



FSCO A05-000307

BETWEEN:

NATASHA MAITLAND

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Rosemary Muzzi

Heard: December 5, 6, 7 and 8, 2005, at the offices of the
Financial Services Commission of Ontario in
Toronto.

Appearances: David S. Wilson for Ms. Maitland
Michael P. Taylor for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Natasha Maitland, was injured in a motor vehicle accident on August 5, 2003. She applied for and received payments for housekeeping expenses, and attendant care and care-giver benefits from State Farm Mutual Automobile Insurance Company (“State Farm”), payable under the *Schedule*.¹ State Farm terminated care-giver benefits on December 2, 2005. The parties were unable to resolve this dispute through mediation, and Ms. Maitland 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.

The issues in this hearing are:

1. Is Ms. Maitland entitled to care-giver benefits of \$250 per week from December 3, 2005 and ongoing, pursuant to section 13 of the *Schedule*?
2. Is Ms. Maitland entitled to a special award from December 3, 2005, pursuant to section 282(10) of the *Insurance Act*.
3. Is Ms. Maitland entitled to interest on all outstanding payments, pursuant to section 46(2) of the *Schedule*?
4. Are the parties entitled to their expenses of the arbitration process?

Result:

1. Ms. Maitland is entitled to care-giver benefits of \$250 per week from December 3, 2005 and ongoing.
2. Ms. Maitland is not entitled to a special award.
3. Ms. Maitland is entitled to interest on all outstanding payments of benefits, in accordance with section 46(2) of the *Schedule*.
4. The parties are encouraged to resolve expenses between themselves, failing which either party may request, within 30 days of receipt of this decision, an appointment before me to determine expenses pursuant to Rules 75-79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

Care-giver Benefits

The main substantive issue to be decided in this case is whether Ms. Maitland is entitled to care-giver benefits from December 3, 2005 and ongoing. Section 13(4) of the *Schedule* provides that an insurer is **not** required to pay care-giver benefits 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 carry on a normal life. Ms. Maitland contends that she is suffering a complete inability to carry on a normal life and State Farm disagrees.

For the purpose of the *Schedule*, “a complete inability to carry on a normal life” is defined in section 2(4):

a person suffers a complete inability to carry on a normal life as a result of an accident if, and only if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.

Therefore, I must determine whether Ms. Maitland sustained an impairment, as a result of the accident of August 5, 2003, that continuously prevents her from engaging in substantially all of the activities in which she ordinarily engaged before the accident.

The starting point for analysis is to compare the applicant’s activities and life circumstances prior to the accident to their activities and life circumstances after the accident.

Activities Pre- and Post-Accident

With respect to Ms. Maitland’s pre- and post-accident activities, Ms. Maitland herself, Ann Mckenzie, her mother, and Leah Maitland, one of her sisters, testified.

Ms. Maitland testified that pre-accident, she lived with her spouse, Tyaobi, and her young son, Tyaobi Jr. At the time of the accident, she was pregnant with her daughter, Njeri, who was born in November 2003. She had been working full-time at Telus Mobility as a customer service representative since April 2002. She was responsible for most of the day to day housework, and she provided most of the child care after work and on weekends as Tyaobi worked seven days a week with variable hours. Child care at other times was the responsibility of a baby-sitter and, on occasion, Leah. Ms. Maitland made Tyaobi Jr.'s breakfast and dinner and bathed him. She played with him, took him shopping, and took him to visit with his grandmother and cousins and to play with other children. She had some physical limitations as a result of injuries to her lower back from a previous accident. As a result, she could not sit on the floor to play with her son or carry him long distances, or lift and carry heavy laundry loads.

Ms. Maitland testified that she used to have an active social and personal life. She saw her friends on a weekly basis, and they would visit or go to clubs, restaurants and movies together. She took great pride in her appearance and dressed up for occasions. She attended family gatherings, which were arranged at least monthly, and she always enjoyed herself. Her relationship with Tyaobi was important to her and she described it as a good one. She regularly pursued personal interests: she had begun working out with weights, on a treadmill and jogging two to three times per week in January 2003; she took recreational walks at work and two to three times per week otherwise; she read a book per week and went shopping. Generally speaking, she described herself as an outgoing, personable, self confident and happy person.

