



FSCO A13-003230

**BETWEEN:**

**JAVED TABEY NADER**

**Applicant**

**and**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

**Insurer**

### **REASONS FOR DECISION**

*\*Paragraph 3, page 19 has been corrected on March 10, 2016 in accordance with the *Dispute Resolution Practice Code* and s. 21.1 of the *Statutory Powers Procedure Act**

**Before:** Robert Bujold

**Heard:** April 7, 8, 9 and June 3, 2015, at the offices of the Financial Services Commission of Ontario in Toronto. Oral submissions heard by telephone conference call on August 6, 2015.

**Appearances:** Oneal Banerjee, Shane Leroux and Michael Wentzel for Mr. Nader  
Darcy McGoey for State Farm Mutual Automobile Insurance Company

**Issues:**

The Applicant, Javed Tabey Nader, was injured in a motor vehicle accident on May 16, 2010. He applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company (“State Farm”), payable under the *Schedule*.<sup>1</sup> Disputes arose regarding Mr. Nader’s ongoing entitlement to certain benefits. The parties were unable to resolve their disputes through mediation, and Mr. Nader applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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<sup>1</sup> *The 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 Mr. Nader entitled to receive a weekly income replacement benefit at the rate of \$303.62 per week from March 26, 2011 to May 16, 2012?
2. Is Mr. Nader entitled to payments for housekeeping and home maintenance at the rate of \$100.00 per week from March 19, 2011 to May 16, 2012?
3. Is Mr. Nader entitled to attendant care benefits at the rate of \$472.53 per month from March 19, 2011 to May 16, 2012?
4. Is Mr. Nader entitled to interest for the overdue payment of benefits?
5. Is State Farm liable to pay a special award because it unreasonably withheld or delay payments to Mr. Nader?
6. Is State Farm liable to pay Mr. Nader's expenses in respect of the arbitration?
7. Is Mr. Nader liable to pay State Farm's expenses in respect of the arbitration?

**Result:**

1. Mr. Nader is entitled to receive a weekly income replacement benefit at the rate of \$303.62 per week from March 26, 2011 to May 16, 2012.
2. Mr. Nader is entitled to payments for housekeeping and home maintenance at the rate of \$50.00 per week from March 19, 2011 to May 16, 2012.
3. Mr. Nader is entitled to attendant care benefits at the rate of \$8.05 per month from March 19, 2011 to May 16, 2012.
4. Mr. Nader is entitled to interest for the overdue payment of benefits.

5. State Farm is liable to pay a special award in the amount of \$5,000.00 because it unreasonably withheld payment of income replacement benefits to Mr. Nader.
6. If the parties are unable to resolve the issue of expenses between themselves, either party may request that I determine the issue in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

## EVIDENCE AND ANALYSIS:

### Background

The Applicant, Javed Nader, was born in Afghanistan in 1986. He left Afghanistan in 2001, at the age of 15, to avoid the Taliban who had risen to power. Mr. Nader first emigrated to Russia where he lived with an uncle. He pursued some high school studies (completing grade 9), and also worked for his uncle in retail. In 2007, at the age of 21, he moved to Canada where he lived with his sister and her husband in their one-bedroom apartment.<sup>2</sup> Mr. Nader testified that he slept on a sofa in their dining room. When he arrived in Canada, Mr. Nader spoke very little English.

Mr. Nader was able to secure employment with Decora Windows in July 2009 as a glass feeder (feeding panes of glass into a machine that washed the panes). He was still employed at Decora Windows at the time of the accident.

Mr. Nader also testified that he shared housekeeping responsibilities with his sister who, though not working, was learning English and taking care of her child. His brother-in-law worked long days and, as he put it, “She was busy. She couldn’t do everything, I help my sister.” His evidence was that he did laundry, vacuumed, mopped the floor, cleaned windows, washed dishes, and cleaned the washroom. Mr. Nader testified “I did everything”, which I understood to mean that he helped with everything. He also testified that he did some cooking, although his sister did most of the cooking.

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<sup>2</sup> It was not clear whether his sister and brother-in-law had any children when he first moved in with them in 2007, but they had one child at the time of the accident in 2010, and 3 children at the time of the hearing in 2015. Mr. Nader was still living with his sister, brother-in-law and their 3 children at the time of the hearing, in another apartment in the same building.

The accident took place on May 16, 2010. Mr. Nader was the driver of a Honda Civic travelling west on Steeles Avenue at approximately 50-60 km/hr when a second vehicle unexpectedly exited from a gas station onto Steeles Avenue and into the path of the Honda. Mr. Nader was unable to avoid a collision. His Honda struck the other vehicle in a “T-bone” type collision. As a result of the collision, airbags on the Honda were deployed. Mr. Nader was wearing his seatbelt, but he reported that he jolted forward striking his nose and face on the driver-side airbag. The damage to the front end of the Honda was extensive and the vehicle was deemed to be a “write-off.”<sup>3</sup>

Police and emergency vehicles attended the scene, but Mr. Nader did not seek medical attention at that time. Mr. Nader testified that the impact was very hard and had scared him, but he did not immediately feel pain. He testified that he was in shock. Mr. Nader called a friend to pick him up and he went home.

