

BETWEEN:

JOSEPHINE LOMBARDI

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

PRE-HEARING DECISION

Before: Eban Bayefsky

Heard: July 31, 2003, at the offices of the Financial Services
Commission of Ontario in Toronto.
Written submissions were received by August 26, 2003.

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 statutory accident benefits from State Farm Mutual Automobile Insurance Company (“State Farm”), payable under the *Schedule*.¹ State Farm denied Mrs. Lombardi’s claim for income replacement benefits (“IRBs”) beyond March 26, 1999, for attendant care benefits and for housekeeping benefits. The parties were unable to resolve 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.

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, 303/98, 114/00 and 482/01.

The arbitration hearing took place on October 2-5 and 10-11, 2000. By decision dated April 11, 2001, the Arbitrator ordered State Farm to pay Mrs. Lombardi IRBs from March 26, 1999 to September 10, 2000, at a rate of \$297.13 per week, plus interest. Mrs. Lombardi appealed this decision. The appeal hearing took place on November 14, 2001, with supplementary written submissions being made on November 27, 2001 and January 9, 2002. By decision dated February 26, 2003, Director's Delegate McMahon allowed Mrs. Lombardi's appeal and remitted to arbitration the issue of Mrs. Lombardi's entitlement to income replacement benefits. Delegate McMahon held that the Arbitrator had erred in making an inference regarding Mrs. Lombardi's ability to return to work and that this undermined the Arbitrator's finding that benefits ought to cease as of September 10, 2000. In ordering a new hearing, Delegate McMahon stated that "[i]f 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."

The pre-hearing conference in the new arbitration was held before me on July 31, 2003. The new hearing has been scheduled for June 7-10, 2004. The sole substantive issue for arbitration is whether Mrs. Lombardi is entitled to receive IRBs from March 26, 1999 onward. Mrs. Lombardi advised that she returned to work on a part-time basis in November 2001 and on a full-time basis in October 2002. The parties agreed on all production issues except State Farm's request for the insurer examinations ("IEs") from Mrs. Lombardi's related tort action that are in her possession.

The issue in this pre-hearing conference is:

1. Is Mrs. Lombardi required to produce to State Farm the tort IEs in her possession?

Result:

1. Mrs. Lombardi is required to produce to State Farm the tort IEs in her possession from October 2, 2000 to February 26, 2003.

EVIDENCE AND ANALYSIS:

Background

The Ontario Court of Appeal recently considered the question of whether the implied undertaking rule operates to protect medical reports obtained in an arbitration proceeding from disclosure in a related tort action.² The Court found that the plaintiffs in question argued “not [for] enforcement of an undertaking, but [for] a protective shield against production of very relevant evidence.” In delivering the decision of the Court, Carthy J.A. stated:

In my view, it would do no service to the implied undertaking rule to extend it in this fashion and would, indeed, be a considerable disservice. It would wrap a cloak of privilege around evidence given in any administrative tribunal hearing where a related issue arose in other proceedings. It would stand in the way of courts and tribunals having available the best evidence, or all of the evidence, bearing on the issue in dispute.

Prior to this decision, the Commission’s principal decision on the disclosure of medical reports from a related tort action was *Sandhu and CAA Insurance Company (Ontario)* (FSCO P01-00044, January 18, 2002). In that case, Director’s Delegate McMahon emphasized that in determining whether to order this form of production, an arbitrator must consider “how importing documents from a civil action will affect the arbitration process,” whether an insurer’s “ability to generate medicals” in proceedings before the Commission is insufficient and whether the interests of justice outweigh any prejudice resulting to the party ordered to disclose the evidence. Delegate McMahon stated that:

In the absence of some compelling reason why the medical reports obtained by the insurer pursuant to the *SABS* are insufficient, I would not grant the insurer’s request for production of the defence medicals from the tort file. The insurer is not prejudiced by the non-production, whereas production of the reports will inevitably and unnecessarily lengthen and complicate the arbitration proceeding.

² *Tanner et al. v. Clark et al. and Reimer et al. v. Christmas* (2003), 63 O.R. (3d) 508.

Two arbitration decisions have been issued following the Court of Appeal's decision in *Tanner*. The first is *Majer and Kingsway General Insurance Company* (FSCO A03-000466, July 10, 2003), in which the Arbitrator declined to order the production of transcripts from an examination for discovery in a related tort action, holding as follows:

I agree with the insurer that the transcripts from the examination for discovery may be relevant. However, the dispute resolution system at FSCO does not include examinations for discovery. When an insured person chooses to arbitrate, rather than bringing a civil action, they give up both the possibility of being examined and of examining the other party prior to the hearing. A party would gain an unfair advantage if it could obtain production of a transcript from an examination for discovery from a related tort or other civil action. This would also lead to a distortion of the process at FSCO, as set out in the *Insurance Act*.

