Dispute Resolution Services

Services de règlement des différends

Ontario

FSCO A08-001142
and A13-013397

BETWEEN:

SUBASHINI YOGESVARAN

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Isabel Stramwasser

Heard: In person on November 19, 20, 21 and 22, 2012; July 10, 11, 13, 17, 18, 19 and 20, 2017; September 11, 12, 13 and 14, 2017; January 8, 9 and 11, 2018; and, February 23, 2018 at the offices of the Financial Services Commission of Ontario in Toronto. Written submissions filed May 15, July 27 and September 13, 2018 and May 10, 21, 25 and 28, 2020.

Appearances: David S. Wilson for Ms. Yogesvaran
Jonathan Schrieder for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Subashini Yogesvaran, was injured in a motor vehicle accident on May 13, 2007. She applied for, and received, statutory accident benefits from State Farm pursuant to the *Schedule* (also known as the *SABS*).[1] In particular, State Farm paid weekly income replacement benefits until January 16, 2008 and housekeeping benefits until January 2, 2008.

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

Ms. Yogesvaran sought ongoing income replacement and housekeeping benefits. The parties were unable to resolve this dispute at mediation and, in May 2008, Ms. Yogesvaran applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

At arbitration in 2009, Ms. Yogesvaran raised a preliminary issue about State Farm's improper termination of income replacement and housekeeping benefits under section 37 of the *Schedule*, which resulted in an order that State Farm resume those benefits. Specifically, on November 26, 2009, Arbitrator Miller ordered:

> State Farm shall pay Mrs. Yogesvaran an income replacement benefit from January 17, 2008 and ongoing until the benefits are terminated in accordance with section 37 of the *Schedule*. In addition, State Farm shall pay housekeeping benefits from January 3, 2008 to May 13, 2009.

To be clear, the arbitrator did not consider Ms. Yogesvaran's entitlement to those benefits, but awarded them on a technicality. The order to resume Ms. Yogesvaran's income replacement benefits was based on State Farm's failure to comply with the technical requirements of section 37. It was not based on Ms. Yogesvaran's entitlement.

Arbitrator Miller's decision was upheld on appeal with the caveat that it was an interim order, subject to a final determination of entitlement at an arbitration hearing. Ms. Yogesvaran was still required to prove her entitlement to the benefits in dispute according to the legislated criteria of eligibility. Specifically, Director's Delegate Blackman ordered the following:

> The November 26, 2009 arbitration decision is varied by adding the following paragraph to the Arbitrator's order:
>
> The above orders are interim. This matter shall proceed to an arbitration hearing to determine the Respondent's final entitlement to this award.

The arbitration was scheduled to resume in 2011, but did not proceed because State Farm applied to vary the appeal order and required that Ms. Yogesvaran attend medical evaluations. An arbitrator dismissed that request for more medical information.

Arbitrator Miller heard the arbitration in 2012. However, after four days of hearing, the parties required more time. Arbitrator Miller retired before completing the arbitration. It was decided that the matter be heard *de novo*.

After a period of delay owing to interim motions and the schedules of counsel, the matter proceeded before Arbitrator Mervin in 2017 and 2018. By that time, Ms. Yogesvaran had added new issues, including a determination that she was catastrophically impaired. The oral hearing before Arbitrator Mervin took 15 days. The parties then made written submissions closing in September 2018. Arbitrator Mervin passed away in July 2019 before rendering a decision.

I was subsequently assigned to hear the matter. The parties argued about whether to have a third oral hearing before me as the third arbitrator to hear the matter. In a decision dated November 29, 2019, I held that the matter would proceed on the record.

After reviewing the material, I asked the parties for submissions on credibility, statutory entitlement, special award and expenses. They provided these submissions in May 2020.

Accordingly, these are the issues I must decide:

1. Is State Farm liable to pay Ms. Yogesvaran income replacement benefits in the amount of $360.50 per week from January 16, 2008 to date and ongoing?

2. Is State Farm liable to pay for Ms. Yogesvaran's assessment of catastrophic impairment by Omega Medical Associates dated July 7, 2015 in the amount of $13,786.00?

3. Is Ms. Yogesvaran catastrophically impaired as a result of the accident?

4. Is State Farm liable to pay Ms. Yogesvaran a housekeeping benefit in the amount of $100.00 per week from May 13, 2009[2] to date and ongoing?

5. Is State Farm liable to pay interest on the overdue payment of benefits?

6. Is State Farm liable to pay a special award, pursuant to subsection 282(10) of the *Insurance Act*, because it unreasonably withheld or delayed payments to Ms. Yogesvaran, namely:

   a. The housekeeping benefits in dispute after May 13, 2009;

   b. The medical benefits and assessments as set out in the order of Arbitrator Miller on January 23, 2013; and,

   c. The Omega assessment in dispute in the amount of $13,786.00.

7. Is one party liable for the other party's expenses of this arbitration?

Result:

1. State Farm is not liable to pay Ms. Yogesvaran an income replacement benefit after January 16, 2008.

2. State Farm is not liable to pay for Ms. Yogesvaran's assessment of catastrophic impairment by Omega Medical Associates dated July 7, 2015 in the amount of $13,786.00.

[2]At the arbitration hearings before Arbitrator Mervin in 2017 and 2018 and in their written submissions in 2018, both parties agreed that the issue was housekeeping benefits from the two-year mark (May 13, 2009). The transcripts show that the applicant only testified about housekeeping from May 13, 2009 precisely because the parties agreed that benefits before the two-year mark were not at issue. However, the appeal of Delegate Blackman had previously ordered that the award of housekeeping benefits from January 3, 2008 to May 13, 2009 was an interim award and that "[t]his matter shall proceed to an arbitration hearing to determine the Respondent's final entitlement to this award." I noted this discrepancy in mid-June 2020, two weeks before our tribunal was scheduled to close. Consequently, I did not ask the parties to reopen the hearing to give evidence and argument on this narrow issue. I leave it to them to bring the matter to arbitration at the Licence Appeal Tribunal if they wish.

3. Ms. Yogesvaran is not catastrophically impaired as a result of the accident.

4. State Farm is not liable to pay Ms. Yogesvaran a housekeeping benefit in the amount of $100.00 per week from May 13, 2009 to date and ongoing.

5. State Farm is not liable to pay any interest because there are no overdue benefits.

6. State Farm is not liable to pay a special award because it did not unreasonably withhold or delay the payment of any benefits in dispute.

7. Ms. Yogesvaran is liable to pay State Farm's expenses of this arbitration in the amount of $40,000.00, which includes all fees, taxes and disbursements.

REASONS:

Positions of the Parties

The case for Ms. Yogesvaran on each of the issues in dispute appears to be the following:

1. Ms. Yogesvaran appears to argue that she is entitled to income replacement benefits in the amount of $360.50 per week from January 17, 2008 to date and ongoing for the following reasons:

    a. She has cognitive limitations due to the accident.

    b. She has only ever done heavy labour as an office cleaner and can no longer do that work as a result of the accident.

    c. She does not have the skills, training or education to do lighter or sedentary work.

d. She is catastrophically impaired as a result of the accident, which prevents her from doing any kind of work.

2. She argues that she is entitled to the catastrophic impairment assessment recommended by Omega Medical Associates on July 7, 2015 in the amount of $13,786.00 because she is entitled to a rebuttal report under section 42(1) of the *1996 Schedule* with no cap or limit on the cost of that report and the report supports her claim for a catastrophic designation.

   In the alternative, if the Tribunal finds that there is no statutory entitlement to a rebuttal report, then she seeks $2,000 plus GST for each of the four reports recommended by Omega Medical Associates on July 7, 2015 plus the cost of the OCF-18 that recommended those four reports on the basis that these were reasonable and necessary and that State Farm provided no reason for denying them.

3. Ms. Yogesvaran appears to argue that she is catastrophically impaired as a result of the accident based on the opinion of Dr. Dory Becker that she has a marked impairment with respect to concentration, as well as other evidence.

4. Ms. Yogesvaran is entitled to a housekeeping benefit in the amount of $100.00 per week from May 13, 2009 to date and ongoing because she is catastrophically impaired. Further, she performed these housekeeping duties before and shortly after the accident, but is no longer able to do so as a result of the accident. At least one of her two children has provided housekeeping services for her.

5. She is entitled to interest on the overdue payment of benefits.

6. She is entitled to a special award for the following reasons:

   a. The evidence overwhelmingly supports the payment of housekeeping benefits after May 13, 2009.

b. State Farm agreed in writing to pay for medical benefits and assessments, but failed to do so until required by order of Arbitrator Miller on January 23, 2013.

c. State Farm provided no reason for denying the Omega assessment in the amount of $13,786.00. The applicable version of section 42(1) of the *Schedule* set no limit on fees for rebuttal reports that assessed a catastrophic impairment. The assessment was reasonable and necessary because it supports her claim for a catastrophic designation.

The case for State Farm is that Ms. Yogesvaran failed to provide the basic reliable evidence to meet her burden of proof. She was not a credible witness – her evidence was evasive and deliberately false. In addition, she was not a reliable witness – there were numerous inconsistencies, errors and inaccuracies in her testimony. Anything she said to a health professional or third party is unreliable. Her claims are belied by repeated failures on validity tests and surveillance video that shows her living a normal life. State Farm also puts causation at issue, citing the applicant's numerous serious other health issues.

Law

It is trite law that the burden of proof rests with the claimant. Accordingly, Ms. Yogesvaran must prove each of her claims on a balance of probabilities.

Credibility

In assessing whether Ms. Yogesvaran has met her burden of proof, I must assess her credibility as an interested witness in these proceedings.

The leading case on credibility is *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.). That case held that a witness' demeanour on the stand is not the only factor in assessing credibility. The case set out the proper approach to assessing the truthfulness of testimony at 356-357:

> …[T]he validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted …these things are elements in testing

> the evidence but they, are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time …
>
> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility … A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
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> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case. …

For ease of reference, the *Faryna* case identifies seven factors for assessing credibility:

1. Demeanour

2. Plausibility

3. Opportunities for knowledge

4. Powers of observation

5. Judgment

6. Memory

7. Ability to describe clearly what is seen and heard

I keep in mind the rule in *Faryna and Chorney* that the "real test" of the witness' story "must be" whether it is in accordance with the preponderance of probabilities of the case as a whole.

Income replacement benefits

Given that the date of Ms. Yogesvaran's car accident was May 13, 2007, the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996* applies and, in particular, the historical version in force between February 1, 2007 and July 2, 2007. That version sets out the rules for income replacement benefits in sections 4 through 11.

In brief, sections 4(1) and 5(1) provide that an insurer is liable to pay income replacement benefits for the first two years after the accident where the injured person has a "substantial inability to perform the essential tasks of the employment" as a result of the accident.

That test changes at the two-year mark. After two years, an insurer is liable to pay income replacement benefits if the insured person has a "complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience" as a result of the accident (section 5(2)).

