



Appeal P98-00026

OFFICE OF THE DIRECTOR OF ARBITRATIONS

MAHTA KHAZAEI

Appellant

and

CANADIAN GENERAL INSURANCE COMPANY

Respondent

BEFORE: Nancy Makepeace, Director's Delegate

COUNSEL: James MacMillan (for Ms. Khazaei)  
J. Claude Blouin (for Canadian General)

**APPEAL ORDER**

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

1. The appeal is dismissed and the arbitration order dated May 26, 1998 is confirmed.
2. Canadian General shall pay Ms. Khazaei her reasonable appeal expenses.

A handwritten signature in cursive script that reads "Nancy Makepeace".  
Nancy Makepeace  
Director's Delegate

August 17, 1999

## **REASONS FOR DECISION**

### **I. NATURE OF THE APPEAL**

Ms. Khazaei appeals from an arbitration order dated May 26, 1998. The arbitrator dismissed her claim for weekly income replacement benefits ("IRBs"), housekeeping and home maintenance expenses, the cost of examinations, and a special award. He awarded chiropractic and related travel expenses for twelve weeks after the accident. Though Ms. Khazaei's *Notice of Appeal* indicated that she wished to appeal only the IRB issue, her counsel made brief submissions with respect to all the benefits claimed, as did counsel for Canadian General. In the result, I find no basis for intervening in the arbitration order with respect to any of the benefits claimed.

### **II. BACKGROUND**

The arbitrator accepted that as a result of the accident of November 9, 1995, Ms. Khazaei sustained an impairment, namely "an exacerbation of her previous symptoms in association with a mild stress fracture of T12." Following a prior accident on June 25, 1994, Ms. Khazaei complained of low back pain radiating to her left leg, neck pain, headaches, dizziness, depression, and concentration and memory problems. She reported the same symptoms after the November 1995 accident, along with mid-back pain. Though Ms. Khazaei testified that she was "95 percent recovered"<sup>1</sup> from the first accident when the second accident occurred, the arbitrator accepted evidence that she continued to have problems in November 1995. The most persuasive evidence was Ms. Khazaei's August 1995 application to withdraw from the upcoming fall term at Seneca College because of "continuous neck and back pain" resulting from the June 1994 accident. Dr. K. Filsoofi, her chiropractor, wrote a note to the College in support of the

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<sup>1</sup> Arbitration decision, p. 5. As I did not have a transcript available for review, this description of Ms. Khazaei's testimony is the arbitrator's. It was not disputed by Ms. Khazaei.

withdrawal application, stating that Ms. Khazaei had not regained her pre-accident physical condition despite completion of treatment.<sup>2</sup> The arbitrator implicitly rejected Ms. Khazaei's testimony that marital problems also contributed to this decision, preferring Ms. Khazaei's contemporaneous account.

Nevertheless, the arbitrator accepted that Ms. Khazaei's symptoms were made worse by the November 1995 accident. X-rays taken on the day of the accident showed a mild compression fracture of T12. This was confirmed by a bone scan on November 20, 1995. The arbitrator accepted the opinion of Dr. Peter Parker, a physiatrist, who reported in January 1996 that Ms. Khazaei had residual myofascial back pain secondary to the stress fracture. Dr. Arthur Ameis, another physiatrist, reviewed Dr. Parker's report at the request of Canadian General in February 1997. He suggested that the fracture might have resulted from some other trauma. However, based on Ms. Khazaei's OHIP records, the arbitrator found no evidence that Ms. Khazaei suffered any other trauma, before or after the 1995 accident, that might explain the fracture.

Ms. Khazaei claimed income replacement benefits based on employment beginning November 1, 1995 — nine days before the accident — at a Mr. Submarine store. Canadian General had concerns about the claim from the outset. It did not accept the legitimacy of the employment. It disputed Ms. Khazaei's account of the mechanics of the accident and the property damage. It may also have been concerned because the accident occurred only five months after it had settled Ms. Khazaei's claim arising out of her previous accident. The results of an investigation in late 1995 and early 1996 did not resolve Canadian General's concerns.