Ms. Maitland testified that after the accident her life changed in every way. She does not work and her personal and social life are shadows of what they once were. Both Ms. Mckenzie and Leah also testified that they saw a real change in Ms. Maitland's living conditions and in both her physical and mental state.

Right after the accident, Ms. Maitland, Tyaobi and the children continued to live in their own home, but Ms. Maitland required a lot of assistance. Both Ms. Mckenzie and Leah testified that they regularly assisted her with child care and housework. Ms. Mckenzie was at her home a

couple of evenings a week and one or two days on the weekend, cleaning up the house which was often in disarray. Leah, who appears to have attended school seldom during this period, spent most days at her sister's home looking after her, tending to her personal needs, and also assisting with child care. Leah testified that her sister complained of back pain problems and was depressed after the accident.

Ms. Maitland testified that she can no longer work and is receiving long term disability benefits. She said that she made three separate unsuccessful attempts to return to Telus Mobility during the last year because she wanted to be a normal person and go to work. During those attempts, she could not sit for long periods of time or cope with the pain well. She often could not complete the shift and took many sick or vacation days. Ultimately, she said that she had to stop because she could not handle the work and could not do the job well. Her limited income caused financial difficulties, the result of which is that she and Tyaobi lost their home. She, Tyaobi and the children have been living in Ms. McKenzie's home with other family members since October 2005. In addition, others in the home perform the majority of tasks that Ms. Maitland used to do for herself. She is incapable of standing for long periods of time so she can only do very light housekeeping, for a few minutes at a time, and cannot cook an entire meal, though she admitted that she had not considered that she could sit or take breaks from standing with certain tasks. She infrequently makes Tyaobi Jr. breakfast and lunch, but she is more able to take her children out with some assistance.

Ms. Maitland also testified that her social and personal life have become very limited. She sees few of her friends, although she talks to some of them on the phone infrequently. She has seen a couple of movies, with her children and a friend. Even though family functions continue, her attendance is very sporadic. She said that she does not have an opportunity to visit as much with her family because she is not in the mood and chooses not to participate in family functions as a result. She spends most of her time in bed. She has no interest in reading books. She might watch TV occasionally or flip through a magazine.

Ms. McKenzie says that it is she who now mostly tends to the children: she bathes them, prepares them lunch and dinner, spends time with them watching TV or reading them books and runs after them. She, Leah and one of her granddaughters do almost all of the housekeeping. Tyaobi may assist with laundry. She said that Ms. Maitland spends four to five days per week locked up in her room for the majority of the day. She sleeps and is withdrawn. The rest of the week she may try to engage with the family. She will read to Tyaobi Jr. or watch TV with him. She will infrequently go out with Tyaobi and the children to shop or eat. Leah gave similar testimony.

State Farm does not challenge her credibility but argues that I should examine Ms. Maitland's evidence and that of her family members with a critical eye and consider the following:

- Ms. Maitland has not been continuously prevented from working. She did return to work on three separate occasions, the last being on a part-time basis as recently as August 2005. She only stopped working after her long term disability benefits claim was approved.
- Ms. Maitland can do some housekeeping tasks. Both pre- and post-accident, when she lived on her own, Ms. Maitland required some assistance with housekeeping. With respect to the assistance she received post-accident, she appears to have exaggerated how often her family members came to help. Furthermore, she does no housekeeping now that she lives with her mother.
- Ms. Maitland is able to care for her children to some extent, though she requires assistance. She spends some time caring for Njeri, more than she does for Tyaobi Jr., but she is still able to read to him and play with him on occasion as well.
- Ms. Maitland can still engage in her personal pursuits: she reads magazines for pleasure; she used her treadmill for a period of time but then stopped because of pain in her knees; though she is limited to twenty minutes, she does take walks.

