

BETWEEN:

BARBARA MARCHILDON

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION

Issues:

The Applicant, Barbara Marchildon, was injured in a motor vehicle accident on October 16, 1992. She applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company (“State Farm”), payable under the *Schedule*.¹ State Farm terminated weekly income benefits on October 16, 1995. The parties were unable to resolve their disputes through mediation, and Mrs. Marchildon applied for arbitration at the Financial Services Commission of Ontario² under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

¹The *Statutory Accident Benefits Schedule — Accidents On or Between June 22, 1990 and December 31, 1993*, Regulation 672 of R.R.O. 1990, as amended by Ontario Regulations 660/93 and 779/93.

²Effective July 1, 1998, the Ontario Insurance Commission was changed to the Financial Services Commission of Ontario, pursuant to the *Financial Services Commission of Ontario Act*, S.O. 1997, c.28.

1. Is the Applicant entitled to weekly income benefits in the amount of \$185 a week beyond October 16, 1995?
2. Is the Applicant entitled to a child care supplement beyond October 16, 1995?
3. Is the Applicant entitled to housekeeping expenses beyond October 16, 1995?
4. Is the Applicant entitled to babysitting expenses beyond October 16, 1995?

Mrs. Marchildon also claims interest on any amounts owing and her expenses incurred in the hearing.

Results:

1. The Applicant is not entitled to weekly income benefits beyond October 16, 1995.
2. The Applicant is not entitled to a child care supplement beyond October 16, 1995.
3. The Applicant is not entitled to housekeeping expenses beyond October 16, 1995.
4. The Applicant is entitled to babysitting expenses in the amount of \$164.

Preliminary Issue:

At the commencement of the hearing on Tuesday, September 22, 1998, I addressed a preliminary issue raised by the Insurer the previous Friday. The Insurer requested a stay of the proceedings until the Applicant attended an Independent Medical Examination (IME) by two specialists chosen by the Insurer. Although the Insurer had previously arranged these medical examinations in June 1998, the Applicant declined to attend, and the Insurer did not pursue the matter at that time. However, after receiving two medical reports from the Applicant's doctors on September 10, 1998, the Insurer argued that it was prejudiced by them, and required the Applicant to undergo an IME by its own medical specialists. The two reports in question, Dr. R. Chow's

report dated September 9, 1998 and that of an occupational therapist dated September 2, 1998³ directly addressed the entitlement test set out in section 13(8) of the *Schedule*.

The Insurer argued that these two reports were the first and only medical reports to directly address the Applicant's abilities, in terms of the section 13(8) test, and that it should have the opportunity to arrange an IME with its own chosen specialists.

The Applicant's counsel agreed to withdraw both reports. After further discussion, it was agreed that Dr. Chow's report of September 9, 1998 would be withdrawn in its entirety, and that Dr. Chow would not give any oral evidence with respect to the matters set out in that report. The occupational therapist's report dated September 2, 1998 remained in evidence, except for the analysis portion, which was struck from the record.

Once that evidence was withdrawn, I found, and the Insurer agreed, that the Insurer no longer required an IME. Accordingly, the hearing proceeded.

During the course of the hearing, the Applicant's counsel advised that his client was not pursuing the following claims: vocational rehabilitation assessment and retraining,⁴ moving expenses for three moves, totaling \$750, miscellaneous cleaning expenses of \$200 and \$136.52, loss of income expenses in the amount of \$752, telephone expenses in the amount of \$546, prescription expenses in the amount of \$24.20, massage therapy expenses in the amount of \$383.64, and a special award. The remaining issues in dispute are the Applicant's entitlement to weekly income benefits, child care benefits, housekeeping, and babysitting expenses after October 16, 1995.

³Dr. Chow's Report dated September 9, 1998 is marked as Exhibit 3, Tab 55, for identification only. The occupational therapist's report dated September 2, 1998, marked as Exhibit 3, Tab 54, is admitted as evidence, except the analysis section which is not part of the record.

⁴The Applicant advised that this issue was premature, as she was not yet fit to resume work, and therefore, not yet fit for vocational retraining.

Introduction:

Mrs. Marchildon was a 28-year-old married mother of a 22-month-old son at the time of the motor vehicle accident. The ambulance and hospital records indicate that Mrs. Marchildon may have struck her head, but was alert and agitated at the scene. She did not remember the details of the accident at that time. She complained of neck pain and was released from the hospital with a cervical collar.