Ms. Khazaei testified at the hearing, as did the friend who took her to Scarborough Grace Hospital after the accident. She adduced documentary evidence of her employment, and medical records including hospital records and reports and records of Dr. M. Boozary, her family doctor,

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<sup>2</sup> Exhibit 1, Tab 6.

Dr. M. Showraki, her psychiatrist, Dr. Filsoofi and Dr. Parker. Canadian General relied on its investigation reports, surveillance and photographic evidence, and the report of Dr. Ameis. It called no witnesses.

Despite accepting that Ms. Khazaei sustained an impairment in the accident, the arbitrator dismissed her claim for income replacement benefits because he did not accept that she was employed before the accident.<sup>3</sup> This is the finding in dispute on appeal.

As Ms. Khazaei filed her application for arbitration before the *Insurance Act* was amended on November 1, 1996, her appeal is not limited to questions of law. However, it is well established that my role on appeal is not to substitute my view of the evidence for that of the arbitrator, who conducted a full hearing and had the advantage of assessing Ms. Khazaei's oral evidence. To succeed, Ms. Khazaei must show that the arbitrator made a specific error that was serious enough to affect the outcome when all the evidence is considered in its entirety.

Ms. Khazaei submits that the arbitrator erred in law by admitting for its truth "double hearsay" evidence — statements allegedly made to an investigator by Mr. Ali Yazdani, the owner of the Mr. Submarine store, and Mr. Paul Pathammavong, an employee at the store. As I will explain, I accept that the arbitrator erred in relying on this evidence. However, I find that his conclusion was supportable based on the other evidence before him, and accordingly I find no basis for interfering with the decision.

### III. ANALYSIS AND CONCLUSIONS

Between June and October 1995, Ms. Khazaei visited family in Holland. She returned briefly in August, when she withdraw from the upcoming fall term at Seneca. She testified that when she

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<sup>3</sup> Ms. Khazaei appears not to have claimed Other Disability Benefits under s. 19 of the *SABS-199*, and has not raise the issue at any time through mediation, arbitration or appeal.

finally returned to Canada in mid-October 1995, she arranged to resume her programme at Seneca in January 1996, and began looking for work. According to Ms. Khazaei, she contacted Mr. Ali Yazdani, owner of the Gerrard Street Mr. Submarine store, after obtaining his name from a friend. He interviewed her a few days later, and they agreed that she would work 35 hours a week, at \$7 an hour, as a cashier and general helper. Ms. Khazaei testified that she started work on November 1, 1995. She testified that she planned to continue working after going back to school, and that she would arrange her courses accordingly. However, she was unable to return to work after the accident. She received a single pay cheque for \$313.53, covering 7 shifts of 7 hours each.<sup>4</sup>

The arbitrator rejected Ms. Khazaei's testimony based on a number of discrepancies. The key paragraph is as follows:

I find troubling the inconsistencies in this evidence such as the differing versions of how Ms. Khazaei came to have the job, how the job could have fit into her full-time curriculum especially considering the distance from her home and her school to the job, why she was driving at 8:30 p.m. instead of working to 10:00 p.m., and why she was paid later and for a different period than the other employee on the employment records. *Most particularly*, I have difficulty understanding how Paul Pathammavong could not have seen her over the seven days she worked there, despite their one-hour overlap in shifts. Ms. Khazaei's explanation did not convince me. There may be satisfactory answers to these questions, but I did not hear them. The only people who testified were Ms. Khazaei and the friend who took her to the Scarborough Grace Hospital after the accident. The burden is on Ms. Khazaei to provide cogent proof of her job. I find that cogent proof lacking. Accordingly, I find that Ms. Khazaei is not entitled to weekly income replacement benefits.<sup>5</sup> [emphasis added]

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<sup>4</sup> A copy of the cheque was filed. Mr. Submarine's payroll records indicate that the gross amount was \$343. The cheque is dated November 25, 1995.