According to Mr. Nader’s evidence, he began to feel pain the day following the accident. He testified that he had a headache and felt pain in his neck, back, right shoulder and leg. On referral from a friend, Mr. Nader attended at KIA Wellness Centre and began receiving active and passive therapy, including physiotherapy, massage therapy and chiropractic treatments. The first treatment plan from KIA is dated May 17, 2010. An OCF-3 also dated May 17, 2010<sup>4</sup> concluded that Mr. Nader had sustained a substantial inability to return to his pre-accident employment or perform his pre-accident housekeeping tasks. A Form 1 dated May 21, 2010<sup>5</sup> prepared by another service provider, EZ Healthcheck, identified attendant care needs in the amount of \$472.53 per month. It appears that, on the basis of these and other submissions, State Farm began paying income replacement benefits, housekeeping and home maintenance benefits, attendant care benefits, and approved various plans for treatment and assessments.

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<sup>3</sup> Although no Motor Vehicle Collision report was tendered into evidence, photographs of the extensive damage to the Honda are found at Exhibit 1, Vol. 3, Tab 15.

<sup>4</sup> Exhibit 1, Vol. 1, Tab 7(b)

<sup>5</sup> Exhibit 1, Vol. 2, Tab 9(e)

Mr. Nader first saw his family doctor, Dr. V. Satei, approximately three weeks after the accident on June 5, 2010, at which time complaints of neck and low back pain are recorded in the doctor's clinical notes. Although the handwritten notes are somewhat difficult to read, and Dr. Satei was not called to testify, it appears that he prescribed pain medication, ice and ongoing physiotherapy. While Mr. Nader continued to attend quite regularly for treatment and assessments at facilities such as KIA and EZ Healthcheck, as well as other providers such as People's Choice and Total Check-Up, Mr. Nader's attendances at his family doctor's office were less frequent, approximately every month or two on average.

### **Termination of Benefits**

State Farm terminated Mr. Nader's ongoing entitlement to income replacement benefits, housekeeping and home maintenance benefits, and attendant care benefits, primarily on the basis of three insurer examinations (conducted by a physiatrist, a psychologist and an occupational therapist) in November and December 2010. For reasons that were not well explained, the OCF-9 that terminated Mr. Nader's entitlement to these benefits was not prepared until March 18, 2011.

Pursuant to the OCF-9, attendant care and housekeeping benefits were terminated effective March 18, 2011. Income replacement benefits were terminated effective March 25, 2011 on the basis that "the physiatry report recommends a gradual return to work over a 6 week period." The OCF-9 provided that "post accident income pay stubs will need to be submitted while you gradually return to work over this 6 week period so that your benefit may be calculated accordingly."

Mr. Nader maintains that, at the time of termination, he remained unable to return to work and, given the repetitive and heavy requirements of his job, there were no light duties that would have allowed him to participate in a graduated return to work program. Mr. Nader maintains that he continued to be substantially unable to return to his pre-accident work for the duration of the first two years post-accident and that, in fact, ongoing sequelae of the accident would prevent him from returning to his pre-accident job even today.

Although Mr. Nader never returned to his pre-accident job, he did get a job in a bakery in February 2013, approaching three years post-accident. It involved putting bread ingredients into an industrial mixing bowl and mixing the ingredients, but Mr. Nader testified that the work was mechanized by “pressing buttons”. Notwithstanding the automation, Mr. Nader found after a few months that the work was aggravating his right shoulder, neck and mid-back pain, so he quit that job. At the time of the hearing, approximately five years post-accident, Mr. Nader had just started a job similar to his pre-accident job as a glass feeder, except that, according to Mr. Nader, the work is light to moderate and he has the aid of a “lifting machine”.

Regarding housekeeping, Mr. Nader admits that, at approximately one year post-accident, he began a gradual return to his pre-accident housekeeping duties. He maintains that, by two years, he had returned to performing all such tasks, other than above-shoulder window cleaning.

As for attendant care, Mr. Nader testified that, at approximately one year post-accident, he had returned to his pre-accident self-care tasks, other than cutting his toenails.<sup>6</sup>

### **Entitlement to Income Replacement Benefits**

Mr. Nader is entitled to an income replacement benefit for the first 104 weeks of disability (other than the first week for which no benefit is payable) if, for this period and as a result of the accident, he suffered a substantial inability to perform the essential tasks of his pre-accident employment.<sup>7</sup> For the following reasons, I am satisfied that Mr. Nader has met this test.

