

**Gupta v. State Farm Mutual Automobile Insurance Co., [2016] O.F.S.C.D. No. 306**

Ontario Financial Services Commission Insurance Decisions

Ontario Financial Services Commission

Toronto, Ontario

Panel: Stuart Mutch, Arbitrator

Heard: July 26 and 27, 2016; written  
submissions, August 26, 2016.

Decision: November 17, 2016.

FSCO No. A14-004854

**[2016] O.F.S.C.D. No. 306**

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

(87 paras.)

## **Appearances**

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Mr. Daniel D'Urzo for Mr. Gupta.

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

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## **REASONS FOR DECISION**

1 The Applicant, Sunil Gupta was injured as the result of a motor vehicle accident that took place on October 19, 2013. He 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.1.8*, as amended.

### **Issues**

2

1. Is the Applicant entitled to the cost of the following medical treatment plans:
  - \* for a chronic pain program by All Health in the amount of \$15,273.54 (OCF-18 dated April 30, 2015)?
  - \* for physiotherapy by Sanjay Attwala of HealthPlus Rehab in the amount of \$1,065.00 (OCF-18 dated March 13, 2014)?
2. 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 (OCF-18 dated January 14, 2014)?
  - \* A psychological assessment by Dr. Jon Mills of Cambridge Medical Assessments in the amount of \$704.24 (OCF-18 dated April 15, 2014, \$2,404.24 less \$1,700.00 paid)?
3. Is the Applicant entitled a Special Award?
  4. Is either party entitled to its expenses?

## Result

### 3

1. The Applicant is entitled to the cost a psychological assessment in the amount of \$300.00.
2. The Applicant is entitled to interest on the above amount, according to the *Schedule*.
3. The Applicant is not entitled to the other amounts claimed.
4. The Applicant is not entitled to a Special Award.
5. The Applicant shall pay to State Farm a total of \$11,863.52 for its expenses.

## Background

**4** The Applicant was 48 years old at the time of the accident. He is married and the father of two daughters, ages 21 and 16. He has been employed full-time at Deco Automotive for over twenty years as a machine operator, working on an assembly line manufacturing auto parts. He did home maintenance activities including grass cutting. He attended his place of worship one to three times per week and did volunteer work there as well. He played badminton once per week.

## The Accident

**5** The Applicant was operating a Dodge Caravan at the time of the accident, which was rear-ended by another vehicle. His wife was in the passenger seat. The airbags did not deploy. His wife was taken to hospital by ambulance. The Applicant drove the vehicle home and later drove to the hospital to visit his wife. The vehicle sustained \$1,051.24 in damage.

**6** The accident took place on a Saturday. The following Monday, the Applicant reported for work. He did not report the accident to his employer. That same day, he saw his family physician, Dr. Singh. He complained of pain and stiffness in his neck, back and shoulders and of headaches and dizziness. Dr. Singh did not recommend that the Applicant take a leave of absence from work or that he work modified duties.

**7** The following day, October 22, the Applicant spoke to a State Farm claims representative, Rahim Virani. The Applicant reported that he was not injured, but that his wife was. He spoke with three other individuals at State Farm on three separate occasions without mentioning any injury. On Thursday October 24, the Applicant, while performing his work duties, injured his lower back. He was taken to hospital by ambulance.

**8** On November 25, 2013 he informed State Farm he was claiming accident benefits.<sup>2</sup>

**9** The Applicant submitted a claim to the Workplace Safety and Insurance Board (WSIB) as a result of this accident. The Applicant did not mention the motor vehicle accident to anyone at the hospital or to anyone at WSIB.

**10** As a result of the workplace accident, the Applicant was off work for six working days, until November 1, 2013 and was then on modified duties for 6 to 8 weeks.

## LAW

**11** The relevant sections of the *Schedule* are section 15, which specifies that medical benefits shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident and section 25, which specifies that the insurer shall pay for reasonable fees for the completion of a disability certificate or treatment confirmation form and for conducting an assessment or examination and preparing a report for those purposes.

### Positions of the Parties

**12** The Applicant argues that the treatment plans and assessment claims are reasonable and necessary. He alleges that State Farm was inflexible in adjusting his claim and did not give proper weight to the medical documentation he provided. He asserts that State Farm was wrong in initially finding that his injuries fell within the Minor Injury Guideline (MIG). (The Applicant was removed from the MIG on June 9, 2014).

