FSCO A99–000957

BETWEEN:

JOSEPHINE LOMBARDI

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Fred Sampliner

Heard: October 2, 3, 4, 5, 10 and 11, 2000, at the Offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Joseph Brian Donnelly for Mrs. Lombardi
Michael P. Taylor for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Josephine Lombardi, was injured in a motor vehicle accident on March 10, 1997. She applied for and received weekly disability benefits from State Farm Mutual Automobile Insurance Company ("State Farm") until March 26, 1999. She claims ongoing disability benefits, reimbursement for housekeeping and attendant care expenses under the *Schedule*.[1] The parties were unable to resolve

[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.

their disputes through mediation, and Mrs. Lombardi applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

1. Is Mrs. Lombardi entitled to income replacement benefits from March 26, 1999 under Part II of the *Schedule*?

2. Is Mrs. Lombardi entitled to attendant care benefits as a result of the accident under section 16 of the *Schedule*?

3. Is Mrs. Lombardi entitled to housekeeping expenses as a result of the accident under section 22 of the *Schedule*?

The parties settled Mrs. Lombardi's claim for payment of her physiotherapy treatment at Prevent Assessment and Rehabilitation Clinic during the course of the hearing.

Result:

1. Mrs. Lombardi is entitled to income replacement benefits from March 26, 1999 through September 10, 2000, together with interest under section 46 of the *Schedule*.

2. Mrs. Lombardi is not entitled to attendant care expenses under section 16 of the *Schedule*.

3. Mrs. Lombardi is not entitled to housekeeping expenses under section 22 of the *Schedule*.

EVIDENCE AND ANALYSIS:

Mrs. Josephine Lombardi and her husband were returning to their Woodbridge, Ontario home from their jobs at Litton Systems (Litton) on March 10, 1997. She was wearing a seat belt in the front passenger side of their stationary vehicle when it was rear-ended, and Mrs. Lombardi suffered a whiplash effect from the impact. Mrs. Lombardi complained of neck and shoulder pain, chiefly on her right side, at a nearby walk-in clinic shortly after the accident.

The evidence is that since the accident Mrs. Lombard has received physiotherapy, nerve block injections, massage and hypnosis therapy, TENS treatment, medication and psychological counselling, which have not alleviated her complaints of neck and right shoulder/arm pain, headaches, sleep loss, jaw pain, fatigue, memory failure and lack of concentration. Mrs. Lombardi maintains that her ongoing disability from this accident prevents her from resuming either her pre-accident job as a engineering clerk at Litton or any other suitable work.

State Farm does not dispute Mrs. Lombardi's entitlement to income replacement benefits under Part II of the *Schedule* for the first 104 weeks of her disability. For that period, the insured person must establish a substantial inability to perform the essential tasks of his or her pre-accident job in order to be eligible for the disability benefits.[2]

After 104 weeks the eligibility test becomes stricter. The insured person must establish a complete inability to engage in any employment for which he or she is reasonably suited by education, training or

[2] Subsection 5(1)

experience.[3] This latter test applies to the present claim. No decision from this Tribunal or any Court has interpreted this test.

Analysis of the post-104 week eligibility test:

The *Schedule* does not define any of the terms in subsection 5(2):

> (2) The insurer is not required to pay an income replacement benefit,
>
> > (b) For any period longer than 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a **complete inability to engage in any employment** for which he or she is reasonably suited by education, training or experience;
> >
> > (my emphasis)

The dictionary defines "complete" as "the maximum extent or degree." "Inability" is defined as "the lack of power or means."[4] Reading the words together literally would exclude all but the most catastrophically injured accident victim from entitlement to disability benefits after 104 weeks because the insured would have to be unable to perform any function of any job to qualify.

Literal reading of total disability clauses has been rejected in previous cases. In the well-known case of *Constitution Insurance Co. v. Coombe*[5] the Court relied on a prominent legal text, *Corpus Juris Secundum*:

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[3] Subparagraph 5(2)(b) of the *Schedule*

[4] *The Concise Oxford Dictionary* (Oxford University Press, 8th ed., 1992)

[5] 15 O.R. 3rd 461 (1993)

> In determining the meaning of total disability clauses, their language must be given a reasonable, rather than literal, construction...Total disability does not mean absolute helplessness or inability to do anything or absolute lack of earning power,....