The second case is *Snook and ING Insurance Company of Canada* (FSCO A02-000728, September 15, 2003), in which the Arbitrator ordered the production of only those defence medicals that post-dated the insurer's termination of benefits, holding as follows:

After reviewing this case law, I agree with the finding in *Majer* that *Reimer, Tanner* can be distinguished on the basis that it did not address the question of production of documents in an arbitration proceeding. I also agree that the question of production of documents involves an exercise of discretion having regard to the impact the request for production of documents from a tort proceeding would have on the arbitration process....

Reviewing the list of documents outlined in ING's submission, I note that a number of them pre-date the termination of benefits in October 1999. I also note that ING already possesses a number of expert reports and assessments from this period. ING did not argue that the reports it obtained pursuant to the *Schedule* were insufficient. As a result, I find that ordering production of the tort defence reports dating from that period would result in a "doubling up" of the assessments and potentially lengthen and complicate the hearing process. In this circumstance, I conclude that production of the pre-October 1999 reports from the tort claim would not be consistent with the arbitration rules and practices designed to ensure a fair, balanced and appropriate level of disclosure, and a less expens[ive] and more efficient alternative to a civil action....

Although ING has the right to request medical examinations under the *Schedule*, it appears that it decided not to exercise that right. ING did not explain why it did not request further medical assessments. In light of the fact that there are no defence medical reports for the period after ING terminated benefits, I find the argument for production of those reports more compelling. In my view, production of these medical documents would provide the Insurer with reasonable disclosure and not result in a “battle of numbers.” As a result, I decided to exercise my discretion to order production of the...medical reports from the tort claim that post-date the termination of benefits....

State Farm submitted that, pursuant to section 22 of the *Insurance Act*, an arbitrator has the same power to order the production of documents as is vested in the Ontario Court (General Division), and that Mrs. Lombardi should be ordered to produce the tort IEs in her possession. State Farm stated that the IEs in the tort action speak to Mrs. Lombardi’s medical condition and are, therefore, directly relevant to the issue she is pursuing in the arbitration, namely, her entitlement to income replacement benefits. State Farm maintained that the IEs are not protected by privilege and that the implied undertaking rule, as set out in Rule 30.1.01(3) of the *Rules of Civil Procedure*, does not apply in this arbitration so as to preclude the production of the IEs. State Farm submitted that the same evidence should be available to both the Court and the Commission regardless of the forum in which the parties are attempting to resolve their dispute, particularly to avoid the possibility of inconsistent results. State Farm maintained that the present case is unique because Mrs. Lombardi has returned to work since the time of the first hearing and State Farm has not had her medically assessed since that time due to the intervening appeal.

Mrs. Lombardi submitted that State Farm has already had her assessed on numerous occasions and that, although it has had the right to seek further assessments, it has not exercised that right. Mrs. Lombardi maintained that there is no evidence that State Farm is incapable of assessing its exposure or presenting its case on the basis of the medical reports currently in its possession. Mrs. Lombardi argued that ordering the production of the tort IEs would allow State Farm to “double up on its medical reports,” rendering the arbitration a lengthier and more costly “battle of numbers.” Mrs. Lombardi,

therefore, submitted that production of the tort IEs would distort the Commission's process. Mrs. Lombardi did not dispute that the tort IEs are relevant to the issues to be decided in the arbitration.

Findings

I find that Mrs. Lombardi should produce the tort IE reports in her possession, from October 2, 2000 (the date of the first arbitration hearing) to February 26, 2003 (the date of the appeal decision).

In my view, the recent Court of Appeal decision in *Tanner* does not significantly alter the approach arbitrators must take to the question of the production of documents from related tort proceedings. An arbitrator must still determine whether to exercise their discretion to order an applicant to produce these documents, having regard to the insurer's ability to obtain its own evidence through the Commission's processes, the impact of ordering production on the arbitration and the relative prejudice to the parties of ordering or declining to order the documents to be produced. In my view, *Tanner* simply highlights the importance of understanding the circumstances under which the documents are to be "imported" from one proceeding to another, including establishing their relevance and ensuring that the court or tribunal has the best evidence available to it.