**13** State Farm alleges that the Applicant was not injured in the accident, or if he was, his injuries had resolved by December 2013. It takes the position that in circumstances where an insured sees his or her family doctor on a regular basis, and the doctor does not refer the insured to a treating specialist, referrals by non-treating doctors cannot be reasonable or necessary.

**14** State Farm questions the Applicant's assertion that he sustained injuries in the accident. It takes the position that the following cast aspersions on the Applicant's credibility:

1. Three days after the accident the Applicant advised State Farm that he had not been injured in the accident.
2. He did not advise his employer or WSIB of the accident.
3. He failed to advise his OCF-3 assessor, Mandeep Deol, of his workplace accident.
4. He failed to advise Dr. Marks, an orthopaedic assessor, of his workplace accident.
5. He did not lose time from work or was placed on modified duties as a result of the motor vehicle accident.

### Causation

**15** As stated above, State Farm takes the position that any of the Applicant's injuries or medical conditions are due to pre-existing conditions and/or his workplace accident of October 24, 2013.

**16** The courts have employed both the "but for" and the "material contribution tests" when considering causation issues. Recent arbitration decisions have employed both tests.<sup>3</sup>

**17** In the instant case, both parties in their submissions posit that the appropriate test of causation is the material contribution test.

**18** The material contribution test poses the question of whether "a cause of disability -- injuries arising from a motor vehicle accident -- is materially contributing to the disability despite other causes, whether they arose before or after the accident".<sup>4</sup>

**19** In order to determine whether the accident materially contributed to the Applicant's injuries, I must consider the medical condition of the Applicant before and after the accident.

### ***Evidence Regarding Pre-Accident Condition***

**20** The Applicant testified that he had a previous motor vehicle accident in 2008 for which he was off work for six months and that prior to the subject accident he had occasional lower back, shoulder and neck pain. However, he stated that he had no problems doing any of his regular activities before the accident.

*Dr. Singh, Family Physician*

**21** I was provided with the clinical notes and records of Dr. Singh, the Applicant's family physician, spanning November 12, 2010 to July 18, 2014. The notes show that, in the three year period before the accident, the Applicant complained of pain and stiffness in his lower back four times, in his shoulders twice, leg pain on three occasions and headaches on four. Dr. Singh found that he had tenderness and a limited range of motion in his lower back on six occasions and he diagnosed lower back sprain twice. Earlier in 2013, before the motor vehicle accident, the Applicant was off work for six weeks due to low back and left arm sprain.

*Workplace Safety & Insurance Board ("WSIB")*

**22** As a result of his workplace accident the Applicant made a claim with WSIB. By way of letter dated December 3, 2013, the Applicant's employer asked for relief from the Second Injury and Enhancement Fund on the basis that the Applicant had a pre-existing lower back problem.<sup>5</sup> The letter cited three instances whereby the Applicant was given leave from work as follows:

1. May 22, 2008 to December 15, 2008 due to injuries to the Applicant's back and neck from a non-work related accident;
2. June 8, 2011 to August 8, 2011 due to complaints of lower back and hand pain, non-work related;
3. April 9, 2013 to May 30, 2013 -- short term disability, non-work related, injury not specified.

**23** The notes of Dr. Singh corroborate the last incident. They state that the Applicant was off work for six weeks due to low back and left arm sprain.

**24** It is evident the Applicant had significant and ongoing lower back problems, as well as occasional leg, arm and shoulder problems, prior to the motor vehicle accident.

***Evidence Regarding Post-Accident Condition***

**25** The Applicant testified that he performed his regular work duties, with difficulty, on Monday, October 21, 2013, two days following the motor vehicle accident. He went to see his family doctor, Dr. Singh, that same day. Dr. Singh's notes show that he was complaining of pain and stiffness in his neck, shoulder and back and of pain that went into his arms and legs as well as headaches and dizziness. However, the notes show that his chief complaint at the time was of cold symptoms. When asked on cross-examination, if that was the real reason he saw Dr. Singh on that date, the Applicant responded "Could be". Dr. Singh did not recommend that the Applicant take time off work or go on modified duties. Curiously, Dr. Singh notes that the Applicant went to the Emergency Room and x-rays were taken, the results of which were within normal limits. There is no mention of this in the Applicant's own evidence or in the OHIP summary.<sup>6</sup>

**26** On October 24, 2013 the Applicant suffered an injury in the course of his employment. According to the Applicant, and to the WSIB records provided, the Applicant, while lifting some boxes, felt severe pain in his lower back and fell to the ground. He was taken to hospital by ambulance. A doctor at the hospital wrote a prescription to the effect that the Applicant was unable to work for the period October 24 to November 1, 2013.<sup>7</sup> After that the Applicant was placed on modified duties until December 2013. The Applicant testified that after the workplace accident he had pain in his neck and shoulders and suffered from dizziness.

