

**Gupta v. State Farm Mutual Automobile Insurance Co., [2016] O.F.S.C.D. No. 237**

Ontario Financial Services Commission Insurance Decisions

Ontario Financial Services Commission

Toronto, Ontario

Panel: Stuart J. Mutch, Arbitrator

Heard: April 12-15, 2016; by written submissions, May 30, 2016.

Decision: August 30, 2016.

FSCO No. A14-005004

**[2016] O.F.S.C.D. No. 237**

Between Anju Gupta, Applicant, and State Farm Mutual Automobile Insurance Company, Insurer

(89 paras.)

## **Appearances**

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Mr. Daniel D'Urzo and Mr. Francesco Blasi for Ms. Gupta.

Mr. Angelo Sciacca for State Farm Mutual Automobile Insurance Company.

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## **REASONS FOR DECISION**

1 The Applicant, Anju Gupta was injured as the result of a motor vehicle accident that took place on October 19, 2013. She applied for accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.<sup>1</sup> The parties were unable to resolve their disputes through mediation, and the Applicant applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act, R.S.O. 1990, c.l.8*, as amended.

### **Issues:**

2

1. Is the Applicant entitled to receive Non-Earner Benefits in the amount of \$185.00 per week from May 16, 2014 to date and ongoing?
2. Is the Applicant entitled to the cost of the following treatment plans:
  - \* for a chronic pain program by All Health in the amount of \$15, 273.54?
  - \* for massage therapy by S. Atwala of HealthPlus Rehab in the amount of \$1,090.00?
3. Is the Applicant entitled to the cost of the following examinations:

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- \* An orthopaedic assessment by Dr. Tavazzani of Cambridge Medical Assessments in the amount of \$2,486.00?
  - \* A psychological assessment by Dr. Jon Mills of Cambridge Medical Assessments in the amount of \$2,404.24?
4. Is State Farm liable to pay a Special Award because it unreasonably withheld or delayed payments to the Applicant?
  5. Is either party entitled to its expenses?

**Result:**

**3**

1. The Applicant is not entitled to Non-Earner Benefits.
2. The Applicant is not entitled to the cost of the above described treatment plans.
3. The Applicant is not entitled to the cost of the above described examinations.
4. The Applicant is not entitled to a Special Award.
5. The Applicant shall pay to State Farm a total of \$22,340.14 for its expenses, plus HST as applicable.

**Background:**

4 The Applicant was 47 years old at the time of the accident. She is married and the mother of two daughters, ages 16 and 21. She testified that she had been employed until 1999 or 2000 when she suffered a work-related injury that resulted in pain in her neck and lower back. Since that time she has been a full-time homemaker. She lives in a four bedroom house. She testified that before the accident she did most of the cleaning, cooking, grocery shopping, laundry and home maintenance, including grass cutting, other gardening and snow shovelling. She chauffeured her daughters and helped them with their homework. She attended her place of worship on a daily basis where she would sit on the floor to pray. She did volunteer work there once per week. She socialized with family and friends at her place of worship and at dinners, birthday and wedding celebrations. She participated in dancing and badminton. The Applicant and her family took trips to Cuba and to the United States. She also travelled to India every three or four years to visit family.

5 The Applicant testified that everything "was perfect" in the one year before the accident and that she was not prevented from doing any of her activities.

**The Accident**

6 The Applicant testified that at the time of the accident she was the front seat passenger in a van driven by her husband. They had to stop suddenly and the car behind them swerved to the right and hit their right rear bumper. Photos of the van post-accident show a small amount of damage to the right rear bumper.<sup>2</sup>

7 The Applicant testified that her body was shaken violently in the accident and that she became very nervous after that. She was taken to hospital by ambulance. She did not suffer any broken bones in the accident. She was discharged with a prescription for analgesics.

8 She saw her family doctor and had massage, acupuncture and physiotherapy treatment. She stopped the treatment when the cost was no longer covered by State Farm.