Black's Law Dictionary also rejects a literal interpretation:

> "Total disability" within an accident policy does not mean absolute physical disability to transact any business pertaining to the insured's occupation, but **disability from performing substantial and material duties** connected with it. The term may also apply to any impairment of mind or body rendering it impossible for insured to follow continuously a substantially gainful occupation without seriously impairing his health, the disability being permanent of such nature as to render it reasonably certain to continue throughout the lifetime of insured.[6] (emphasis added)

> A person is "totally disabled" if his physical condition, in combination with his age, training and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income.[7]

The Courts of Ontario have applied the principle that "total disability" does not mean an absolute work disability[8] under the pre-1990 no-fault benefits policy.[9]

The 1990 version of the *Schedule (OMPP)*[10] changed the "total disability" test to the following:

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[6](West Publishing Co., 6th ed., 1990) at p. 462

[7]*ibid.*, at p. 1490

[8]John P. Weir, *Norwood on Life Insurance Law In Canada*, (2nd ed. Carswell, 1993), *Paul Revere Life Insurance Company v. Sucharov* (1983) 2 S.C.R. 541

[9]*Dale v. Commercial Union Assurance Company of Canada* (1980) I.L.R. 1-1271

[10]Subparagraph 12(5)(b) of the 1990 *Schedule* - The *Statutory Accident Benefits Schedule - Accidents on* or *Between June 22, 1990 and December 31, 1993*, Regulations 672 of R.R.O, as amended by Ontario Regulations 660/93 and 779/93.

> (5) The insurer is not required to pay a weekly benefit under subsection (1),(b) for any period in excess of 156 weeks unless it has been established that **the injury continuously prevents** the insured person from engaging in any occupation or employment for which he or she is reasonably suited by education, training or experience. (bold added)

The literal meaning of these words would appear to require that any portion of any job is impossible.[11]

However, the cases decided under the OMPP legislation have not narrowed the test to its literal sense. The insured person must demonstrate that the accident injuries sufficiently diminish his or her physical and mental capabilities to prevent any competitive work at a job that is reasonably comparable in nature, status and remuneration with his or her pre-accident employment.[12] Each case has been decided on its own facts,[13] but none clearly identifies the specific disability level in respect of each suitable job.

The use of the word "continuous" is an important feature of the OMPP test. In the *Lanctot*[14] appeal decision, Director's Delegate Draper thoroughly reviews the wide-ranging case law dealing with the words "continuously prevents." Entitlement is not lost simply because the insured is capable of working for a brief period.

The 1996 *Schedule* does not contain any requirement or refer to any definition that would lead me to conclude the insured must be "continuously" prevented from working. I find that the drafters did not

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[11] "Prevent" is to "stop from happening" or "make impossible." "Continuously" is "an unbroken succession." *The Concise Oxford Dictionary, ibid.,*

[12] *Pedden and Dominion of Canada General Insurance Company* (OIC A-008977, December 29,1995) and *McPherson and Pilot Insurance Company* (OIC P-006195, July 29, 1997.

[13] *Singh and State Farm Mutual Automobile Insurance Company* (OIC A-005714, May 8, 1995)

[14] *Zurich Insurance Company and Lanctot* (FSCO P99-00012, November 9, 1999)

intend periodic work to necessarily bar benefits in relation to the overall analysis of a work disability, and that the test is less restrictive in this sense.

The 1994 *Schedule*, the most comprehensive no-fault regime to date, contained the words "complete inability" in the eligibility test for the non-earner disability benefits.[15] The phrase "complete inability to carry on a normal life" was given a specific definition under the 1994 *Schedule*, stating in pertinent part:[16]

> .., the person suffers an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.