<sup>5</sup> Arbitration decision pp. 14-15.

Mr. Pathammavong reportedly told the investigator on November 25, 1995 that he had worked the day shift (10:00 a.m. to 4:00 p.m.) for the past three months and did not know Ms. Khazaei; the only woman he had seen working at the store was Mrs. Yazdani.<sup>6</sup> Ms. Khazaei testified that she did not see Mr. Pathammavong either. When asked "why not?", "she replied that she supposed he left early. She was only there 10 days and she got there around 3:15 p.m." The arbitrator implicitly rejected this explanation. The italicized words indicate that the arbitrator put significant weight on this discrepancy.

Two other discrepancies depend on statements made to the investigator.

Mr. Yazdani reportedly gave the investigator a different account of how he came to hire Ms. Khazaei. He allegedly said that Ms. Khazaei came to his attention when she wrote her name on a pad of paper he keeps on the front counter for job applicants. When he saw she had a Turkish name, he called her because he feels he would be more comfortable working with someone who speaks Farsi, his native language. Ms. Khazaei denied this, testifying that her name is not Turkish and Turkish people do not speak Farsi.

Mr. Yazdani is also reported to have told the investigator on November 27, 1995 (about three weeks after the accident) that he had not replaced Mr. Khazaei and instead his wife was working extra hours. This is inconsistent with his statement that he hired Ms. Khazaei to work 35 hours a week for the Christmas rush.

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<sup>6</sup> This statement is set out in a report by Kevin Spiers, an investigator with King-Reed & Associates Ltd., dated December 8, 1995 (Exhibit 4, Tab 6). On appeal, Ms. Khazaei's counsel submitted that some of the King-Reed reports are not signed by the investigator. The December 8, 1995 report, the one at issue on appeal, is signed by both Mr. Spiers and Elizabeth A. Brown, supervisor.

I find that the law with respect to the admission of hearsay evidence is as described by Director's Delegate Naylor in *Salvaggio and Simcoe and Erie General Insurance Company*.<sup>7</sup> In that case, the arbitrator rejected Mr. Salvaggio's claim based on a contract of future employment. The arbitrator accepted a report from Mr. Salvaggio's family doctor, Dr. Saplys, that Mr. Salvaggio told him he had a "verbal commitment" to start work. On appeal, the Director's Delegate made the following comments:

The admission of hearsay is guided by the cardinal principles of necessity and reliability.<sup>8</sup>

Commission adjudicators must comply with the rules of fairness and natural justice and with applicable statutory provisions relating to evidence, such as those in the *Statutory Powers Procedure Act* ("SPPA").<sup>9</sup> However, subject to certain qualifications, they are not bound to follow the strict rules of evidence applicable in court proceedings, including the hearsay rule or rules about opinion evidence.<sup>10</sup>

Arbitrators therefore have a greater latitude than a court (particularly a court in criminal matters) in dealing with evidence. This allows the focus to be on the weight to be attributed to such evidence rather than the technicalities of admissibility. As one commentator puts it, the rules of evidence should be considered "in terms of the signals that the rules send about a particular piece of evidence."<sup>11</sup> The principles underlying the rules should inform an arbitrator's approach.

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<sup>7</sup> (FSCO P97-0062, January 21, 1999). See also *Ahmed and Allstate Insurance Company of Canada* (FSCO P96-00068, June 23, 1998).

<sup>8</sup> *R. v. Khan*, [1990] 2 S.C.R. 53, *R. v. Smith*, [1992] 2 S.C.R. 915.

<sup>9</sup> R.S.O. 1990, c. S.22, as amended.

<sup>10</sup> *SPPA*, s. 15(1); s. 15(2) states that nothing is admissible in evidence that would be inadmissible in a court by reason of privilege or by statute.

