



Appeal P01-00022

OFFICE OF THE DIRECTOR OF ARBITRATIONS

JOSEPHINE LOMBARDI

Appellant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

BEFORE: Stewart M. McMahon
REPRESENTATIVES: Joseph Brian Donnelly for Mrs. Lombardi
Michael P. Taylor for State Farm
HEARING DATE: November 14, 2001, with supplementary written submissions filed on
November 27, 2001, and January 9, 2002

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that:**

1. The appeal is allowed. Paragraph 1 of the arbitration order, dated April 11, 2001, is rescinded, and the issue of Mrs. Lombardi's entitlement to income replacement benefits is remitted to arbitration.
2. State Farm shall pay Mrs. Lombardi's appeal expenses.

February 26, 2003

Stewart M. McMahon
Director's Delegate

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Mrs. Lombardi was injured in a motor vehicle accident on March 10, 1997. She applied for weekly income replacement benefits (“IRBs”) from State Farm Mutual Insurance Company (“State Farm”) pursuant to s. 4 of the *SABS-1996*.¹ Paragraph 1 of s. 4 provides that these benefits are payable in the event the insured person suffers a substantial inability to perform the essential tasks of their own occupation. State Farm accepted this claim and paid IRBs for approximately two years. However, s. 5(2)(b) provides:

The insurer is not required to pay an income replacement benefit,

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....

State Farm took the position that Mrs. Lombardi did not meet this more stringent “any occupation” test, and terminated benefits on March 26, 1999. Mrs. Lombardi challenged the termination, and the dispute proceeded to an arbitration hearing. The Arbitrator released a decision on April 11, 2001, in which he ordered State Farm to pay Mrs. Lombardi IRBs from March 26, 1999 to September 10, 2000.

Mrs. Lombardi challenges the Arbitrator’s decision to limit benefits to September 2000. Mrs. Lombardi’s counsel advanced a number of arguments in his written and oral submissions. For my purposes, these can be reduced to two key arguments.

- The Arbitrator erred in his interpretation and application of the “any occupation” test.

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

- The September 2000 stoppage date is artificial, and was based on an improper inference. I am not convinced that the Arbitrator erred in his interpretation or application of the “any occupation” test. However, I am persuaded by Mrs. Lombardi’s submission that the inference the Arbitrator used to justify the stop date was improper and, for this reason, his decision cannot stand.

II. BACKGROUND

Mrs. Lombardi was involved in a multi-vehicle accident on March 10, 1997. She sustained typical whiplash type injuries. Unfortunately, her symptoms did not subside, and she went on to develop a chronic pain syndrome that included significant psychological overtones. She has been treated with various forms of physical therapy including: physiotherapy, nerve block injections, massage and TENS sessions. She has also received psychological counseling and psychiatric intervention.

At arbitration, the bulk of the medical evidence was tendered in the form of reports and records. Mrs. Lombardi testified, as did her husband and son. The Arbitrator discounted the evidence of Mrs. Lombardi and her husband because they exaggerated the level of her disability. He did not think the son’s evidence added much to his understanding of Mrs. Lombardi’s condition. Despite these findings, the Arbitrator concluded that as of March 1999, when benefits were terminated, Mrs. Lombardi was incapable of returning to suitable employment, and hence was entitled to further IRBs.

The Arbitrator was not convinced that Mrs. Lombardi’s physical limitations prevented her from returning to work. However, he accepted the opinions of a number of psychologists and psychiatrists who reported that Mrs. Lombardi developed a severe depression that prevented her from returning to the workforce.

The Arbitrator then went on to find that Mrs. Lombardi’s psychiatric condition stabilized, and that she had not presented sufficient evidence to establish her entitlement to IRBs beyond September 10, 2000.

III. ARGUMENT AND ANALYSIS

A. Did the Arbitrator err in his interpretation and application of the “any occupation” test set out in s. 5(2)(b) of the SABS-1996?