Assessment

The law on assessments changed with the introduction of the new *Schedule* in 2010.

A Bulletin from the Financial Services Commission of Ontario on the transition from the 1994 to the 2010 rules is helpful for clearly explaining the change.[3] The Bulletin describes accidents that took place before 2010 as "old accidents":

> "Old accidents" are defined as automobile accidents occurring on or after November 1, 1996 and before September 1, 2010.

Ms. Yogesvaran's car accident occurred on May 13, 2007. It is therefore an "old accident." The Bulletin further explains that the new *Schedule* will govern most claims processing and most calculations of amounts payable to establish benefit entitlements.

> As of September 1, 2010, as a general rule the New SABS will govern claims processing relating to old accidents and the determination of amounts payable by insurers on account of expenses paid to establish benefit entitlements arising out of old accidents (Old SABS ss. 3(1.2), (1.5) and (1.6); New SABS s. 2(2)).

In particular, the Bulletin clarifies that there is no longer an entitlement to rebuttal assessments:

> Section 42.1 of the Old SABS concerning rebuttal assessments does not apply after August 31, 2010 (Old SABS s. 3 (1.2)).

In other words, there is no statutory entitlement to a rebuttal assessment after August 31, 2010, regardless of the date of the car accident. Instead, claims for rebuttal assessments are assessed on the merits, according to whether they are reasonable and necessary.

[3] "Transition to the New *Statutory Accidents Benefits Schedule* - Effective September 1, 2010," Bulletin A-04/10 - Auto Property & Casualty, by Philip Howell, Chief Executive Officer and Superintendent of Financial Services (April 26, 2010), available online at: http://www.fsco.gov.on.ca/en/auto/autobulletins/2010/Pages/a-04_10.aspx

The relevant version of the *Schedule* is the one in force between January 1, 2015 and March 3, 2016. Subsection 25(1)5 of that historical version provides that an insurer "shall pay" the "reasonable fees" of a catastrophic impairment assessment. Further, subsection 25(5) specifies that the maximum allowable amount is $2,000.00 per assessment.

Catastrophic impairment

In determining the legal requirements for a finding of catastrophic impairment, I have had regard to the version of the *Schedule* in force on May 13, 2007, the date of Ms. Yogesvaran's accident, namely the historical version for the period February 1, 2007 to July 2, 2007.

Subsection 2(2.1) of that version of the *Schedule* defines "catastrophic impairment":

> (1.2) For the purposes of this Regulation, a catastrophic impairment caused by an accident that occurs after September 30, 2003 is,
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> (a) paraplegia or quadriplegia;
>
> (b) the amputation or other impairment causing the total and permanent loss of use of both arms or both legs;
>
> (c) the amputation or other impairment causing the total and permanent loss of use of one or both arms and one or both legs;
>
> (d) the total loss of vision in both eyes;
>
> (e) subject to subsection (1.4), brain impairment that, in respect of an accident, results in,
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> (i) a score of 9 or less on the Glasgow Coma Scale, as published in Jennett, B. and Teasdale, G., *Management of Head Injuries*, Contemporary Neurology Series, Volume 20, F.A. Davis Company, Philadelphia, 1981, according to a test administered within a reasonable period of time after the accident by a person trained for that purpose, or
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> (ii) a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale, as published in Jennett, B. and Bond, M., *Assessment of Outcome After Severe Brain Damage*, Lancet i:480,

1975, according to a test administered more than six months after the accident by a person trained for that purpose;

(f) subject to subsections (1.4), (2.1) and (3), an impairment or combination of impairments that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in 55 per cent or more impairment of the whole person; or

(g) subject to subsections (1.4), (2.1) and (3), an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder. O. Reg. 281/03, s. 1 (5).

Housekeeping benefits

In determining the legal entitlement to housekeeping benefits, I have had regard to the version of the *Schedule* in force on May 13, 2007, the date of Ms. Yogesvaran's accident, namely the historical version for the period February 1, 2007 to July 2, 2007.

Under subsection 22(4) of that version of the *Schedule*, an insurer is liable to pay a benefit for housekeeping and home maintenance in the amount of $100.00 per week more than 104 weeks after the onset of the disability where the insured person is catastrophically impaired as a result of the accident.

Interest

In determining what version of the statute governs the issue of interest on overdue benefits, I have had regard to the historical version of the *Schedule* for the period February 1, 2007 to July 2, 2007 in force at the date of the subject accident.

The relevant section provides that interest is payable on overdue benefits at the rate of 2% per month, compounded monthly.

> 46(1) An amount payable in respect of a benefit is overdue if the insurer fails to pay the benefit within the time required under this Part. O. Reg. 403/96, s. 46 (1).
>
> (2) If payment of a benefit under this Regulation is overdue, the insurer shall pay interest on the overdue amount for each day the amount is overdue from the date the amount became overdue at the rate of 2 per cent per month compounded monthly. O. Reg. 403/96, s. 46 (2).

There is no discretion regarding whether to award this interest. Section 46 states that "the insurer shall pay interest" on the overdue amount. If there is an overdue payment, then interest is payable.

Special award

An arbitrator "shall" order a special award upon finding that the insurer has unreasonably withheld or delayed payments. There is no discretion. Subsection 282(10) of the *Insurance Act* reads as follows:

> If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*. R.S.O. 1990, c. I.8, s. 282 (10); 1993, c. 10, s. 1.

Under this provision, I am obligated to award Ms. Federico a special lump sum payment if I find that State Farm "unreasonably withheld or delayed payments" of benefits.

The first case on a special award, *Erickson and The Guarantee Company of North America* (OIC A-000560, June 2, 1992, per Senior Arbitrator Rotter) adopted the definition of "unreasonable" from the *Oxford English Dictionary*, at pages 8-9:

1. Going beyond the limits of what is reasonable or equitable;
2. Not guided by or listening to reason.

In the context of accident benefits, reasonableness demands that an insurer "make every effort" to re-consider the insured person's claim before proceeding with litigation:

> A reasonable insurer would satisfy itself that its position was still correct, and make every effort to evaluate the merits of the insured's position before proceeding to a hearing (*Erickson* at page 11).

The type of conduct that is deemed unreasonable includes conduct that is "excessive, imprudent, stubborn, inflexible, unyielding or immoderate": *Plowright and Wellington Insurance Company* (OIC A-003985: October 29, 1993, per Arbitrator Palmer at page 17).

In *Melchiorre and Wawanesa Mutual Insurance Company* (A05-000491 and A05-000492, December 22, 2006, at page 25), Arbitrator Feldman provided examples of the insurer's duty to act in a reasonable and fair manner when responding to a claim for accident benefits:

> ...
>
> - Approach the claim with an open mind, treating the insured person in a fair manner and not as a potential adversary;
>
> - Carefully consider all of the available information, giving appropriate weight to that information in a fair and even-handed manner;
>
> …
>
> - reassess the validity of the claim as new information is received.

The proper approach to special awards under s. 282(10) of the *Insurance Act* is set out in the appeal decision of *Liberty Mutual Insurance Company and Persofsky* (FSCO P00-00041, January 31, 2003, at pages 17-18), per Director Draper, as follows:

1. Determine the benefits owing to the insured person, including interest calculated under the applicable version of the *SABS;*

2. Decide whether the insurer unreasonably withheld or delayed the payment of these benefits. If so, the insurer will be ordered to pay a lump sum amount in addition to the benefits and interest calculated in #1;

3. If the insurer did not act unreasonably in respect of all the benefits owing under #1, determine the amount of the benefits that were unreasonably withheld or delayed, and the interest payable on these benefits under the applicable version of the SABS.

4. Determine the maximum special award that can be awarded under s. 282(10), or at least a reasonable approximation. This is done by taking the amount in #1 or #3, whichever is applicable, and adding the additional interest component in s. 282(10) -- two per cent per month, compounded monthly. To be clear, this calculation includes interest on the unpaid SABS interest. The maximum special award is 50 per cent of this total.

   Expressed as a formula, the calculation is as follows:

   Maximum special award = 50% x (benefits that were unreasonably withheld or delayed + interest on these benefits calculated under the SABS + compound interest calculated according to s. 282(10))

5. Consider all relevant factors (discussed below) to determine an appropriate lump sum special award, not a percentage, that responds to the facts of the case and bears a reasonable relationship to other special awards, and does not exceed the maximum.

6. Provide reasons for concluding that the special award is payable, and for the amount of the award.

7. In the order, express the special award as a specific, lump sum amount. No interest is payable on this amount, except as part of the enforcement process.

Analysis

Background findings of fact

I make the following findings to provide context. I consider these findings uncontroversial. I also find that the evidence supports these findings on a balance of probabilities. State Farm did not necessarily accept the following and, in respect of some matters, suggested otherwise to the applicant on cross-examination. However, State Farm did not raise plausible questions about the following, nor did it lead evidence to dispute it.

Ms. Yogesvaran was born on July 2, 1972 in Sri Lanka. She completed her schooling up to Grade 12. She was married at the age of about 18 in 1990 and had three children. She never worked in Sri Lanka.

The family emigrated to Canada in 2004, approximately three years before the subject car accident.

English is not Ms. Yogesvaran's first language. She studied English for one year after moving to Canada and then stopped. She required a Tamil interpreter at the arbitration hearing.

Ms. Yogesvaran was employed for about four and a half months in Canada before the accident. She worked as an office cleaner at a company for three months in 2006. Then, later on, after a gap of numerous months where she was not employed, she worked as an office cleaner at a different company, named Twins, for six weeks immediately preceding the accident in May 2007.

Medical records prior to the accident show that Ms. Yogesvaran had pre-existing health problems, namely:

- Gynecological issues for which she was seeing a gynecologist for years before the accident
- Knee pain for about a month from December 2006 to January 2007
- Very severe abdominal pain in March 2007
- Shoulder pain for about two weeks in April-May 2007

The car accident occurred in a parking lot in the middle of the day on May 13, 2007. Ms. Yogesvaran was driving with her two children. Another vehicle backed out of a parking spot from her left and hit the front left corner of her car.

Two days after the car accident, Ms. Yogesvaran attended at her family doctor and complained of neck and back pain.

A few months after the accident, Ms. Yogesvaran worked in a factory for about three weeks doing assembly line work.

Ms. Yogesvaran had serious, unrelated health problems after the accident, including the following:

- She was diagnosed with thyroid cancer in 2008. Her treatment for thyroid cancer included the following:
    - Two surgeries, one in September 2008 and the other November 2008
    - Radiation therapy in March 2009
- She continued to have gynecological problems after the accident:
    - Uterine bleeding on numerous occasions for weeks at a time
    - Anemia, requiring iron and, eventually, a blood transfusion in December 2007
    - Uterine and ovarian cancer treated with a hysterectomy and oophorectomy in October 2010.