Mrs. Marchildon was paid weekly benefits in the amount of \$185 a week under section 13(1) and a child care supplement of \$50 a week under section 13(4) of the *Schedule* for three years after the accident. She was also reimbursed for housekeeping expenses during that time. On October 16, 1995, the Insurer ceased paying weekly benefits, the child care supplement and housekeeping expenses. Mrs. Marchildon claims entitlement to ongoing weekly income benefits and housekeeping expenses.

Weekly Benefits/Child Care Supplement:⁵

The Test

During the first 156 weeks of disability, non-earners need only establish that they suffer a substantial inability to perform the essential tasks in which they would normally engage. The test for entitlement becomes more stringent after the first 156 weeks of disability.

After three years, the onus is on an applicant to establish that the injuries from the accident continuously prevent him or her from engaging in substantially all of the activities in which he or she would normally engage. This test is more stringent in two ways.

⁵The parties were in agreement that the weekly benefits and the child care supplement were both dependent on the Applicant establishing entitlement under section 13(8) of the *Schedule*.

While the pre-156 test focuses only on *essential tasks*, the post-156 test focuses on *substantially all activities* in which the insured would normally engage. Thus, an applicant must establish inability, not only with respect to his or her essential tasks, but with substantially all the activities in which he or she would normally engage. The degree of functional impairment is also stricter. Pre-156, the applicant must establish that he or she suffers a *substantial inability* to engage in the essential tasks. Post-156, the applicant must establish that he or she is *continuously prevented* from engaging in the relevant activities.

While the post-156 test is strict, it should not be read so strictly as to make it virtually impossible for anyone to qualify. In cases such as the present one, where pain is the primary factor which allegedly prevents the Applicant from engaging in her former activities, the question is not whether the Applicant can physically do these activities, but whether the degree of pain she experiences, either at the time, or subsequently, is such that she is practically prevented from engaging in those activities.

The Symptoms

For approximately two and a half years prior to the accident, Mrs. Marchildon was primarily a homemaker and a mother.⁶ Prior to that, she had worked at a variety of factory jobs. In addition, she and her husband engaged in numerous recreational activities.

Mrs. Marchildon testified that her condition has remained unchanged from October 1995 until the present.⁷ She experiences daily headaches, from morning to night. She has pain in her neck, particularly on the right side. To a lesser degree, she suffers pain in her back. She experiences

⁶Mrs. Marchildon ceased working either while she was pregnant or shortly before she became pregnant.

⁷Mrs. Marchildon testified that her condition has remained the same since at least January 1994, but the relevant period of entitlement begins in October 1995. However, the January 1994 date becomes important when the video surveillance, beginning in May 1994, is addressed.

dizziness when she gets up quickly, climbs, or looks down. She is extremely forgetful and has difficulties with concentration and organizing. She has trouble sleeping. Her condition worsens in cold or damp weather. She experiences increased sensitivity to light, requiring her to wear sunglasses outside.

Mrs. Marchildon testified that she takes medication for her headaches and pain, but that they help very little. On good days, she is able to attempt some activities, but if she overdoes it, she pays for it later. On bad days, she spends most of the day on the couch. She testified that she had more bad days than good days during the week.

There was conflicting medical evidence whether Mrs. Marchildon's complaints had a physical basis. X-rays of the cervical spine at the time of the accident indicate that Mrs. Marchildon had an osteophyte (a build-up of bone) at the C-5 level, which predated the accident.⁸ Subsequent x-rays in 1994 showed mild degenerative changes and encroachment by an osteophyte at the C-6, C-7 level.⁹ By 1995, a CT scan of the cervical spine showed some disc herniation at C-6, C-7.¹⁰ A 1998 CT scan also showed a small disc herniation at the C-4, C-5 level.¹¹

Dr. R. Chow, a specialist in Physical Medicine and Rehabilitation, testified that while degenerative changes may occur due to the aging process, premature degeneration can occur because of trauma. Dr. Chow also testified, based on two examinations in August 1997 and June 1998, that Mrs. Marchildon's symptoms were compatible with fibromyalgia. An earlier

⁸Exhibit 4, Volume 1, Tab 3, X-ray taken on October 16, 1992 showed a possible ossicle (a fragment of bone which may have broken off). A subsequent x-ray taken on October 22, 1992, (Exhibit 4, Tab 3), showed that it was an osteophyte (not broken off). The October 22, 1992 x-rays showed flexion and extension views of the cervical spine, which indicated no instability in the spine at the time.