**27** Ten days after the subject accident, on October 29, 2013, the Applicant saw Dr. Singh again, complaining of

acute low back pain. Dr. Singh noted the work injury of October 24 and that the duration of the back pain was five days, which suggests that the complaint of back pain commenced with the work injury. There is no mention of the motor vehicle accident.

**28** In a note dated November 13, 2013 Dr. Singh notes complaints of pain and stiffness in the neck, shoulders and back with headaches and dizziness. He does note a history of "mva and work injury two weeks back" and under "Assessment" writes "MVA injuries -- WAD 2 -- back sprain."

**29** On December 23, 2013 the Applicant saw Dr. Singh again, who noted that the Applicant had recovered from his back sprain and was feeling better. The next notes of Dr. Singh's are dated February 10, 2014, and March 11, 2014 in which he again notes that the Applicant has recovered from his back sprain, although he notes back *strain* (emphasis mine), which he attributes to heavy work. Low back pain and stiffness is again mentioned in a note of April 2, 2014. There is no mention of the motor vehicle accident, he assesses the Applicant as having "mechanical backache".

**30** Dr. Marks, an orthopaedic surgeon, performed an independent medical examination of the Applicant on March 13, 2014.<sup>8</sup> Dr. Marks was asked to provide an opinion as to whether the Applicant's injuries fell outside the Minor Injury Guideline. In his opinion they did not. He found that the Applicant had suffered from cervical and lumbar strain and that he had reached pre-injury status and that there was no objective evidence of any ongoing impairment.

**31** The Applicant was assessed by Dr. Gnam, a psychiatrist, on June 9, 2014. Dr. Gnam made the DSM-IV diagnosis of Anxiety Disorder Not Other Specified (with features of PTSD and Specific Phobia, situational type) and that the motor vehicle accident made a material contribution to this disorder. He opined that the mental impairments suffered by the Applicant fell outside of the MIG. Accordingly, the Applicant was removed from the MIG.

**32** The Applicant testified that he currently suffers from neck, shoulder and lower back pain and dizziness, as well as insomnia due to pain and anxiety [which he attributes to the accident].

### **Analysis**

**33** The Applicant had a consistent history of pain starting at least three years before the motor vehicle accident. He did not take time off work because of the accident and in fact he initially told State Farm that he was not injured in the accident. Five days after the motor vehicle accident he had a workplace fall that resulted in his being off work for six working days and then on modified duties for somewhere in the area of six to eight weeks.

**34** He saw his family physician two days after accident, reported the accident and complained of pain but it appears from the clinical notes, and the Applicant endorsed this, that his motive for visiting the doctor was cold symptoms. In the next note, the Applicant complains of acute low back pain, but the doctor attributes that to the workplace accident five days earlier. There is only one other mention, in the notes of November 13, 2013, of the motor vehicle accident. On December 23, 2013 Dr. Singh notes that the Applicant has recovered from his back sprain. There is no further mention of the motor vehicle accident. A physical exam by Dr. Singh undertaken June 11, 2014 revealed no abnormalities.<sup>9</sup>

**35** I find that the motor vehicle accident made no material contribution to the Applicant's *physical* complaints or impairments. The preponderance of the evidence suggests that they pre-dated the accident off and on for a significant period and that any exacerbation of those injuries is more likely due to the not insignificant workplace accident that followed on the heels of the motor vehicle accident. I do accept Dr. Gnam's finding that the motor vehicle accident materially contributed to the Applicant's *mental disorder*, as diagnosed by Dr. Gnam.

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

**36** Even though I have found that the motor vehicle accident did not make a material contribution to the Applicant's

physical injuries and impairment, I feel it necessary to consider each of the claimed treatment plans and assessments and give reasons why, with the exception of the psychological assessment, they are not reasonable and necessary.

