FSCO A99–000601

BETWEEN:

FRANK D'AMATO

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Beth Allen

Heard: May 29 and 30, 2000, at the Offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Mr. D'Amato was unrepresented
Michael P. Taylor for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Frank D'Amato, was injured in a motor vehicle accident on January 7, 1998. He applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.[1] State Farm terminated weekly income replacement benefits (IRBs) on June 4, 1998. Mr. D'Amato seeks reinstatement of the

[1]The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96 and 303/98.

weekly IRB at the established rate. The parties were unable to resolve their disputes through mediation, and Mr. D'Amato applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended (the "Act").

The issues in this hearing are:

1. Is Mr. D'Amato entitled to further IRBs after benefits were terminated on June 4, 1998?

2. Is State Farm liable to pay Mr. D'Amato's expenses incurred in respect of the arbitration hearing pursuant to subsection 282 (11) of the *Act*?

3. Is Mr. D'Amato liable to pay State Farm's expenses incurred in respect of the arbitration hearing?

Result:

1. Mr. D'Amato is not entitled to further IRBs after June 4, 1998.

2. I may be spoken to on the issue of the expense of the arbitration hearing.

PROCEDURAL MATTERS:

Explanation of the Proceeding and Interpretation Services:

The hearing took place on May 29 and 30, 2000. Although State Farm had retained the services of a court reporting service for the hearing, a court reporter did not appear on May 29. State Farm chose to proceed with the hearing without a court reporter on May 29. A court reporter did attend on behalf of State Farm on May 30.

Mr. D'Amato was not legally represented at the hearing. At the commencement of the hearing, I indicated that I would explain the hearing process to him. I also invited him to inform the tribunal throughout the proceeding if he had any difficulties following or understanding the proceeding. As the hearing progressed, I explained the process and the respective roles the participants would play at each stage in the procedure. I inquired whether Mr. D'Amato intended to call witnesses other than himself. He indicated that although his doctors know his medical condition, he would not be calling any of them or anyone else as witnesses.

Mr. D'Amato stated that he did not know how to write and could not understand the documents he received from State Farm in connection with the hearing. However, Mr. D'Amato testified that he has been a real estate agent for some 35 years which occupation clearly requires skills in reading and writing in English as well as some familiarity with legal documents. As noted later, in his closing statements, Mr. D'Amato referred to and read extensively from investigation reports State Farm filed into evidence. However, I informed Mr. D'Amato that the Commission would provide an interpreter if he felt he required this service. Mr. D'Amato stated that he did not require an interpreter.

Adjournment:

At the commencement of the hearing, I also inquired whether the parties had any preliminary matters to present before I began hearing Mr. D'Amato's evidence. Mr. D'Amato and Mr. Taylor indicated that there were none. However, in his closing remarks, Mr. D'Amato indicated that in a teleconference arranged by the Commission on May 26, 2000 involving an arbitrator, a legal representative for State Farm and himself, he requested an adjournment. He stated that he required the adjournment because he had a medical appointment on June 22, 2000 and wanted the hearing adjourned until after this appointment to permit him to use the results of his medical appointment as evidence in the hearing. He submitted that June 22 is not far away and the hearing could be held soon thereafter. Although Mr. D'Amato did not directly ask to reopen his

adjournment request, I dealt with Mr. D'Amato's reference to the adjournment as a request to revisit his previous request for an adjournment of the hearing.

I inquired whether State Farm's counsel had arguments in response to Mr. D'Amato's adjournment request. Mr. Taylor objected to an adjournment to permit Mr. D'Amato an opportunity to produce more evidence. He pointed out that Mr. D'Amato undertook at the pre-hearing discussion on December 20, 1999 to produce documents and to sign authorizations with respect to documents State Farm had previously requested. Mr. Taylor submitted that despite correspondence to Mr. D'Amato enclosing the authorizations, Mr. D'Amato has refused to respond or honour his undertaking to sign the authorizations. For this reason, Mr. Taylor submitted that Mr. D'Amato should not be permitted an adjournment to allow him to produce more evidence.

The *Dispute Resolution Practice Code*[2] (the *Code*) provides procedural guidelines for the mediation, arbitration, neutral evaluation and appeal processes at the Commission. Rule 69 provides arbitrators with a broad discretion in considering adjournment requests. It states:

> **69.4** An adjudicator may adjourn a hearing on his or her own initiative, or at the request of a party, on such terms he or she considers appropriate.

After hearing the parties' arguments, I refused to grant the adjournment. I considered the following factors in making my decision: the lack of consent from the Insurer; the timing of the request; Mr. D'Amato's non-compliance with his production obligations; and the unfairness that would result from allowing the adjournment. I accept Mr. Taylor's objection and find it would be unfair to permit Mr. D'Amato an opportunity to produce further evidence under circumstances where he has not complied with his production obligations. Further, allowing an adjournment would result in prolonging the hearing in a situation where Mr. D'Amato had ample opportunity

[2]Ontario Insurance Commission, 3rd edition, April 15, 1997.

at an earlier point to schedule a medical appointment to take place before the current hearing dates.