**THE CLAIM FOR NON-EARNER BENEFITS**

## Evidence and Analysis

9 The *Schedule* provides that an insurer shall pay a non-earner benefit to an insurer person who sustains an impairment as a result of an accident and who suffers a complete inability to carry on a normal life as a result of, and within 104 weeks after the accident. A complete inability to carry on a normal life is defined as an impairment that "continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident".<sup>3</sup>

10 In *Heath v. Economical Mutual Insurance Company*<sup>4</sup> the Court of Appeal set out criteria for entitlement to non-earner benefits:

- \* Analysis should start by comparing activities and life circumstances before the accident to activities and life circumstances after the accident
- \* Assessment of pre-accident activities should encompass a reasonable period prior to the accident, the duration of which will depend on the facts of case
- \* In considering pre-accident activities, greater weight may be assigned to those activities which the applicant identifies as important to him or her
- \* The phrase "continuously prevents" means the applicant must demonstrate a "disability or incapacity of the requisite nature, the extent and degree of which is and remains unchanged"

11 The question of entitlement to a Non-Earner benefit can be broken down into two sub-issues:

- a) Did the Applicant suffer any accident related impairments 26 weeks after the accident (as required by section 13(4)(a))?
- b) If so, did the impairments result in a complete inability to carry on a normal life?

12 Considering whether an insured qualifies for Non-Earner Benefits necessitates a comparison between what an insured was doing for a reasonable period before the accident and what an insured is capable of doing after the accident. "A complete inability" suggests that there needs to be a substantial change in an insured's ability to function, as a result of the accident.

### ***Evidence Regarding Pre-Accident Activities and Medical Condition***

13 There are contradictions between the Applicant's evidence and the records of her treating physicians. There are also contradictions between her evidence and what she told assessors regarding her pre-accident condition.

14 As outlined above, the Applicant described herself as a physically active homemaker prior to the accident, whose activities included snow shovelling and cutting the lawn. She had been in the role of a full-time homemaker since she left her employment in 2000.<sup>5</sup> It was evident that homemaking, parenting and attending temple were paramount activities in the Applicant's life. Her daughter corroborated her mother's testimony with regard to her activities. In her testimony, the Applicant said that things were going "perfectly" before the accident and that the neck and back pain from her workplace injury had been reduced and that she was feeling "very good". She felt she had a bright future. She told Elyse Freedman, an occupational therapist, that she was "fine" before the accident.<sup>6</sup> In the Disability Certificate completed by Mandeep Deol dated October 30, 2013, eleven days after the accident, the Applicant stated that she did not have any disease, condition or injury that affected her ability to perform the activities listed in Part 6, prior to the accident.<sup>7</sup> There were no activities described in Part 6. She told Dr. Tavazzani, an orthopaedic assessor that she had no impairment of musculoskeletal function immediately prior to the accident.<sup>8</sup>

15 She told Dr. Debow, a psychiatric assessor, that she had no pre-existing issues except right arm pain due to a

work-related injury.<sup>9</sup>

*Notes of Treating Physicians*

**16** The notes of the Applicant's treating physicians paint a different picture of the Applicant's pre-accident medical condition.

**17** The clinical notes of the Applicant's family physician, Dr. Singh, span October 1, 2010 to January 29, 2016. On six of the twelve recorded visits preceding the accident the Applicant complained of headaches, on five visits pain in her arms or legs, on three occasions of sleep disturbances, on three occasions of dizziness, and on three occasions of heightened stress. In cross-examination Dr. Singh admitted that the Applicant had chronic headaches and neck, back and shoulder pain before the accident. When it was pointed out that these complaints did not appear in every note, Dr. Singh admitted that he did not make a note of it each time "but she complained every time".

**18** I was also provided with the clinical notes and records of the Applicant's treating psychiatrist, Dr. Panjwani from August 31, 2010 to December 16, 2015. In the period preceding the accident the Applicant consulted Dr. Panjwani ten times. On five of those occasions, Dr. Panjwani referred to pain and/or stress management. On three occasions the Applicant complained of sleep difficulties. On six occasions Dr. Panjwani noted that the Applicant's mood tended to fluctuate or that the Applicant was stressed or that she was angry and irritable.

**19** The records of her treating physicians show repeated complaints of headaches, dizziness, shoulder and arm pain, stress and sleep problems prior to the accident, yet she told Dr. Mills, an orthopaedic assessor, that she used to sleep "for 8 hours throughout the night".<sup>10</sup> On the other hand, she told Dr. Debow that she slept with "frequent awakening" before the accident. The Applicant told Dr. Marks, another orthopaedic assessor, that she was on long-term disability for a work related injury to her neck, back and arm and that she had never recovered prior to the accident,<sup>11</sup> which completely contradicts the self-description given in her testimony.

**20** The Applicant admitted on cross-examination that she had neck, right shoulder, back pain and headaches before the accident. The Applicant's daughter admitted on cross-examination that, prior to the accident, her mother had damage to her neck and back, that she had mood swings and complained of pain.