Since the accident, Ms. Yogesvaran has had the following complaints, which she attributes to the accident:

- Knee pain
- Abdominal pain
- Shoulder pain
- Neck pain
- Back pain
- Full body pain

- Headaches
- Dizziness
- Chest pain
- Fatigue
- Trouble concentrating
- Poor memory
- Inability to tolerate noise
- Emotional problems: trouble sleeping, nightmares, anxiety, depression, anger, fear of driving and marital problems

Credibility

After reviewing all of the evidence, I find that Ms. Yogesvaran was not a credible witness. Not only was she an unreliable historian, but she exaggerated her testimony and her evidence was evasive. I give her evidence little weight.

This is not one of those cases where I am able to allow some of the applicant's claims and not others. I have assessed all of the applicant's claims and find that they are all discredited by her lack of credibility.

In assessing the applicant's credibility, I have had regard to the seven factors in *Faryna*, which I number from one to seven below. Collectively, these factors discredit Ms. Yogesvaran's evidence.

1. Demeanour

I was unable to assess the witness' demeanour on the stand because I conducted the hearing on the record. Ms. Yogesvaran was aware of this limitation to assessing her credibility, yet she requested that the arbitration proceed on the transcripts. State Farm disagreed and, as a result, I had to make a decision about whether to have another in-person hearing. In the end, I agreed with Ms. Yogesvaran that this hearing ought to proceed on the record.

In any event, *Faryna* establishes that demeanour is but one factor in assessing credibility and, moreover, that it is not the most important factor.

2. Plausibility

I find that Ms. Yogesvaran's evidence is not plausible. It is inconsistent with the preponderance of probabilities in this case as a whole.

In assessing whether Ms. Yogesvaran's evidence was plausible, I considered it in context and asked myself whether her evidence made sense, whether she showed a tendency to exaggerate and whether her evidence was contradicted either by herself or by others. I also considered that the *Faryna* case maintains that this factor is the most important one in assessing credibility.

Whether her evidence made sense

Ms. Yogesvaran claimed to be catastrophically impaired as a result of the accident, but she hardly mentioned it to her family doctor and she told other health professionals that her health was fine and that she had no problems. In light of this discrepancy, I find that her story of being catastrophically impaired does not make sense.

Hardly mentioned catastrophic impairment to family doctor

Ms. Yogesvarana saw her family doctors regularly after the accident but rarely mentioned the accident or any related pain complaints. (Both her family doctors are named Dr. Lambotharan as they are spouses who work together).

The family doctor's first note after the accident is dated two days post accident and pertains to the accident. However, there is no mention of the accident or any associated symptoms for eight months, despite numerous visits (June 15, August 7, August 31, November 22 and December 10, 2007). There are a few visits in early 2008 when the applicant reports neck pain

that the doctor initially attributes to the May 2007 car accident and then also attributes to thyroid problems. However, the vast majority of Dr. Lambotharan's records for years after the accident contain scarce mention of the subject car accident and resultant pains and impairment arising from it. The vast majority of the applicant's numerous and regular visits to her family doctor do not pertain to the accident nor to any symptoms or impairment arising from it. They are completely unrelated. The general practitioner takes no time to address the applicant's alleged chronic pain and disability.

Notably, I refer here only to GP records that are legible. I have not considered those GP clinical notes that cannot be deciphered due to illegible handwriting. State Farm asked me to draw an adverse inference against the applicant for submitting illegible records, noting that she could have had those transcribed. I decline to do so and, instead, give them no weight.

In response to State Farm's point that there is little to no mention of the accident in her family doctor records, the applicant testified that she could not remember those visits. She also added that she was seeing other providers for treatment related to the accident. However, this does not address the question of why she would not report a catastrophic impairment to her family doctor. I find that the few visits where she does mention the accident or related symptoms do not explain the failure to mention anything at all at the other visits.

Counsel for the applicant points out that the GP filled out a Disability Certificate and provided reports about the applicant's accident-related symptoms to counsel, but I give these documents little weight. They are clearly based on little to no direct knowledge or treatment of the applicant's accident-related complaints.

I agree with counsel for State Farm that, generally, the records of Ms. Yogesvaran's family doctor do not match with the narrative she presents of being in constant pain, depression and anxiety caused by the motor vehicle accident. Rather, the records show a woman who is not talking much about a car accident, but is dealing with very serious health issues that have nothing to do with a car accident.

Did not mention catastrophic impairment to other health providers

The records from the applicant's unrelated medical issues never mention anything about her alleged severe chronic pain and psychological impairment due to the accident. On the contrary, there are numerous examples of the applicant reporting that she is well and has no other health problems whatsoever. I agree with the insurer that one would think that the applicant would have mentioned disabling and severe chronic pain and severe mental impairment if they were present.

- For example, the October 8, 2008 report of Dr. Neculau, endocrinologist, says that the applicant "has no other medical history. She takes no medications at the current time. She feels well." On cross-examination, Ms. Yogesvran said that she had severe pain at the time, so if in fact Dr. Neculau had asked her about it, she would have told the doctor so. The applicant also denied telling the doctor that she felt well and testified that she was, in fact, taking pain medication at the time for severe pain.

- On November 3, 2008, Ms. Yogesvaran was at the Scarborough Hospital for thyroid cancer surgery and completed an Anesthesiologist Patient Questionnaire. The questionnaire asked her questions about her health, including whether she had arthritis or any medical conditions. The applicant answered "no" to those questions. On cross-examination, Ms. Yogesvaran confirmed that there was a Tamil interpreter there and stated that she thought that the handwriting on the form was hers. She said that she did not recall saying whether she had chronic pain, whether she had severe depression and anxiety, that she had pains and psychological issues so severe that prevented her from doing activities of daily living.

- On August 9, 2010, she saw Dr. Mahmoud at Scarborough Hospital and denied severe pain. She denied any need for pain medication.

- On August 25, 2010, the applicant saw Dr. Covens at the division of gynecological oncology (of Sunnybrook Hospital) and reported that, other than irregular periods, she was "otherwise a reasonably healthy woman." Her physical exam revealed no abnormalities.

- On November 17, 2010, she saw Dr. Covens again and reported that she was "feeling very well." She had "no complaints."

- On March 9, 2011, she saw Dr. Covens at gynecological oncology and, once again, had "no complaints." Physical examination was negative.

- On October 5, 2011, Ms. Yogesvaran saw Dr. Neculau to follow up for thyroid cancer and reported that she was "doing well." On examination, the doctor reported that she "looks well."

- In February 2012, she saw Dr. Gozlan who reported her telling him that she did not have any pain limitations or problems since the surgery in 2010.

When cross-examined on the fact that she made no mention of her supposed catastrophic injuries to non-treating health professionals and, rather, told them that her health was fine, Ms. Yogesvaran did not have much to say other than that she did not remember. Her counsel did not address this in written submissions.

Whether she exaggerated

I find that Ms. Yogesvaran showed a tendency to exaggerate her testimony. She made numerous sweeping and extreme statements and then backtracked from those when pressed. I find that the applicant's tendency to exaggerate makes her testimony difficult to believe.

Computer skills

For example, when asked if she had any computer skills, she initially responded that she could turn a computer on. She repeated this numerous times, giving the impression that her only computer skill was being able to turn on a computer. It was not until she was pressed by her own lawyer that she added that she had been trained in basic computer skills.

Nature and onset of symptoms

In her direct examination for this tribunal, Ms. Yogesvaran painted a picture of catastrophic impairment similar to the picture she painted for those health care providers who were assessing her for this hearing. However, this picture did not hold up under scrutiny and I find that she exaggerated her symptoms.

Whole body pain, shoulders and knee immediately post-accident

In particular, Ms. Yogesvaran testified on direct examination that, the day after the accident, she had whole body pain, with the worst pain being to her shoulder, low back, head and knee. Yet, she attended at her family doctor a few days after the accident and only reported neck and back pain.

Head pain immediately post accident

Ms. Yogesvaran testified on direct that she developed head pain starting the day after the accident. In fact, she explained that she has had severe headaches with dizziness every day since the accident, without relief. However, Ms. Yogesvaran went to her family doctor and to physiotherapy in the days after the accident and none of those records mentions head pain, headaches or dizziness in the days after the accident. The insured did not address this contradiction in submissions.

No anxiety, depression or fatigue as a result of cancer

On cross-examination, Ms. Yogesvaran denied any anxiety, depression or fatigue from any cancer diagnoses or treatment. For example, when asked if she had anxiety or depression or fatigue from radiation for thyroid cancer, she asserted, “They gave only one tablet, but I didn’t have any problem.” It was put to the applicant that her GP record of February 26, 2009 states: “Is going for radiation treatment. Very stressed and anxious. Worried about the side effects. Very depressed. Low energy.” When counsel for the insurer asked why she denied anxiety and

depression as a result of thyroid diagnosis and treatment, Ms. Yogesvaran replied, "The cancer was a small issue. I was not affected due to that. Because of the accident, probably I was … affected." Then when it was put to her that any human being would be depressed and anxious about a cancer battle, she backtracked and said, "I was worried, but I wasn't depressed because of that."

Typical day

On direct examination, Ms. Yogesvaran gave evidence about her medical condition at the time of the hearing. Her evidence was the following:

- She continued to have full body pain since the accident, "but not severe like before, it's like medium pain." She said that she has never been without pain since the accident.

- She has had headaches every day since the accident, which have been the same in nature and in severity since 2007. They consist of a sharp pain with burning sensation and numbness. She also has dizziness that sometimes accompanies headache. The pain is all over her head.

- While she had severe neck pain for a few months post-accident, she only had neck pain sometimes by the time of the hearing ten years later. She was unable to say how often, but it hurts when she turns it. The pain is to her entire neck.

- While she had severe bilateral shoulder pain after the accident, more on the right, which she testified was a 9 or 10 out of a scale of 1 to 10 with 10 being the highest, shoulder pain at time of hearing was a 6 or 7.

- She also has bilateral numbness from elbow to fingers but does not recall when this started.

- She had severe back pain after the accident, rated at a 9 out of 10, on right and left sides and from the top of the shoulders to the low back. Three or four months post-accident, pain started radiating down both legs to feet. She still had back pain at the time of the hearing but

it was less, at about a 6 or 7 out of 10. The back pain was constant since the accident and there was never a time that she was without pain. Sitting, standing or walking more than ten minutes or walking on stairs increases pain. Lying down also hurts. She reported that the pain at time of hearing was going down her back through her legs and to her feet, especially at the knee.

- She has severe bilateral knee pain and swelling.

- She was able to concentrate before the accident, but no longer can.

- She gets dizzy ever since the accident and still to this day, two to three times per week.

- She has had chest pain since the accident, to this day.

- She has had abdominal pain since the accident, to the date of the hearing.

- She has had trouble sleeping ever since the accident. She has had nightmares since the accident, often daily, to this day. She was initially unable to say what the nightmares were about but, when her lawyer prodded, she said, "Mostly … my nightmares are about accidents, vehicles coming in, hitting ..."