- The change in her social life is also affected by the fact that she has two small children and is experiencing some marital problems.
- While Ms. Maitland claims to spend 70-80% of her time in bed where she is essentially non-functioning, she did not present that way during the hearing where she sat for lengthy periods of time, had good recall, was articulate and displayed a whole gambit of emotions.

Medical Evidence

With respect to Ms. Maitland's physical problems, some of the earlier medical assessors,² such as Dr. M. Devlin (physiatrist), concluded that Ms. Maitland had chronic pain syndrome, but found no anatomic or etiological diagnosis though there was restriction in her range of movement. Deborah Westbrook (physiotherapist) noted her refusal to perform certain tasks during the assessment because of pain. Dr. Wong (physiatrist), who examined her on a few occasions, diagnosed her with moderate myofascial injury of the cervical spine and thoracic spine, including the rhomboid muscles and trapezius, with a similar injury to her sacral spine and gluteal muscles and with referred pain to the lumbar spine and lower extremities. He also found post traumatic insomnia and psychological problems.³ In September 2005, he opined that she continued to suffer a substantial inability to perform her work.⁴ She has also been found to have decreased strength and endurance capacity of the neck and shoulder and upper back musculature which causes her functional limitations, and difficulty maintaining postural stability especially during lifting and performing prolonged tasks.⁵ Some of the assessors have concluded that she

² See the Attendant Care Needs DAC assessment conducted by Dr. M. Devlin (physiatrist) and Deborah Westbrook (physiotherapist) in May and June, 2005. Exhibit 6, Tabs 3b and 3c

³ Dr. Wong's (physiatrist) report of January 4, 2005. Exhibit 1, Tab 8

⁴ Dr. Wong's (physiatrist) report of September 5, 2005. Exhibit 1, Tab 13

⁵ Functional Capacity Evaluation by Atila Balaban (Exercise Physiologist) June 23, 2005. Exhibit 1, Tab 2

requires some care-giving assistance, especially with respect to her 18 month-old, and assistance with heavier housekeeping tasks.

Ms. Maitland admitted that, as of September 2005 when she was assessed by Sophie Bielawski (occupational therapist), her ability to walk, stand, sit, lift and carry had improved from earlier, however, she continues to feel pain and pressure in her ears and head. She has pain on the left side of her neck everyday and it is stiff. The pain in her left shoulder has increased in the last few months. Her upper back hurts everyday and the pain increases with mobility. She explained that her pain increases with stress.

The other component of Ms. Maitland's impairment is her psychological state. With respect to this, there have been diagnoses of depression and anxiety.⁶ Dr. Resnick (psychologist), who produced the Psychological DAC report of March 16, 2005, found clinical depression at a severe level, without psychotic features, with significant symptoms of anxiety and panic and also pain management control issues as well as chronic post-traumatic stress disorder. He identified some extreme fears and phobias, especially related to accidents and driving. As a result he concluded that a treatment plan recommending 12 hours of treatment intervention was reasonable and necessary. Dr. Resnick also recommended that Ms. Maitland attend at a psychiatrist to review her medications for depression. Ms. Maitland is currently attending at a psychologist and seeking psychiatric assistance as well. In describing her psychological state, Ms. Maitland says that she feels stressed, depressed and alone. She suffers from loss of appetite and serious insomnia. She is not motivated to do most things and has not returned to her earlier level of activity in any area of her life. She would rather spend most of her time by herself.

State Farm contends that without a psychiatric assessment, her impairments can best be described as soft tissue injuries, with no objective physical findings, coupled with an emotional overlay.

⁶ Psychological assessment of Dr. Saunders (psychologist), dated October 6, 2004. Exhibit 1, Tab 4

Findings Regarding Pre- and Post-Accident Activities

I find that Ms. Maitland, Ms. Mckenzie and Leah provided credible evidence about Ms. Maitland's pre- and post-accident activities. Despite the presence of some minor discrepancies, overall I find that the evidence with respect to Ms. Maitland's pre- and post-accident activities is consistent.