*Disability Tax Credit*

**21** The Applicant's income tax returns show that the Applicant has claimed a Disability Tax Credit for the tax years 2008 through 2012 inclusive.<sup>12</sup>

**22** A Disability Tax Credit is available to persons with a severe and prolonged impairment in physical or mental functions.<sup>13</sup> Subsection 118.3(1)(a.1) of the *Income Tax Act* goes on to state:

**The effects of the impairment or impairments are such that the individual's ability to perform more than one basic activity of daily living is significantly restricted where the cumulative effect of those restrictions is equivalent to having a marked restriction in the individual's ability to perform a basic activity of daily living** or are such that the individual's ability to perform a basic activity of daily living is markedly restricted or would be markedly restricted but for therapy that

(i) is essential to sustain a vital function of the individual,

(ii) is required to be administered at least three times each week for a total duration averaging not less than 14 hours a week, and

(iii) cannot reasonably be expected to be of significant benefit to persons who are not so impaired  
[Emphasis mine]

**23** This definition suggests that the individual must be significantly restricted in one basic activity to daily living, or

where the cumulative effect of restrictions is the equivalent of having a marked restriction in a basic activity of daily living.

**24** It was unclear who provided the medical opinion that allowed the Applicant to qualify for this benefit. Dr. Singh denied that he did. When Dr. Panjwani was asked if he provided it his response was that "I think I have filled this out for a lot of patients". In their submissions, counsel for the Applicant state that the Applicant began receiving the disability tax credit "through the assistance of Dr. Panjwani". The Applicant testified that the basis for her claiming the credit is depression and pain.

**25** A four year history of claiming a Disability Tax Credit is at odds with the Applicant's description of herself as a fully functioning homemaker, who was also cutting grass and shovelling snow, and who was unrestricted in her activities.

**26** The notes and testimony of the Applicant's treating physicians make it abundantly evident that the Applicant had chronic medical problems prior to the accident. Claiming a Disability Tax Credit buttresses this point of view. The Applicant has been inconsistent in her description of her pre-accident medical condition. Her evidence is unreliable. I find that her portrayal of her level of activity prior to the accident to be exaggerated.

### **Evidence Regarding Post-Accident Activities and Medical Condition**

**27** The Applicant testified that after the accident she suffered from "almost constant" acute pain in the head, accompanying dizziness, pain over her entire neck and stiffness and numbness, which affects her right shoulder. The Applicant also stated that she has low back pain that affects her legs. She stated that all the pain she had before the accident increased after the accident as did her insomnia.

**28** She testified that she used to do cooking but now her daughters do much of the cooking, or they order in. She is unable to garden. She testified that her daughters do most of the cleaning. Her elder daughter corroborated this in her testimony.

**29** She testified that she now only goes to temple twice per week and that she is unable to do any volunteer work there. She stated that she gets irritable and angry with her family and that she doesn't feel like socializing.

**30** The Applicant's daughter testified that after the accident her mother became sad and more irritable and that she was cooking and cleaning only "a little bit". She estimated her mother's functioning to be 2 out of 10. She indicated that she and her sister were doing most of the cleaning and cooking. She testified the Applicant attends social events but does not dance or interact as she used to. There was some inconsistency in her testimony. On direct examination she stated that her mother cooked once a month. On cross-examination she stated her mother made meals once or twice per week.

### ***Post-Accident Notes of Treating Physicians***

*Dr. Singh*

**31** Dr. Singh's notes, post-accident, continue to reference back pain and headaches, albeit on a more frequent basis. What is unprecedented is complaints of neck pain. At the same time, he notes after his complete physical examination of the Applicant, on November 28, 2013, approximately five weeks after the accident, that her neck was non-tender with a full range of motion. He also notes that the Applicant was "well appearing", that her back was non-tender to palpation and that the joints of her arms and legs had a full range of motion with "grossly normal" strength.<sup>14</sup>

*Dr. Panjwani*

**32** I have nine consultation notes of Dr. Panjwani from the post-accident period, spanning October 30, 2013 to

December 16, 2015. The complaints of the Applicant are largely physical. As for her emotional complaints they vary little from the complaints she had before the accident. There are references to a fluctuating mood, sleep hygiene and difficulties sleeping and stress management, all of which appeared repeatedly in Dr. Panjwani's notes pre-dating the accident.

**33** In his testimony, Dr. Panjwani opined that the Applicant's depression disorder "has reoccurred because of the accident". He felt that her pre-accident depression had gone into remission and that after the accident she "went downhill to the point she was non-functional". Dr. Panjwani was under the impression that the Applicant did not go to her place of worship unless it was for an important occasion and that she is not driving at all. This contradicts the Applicant's own evidence. I question Dr. Panjwani's knowledge of the Applicant's situation and functioning.