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

**37** This treatment plan dated January 14, 2014 was submitted by Dr. Tavazzani of Cambridge Medical Assessments three months after the accident.<sup>10</sup> State Farm denied this treatment plan by fax back on January 28, 2014.<sup>11</sup> It denied this treatment plan again in an OCF-9 on March 27, 2014.<sup>12</sup> Dr. Tavazzani nevertheless submitted an invoice for the assessment dated August 29, 2014.<sup>13</sup>

**38** State Farm's rationale for initially rejecting this treatment plan is that it had no medical documents, beyond an OCF-3 dated October 30, 2013 which indicated that the Applicant had suffered "low back pain" and "sprain and strain of lumbar spine" and that he would be disabled for 9 to 12 weeks. The fax notation at the bottom of the document appears to indicate that it was provided to State Farm on December 3, 2013.<sup>14</sup>

**39** Sprain is a term used to describe damage to ligaments and tendons.<sup>15</sup> It is not a condition that requires the attention of an orthopaedic surgeon, whose primary concern is bones.

**40** The OCF-18 completed by Dr. Tavazzani lists 23 complaints, some of which were never substantiated by the Applicant or any medical practitioner, including "pain in thoracic spine", "radiculopathy cervical region", "sprain and strain of other and unspecified parts of knee", "noise effects on inner ear", "low vision, both eyes". Dr. Tavazzani indicates that it is "unknown" whether the Applicant's impairments affect his ability to carry out his employment duties. The Applicant's functional goals are stated to be "Assessment". It is evident that Dr. Tavazzani evaluated the Applicant in a perfunctory manner and provided little basis on which to justify an orthopaedic assessment.

**41** Dr. Singh's notes, in the period up to the date of this treatment plan, make no reference to any orthopaedic injury. They refer only to low back sprain and in notes dated December 23, 2013 and February 10, 2014, Dr. Singh states that the Applicant has recovered from low back sprain. It is notable that Dr. Singh never referred the Applicant to an orthopaedic surgeon. Further complaints of back pain and stiffness were attributed to the nature of the Applicant's work, there is no reference to the motor vehicle accident.

**42** In an Addendum dated September 8, 2014 Dr. Marks specifically addressed this treatment plan.<sup>16</sup> Dr. Marks maintained his opinion that the Applicant's injuries do not fall outside of the Minor Injury Guideline. He notes a "clear" history of complaints of pain and stiffness in the low back, shoulders and neck, with headaches and dizziness prior to the accident. He was of the opinion that no further investigation or therapy was required.

**43** When State Farm received this treatment plan, it had no medical evidence that the Applicant was suffering from an orthopaedic injury. Subsequent investigation did not reveal an orthopaedic injury. This treatment plan is neither reasonable nor necessary.

*\$2,404.23 for a psychological assessment*

**44** This treatment plan dated April 15, 2014 was submitted by Dr. Jon Mills of Cambridge Medical Assessments.<sup>17</sup> The cost of the proposed treatment was broken down as follows:

Preparation of treatment plan \$200.00  
 Assessment of mental health \$1,779.36  
 Report preparation and service \$ 148.28  
 TOTAL \$2,127.64  
 Tax \$ 276.60  
 TOTAL \$2,404.24

**45** State Farm initially denied the entire treatment plan on April 30, 2014.<sup>18</sup>

**46** State Farm subsequently arranged to have the Applicant assessed by Dr. Gnam and as stated earlier, Dr. Gnam found the Applicant was suffering from an anxiety disorder not otherwise specified and that it was reasonable that the Applicant be psychologically assessed.<sup>19</sup>

**47** On that basis State Farm approved \$1700.00 for a psychological examination, which is the amount Dr. Gnam felt was reasonable for that service. Dr. Gnam did not specify whether this amount was inclusive of tax or why he thought that the psychological examination "should not exceed \$1700" as he stated in his report.

**48** The Applicant claims the remaining \$704.24 unpaid by State Farm. It should be noted that subsection 25(5) of the *Schedule* provides that the insurer is not required to pay more than \$2000 in respect of fees and expenses for conducting any one assessment or examination and for preparing reports in connection with it. I am therefore left to consider whether State Farm should pay an additional \$300.00 for this assessment.

