certificate (OCF-3) that indicated, among other things, Post-Traumatic Stress Disorder (PTSD). Mr. Kidder claimed benefits from his insurer, Economical Mutual Insurance Company. He eventually claimed that he had suffered a catastrophic impairment due to a mental or behavioural disorder.

The issues came before the Arbitrator. First, he considered Mr. Kidder's evidence in general. He found Mr. Kidder was not credible. Mr. Kidder continued to drive while reporting to health care professionals that he had stopped due to anger and safety considerations. He received $18,653 in Employment Insurance in 2009 even though he was employed and understood this was inappropriate. He misreported his activities and social functioning compared to what was seen in surveillance. The Arbitrator found that the surveillance showed a high level of activity

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

and an ease when interacting with people that contrasted starkly with the picture Mr. Kidder portrayed to the various medical assessors and at the arbitration hearing.

Next, turning to the issue of catastrophic impairment, the Arbitrator considered the three-stage legal analysis set out in *Pastore v. Aviva Canada Inc.*, 2012 ONCA 642 (CanLII), to determine whether the test for a mental or behavioural disorder in s. 2(1.2)(g) had been met.

The Arbitrator found Mr. Kidder's case passed the first stage of the *Pastore* analysis – whether the accident caused him to suffer a mental or behavioural disorder. He found he suffered PTSD or a similar anxiety-related disorder, but not severe depression.

However, the Arbitrator found Mr. Kidder's case failed at the second stage of the *Pastore* analysis – the impact of the mental or behavioural disorder. The Arbitrator found Mr. Kidder not credible. A large part of the medical evidence he relied upon was based upon his own self-reporting. For instance, Dr. Rosenblat completed the Catastrophic Psychiatry Assessment on his behalf after assessing him on March 31, 2012. Mr. Kidder reported to Dr. Rosenblat 15 specific issues and problems that affected him. However, the Arbitrator found that some of these had little or no evidence in support, and the others were refuted by the surveillance and other evidence, including medical reports. The Arbitrator, therefore, concluded that there was no significant impact on Mr. Kidder's daily life.

Although not strictly necessary, the Arbitrator then considered the third stage of the analysis – the level of impairment. Pursuant to s. 2(1.2)(g) of the *SABS*, Mr. Kidder had to display at least a marked level of impairment in one of four areas of function in daily life set out in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993. Dr. Rosenblat's Catastrophic Assessment report dated May 7, 2012 found marked impairment in two areas, social functioning and work adaptation.

However, the Arbitrator gave no weight to the report. The Arbitrator noted that, aside from the fact it was based primarily on Mr. Kidder's exaggerated or inaccurate information, Dr. Rosenblat had seen little documentation, including no employment documentation, had not seen the surveillance, and had based his ratings on a number of diagnoses when the Arbitrator found only

a diagnosis of PTSD supportable. In particular, with respect to the areas of function where Dr. Rosenblat found marked impairments, the Arbitrator found none.

Accordingly, the Arbitrator found that Mr. Kidder did not suffer a catastrophic impairment as a result of the accident.

Finally, aside from awarding the cost of two treatment plans and the cost of one examination, the Arbitrator dismissed the rest of Mr. Kidder's claims. Regarding attendant care, he found there was no actual testimony regarding any incurred expenses for reasonable and necessary expenses provided by an aide or attendant, and that a Form 1 standing alone, as identification of the need for Attendant Care, was not sufficient to establish entitlement. Regarding housekeeping, he found that the combination of the surveillance and the lack of weight he gave to Mr. and Mrs. Kidder's testimony meant the burden of proof was unmet. Regarding the special award, considering Mr. Kidder's initial reaction to the accident, and the course of his symptomatology and activity post-accident, the Arbitrator found the insurer had not unreasonably withheld or delayed payments under s. 282(10) of the *Insurance Act*.

III. ANALYSIS

Subsection 283(1) of the *Insurance Act* provides that a party to an arbitration may appeal the order of the arbitrator to the Director or his delegate on a question of law. I find no question of law raised in this appeal.