⁹Exhibit 4, Volume 1, Tab 4, X-rays, February 21, 1994.

¹⁰Exhibit 4, Volume 1, Tab 7, CT-scan, July 14, 1995.

¹¹Exhibit 4, Volume 2, Tab 35, April 24, 1998, CT-scan.

consultation with Dr. Wilkins, proved inconclusive with respect to a diagnosis of fibromyalgia.¹² Dr. Franks, another physiatrist, reported that soft-tissue injuries can cause scar tissue development, which can lead to bone buildup, which would explain the subsequent development of osteophytes at the C-6, C-7 level.¹³ Dr. Franks also opined that Mrs. Marchildon was experiencing “instability” of the cervical spine which explained her neck pain. Dr. T. Gray, an orthopaedic surgeon, disagreed. He testified that “instability” can only be confirmed by flexion/extension x-rays, which had not been taken recently in this case.

For the purposes of this arbitration, I do not need to resolve whether the x-rays and CT-scans explain the degree of ongoing neck pain Mrs. Marchildon is experiencing. I accept that she has been experiencing neck pain since the motor vehicle accident, and that the pain is related to the accident. I am concerned, not with whether the pain can be traced to a physical finding, but with the functional limitations caused by the pain. Similarly, it is unnecessary for me to put a label, such as fibromyalgia, on Mrs. Marchildon’s symptoms.

Mrs. Marchildon began receiving counseling from Dr. S. Mason in 1994, in connection with the emotional problems she experienced after the accident. Dr. Mason noted Mrs. Marchildon’s continuing difficulties with memory, and referred her to Dr. Franks, to explore the possibility of a residual brain injury. After reviewing the results of an MRI and a SPECT scan of the brain, Dr. Franks concluded that whatever brain dysfunction Mrs. Marchildon may have experienced as a result of the accident, had resolved by May 1995.¹⁴ He noted that, if Mrs. Marchildon’s cognitive symptoms were caused by brain injury, they would have been resolving over time, rather than getting worse. Accordingly, he concluded that Mrs. Marchildon’s ongoing cognitive difficulties were secondary to her chronic pain problem and anxiety. After reviewing Dr. Franks’ conclusions,

¹²Exhibit 4, Volume 1, Tab 6, Report of Dr. K. Wilkins, October 28, 1994.

¹³Exhibit 4, Volume 2, Tab 27, Report of Dr. Franks, July 2, 1996.

¹⁴Exhibit 4, Volume 2, Tab 22, Report of Dr. Franks, May 5, 1995.

Dr. Mason concurred that whatever brain injury Mrs. Marchildon may have suffered in the accident, appeared to have resolved, and that her ongoing difficulties with memory and concentration were likely related to her chronic pain.

Again, I do not need to conclusively decide whether Mrs. Marchildon suffered a brain injury at the time of the accident. I accept that Mrs. Marchildon experiences difficulties in sleeping, concentrating, remembering, and controlling emotions, and that these symptoms after 1995 are more likely than not related to the chronic pain, which in turn was related to the motor vehicle accident.

Functional Abilities After October 1995

Mrs. Marchildon gave detailed evidence of the activities in which she is limited or prevented from engaging. With respect to her housekeeping duties, Mrs. Marchildon testified that she is effectively prevented from most cleaning chores, because of pain in the neck, difficulties bending and crouching, stretching, reaching, pushing and pulling and dizziness. She has difficulty lifting anything above minimal weights. These symptoms effectively prevent her from cleaning the kitchen cupboards, floor, oven, fridge, and the bathroom, and from washing the walls and doing laundry. She is unable to do the heavier spring cleaning. She cannot prepare large meals. All she does around the house is a little dusting and vacuuming with a lightweight vacuum for short periods of time. She also prepares light meals. Mrs. Marchildon and her husband do the laundry and the grocery shopping. Her husband does most of the cleaning, except for those periods of time¹⁵ when a hired person comes to do approximately three hours of housecleaning a week.

¹⁵Exhibit 3, Tab A sets out the dates the Applicant paid Noella Leclair or Penny Lesperance for housecleaning, approximately 3 hours per week at \$12 an hour.