<sup>11</sup> M. I. Jeffrey, Q.C., *Proving Causation and Future Risk in the Course of Environmental Decision-Making, Filtering and Analyzing Evidence in an Age of Diversity*, M. T. MacCrimmon and M. Oulette, eds. Canadian Institute for the Administration of Justice, Montreal, Themis, 1993 at p. 226; See also I. Blue, *Common Evidentiary Issues before Administrative Tribunals and Suggested Approaches*, *Advocates Quarterly* [1993] Vol. 14, No. 4, p. 385.

The arbitrator should have clearly addressed the underlying reliability of Dr. Saplys' report of what was said. It is clear from the transcript that Mr. Salvaggio did not admit to making the statement. The form of Mr. Salvaggio's job offer was unrelated to the purposes of the examination and of no possible clinical significance to Dr. Saplys. There is no reference to a verbal offer in other reports and no other evidence from Dr. Saplys in corroboration.

Despite these concerns, however, I am not convinced that the arbitrator relied to any significant extent on Dr. Saplys' evidence. It was but one of a number of factors informing his adverse assessment of credibility. A rehearing is not warranted on this ground alone.

Counsel for Canadian General points out that FSCO arbitrators often admit investigation reports without the need for the investigator to qualify the report. Insured persons frequently waive the right to cross-examine the investigator where there is no dispute about the authenticity of the surveillance or photographic evidence relied on by the insurer and no dispute that the person depicted is the applicant. Arbitrators rightly encourage this practice, which is consistent with the Commission's commitment to facilitating "the quickest, most just and least expensive resolution" of disputes.<sup>12</sup>

The situation is different when the insurer relies on statements made to an investigator by a prospective witness on a critical issue in dispute. Where there is no signed statement or other record of the interview, the trier of fact is unable to determine whether the investigator has reported the witness' statement accurately. Even if the investigator has reported the discussion accurately, the reliability of the witness' statement is diminished because the witness was not required to sign a written statement, affirm the truthfulness of his statement or answer questions on cross-examination.

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<sup>12</sup> Rule 1.1 of the *Dispute Resolution Practice Code (3rd ed.)*.

Counsel for Canadian General points out that he sent the investigation report to Ms. Khazaei's representative before the hearing<sup>13</sup> and that no objection was made to its admission before or at the hearing. This may have been an oversight on the part of Ms. Khazaei's representative, but Canadian General also took a risk in adducing this evidence without calling Mr. Yazdani or Mr. Pathammavong as witnesses. As I have heard no suggestion that they were unable to attend at the hearing, there was no necessity for the arbitrator to rely on their hearsay evidence.

In their conduct of a hearing, arbitrators must respect each party's right to present its case as it sees fit, while controlling the process to ensure a full, fair and expeditious hearing. This can often be a fine balance. In this case, Ms. Khazaei's representative at arbitration was not a lawyer, and her appeal submissions do not rely on a merely technical infringement of the hearsay rule. The tendered evidence raises numerous questions. For example, if Mr. Pathammavong had testified, Ms. Khazaei's representative would have had an opportunity to cross-examine him about his hours of work and his activities during the alleged overlap with Ms. Khazaei's shift, the length of his employment,<sup>14</sup> his relationship with Mr. Yazdani, any discussions he might have had with his employer about the investigation, whether the investigator showed him a photograph of Ms. Khazaei, and whether he was offered an opportunity to sign a written statement. Mr. Yazdani could have been cross-examined about his payroll and tax-reporting practices, his relationship with Ms. Khazaei, how he came to hire her, the language issue, his expectations regarding punctuality and early departures, events on the day of the accident, the length of Mr. Pathammavong's employment, possible explanations for Mr. Pathammavong and Ms. Khazaei's failure to meet, and his staffing needs over the Christmas rush and afterwards.

In my view, the arbitrator erred in relying on the investigation report as evidence of the truth of the reported statements of Mr. Yazdani and Mr. Pathammavong. However, this error is not fatal

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<sup>13</sup> The covering letter is dated December 22, 1997. The hearing was held on January 6, 1998.