- She has had emotional problems ever since the accident. Ever since the accident, she just wants to be alone. She had "full satisfaction" with life before the accident. Ms. Yogesvaran repeated over and over that she was "very happy" before the accident. She said: "Before the accident, I was interested in everything. After the accident I lost interest, and I wasn't interested." She is "always sad" since the accident and said that "nothing makes me happy." She also has anger issues since the accident.

- She has been unable to tolerate noise since the accident.

- She has had a poor memory since the accident.

Ms. Yogesvaran testified that she never had any of these problems before the accident.

She testified that her typical day is as follows:

- Wakes up at 8 or 8:30 a.m. and drives her daughter to the bus stop

- Returns home, has breakfast and lies down for most of the day. She repeatedly testified that she is lying down "most of the time" since the accident because she gets headaches, her whole body aches and she gets irritated. As a result of her symptoms, she takes medications, sleeps and then feels better.

- She might sweep the house, and do some light cooking. She might go out to do small errands.

- Goes to bed by 8 or 8:30 p.m.

Ms. Yogesvaran argues that any factual misstatements she made were unintentional and relate to her true belief about what happened, but I do not accept this. Her factual misstatements were often to her advantage and too numerous to be unintentional. She exaggerated the facts and then, if questioned, retracted or changed her statements or said that she did not remember. This is not evidence of lack of intention. To me, this is evidence of intention to deceive.

I also acknowledge the submissions of Ms. Yogesvaran's lawyer that the fact that she did not exaggerate when given an opportunity to do so supports her credibility. Counsel says that there were times when she could have exaggerated but did not, although "no one, including the insurer, would have been the wiser." Counsel points out that, when describing her job duties, she testified to using a small vacuum cleaner, although she could have testified that it was large and heavy (which, she says "would not have been surprising"). She also indicated that she was not required to mop floors, although it would have been easy for her to say that mopping was part of the job. However, these two examples where she did not exaggerate do not go far to establishing her truthfulness, which the weight of the evidence discredits. In any event, I do not know of any legal basis for finding a witness credible on the basis that they did not lie when they could have, nor did counsel point me to any such law.

Whether she contradicted herself on the stand

Ms. Yogesvaran's testimony was internally contradictory. She often contradicted herself within moments and, at times, in the same sentence. I find that Ms. Yogesvaran's tendency to contradict herself makes her testimony difficult to accept.

Headaches

For example, the applicant's testimony about headaches was self-contradictory. First, she testified that she gets numbness when she gets headaches: the numbness is not continuous, it comes and it goes. Then, when asked if the numbness only comes on when she has a headache, she denied it and said that she does not know when she gets numbness.

Working with her husband

In another example, Ms. Yogesvaran initially testified that her husband "is working for other place [sic] for cleaning. I joined with him. I was helping him." Very shortly thereafter, however, the applicant testified that she got the job when her husband got sick and she replaced him. Clearly, both of these statements cannot be true.

Living away from her husband

When it was put to Ms. Yogesvaran on cross-examination that her husband had reported her missing to the police and to the social assistance authorities, she stated, "I don't remember and it didn't happen." This answer is internally contradictory.

Sister's car

When surveillance video was put to Ms. Yogesvaran on the stand, she testified that the car being driven by the video subject was her sister's car and then, when pressed, she changed her testimony and stated that her sister often came to her home to borrow her car.

Whether she made prior inconsistent statements

There are numerous examples of Ms. Yogesvaran's testimony on the stand that contradict statements she made before the arbitration. I find that the prior inconsistent statements make her testimony difficult to believe.

Claimed to have worked for six months at Twins

Shortly after the accident, Ms. Yogesvaran made an insurance claim stating that she was employed with Twins for six months before the accident, when, in fact, employment documents show that she only worked there six weeks. Specifically, the Application for Accident benefits dated May 18, 2007 clearly states that she had worked at Twins Maintenance as a cleaner from November 2006 to May 2007. Ms. Yogesvaran filled out that application just five days after the accident.

When this document was put to her on cross-examination, Ms. Yogesvaran confirmed her signature. However, she later could not confirm that it was her handwriting that stated she had worked at Twins for six continuous months. Regardless, I find that by signing the Application for Accident Benefits, Ms. Yogesvaran took responsibility for claiming to have worked at Twins for six continuous months before the accident. I find that this claim was misleading.

Claimed loss of consciousness and head injury in the accident

On cross-examination, it was put to Ms. Yogesvaran that she had told some health professionals that she lost consciousness in the accident and had a head injury, but told others that she did not.

The applicant replied that she did not remember whether she hit her head or any body part and did not remember if she lost consciousness. She added that she did not know which was true, whether she did or did not lose consciousness in the accident.

Following are some contradictory self-reports of Ms. Yogesvaran about head injury and loss of consciousness during the accident, in chronological order:

- In December 2007, Ms. Yogesvaran met Janet Njelesani OT who wrote that the applicant reported "no deployment of air bags and denied any loss of alteration of consciousness."

- In January 2008, the applicant met Dr. Oshidari who indicates that she reported hitting her left knee and left side of the body, but denied any loss of consciousness, bleeding or bruise.

- In November 2008, she met Dr. Majl, who said she reported hitting her forehead on the steering wheel during the accident, but did not lose consciousness.

- According to the April 2009 report of Sophie Bielawski, OT, "The client reported that she had a loss of consciousness for an unpredictable period of time and that she hit the back of her head."

- At the catastrophic impairment assessment in 2013 of Loreta Stanulis-Duz OT, the applicant apparently said that she did not lose consciousness in the accident.

On the stand in 2017, Ms. Yogesvaran testified in direct that she did not think she lost consciousness. However, immediately after, in cross-examination, she testified that she does not remember whether she lost consciousness. Notably, Ms. Yogesvaran testified that she did not remember making any of the above statements to health professionals about a head injury or loss of consciousness.

I find that these contradictory reports about a head injury and loss of consciousness are material and compromise Ms. Yogesvaran's credibility.

Whether her testimony was contradicted by other evidence

Ms. Yogesvaran's testimony was contradicted by significant and material evidence, including video surveillance, medical evidence and other documents. I find her explanations for the contradictions unconvincing. Consequently, the contradictions compromise her claims to truthfulness.

Surveillance video

The insurer took surveillance video of Ms. Yogesvaran in June 2011 that shows her driving on the Don Valley Parkway toward Toronto, going shopping, carrying her purse and filling the car with gas while her husband sits in the car. The report says that she was observed on several occasions and, though she complains of neck and back injuries, she operated the vehicle in a normal manner and was able to rotate her head and neck in each direction quickly as she reversed her vehicle on several occasions. She was also able to bend over at the waist repeatedly into the back seat of her vehicle removing objects. She walked with a normal gait and appeared to be in no discomfort. I viewed the surveillance video and agree with those descriptions of Ms. Yogesvaran's behaviour.

I acknowledge Ms. Yogesvaran's argument that the fact that she was able to drive (an unstated distance), shop, carry a purse and fill a car with gas does not belie her claim of chronic pain. I agree that the surveillance video is not a definitive indication of whether she does or does not have chronic pain. However, the surveillance video shows her smiling, moving her neck and back easily, lifting objects and driving the car numerous times in the course of a day and week. Given that, at the time of the surveillance, she was complaining of severe pain to her hand, back and neck and severe incapacitating migraine-like headaches, the surveillance video showing her going out regularly and moving with no apparent problem does raise serious questions about her credibility. Dr. Lance Majl neurologist reported on August 7, 2011 that Ms. Yogesvaran's pain was such that he referred her to a pain clinic and for more physiotherapy.

Furthermore, I find that the surveillance belies the severity of Ms. Yogesvaran's fear of driving. She is shown making numerous trips a day in her car while smiling and with her husband in the car. When asked on cross-examination whether her husband also had a driving anxiety, she replied that she did not understand. In contrast to the surveillance evidence, a report of Dr. Oren Gozlan dated June 7, 2011 for psychological treatments from April 19 through June 7, 2011 states, "She had not resumed driving at present due to ongoing fear and lack of availability of support and opportunity to resume her previous driving routine."

Her lawyer argues that the fact that she is seen driving, not for particularly long distances, does not, contrary to the submissions of the insurer, belie her claim of driving anxiety. However, I disagree, given that she claimed to be too afraid to be driving at all since the accident.

Medical documents

Ms. Yogesvaran repeatedly testified that she never made the statements that health professionals attribute to her, ranging from reports of improvement to reports that cancer diagnosis and treatment caused her stress.

Ms. Yogesvaran is therefore asking me to accept that health professionals have repeatedly made errors in attributing statements to her. I decline to do so. The odds of all these health professionals making the same error are too high. While I accept the possibility generally that health professionals may misunderstand their patients, I do not accept that such misunderstandings are common.

I also decline to accept Ms. Yogesvaran's story because it is inconsistent with her presentation of having a poor memory. While she responded with "I don't know" to the vast majority of questions put to her at the hearing, she is also claiming that her memory is better than the contemporaneous records of numerous health providers, often many years after the fact.

Denied pre-existing conditions

On direct examination, Ms. Yogesvaran testified that she had no pre-existing health problems. When pressed by her counsel, she changed her answer to "I don't remember."

However, the applicant's evidence is contradicted by the pre-accident records of her family physician, Dr. Lambotharan. They indicate health problems. Dr. Lambotharan's January 8, 2007 note indicates a one-month history of left knee pain. A knee brace, Advil and physiotherapy are indicated. The GP's March 6, 2007 note indicates very severe abdominal pain and heavy periods. The doctor diagnoses menstrual disorder and iron deficiency. May 4, 2007 indicates a two-week history of shoulder pain with no history of trauma and no history of heavy lifting. Naproxyn was indicated.

When this was put to the applicant on cross-examination, she said that she could not recall any of those pre-accident visits. She then testified that she doubted whether her GP wrote those records because she saw no signature.

Notably, after the accident, the applicant attributed knee pain, abdominal pain and shoulder pain to the accident. However, she did not see fit to tell assessors about these pre-existing complaints. Her story was that her health was good before the accident and catastrophic thereafter, as a result of the accident. For example, Ms. Yogesvaran denied any pre-accident pains to Dr. J. Frank, the psychologist who did her 2013 Catastrophic Evaluation. Nor did the applicant see fit to testify to them in her direct examination. Indeed, she testified that her health was "good" before the accident.

Denied heavy lifting

Ms. Yogesvaran reported to her family doctor just a week before the accident that she did no heavy lifting, but she told this tribunal that her pre-accident job at the time required heavy lifting. Specifically, her family doctor's May 4, 2007 note indicates a two-week history of shoulder pain, and specifically negated a history of heavy lifting.

In other words, Ms. Yogesvaran told her doctor on May 4, 2007 she had not been doing any heavy lifting. That means that she was not doing the job that she described to the tribunal. The job she described in her testimony included heavy machinery and lifting 20 to 25-liter buckets of water several times a shift.

