FSCO A97–000928

BETWEEN:

B. M.

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Deena Baltman

Heard: January 25, 26, 27, 28, and February 1, 1999,
at the Offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Domenic A. Romeo for Ms. M.
Michael P. Taylor for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Ms. M.[1], was injured in a car accident on January 29, 1996. Because she could not return to her former job as an office administrator, State Farm Mutual Automobile Insurance Company ("State Farm") paid her income replacement benefits under the *Schedule*[2] until July 25, 1996. The parties disagree as to whether Ms. M. was disabled from her employment for any further period, and whether she is entitled to various medical and rehabilitation expenses.

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[1]Before this accident Ms. M. married and changed her name, but State Farm continued to insure her, and later adjusted this file, under her original name. I have used initials only, for reasons of privacy.

[2]The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94 and 463/96.

The issues in this hearing are:

1. Is Ms. M. entitled to weekly income replacement benefits from July 26, 1996?

2. Is Ms. M. entitled to payment for various medical and rehabilitation expenses?

3. Is Ms. M. entitled to interest on any amounts owing?

Result:

1. Ms. M. is not entitled to weekly income replacement benefits from July 26, 1996.

2. Ms. M. is entitled to payment of various medical and rehabilitation benefits, identified below.

EVIDENCE AND ANALYSIS:

Background

Ms. M., now 27 years old, is married and the mother of a ten month old boy. At the time of the accident, she had been employed for two years as an office administrator with Gill Machineworks Ltd., a company which manufactures robotic parts.

On January 29, 1996, Ms. M. was driving on the 401, during slippery conditions, when another car lost control and swerved into her lane. Her car was hit twice, first at the front and then at the rear, and she struck her head on the driver's side. She remained conscious, although dizzy and

shaken. Her car was damaged beyond repair and she was taken to hospital by ambulance, where she was released the same day.

As her own physician was away, Ms. M. saw the covering doctor the following day with complaints of pain all over, particularly in her neck and back, along with headaches and dizziness. She was prescribed medication and was referred to physiotherapy.

Ms. M. stayed at her mother's house for a month after the accident as she was unable to work and needed help in all her activities of daily living, including bathing and dressing. She then returned to her own home.

Despite prolonged treatment, including physiotherapy, massage, acupuncture and psychological counselling, Ms. M.'s complaints have changed little since the accident. They include: low back pain, often severe and prolonged, which may radiate down her legs and into her toes; severe headaches, sometimes accompanied by dizziness; neck and shoulder pain; and reduced memory and concentration. She has also experienced a significant degree of anger and depression.

Ms. M. claims that because of her injuries, she is unable to return to her pre-accident employment, as she cannot tolerate prolonged sitting or standing, or holding her neck in a flexed position for extended periods. She also claims that her reduced concentration and memory, along with fatigue and impatience, prevent her from dealing with customers and co-workers effectively. She has not attempted any return to work since the accident and feels that she is unlikely to improve in the future.

The Insurer terminated income replacement benefits on July 25, 1996, relying on the reports of Dr. J. Zeldin, an orthopaedic surgeon it retained, and Dr. R. Grossman, who performed a DAC assessment. Both concluded that Ms. M. is not disabled from returning to her pre-accident

employment. The Insurer submits that Ms. M. has exaggerated her symptoms and is poorly motivated.

In order to recover further income replacement benefits, Ms. M. must establish that she was substantially unable to perform the essential tasks of her employment for some period beyond the termination date of July 25, 1996, in accordance with section 7 of the *Schedule*.

Ms. M.'s Medical History

Ms. M. was in good physical health in the years leading up to this accident, with no record of absenteeism from work.

In December 1987, Ms. M. was briefly hospitalized for a drug overdose following a confrontation with her father. She remained an outpatient until May 1988 and, with the benefit of therapy, soon resolved much of her family difficulties.