This phrase has been interpreted to cover most or nearly all normal pre-accident activities, viewed over a reasonable period of time.[17]

Arbitrator McMahon found little difference between the "complete inability to carry on a normal life" test under the 1994 *Schedule* and "continuously prevents the insured person from engaging in substantially all of the activities in which the person would normally engage" in the 1990 *Schedule* [18] He equated the two degrees of impairment, finding them more stringent than the "substantial inability" test.[19]

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[15]Subsection 19(1) of the 1994 *Schedule* (Accidents on or after January 1, 1994 but before November 1, 1996)

[16]Section 3 of the 1994 *Schedule* (Accidents on or after January 1, 1994 but before November 1, 1996)

[17]*J.P. and Wawanesa Mutual Insurance Company*.(FSCO A96-001312, August 11, 1997)

[18]Subparagraph 13(8)(b) of the 1990 *Schedule* - The *Statutory Accident Benefits Schedule - Accidents on* or *Between June 22, 1990 and December 31, 1993*, Regulations 672 of R.R.O, as amended by Ontario Regulations 660/93 and 779/93.

[19]*Patrick and Peel Mutual Insurance Company*. (FSCO A96-00478, August 26, 1998)

The drafters of the 1996 *Schedule* could have easily written that the insured person was required to establish a "substantial inability" to engage in any employment, if that was their intention. I find that the Legislature intended "complete inability" to mean a higher degree of disability than the pre-104 week "substantial inability" test.

Three distinct levels of injury or disability appear in the 1996 *Schedule*. A "catastrophic impairment" is the most severe and has a specific definition.[20] The phrases "substantial inability" and "complete inability" are undefined, but each has been interpreted in previously noted cases. I find that the drafters did not intend for there to be a similarity between these two because otherwise there would be no need for both.

I am persuaded from the review of the various no-fault legislation and the case law that the drafters of the 1996 *Schedule* intended all three phrases to operate as a continuum. I find that "complete inability" does not require the degree of impairment that is as high as a "catastrophic impairment" so as to preclude legitimate claims for ongoing disability, nor so low as a "substantial inability, as that would encourage specious claims after the first 104 weeks.[21]

Thus, two themes emerge from the current regime's use of the term "complete inability." First, I find that the grammatical arrangement of the phrase modifies "any employment," distinctly referring to the

[20]Section 2 of the *Schedule*: quadriplegia, paraplegia, limb amputations, total blindness, significant brain impairments.

[21]*Zurich Insurance Company and Lanctot, supra* see note #14 at p. 11. "The standard should not be set so high that it precludes legitimate claims, or so low that it encourages specious ones."

range of all suitable jobs.[22] Second, I find that the Legislature intended to raise the standard beyond a relatively sizable inability[23] for each job.

Suitable employment:

Mrs. Lombardi's education, training and work experience must be reviewed in order to determine the suitable jobs she must consider under "any employment."

Mrs. Lombardi was born in Hungary in 1947, and emigrated to Canada with her parents in 1964. She completed a two year cooperative work program in high school. After graduating, she worked for a short time as a hairdresser, and at her father's studio framing artwork. She has been a cashier, stock person and has experience as a floral arranger. Mrs. Lombardi testified that she quit hairdressing due to allergies from the chemicals.

Mrs. Lombardi has held office jobs for the majority of her working career. The undisputed evidence is that she worked in data entry, customer service, sorting mail, answering phones, copying documents and other general office duties. Mrs. Lombardi also has training in word processing.

After raising two children, Mrs. Lombardi obtained a job as a reproduction clerk at her husband's employer (Litton). She was considered conscientious, courteous and an excellent worker.

Her duties at Litton are clearly identified. Mrs. Lombardi stood all of the time to reach and sort documents at waist level, but did not lift more than 10 kilograms periodically or carry this weight more than two metres.

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[22] *Wigle and Royal Insurance Company of Canada* (OIC A-012312, January 12, 1996)

[23] *Steele and Zurich Insurance Company of Canada* (OIC A-001024, December 3, 1992), *Whitney and Co-operators General Insurance Company*. (OIC A-001005, March 31, 1993)

Dr. Carlo Vigna, a clinical psychologist, conducted a vocational assessment in 1999. He evaluated all of Mrs. Lombardi's skills and work experience except art framing. No evidence contradicts his opinion about her job skills, and I accept it.

