



Appeal P06-00018

OFFICE OF THE DIRECTOR OF ARBITRATIONS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Appellant

and

NATASHA MAITLAND

Respondent

BEFORE: David Evans
REPRESENTATIVES: Michael P. Taylor for State Farm
David S. Wilson for Ms. Maitland
HEARING DATE: February 2, 2007

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 dismissed and the arbitration order, dated May 9, 2006, is confirmed.
2. If the parties are unable to agree on appeal expenses, an expenses hearing may be requested in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

David Evans
Director's Delegate

February 8, 2007

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

State Farm appeals the arbitrator's finding that Ms. Maitland, pursuant to section 13 of the *SABS-1996*,¹ is entitled to ongoing caregiver benefits of \$250 per week from December 3, 2005.

II. BACKGROUND

Ms. Maitland was injured in an accident on August 5, 2003. She claimed caregiver benefits, and Wawanesa paid them up to December 2, 2005. Since she was claiming continuing benefits more than 104 weeks after the accident, she had to meet the strict test — discussed below — that she was continuously prevented from engaging in substantially all of the activities in which she ordinarily engaged before the accident.

In conducting her analysis of that test, the arbitrator compared Ms. Maitland's life before and after the accident, relying on the testimony of Ms. Maitland herself, her mother, and one of her sisters. She found that they provided credible evidence about Ms. Maitland's pre- and post-accident activities that, despite some minor discrepancies, was consistent.

Ms. Maitland had been working as a customer service representative since April 2002. She was married with one child, lived with her husband in their own residence, and carried on an active social and personal life. She gave birth to her second child after the accident and made three failed attempts to return to work after the end of her maternity leave. As a result of the lowered income, she and her husband lost their home. In October 2005, the family started living in her mother's home with her other family members, who performed the majority of tasks that she

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

used to do for herself. Ms. Maitland testified that her social and personal life had become very limited, as she rarely attended family functions, spent most of her time in bed, and left the care of her children to her mother and sister.

The arbitrator found that substantially all of the activities in which Ms. Maitland ordinarily engaged before the accident had 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.”

She found that Ms. Maitland’s impairments were very serious. She noted that Ms. Maitland was engaged in psychological treatment, pursuing psychiatric help, and had been prescribed antidepressants. These impairments, in the arbitrator’s view, had

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.

The arbitrator found that Ms. Maitland’s “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.” The arbitrator noted that, while the test is a strict one and only a few applicants will be able to meet it, she found that Ms. Maitland did.

III. ANALYSIS

At the beginning of the appeal hearing, counsel for the insurer advised that, while he was of the view that the arbitrator’s decision is incorrect, and he took issue with the factual conclusions she drew and the inferences she made, he conceded it was a carefully drafted decision on her part

and that he was limited to questions of law.² Accordingly, he neither disputed the factual conclusions the arbitrator came to nor the inferences she drew from those facts. Instead, he submitted that the arbitrator made an error of law with respect to the definition of “complete inability to carry on a normal life” set out in s. 2(4) of the *SABS*:

For the purpose of this Regulation, 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.

This definition is relevant because caregiver benefits are not payable “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.” [s. 13(4)]

The insurer submits that the arbitrator erred in the “substantially all” part of the test. It submits that it is clear law that “substantially all” means “substantially all of the activities,” not most of or the essential or the important activities. For instance, in *Todd and State Farm Mutual Automobile Insurance Company*, (FSCO A00-001314, November 25, 2003), the arbitrator noted that “the test for complete inability encompasses substantially all of the insured person’s activities, and not simply her essential activities.” In *J.P and Wawanesa Mutual Insurance Company*, (OIC A96-001312, August 11, 1997), the arbitrator stated: “In order to recover benefits, the applicant must be prevented from engaging in **most** or **nearly all** of her pre-accident activities.” [Emphasis in the original.]

To support its position, the insurer cites the following statement from page 10 of the arbitrator’s decision: “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

² A party to an arbitration at the Commission may appeal the order of the arbitrator to the Director or his delegate “on a question of law”: see s. 283(1), *Insurance Act*, R.S.O. 1990, c. I-8.

accident.” [Emphasis in the original.] The insurer submits that the arbitrator misstated the test as being from “those” activities and not “all” activities.

First, in the passage cited by the insurer, the arbitrator was not turning her mind to the “substantially all” portion of the test but to the “continuously prevents” portion. Second, by using the word “those” in that passage, she was referring to the previous paragraph, in which she specifically discussed the “substantially all” portion of 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 arbitrator found that, whether or not “substantially all” means “most” or “nearly all,” it made no practical difference in this case because she found that Ms. Maitland could not engage in “virtually all” of the pre-accident activities in which she ordinarily engaged. I find the arbitrator did not misdirect herself on the test because the phrase “virtually all” is at least as strict as “substantially all.” Thus, in context, there was no error of law.

The insurer submits that the arbitrator then applied the test incorrectly when she reached her conclusions on p. 12 of the decision:

I am satisfied that [Ms. Maitland’s] 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 cannot 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 cannot 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.

The insurer submits that this is not a list of “substantially all” Ms. Maitland’s pre-accident activities but only her important or essential activities, which, it argues, is not the test. The insurer submits that the arbitrator made an error of law by equating substantially all with essential or important activities. However, I cannot see what other activities the arbitrator should have considered, nor did the insurer point out any to me.

The activities referred to in the test are those in which Ms. Maitland “ordinarily engaged before the accident,” not all her activities plain and simple. Activities in which she was not ordinarily engaged before the accident are excluded from consideration: the post-accident inability to do something she did not ordinarily do before the accident would not count in her favour and, conversely, a post-accident ability to do something that she did not ordinarily do before the accident would not count against her.

The question is: in what activities was Ms. Maitland ordinarily engaged before the accident? The arbitrator discussed those activities in her decision and, in the paragraph cited above, the arbitrator answered that question. The arbitrator found that Ms. Maitland could not engage in — or take part in or participate in — working, socializing, caring for her children, or any other ordinary aspect of her pre-accident life. I find the arbitrator correctly understood the test and correctly applied it to the facts as she found them. Accordingly, I find no error of law.

The appeal is dismissed.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, a hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

David Evans
Director's Delegate

February 8, 2007

Date