Prior to the accident, Mrs. Marchildon helped fix up their previous house. She did the painting and wallpapering herself. She helped her brother with the drywall. She testified that she could not do these activities any more.

Mrs. Marchildon testified that after the accident, she was unable to use the lawnmower, because of the vibration, and was unable to do any weeding, gardening or raking.

As Mrs. Marchildon's son grew older, he was more able to take care of himself. By October 1995, he was almost five and by then Mrs. Marchildon was able to care for him, except for bathing him. She cannot, however, play strenuously with him, or push him on rides at the park. She cannot go on amusement park rides with him.

In terms of her recreational activities, Mrs. Marchildon testified that she is unable to sit and visit for longer than an hour, as this makes her uncomfortable. The family no longer entertains at Easter and Christmas because she cannot prepare large meals. Birthday parties are too noisy. She is unable to participate in cutting down the Christmas tree, or decorating parts of the tree.

Mrs. Marchildon testified that she is no longer able to drive a car for long periods, ride a snowmobile or a boat. She cannot swim, attend church, camp in a trailer, play bingo, bowl, dance, go-kart, go morel picking, preserve fruits and vegetables, clean the car, fix the automobile and work on small appliances. Although she can still use a camera, she is unable to crouch to take pictures. She can use her computer, but for no longer than half an hour to an hour. She can play darts up to half an hour, and play two or three hands of cards. She can bike, but not more than a few blocks. She can play the guitar for a short time. She cannot enjoy winter events, because she cannot stand outside in cold weather, and she cannot enjoy summer events, because she cannot endure the strain.

Two of Mrs. Marchildon's friends, Donna Lesperance and Tanya Lacelle, testified that prior to the accident, they engaged in activities such as walking, fishing, singing, dancing and shopping with Mrs. Marchildon, but that since the accident, they have not engaged in any of those activities. They also confirmed that when they visited Mrs. Marchildon, she appeared to be in pain. Mr. Marchildon also confirmed that his wife was very limited in her activities since the accident, on account of pain.

I accept that Mrs. Marchildon continues to experience headaches and pain in her neck and back from October 1995 until the present. I also accept that she has some difficulties with sleeping, and problems with her memory, concentration and organization, which are all probably related to her ongoing pain. However, I do not accept her evidence that her physical pain and cognitive difficulties continuously prevent her from engaging in substantially all of her normal activities.

Video Surveillance

Mrs. Marchildon's oral testimony about her physical abilities is in stark contrast to video surveillance evidence taken on five separate occasions over four years.

May 1994

On Thursday, May 12, 1994, Mrs. Marchildon was out from approximately 9:00 a.m. to 4:30 p.m. She drove to do some errands. She ran into a store and ran back out. Then, she drove around "garbage picking." Mrs. Marchildon explained that in that week the community left unwanted items at the curb, which others were free to pick up. Mrs. Marchildon stopped frequently to get out of the car to look over items left at the curb. She frequently bent over items and remained bent over for some time while inspecting them. She lifted up items with both hands to inspect them. She picked up a child's desk, with a chair attached and maneuvered it into the trunk of her car. She picked up a tall clothes rack and placed it in the car. Later than day, she engaged in a cleanup of her own home, throwing items of garbage over a waist-high porch rail

into the yard. Then she gathered the items and put them in a garbage bag which she placed on the curb. That same afternoon, she jumped over her porch and ran to help her husband and another man push a vehicle parked in their driveway. After this, she went out again with her husband to look for more items, stopping to get out of the car and bending over to look at items. At one point, she leaned over a mattress and tried to unwind the legs from it. She returned home around 4:30 p.m.

On Friday, May 13, 1994, Mrs. Marchildon left her house at 10:00 a.m., and drove around doing errands. She ran to and from her car. She and a friend drove around again, looking at items at the curb. At one point, Mrs. Marchildon picked up a lady's bike and lifted it into her car trunk. When they returned home near noon, she unloaded the bike, crouched down at it for awhile, and rode the bike briefly. Mrs. Marchildon then stayed around her home, walked to the store at 3:20 p.m. and then entered her house.