*Report and Testimony of Dr. Jon Mills, Psychologist*

**34** I was provided with a psychological assessment report signed by Dr. Mills. The assessment was conducted on June 13, 2014.<sup>15</sup> Dr. Mills was of the opinion that the Applicant met the test for NEB. He felt she required a minimum of 20 sessions of psychotherapy and 12 to 16 weeks of continuous rehabilitative care.

**35** Dr. Mills was cross-examined by State Farm's counsel. Any potential impact of Dr. Mills' opinion, as expressed in the report, was diluted by the fact that the actual assessment of the Applicant was performed by a Simran Narula, apparently a psychometrist under his supervision. There is information in the report that contradicts other documentary evidence. For example, the Applicant told the assessor that she used to sleep 8 hours per night, whereas the notes of Drs. Singh and Panjwani indicate that the Applicant made repeated complaints of sleep difficulties in the three years prior to the accident. She told the assessor she was on long-term disability, although there is no other evidence of this.

**36** It became evident in his testimony that Dr. Mills had not met the Applicant and had no access to the reports or notes of both her treating physicians and others who had assessed her. He was essentially doing what I would call an arms-length assessment of the Applicant based on information provided to him by the Applicant, through Ms. Narula, with little or no background information beyond that. I place little weight on his report or his testimony.

*Report and Testimony of Dr. Tavazzani -- Orthopaedic Surgeon*

**37** Dr. Tavazzani authored a report<sup>16</sup> following an assessment of the Applicant conducted August 18, 2014. Dr. Tavazzani was of the opinion that the Applicant "has virtually lost her ability to function in those quality pre-accident activities she enjoyed and ordinarily engaged in prior to the collision".<sup>17</sup>

**38** Dr. Tavazzani wrote that the Applicant "was completely asymptomatic prior to her motor vehicle collision with respect to neck and back pain". At the same time the notes of Dr. Singh indicate that the Applicant made a complaint of back pain prior to the accident. She told Dr. Marks, an orthopaedic assessor, that she had not recovered from injuries to her neck and back prior to the accident.

**39** Dr. Tavazzani was not provided with any of the notes of treating doctors or reports of other assessors. He was unaware that the Applicant was claiming a disability tax credit, or that she had complained of headaches, dizziness, insomnia and fatigue to her family physician prior to the accident.

**40** Under cross-examination Dr. Tavazzani admitted that the orthopaedic examination of the Applicant "was fairly normal" although he qualified those words by adding "and not normal". He also noted that the Applicant tested positive for non-anatomical pain distribution, pain amplification and overreaction.

**41** Dr. Tavazzani asserted that the words used in his report under the heading "Social History" were his words. However, it is interesting to note this portion of his report is word for word the same as Dr. Mills' report. As Dr. Mills' report precedes Dr. Tavazzani's, I can only conclude that Dr. Tavazzani has "cut and pasted" from Dr. Mills' report.

**42** It is evident that Dr. Tavazzani had no background information regarding the Applicant, beyond what she provided to him. His knowledge of her circumstances was superficial. I place little weight on his report or his testimony.

*Report and Testimony of Dr. Debow, Psychiatrist*

**43** Dr. Debow completed an assessment report of the Applicant on April 30, 2014.<sup>18</sup> He noted that the Applicant suffered from pre-existing depression. He stated: "She has some symptoms of major depressive episode, pre-existing, not in direct relationship to the motor vehicle accident, in partial remission" In his report, he stated that he suspects that her pain symptoms and subjective complaints of cognitive difficulties are better explained by pre-existing and continuing issues of major depressive episode "not in direct relationship to the motor vehicle accident". He testified that, in his experience, she did not have the facial appearance typical of depressed people. He thinks that the accident was a "blip" in a continuing state of depression. He judged her to have reached pre-injury status.

**44** After a paper review dated June 2, 2014<sup>19</sup> in response to a treatment plan by Dr. Mills proposing a psychological assessment, an addendum to his report, dated November 14, 2014<sup>20</sup>, and a further assessment of the Applicant on July 6, 2015<sup>21</sup>, he found there to be no objective evidence of any further clinically significant information beyond what he had obtained in his original assessment. His opinion remained unchanged.

**45** Dr. Debow has 46 years of experience as a psychiatrist. His testimony was not shaken on cross-examination. I find him to be a credible witness.