In response, counsel for Ms. Yogesvaran argued that, even if there had been a discussion about heavy lifting, she may not have understood that the lifting of pails at work could be described in this manner. However, I do not accept this argument. It stretches the imagination. Moreover, Ms. Yogesvaran testified that she spoke Tamil with her GP so I do not accept that she could not communicate basic concepts such as whether she had been lifting anything heavy.

Denied return to work

At the hearing, Ms. Yogesvaran confirmed that she worked in a factory after the accident, in July and August 2007, for a total of 88 hours over three weeks. Yet, she did not tell any health assessors that she had returned to work after the accident.

- Dr. Oshidari reported in January 2008 that she denied any work at all since the accident. I find that it is not plausible that the applicant forgot, in January 2008, that she had worked just five months before.

- Dr. James Fung, chiropractor, reported that she told him she had not worked since the accident.

- In April 2019, Dr. Gnam reported in his catastrophic impairment assessment that she had told him she had not worked for pay since the accident.

On cross-examination, Ms. Yogesvaran testified that she did not recall whether she told any health professionals that she had worked after the accident.

Denied driver rehabilitation program

I find that, if Ms. Yogesvaran really was afraid of driving, she would have arranged a driver rehabilitation program as agreed years before with her family doctor. On cross-examination, Ms. Yogesvaran was asked if she ever took driver rehabilitation program treatment for driving anxiety and she said she that she did not remember. She also said that she did not think so. (These two answers are inconsistent). When asked if her family doctor ever told her to arrange a driving program treatment for driving anxiety, she denied it. When it was put to her that she told the GP that she would arrange the driving program herself, she denied it. This contradicts her GP's clinical note of November 4, 2008, which states that she was told to arrange a driving program. I prefer the contemporaneous records over Ms. Yogesvaran's memory nine years later.

Denied driving after the accident

Ms. Yogesvaran testified that the accident impacted her ability to drive such that she could drive no more than about 15 to 20 minutes due to back pain and numbness in her arms. However, the medical records show that she told different medical providers different things about her ability to drive. The May 4, 2009 report of Remedial Assessments' Dr. Chen says that she told him that she could hardly drive at all due to severe pains. Her reports to mental health providers say that she never drove at all after the accident because she was too afraid.

Denied significant improvement after the accident

When Ms. Yogesvaran was asked on cross-examination whether she has had any significant improvement since the accident, she replied, "No." Yet, it was put to her that she reported improvement to two doctors:

- Dr. Oshidari's report of 2008 says that she reported 20% improvement after six months of treatment.

- Dr. Ruhr, a chiropractor she saw in summer 2008, stated that she reported a 15% improvement.

In response, Ms. Yogesvaran testified that, despite the fact that there was a Tamil interpreter with Dr. Oshidari, the doctor got it wrong and she did not tell him she had significant 20% improvement. Ms. Yogesvaran testified that either she misunderstood these doctors or they misunderstood her. She added that she cannot understand all interpreters.

Other documents

Denied living separate from her husband

I find that the applicant was evasive about her address. She testified in direct examination in detail about the big houses where she lived and the need for housekeeping benefits. She insisted that she always lived there with her husband.

However, when the insurer put her 2006 tax return to her on cross-examination to show that she had reported living at another address, she admitted to living in an apartment in 2006. Then when the insurer put to her 2007 tax return that showed her still living in that same apartment, she testified, "I don't know, I don't remember." When pressed, Ms. Yogesvaran testified, "Maybe .. that must be my brother's address. … I lived there for some time." Then she testified that she lived with her brother for the majority of the time in 2006 but did not remember after that. Then, Ms. Yogesvaran admitted that her husband had been living at his sister's house in 2006 and that she had never lived there with him.

When it was put to her that she had made no mention of living with her brother in chief and that she had claimed that she was always living with her family, Ms. Yogesvaran stated that she went to live with her brother "not because we had some family issues. We were not separated … my brother had a baby so I went there on and off and I was helping them, that is the only thing." At another point during cross-examination, Ms. Yogesvaran stated that she had been using her

brother's address for mailing, but did not explain why. Notably, Ms. Yogesvaran's daughter later testified that her mother lived with her brother at regular intervals.

Later on during her cross-examination, Ms. Yogesvaran changed her testimony yet again. When State Farm asked her whether she lived away from your family for about a year and a half after the accident, she categorically denied it. However, the report of Loreta Stanulis-Duz, occupational therapist, states: "She also disclosed being separated from her family for one and a half years. She returned to live with them in 2012." When State Farm asked the applicant if that is what she told Ms. Stanulis-Duz, the applicant adamantly denied it: "Why should I say like that? I don't have to say what didn't happen"; "I did not live separately like that, why should I tell her like that?"; and, "I have never lived separately" from my family.

Denied pre-existing marital problems

The client repeatedly stated that she had a good marriage before the accident, but that she had marital problems afterward, as a result of the accident. This is the story that she told most assessors. For example, Dr. Frank's 2013 catastrophic impairment evaluation states that, before the accident, the applicant had a good marriage but "now there's trouble." Similarly, most health assessors say that everything was good for this applicant before the accident, physically, psychologically and emotionally and that, after the accident, these things were all pretty bad.

On cross-examination, the applicant had little to say and denied any knowledge of why her husband completed forms stating that his wife left the family on February 4 or April 2, 2007 and that he did not know her whereabouts despite calling police to report her missing.

I do not accept that the applicant's marriage was great before the accident.

Denied renting a car

Ms. Yogesvaran testified that she could not sit or drive in the short period after the accident. However, on cross-examination, it was put to her that she had a rental car for the period from

May 13 to June 8, 2007 in an invoice dated June 14, 2007 of Routes Car & Truck Rentals. The applicant said that she could not remember.

In response, her lawyer submitted that "there is no real contradiction here." Her initial evidence on direct was that, for a while after the accident, she did not drive at all and only resumed driving one month after the accident because "after the accident, I was scared to drive." Later, she stated that she did not remember if she did not drive at all for a month. Then she changed her testimony again and said that she had driven in the month after the accident. She was unable to remember if she had a rental car, however, even if she had one, she said that her husband would have driven her, although she was unable to remember if she had driven it as well.

I disagree with counsel for Ms. Yogesvaran that there is no real contradiction. In fact, I find that there are so many contradictions arising as a result of examination on whether she drove after the accident that I believe none of them.

3. Opportunities for knowledge

I find that Ms. Yogesvaran had more opportunity for knowledge about the determinative issues in this case than anyone else. The whole case turns on her subjective evidence. She is claiming to be impaired for psychological reasons.

By way of explanation, Ms. Yogesvaran is claiming a catastrophic impairment with respect to concentration, persistence and pace as a result of a pain disorder. Ms. Yogesvaran's expert witness, Dr. Dory Becker, testified that a pain disorder is not the same as chronic pain. Chronic pain is "organic" in nature. It is based on a physical injury that leads to long-term pain. A pain disorder, on the other hand, is psychological in nature. The example that Dr. Becker gave on the stand was of a child being nervous and getting a tummy ache.

4. Powers of observation

Given that this arbitration turns on Ms. Yogesvaran's subjective experience of pain, it follows that her powers of observation are critical to an understanding of the case. However, she showed weak powers of observation at the hearing. In fact, her powers of observation were so weak that I doubt that she honestly reported her observations. Consequently, I cannot rely on her observations.

Claimed she was hit on the driver's side door

For example, Ms. Yogesvaran testified that the car hit her driver's side door. A few moments later, when pressed and shown a photograph of damage to the front corner, she changed her evidence to say that the car hit her front-left side.

Claimed other driver reversed out of a parking spot at 70 or 80 kmph

In another example, Ms. Yogesvaran testified that the other driver pulled out of a parking spot at about 70 or 80 kilometers per hour and struck her car. This observation is incredible given a common sense understanding of how people behave in parking lots in the middle of the day. It is also unbelievable given a common sense understanding how cars typically accelerate. When State Farm raised this in its submissions, Ms. Yogesvaran did not reply.

Denied that surveillance showed her, her car, her home or her husband

The surveillance footage is also relevant to an assessment of credibility in that the applicant denied that it depicted her, her car, her home or her husband. On cross-examination, Ms. Yogesvaran made repeated denials with steadfastness and certainty that it was her depicted in the surveillance evidence. She initially left no room for doubt, although she later recanted some of those assurances. While Ms. Yogesvaran eventually agreed that it was her in the surveillance footage, this was only after persistent questioning and as the video became more clear and left no room for doubt.

Denied it was her or her car

In particular, when she was shown six photographic stills of the video and asked to identify herself, she said, "My sister also resembles me a lot. I don't know whether it is my sister or me." When asked if it was her car and again if it was her, the applicant replied, "It must be my sister." She explained, "My sister lives in Brampton, she comes and uses my car. Her car is also the same colour. I am not sure whether it is her car or my car."

Ms. Yogesvaran continued to insist that it was her sister, even while watching the video. While when the video first started playing and counsel pressed her to admit it was her, she agreed, "Yes, it's me." However, she immediately changed her testimony and stated, "It must be my sister, because she is like me. She resembles me a lot." I note that this is not an observation, but a guess that the applicant makes in her own favour. Again, when asked, "Who is that?" the applicant replied, "She's just like me, it must be my sister." Then she insisted again, "Yeah. She has the same car." Then when asked the license plate of her car she changed her story: "She comes home and takes my car." Notably, when asked whether her sister had the same exact mole that she had on her face, Ms. Yogesvaran claimed that she never noticed whether her sister had such a mole on her face.

Denied it was her home

When Ms. Yogesvaran was asked if she knew where three of the six photographs were taken, she claimed not to know. The photos clearly show a driveway with a wooden fence and/or a door and wall. Ms. Yogesvaran insisted that she was "unable" to recognize the area, the fence, the door or the wall. Yet, those photos were all taken at her home residence. Eventually, after watching the video, she admitted that it was her home.

Denied it was her husband

When asked who was in the passenger seat of the vehicle, Ms. Yogesvaran stated, "I'm not sure, it looks like her [her sister's] husband." However, eventually, she admitted that it was her husband.

Summary

I do not believe that Ms. Yogesvaran did not recognize her own body or her own physical movements or her own clothing, car, home or husband. I also do not believe that her sister has very similar physical features and movements, clothing, car and that her sister's husband also coincidentally looks very much like the applicant's husband. Lastly, I do not believe that the applicant never noticed whether she and her sister had the same moles on their faces.

Consequently, I am unable to rely on Ms. Yogesvaran's observations to understand the evidence that is essential to her claims.

5. Judgment

I find that Ms. Yogesvaran did not show proof of good judgment. For example, as shown in the section on memory, below, her responding to nearly all questions with "I don't remember" is proof of poor judgment, particularly as she later claimed to remember certain matters and particularly as she was able to remember certain matters in support of her claim in great detail such as the accident and her pre-accident employment.

6. Memory

There is no dispute that Ms. Yogesvaran presented with a poor memory at arbitration. She answered the great majority of questions at the hearing with "I don't remember." Another common refrain was, "I don't remember anything." She was clearly an unreliable historian.