### **Essential tasks of Mr. Nader’s pre-accident employment**

One area of dispute involves the essential tasks of Mr. Nader’s pre-accident job and whether they constituted moderate or heavy work. There is agreement that Mr. Nader had to lift pieces of glass from a table about a foot off the ground to nearly chest height, as he turned and placed the pieces

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<sup>6</sup> Hearing transcript from April 8, 2015, pages 22-23.

<sup>7</sup> Section 5 of the *Schedule*.

on a machine that washed the glass. Someone on the other end of the machine would remove the washed pieces of glass. This process took about two minutes, and it was repeated for his shift which was typically 8 hours.

The disagreement between the parties arises with respect to the size and weight of the pieces of glass Mr. Nader had to handle. Mr. Nader testified that, while he had to lift and load many smaller, lighter pieces, many pieces of glass were larger and heavier, with some being too large for him to lift by himself. The largest pieces were estimated to be as large as 6 by 8 feet and weighing over 100 lbs.

A worksite assessment was conducted on October 5, 2010 by Ms Jasmine Chadha, kinesiologist.<sup>8</sup> Information regarding the physical demands of Mr. Nader's job as a glass feeder was obtained from an interview with someone by the name of Mr. Michael Tropea from the human resources department of Decora Windows. The assessment concluded that Mr. Nader's work as a glass feeder involved a physical demands rating of M (medium) based, in part, on information that the "usual weight" of the panes of glass that Mr. Nader had to lift and place into the glass washing machine was 5-15 lbs depending on the size of the panes. The report notes that the panes of glass varied in size (small, medium and large), but there is no objective reference in the report to how small or how large the pieces could get. The assessment also noted that Mr. Nader's job involved constant standing; eye/hand/foot coordination; manual grasping; frequent walking; forward bending; twisting; forward neck movement; and, arm use at and below waist level. The noise level of the work environment is rated as high.

Mr. Nader was not familiar with Mr. Tropea of Decora's human resources department, but he was adamant that the range of 5-15 lbs for the "usual weight" of the glass pieces that he had to lift and load into the cleaning machine was not correct. While many of the pieces would have fallen in this range, many pieces were heavier and sometimes much heavier.

I accept Mr. Nader's evidence that the pieces of glass he was required to lift and load included pieces well beyond the range of 5-15 lbs. There is no reference in Ms. Chadha's report that Mr.

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<sup>8</sup> Ms. Chadha's report is found at Exhibit 1, Vol. 2, Tab 9(t).

Nader was consulted with respect to the preparation of her report or asked to review its contents for accuracy. As well, neither Ms. Chadha nor Mr. Tropea (or any representative of Decora) were called to give evidence at the hearing. I have no information on the basis for Mr. Tropea's "usual weight" estimate (he may have been reading from a job description as opposed to having first-hand knowledge of the job), and I also find it entirely plausible that there may have been a misunderstanding between Ms. Chadha and Mr. Tropea regarding the term "usual weight". Mr. Tropea may have been referring to the weight of pieces that he understood Mr. Nader most "usually" handled, even though larger pieces also had to be handled throughout a shift. Without the benefit of hearing from Ms. Chadha or Mr. Tropea, I accept that Mr. Nader's job was repetitive and included not infrequent heavy lifting well beyond 5-15 lbs.

### **Substantial inability to return to pre-accident employment**

Mr. Nader testified that persisting pain located primarily in his back, neck and right shoulder precluded him from returning to his job at Decora when his benefits were terminated in March 2011. Other symptomology included frequent headaches, insomnia and anxiety.

Dr. Tim Dwyer, an orthopaedic surgeon practicing sports medicine, testified on behalf of Mr. Nader. Dr. Dwyer assessed Mr. Nader on April 16, 2012, approximately two years post-accident.<sup>9</sup> On the basis of his assessment and extensive file review, Dr. Dwyer concluded that Mr. Nader had sustained myofascial sprains of the cervical and lumbar spine with resultant chronic pain syndrome; a soft tissue contusion of the right shoulder with resultant chronic pain syndrome; cervicogenic headaches; and, an adjustment disorder. Dr. Dwyer noted that Mr. Nader had reported improvement in his pain complaints, but the improvements were not significant enough to result in a return to his pre-accident level of function. Dr. Dwyer also noted evidence of degenerative disc features in the C5-C6 level of Mr. Nader's cervical spine from an MRI taken in February 2011. Dr. Dwyer testified that it either evidenced a pre-existing condition that would make Mr. Nader more susceptible to developing neck pain from trauma or it may have been the result of the accident. Either way, Dr. Dwyer found the MRI significant. In conclusion, Dr. Dwyer opined that, as a result of the accident, Mr. Nader was still disabled at the two year

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<sup>9</sup> Dr. Dwyer's report is found at Exhibit 1, Vol. 3, Tab 11.



mark from returning to his pre-accident job or from performing any job that would require him to bend and lift heavy objects. Dr. Dwyer was the only medical witness called by Mr. Nader.