*Dr. Marks, Orthopaedic Surgeon*

**46** Dr. Marks conducted an assessment of the Applicant in March 25, 2014 to determine if the Applicant suffers a complete inability to carry on a normal life. He found that she did not have a complete inability and that there was no evidence of orthopaedic impairment. He thought she had reached pre-accident status.<sup>22</sup>

**47** Dr. Marks found the Applicant to be extremely pain-focused and somewhat uncooperative. His report states that "informally, she has full range of motion without distress". In his testimony he indicated that he reached this conclusion by observing the Applicant move her head to look at him and the interpreter without any limitation. He noted no muscle wasting or signs of nerve root impingement. Dr. Marks notes that the Applicant "demonstrated a full spectrum of moderate pain magnification, pain behaviour and functional overlay" and that "She had overreaction with disproportionate verbalization, facial expression, pain behaviour, eye closing, grimacing, giving way and poor effort".

**48** Dr. Marks testified that the Applicant's pain behaviours were not, in his experience, those seen in the general population, or in people with multiple traumas. He noted that she had diffuse pain on shoulder testing and that this was unexpected in that one would normally expect the pain to follow a pattern. He testified that there is not normally tenderness over the clavicle unless it is fractured.

**49** He found it perplexing that the Applicant claimed to be capable of shovelling snow and at the same time claiming to be on disability benefits. At one point in his testimony he stated: "Her pain behaviour suggests that she can function at a higher level than she is".

**50** I find Dr. Marks to be a credible witness. He took the time to examine the Applicant thoroughly. He was familiar with her circumstances. His conclusions were based on what appeared to be a thorough knowledge of orthopaedics. He was able to justify his conclusions in a logical manner.

*Elyse Freedman, Occupational Therapist*

**51** I was provided with a report dated August 25, 2014 by Elyse Freedman, who completed an in-home

assessment of the Applicant's Attendant Care needs.<sup>23</sup> Like Dr. Marks, Ms. Freedman noted self-limiting behaviour on the part of the Applicant. She thought the evaluation she conducted was not a true indication of the Applicant's actual abilities. There were no objective findings that indicated a need for assistance with regard to self-care tasks.

### ***Analysis of Post-accident Activity and Circumstances***

**52** The relevant period I must consider is that commencing April 20, 2014, 26 weeks after the accident. At that point the applicant had been assessed by Dr. Marks. She was assessed by Dr. Debow on April 29, 2014.

**53** Some of the Applicant's post-accident activities would seem to be inconsistent with her stated medical condition. She was able to travel to India in 2015, to see her ailing father. It goes without saying this involves lengthy air travel. The Applicant testified that she was very miserable during the journey. Dr. Debow opined that a person suffering from major depression could not tolerate such a long trip or the crowded conditions that go with air travel. In 2015 she took a four day trip to Chicago with her family. They travelled by car. The Applicant testified that she did not enjoy this trip, that she was having pain the whole time. The reason for the trip was that her psychiatrist felt that a change of scene would do her good. There is no evidence that this goal could not have been accomplished by taking a shorter trip outside of the Greater Toronto Area, rather than a trip that would involve at least sixteen hours of driving within a four day period.

**54** The Applicant had told Dr. Marks, whom she saw before the commencement of the period in question, that she has only 20 minutes sitting tolerance. In her testimony she stated that she cannot sit for "a long duration". When pressed on cross-examination she stated that the longest she could sit was half an hour. Yet the Applicant, while giving her testimony, sat for 1.5 hours with little shifting or visible discomfort.

**55** Dr. Debow, Dr. Marks and Elyse Freedman found the Applicant to be self-limiting. They believe that the Applicant is capable of doing more than she is claiming. Dr. Marks and Dr. Debow assessed the Applicant approximately 20 and 27 weeks after the accident, respectively. I found both to be credible witnesses. Both were of the opinion that at the time they assessed the Applicant she was no longer suffering from any accident-related injury or impairment.

**56** As stated earlier, the threshold for a Non-Earner Benefit is an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident. I have no reliable evidence as to the level of activity the Applicant was engaged in prior to the accident. Objective evidence (the disability tax credit, her treating physician's records) indicates she had chronic medical conditions that would limit her functioning and that cast doubt on the level of activity that she claims she was engaged in. As for her post-accident function there is credible objective evidence (the opinions of Dr. Debow, Dr. Marks, and Elyse Freedman) that she is capable to doing more than she indicated she can do. Even if I were to accept without reservation the Applicant's evidence that she was a high functioning homemaker, and enjoyed socializing, dancing and regular attendance at her place of worship prior to the accident, the balance of the medical evidence does not indicate that the accident caused the Applicant to sustain an impairment that continuously prevents her from engaging in substantially all of the activities in which she engaged before the accident. The onus is on the Applicant to demonstrate her entitlement to benefits. She has failed to do so. Her claim for Non-Earner Benefits is dismissed.