Based on Dr. Vigna's report and evidence of her employment history, I find that Mrs. Lombardi is reasonably suited to work as a copy clerk, floral arranger, art framer, information clerk, quality control clerk, inventory clerk, receptionist, customer service clerk, order desk clerk, receptionist, customer service clerk, ticket seller.

Pre-accident health:

None of the evidence establishes that Mrs. Lombardi suffered any condition affecting her ability to function at the time of the accident. Despite right-sided vision and hearing losses, she drove a car. Mrs. Lombardi had bone spurs on her feet, occasionally visited a chiropractor for back pain, and her family doctor's notes indicate she complained of anxiety and a stiff neck three months before the accident. The evidence is that Mrs. Lombardi led a normal social, recreational and working life, and I find that she was fully functional prior to the accident.

Mrs. Lombardi's evidence:

Mrs. Lombardi testified that her physical pain prevents her from resuming any suitable work. Since the accident, she has been unable to manage most household tasks and some aspects of her personal hygiene. She does not cook meals or wash dishes without assistance from her husband. Her husband showers her, shampoos and combs her hair, dresses and undresses her. He vacuums and carries most of the groceries. Mrs. Lombardi puts clothes in the washing machine, but her husband lifts the wet items out.

The July 1997 reports from Dr. S. M. Liao, family physician, and Woodbridge Physiotherapy Centre contradict her testimony. Mrs. Lombardi told the former that she was independent with self-care, and the latter that she was pacing her household activities, with occasional help from family members. State Farm's medical examiner and the Designated Assessment Centre also indicated in the spring of 1999 that Mrs. Lombardi reported she was totally independent with her self-care and able to perform light household cleaning and cooking.[24]

Mrs. Lombardi did not dispute the accuracy of these statements in her evidence, and reluctantly admitted that she was able to dress and undress without assistance for the various medical examinations she has undergone since the accident. I am convinced that Mrs. Lombardi exaggerates her disability level, and I cannot rely on her evidence about her symptoms and disability.

Mr. Lombardi:

Mr. Lombardi testified that his wife's recall of her complaints is poor. She has been depressed and has needed help with everything since the accident. Currently, she does not do any light housework. He helps bath her, cuts her toenails once a month and occasionally helps her dress.

Mrs. Lombardi did not dispute the accuracy of the reports of her homemaking duties, and therefore I cannot accept her husband's evidence that she does nothing. I find that Mr. Lombardi exaggerates the extent of his wife's disability and that his evidence is unreliable.

Mrs. Lombardi's son:

Steven Lombardi, 26 years old, testified that he has had little opportunity to interact with his parents. He lived at the University of Waterloo at the time of the accident, and did not often visit them. Steven

[24]Dr. John O'Reilly and Dr. J. Ogilvie-Harris

went to work in Dallas, Texas after graduating. His parents stayed a week at his apartment once, where his mother was inactive and withdrawn. Steven moved back into his parents' home in January 2000, but spends his time at work, in the gym or with his friends. I find that Steven Lombardi has insufficient personal knowledge of Mrs. Lombardi's function.

Medical Evidence:

My finding that Mrs. Lombardi has not established that she physically suffers a complete inability to engage in any suitable employment is based on the following evidence.

Although Mrs. Lombardi has a large cervical rib (C4/C5) protruding from the right side of her spinal column and smaller one on the left (C5/C6), there is no indication that these bony structures impinge on the any nerves or that these abnormalities were caused by the accident. No diagnostic evidence pinpoints the cause of Mrs. Lombardi's continuing complaints of neck, shoulder pain, headaches, chest and jaw pain.