The only medical witness called by State Farm was Dr. Kathleen Armitage, the physiatrist who assessed Mr. Nader on November 1, 2010. Dr. Armitage's report was the primary basis upon which State Farm terminated Mr. Nader's income replacement benefits in March 2011.<sup>10</sup>

At the November 1, 2010 assessment, Dr. Armitage noted that Mr. Nader reported knife-like pain in his right shoulder, pain in the lumbar region, discomfort in the left wrist, and symptoms in his right knee that were aggravated by walking. Still, based on Mr. Nader's history and her clinical assessment, Dr. Armitage concluded that Mr. Nader could return to his pre-accident work, if his return to work was graduated over the course of six weeks and done concurrently with active rehabilitation.

Dr. Armitage testified that Dr. Dwyer's report did not affect her opinion. Specifically, with respect to the MRI done in February 2011 (which was never provided to her for an addendum report), Dr. Armitage noted that the degenerative disc features noted were "mild", and found at the most common level of the cervical spine for changes to occur. Further, the mild posterior protrusion was on the opposite side to where Mr. Nader had symptoms, and therefore did not correlate to his symptoms and his clinical presentation.

Pursuant to Dr. Armitage's recommendation, State Farm terminated Mr. Nader's entitlement to income replacement benefits. The OCF-9 notified Mr. Nader that he was expected to return to work over a six week period beginning March 25, 2011. Thereafter, his income replacement benefits would not be issued on a biweekly basis. Instead, post-accident income pay stubs (from the graduated return to work) would need to be submitted so that the amount of any benefit could be calculated. While there is no explicit reference regarding what would happen after the six weeks were up, the clear implication is that no further income replacement benefits would be payable.

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<sup>10</sup> Dr. Armitage's report is found at Exhibit 3.

Mr. Nader did not return to work on any basis in the six weeks that were provided for the graduated return to work in the OCF-9 dated March 18, 2011.<sup>11</sup> In fact, as noted earlier, Mr. Nader has never returned to his pre-accident job. Mr. Nader testified that the work at Decora did not lend itself to accommodation as part of a graduated return to work, although he admitted that he did not contact his employer to discuss the graduated return to work recommendation and whether any accommodation could be made. In Mr. Nader's view, it was obvious that the work could not be done on a graduated basis. The work was simply too heavy and repetitive, and required lifting and twisting that he was not capable of doing.

Counsel for Mr. Nader did notify State Farm on May 3, 2011 (approximately six weeks after the OCF-9 termination) that Mr. Nader had not returned to his pre-accident job. The log notes indicate that an adjuster by the name of "Donnelly" (who was not one of the two adjusters who testified at the hearing) told Mr. Nader's counsel that "our determination still stands regardless."<sup>12</sup> There is no evidence in the log notes, nor did I hear any evidence, to indicate that adjuster Donnelly made any inquiry of counsel as to why Mr. Nader had not returned to work; nor is there any evidence that State Farm has ever followed-up with Decora, even in preparation for this hearing, to confirm whether or not graduated work was available, but if it ever did, no one from Decora was called to give evidence at the hearing.

Although she maintained her opinion that Mr. Nader could have returned to work on a graduated basis, provided he was also receiving active rehabilitation, Dr. Armitage amplified on that recommendation at the hearing. Dr. Armitage noted the importance of helping Mr. Nader "phase to the fact that he could be functional again". He needed support to move from being pain-focused to work-focused. While admitting that she is not a psychologist, Dr. Armitage also noted Mr. Nader's "history of being in several countries and having a psychological history that was unfair to him in terms of what we would think in Canada." She continued that "I think he adapted remarkably well, perhaps until the motor vehicle accident, and then his world fell apart.

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<sup>11</sup> Mr. Nader did continue to receive some treatment in the six weeks following the issuance of the OCF-9, and for a short time thereafter. By late May 2011, however, most treatment ceased to be approved, including some that had an active rehab component.

<sup>12</sup> Log note 118 dated May 3, 2011.

So I think that getting him in charge of his world again is important... I have seen it work... But I think that the system has failed this man from what I see in the further documents.”

Dr. Armitage testified that she did not know whether a graduated return to work would be available to Mr. Nader when she made her recommendation. In the event that a graduate return to work was not possible, Dr. Armitage testified that a vocational assessment would have been “a good place to start” to assess Mr. Nader’s marketability, and to see if he might require some re-education or re-training. She also testified that, even if a graduated return to work program was available, Mr. Nader’s weak psychological state meant that he could have required more than six weeks, and perhaps some additional psychological counselling, to successfully resume his pre-accident duties. She agreed that a re-assessment after the six weeks would have been appropriate.