### ***Treatment Plans and Cost of Examinations***

*\$15,273.54 for a Chronic Pain Treatment Program*

**57** Dr. Danmish Saini of All Health Medical Centre submitted the above treatment plan on the Applicant's behalf on May 12, 2015.<sup>24</sup> The treatment proposed included exercise, unspecified therapy, education, acupuncture, mental health therapy and a total body assessment for 15 weeks.

**58** The treatment plan was supported by a Chronic Pain Examination Report dated April 30, 2015 authored by Dr. Zatzman and Dr. Saini of the All Health Medical Centre.<sup>25</sup> The assessors found the Applicant's physical condition

and clinical status "fit the classical picture of a Chronic Pain Syndrome secondary to unresolved residual pain as a direct result of [the motor vehicle accident]".

**59** In a Disability Certificate dated March 9, 2016, the Applicant's family physician noted "chronic neck/shoulder/back pain syndrome".<sup>26</sup>

**60** State Farm takes the position that the Applicant incurred an unspecified amount of the chronic pain program before the treatment plan was submitted. As far as I can tell, the only amount incurred was \$200 for the assessment portion of the treatment.

**61** The Applicant was assessed by Dr. Khaled, a family physician, on July 3, 2015.<sup>27</sup> Dr. Khaled found no evidence of a chronic pain disorder. He was of the opinion that the Applicant's injuries were of a soft tissue nature only and, like Dr. Debow and Dr. Marks, he found that there is no objective evidence of accident related impairment.

**62** I prefer the opinions of Dr. Khaled, Dr. Debow and Dr. Marks over that of Dr. Zatzman and Dr. Saini. Dr. Debow's and Dr. Marks' gave *viva voce* evidence and it was tested on cross-examination. I found them to be credible witnesses.

**63** I find that the balance of the evidence indicates that the Applicant does not have a chronic pain disorder. If I am incorrect and she does, it was not caused by the accident. Her medical records indicate persistent complaints of pain that pre-date the accident for a significant period. A treatment plan to treat such a disorder is neither reasonable nor necessary.

*\$1090.00 for reassessment, active functional restoration program and massage therapy*

**64** Sanjay Attwala of HealthPlus Rehab Centre submitted this treatment plan dated May 2, 2014.<sup>28</sup> State Farm denied this treatment plan on the basis of a paper review by Dr. Marks, dated July 7, 2014. In his opinion, Dr. Marks noted that the Applicant had pre-existing issues with her neck and low back and that there was no evidence of any superimposed, accident-related impairment or disability. He was of the belief that she had reached pre-accident status.

**65** I have accepted Dr. Marks' evidence and opinion. I find this treatment plan to be neither reasonable nor necessary.

*\$2,486.00 for a Total Body Assessment*

**66** This treatment plan dated January 14, 2014 was submitted by Dr. Tavazzani of Cambridge Medical Assessments three months after the accident.<sup>29</sup> It would be reasonable for the Applicant to have a complete orthopaedic assessment were it not for the fact that her family doctor had given her complete physical on November 28, 2013 and found no objective evidence of any orthopaedic, or for that matter, soft tissue injury.

**67** I find this treatment plan to be neither reasonable nor necessary.

*\$2,404.23 for a psychological assessment*

**68** This treatment plan dated April 15, 2014 was submitted by Dr. Jon Mills of Cambridge Medical Assessments.<sup>30</sup> State Farm denied the cost of this assessment on June 11, 2014 on the basis that it was not reasonable and necessary in light of Dr. Debow's report and because there was a pre-existing history of depression.

**69** As stated above the Applicant's complaints to her psychiatrist after the accident varied little from her complaints pre-accident. As well, Dr. Debow in his report of April 29, 2014, opined that the accident caused only "a blip" in the Applicant's depressed state. Also referenced earlier was the fact that Dr. Mills had little personal knowledge of the Applicant and that the fact gathering and testing had been done by someone else.

70 At the time of the accident, the Applicant was under the care of a psychiatrist, who was qualified to assess the Applicant and to rebut the opinion of Dr. Debow.

71 I find this treatment plan to be neither reasonable nor necessary.

### **Special Award**

72 Subsection 282(10) of the *Insurance Act* provides that if the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to an award of benefits and interest, shall award a lump sum of up to 50 per cent of the amount to which the insured person was entitled at the time of the award.