Mrs. Lombardi submits that the Arbitrator erred by failing to recognize that the more stringent “any occupation” test imposed by s. 5(2)(b) must be circumscribed by the expectations of a reasonable employer. Her counsel refers to this as the “commercial reality test.” I reject this submission for two reasons.

First, I think that Mrs. Lombardi takes the matter too far when she suggests there is a “commercial reality test.” She cites a number of decisions which use the standard of a reasonable employer as a gauge of disability. See for example *McKenzie v. Federation Insurance Co. of Canada*, [1981] C.I.L.R. 1-1412, and *Foden v. Co-Operators Insurance Ass’n (Guelph)* (1978), 20 O.R. (2d) 728. I agree that there must be an air of reality to the inquiry, and it may be illuminating to ask if a reasonable employer would hire the person, but that is not the test *per se*. The test is defined by the wording of s. 5(2)(b), which limits the insurer’s liability for benefits beyond 104 weeks, to those persons who are “suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience.” In my view, it is better to speak of a commercial “reality check,” rather than a commercial reality test.

Second, and more to the point, the Arbitrator used such a reality check when he applied the provisions of s. 5(2)(b) to the facts of this case. As part of his rationale for ordering State Farm to pay benefits from March 1999 to September 2000, the Arbitrator cited the opinion of a psychologist who doubted whether Mrs. Lombardi could consistently maintain the demands of a commercial work place. The Arbitrator expressed the same concern himself when he found that until September 2000, Mrs. Lombardi could not “effectively cooperate with co-workers, recall and follow instructions... or realistically be expected to transact business in a positive cordial manner with the public in *any commercial setting*.” [emphasis added]

Given that the Arbitrator applied this reasoning as part of his rationale for ordering State Farm to reinstate benefits as of March 1999, I see no reason to doubt that he approached the matter in the same way when he concluded that she was not entitled to benefits beyond September 10, 2000.

This ground of appeal is dismissed.

B. Did the Arbitrator err when he concluded that Mrs. Lombardi had not established her entitlement to benefits beyond September 10, 2000?

Mrs. Lombardi submits that the Arbitrator required her to prove her claim to a much higher standard than the accepted civil standard of a “balance of probabilities.” State Farm responds by noting that when the Arbitrator discussed the disability issue, he used the terms “on balance” and “balance of probabilities.” It argues that there is no good reason to think that he applied some higher standard. I agree. However, to be fair to Mrs. Lombardi, this ground of appeal can be couched in wider terms.

In essence, Mrs. Lombardi is complaining about an inference the Arbitrator drew from a report prepared in September 2000, by Dr. M. Mamelak, her treating psychiatrist. More specifically, she challenges the Arbitrator’s suggestion that this inference cast an onus on her to call further evidence to prove her claim beyond September 2000. Some further background is needed to understand this ground of appeal.

Shortly after the accident, Mrs. Lombardi began to receive psychological counseling for anxiety and chronic pain. Initially, the results were promising. Unfortunately, Mrs. Lombardi’s condition deteriorated. A February 1999, report indicated that she was experiencing severe depression, moderate stress and mild anxiety. Counseling sessions with a psychologist and psychiatric intervention by Dr. Mamelak improved Mrs. Lombardi’s condition somewhat. In November 1999, Mrs. Lombardi’s counsel arranged for a psycho-vocational assessment by Dr. C. Vigna.

Dr. Vigna identified a number of potential occupations based on Mrs. Lombardi's interest, experience and aptitudes. However, he expressed concern about some of these options because of Mrs. Lombardi's physical limitations. He indicated that "only through a trial work period can one indicate with more certainty whether such interests would be realistic for her to pursue on a consistent, long-term basis." In addition, Dr. Vigna thought Mrs. Lombardi would "encounter significant difficulties in meeting successfully the demands of a work setting that would require sustained, consistent effort on her part." He suggested that with "some improvement in her chronic pain problems, it may be more realistic for her to aim for some part-time employment." Dr. Mamelak's notes indicate that Mrs. Lombardi attempted to reduce her medication shortly after Dr. Vigna's assessment, but this resulted in a "suicidal depression."