Dr. Daniel Contogiannis, Mrs. Lombardi's treating chiropractor at Prevent Assessment and Rehabilitation Clinic (Prevent), testified that objective tests established her physical limitations. He opined that she suffers bursitis and tendinitis in her right shoulder, irritation of soft tissue in her neck, and irritation of the cervical fascia. He testified at the time he discharged Mrs. Lombardi in August 1999 she suffered significant neck and shoulder limitations (approximately 50 percent of normal) due to the accident, but he did not address the eligibility test of whether she could perform the duties of suitable employment.

There is little value in the opinion of Dr. J. B. Schacter, a consulting neurosurgeon. His February 1999, conclusion that Mrs. Lombardi could not return to work is contradicted by his finding that she had no motor or sensory deficits and his failure to provide any analysis of her work skills for suitable employment.

Dr. A. Kachooie and Dr. Peter Parker, consulting physiatrists, gave no opinion concerning Mrs. Lombardi's ability to work. Dr. Kachooie diagnosed whiplash and mild rotator cuff tendinitis and Dr. Parker, felt she had some unresolved pathology in her neck, albeit with exaggerated pain.

A third consulting physiatrist, Dr. Pierre Kirwin, did render a disability opinion, but without any supporting analysis of her work skills, abilities and the job demands. I do not rely on his opinion.

A Designated Assessment Centre (DAC) conducted an evaluation of Mrs. Lombardi's treatment needs in August 1999. Dr. George Rado, physiatrist, stated that her soft tissue neck and shoulder strain had not completely resolved, but he found no major underlying physiological problems. None of the other examining DAC experts dealt with the disability issue either.

Mrs. Lombardi relies on the opinion of Dr. J. Ogilvie-Harris, a consulting orthopod, who saw her in 1999 and 2000. In April 1999, he concluded that Mrs. Lombardi's neck pain temporarily subsided after she received facet joint injections was an indicatation that the soft tissue spinal joints in her neck were damaged in the accident. Dr. Ogilvie-Harris' opinion was that Mrs. Lombardi's restrictions were valid, and that she could not resume working at Litton. Dr. Ogilvie-Harris' second report in July 2000 specified her restrictions. Mrs. Lombardi could not carry out heavy physical tasks. She would have difficulty sitting, bending over a desk, moving her neck and repeatedly using her arms.

Dr. Ogilvie-Harris gives no clear explanation for his opinion that Mrs. Lombardi could not sit, bend, move her neck or arms. The primary basis for his opinion that Mrs. Lombardi suffers a complete inability to engage in any suitable employment is that she suffers significant psychological and emotional difficulties arising from the accident which exacerbate her pain perception. However, it does not appear that he conducted psychological testing and Dr. Ogilvie-Harris is not an expert in this area.

Dr. John O'Reilly is a physiatrist who examined Mrs. Lombardi three times on behalf of State Farm. In his first two reports in 1997 and 1998, Dr. O'Reilly opined that she was physically disabled from resuming work at Litton, but had recovered at the time of his 1999 examination.

Dr. O'Reilly was convinced that the impact of the accident on her right cervical rib had somehow changed the normal muscular alignment in her neck. She required further therapy due to this underlying neck pathology in 1998. At the time of Dr. O'Reilly's third and final examination in March 1999, he was of the opinion that the muscle spasms he previously found in Mrs. Lombardi's neck had completely disappeared, and she was therefore physically ready to resume working at Litton.

Dr. O'Reilly expanded his opinion during the hearing. Though his testimony was based only on his reports and memory because he destroyed his clinical notes and records after retiring from professional practice, he appears to have quite a good recall of Mrs. Lombardi's condition. Sometimes Dr. O'Reilly referred to his reports and other times he answered without needing to refresh his memory. I do not accept that Dr. O'Reilly's evidence should be discounted or ignored on the basis that his notes are unavailable.

Dr. O'Reilly testified that Mrs. Lombardi would have some restrictions at a light duty job, but did not agree with Dr. Ogilvie-Harris' conclusion that she suffered a severe work disability. I was impressed with the thoughtful professionalism and fairness that Dr. O'Reilly displayed during his evidence. He supported that Mrs. Lombardi had suffered physical damage to her facet joints, and that her injuries caused her pain and limitations for a considerable period. He also readily agreed that Mrs. Lombardi's psychological factors were beyond his expertise. I prefer the opinion evidence of Dr. O'Reilly over Dr. Ogilvie-Harris in respect of Mrs. Lombardi's physical condition.