I agree with State Farm that the present case involves unique circumstances. A hearing has already been held in this matter, but due to an appeal of the resulting decision, a new hearing is now to be held, some five years after State Farm's initial termination of benefits. The new hearing is not limited in any way. It is to be a full hearing on Mrs. Lombardi's entitlement to income replacement benefits from March 26, 1999 to the date of the first hearing and beyond. In my view, State Farm has properly not requested any tort IEs prior to the date of the first hearing. To order these to be produced would result in the "doubling up" of medical information that the cases suggest ought to be avoided. An insurer should not be allowed to obtain additional medical information through the tort proceeding for the period it could have obtained (and did obtain) its own medical information through the Commission's processes.

However, State Farm has indicated that it did not seek further medical assessments of Mrs. Lombardi due to the appeal of the first arbitration decision. I accept this as a legitimate reason for which State Farm did not generate additional medical information through the Commission's usual processes. In any event, given that the first arbitration decision denied Mrs. Lombardi benefits beyond September 2000, it is unclear why State Farm would have attempted to re-assess Mrs. Lombardi beyond this date (which coincided roughly with the date of the first hearing). In the language of *Sandhu*, I find this a compelling reason that the medical reports State Farm obtained pursuant to the *Schedule* are insufficient. A significant period of time will have elapsed between State Farm's initial termination of benefits and the new arbitration. Given that a full hearing *de novo* is now to be conducted, the parties must proceed on the basis that the first hearing did not take place and that the hearing will occur for the first time in June 2004. In the absence of the particular history of this proceeding, I find it unlikely that State Farm would have proceeded to a hearing several years after the termination of benefits without having re-assessed Mrs. Lombardi. Conversely, had Mrs. Lombardi fully succeeded at the first arbitration, State Farm would have had the right to re-examine her to determine her ongoing entitlement to benefits. Since this did not happen, and since the matter was appealed, State Farm did not seek to have Mrs. Lombardi re-examined. The new arbitration will address Mrs. Lombardi's entitlement beyond the date of the first hearing, the period during which State Farm would otherwise have had the right to re-assess her entitlement to benefits. In these circumstances, I find that State Farm would be prejudiced if it were not permitted to obtain the IEs generated in Mrs. Lombardi's tort proceeding. I also find that the hearing arbitrator would benefit from having this evidence, which would be consistent with the proposition laid out in *Tanner* that, as a general matter, courts and tribunals ought to have the best evidence, or all of the evidence, bearing on the issue in dispute. As noted, Mrs. Lombardi does not dispute that the tort IEs are relevant to the issues to be decided in the arbitration.

I see no reason that the production of these materials will unduly lengthen or complicate the current proceeding. Given that these reports already exist, and are in Mrs. Lombardi's possession, ordering her to produce them to State Farm may, in fact, simplify the arbitration process. Similarly, I do not find that Mrs. Lombardi will be prejudiced by having to produce these reports or that the arbitration process will be compromised. Since State Farm did not have Mrs. Lombardi assessed following the first hearing,

allowing them access to the tort IEs will not “double up” its medical evidence or result in a “battle of numbers.”

One final point needs to be addressed. In her written submissions, Mrs. Lombardi indicated that “the entitlement of the claimant to income replacement benefits is capped, time limited and not ongoing.” As indicated above, Mrs. Lombardi returned to work on a part-time basis in November 2001 and on a full-time basis in October 2002. However, at the pre-hearing conference, the issue set down for arbitration was her entitlement to income replacement benefits from March 26, 1999 onward and this remains the issue. To the extent that Mrs. Lombardi seeks ongoing benefits, I find that she ought to produce the tort IEs in her possession from the date of the first hearing to the date of the appeal decision. Given that the appeal decision fully re-opened the issue of Mrs. Lombardi’s entitlement to income replacement benefits, I find that, as of the date of that decision, it was reasonable for State Farm to request further medical assessments of Mrs. Lombardi and that it should not be allowed access to any additional medical reports created through the tort proceeding. Therefore, I order Mrs. Lombardi to produce the tort IEs in her possession from October 2, 2000 to February 26, 2003. I leave it to the hearing arbitrator to determine the relevance and admissibility of any documents covered by this order, should Mrs. Lombardi formally restrict her claim for income replacement benefits prior to the hearing.

EXPENSES:

The parties did not address the issue of expenses. This is reserved to the hearing arbitrator to be determined at the conclusion of the proceeding.

Eban Bayefsky
Arbitrator

December 4, 2003

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. Mrs. Lombardi shall produce to State Farm the tort IEs in her possession from October 2, 2000 to February 26, 2003.

Eban Bayefsky
Arbitrator

December 4, 2003

Date