

BETWEEN:

HAI HONG PHAM

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: William J. Renahan

Heard: July 25 and 26, 2000, at the Offices of the Financial
Services Commission of Ontario in Toronto.

Appearances: L. Brent Vickar for Mr. Pham
Michael P. Taylor for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Hai Hong Pham, was injured in a motor vehicle accident on February 27, 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 on July 9, 1998. The parties were unable to resolve their disputes through mediation, and Mr. Pham applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹The *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.

The issues in this hearing are:

1. Is Mr. Pham entitled to income replacement benefits pursuant to section 4 of the *Schedule* after July 9, 1998?
2. Is either party entitled to expenses of the arbitration proceeding?

Result:

1. Mr. Pham is entitled to income replacement benefits from July 9, 1998 to December 9, 1998.
2. The issue of entitlement to expenses of the arbitration proceeding is deferred.

EVIDENCE AND ANALYSIS:

Background:

Mr. Pham is now 42 years old. He came to Canada in 1993. He worked about one year at a window manufacturing job until 1995 when he was injured in a motor vehicle accident. He was off work until May 1997 when a friend helped him find employment at CANAC KITCHENS ("CANAC"). He worked at CANAC until he was injured in a motor vehicle accident on February 27, 1998. Mr. Pham claimed that he suffered soft tissue and psychological injuries which still prevent him from doing the type of work he did at CANAC. He did not return to work at CANAC and that job is no longer available.

Dr. Nhan Tong is Mr. Pham's family doctor and still treats Mr. Pham for headache, poor sleep, anxiety, neck pain, back pain and left ankle pain, which, in his opinion have not improved significantly since the motor vehicle accident. Mr. Pham suffered a serious ankle fracture in 1990 which he claimed did not bother him at the time of the motor vehicle accident.

State Farm terminated benefits on the basis of medical report prepared for them by Dr. Joseph Kwok, orthopaedic surgeon. Mr. Pham underwent a medical and rehabilitation assessment at a Designated Assessment Centre ("DAC") in July 1998 which determined that Mr. Pham did not require further physiotherapy or chiropractic treatment. It did approve six to eight sessions of psychological treatment for pain focussed behaviour. Mr. Pham advised State Farm of his election to have his disability assessed at a disability DAC. The request was made late and Mr. Pham conceded that he is not entitled to rely on those provisions of the *Schedule* which require the insurer to pay income replacement benefits pending the report of the DAC. The disability DAC reported in December 1998 that Mr. Pham was not disabled from returning to work at CANAC.

Mr. Pham started to look for work as a cook. When he could not find work in Toronto, he moved to Vancouver in September 1999 where he worked in a friend's restaurant. Starting January 1, 2000, Mr. Pham's income from work in the restaurant exceeded the amount of his income replacement benefit and therefore, he does not claim income replacement benefits beyond January 1, 2000.

Mr. Pham returned to Toronto this May. His friend is moving to Toronto soon and Mr. Pham intends to work in his friend's new restaurant.

Legal test:

If Mr. Pham suffered an impairment as a result of the accident, he is entitled to an income replacement benefit for the period in the 104 weeks after the accident in which he suffered a substantial inability to perform the essential tasks of his employment at CANAC.

Essential tasks of employment:

CANAC manufactures kitchen cabinets for residential and commercial kitchens. The disability DAC which examined Mr. Pham obtained a job description from CANAC on a form prepared by the DAC. Mr. Pham took issue with the duties set out in the job description prepared by his employer. The employer described Mr. Pham's job as mostly working at a work bench and using a power drill to attach drawer rails or guides to gables (side of cabinet). Mr. Pham voiced his disagreement at the DAC and at this hearing. He said that most of his job involved reading the order form and obtaining the pre-cut wood parts from storage, placing them on a skid and taking them to an assembler who put the cabinet together. At times he used a ladder to obtain pieces of wood from bins. He said the largest panel he obtained was 18 feet long and some panels measured four by ten feet. Mr. Pham agreed that part of his job involved screwing metal drawer guides onto cabinet sides. Mr. Pham's description of his tasks is similar to that of Dr. Kwok who examined Mr. Pham and prepared a report for State Farm on June 12, 1998. Dr. Kwok added that Mr. Pham used a trolley and pump truck to move the pieces and the skid which carried the pieces he assembled and that most of his work involved standing and walking. Although Dr. Kwok did not know the weights of the material Mr. Pham moved, he thought that the strength requirements for the job were heavy. Mr. Pham's description of his tasks is consistent with the version he gave Dr. Kwok and appears reasonable. I accept Mr. Pham's description of his tasks over the written description CANAC gave the disability DAC. However, I do not accept that the strength requirements of the job were heavy. Mr. Pham testified that the pieces were pre-cut. He did not give persuasive evidence that individual pieces were particularly heavy. As well, for moving a number of pieces or individual heavier pieces, Mr. Pham used a trolley or pump truck. Finally, Mr.