State Farm also relied on a report dated December 15, 2010 by Dr. Bodenstein, psychologist,<sup>13</sup> in support of its decision to terminate Mr. Nader’s income replacement benefits. Although he concluded that Mr. Nader was not prevented from returning to his pre-accident work from a psychological perspective, Dr. Bodenstein noted that Mr. Nader had significant pain complaints, and found that Mr. Nader’s problems with sleep initiation and maintenance were indicative of a Sleep Disorder. He also found that, while Mr. Nader’s “various depressive and anxiety symptoms” fell short of the overall diagnostic criteria for Post Traumatic Stress Disorder, the symptoms did “merit the diagnosis of Symptoms of Specific (isolated) phobias (automobile anxiety – passenger and to a lesser extent as a pedestrian).” Dr. Bodenstein also concluded that, from a psychological perspective, Mr. Nader had not reached his pre-injury status nor reached maximum medical improvement. I conclude from Dr. Bodenstein’s report that, even if Mr. Nader was not “disabled” from working from a psychological perspective, Dr. Armitage was correct to identify him as psychologically vulnerable and in need of support.

While appearing careful not to disagree with Dr. Armitage, State Farm submitted that it was not only justified in its initial termination of Mr. Nader’s income replacement benefits, but also justified in continuing to maintain that position. State Farm submitted that Mr. Nader had a

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<sup>13</sup> Dr. Bodenstein’s report is found at Exhibit 1, Vol. 3, Tab 12(g).

positive obligation to investigate and attempt a graduated return to work or, if no such work was available, to advise State Farm of same. In failing to meet his obligation, State Farm asked that I find Mr. Nader had disentitled himself from any further income replacement benefits.

I accept that Mr. Nader, like any insured person who is not incapacitated, has an obligation under the *Schedule* to take reasonable measures to obtain treatment, participate in rehabilitation, and seek employment.<sup>14</sup> I further accept that this would include pursuing a graduated return to work program, if available, and participating in related active rehabilitation. However, the OCF-9 in this case seems to simply assume that Mr. Nader would be able to engage in a graduated return to work, and does not advise Mr. Nader that inquiries into the availability of a graduated return to work program rested upon him as a positive obligation (whether graduated work seemed like a possibility to him or not given the nature of his job). While Mr. Nader could have done more to explore a graduated return to work, I find that State Farm could and should have done more to clearly communicate its expectations of Mr. Nader.

More importantly in this case is the duty of a first party insurer to act in good faith. This duty extends to continuing to adjust the insured person's file with an open mind on the basis of new information, and to take reasonable steps to facilitate claims. In this case, Mr. Nader's counsel contacted State Farm to advise that he had not returned to work. I find that the duty to act in good faith made it incumbent on State Farm to make reasonable inquiries at that point to determine the reason for the non-return and, if necessary, to follow-up with the pre-accident employer to confirm the availability (or not) of a graduated return to work. I have no evidence that State Farm did either. Given Dr. Armitage's recommendation, upon which the OCF-9 was based, the duty would also include looking at whether Mr. Nader had been continuing to participate in treatment, especially active rehabilitation. It was not sufficient for State Farm's adjuster to simply state "our determination still stands regardless." I find this constituted a failure to continue to adjust the file in good faith and, notwithstanding any shortfall in Mr. Nader's own

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<sup>14</sup> See Part X of the *Schedule*.

conduct, disentitled State Farm in the circumstances of this case from being able to continue to rely on the initial position it took in its OCF-9.<sup>15</sup>

Of course, in order to be successful, Mr. Nader must still establish that he was substantially unable to return to his pre-accident employment for the period claimed.<sup>16</sup> In that regard, I accept not only the documentary evidence of the treating clinics, and the *viva voce* evidence of Mr. Nader and Dr. Dwyer, but I also accept the evidence of State Farm's own witness, Dr. Armitage, that Mr. Nader was not able to return to work unless it was a graduated return with appropriate supports in place; conditions I have found were not satisfied.

Before I conclude on the issue of income replacement benefits, I will deal briefly with State Farm's submission that I should view certain evidence as reflecting poorly on Mr. Nader's credibility.

First, Mr. Nader's family doctor's records indicate that Mr. Nader had been punched in the face in an altercation that took place in November 2010 resulting in a possible subtle fracture of the right orbit. State Farm noted that Mr. Nader had failed to mention the altercation in subsequent assessments, and there was specific concern that Mr. Nader's complaints of right shoulder pain did not appear in medical records until early 2011, suggesting that any injury in that area may have arisen from the November 2010 altercation.

I was not persuaded that this evidence impugned Mr. Nader's credibility. Mr. Nader's command of English, even at the hearing in 2015, was not strong, and questions often needed to be repeated and/or clarified. I am not satisfied on the evidence presented that Mr. Nader intentionally withheld what he understood to be relevant information from assessors in late 2010, if in fact he was even asked about post-accident injuries unrelated to the motor vehicle accident.