Arbitrator Mervin and I have both given Ms. Yogesvaran leeway for the fact that her testimony at the arbitration hearing was given in 2017, some ten years after the accident, and for the fact that she claims to have problems concentrating, which could affect her memory. I have taken these two matters into account when assessing her credibility. The transcripts show that Arbitrator Mervin also took these two matters into account when he provided what he called "some allowance" and "some latitude" for Ms. Yogesvaran during her examination-in-chief. Specifically, the arbitrator allowed, "with great regret," for counsel to jog Ms. Yogesvaran's memory with questions on direct examination that were, as Arbitrator Mervin described them, "more in the nature a question for cross-examination."

I find that Ms. Yogesvaran was an evasive witness. I find it more likely than not that she was being selective about what recollections to share with the tribunal. It is common to be unable to remember matters. It is also common to innocently forget things. However, it is another matter entirely to purposefully evade the issues in dispute.

Memory for pre-accident job duties

While Ms. Yogesvaran responded with "I don't remember" to the great majority of questions, her recollection was good when describing her pre-accident employment duties. For example, she remembered details about her job duties, which included the following:

- Carrying 20 to 25 liter buckets of water at least five to six times a shift and sometimes more

- Pushing a heavy machine of a height that she recalled and was able to demonstrate with gestures on the stand

- Pushing the machine for a period of two to three hours a time

- Pushing the machine for a specific distance that she was able to describe in terms of distance in the tribunal

- Details about vacuuming

- Details about emptying garbage

- Initially on cross-examination, she denied doing any window cleaning but then, suddenly, halfway through cross-examination, a flood of memories returned about her additional job duties window cleaning. She explained in detail that she would take papers and wipe windows after spraying with Windex and she remembered with certainty that she did not dry the windows after cleaning.

Memory for accident

Ms. Yogesvaran claimed not to remember much of the motor vehicle accident on cross-examination although she remembered it in detail in direct examination. When it was put to her that she had a good memory about the accident when her lawyer was asking questions, she replied, "I remember somewhat but if I talk about my accident, I get headache."

I find that, while Ms. Yogesvaran claimed to have memory on direct, she was evasive on cross-examination. Below are a few more typical exchanges from the transcript:

- "I believe you told us last week that you were shocked immediately after the impact, right?"

    - "I don't remember"

- "Last week when you described the car accident, you indicated that the impact was heavy, a strong impact, and you were hit at your driver's side, is that correct?"

    - "Might be."

- "Do you remember saying that or not?"

    - "Somewhat I remember."

- "Did your body move at all?

    - "Really, I don't remember that."

Evasiveness about attendant care

At the hearing, Ms. Yogesvaran confirmed that she worked in a factory after the accident, in July and August 2007, for a total of 88 hours over three weeks. Yet, she submitted an insurance claim dated December 22, 2007 that covers the period July and August 2007 (the period during which she worked) saying that she needed $6,555.33 for monthly attendant care.

On cross-examination, State Farm asked Ms. Yogesvaran if she was able to take care of her personal needs while she was working at the factory in 2007 and she replied that she did not remember. The insurer asked if she could dress and undress herself and she said that she could not do it quickly, she was doing it slowly. However, Ms. Yogesvaran then backtracked and said that she did not remember very well. When pressed, she said that she thought she did get dressed in the morning for work by herself. When asked whether she could take a shower, she said that she did not remember. To questions of whether she was able to eat her lunch on her own or was able to walk at work, she confirmed that yes, she was able to do both. However, she added that she did not have to walk much while working at the factory.

When the insurer put to her the document for attendant care needs submitted by her occupational therapist, Sophie Bielawski, the applicant said that she could not remember anything about this claim. According to this form, Ms. Yogesvaran was catastrophically impaired from the date of the accident to the end of December 2007 and was unable to do much of anything on her own. Yet, it turns out that she was working for three weeks during that time.

When the insurer put to her that the form says that she needed help dressing and undressing, but she had testified that she did not, the applicant changed her evidence. She said that, before she went to work she was able to manage, but not afterward and that is why she stopped going to

work. However, the applicant then changed her evidence again and stated that could not remember if she could dress or undress herself while she was working that summer.

State Farm put to her that, according to the Bielaswki report, Ms. Yogesvaran needed 30 minutes a day assistance with walking, but that was untrue. The applicant said that she never walked for half an hour during that time.

State Farm also put to her that the Bielawski report says that the applicant needed about 7,800 minutes a week of basic supervisory care because she lacked the ability to independently get in and out of a wheelchair or be self-sufficient in an emergency. Ms. Yogesvaran replied that she did not understand. Counsel explained that the form said she needed 18 hours of babysitting per day and put to her that she did not in fact need to be supervised or monitored 18 hours a day at any time. The applicant replied that, in 2007, maybe because she was "very sick at that time." Counsel pressed, "Well, when you went to work at the factory, was there someone there who could monitor you and ensure that you were able to get in and out of a wheelchair or be self-sufficient in an emergency?" The applicant replied that she was very sick and needed help after the accident. When counsel asked her with what she said, "For all my personal care I needed help."

State Farm asked if she needed crutches, canes, braces or a walker and Ms. Yogesvaran said, "No." The insurer then asked her if Ms. Biewlaski was making that up. The applicant replied, "I was really sick" and then added, "I don't remember."

I note that the Biewlaski report says that its "recommendations are based on the client's report and demonstrations." I do not accept any of the applicant's testimony about this report because I find that it was confused and inconsistent. I also find that her testimony about this report was evasive.

Conclusion

Ms. Yogesvaran's counsel submits that her responding, "at times," with "I cannot recall" and then a moment later giving a precise answer is evidence of her preference not to guess, but I disagree. She did not claim to forget things merely "at times." Rather, she nearly always claimed not to remember. I find it more likely than not that her claiming not to remember is evidence of her preference to paint a picture of herself as disabled. I also find it more likely than not that her claiming not to remember is evidence of her preference to shield her testimony from being tested on cross-examination.

7. Ability to describe clearly what is seen and heard

I find that Ms. Yogesvaran was unable to describe clearly what she saw and heard. More generally, she was unable to describe any experiences with clarity. Her testimony was not articulate, even though she had an interpreter. As established above, she claimed not to remember much and, when she did, she often painted a confusing picture.

Income replacement benefits

I am not persuaded on the evidence that Ms. Yogesvaran was unable to work as a result of the accident.

I am unable to accept her testimony or any medical evidence that is based on her subjective reports because it is all tainted by her lack of credibility and unreliability. Not surprisingly, there is medical evidence that raises questions about the validity of Ms. Yogesvaran's pain presentation and catastrophic impairments. However, I am not satisfied with the reliability of the formal validity testing by assessors. However, I do not require validity testing after reviewing all the material. Given that I have found Ms. Yogesvaran to lack credibility, I am unable to rely on the medical evidence that is necessarily based on her subjective report.

I conclude that State Farm is not liable to pay Ms. Yogesvaran income replacement benefits after January 16, 2008.

Assessment

Ms. Yogesvaran did not meet the burden of proof to show that an assessment was reasonable and necessary in this case.

In particular, as her claim lacked credibility, it follows that it is neither reasonable nor necessary to order payment of reports to support her claim. Her claim for the assessment is so connected with the advancement of the exaggerated claim for benefits that it is too tainted to be recoverable from State Farm.

Moreover, I acknowledge Ms. Yogesvaran's argument that State Farm provided no reason for denying the Omega assessment in the amount of $13,786.00 and I also acknowledge her argument that the version of section 42(1) of the *Schedule* at the time had no cap on fees for rebuttal reports regarding a catastrophic impairment. However, there is no statutory entitlement to rebuttal assessments after 2010. Therefore, it was reasonable for the insurer to deny the claim for a rebuttal assessment conducted in 2015.

I conclude that Ms. Yogesvaran is not entitled to the catastrophic impairment assessment by Omega Medical Associates dated July 7, 2015 in the amount of $13,786.00.

Catastrophic impairment designation

Ms. Yogesvaran did not establish on a balance of probabilities that she is catastrophically impaired as a result of the May 2007 car accident. In particular, her testimony and the medical evidence in support of her claim to a catastrophic impairment designation is tainted by her lack of credibility.

Consequently, I find that Ms. Yogesvaran is not catastrophically impaired as a result of the accident.

Housekeeping benefits

Having found that Ms. Yogesvaran is not catastrophically impaired as a result of the accident, it follows that she is not entitled to housekeeping benefits.

Interest

Having found that Ms. Yogesvaran is not entitled to any benefits, there is no interest payable on overdue benefits.

Special award

Ms. Yogesvaran is not entitled to a special award, for two reasons: special awards are only payable on outstanding benefits and I have no jurisdiction to consider benefits that are not in dispute.

i. Special award only payable on outstanding benefits

Having found that State Farm does not owe Ms. Yogesvaran any benefits, I conclude that there is no special award payable. The first step of the *Persofsky* analysis is to determine the benefits owing. If there are no benefits owing to the insured person, there is no special award payable.

ii. Benefits in the order of Arbitrator Miller are not in dispute

Ms. Yogesvaran argues that State Farm had agreed in writing to pay for certain benefits but failed to do so until she obtained an order of Arbitrator Miller on January 23, 2013 and that this refusal to comply with its written agreement is unreasonable.

However, I do not have the jurisdiction to consider a special award for benefits not currently in dispute. *Persofsky* requires that I begin the special award process by determining the benefits currently owing to the insured person. The benefits currently owing do not include the ones that were resolved seven years ago by order of Arbitrator Miller.

The time to seek a special award for the unreasonable withholding or delay of those benefits was when they were before Arbitrator Miller in 2013. Ms. Yogesvaran made no submission that she claimed a special award in 2013. Certainly, Arbitrator Miller's 2013 order does not mention it.

EXPENSES:

Overview

Ms. Yogesvaran submitted that the expense issue before me is associated with the entirety of these proceedings, from February 9, 2010 to the present, with the exception of those matters that already had expense orders. State Farm did not dispute it. The hearings before me for the purpose of assessing an expense award are the following:

- The partial arbitration in person before Arbitrator Miller, before she retired, namely four days of hearing from November 19 to November 22, 2012

- The arbitration *de novo* before Arbitrator Mervin, also in person, before he passed away, namely 15 days of hearing between 2017 and 2018

- The arbitration on the record before me since 2019

I have no jurisdiction to consider expenses associated with the following hearings because expenses were ordered at those hearings:

- The arbitrations before Arbitrator Miller from May 18, 2008 to February 2, 2010 and from September 14, 2011 and December 16, 2011

Entitlement

I am bound by statute to consider only seven criteria in awarding expenses. I consider each, in turn:

(a) Each Party's Degree of Success in the Outcome of the Proceeding

State Farm was successful in the relevant arbitration matters except on the issue of whether to proceed on the transcripts. I heard that issue by written submissions in Fall 2019 and the hearing proceeded efficiently.