**49** As Dr. Gnam found the treatment to be reasonable, but gave no reason for the amount approved, I will allow an additional \$300 for this treatment to cover the cost of preparing a report and tax.

*\$1090.00 for reassessment, physiotherapy and massage therapy*

**50** Sanjay Attwala of HealthPlus Rehab Centre submitted this treatment plan dated May 30, 2014.<sup>20</sup> It was unsigned by anyone from HealthPlus. Despite a documented medical history of back pain and strain, before and after the motor vehicle accident, the form indicated that the Applicant did not have any disease, condition or injury, acquired either before or after the accident that could affect his response to treatment.

**51** State Farm denied this treatment plan on the basis of a paper review by Dr. Marks dated June 18, 2014.<sup>21</sup> As stated earlier, Dr. Marks found no evidence of any valid diagnosis related to orthopaedic impairment. He believes the Applicant has suffered only soft tissue injuries, and that those injuries should have resolved themselves by the time Mr. Attwala had submitted this treatment plan.

**52** As stated earlier, the Applicant has a significant history of pain complaints and injury, including the workplace accident of October 24, 2013. This was either not reported to Mr. Attwala, or he chose to ignore this history. Dr. Singh's notes indicate that the Applicant's low back sprain was resolved by December 2013. The Applicant has failed to demonstrate that the motor vehicle accident materially contributed to his injuries, or to the complaints that this treatment plan intended to address.

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

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

**54** I have been provided with an unsigned copy of the above treatment plan, dated April 30, 2015<sup>22</sup> from Dr. Danmish Saini of All Health Medical. The treatment proposed included exercise, physiotherapy, education, acupuncture, massage therapy, work conditioning, a psychological treatment session and a chronic pain report.

**55** 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>23</sup> The assessors found the Applicant's physical condition and clinical status had shifted from an acute pain state to a chronic pain state.

**56** Dr. Saini was of the opinion that the Applicant was completely unable to perform his normal daily activities. Yet, the Applicant had told Dr. Marks in March 2014 that he was capable of doing most his day-to-day activities. As well, an Occupational Therapy In-Home Assessment by Sarah Tran O.T., dated August 25, 2014 noted no impairment in self-care activities. Dr. Saini also relied on the observation by Dr. Tavazzani that the Applicant would be forced to

work part-time or take early retirement because of the injuries suffered in the motor vehicle accident. In fact, there is no evidence the Applicant took any time from his employment as a result of the subject accident and by his own evidence continues to work full-time hours as of July 2016.

**57** The Applicant was assessed by Dr. Khaled, a family physician, on July 3, 2015.<sup>24</sup> Dr. Khaled states that he has significant experience with chronic pain patients. He described the Applicant's injury stemming from the accident as "an uncomplicated soft tissue injury only". He found there to be no objective evidence of ongoing accident-related impairment. Dr. Khaled was of the opinion that the Applicant had reached pre-injury status. Dr. Marks also had found that the Applicant had reached pre-injury status and that there was no objective evidence of any ongoing impairment as of March 13, 2014.<sup>25</sup>

**58** Dr. Singh found no abnormalities in his physical examination of the Applicant undertaken on June 11, 2014.<sup>26</sup>

**59** I prefer the opinions of Dr. Khaled and Dr. Marks over that of Dr. Zatzman and Dr. Saini. The report of Drs. Zatzman and Saini is seriously flawed in that it contains information that is in direct contradiction to most of the other evidence in this case, including the Applicant's oral evidence.

**60** There is no reliable evidence that the Applicant suffered or suffers from chronic pain syndrome. If the Applicant in fact has chronic pain syndrome it is much more likely than not the result of injuries suffered over the course of his employment, which is physically demanding. Those injuries are described in the WSIB documents referred to earlier.

**61** A treatment plan to treat such a disorder is neither reasonable nor necessary.

### **Special Award**

**62** 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.

**63** The Applicant argues that State Farm has unreasonably withheld payments and that its adjustment of the Applicant's file falls "well below the standard care required by Insurers in Ontario".

**64** The Applicant alleges that State Farm acted improperly in releasing a copy of the Applicant's 2008 accident benefit claims file to Dr. Gnam, without the Applicant's permission. State Farm argues that this issue was raised for the first time during the course of the hearing, that there is authority to suggest that State Farm had the Applicant's implied consent to do so and this unauthorized release does not relate to the test for a Special Award which is unreasonable withholding or delay of payment.