I find this history of little relevance to this case. It appears to have been an impulsive gesture, rather than a calculated attempt to end her life; immediately after taking the overdose, Ms. M. told her mother about it, which, according to several of the experts who testified, suggests that it was more a "cry for help" than a genuine desire to end her life. Moreover, the incident occurred over a decade ago, and Ms. M. has since not required any further psychiatric care.

Ms. M. did not reveal these events when questioned by numerous assessors about her pre-accident medical history. The Insurer says this proves she lacks credibility, and should cast doubt on many of her assertions. I disagree. The events were highly embarrassing, occurred over a decade ago, and were hardly relevant to this case. Under these circumstances, I find her silence understandable. I was more troubled by the Insurer's persistent questioning of witnesses about this matter.

Essential Tasks of Employment

In a typical week, Ms. M. worked 40 hours of regular time and approximately 5-10 hours of overtime. Her duties included customer service, invoicing, accounts payable and receivable, computer work, filing, answering phones, and arranging meetings. Approximately once a week she replenished the office supplies. She occasionally stored and retrieved files. She had frequent contact with customers, by phone and in person.

Her physical demands included prolonged sitting and standing, some bending and lifting (while filing), and frequent reaching and handling. She estimated (and her employer confirmed) that the job involved approximately 80 per cent sitting and 20 per cent standing.

The majority of her assessors categorized the job as "sedentary." However, the Functional Abilities Evaluation (F.A.E.) report considers it a "light" job. In either case, I find the job moderate in its demands, and within her capacity at the time State Farm terminated benefits.

Entitlement to Weekly Income Benefits

Each party presented a myriad of medical witnesses, including experts in the fields of family medicine, orthopaedics, physiatry, psychology, psychiatry, and occupational medicine. I have not discussed their evidence in detail because they agreed on several key elements. In particular, several of them found, and I accept, the following:

1. Ms. M. suffered *some* level of impairment (i.e. a reduction in her physical and/or psychological function.)

2. The impairment was caused by the accident.

3. The CT and MRI scans show a mild bulging of the L4-5 disc, without compression on nerve roots. It is medically recognized that a patient can experience pain even in the absence of nerve infringement.

4. Ms. M. is not malingering, in the sense of consciously exaggerating her symptoms.

The critical question before me, and where the experts disagree, is whether Ms. M's impairment disables her from her job. For the following reasons I find that it does not.

It is well known that patients' responses to pain vary widely, particularly with soft tissue injuries. At the same time where, as here, there is little objective evidence of disability, an applicant's motivation and reliability become particularly important.

In this case, I have grave concerns about Ms. M's motivation, primarily because she refused to attempt a trial return to work. In July 1996 Ms. M's longstanding family physician, Dr. J. Gustafsson, advised her to "return to work now." Ms. M. testified that she did not return to work because her former position was no longer available. I received no corroborative evidence on this point, but even if it's true, that is not the test under the legislation. If Ms. M. was capable of resuming her pre-accident work, she is no longer entitled to benefits. Moreover, she could have looked for similar work with another employer, but did not.

Ms. M. also suggested that if a job was available, it would have to be drastically modified. But there was no evidence that she even attempted a modified or graduated return to work, with any employer. She argued that it was State Farm's responsibility to arrange a work hardening program, followed by a graduated return to work, in accordance with the recommendations contained in the F.A.E. In this case, I don't agree. State Farm received both a DAC report and the opinion of Dr. Zeldin advising that Ms. M. was ready to resume all her pre-accident tasks. Dr.

Gustafsson, who, according to her testimony, she both liked and trusted, agreed with these assessments.

At the hearing Dr. Gustafsson testified that he merely intended that Ms. M. *attempt* a return to work, and was not convinced that she was capable of full-time duties. This testimony, though a loyal attempt to assist Ms. M. in her claim, contradicts the simple and unqualified directive contained in his clinical note of July 29/96:

> ...reviewed Dr. Grossman's report with patient. He also agrees with previous assessment that she should be able to return to work. Discussed some of the inconsistencies of physical findings. **Advised patient to return to work now**.
> [emphasis added]

It is true that in April 1997, during a telephone conversation with Ms. M.'s (former) counsel, Dr. Gustafsson recommended a *graduated* return to work. But by then Ms. M. was significantly deconditioned by her self-imposed exile from the workforce for over 15 months, and would have needed to build up gradually. In any case, even then she refused to try any part-time work, confirming my view that she had no genuine desire to re-enter the workforce. Nor did she undertake any upgrading or educational courses, or consider any type of flexible work from home.