February 1995

On Friday, February 17, 1995, Mrs. Marchildon went for a short walk at 10:00 a.m. She drove to the doctor's, and returned home by 11:20 a.m. While driving, she turned her neck quickly in both directions, while backing up. She then walked up the road to meet her son's school bus. At around noon, Mr. Marchildon fetched Mrs. Marchildon and they went to Barrie. They stopped briefly at "Toys R Us" and entered the store. Mrs. Marchildon went to the Columbia Health Care Centre at 1:00 o'clock. Shortly before 3:00 p.m., Mr. Marchildon picked Mrs. Marchildon up and they began the trip home. They stopped a couple of times for brief errands, and Mrs. Marchildon got in and out of the car easily. They stopped and visited someone for half an hour. Mrs. Marchildon drove a short way home and they arrived at 4:30 p.m.

On Wednesday, February 22, 1995, Mrs. Marchildon drove her son to school at 8:30 a.m. On the way back, she stopped briefly at a store and at a private residence. She returned home and ran inside. She returned to the store. She turned her head and neck back and forth quickly while backing up. Later that morning, she stood outside observing someone installing a dryer vent, going into and out of the house to get things. Next, she drove to do an errand, running back and forth to her car. After picking up her son at 11:45 a.m., Mrs. Marchildon returned home.

On Thursday, February 23, 1995, Mrs. Marchildon walked her son to the bus stop at 8:30 a.m. and went home. She had visitors that morning. At 11:00 a.m., Mrs. Marchildon walked to the post office and back. She walked with a slight limp. While waiting for her son at the bus stop from 11:38 a.m. to 11:49 a.m., Mrs. Marchildon walked around, raised her arms, looked down, flexing her neck without any apparent dizziness. When her son arrived, she bent down to give him a kiss. They ran part of the way home. At 1:23 p.m. Mrs. Marchildon went out with her son, left him with someone, and drove to the Huronia Medical Centre. She came out an hour later, walking with a slight limp. She picked up her son, visited for half an hour or so, and arrived home around 3:37 p.m. She and her son remained on the porch for approximately 20 minutes. Mrs. Marchildon leaned on the porch rail. Her son was shovelling snow and ice off the porch. Mrs. Marchildon helped occasionally, and kicked at the snow and ice. The surveillance ended at 4:11 p.m.

August 1995

On Thursday, August 17, 1995 Mrs. Marchildon was up and dressed by 9.34 a.m.. She carried a plastic laundry basket to the front porch. Visitors arrived at 10:00 a.m. Mrs. Marchildon walked to the post office and back. Her visitors left after noon. At one o'clock, Mrs. Marchildon drove her son to a private home and left him there. She then drove to the Huronia Medical Centre by 1:30 p.m and returned at 2:19 p.m. While backing up, she turned her head and neck several times. She reversed for some distance, with her body twisting around and her arm over the front seat.

She stopped on errands a couple of times, went to pick up her child and returned home by 2:51 p.m.

On Friday, August 18, 1995, Mrs. Marchildon came out of the house at 11:00 a.m., to speak to a visitor. She walked to the post office and back, walked to a nearby store, and then picked up her car from a garage across the street. She left her house at noon with her son and drove to the mall in Midland. She shopped for clothes with her son. She finished shopping at 12:40 p.m. She stopped to do an errand on the way home. She drove home, and then left again with her son to go to a private residence, where she stayed for approximately half an hour. She returned home and stayed inside after 1:30 p.m.

July and August 1997

On Thursday July 31, 1997, Mrs. Marchildon left the house at 9:30 a.m. with her son. She drove to the Veterinary Hospital. While backing out, she turned her head and neck frequently. She returned home at 10:00 a.m. When she and her husband went out again, Mrs. Marchildon did the driving. They were at the insurance broker's office for an hour. Again, Mrs. Marchildon backed out, turning her head and neck frequently. She drove to her lawyer's office. She drove the return trip home, arriving at 12:22 p.m. Near one o'clock, she came out of her house to speak with some visitors for a few minutes. She remained inside for the rest of the day.

On Friday, August 1, 1997, Mrs. Marchildon drove to a friend's residence and spent an hour there. Then she drove to the Veterinary Hospital and stopped at other stores. She ran in and out of the car to the stores. She turned her head and neck frequently while backing out. She drove to her friend's home at 10:49 a.m. and stayed till 1:18 p.m. After returning home, she stayed home for the rest of the afternoon.