Pham had his employer's written description of his job prior to this hearing which described his job as "light" with the majority of his time operating a power drill. Mr. Pham did not ask his employer to provide a written description of what he thought was heavy work or summons his employer to this hearing if he did not provide such a description. I find that Mr. Pham's essential tasks involved standing and walking all day to collect panels of pre-cut pressed wood. He also attached drawer guides to cabinet gables. I find that the physical demands of this employment were similar to that of a cook in that the major requirement was standing and walking all day and moving items which do not require any particular strength other than stamina.

Impairment:

The accident occurred as Mr. Pham was returning from work. It was raining and he was travelling at about 55 kilometres per hour. He applied his brakes when the vehicle in front of him stopped at a traffic light, but not in time to stop from driving into the rear of the vehicle.

He was taken by ambulance to hospital and discharged after six hours. The emergency department record indicates that he complained of left chest and shoulder pain and an abrasion on his leg. The first note of Dr. Tong indicates that Mr. Pham complained of head, back, chest, neck and left shoulder pain. At the hearing, Mr. Pham testified that he regained consciousness at the accident scene to find himself lying on the sidewalk. In his recent report, Dr. Tong noted that Mr. Pham said that he had a brief loss of consciousness, however, I cannot find such an observation in his clinical notes. Dr. L. Steiner, a psychologist, examined, tested and treated Mr. Pham at the request of either Mr. Pham's previous lawyer or Dr. Tong. Dr. R. Silverman performed a psychological assessment at a medical and rehabilitation DAC assessment. Another psychologist, Dr. Neil Weinberg, examined and tested Mr. Pham at the disability DAC. None of these psychologists reported any head injury. I find that Mr. Pham did not suffer any head injury in the motor vehicle accident.

In June 1998, Dr. Kwok, orthopaedic surgeon, reported to State Farm that Mr. Pham's worst pain were headaches which prevented him from sleeping. The next pain was low back pain followed by left ankle pain. Mr. Pham felt that his chest, neck and left shoulder pain had improved. This is fairly consistent with what Mr. Pham told the physiotherapist and physiatrist at the medical and rehabilitation DAC the next month. He made similar complaints to Dr. Howard Seiden, a family doctor, at the disability DAC in December 1998.

Mr. Pham suffered a serious fracture of his left ankle in 1990. He told the assessors that it was not painful prior to the motor vehicle accident and that it was aggravated by the motor vehicle accident. Dr. Tong did not mention the ankle in his disability certificate which he completed one month after the accident. Dr. Tong referred Mr. Pham to Dr. Raphael Chow, a physiatrist, in June 1999. Dr. Chow notes that Mr. Pham's problem were neck and back pain. Although he notes that Mr. Pham had a previous ankle fracture and tenderness and degenerative changes in the ankle, he did not suggest that Mr. Pham suffered any impairment in the ankle or that he required treatment for an ankle injury. I find that Mr. Pham did not suffer any impairment of ankle function as a result of the motor vehicle accident.

I find that at the time State Farm terminated income replacement benefits in July 1998, Mr. Pham's most significant physical complaints were headaches and low back pain.

All of the examiners noted psychological complaints. In June 1998 Dr. Steiner noted that Mr. Pham was increasingly depressed and that he had crying spells and feelings of hopelessness and despondency. He reported that he had concentration and memory problems and expressed inappropriate anger and irritability. The next month, at the medical and rehabilitation DAC, Dr. R. Silverman did not find disordered or confused thinking, pronounced concentration lapses or long-term memory disturbance. However, he thought that Mr. Pham exaggerated the severity of his psychological distress to emphasize his need for help. He also thought that Mr. Pham was genuinely suffering pain and headaches. At the disability DAC in December 1998, Dr. Neil Weinberg found severe depression and anxiety. He noted that the Pain Patient Profile revealed:

On this inventory, Mr. Pham obtained a valid profile, indicating that he approached the test in an open and candid fashion, with no attempt to magnify or exaggerate his distress. In comparison to a sample of average pain patients, his profile revealed significant somatization suggesting that he is troubled by physical problems and pain that are having a negative effect on his life. His pain may occupy a disproportionate amount of his attention and concentration, causing him to become easily distracted and pain-focused. Moreover, his profile revealed significant levels of depression, with symptoms of chronic fatigue, sadness, listlessness, and sleep disturbance that appear to be linked to his pain.

The evidence is generally consistent, and I find, that at the time State Farm terminated income replacement benefits Mr. Pham suffered from depression, anxiety and pain-focussed behaviour.

Disability:

At the medical and rehabilitation DAC, Dr. R. Silverman explained that the Digit Memory Test showed significant symptom magnification because a person should get the answer right at least half the time if they guess, and Mr. Pham scored lower than that. The Functional Abilities Evaluation at the disability DAC showed pain focused behaviour and symptom magnification because Mr. Pham placed himself in the “crippled” category when he clearly was not crippled. His heart rate during strength and lifting tests remained low which indicated submaximal effort. I find that Mr. Pham magnified his physical impairment. In the absence of any evidence to explain why Mr. Pham’s physical soft tissue injuries did not resolve by the time State Farm terminated income replacement benefits, Dr. Seiden’s opinion that Mr. Pham exaggerated his physical impairment and that his soft tissue injuries should have resolved in the four months before State Farm terminated income replacement benefits and appears reasonable and I accept it. I find that Mr. Pham was not disabled on account of a physical impairment after July 9, 1998.