Dr. Gustafsson was not the only treating physician who advised Ms. M. that she was not disabled from working. Dr. David Day, a psychologist, treated Ms. M. from September 1996 until April 1997. In response to a letter from Ms. M.'s lawyer inquiring about whether she could work, Dr. Day wrote in his clinical note that she was "not disabled psychologically." When he explained this to Ms. M., she became upset and demanded that he not report his views to her lawyer "at all." Dr. Day had earlier expressed his views in a report dated September 9, 1996, to Dr. Kachooie, the referring physician. In particular, he noted that Ms. M.'s most predominant reaction to the

accident was anger to the other driver. She believed that the other driver was speeding and had made an improper lane change, and noted that he had not been charged[3]:

> The most significant primary affect which she reported as having experienced at the time of the accident was anger. She was very angry at the other driver and the affect continues through to the present. She lays awake rethinking the accident, and the predominant affect during this experience is anger, not anxiety...

Dr. Day's clinical notes contain numerous references to her ongoing anger and her persistent inability - or refusal - to come to grips with it. In her testimony, it was evident that Ms. M. still resents the other driver and believes that his negligence, on its own, entitles her to compensation: "I didn't ask for this accident, it wasn't my fault." Although her feelings are understandable, their persistence and severity suggest that her ongoing claim may be fuelled more by acrimony than by a genuine inability to work.

Dr. Day, as the treating physician, had the benefit of seeing Ms. M. over a prolonged period. In addition, his reports and clinical notes suggest that he took a balanced approach to her care, in that he acknowledged her pain and frustration but encouraged her to learn coping techniques and resume her activities. For these reasons, I place considerable weight on his evidence.

Ms. M. testified that it was obvious to her that she could not work at all because, from the outset, she was severely limited in even the simplest household tasks. She stated that she has required a great deal of help from family, especially since May 1998, when her son was born. But her evidence on this point was inconsistent. In cross-examination, she conceded that she often takes care of her son by herself. Her mother lives in Mississauga and therefore cannot attend frequently, and her cousin only comes *every 3-4 days*. Ms. M. stated that her son, now eight months old, needs to be diapered approximately 6-8 times a day. To do this she lifts him on and off a diaper

[3]The accident was attributed to weather conditions.

table. But she then insisted that she normally doesn't change his diaper more than once a day, "unless he's crying." She added that her husband *occasionally* comes home for lunch, and he then changes the baby's diaper mid-day. I found this explanation implausible.

Then in re-examination, Ms. M. stated that her husband comes home for lunch *4 times a week,* and her cousin attends *3-4 days each week*. I found this clarification suspect, coming as it did in response to highly leading questions. Nor was this evidence corroborated at the hearing, as none of Ms. M.'s family members testified. Although Ms. M. did not advance a claim for housekeeping expenses, she relied on her alleged difficulties at home to support her assertion that she could not work. I therefore found it curious that I received no evidence to corroborate her description of her day to day capabilities. I also found it curious that Ms. M. made no comment about whether her son's birth had any effect on her motivation to return to work.