Based principally on the reports and clinical notes of Drs. Vigna and Mamelak, the Arbitrator found that Mrs. Lombardi's poor memory, sleep loss and moodiness continued unabated up to February 14, 2000, and that these symptoms prevented her from returning to work. He concluded that Mrs. Lombardi was still entitled to ongoing IRBs as of March 1999, when State Farm terminated these benefits.

The importance the Arbitrator attached to the opinions of Drs. Vigna and Mamelak is reflected in the language he used to describe their evidence. On one occasion, he referred to it as "unassailed," and on another as "unrebutted."

Dr. Mamelak authored a report in September 2000, on the eve of the arbitration hearing, in which he acknowledged that Mrs. Lombardi's condition had improved, but warned that "this improvement is superficial and could easily be reversed if excessive demands, i.e., the normal demands of everyday life, were made on Mrs. Lombardi." He then went on to express his opinion about her ability to work, in the following terms:

Most important, I do not believe that she will ever be employed again in any capacity commensurate with her training and background. Indeed, I do not believe that she

will ever be even employed again in any capacity. Progressive pain, fatigue, inattentiveness and confusion in the face of daily demands would render her a hazard to herself and to her fellow employees in any work setting. I can't imagine that any employer would hire her even part time. Moreover, Mrs. Lombardi may soon have her driver's license suspended because she can't turn to the right and that would further limit her work options. Dr Vigna also thought that it was unlikely that Mrs. Lombardi would ever be able to get a job *but should there remain any doubts about this, I would ask that another opinion about this matter be obtained from vocational professionals.* I would urge that Mrs. Lombardi have a vocational assessment at a public vocational agency like the Jewish Vocational Service or better still, that she have a work trial in any position for which she is considered suitable. [emphasis added]

The Arbitrator accepted Dr. Mamelak's statement that Mrs. Lombardi's gains were based on medication, and that she would regress if it was withdrawn. However, he stated "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." He also rejected Dr. Mamelak's opinion that she would be a hazard to herself and other employees.

The Arbitrator discussed the vocational testing and work trial "recommendation" in more detail in the penultimate paragraph of his reasons on the disability issue. This paragraph is at the heart of Mrs. Lombardi's appeal. It reads as follows:

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.

Mrs. Lombardi submits that Dr. Mamelak's report does not state that he recommended to her that she should attend vocational testing or a work trial. She argues that the opening sentence of the paragraph, quoted above, makes it crystal clear that the doctor's opinion regarding her inability to work was unqualified. In her view, Dr. Mamelak's reference to a vocational assessment or a work trial was

nothing more than a plea to anyone who doubted his opinion, to arrange for an independent assessment. Mrs. Lombardi argues that in light of this, it was not open to the Arbitrator to infer that Dr. Mamelak thought she could do some type of work, or to impose on her an evidentiary onus to call additional evidence to prove her entitlement to IRBs beyond September 11, 2000.

Mr. Michael Taylor, counsel for State Farm, argued the appeal in a forthright and candid manner. He acknowledged that given the Arbitrator's comments regarding the weight he attached to the opinions of Drs. Vigna and Mamelak, the only basis for his subsequent conclusion that Mrs. Lombardi had not proven entitlement beyond September 2000, is the inference he drew from Dr. Mamelak's report. Mr. Taylor also conceded that if the inference is not sustainable, the decision cannot stand. However, Mr. Taylor argued that the drawing of this inference was part of the Arbitrator's fact-finding function, that could not be interfered with, absent some error of law. In light of this, the appeal turns on whether there is a basis for interfering with the inference drawn by the Arbitrator.