**65** I agree with State Farm that this action is irrelevant to the issue of a Special Award. The ultimate result of Dr. Gnam's examination was that the Applicant was taken out of the MIG and State Farm paid a substantial portion of the claimed treatment plan.

**66** The Applicant further alleges that State Farm unreasonably kept the Applicant in the MIG, despite evidence of pre-existing back pain. However, examination of the facts shows that State Farm had no medical documentation of a specific medical condition that would have interfered with the Applicant's recovery until after he was taken out of the MIG for other reasons.

**67** The only medical information State Farm had was an OCF-3 which it received December 3, 2013. In response to the question "did the Applicant have any disease, condition or injury that affected his ability to perform the activities listed in Part 6?" the answer was "Yes- MVA (4-6 years ago)". This was the only indication of any pre-existing condition, and no specifics were given as to the ongoing sequelae, if any, originating from that accident.<sup>27</sup>



**68** Dr. Singh's notes document pre-existing back pain. However those notes were not in the possession of the Applicant's counsel until July 29, 2014<sup>28</sup>, and therefore would not have been in State Farm's possession before that date. By that time, the Applicant had been removed from the MIG.

**69** Dr. Tavazzani responded 'unknown' to the OCF-18 question: "Prior to the accident, did the applicant have any disease, condition or injury that could affect the Applicant's response to treatment?"<sup>29</sup>

**70** Both Dr. Mills' treatment plan of April 15, 2014 and Mr. Attwala's treatment plan of May 13, 2014, in response to the same question, say "No".<sup>30</sup>

**71** State Farm had no medical evidence to suggest that the Applicant fell outside of the MIG until Dr. Gnam produced his report.

**72** The Applicant also argues that State Farm was remiss in failing to send Dr. Gnam's report to Dr. Marks, and thus Dr. Marks was unaware of the fact that the Applicant had been taken out of the Minor Injury Guideline when he produced two addendums, both dated September 8, 2014.<sup>31</sup> However this has no effect on State Farm's handling of the claim. Dr. Gnam, who examined the Applicant from a psychiatric perspective, opined that the Applicant had a psychiatric disorder that did not constitute "clinically associated sequelae" and therefore the Applicant's mental impairments took him outside of the MIG. Dr. Marks assessed the Applicant from a purely orthopaedic perspective and found the Applicant to have suffered only soft tissue injuries. Dr. Gnam's opinion would have no bearing on Dr. Marks' opinion. State Farm's failure to provide Dr. Gnam's report to Dr. Marks is irrelevant in the consideration of a Special Award.

**73** I find that the Applicant is not entitled to a Special Award.

### **Expenses**

**74** 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;
- (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. (Emphasis added)

**75** 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 almost entirely State Farm's.

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

**77** In its submissions, State Farm provided me with an outline of the legal costs incurred in defending this claim. State Farm claims a total of \$15,387 in legal costs at the rates prescribed by the *Expense Regulation*, \$2,000.42 for HST, and \$6,235.31 in disbursements. For the reasons that follow, I am awarding a reduced amount to State Farm.

**78** State Farm claims a total of \$3,861.19 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.

**79** I will award expenses for counsel and a law clerk's preparation and counsel's attendance at the hearing. Counsel claims 20 hours for the conduct of the hearing but in fact the hearing took place over two days and did not exceed 6 hours either day with a break for lunch. I will allow 12 hours for the conduct of the hearing. Counsel was well prepared. The issues were not complex and no expert witnesses were called. I allow 3 hours of preparation for every hour of hearing for a total of 36 hours for preparation, plus the law clerk's time as claimed for a total of \$4,252.63.

**80** With regard to the post-hearing amounts claimed, I will allow the amount claimed for correspondence and communication. Fifteen hours is a reasonable amount of time for preparation of written submissions and a Bill of Costs.

**81** With regard to disbursements, I will allow the amounts claimed for printing, process server, and travel.

**82** State Farm claims the cost of three reports by Dr. Marks, one report by Dr. Khaled and two reports by Dr. Gnam.

**83** Dr. Marks' initial report pre-dates the Application for Arbitration and was part of the ordinary adjusting of the claim. The next report, dated June 16, 2014, specifically addresses one of the treatment plans in dispute and relies to an extent on findings made in the initial report. I will allow \$500 for that report. There are two further addendum reports, both dated September 8, 2014. One specifically addressed Dr. Tavazzani's treatment plan, the other was in response to a request for further comment in light of receipt of Dr. Singh's notes. They are both brief. I would allow \$300 for each.