Psychological evidence:

The evidence of Mrs. Lombardi's psychological complications since the accident supports her claim. Dr. Philip Miller, a psychologist, began counselling Mrs. Lombardi for anxiety and chronic pain in 1997 and last reported in May 1988 that Mrs. Lombardi was less phobic about exacerbating her neck pain and that her headaches were reduced. At the time that State Farm refused to fund Dr. Miller's final segment of counselling, he did not believe she would require much further intervention.

Nine months later, Dr. Cathy Notarfonzo, a psychologist, assessed Mrs. Lombardi, and found she had regressed. She was experiencing severe depression, moderate stress and mild anxiety. She needed counselling.

It is significant that in the June 1999 psychological assessment by Dr. Sergio Bacal at a Designated Assessment Centre (DAC), he agreed with Dr. Notarfonzo's diagnosis of severe depression and proposal for counselling. Mrs. Lombardi's psychological disorder magnified her physical complaints.

Dr. Notarfonzo's records show that Mrs. Lombardi's moods stabilized and her coping skills increased during the next six months of counselling. According to the notes, Mrs. Lombardi was able to accomplish most of the cooking by taking more time, was dusting and had been going out more and running errands. By November 1999, Mrs. Lombardi was not as socially withdrawn and was somewhat functional.

Although Dr. Bacal, Dr. Notarfonzo and Dr. Miller did not provide disability opinions, Dr. Carlo Vigna did. He is the clinical psychologist who conducted a psychological-vocational assessment in December 1999.

Mrs. Lombardi told Dr. Vigna that her mood and memory had improved and that she was pacing some home activities, evidence supported by Dr. Notarfonzo's notes. However, considering the severity of her depression, Dr. Vigna cautiously gave his opinion that Mrs. Lombardi was at risk for termination even at the sedentary light jobs he recommended due to her inability to pace activities and essentially

cope with the pressures of a commercial workplace. There is no evidence to contradict Dr. Vigna, that from a psychological standpoint Mrs. Lombardi could not consistently maintain the demands of a commercial workplace at that point in time.

The notes of Dr. M. Mamelak, psychiatrist, indicate that Mrs. Lombardi's condition improved early in 2000. A suicidal bout in December 1999 due to withdrawal from medication did not re-occur again. On January 18, 2000, Dr. Mamelak notes that her mood was improved. She was remembering things, and she only developed neck pain when concentrating. The February 14, 2000 note states that her mental state and memory were better, but that she still felt significant pain. Over the next six months, there was no change in Mrs. Lombardi's condition. Medication and counselling had stabilized her psychological state and it appears that her problems centred on the physical pain in her neck and right shoulder/arm.

Dr. Mamelak reported in September 2000 that Mrs. Lombardi's significant psychological improvements were primarily the result of trying various combinations of medications to alleviate her symptoms. I accept his caution that the positive influence of these drugs on her emotional state and functionality would disappear if she stopped. I must discount his opinion that she will never work in any capacity because of his contradictory recommendation that Mrs. Lombardi should seek vocational testing and a work trial. Likewise undermining Dr. Mamelak's conclusion, he did not explain why she would be a hazard to other employees in any workplace when her condition was stable and she was fit enough to attempt the work trial.

Disability Analysis:

I find that Mrs. Lombardi has not established that she suffered complete inability to engage in any suitable employment as a result of physical injuries from the accident. In fact, based on Dr. O'Reilly's opinion, I find that she was physically capable of resuming her pre-accident job as a production assistant at the time State Farm terminated her benefits on March 26, 1999.