I conclude that this factor supports an award of expenses to State Farm, with a small reduction to account for Ms. Yogesvaran's success on the narrow and brief issue of whether to proceed on the transcripts.

(b) Any Written Offers to Settle made in Accordance with Rule 76

Both parties submitted that this factor was not applicable.

As a result, this factor is neutral with regard to an award of expenses.

(c) Whether Novel Issues are Raised in the Proceeding

There was one novel issue raised in this proceeding pertaining to whether to proceed on the transcripts. Otherwise, the arbitration was a straightforward application of the law.

State Farm argued that there were no novel issues raised in the proceeding, but did not explain why it took this position.

I agree with Ms. Yogesvaran that the issue of the mode of proceeding was novel. The factual circumstances were unusual in that the first arbitrator retired in the middle of the hearing and the second arbitrator passed away after a rehearing but before making a decision. More to the point, the legal circumstances were novel in that my November 2019 turned on an appeals decision made just a few months prior in *State Farm and A.B.* (FSCO P18-00035, June 14, 2019).

Consequently, I find that this factor increased the complexity of the proceedings and therefore the value of expenses associated with the narrow issue of whether to proceed on the transcripts in fall 2019.

It follows that this factor increases the "small reduction" in expenses that I awarded under factor (a), above, to Ms. Yogesvaran's credit.

> *(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*

I consider factors (d) and (e) together.

I have found that Ms. Yogesvaran lacked credibility and exaggerated her claims. It follows that her conduct in bringing and maintaining this arbitration was improper, vexatious and unnecessary.

However, I also find that State Farm unnecessarily prolonged this arbitration by its conduct on the eve of the arbitration in 2011. The parties were on notice in November 2010 that the arbitration was scheduled for December 2011. Some four months later in April 2011, State Farm wrote to Ms. Yogesvaran requiring her attendance at insurer medical examinations.
Ms. Yogesvaran provided a timely response one week later refusing to attend. Some eight months later in December 2011, three days before the arbitration, State Farm brought a motion to

stay the arbitration and stop benefits pending her attendance at medical assessments. The arbitration had to be adjourned to hear that motion, which was eventually dismissed.

In short, the arbitration of December 2011 was adjourned due to State Farm's conduct. At page 9 of her decision dated March 1, 2012, Arbitrator Miller found State Farm's conduct to be "completely unreasonable, in that the insurer should not have waited until the eve of the resumed arbitration hearing to bring its motion ..." Arbitrator Miller added that State Farm's actions "significantly delayed her [Ms. Yogesvaran's] ability to have her case heard in a timely and expeditious manner." I agree.

In addition, I find that State Farm prolonged the expense hearing in 2020 by claiming expenses that it should have known were not allowable. In particular, it claimed outlandish sums for experts. It claimed $19,775.00 in expert fees (before HST) when the rules make it clear that, in best scenario, only $5,000.00 could be allowable. It also claimed a court reporter although FSCO jurisprudence has been consistent in denying these claims. In the appeal decision of *Yogesvaran and State Farm Mutual Insurance Company*, (FSCO, P17-00086, October 5, 2018 at para. 7), Director's Delegate Evans wrote: "A review of the Expenses Regulation suggests that transcripts are not recoverable as expenses: *Kingsway General Insurance Company and Pereira*, (FSCO, P05-00031, September 17, 2007)."[4] Further, Arbitrator Evans sent the parties an email on March 25, 2020 (in another case) reminding them that claims for expenses related to court reporters are not permitted. State Farm received this email about six weeks before its expense submissions in the case before me now.

Furthermore, I find that State Farm prolonged the hearing by making an expense claim without submissions on quantum. It simply provided a bill of costs and invoices. This required a tedious exercise of calculations and minute review of invoices to address.

I also find that State Farm prolonged the hearing by being late with submissions in 2020. State Farm's submissions on expenses were due on May 11, 2020 and its submissions on the special award were due on May 20, 2020. State Farm filed both submissions on May 21, 2020,

[4]See also *Mooney and Wawanesa Mutual Insurance Company*, (FSCO, P17-00050, June 21, 2019).

without having requested an extension and without acknowledging the lateness. After Ms. Yogesvaran objected to the late filing, State Farm stated that it thought the submissions were due May 20, 2020, which still did not justify its failure to request an extension or its failure to acknowledge the late deadline.

In addition, Ms. Yogesvaran submits that State Farm prolonged the hearing by improperly terminating benefits in January 2008, but I disagree. The arbitration was originally scheduled for July 2009 but was adjourned generally because the arbitrator had to decide the preliminary issue about whether the insurer had improperly terminated benefits. Ms. Yogesvaran did not explain why she waited until the arbitration to bring this motion on a preliminary issue. She had a year and a half to bring the motion about improper termination of benefits but did not do so until the arbitration. The evidence does not support that the delay lies at the insurer's feet.

On balance, I find that Ms. Yogesvaran unnecessarily prolonged the proceedings significantly more than did State Farm.

It follows that this factor supports an award of expenses to State Farm, with a small reduction to account for its conduct on the eve of the arbitration in 2011, its improper claim of disbursements and its late submissions in 2020.

> *(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.*
>
> *(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.*

I consider factors (f) and (g) together.

I see no evidence that Ms. Yogesvaran refused or failed to submit to an insurer's examination, nor did the parties make any such allegation.

It follows that these criteria are neutral to my assessment.

Conclusion on entitlement

Having considered the seven criteria, I conclude that State Farm is entitled to an award of expenses, with a reduction to account for Ms. Yogesvaran's success on the novel issue of whether to proceed on the transcripts and State Farm's conduct in unnecessarily prolonging the proceedings in 2011 and 2020.

Quantum

State Farm is seeking a total expense award in the amount of $105,151.07. This comprises $58,982.67 for fees and HST and $46,168.40 for disbursements and HST. However, this award excludes services for matters that were the subject of earlier orders of this tribunal. State Farm did not provide submissions on the quantum of expenses. It merely filed a bill of costs and associated invoices.

For the reasons below, I find that State Farm's failure to explain the amount of its bill is unsatisfactory because it leaves me largely unable to assess whether it is reasonable. I have put significant effort and time into trying to understand State Farm's bill and invoices. However, fairness dictates that I not guess at these matters and, where I am uncertain about expenses, as explained below, I do not allow them.

Fees

State Farm is claiming 475.6 hours of legal fees, totalling $58,616.89, including HST.

State Farm's bill of costs claims legal fees for 485.6 hours of work, totalling $58,982.67, including HST. However, these numbers are incorrect. The error arose in State Farm calculating SH's hours as 11.1 rather than 1.1. She is a law clerk billing out at $32.37 per hour. The difference of 10 hours equals a dollar difference of $365.78, including HST.

Number of hours claimed

I adopt the principle in *Amoa-Williams and Allstate Insurance Company of Canada* (FSCO A97-001864, October 24, 2001) to the effect that it is inappropriate to monitor "time at a hearing to the degree of accuracy normally reserved for sporting events" and that, accordingly, seven hours are allowable per day for attendance at a hearing. Arbitrator Evans also adopted this prinicple in the recent decision of *Aloysius and Royal and SunAlliance Insurance Company of Canada* (A12-003310, A12-003311 and A12-005353, April 30, 2020).
There were 19 days of hearing. Applying the principle in *Amoa-Williams and Allstate*, seven hours per day comes to a total of 133 hours.

Ms. Yogesvaran submits that some of those hearing days were actually not seven hours long and that the total should be reduced accordingly, but I disagree. Doing so would defeat the purpose of the principle in *Amoa-Williams and Allstate*. The fact that the transcripts of the hearing before Arbitrator Mervin suggest that one or more hearing days were longer than usual further supports the principle of upholding a seven-hour average.

Next, I find it reasonable to allow 2 hours of preparation time for each of the 133 hours of hearing. State Farm did not take a complex approach to this matter, but argued that the case simply turned on credibility. Nonetheless, there were many years of evidence to contend with as well as the need to defend against a catastrophic impairment claim. Also, credibility is not an easy matter to disprove. On my calculation, this reasonably adds 266 hours to the file.

The parties proceeded by written submissions before Arbitrator Mervin and before me. They made extensive submissions to Arbitrator Mervin in 2018 summarizing the evidence and argument after 15 days of hearing. They then made submissions before me in 2019 regarding

whether to proceed on the record and in 2020 regarding the quantum of special award, expenses, statutory entitlement to assessments and the law of credibility. Having reviewed their written material, I find it reasonable to allow an additional 26 hours for State Farm's written submissions.

When I add the above findings regarding allowable hours for the hearing, hearing preparation and written submissions, I get a total of 425.

I acknowledge Ms. Yogesvaran's submission that the complete absence of detail in State Farm's claim for legal services makes it difficult, if not impossible, for me to assess the reasonableness of the fees. However, I disagree. The principle in *Amoa-Williams and Allstate* supports the approach I have taken. The purpose of using a ratio approach of hearing time to hearing preparation is to avoid an item-by-item analysis of the bill, whether or not those line items have been provided.

I conclude that State Farm is entitled to its legal fees representing 425 hours of work on this file (rather than the 485.6 it claimed).

Hourly rate

The majority of the work was completed by Jonathan B. Schrieder. Specifically, State Farm claims that Mr. Schrieder worked 302 hours of the 475.6 total claimed. In other words, Mr. Schrieder's share of the work is 64%.

I accept that it is reasonable to delegate work to others. While I acknowledge Ms. Yogesvaran's point that State Farm does not explain why it claimed 119.8 hours in services from law clerks, I do not see the relevance. Having already determined that the total amount of billable hours is reasonable, I find it responsible to allocate a significant amount of those hours to law clerks rather than bill them all out to counsel at the highest hourly rate. Consequently, I accept that 64% of the work on this file is attributable Mr. Schrieder and the balance to others.

As I have allowed only 425 hours total on this file, I apportion the allowable hours based on the percentage of 64% to Mr. Schrieder and the balance to others. This means that I allow 272 hours for Mr. Schrieder's work and 153 hours for the work of others.

I accept State Farm's submission that Mr. Schrieder's hourly rate is properly $136.43. This is the Tier 3 rate, the highest rate for lawyers on the Ontario legal aid tariff. He is a senior member of the bar, called in 2000, with extensive experience in accident benefits litigation.

The balance of the work was completed by other lawyers of the same or lesser billing rates or by support staff. However, State Farm did not explain their hourly rates. Consequently, in the interest of fairness, I allow their work at the lowest rate, namely the law clerk rate of $32.37.

Subtotal fees

Having allowed the hourly rate of $136.43 for each of Mr. Schrieder's 272 allowable hours and adding 13% for HST, I find that the total allowable fees for Mr. Schrieder is $41,933.12, which I round to $42,000.00.

Having allowed the hourly rate of $32.37 for each of the 153 allowable hours worked by others on this file and adding 13% for HST, I find that the total allowable fees for other people working on this file is $5,596.45, which I round to $6,000.00.