**84** Dr. Khaled's report was produced in response to one of the dispute treatment plans. I will allow \$750 for his report.

**85** Dr. Gnam's initial report in fact approved a portion of the psychological treatment plan claimed by the Applicant and had the effect of removing him from the MIG. I don't believe the Applicant should bear the cost of this report. His second report was in response to the treatment plan for a chronic pain program, that was ultimately denied and that I have found not to be reasonable. This is a fairly extensive report. I will allow \$1000 for that report.

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

|  |                   |            |
|--|-------------------|------------|
| Preparation for arbitration                              | \$4,252.63        |            |
| Attendance at the arbitration hearing                    | \$1,403.16        |            |
| (12 hours at \$116.93 per hour)                          |                   |            |
| Post arbitration work                                    | \$ 397.56         |            |
| Preparation of the written submissions and Bill of Costs | \$1,714.98        |            |
| TOTAL LEGAL FEES   | \$7,768.33        |            |
| H.S.T.   | <u>\$1,009.88</u> |            |
| TOTAL  |                   | \$8,778.21 |

Disbursements

|                                      |                   |                   |
|--------------------------------------|-------------------|-------------------|
| Printing, process server, etc.       | \$ 235.31         |                   |
| Dr. Marks' reports                   | \$1,100.00        |                   |
| Dr. Khaled's report                  | \$ 750.00         |                   |
| Dr. Gnam's report                    | <u>\$1,000.00</u> |                   |
| TOTAL DISBURSEMENTS                  |                   | <u>\$3,085.31</u> |
| TOTAL EXPENSES AWARDED TO STATE FARM |                   | \$11,863.52       |

November 18, 2016  
Date

Stuart J. Mutch  
Arbitrator

\* \* \* \* \*

**ARBITRATION ORDER**

**87** 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 entitled to \$300 for a psychological assessment.
2. The Applicant is entitled to interest on the above sum in accordance with the *Schedule*.
3. The remainder of the Applicant's claims are dismissed.
4. The Applicant is not entitled to a Special Award.

5. The Applicant shall forthwith pay to State Farm \$11,863.52 for its expenses.

November 17, 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 1, Tab 12
  - 3 *Vandergaag and Aviva Canada Inc.*, (FSCO A12-007924, February 1, 2016) and *Agyapong and Jevco Insurance Company* (FSCO A11-003445, January 25, 2016)
  - 4 *Arunasalam and State Farm Mutual Automobile Insurance Company* (FSCO P09-00025, March 2, 2011) paragraph 30.
  - 5 Exhibit 1, Tab 33, page 27.
  - 6 Exhibit 1, Tab 27
  - 7 Exhibit 1, Tab 33, page 23
  - 8 Exhibit 2, Tab 13A
  - 9 Exhibit 1, Tab 29, page 26
  - 10 Exhibit 1, Tab 20
  - 11 Exhibit 2, Tab 11B
  - 12 Exhibit 2, Tab 10E
  - 13 Exhibit 1, Tab 21
  - 14 Exhibit 2, Tab 9
  - 15 *Minor Injury Guideline -- Superintendent's Guideline No. 01/14*, February, 2014
  - 16 Exhibit 2, Tab 13H
  - 17 Exhibit 1, Tab 17
  - 18 Exhibit 1, Tab 18
  - 19 Exhibit 2, Tab 13(B)
  - 20 Exhibit 1, Tab 14
  - 21 Exhibit 2, Tab 13D
  - 22 Exhibit "1" Tab 24
  - 23 Exhibit 1, Tab 25
  - 24 Exhibit 2, Tab 13J
  - 25 Exhibit 2, Tab 13A
  - 26 Exhibit 1, Tab 29, page 26/38
  - 27 Exhibit 2, Tab 9
  - 28 Exhibit 1, Index and fax headline of Tab 29

**29** Exhibit 2, Tab 11B

**30** Exhibit 2, Tab 11D and Tab 11E

**31** Exhibit 2, Tab 13G and H

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