The evidence is generally consistent that Mr. Pham continued to suffer psychological distress after State Farm terminated income replacement benefits. Dr. Steiner and Dr. Silverman thought Mr. Pham needed treatment. Dr. Weinberg was of the opinion that Mr. Pham’s magnification of his

psychological distress obscured the clinical picture to the point he could find no psychological impairment that prevented Mr. Pham from resuming pre-accident functioning.

It is not clear when Mr. Pham started to look for restaurant work. He testified that he started to look for restaurant work in July 1998. At another time, he testified that he started to look in October 1999. He testified that he visited about five restaurants in Toronto and that he moved to Vancouver in September 1999 to work for his friend. He also testified that he contacted a few friends in an effort to find factory work, however, he did not provide any details about these requests. He returned to Toronto this May when his friend decided to open a restaurant in Toronto. I find it likely that Mr. Pham moved to Vancouver shortly after he made minimal attempts to find employment in Toronto. I find that he started to look for work in September 1999.

Mr. Pham used up all his savings after State Farm terminated benefits. He received no advantage from not working. The only evidence I heard to explain why Mr. Pham did not look for work before September 1999 was that he suffered from anxiety and depression and became focussed on his pain. I find that these psychological symptoms disabled Mr. Pham from working until he overcame these feelings on his own and started to look for work in September 1999.

Since I have found that Mr. Pham's essential tasks at CANAC required the ability to stand and walk through a normal work day with no particularly heavy lifting, I find that Mr. Pham no longer suffered a substantial inability to perform his essential tasks of employment as early as September 1999 when he started to look for work.

Causation:

In June 1998, Dr. Steiner recommended 12 to 16 sessions of psychological treatment. He expected that Mr. Pham would return to work at the end of the treatment. The medical and rehabilitation DAC approved psychological treatment. Dr. Silverman wrote:

Mr. Pham is unlikely to benefit from insight-oriented or supportive psychotherapy. It seems more likely he may profit from a highly directive cognitive-behavioural approach focusing on pain management and the acquisition of strategies for coping more effectively with pain and distress. . . . I believe he should be offered an initial trial of six to eight sessions of counselling followed by a reassessment to determine whether he can benefit from the full 12 to 16 sessions recommended by Dr. Steiner. In my opinion, his prognosis for improved psychological functioning will likely depend upon the effectiveness of psychological intervention and his future capacity to resume his pre-accident employment and activities of daily living.

Mr. Pham has yet to receive psychological intervention and [he] should be given the opportunity to pursue it. To this extent, I believe psychological treatment is reasonable for addressing his pain and secondary symptoms of depression and anxiety. . . .

In my opinion, Mr. Pham's preoccupation with pain and secondary symptoms of depression and anxiety should be the central focus of treatment.

I agree with Dr. Silverman's assessment of Mr. Pham's problem and I find his recommendation reasonable. Mr. Pham was supposed to attend psychological treatments weekly starting October 27, 1998. Mr. Pham testified that he found the treatments helpful but on December 9, 1998, Dr. Steiner reported that Mr. Pham had only attended three sessions and that his "sporadic attendance hampers recovery efforts."

Mr. Pham attended physiotherapy treatment and, on discharge, was given light exercises to do. Dr. Tong recommended exercise. Dr. Seiden reported that Mr. Pham could only demonstrate two stretching exercises he did. Mr. Pham testified that he spent most of his day resting. He did not provide any detail of efforts he made to rehabilitate himself until he started to look for work in September 1999.

I find it likely that Mr. Pham would have overcome his psychological distress and disability earlier than September 1999 had he attended Dr. Steiner's psychotherapy sessions and followed recommendations that he exercise. His sporadic attendance and failure to follow up on recommended exercise demonstrate that he chose not to rehabilitate himself. I find that as of the

date of Dr. Steiner's progress report, Mr. Pham's distress and inability to work was due to his own choice not to follow recommended rehabilitation. By that time, the injuries he suffered in the motor vehicle accident were not a significant cause of his disability.

Accordingly, he is entitled to income replacement benefits from July 9, 1998, to December 9, 1998, the date of Dr. Steiner's progress report.

EXPENSES:

If the parties cannot agree on the issue of entitlement to expenses of the arbitration proceeding, they may make written submissions to me within 60 days of the date of this decision.

William J. Renahan
Arbitrator

August 28, 2000

Date

FSCO A99-000911

BETWEEN:

HAI HONG PHAM

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 Mutual Automobile Insurance Company shall pay Hai Hong Pham income replacement benefits from July 9, 1998 to December 9, 1998.
2. The issue of entitlement to expenses of the arbitration proceeding is deferred.

William J. Renahan
Arbitrator

August 28, 2000

Date