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<sup>15</sup> State Farm referred me to the case of *Boateng and State Farm Mutual Insurance Company* (FSCO A13-001169, December 2, 2014) in support of its position that Mr. Nader's failure to inquire about a graduated return to work program should be viewed as reflecting poorly on the merits of his claim. Of course, each case must be decided on its own facts. I find *Boateng* distinguishable, not only because of State Farm's own failure to continue to properly adjust Mr. Nader's file, but also because *Boateng* appears to focus on a refusal to attempt a return to work as opposed to whether a graduated return to work program was available or even feasible.

<sup>16</sup> *Stranges v. Allstate Company of Canada*, 2010 ONCA 457, leave to appeal to the SCC dismissed.

Further, State Farm's submission that Mr. Nader's right shoulder complaints post-dated the November 2010 altercation is simply factually wrong. A progress note from KIA Wellness dated August 30, 2010, for example, lists right shoulder pain as the second of eleven complaints noted on that date.<sup>17</sup>

State Farm also argued that Mr. Nader's motivation to return to work should be looked at with skepticism because he received employment insurance after the termination of his income replacement benefits. State Farm noted that, in order to receive these benefits, Mr. Nader had to indicate that he was ready, willing and able to work.

Mr. Nader testified that he was prepared to return to work provided that it was an "easy" job, and that he had asked around amongst his friends for any such opportunities.<sup>18</sup> I accept this evidence. I also note that, although no evidence was led on the matter, the log notes appear to show that a vocational assessment was recommended in July 2011,<sup>19</sup> but subsequently found to be not reasonable and necessary by State Farm in September 2011.<sup>20</sup> This further counters the submission that Mr. Nader was simply content to sit back and collect employment insurance.

### **Conclusion re income replacement benefits**

In summary, I conclude on the evidence that Mr. Nader was substantially unable to engage in the essential tasks of his pre-accident employment when State Farm terminated his entitlement to income replacement benefits effective March 25, 2011. I also conclude that, due to failures owing at least as much to State Farm as to Mr. Nader, he remained substantially unable to return to his pre-accident employment for the balance of his claim to the two year mark. I therefore find that Mr. Nader is entitled to receive a weekly income replacement benefit at the rate of \$303.62 per week from March 26, 2011 to May 16, 2012.

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<sup>17</sup> Exhibit 1, Vol. 1, Tab 6(a), page 23.

<sup>18</sup> As noted earlier in these reasons, Mr. Nader did eventually find work in a bakery in February 2013, which lasted a few months, and he had just started a job at another window company just prior to the commencement of the hearing.

<sup>19</sup> Log note 167 dated July 19, 2011.

<sup>20</sup> Log note 191 dated September 6, 2011.

## Housekeeping and Home Maintenance Benefits

Mr. Nader is entitled to housekeeping and home maintenance benefits of up to \$100.00 per week for the first 104 weeks post-accident if, for this period and as a result of the accident, he suffered a substantial inability to perform the housekeeping and home maintenance services that he normally performed before the accident.<sup>21</sup> For the reasons that follow, I find that Mr. Nader is entitled to a portion of the housekeeping benefits claimed in this arbitration.

Mr Nader was initially paid housekeeping and home maintenance benefits at the rate of \$100.00 per week. On December 3, 2010, Mr. Nader was assessed on behalf of State Farm by Ms. Deepali Dhawan, occupational therapist.<sup>22</sup> Although Mr. Nader reported ongoing pain complaints in his lower back, neck, left wrist, right shoulder, nose and bilateral knee joints, and declined to attempt certain tasks, such as vacuuming, Ms. Dhawan concluded that Mr. Nader's functional range of motion and tolerances were sufficient to enable him to return to all of his pre-accident housekeeping duties. On the basis of Ms. Dhawan's assessment,<sup>23</sup> Mr. Nader's entitlement to housekeeping and home maintenance benefits was terminated effective March 18, 2011. As noted, Ms. Dhawan did not testify at the hearing.

An OCF-3 Disability Certificate prepared by KIA Wellness on December 23, 2010 (shortly after the date of Ms. Dhawan's assessment) and another OCF-3 prepared by People's Choice on May 9, 2011 (shortly after the date that Mr. Nader's housekeeping benefits were actually terminated) both provide opinions that Mr. Nader continued to be substantially disabled from performing his pre-accident housekeeping and home maintenance tasks.<sup>24</sup> An in-home assessment by Maria Yaglovski, RN, of Total Check-Up was also conducted on January 15, 2011.<sup>25</sup> Ms. Yaglovski concluded, on the basis of a client interview as well as a physical examination and range of

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<sup>21</sup> Section 22 of the *Schedule*.