In his submissions, Ms. M's counsel suggested that I should give particular weight to the opinions of Doctors Ogilvie-Harris, Steiner, and Hanick. Dr. D. J. Ogilvie-Harris, an orthopaedic surgeon, testified that Ms. M's physical injuries prevented her from returning to work. Dr. L. Steiner, a psychologist, concluded that she was psychologically impaired from working. Dr. A. Hanick, a psychiatrist, testified that Ms. M. suffered a psychiatric impairment that prevented her from working. All three doctors are learned, experienced, and expressed genuinely held opinions. Doctors Ogilvie-Harris and Steiner were particularly impressive. But all three doctors reached their conclusions largely by relying on Ms. M.'s subjective complaints. I have already noted that she viewed herself as completely disabled from the outset, despite contrary advice from her longstanding family physician and her treating psychologist. And although Doctors Ogilvie-Harris, Steiner and Hanick referred to Ms. M.'s herniated disc as objective evidence of injury, they agreed that it alone did not necessarily result in disability, particularly where, as here, there was no

evidence of nerve impingement[4]. Finally, all three doctors were retained solely for medical-legal purposes, and saw her on only one occasion. Their views contrasted starkly with those of Doctors Day and Gustafsson, who treated her over a prolonged period[5]. For all these reasons, I give little weight to their testimony.

Ms. M. also relied on surveillance conducted by State Farm, which shows her walking and entering her car in a slow, hesitant manner. She also tended to slightly favour her right leg. The surveillance was, however, conducted several years after the accident, by which time Ms. M. was greatly deconditioned by her self-imposed absence from the workforce and abdication of many household tasks. Her appearance is also consistent with an exaggerated but real belief of disability. But even if Ms. M. honestly believes herself to disabled, that is not enough to qualify her for further benefits. Most of the medical assessors agree, and I accept, that Ms. M.'s activities were disrupted for some period following the accident, and that she continues to experience some level of pain. However, I am not persuaded that she suffered a substantial inability to engage in the essential tasks of her pre-accident job, on the grounds of either physical or psychological impairment, for any period beyond the termination date of July 25, 1996. She is therefore not entitled to any further weekly income benefits.

Medical and Rehabilitation Benefits

Ms. M. seeks payment of three outstanding accounts:

[4]Dr. Ogilvie-Harris also relied on inclinometer readings as objective proof of disability. However, Dr. A. Ameis, who also used an inclinometer (during a DAC assessment), found the results "lacking in plausibility and of uncertain relevance."

[5] Dr. Kachooie, her treating physiatrist, also opined that she was disabled. But he relied significantly on his findings that she was "markedly depressed" and suffering "post traumatic distress disorder" and, because he is not a qualified psychologist, referred her to Dr. Day, who concluded that she was not psychologically disabled.

1. For Dr. A.D.S. Rad, who provided acupuncture treatments from August 1996 until April 1997. State Farm paid his account until February 1997. Dr. Rad is owed $652.74.

2. For physiotherapy from The Rehab Centre, for the period of March 7, 1997 to March 27, 1997, on which $1,080.00 is owed.

3. For psychological treatments provided by Dr. L. Steiner from August 1, 1997 to December 9, 1997, which total $2,725.00[6].

I received few submissions on this issue. State Farm argued that all these accounts should be disallowed because they are for treatments rendered after the DAC report of February 1, 1996 concluded that Ms. M. did not require any further medical or rehabilitative services. I agree with previous Commission cases that, although the DAC is an important piece of evidence, it is not determinative of the issue. In this case, several physicians opined that Ms. M. required the treatments in dispute. Although they did not assist her to the point that she could return to work, Ms. M. testified, and I accept, that she benefitted from them. For these reasons, I find that the treatments reasonable, and order State Farm to pay them[7].

[6]Counsel agreed during submissions that this was the outstanding amount, even though the invoices add up to a different figure.

[7]Although the disputed services are covered by the "pay pending dispute" provision of the *Schedule*, Applicant's counsel did not raise the issue of a special award, and I do not find this an appropriate case in which to so exercise my jurisdiction.

EXPENSES:

I encourage the parties to resolve this issue on their own. If necessary, I may be spoken to.

March 30, 1999

Deena Baltman
Arbitrator

Date

FSCO A97–000928

BETWEEN:

B. M.

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 amended, it is ordered that:

1. Ms. M.'s claim for weekly income replacement benefits is dismissed.

2. Ms. M.'s claim for payment of medical and rehabilitation benefits is allowed.

March 30, 1999

Deena Baltman
Arbitrator