July 1998

On Canada Day, July 1, 1998, Mrs. Marchildon went out at 10:00a.m. with her husband and son. She reversed the car and drove to a friend's house where they remained until after noon. She drove the family to a park in Midland where Canada Day celebrations were underway. At 3:30 p.m. she was drinking in the beer tent. Throughout the afternoon, Mrs. Marchildon moved about easily, walking, moving her arms and shoulders. She frequently bent over and crouched down to talk with young children. She lifted a baby approximately 11 months old and carried the child while swaying to the music. She sat on the ground for awhile with a child of six or so in her lap. She lifted the child up to rearrange herself and reposition the child, arching her back with the full weight of the child on her. At one point, she scrambled underneath a tent flap and out the other side, and run up a hill. She later ducked under a fence into the beer tent. While listening to music at the bandstand, she and her husband began a jive dance for two minutes, during which time he spun her around three times. At various times, she reached up to hug people. She left the park at 7:00 p.m.¹⁶

On July 2, 1998, Mrs. Marchildon was seen driving at 9:30 a.m. She was found by the investigator at a friend's house at around 11:15 a.m. that morning, wearing a bathing suit. She bent over from the waist and pulled up some weeds. She picked up a garden hoe and pulled at the ground strenuously for a few minutes. Surveillance was discontinued when the investigator was spotted by a neighbor.

Apart from a few occasions when Mrs. Marchildon pointed out that she was biting her lip or otherwise manifesting pain, I did not see any evidence that she was experiencing pain while doing

¹⁶Mrs. Marchildon explained that she was drinking on July 1, 1998 and this explained the fluidity of her movements and the fact that she was able to do things she wouldn't normally attempt. While I accept that the alcohol may have caused her to attempt certain manoeuvres she might not have attempted, I am not convinced that the alcohol would have completely masked the pain.

the activities depicted in the surveillance. There was no evidence of any dizziness. There was an indication that Mrs. Marchildon was walking stiffly on some occasions, which I interpret as a confirmation of pain in the back. However, the pain did not prevent her from engaging in the activity depicted on the video. Also, on one occasion, Mrs. Marchildon entered her car stiffly, guarding her back. I accept this as confirmation of pain in the lower back. However, on numerous other occasions she moved easily in and out of the car, and drove frequently. I conclude that the pain depicted in that one scene did not continuously prevent her from engaging in driving or other activities.

On each occasion, surveillance was undertaken over at least two days, which indicates to me that the physical activities Mrs. Marchildon engaged in on the first day did not cause a subsequent onset of pain sufficient to keep her housebound, or on the couch the next day. Therefore, I conclude that the activities seen on the surveillance are an accurate representation of Mrs. Marchildon's abilities.

Conclusions:

I find that Mrs. Marchildon's own evidence is not reliable with respect to her functional capabilities. From a physical standpoint, the video surveillance establishes that she is able to do many activities without significant dizziness or pain. She is able to move her neck freely in both directions. She is able to get in and out of an automobile easily and drive independently. She is able to walk and even run to do errands. She is able to bend over for several minutes. She can crouch and squat. She is able to pick up items of more than minimal weight and size and carry them. She is able to reach above her head and in front of her. She is able to push and pull with some strength. She is up and about on most days at least two to three hours and frequently for seven or eight hours.

Based on the above capabilities, I find that Mrs. Marchildon is functionally capable of carrying out many of her normal activities. She is capable of taking care of herself and her son. She is able to perform ordinary daily housekeeping activities such as cleaning the house, cooking, grocery shopping, doing laundry and some yardwork. She is capable of engaging in some recreational activities such as photography, computers, card and board games, darts, biking, camping, fishing, playing bingo, playing the guitar, dancing, socializing, and attending church.¹⁷

It is unnecessary for me to determine whether she is capable of engaging in some of the more strenuous housekeeping or recreational activities she used to engage in such as drywalling, bowling, boating, snowmobiling and gokarting. Since Mrs. Marchildon's *primary* activities prior to the accident were housekeeping and child care, and since I have found that she is not continuously prevented from engaging in these activities, or in many recreational activities, I conclude that she has not established that she is continuously prevented, physically, from substantially all of her normal activities.

While Mrs. Marchildon may experience "bad days" when she is in such pain that she cannot effectively carry out her household or other activities, I do not find that she is *continuously* prevented from performing those activities.