The Arbitrator's decision is almost completely fact-based and so not subject to review unless there was an error of law. As I stated in *Liberty Mutual Insurance Company and Young*, (FSCO P03-00043, June 20, 2005), errors of law include findings of fact made in the complete absence of supporting evidence, made on the basis of conjecture, or made on the basis of a misapprehension of the evidence caused by a misdirection on a legal principle.

Much of Mr. Kidder's submissions consist of pointing out where there was evidence to support his case. However, that is not the issue on appeal. As long as there was evidence before the

Arbitrator to support his conclusions, there is no basis for me to intervene. I find that over the 30 pages of his decision the Arbitrator set out the evidence and reached conclusions based upon it.

Mr. Kidder submits that the Arbitrator misheard and misquoted him when he was being questioned about his driving habits and his testimony that he stopped driving in late 2010, but was later seen driving:

> When cross-examined on his driving, the Applicant responded as follows: "I have a cat (catastrophic impairment). I could do a lot of different things and unfortunately the decision that was made is I was to drive."

Mr. Kidder submits that the audio tape of the hearing shows that he said he "could have had a cow" and not "I have a cat." However, nothing turns on this mishearing, as the Arbitrator was concerned with Mr. Kidder's explanations of why he resumed driving. The Arbitrator did not accept those explanations and found that Mr. Kidder continued to drive on a regular basis. There was evidence before him to reach that conclusion.

With respect to his housekeeping claim and general activity levels, Mr. Kidder submits that there is no surveillance showing him taking *out* the garbage on July 26, 2013, contrary to what the Arbitrator wrote. Perhaps the Arbitrator could have more carefully chosen his words, since the surveillance shows Mr. Kidder bringing *in* the garbage container. In any event, that was just one of the 15 points from Dr. Rosenblat's report that the Arbitrator had discussed. The Arbitrator had evidence before him that Mr. Kidder was much more active than he said, so he was entitled to accept that evidence.

Mr. Kidder submits that the Arbitrator should not have discounted Dr. Rosenblat's report regarding his activity level, when the surveillance recordings were all made after Dr. Rosenblat saw him. However, the Arbitrator was entitled to consider all the evidence before him, and he was entitled to weigh what Mr. Kidder told Dr. Rosenblat about his activities with what Mr. Kidder was seen doing in subsequent years. Furthermore, the Arbitrator was not required to stop the hearing to require Dr. Rosenblat to review the surveillance. This is not an inquisitorial system, and it was up to Mr. Kidder to ensure his witnesses were properly prepared for the hearing.

Mr. Kidder submits that the Arbitrator should have shown more deference to the evidence of Dr. Rosenblat and his other expert witness evidence, or at the very least have followed the procedures for assessing psychiatric problems set out in the *Guides* for medical assessors. Mr. Kidder misunderstands the role of the Arbitrator. It was the Arbitrator's mandate to review all the evidence, weigh it, and reach a conclusion. There was no error in the Arbitrator doing so.

Mr. Kidder submits that the Arbitrator erred in saying there was no evidence to support the Attendant Care and Housekeeping claims, that evidence to support them was scattered throughout the hearing, albeit perhaps without specific reference to those claims, and the Arbitrator could have ordered a further Form 1 be prepared. However, the Arbitrator said there was no actual evidence of any expenses incurred, not that there was no evidence at all, but that the other evidence was unreliable as it came from the Kidders. Furthermore, he was not required to order a further Form 1. I find no error in the Arbitrator's determination of these issues.

In conclusion, I find there was no error of law, the Arbitrator's order of December 19, 2014 is confirmed, and this appeal is dismissed.

Both parties spoke to the legal expenses of the appeal. No grounds other than success were raised for determining entitlement to expenses. I find that, since Economical was successful on appeal, it is entitled to its expenses.

Regarding the amount of the expenses, Economical claimed $3,000, representing about half the hours claimed by Mr. Kidder for his counsel fee, but at a higher Legal Aid rate, based on experience. This is very close to the average appeal expenses award to insurers of $2,800 as determined in *Bains and RBC General Insurance Company*, (FSCO P09-00005, September 8, 2010). I find this amount reasonable, so Mr. Kidder is required to pay Economical its legal appeal expenses of $3,000.

David Evans Director's Delegate	January 28, 2016 Date