Before the accident, Ms. Maitland was as independent a person as one could be in her circumstances. She had a full-time job in customer service. Her spouse also worked full-time, with varying hours. Like most working couples, Ms. Maitland and Tyaobi made use of babysitting services, but Ms. Maitland performed most of the housework and the child care duties when she was at home after work and on weekends. She took care of herself, and had an active social and personal life.

Since the accident, Ms. Maitland's ability to function independently has deteriorated significantly. At the time of the hearing, she was living with her mother and other family members. She does little, if any, of the housekeeping and cooking. She provides some care for her young daughter. She does not tend to most of her son's personal needs, as she did before. She socializes with friends very infrequently, though she does maintain some contact with a few of them. She socializes with her family very little. She spends a very good deal of her time in bed, sleeping or otherwise withdrawn from people. She is no longer extroverted and energetic and is not motivated to take care of herself or to do things for herself.

I find that substantially all of the activities in which Ms. Maitland ordinarily engaged before the accident have been affected by the impairments she suffered as a result of the accident. Every aspect of her life has changed as a result of the accident.

The Test

There is a long interpretative history to the applicable test in this case. Much of the jurisprudence that has been developed examines the constituent elements of the definition. The parties essentially relied on a similar interpretation of the definition except insofar as the interpretation of the constituent element of “substantially all” is concerned - does it mean “most of” her activities or “nearly all of” her activities? Practically speaking, in this case, it makes no difference. In my view, Ms. Maitland has demonstrated that virtually all of the activities in which she ordinarily engaged have been affected by the impairments she suffered as a result of the accident.

The question that remains is whether Ms. Maitland’s impairments *continuously prevent* her from engaging in those activities in which she ordinarily engaged before the accident. The general consensus is that, in all of its aspects, the test is a strict one. Some of the generally accepted propositions with respect to this part of the test are:

- the degree of functional impairment must be a significant but need not be a complete disability;⁷
- the analysis of the applicant’s ability to engage in an activity includes assessing the activity as a whole and considering the quality of the activity and the need for assistance;

⁷ *Walker v. Ritchie*, [2003] O.J. No. 18. See also *Marchildon and State Farm Mutual Automobile Insurance Company*, (FSCO A97-000643, November 3, 1998), where the arbitrator finds that the post-156 test (same as the one considered in this case) should not be read so strictly as to make it virtually impossible for anyone to qualify. Where pain prevents engagement, the question cannot be whether the applicant **can do** but whether degree of pain is such that she is practically prevented from engaging in those activities.

- the applicant must establish that she is *continuously prevented* from engaging in her pre-accident activities, which is more than being *substantially unable* to engage in those activities - this is to say, is the applicant practically prevented from engaging in them?⁸
- the test should not be read so strictly as to make it impossible for anyone to qualify.

In the case of *The Estate of Salvatore Buccellato and Allstate Insurance Company of Canada*,⁹ Arbitrator Muir provides what I see as a comprehensive and accurate reflection of the meaning of the definition as it has developed throughout the years. Arbitrator Muir says that for an applicant “to meet [the test for entitlement] requires a significant degree of impairment and a marked, measurable impact on levels of function and consequent ability of the insured person to continue in their pre-accident activities”.

I rely upon these principles for the purposes of this decision.

Conclusions

Ms. Maitland’s physical injuries, chronic pain problems and severe depression have had an impact upon her ability to act in all of the aspects of her life and, consequently, on virtually all of her pre-accident activities. The lay witnesses and much of the medical evidence corroborate her contentions that she has physical and psychological impairments. The components of Ms. Maitland’s psychological impairment, in particular, have been described as significant, severe and extreme. Based on all of this evidence, and in particular on the Psychological DAC report of Dr. Resnick, I find that Ms. Maitland’s impairments are very serious. She is engaged in psychological treatment, is pursuing psychiatric help and has been prescribed antidepressants.