From an emotional standpoint, I accept the documented evidence of Dr. Mason, Mrs. Marchildon's psychologist, that by May 1995, her sleep was disturbed on only a few occasions, otherwise she tended to sleep 6 to 7 hours a night.¹⁸ By the same date, Dr. Mason also reported that Mrs. Marchildon's physical symptoms were the primary problem, that her problems with

¹⁷My conclusion about Mrs. Marchildon's capacities was confirmed by Dr. Woods' oral evidence. Dr. Woods, Mrs. Marchildon's family physician for many years, confirmed that he saw Mrs. Marchildon every six weeks and that his impression was that she was not continuously impaired, but that she had flare-ups caused by overexertion.

¹⁸Exhibit 4, Volume 1, Tab 16, Report of Dr. S. Mason, May 23, 1995.

memory and concentration had subsided, and that her level of depression had decreased.¹⁹ Her lack of significant attention, concentration or memory problems was confirmed by Dr. G. Kumchy in November 1996.²⁰

While I accept Mrs. Marchildon's evidence, confirmed by her husband and friends, that she experiences some ongoing problems with her memory, attention and concentration, as well as her difficulties sleeping, I do not find that they are severe enough to continuously prevent her from engaging in substantially all of her normal activities.

Housekeeping Expenses

The expenses submitted by Mrs. Marchildon relate to three hours a week for basic housekeeping assistance. In light of my conclusion that Mrs. Marchildon was capable of performing ordinary daily housekeeping duties, I find that the housekeeping services are not required because of the accident.

Babysitting Expenses

Donna Lesperance testified that since July 1998, she provided babysitting services to the Marchildon family when Mrs. Marchildon was unable to cope with the pain. I accept that Mrs. Marchildon had occasions when she experienced pain severe enough to interfere with her ability to care for her son. The Insurer did not dispute the dates that babysitting was provided. Accordingly, babysitting expenses in the amount of \$164 are payable.

¹⁹Exhibit 4, Volume 1, Tab 16, Rehabilitation Management Inc., Minutes of Meeting May 5, 1995.

²⁰Exhibit 4, Volume 2, Tab 51, Report of Dr. G. Kumchy, November 14, 1995.

Expenses:

The parties may make submissions on expenses, within three weeks of the date of this decision.

Order:

1. The Insurer is ordered to pay the Applicant \$164 in babysitting expenses.

M. Kaye Joachim
Arbitrator

November 3, 1998

Date

Hearing:

The hearing was held at the Great Hall of the Penetanguishene Centennial Museum in Penetanguishene, Ontario, on September 22, 23, 24 and 25 before me, M. Kaye Joachim, Arbitrator.

Present at the Hearing:

Applicant: Barbara Marchildon

Applicant's
Counsel: : Mr. David Morin
Barrister and Solicitor

State Farm's
Counsel: Mr. David Zarek
Barrister and Solicitor

Insurer's
Representative: Tracey Dunsmore

Court Reporters: Lynne Zinn, Bennie Billawey, Banarie Van Greene
Legal Reporting Services

Witnesses: Barbara Marchildon, the Applicant
Dr. D. Woods
Dr. R. Chow
Dr. S. Mason
Donna Lesperance, friend of the Applicant
Allan Marchildon, husband of the Applicant
Chris Pajor, adjuster
Dr. Trevor Gray
Tanya Lacelle, friend of the Applicant
Roma McGlasson

Exhibits: Six exhibits were filed at the hearing.

**MARCHILDON and STATE FARM
FSCO A97-000643**

Appendix

Hearing:

The hearing was held in Centennial Museum, Penetanguishene, Ontario, on September 22, 23, 24 and 25, 1998, before me, M. Kaye Joachim, Arbitrator.

Present at the Hearing:

Applicant: Barbara Marchildon

Mrs. Marchildon's
Representative: David A. Morin
Barrister and Solicitor

Trace Dunsmore
Law Clerk

State Farm's
Representative: David Zarek
Barrister and Solicitor

State Farm's
Officer: Chris Pajor

Court Reporters: Lynne Zinn, Bonnie Billawey and Bonnie VanGeene
Legal Reporting Services

Witnesses: Mrs. Barbara Marchildon, Applicant
Mr. Allan Marchildon, Applicant's husband
Ms. Donna Lesperance

Ms. Tanya Lacelle
Dr. D. Woods
Dr. R. Chow
Dr. S. Mason
Mr. Chris Pajor, Adjuster
Dr. T. Grey
Ms. Rona McGlasson

Exhibits: Six exhibits were filed