<sup>14</sup> The Mr. Submarine payroll records adduced at the hearing show only two payments to "Paul."

to the decision if the arbitrator's rejection of Ms. Khazaei's evidence of employment is supportable on the evidence in its entirety.

Not all the arbitrator's reasons for rejecting Ms. Khazaei's evidence of employment depend on his acceptance of the interview statements reported in the investigation report. There were other problems with Ms. Khazaei's evidence.

The November 1995 payroll records show two payments to "Paul" for periods "to Nov. 10" and "to Nov. 24" and one payment to Ms. Khazaei "1/11 to 9/11/95." Ms. Khazaei's pay cheque was dated November 23, 1995. The arbitrator referred to the different pay periods and the delay in paying Ms. Khazaei as troubling inconsistencies. The arbitrator implicitly rejected the explanation offered by Mr. Yazdani to the investigator: that he holds new employees' cheques back for the first two weeks. This finding was open to the arbitrator in the absence of corroborating evidence explaining the anomaly.

The Mr. Submarine store on Gerrard Street East is a long way from Ms. Khazaei's home on Don Mills Road between Sheppard Avenue and Finch Avenue. The arbitrator implicitly rejected her explanation that she was unable to find a job any closer to home. An explanation might lay in Ms. Khazaei's admission, on cross-examination, that Mr. Yazdani was a friend. This does not preclude Ms. Khazaei from claiming benefits — many people get jobs through friends — but it is a legitimate reason for an arbitrator to require independent evidence to corroborate the employment. The onus was on Ms. Khazaei to present this evidence, and she did not do so. Her reluctance to admit her non-arm's length relationship with Mr. Yazdani is even more troublesome.

The store is also a very long way from the Seneca College campus on Finch Street East, where Ms. Khazaei intended to resume her studies in January 1996. Ms. Khazaei testified that she was to work the 3:00 p.m. to 10:00 p.m. shift at Mr. Submarine. Her courses in the winter 1996 term

were held between 9:45 a.m. and 2:30 p.m. The arbitrator noted that Mr. Yazdani reportedly told the investigator he put Ms. Khazaei on the afternoon shift for the Christmas rush, but planned to put her on the 10:00 a.m. to 4:00 p.m. shift after Christmas. However, the arbitrator did not rely on this statement. He found that "even on the later shift" (3:00 p.m. to 10:00 p.m.), Ms. Khazaei would have had little time to travel between the Seneca campus and the Mr. Submarine outlet. This was a legitimate consideration in my view.

Despite the fact that Ms. K's shift was to last till 10:00 p.m., the accident occurred at 8:30 p.m., and Ms. K testified that she had left work at 6:30 p.m. — 3 ½ hours early. In her signed written statement given to the investigator on November 27, 1995, she said she left work to go shopping with a friend. The accident happened as Ms. Khazaei and her friend drove home from Fairview Mall. Despite leaving early, Ms. Khazaei was paid for the entire shift. The decision does not indicate that any explanation was offered, and Ms. Khazaei's counsel did not submit that one was.

The arbitrator concluded "There may be satisfactory answers to these questions, but I did not hear them." While another arbitrator might have weighed the evidence differently, I find that the gaps and inconsistencies in Ms. Khazaei's own evidence are sufficient to support the arbitrator's finding, without relying on the hearsay statements of Mr. Yazdani and Mr. Pathammavong. Accordingly, I am not satisfied that the decision calls for intervention.

Ms. Khazaei identified no specific error in respect of the arbitrator's orders with respect to housekeeping and home maintenance expenses, additional chiropractic and related travel expenses, cost of examination and special award. Accordingly, these paragraphs of the arbitrator's order are also confirmed.

**IV. EXPENSES**

Although Ms. Khazaei was unsuccessful on appeal, I find this an appropriate case for exercising my discretion to award her reasonable appeal expenses because I accept her submission that the arbitrator erred in his reliance on the disputed evidence.



Nancy Makepeace  
Director's Delegate

August 17, 1999