In Mrs. Lombardi's initial written submissions, she cites the Court of Appeal's decision in *Equity Waste Management of Canada v. Halton Hills* (1997), 35 O.R. (3d) 321, in support of a proposition that findings of fact are reversible if the appellant can demonstrate a "palpable and overriding error," a "manifest error," or a "clear error." However, the Court of Appeal is empowered to review the decisions of a trial judge on the basis of errors of fact and law. In contrast, appeals from the decision of an arbitrator are restricted to question of law. See *Insurance Act*, s. 283. In light of this, care must be taken when relying on cases such as *Equity Waste Management*. Mrs. Lombardi's supplementary written submissions acknowledge this limitation, but suggest that inferences are not entitled to the same deference afforded to primary findings of fact.

The Supreme Court of Canada recently conducted a lengthy discourse on standards of review from a decision of a judge sitting on a civil case in *Housen v. Nikolaisen*, [2002] S.C.J. No. 31. In a 5 to 4 decision, the Court rejected the notion that inferences are reviewable on a lesser standard than typical findings of fact. However, the decision goes on to explain that inferences can be attacked at two distinct

levels. First, the findings of fact on which the inference is based can be challenged. Second, the inference can be challenged if the trier of fact makes an error in the inference drawing process itself.

Applying these principles in the context of an appeal from the decision of an arbitrator, I conclude that inferences can be attacked if the appellant can demonstrate the arbitrator made an error of law when he made the findings of fact on which the inference was based, or if the arbitrator made an error of law in the inference drawing process itself.

Our courts have long recognized that there is an overlap between questions of law and questions of fact. Or, to put it another way, the types of mistakes a trier of fact can make when considering the evidence lie along a spectrum. Some will be characterized as simple errors of fact; others will be characterized as errors of law. State Farm alluded to the most common example of the latter in its submissions — a finding of fact made in the complete absence of supporting evidence amounts to an error of law.

The use of the term “a complete absence” suggests a very narrow view of the types of errors that can qualify as an error of law. However, the late Justice Sopinka and Mark A. Gelowitz in their text *The Conduct of an Appeal* (2nd ed.): Toronto, Butterworths, 2000, indicate that appeal courts will characterize at least two other types of findings as errors of law. One, findings that are made on the basis of conjecture. Two, findings that arise from a misapprehension of the evidence that is caused by a misdirection on a legal principle. These two examples suggest a more nuanced approach to considering whether the error is a simple error of fact, or amounts to an error of law.

The first of these examples is particularly germane to inferences. In *Johnston v. Murchinson*, [1995] P.E.I.J. No. 23 the Court of Appeal quoted with approval the following passage from *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152 (H.L.).

Inferences must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is

sought to establish....But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

In this case, Mrs. Lombardi submits that there was no evidence on which the Arbitrator could have found that Dr. Mamelak suggested to her that she should undergo a vocational assessment or work trial, and hence the Arbitrator was speculating when he inferred that Dr. Mamelak thought she was capable of some type of work. State Farm suggests that the Arbitrator's reading of the report was possible and hence not reviewable.

The line between a conclusion that there was "no evidence" to support a finding, and a mere "insufficiency of evidence" will often be difficult to discern. This case is a prime example. However, it is a vital distinction. In the first case, the error is properly characterized as an error of law, and hence reviewable. In the second, it is no more than an error of fact, that is not reviewable. After careful consideration, I am satisfied there was no evidence on which the Arbitrator could have found that Dr. Mamelak had recommended to Mrs. Lombardi that she should undertake a vocational assessment or work trial. Accordingly, the inference that Dr. Mamelak thought she could perform "some portion of suitable employment" is conjecture or speculation.

It is true that Dr. Mamelak's report contains the following sentence: "I would urge that Mrs. Lombardi have a vocational assessment at a public vocational agency like the Jewish Vocational Services or better still, that she have a work trial in any position for which she is considered suitable." But that is not sufficient to end the inquiry into whether there was any evidence to support the finding on which the inference was drawn. Stopping at that point would endorse the overly narrow approach which I have suggested is inappropriate.