73 The Applicant has argued that State Farm has unreasonably withheld payments and that its adjustment of the Applicant's file falls "well below the standard of an Ontario insurer or a party to an insurance contract". It takes the position that State Farm terminated the Applicant's NEB based on insufficient evidence, specifically the reports of Dr. Marks and Dr. Debow. In particular, the Applicant's counsel argues that neither Dr. Marks nor Dr. Debow enquired sufficiently into the Applicant's pre-accident and post-accident activities.

74 That is not the task of these doctors. Their job is to assess the Applicant from the perspective of their medical speciality and give an opinion as to whether the Applicant's medical condition can be linked to the accident. This evidence can help assess the Applicant's capacity to function. That, and whether the Applicant meets the statutory definition of entitlement to NEB is the job of the arbitrator. I am aware that the question of whether an applicant meets the test for a particular benefit is frequently put to medical professionals. However, it is ultimately a legal question and not a medical one.

75 Both Dr. Marks and Dr. Debow found that the Applicant did not suffer any orthopaedic or psychiatric impairments that would be linked to the accident. State Farm did not act unreasonably when it terminated the Applicant's benefits based on those opinions.

76 The Applicant's counsel argues that the Applicant should have been taken out of the MIG because of her pre-existing medical issues, when in fact the point is moot because the Applicant was taken out of the MIG due to a procedural error on behalf of State Farm. Applicant's counsel further argues that State Farm never provided the reports to Drs. Tavazzani and Mills to its assessor but State Farm was not provided with copies of those reports until after the pre-hearing in March 2015. The fact is, and I have found that by April 2014, State Farm had solid medical reasons for denying the Applicant benefits, including evidence that she had returned to her pre-accident status.

77 In any case, having found that the Applicant is not entitled any of the benefits claimed, the issue of a Special Award is moot.

### **Interest**

78 The Applicant claims interest on overdue payments. As no benefits are owing, there are no overdue payments upon which interest would accumulate.

### **Expenses**

79 The *Expense Regulation* reads as follows:

The arbitrator will consider only the criteria referred to in the *Expense Regulation* found in Section F of the *Code*. These criteria are:

- (a) each party's degree of success in the outcome of the proceeding;

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- (b) any written offers to settle made in accordance with Rule 76;
- (c) whether novel issues are raised in the proceeding;
- (d) the conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders;
- (e) whether any aspect of the proceeding was improper, vexatious or unnecessary.
- (f) whether the insured person refused or failed to submit to an examination as required under section 42 of Ontario Regulation 403/96 (Statutory Accident Benefits Schedule -- Accidents on or after November 1, 1996) made under the Act or refused or failed to provide any material required to be provided by subsection 42 (10) of that regulation; and
- (g) whether the insured person refused or failed to submit to an examination as required under section 44 of Ontario Regulation 34/10 (Statutory Accident Benefits Schedule -- Effective September 1, 2010), made under the Act, or refused or failed to provide any material required to be provided under subsection 44 (9) of that regulation.<sup>31</sup> [Emphasis added]

**80** There were no novel issues raised in this proceeding, nor were any written offers to settle brought to my attention. The Applicant did not fail to submit to an examination. I have no evidence that either party or their representatives did anything to prolong, obstruct or hinder the proceeding or that any aspect of the proceeding was improper, vexatious or unnecessary. The sole criteria to consider in awarding expenses is the degree of success of the parties, which was entirely State Farm's.

**81** State Farm was put to the expense of defending the Applicant's claims. It is appropriate that the Applicant cover some of its expenses.

**82** In its submissions, State Farm claims a total of \$26,050.92 in legal fees at the rates prescribed by the *Expense Regulation* and \$16,332.49 in disbursements. For the reasons that follow, I am awarding a reduced amount to State Farm.

**83** As part of its legal fees, State Farm claims a total of \$6,848.37 in legal costs incurred leading up to preparation for the arbitration hearing. This includes responding to the Application for Arbitration and preparation and attendance at the pre-hearing. I decline to award expenses for this portion of the claim as the parties were still in the process of confirming the issues and gathering information.

**84** I will award expenses for counsel and the law clerk's preparation and attendance at the hearing. Counsel claims 40 hours for the conduct of the hearing but in fact the hearing took place over four days and rarely exceeded 6.5 hours with a break for lunch. I will allow 26 hours for the conduct of the hearing. Counsel was well prepared. I will allow 4 hours of preparation for every hour of hearing for a total of 104 hours as was claimed. I will allow the amounts claimed by other individuals involved in preparing for the hearing, which totals \$699.01. With regard to the post-hearing amounts claimed, 8.4 hours is reasonable for the preparation of written submissions and correspondence. I am reducing the amount claimed for cost submissions to 3 hours of the law clerk's time.