Reopening the Hearing:

The hearing was originally scheduled to take place during the four days, May 29, 30, 31 and June 1, 2000. However, all evidence was in and closing remarks were completed by 12:30 p.m. on the first hearing day. Mr. D'Amato called himself as a witness and State Farm called its adjuster, Mr. Christopher Metson. Mr. D'Amato had the opportunity to give his evidence in chief, in re-examination and to cross-examine Mr. Metson. Mr. D'Amato also gave reply evidence after State Farm had completed its case. State Farm cross-examined Mr. D'Amato and examined Mr. Metson in chief. Both parties presented closing remarks. Before closing the hearing, I inquired as to whether Mr. D'Amato had any further submissions to make and he said he did not. I indicated that a written decision would be sent by courier to both parties in the near future, after which the parties could request an order as to the expenses of the arbitration hearing.

Later on May 29, 2000, Mr. D'Amato contacted Acting Senior Arbitrator, Mr. Lawrence Blackman, and stated that he thought the hearing would be continuing until June 1, 2000 and that he did not understand that the hearing had been concluded. He indicated that he had more to say and wanted the opportunity to do so.

I decided to sit on May 30, 2000 to hear a motion by Mr. D'Amato to reopen the hearing. I heard submissions from both Mr. D'Amato and Mr. Taylor. Mr. D'Amato submitted that because four days had been scheduled, he thought that all of the days would be used for the hearing. He indicated that he wanted the opportunity to more fully address the investigation reports State Farm submitted. State Farm filed into evidence reports dated April 8 and 22, 1998 prepared by Nielsen & Associates Investigations Inc. (Nielsen). Mr. D'Amato also indicated that he had more documents in his car to which he wished to refer.

Regarding the additional documents in his car, I asked him to identify these documents before I made my ruling. He did not clearly answer my query and was ultimately unable to advise as to which documents he was referring. I therefore ruled that I would consider only the two investigator's reports in my decision whether to reopen.

State Farm objected to the hearing being reopened. Mr. Taylor argued that while Rule 39 of the *Code* grants an arbitrator the discretion to reopen a hearing at any time before the final disposition of the matter, this discretion is limited. Rule 39 states:

> **39.1** The arbitrator may reopen a hearing at any time before he or she makes a final order disposing of the arbitration.

Mr. Taylor relied on the ruling in the *Tran and Pilot Insurance Company*[3] arbitration case that dealt with whether a hearing should be reopened to receive further evidence after the case had been closed. The arbitrator in this case held that a case should be reopened only in exceptional and extraordinary circumstances. She presented a two-pronged test to guide the exercise of discretion. She held that it must be shown that the evidence is relevant and weighty and if adduced would have an important influence on the outcome of the case and that the lateness in presenting the evidence is justified by unusual circumstances beyond the control of the party seeking to adduce it.

Mr. Taylor argued that Mr. D'Amato has already testified about the investigator's reports and in his view any further comments Mr. D'Amato would wish to make would not meet the requirement of being sufficiently weighty as to affect the ultimate outcome of the case. Mr. Taylor also submitted that Mr. D'Amato had the investigator's reports before the hearing and because of his lack of diligence did not prepare in advance to make his comments on the reports on the first day of the hearing.

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[3] *Tran and Pilot Insurance Company-2*, (OIC A-005207 August 16, 1995).

After considering the parties' submissions, I decided to exercise my discretion to reopen the hearing. I find that Mr. D'Amato's circumstances do not satisfy the tests set out in the *Tran* decision because the additional evidence he wishes to present is not likely to significantly affect the outcome of the case. Furthermore, it was within Mr. D'Amato's control to have made his comments on the investigator's reports on the first day of the hearing and he failed to do so.

However, I took into account that Mr. D'Amato was unrepresented at the hearing and for this reason lacked the advantage of having legal counsel to advise him as to the procedural rules. Although I explained the procedure to him during the hearing, I understand how Mr. D'Amato might have drawn the conclusion that the hearing would not conclude until June 1, 2000 since four days had been scheduled. I found Mr. D'Amato's lack of representation qualified as an exceptional circumstance, sufficient to warrant my reopening the hearing to permit him to conclude his evidence and remarks on the investigator's reports.

EVIDENCE AND ANALYSIS:

The Law:

Section 4 of the *Schedule* applies to persons who were employed at the time of the accident. Applicants in this category must establish that they sustained an injury as a result of the accident that substantially prevents him from doing the essential tasks of his pre-accident employment. This provision states:

> **4.** The insurer shall pay an insured person who sustains an impairment as a result of an accident an income replacement benefit if the insured person meets any of the following qualifications:
>
> 1. The insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a

> substantial inability to perform the essential tasks of that employment.

Mr. D'Amato has the burden to prove on a balance of probabilities that he satisfies the requirements of section 4 of the *Schedule*.