I conclude that State Farm is fairly entitled to $48,000.00 in legal fees, including HST (rather than the $58,982.67 it claimed).

Disbursements

State Farm claims $47,285.90 in taxes and disbursements.

In its bill of costs, State Farm claims $46,168.40 in taxes and disbursements, but on my calculation, that total is incorrect. As State Farm did not bother to break down its disbursements

into categories, I had to go through each expense and categorize them. As a result, I recalculated the total.

On my calculation, the claim for disbursements, including HST, breaks down as follows:

- $22,345.75 attendance of experts at arbitration
- $12,628.32 court reporter and transcripts
- $6,780.29 process service
- $2,001.42 photocopies
- $1,691.29 medical records for the applicant
- $1,231.78 conduct money for 19 witnesses
- $310.40 travel expenses to attend arbitration
- $296.65 courier

Attendance of experts at arbitration

Sections 5.3 and 5.4 of the *Schedule - Dispute Resolution Expenses*[5] provide:

> 3. The maximum amount that may be awarded for the attendance of an expert witness is $200 per hour of attendance, up to a maximum of $1,600 per day.
>
> 4. The amount of the expenses paid by or on behalf of the insured person or the insurer to an expert witness for preparation for a hearing at which the witness testifies may be awarded, to a maximum of $500.

Despite this, State Farm claimed invoices for four experts in the amount of $22,345.75 (including HST) representing their attendance and/or preparation for the hearing:

- $600.00+HST for Dr. Howard Platnick, being one hour for arbitration preparation on July 4, 2017.

I do not understand this claim for arbitration preparation because this expert did not appear at the arbitration. State Farm did not explain it. In any event, the rules are clear that preparation is only allowable for experts who testify. Consequently, I do not allow this expense.

[5] *Dispute Resolution Practice Code* (Fourth Edition — Updated January 2014), Section F Expense Regulation

- $1,500.00+HST for Dr. Dory Becker's arbitration attendance on August 14, 2017.

  As Dr. Becker testified for half a day, the most that can be claimed for attendance is four hours or $800.00. Together with the maximum of $500.00 for preparation, the maximum that can be claimed for this expert is $1,300.00.

  However, the transcripts show that there is no dispute that Dr. Becker was not properly served. Arbitrator Mervin allowed her to appear as an indulgence. I decline to require Ms. Yogesvaran to pay for her attendance when she was not properly served.

- $15,875.00+HST for Dr. William Gnam's arbitration attendance on October 4, 2017 ($3,500 for ½ day attendance + $3,250.00 for 6.5 hours of preparation) and on July 18, 2017 ($3,500 for ½ day attendance + $5,625.00 for 11.25 hours of preparation). This means that State Farm is claiming $500.00 per hour for this expert.

  The maximum that State Farm could have claimed for this expense is $2,600.00 ($1,600.00 for two half-days of attendance and $1,000.00 for preparation, on the premise that the expert needed to review the material again for the second court attendance which took place numerous weeks after the first).

- $1,800.00+HST for Loreta Stanulis-Duz, OT's 12 hours at $150 per hour for preparation and attendance at the arbitration on January 8, 2018.

  The maximum allowable is $200.00 per hour of attendance and up to $500.00 for preparation. If Ms. Stanulis-Duz's fee is $150.00 per hour and she testified for half a day (four hours), then State Farm can claim $600.00 for attendance and up to $500.00 for preparation for a maximum of $1,100.00.

In sum, State Farm claimed $19,775.00 in expert fees (before HST) when a simple regard for the rules would have shown that, in the best scenario, only $5,000.00 could possibly be allowed.

I agree with Ms. Yogesvaran that this claim is made with no regard for the Rules. In fact, I find this claim outlandish. The most I can consider allowing is $5,650.00 including HST.

Court reporter

The claim for $12,628.32 (including HST) for a court reporter and transcripts is not allowable. As explained above, State Farm should have known that this was not an allowable expense.

Process service

State Farm also claimed $6,780.29 for process service, in two invoices, but did not explain them:

- $4,667.78, including HST, for an invoice from Albright for 37 hours of service plus mileage in 2012. However, the invoice does not itemize who was served, with how many attempts, for what dates or at what cost. Moreover, I agree with Ms. Yogesvaran that I cannot even assume that this invoice relates to process service because the invoice does not make any such reference, but only makes a list of dates on which services were rendered. Like Ms. Yogesvaran, I considered whether this invoice related to surveillance, but when I went back to the surveillance report, I saw that the company that provided it bears a different name. As State Farm did not bother to explain the invoice, I am not going to guess at it. As a result, I am unable to assess the reasonableness of this expense. Out of fairness, I must err on the side of caution. I do not allow any of it.

- $1,766.25, including HST, for an invoice from Cyberbahn for the July 2017 hearing, which itemizes the names and dates of service and date returnable. However, I agree with Ms. Yogesvaran that this claim is also problematic. Eight of the names refer to the insurer's own witnesses. There is no explanation for why those witnesses required formal service. Moreover, only three of the witnesses appeared at the hearing. One of those witnesses, Dr. Becker, was not properly served so I decline to require Ms. Yogesvaran to pay for improper service. Another, Dr. Oshidari, appeared at the hearing but did not testify at the request of the insurer, so I also decline to require Ms. Yogesvaran to pay for his service. Lastly, Ms.

Yogesvaran argued that it was uncertain whether the third witness, Dr. Frank, was actually served and State Farm did not deny it. Consequently, I decline to order that as an expense. State Farm provided no explanation for why service should be allowable for witnesses who did not appear. I will not guess at that claim. Therefore, none of this claim is allowable.

Photocopies

State Farm also claimed expenses from Print Three in the amount of $574.95 (not including HST) for arbitration briefs in 2012 and 2017. I consider these a photocopying expense. In addition, State Farm claimed $1,196.22 for photocopies, not including HST. Photocopies are an allowable expense under the *Schedule*. The amounts do not seem unreasonable in the circumstances of more than ten years of evidence and 19 days of hearing. As explained below, I consider allowing them at 100% for a total of $2,001.42, including HST.

Medical records

State Farm claimed $1,691.29 including HST for medical records provided to the applicant. While Ms. Yogesvaran points out that State Farm did not produce all the invoices, she did not deny having received them. Also, while Ms. Yogesvaran points out that State Farm made no submissions about why those were required, I accept that this is a reasonable amount for producing more than ten years worth of medical records to the applicant. I consider allowing the expense at 100%.

Conduct money

State Farm also claimed $1,231.78 (including HST) in conduct money for 19 witnesses. However, 19 witnesses did not appear at the hearing. I do not understand why State Farm paid conduct money to all these other witnesses. State Farm made no submissions about this point. I decline to go through the transcripts to confirm which witnesses appeared and match them with the amounts set out in the expense claim. I decline to go through that process if State Farm itself

did not bother to do so and I decline to guess at a fair amount. Consequently, I do not allow this expense.

Travel expenses

The insurer also claimed $310.40 including HST in travel expenses for Mr. Schrieder to attend the arbitration. The *Schedule* provides that disbursements may be awarded for photocopies, expert reports and "other out-of-pocket expenses incurred in furtherance of the arbitration …" I find that travel expenses fall under the latter category. Although there is no explanation for the expense, I find the amount not unreasonable given that there were 19 days of hearing. There are no residential accommodations or legal offices on the tribunal's site. Consequently, travel to the site was required. I consider allowing this expense at 100%.

Courier

State Farm also claimed $262.52 for courier costs. It did not explain them. Consequently, I am in no position to justify them. I cannot allow them.

Subtotal disbursements

I have considered allowing $5,650.00 for expert attendance at the hearing, $310.40 for travel, $1,691.29 for medical records to the applicant and $2,001.42 for photocopies.

This brings the amount for State Farm's taxes and disbursements to $9,653.11 (keeping in mind that State Farm claimed $47,285.90).

Reduction

At this point, State Farm's presumptively allowable legal fees of $48,000.00 and disbursements of $9,653.11 come to a subtotal of $57,653.11. However, this is not the end of the calculation.

I have already decided that Ms. Yogesvaran is entitled to a reduction in the expenses she must pay to State Farm. I gave five reasons to reduce the total award. I reiterate them here, with values attached and my reasons.

1. Ms. Yogesvaran's success on the narrow but novel issue of whether to proceed on the transcripts, which I value at $500.00 representing the applicant's reasonable legal fees of that hearing;

2. State Farm's conduct on the eve of the arbitration in 2011, which I value at $5,900.00 representing Ms. Yogesvaran's costs thrown away of the adjournment, including the need to review the same material for the next hearing and the need to gather new evidence and make new submissions at the next hearing;

3. State Farm's late submissions in 2020, which I value at $100.00, representing the reasonable legal fees to address the matter in submissions; and,

4. State Farm's claim for unallowable disbursements (court reporter and expert fees) which I value at $500.00, to account for Ms. Yogesvaran having to respond to those baseless claims.

5. State Farm's expense claim made in the absence of submissions on quantum, which required painstaking attention to detail to understand, I value at $500.00 to account for the time Ms. Yogesvaran had to respond to them.

However, there is precedent to impose a further reduction for State Farm's conduct in "overreaching" in its expense submissions. State Farm made an outlandish claim for expenses without bothering to explain it. Ms. Yogesvaran argues that this constitutes egregious overreaching for which consequence are appropriate. I agree.

In *Mooney and Wawanesa*,[6] the Delegate found that the insurer was not entitled to any expenses as a result of its overreaching. Delegate Evans found that the insurer was seeking payment for

[6] *Supra*, note 4.

items that are not payable under the Regulation, items that totalled nearly 80% of the entire amount claimed. He found the insurer's conduct in making these expense claims to be improper and vexatious and dismissed the entire expense claim as a result.

In this case, State Farm sought payment for disbursements not payable under the Regulation, namely for court reporter, transcripts and expert fees. These items represent approximately 70% of the entire amount of disbursements claimed. Consequently, I decline to allow any disbursements. I also discount the claim for legal fees in regard to expense submissions in the amount of $500.00.

I conclude that Ms. Yogesvaran is liable to pay State Farm's expenses of the arbitration in the amount of $40,000.00, inclusive of fees, taxes and disbursements.

CONCLUSION:

The evidence leads me to dismiss Ms. Yogesvaran's claims and find her liable to pay State Farm's expenses of this arbitration in the amount of $40,000.00, which includes all fees, taxes and disbursements.

June 29, 2020

Isabel Stramwasser
Arbitrator

Date

Dispute Resolution Services

Services de règlement des différends

Ontario

FSCO A08-001142
and A13-013397

BETWEEN:

SUBASHINI YOGESVARAN

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. Subashini Yogesvaran's applications for arbitration are dismissed.

2. Subashini Yogesvaran shall pay State Farm's expenses of this arbitration in the amount of $40,000.00, which is inclusive of all fees, taxes and disbursements.

Isabel Stramwasser
Arbitrator

June 29, 2020
Date