⁸ In the case of *Zurich Insurance Company and C.L.*, (FSCO P98-00043, March 24, 1999-appeal) the Director’s Delegate Draper says that continuously prevented is not the same as substantial inability. The test requires a high degree of impairment beyond that recognized as a substantial inability. See also *Patrick and Peel Mutual Insurance Company* (FSCO A96-000478, August 26, 1998) and *Urquhart and Zurich Insurance Company*, (FSCO, OIC A96-000368, June 4, 1997)

⁹ (FSCO A03-000609, April 14, 2004) While the case of *Buccellato* dealt with non-earner benefits, the test for entitlement is the same, i.e., has the insured suffered a complete inability to carry on a normal life as a result of the accident.

Furthermore, these serious impairments, in my view, have clearly led to profound limitations when her activities pre- and post-accident are compared. When I assess her activities on the whole and the quality of her engagement in those activities, it is clear to me that Ms. Maitland is at this time a fraction of the person she used to be, especially on account of her psychological impairments.

Ms. Maitland used to be an independent, fully engaged working mother and spouse who was happy and motivated. She is now, essentially, a completely different person with a different life post-accident. While she has lost no limbs and can still see, hear, speak and walk, her ability to function as the employee, mother, spouse, friend and individual she used to be is crippled by physical limitations, chronic pain and very serious depression.

I am satisfied that her lack of will, energy, motivation, and her feelings of despair, hopelessness, sadness and fear, all as a result of her depression, combined with her chronic pain prevent her from engaging to any meaningful degree in virtually all of the activities in which she ordinarily engaged before the accident. She can no longer work though she has attempted to many times. She does almost none of the housekeeping and only the bare minimum of child care with respect to each of her children because she lacks the physical strength, the energy and the will to engage with them as she used to and as is necessary. She can not socialize with her family and friends as she used to because of her depression and feelings of isolation. She lacks the desire to spend time on her personal care and personal pursuits. In my view, her sporadic attempts to assist with housework and child care and to socialize can not be held against her. Despite her attempts at being a “normal person”, to use her expression, Ms. Maitland has remained only very peripherally engaged in her own life.

While I agree that the test to be applied in this case is a strict one and only few applicants, as a result, will be able to meet it, I fail to see, given the particular circumstances of her life, how Ms. Maitland does not meet that very strict test.

I conclude, that Ms. Maitland suffers a complete inability to carry on a normal life as a result of the accident of August 2003 because, as a result of that accident, she sustained impairments that continuously prevent her from engaging in substantially all of the activities in which she ordinarily engaged before the accident.

SPECIAL AWARD

In addition to awarding the benefits and the interest to which an insured person is entitled under the *Schedule*, an arbitrator shall make a special award, pursuant to section 282(10) of the *Insurance Act*, where she finds that an insurer has *unreasonably* withheld or delayed payments. It is not enough to find that the insurer's decision to withhold or delay payments is wrong. The applicant did not adduce sufficient evidence or make a persuasive argument that the behaviour of the State Farm adjusters in this case was unreasonable. Furthermore, I found no basis upon which to conclude that State Farm unreasonably withheld or delayed payments. Therefore, I find that a special award is not appropriate in this case.

EXPENSES:

The parties did not argue the issue of expenses before me. The parties should attempt to resolve their claims for the expenses of this arbitration process by reviewing Rules 75 to 79 of the *Dispute Resolution Practice Code*. If the parties are unable to resolve the issue of expenses, either party may request, within 30 days of receipt of this decision, an appointment before me to determine expenses.

Rosemary Muzzi
Arbitrator

May 9, 2006

Date



FSCO A05-000307

BETWEEN:

NATASHA MAITLAND

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 Ms. Maitland care-giver benefits of \$250 per week from December 3, 2005 and ongoing.
2. State Farm shall pay Ms. Maitland interest on all outstanding payments of benefits, in accordance with section 46(2) of the *Schedule*.
3. The parties are encouraged to resolve expenses between themselves, failing which either party may request, within 30 days of receipt of this decision, an appointment before me to determine expenses pursuant to Rules 75-79 of the *Dispute Resolution Practice Code*.

Rosemary Muzzi
Arbitrator

May 9, 2006

Date