I find that Mrs. Lombardi has established on a balance of probabilities a complete inability to engage in any suitable employment as a result of the psychological complications from the accident injuries after March 26, 1999. Based on the unassailed evidence that Mrs. Lombardi developed severe depression and anxiety resulting from her injuries, I find that her psychological complications were caused by the accident. The opinion of Dr. Vigna and Dr. Mamelak's notes of the same time are likewise unrebutted, and establish on balance that Mrs. Lombardi's symptoms of poor memory, sleep loss and moodiness continued unabated up to February 14, 2000.

Therefore, until Mrs. Lombardi was stable for a reasonable period of time after February 14, 2000, I am persuaded that she could not effectively cooperate with co-workers, recall and follow instructions from supervisors or management personnel or realistically be expected to transact business in a positive cordial manner with the public in any commercial setting.

Mrs. Lombardi did not go to vocational testing or the work trial recommended by her own psychiatrist, nor did she call any evidence to rebut Dr. Mamelak's recommendation. I draw the inference from Dr. Mamelak's recommendations that she could perform some portion of suitable employment. On balance, her failure to call evidence to rebut Dr. Mamelak's recommendation does not meet her burden to prove that she suffered a "complete inability to engage in any employment" as a result of the accident injuries for the period after September 11, 2000.

Consequently, I find on a balance of probabilities that as a result of her accident injuries Mrs. Lombardi suffered a complete inability to engage in any employment for which she is reasonably suited by education, training or experience, and that she is entitled to income replacement benefits under Part II of the *Schedule* through September 10, 2000, together with applicable interest.

Housekeeping and Attendant Care Expenses:

Section 22 of the *Schedule* provides coverage for housekeeping/home maintenance expenses incurred to perform tasks that an insured would normally perform if not injured in an accident.

Expenses for an aide or attendant to care for the insured person because of accident injuries are covered under section 16 of the *Schedule*. Mrs. Lombardi claims that State Farm should reimburse her for approximately $10,000 in housekeeping and $20,000 in attendant care expenses for her husband's services to date.

Both sections of the *Schedule* use the words "expenses incurred." The insured or another person acting for them must either have paid money or incurred a debt to reimburse the services.[25] I agree with the case law that these sections are clearly intended as indemnity coverage for actual expenses incurred.[26]

Mrs. Lombardi submits that her husband's testimony is sufficient to satisfy the requirement that the expenses were incurred to care for her and the family household while she was ill. Mr. Lombardi did not state that his wife agreed to pay him a set rate, nor did he refer to any documentation of his hours.

Neither Mr. nor Mrs. Lombardi produced any agreement or other documentation to confirm that she paid or agreed to pay for attendant care and housekeeping. Mr. Lombardi's testimony is the sole support of his wife's financial obligation for the services.

I do not accept that Mr. Lombardi's testimony is acceptable to prove that Mrs. Lombardi incurred a cost or obligation without some documentary evidence such as an agreement, proof of payment identification of time and hourly rate.

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[25] *The Concise Oxford Dictionary* (Oxford University Press, 8th ed. 1992) p. 411, 599

[26] *Kopo and Marjana Jelisic and Guarantee Company of North America* (FSCO A98-000029, April 8, 1999)

I find that Mrs. Lombardi did not pay for or agree to pay her husband for housekeeping or attendant care services, and that she is not entitled to indemnification for any expenses under sections 16 and 22 of the *Schedule*. I have not addressed the reasonableness and necessity of the claims as a result of this finding.

EXPENSES:

The parties should attempt to resolve the expenses of the arbitration. If they cannot settle an expense claim in accordance with the policies and procedures outlined in *Expense Regulation 464/96* of the *Dispute Resolution Practice Code*, either may apply for an assessment.

April 11, 2001

Fred Sampliner
Arbitrator

Date

FSCO A99–000957

BETWEEN:

JOSEPHINE LOMBARDI

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. State Farm shall pay Mrs. Lombardi $297.13 per week from March 26, 1999 through September 10, 2000, together with interest in accordance with section 46 of the *Schedule*.

2. Mrs. Lombardi's claims for housekeeping and attendant care are dismissed.

April 11, 2001

Fred Sampliner
Arbitrator

Date