**85** With regard to disbursements I will allow the amounts claimed for printing, process server, witness conduct money and Ideologic PDS Inc. totalling \$1,132.49. According to the *Expense Regulation*, the maximum that may be awarded for the attendance of an expert witness is \$200 per hour of attendance to a maximum of \$1,600. Neither Dr. Marks nor Dr. Debow gave evidence for more than 2 hours. I am limiting their attendance fee to \$400 each. The maximum for preparation time is \$500 and that is what was claimed. I am limiting their preparation claims to \$250 each.

**86** State Farm claims the cost of four reports by Dr. Marks, five reports by Dr. Debow and two reports by Dr. Khaled.

**87** Two of Dr. Marks' reports, including his initial assessment, pre-date the commencement of arbitration

proceedings as do two of Dr. Debow's. Their reports, subsequent to the commencement of arbitration, were relatively brief and partly relied on information previously gathered. I will allow \$300 for each of their subsequent reports. Both Dr. Khaled's reports were produced after the commencement of arbitration. I will allow \$750 for his initial assessment and \$300 for his addendum.

**88** I therefore award expenses to State Farm as follows:

Preparation for arbitration	\$12,964.97	
Attendance at the arbitration hearing (26 hours at \$116.93 per hour)	\$ 3,040.18	
Post arbitration work	\$ 982.31	
Preparation of the Bill of Costs	<u>\$ 370.29</u>	
<b>TOTAL LEGAL FEES</b>		<b>\$17,357.75</b>

Disbursements

Printing, process server etc.	\$ 1,132.49	
Witness preparation fees	500.00	
Witness attendance fees	800.00	
Medical reports	<u>\$ 2,550.00</u>	<u>\$ 4,982.49</u>
<b>TOTAL DISBURSEMENTS</b>		
<b>TOTAL EXPENSES AWARDED TO STATE FARM</b>		<b>\$22,340.24</b>

August 30, 2016  
Date

Stuart J. Mutch  
Arbitrator

\* \* \* \* \*

**ARBITRATION ORDER**

**89** Under section 282 of the *Insurance Act, R.S.O. 1990 c. 1.8* as it read immediately before being amended by

Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario *Regulation 664*, as amended, it is ordered that:

1. The Applicant is not entitled to Non-Earner Benefits.
2. The Applicant is not entitled to medical and rehabilitation benefits.
3. The Applicant is not entitled to the cost of examinations.
4. The Applicant is not entitled to a Special Award.
5. The Applicant shall forthwith pay to State Farm its expenses of \$22,340.24 plus H.S.T where applicable.

August 30, 2016

Date

Stuart J. Mutch

Arbitrator

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- 1 *The Statutory Accident Benefits Schedule -- Effective September 1, 2010*, Ontario Regulation 403/96, as amended.
  - 2 Exhibit 2, Tab 16
  - 3 Subsection 2(4) of the *Schedule*
  - 4 [\[2009\] 95 O.R. \(3d\) 785](#)
  - 5 Exhibit 2, Tab 12F, page 6.
  - 6 Exhibit 2, Tab 12F
  - 7 Exhibit 2, Tab 7, page 5, Part 8
  - 8 Exhibit 1, Tab 20, page 12, (page 3 of the report)
  - 9 Exhibit 2, Tab 12 C, page 3
  - 10 Exhibit 1, Tab 16, page 13 (page 8 of the report)
  - 11 Exhibit 2, Tab 12B
  - 12 Exhibit 1, Tab 34.
  - 13 *Income Tax Act*, R.S.C. 1985, C. 1 (5th Supp.), subsection 118.3.(1)(a)
  - 14 Exhibit 1, Tab 28, page 38
  - 15 Exhibit 1, Tab 16
  - 16 Exhibit "1", Tab 20
  - 17 Exhibit "1", Tab 20, page 16 (page 7 of report)
  - 18 Exhibit 2, Tab 12C
  - 19 Exhibit 2, Tab 12D
  - 20 Exhibit 2, Tab 12I
  - 21 Exhibit 2, Tab K
  - 22 Exhibit 2, Tab 12B

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- 23** Exhibit 2, Tab 12F
- 24** Exhibit 2, Tab 9F
- 25** Exhibit 1, Tab 23
- 26** Exhibit 1, Tab 4, page 3
- 27** Exhibit 2, Tab 12J
- 28** Exhibit 1, Tab 13
- 29** Exhibit 1, Tab 20
- 30** Exhibit 1, Tab 16
- 31** Regulation 664, R.R.O. 1990, made underThe *Insurance Act*, as amended.

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