The sentence must be read in light of the opening two sentences of the paragraph: "Most important, I do not believe that she will ever be employed in any capacity commensurate with her training and background. Indeed, I do not believe that she will ever be even employed again in any capacity." It must also be read in light of the sentence that immediately precedes it: "Dr. Vigna also thought that it was unlikely that Mrs. Lombardi would ever be able to get a job but should there remain any doubts

about this, I would ask that another opinion about this matter be obtained from vocational professionals.”

When the subject sentence is read in context, I do not believe it is possible, on any reading, to say that Dr. Mamelak was suggesting to Mrs. Lombardi that she should have undertaken a vocational assessment, or attempted a work trial to explore what kind of work she could pursue. It was, as stated by Mrs. Lombardi’s counsel, nothing more than a plea to anyone who doubted his unqualified opinion. In light of this conclusion, there was no factual basis for the Arbitrator’s pivotal inference that Dr. Mamelak thought she could do some type of work. As noted above, State Farm conceded that if the inference is not sustainable, the decision could not stand.

The next question is — what is the appropriate disposition? Mrs. Lombardi submits that in the absence of a cross-appeal, all of the Arbitrator’s other findings must be accepted, and therefore, the appropriate disposition is an order for ongoing benefits. State Farm opposes this submission. It argues that it is impossible to know what the Arbitrator would have done if he had read the report correctly. I agree. I do not think it is appropriate to substitute a positive order for further benefits.

In the alternative, Mrs. Lombardi submits that the matter should be remitted for a new hearing, but only on the question of her entitlement to benefits beyond September 10, 2000. She submits that the portion of the order that awarded her IRBs from March 26, 1999 to September 10, 2000 should not be disturbed. State Farm submits that if the decision is reversed, it should be remitted to arbitration for a new hearing on the issue that was before the Arbitrator, namely, is Mrs. Lombardi entitled to benefits for any period beyond March 26, 1999?

I am sympathetic to Mrs. Lombardi’s argument. The narrow issue on appeal was whether the inference was proper. In this context, it was appropriate to focus on that part of the Arbitrator’s decision. But, the point at which benefits were no longer owing was only a part of the issue submitted to arbitration. The issue was Mrs. Lombardi’s entitlement to benefits for any period beyond March 1999. The order

relating to that issue states; “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*.” In my view, it is inappropriate to permit a party to sever portions of this kind of order.

The question of the period over which a person is entitled to IRBs often cannot be determined with precision. See *Pisani and Simcoe and Erie General Insurance Company and Canadian General Insurance Company*, (OIC P-003929, and OIC P-005593, December 11, 1995). It may be possible, as part of the type of *post facto* examination conducted in an appeal, to identify a particular error that calls for the order to be set aside. But as a general comment, the period over which the person is entitled to benefits should be made on the basis of the evidence as a whole and, as noted in *Pisani*, the arbitrator must be given a fair bit of flexibility to fashion a result that is fair based on that evidence. In light of this, I do not think it is appropriate to allow an appellant to pick those portions of the order relating to IRBs that she likes, and discard the rest. Ultimately, the appeal is taken from the order, not the reasons. See *Saliba and Allstate Insurance Company of Canada and Progressive Casualty Insurance Company of Canada*, (FSCO P01-00031, July 24, 2001). Either the order stands or it falls. If it is not possible on appeal to fix the period of entitlement, and it is not in this case, the matter must be remitted for a hearing, before a new arbitrator, for a determination of the claim on the basis of the evidence as a whole.

IV. EXPENSES

Mrs. Lombardi was successful on the appeal. In the circumstances, I see no reason why she should not be awarded the expenses of the appeal. I may be spoken to if the parties cannot agree on the amount.

Stewart M. McMahon
Director’s Delegate

February 26, 2003

Date