<sup>22</sup> Ms. Dhawan's report is found at Exhibit 1, Vol. 3, Tab 12(d).

<sup>23</sup> Dr. Bodenstein's assessment (*supra*, fn 13) also opined on Mr. Nader's ability to perform housekeeping and home maintenance tasks from a psychological perspective.

<sup>24</sup> Two earlier OCF-3s, both dated September 17, 2010, prepared by KIA Wellness and Mr. Nader's GP, Dr. Satei, give conflicting opinions on whether Mr. Nader could return to performing his pre-accident housekeeping and home maintenance duties.

<sup>25</sup> Ms. Yaglovski's report is found at Exhibit 1, Vol. 2, Tab 8(h).

motion testing, that Mr. Nader required ongoing assistance “including grocery shopping, meal preparation, dishwashing, floor care, general housekeeping and laundry tasks for at least 16.75 hours per week...” No witnesses from any of these facilities gave evidence at the hearing.

As noted earlier in these reasons, Mr. Nader testified that he shared in a significant portion of the housekeeping required at the apartment he occupied with his sister, brother-in-law, and their child (now children) due to his sister’s childcare responsibilities and the long hours worked by his brother-in-law. Mr. Nader testified that he helped with laundry, vacuuming, floor mopping, window cleaning, dishwashing, and bathroom cleaning. He also did some cooking.

Mr. Nader testified that he started helping again with some housekeeping tasks after about one year, and that he did more as he continued to improve over time. He admitted that he had returned to helping with all tasks by the end of two years, other than window cleaning that involved reaching above his head.

As noted, I found Mr. Nader to be generally credible as a witness. While struggling at times to understand and articulate answers to some questions as a result of English not being his first language, Mr. Nader’s evidence was largely consistent and withstood testing on cross-examination. His evidence regarding the difficulties he had performing housekeeping tasks was also largely consistent with the complaints noted in the reports of Ms. Dhawan and Ms. Yaglovski of more than four years earlier. In the absence of hearing from Ms. Dhawan and Ms. Yaglovski regarding their conflicting conclusions, I am satisfied on the basis of Mr. Nader’s evidence that he was still substantially unable to perform his pre-accident housekeeping duties when his benefits were terminated on March 18, 2011. I also accept that, by two years, Mr. Nader had improved to the point that he was no longer substantially unable to perform his pre-accident housekeeping duties.

Since Mr. Nader resumed performing some housekeeping tasks at approximately one year post-accident, and continued to improve and assume more tasks throughout year two, I do not find that a rate of \$100.00 per week for housekeeping and home maintenance benefits is warranted for the entire period of his claim. In the circumstances, and to better approximate his



actual need, I find that Mr. Nader is entitled to receive housekeeping and home maintenance benefits at the rate of \$50.00 per week for the period March 19, 2011 to May 16, 2012.

### **Attendant Care Benefits**

Mr. Nader is entitled to attendant care benefits for the first 104 weeks post-accident for all reasonable and necessary expenses incurred by or on his behalf as a result of the accident for services provided by an aide or attendant.<sup>26</sup> For the reasons that follow, I find that Mr. Nader is entitled to a portion of the attendant care expenses claimed in this arbitration.

Ms. Dhawan's in-home assessment conducted on December 3, 2010 not only looked at Mr. Nader's ability to perform his pre-accident housekeeping tasks, but also included an assessment of his attendant care needs.<sup>27</sup> Ms. Dhawan concluded that Mr. Nader was able to return to all self-care tasks, even though he reported that he could not perform certain tasks (such as cutting his toenails), and reported pain that caused him to stop when trying to demonstrate pulling a T-shirt over his head. On the basis of Ms. Dhawan's assessment, State Farm terminated Mr. Nader's attendant care benefits on March 18, 2011.

Shortly prior to Ms. Dhawan's assessment, Mr. Nader's attendant care needs had been assessed by Ms. Yaglovski on November 19, 2010. Ms. Yaglovski prepared a Form 1 providing the opinion that Mr. Nader required assistance with attendant care in the amount of \$448.39 per month.<sup>28</sup>

Mr. Nader testified that, following the accident, he had a number of challenges with his self-care that included a need for assistance with putting on socks and some shirts, washing his hair, and cutting his toenails. These are noted in Ms. Yaglovski's Form 1. Mr. Nader also admitted in his examination-in-chief that he had returned to doing everything in terms of self-care, other than

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<sup>26</sup> Section 16 of the *Schedule*.

<sup>27</sup> Ms. Dhawan's Form 1 is found at Exhibit 1, Vol. 3, Tab 12(e).

<sup>28</sup> Ms. Yaglovski's Form 1 is found at Exhibit 1, Vol. 2, Tab 8(g).

not being able to cut his toenails, by approximately one year post-accident.<sup>29</sup> Mr. Nader testified that he remains unable to cut his own toenails.