The Accident and Employment Background:

Mr. D'Amato, aged 58 at the time, was involved in a car accident on January 7, 1998. Another vehicle rear-ended his car. He sustained injuries to his back and neck as a result of the accident. State Farm paid Mr. D'Amato IRBs at the rate of $153.14 per week covering the period from January 14, 1998 to June 4, 1998. Mr. D'Amato does not dispute the IRB rate, however, he claims entitlement to benefits beyond June 4, 1998.

At the time of the accident, Mr. D'Amato was a real estate agent with a company called Realty World. He testified that he has worked in this capacity for about 35 years. He conceded that he resumed this work after the accident but claimed that he has only been able to work off and on because of his injuries. Mr. D'Amato testified that his job involves selling houses and buildings which requires him to search for listings, telephone clients, drive around in search of properties, pick up clients to show houses and inspect properties. He stated that he worked every day, for 12 to 14 hours a day and conducted his business in Toronto and the surrounding areas.

Disability:

Mr. D'Amato presented no documentary evidence or witnesses other than himself to support his disability claim.

Mr. D'Amato testified that although he returned to work after the accident, he only went to work when he felt well enough. He stated that some days he had to remain in bed because of his back pain. He said that if he sat for any more than 15 minutes the pain would start.

State Farm submitted that when it terminated benefits on June 4, 1998, Mr. D'Amato was no longer disabled from resuming the essential tasks of his employment. To support its position, State Farm relied chiefly on two independent medical assessments, the report of a physiotherapy facility which State Farm commissioned and the surveillance conducted by Nielsen .

On April 15, 1998, Dr. Barry Little, a physician with Paramount Rehabilitation Centre Inc., conducted a medical assessment on Mr. D'Amato. After conducting a physical assessment, Dr. Little diagnosed soft tissue injuries to his neck and back and concluded that Mr. D'Amato did not demonstrate a substantial disability to perform the substantial tasks of his pre-accident employment.

On April 21, 1998, Dr. Lyndon F. Mascarenhas, a physician certified in injury evaluation, conducted an assessment on Mr. D'Amato on behalf of State Farm and diagnosed myofascial strain to his neck and back. Dr. Mascarenhas noted that while Mr. D'Amato continued to experience discomfort in his lower back, he concluded that Mr. D'Amato was not disabled from undertaking his ordinary domestic responsibilities. Dr. Mascarenhas gave a prognosis of excellent and projected that Mr. D'Amato's symptoms will subside with time. However, he did not comment on his capacity to return to his pre-accident work as required by section 4 of the *Schedule*.

Dr. Richard Goldford, a chiropractor with Austin Treatment and Rehabilitation Clinic, a facility State Farm retained, recommended in his April 6, 1998 report that Mr. D'Amato be discharged from his active rehabilitation program and that he gradually increase his activities over four to six weeks to prepare for a return to his regular employment duties.

I find that Mr. D'Amato's testimonial evidence did not persuade me that State Farm's medical evidence was inaccurate.

Nielsen conducted surveillance on Mr. D'Amato during several days in March and April 1998. State Farm concluded from the surveillance reports that by April 1998, Mr. D'Amato had returned to work at Realty World, contrary to representations Mr. D'Amato had made to Dr. Little on April 15, 1998 that he had not resumed work. Mr. D'Amato had been observed on a number of occasions at the Realty World Office getting in and out of his car. According to a Nielsen investigator, Mr. D'Amato made arrangements to show him a home on April 3, 1998 after two other appointments Mr. D'Amato had on that day which, due to communication restrictions, did not materialize. According to the April 8, 1998 report, the office administrator indicated that Mr. D'Amato called into the office for his messages.

After reviewing the evidence, I conclude that Mr. D'Amato failed to prove that he is substantially disabled from resuming the tasks of a real estate agent. Mr. D'Amato admitted that he has returned to work off and on since the accident. However, he did not persuade me he was substantially unable to undertake the essential tasks of a real estate agent.

Mr. D'Amato dedicated the greatest part of his testimony and submissions to challenging the contents of the Nielsen investigation reports. I find that he failed to effectively refute this evidence. He might have filed into evidence employment financial records and called family members, friends and representatives from his employer to corroborate his allegations about the reports. However, I find that even had he successfully refuted the investigative evidence, this would not have been sufficient, without persuasive medical evidence, to meet the burden to prove his disability. I find Mr. D'Amato failed to meet this burden.

I therefore conclude that Mr. D'Amato is not entitled to further IRBs as he has failed to meet the requirements of section 4 of the *Schedule*.

EXPENSES:

If the parties do not settle the issue of the expenses of the arbitration hearing, I may be spoken to on this matter.

June 30, 2000

Beth Allen
Arbitrator

Date

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BETWEEN:

FRANK D'AMATO

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. Mr. D'Amato is not entitled to further IRBs after the June 4, 1998 benefit termination date.

2. I may be spoken to on the issue of the expenses of this hearing.

June 30, 2000

Beth Allen
Arbitrator

Date