I accept Mr. Nader's evidence regarding his attendant care needs. However, I find his estimate of when he became independent with self-care (other than needing help cutting his toenails) to be sufficiently close to the start date of his claim that I award attendant benefits for toenail care only for the full period of his claim.

Ms. Yaglovski's Form 1 allocated 10 minutes per week to clean and trim toenails. At the Level 1 attendant care rate of \$11.23 per hour, I calculate the monthly amount for toenail care to be \$8.05 per month. I therefore find that Mr. Nader is entitled to attendant care benefits at the rate of \$8.05 per month from March 19, 2011 to May 16, 2012.

### **Special Award**

Mr. Nader is entitled to a special award where there is a finding that benefits have been "unreasonably withheld or delayed" in an amount "up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*."<sup>30</sup> For the reasons that follow, I find that Mr. Nader is entitled to a special award in the amount of \$5,000.00.

The question of whether an insurer's delay or failure in paying a benefit is "unreasonable" is fact driven and highly dependent on the arbitrator's view of the evidence.<sup>31</sup> The sort of conduct that would constitute "unreasonable" behaviour includes "excessive, imprudent, stubborn, inflexible, unyielding or immoderate" behaviour.<sup>32</sup>

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<sup>29</sup> *Supra*, fn 6.

<sup>30</sup> Subsection 282(10) of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

<sup>31</sup> See, for example, *Maas and State Farm Mutual Automobile Insurance Company*, (OIC P96-00080, December 8, 1997)

<sup>32</sup> *Plowright and Wellington Insurance Company*, (OIC A-003985, October 29, 1993)

In this case, Mr. Nader claims that State Farm acted unreasonably in several respects.

In terms of State Farm's handling of new medical documentation, Mr. Nader submits that State Farm acted unreasonably when it failed to forward the MRI taken in February 2011 to any of the assessors who saw him in November and December 2010, and whose opinions led State Farm to terminate his benefits in March 2011. Mr. Nader also notes that State Farm failed to order further assessments when it received OCF-3 Disability Certificates, prepared after the assessments that led to the termination of his benefits, indicating that he was still disabled from returning to his pre-accident employment and housekeeping duties. Finally, Mr. Nader submits that Dr. Dwyer's report from April 2012, which concluded that Mr. Nader suffered from chronic pain and continued to be disabled from returning to his pre-accident employment, should have been forwarded to State Farm's assessors for addendum reports.

I agree that State Farm's handling of new medical documentation was less than ideal. Nevertheless, on the facts of this case, I am not persuaded that State Farm's handling amounted to unreasonable conduct warranting a special award. First, the evidence was unclear as to when State Farm came to be in possession of several of these documents. Further, the OCF-3s appear to have largely repeated previous opinions, and did not offer new medical evidence upon which the opinions were based. As for the MRI and Dr. Dwyer's report, Dr. Armitage was sympathetic to Mr. Nader, but she was also clear that neither the MRI nor Dr. Dwyer's report would have affected her opinion. Therefore, I am not persuaded that, in any event, forwarding the various medical documents to State Farm's assessors would have resulted in a determination that he was entitled to benefits.

In addition to the way State Farm handled new medical documentation, Mr. Nader also took issue with the way State Farm handled the termination of his benefits, and how it dealt with the follow-up information that he had not returned to work. In this respect, I agree that State Farm acted unreasonably, and Mr. Nader is entitled to a special award.

Dr. Armitage's opinion that Mr. Nader could return to work was premised on the availability of a graduated return to work program, and the provision of active rehabilitation and other supports

as may be reasonably required to facilitate the attempt. However, neither Dr. Armitage nor State Farm knew whether graduated work was available, and the OCF-9 provided no guidance or direction to Mr. Nader with respect to what was expected of him in terms of investigating, arranging or participating in a graduated work return. More importantly, when advised that Mr. Nader had not returned to work, State Farm took no steps to ascertain the reasons for his non-return to work, help determine the availability of graduated work, and either help facilitate a graduated return to work (if available) or proceed with a vocational assessment to explore other employment options, including possible upgrading. Instead, State Farm simply maintained its denial.<sup>33</sup> In these ways, State Farm acted unreasonably, and its withholding of income replacement benefits from this point became subject to a special award.

The leading case on the proper approach to the calculation of special awards is *Liberty Mutual Insurance Company and Persofsky*.<sup>34</sup> The calculation begins by first determining the amount of the benefits unreasonably withheld, plus applicable interest. The maximum permissible special award can then be determined by “adding the additional interest component in s. 282(10) two per cent per month, compounded monthly. To be clear, this calculation includes interest on the unpaid SABS interest. The maximum special award is 50 per cent of this total.” With at least an approximation of the maximum amount in mind, a lump sum is to be awarded, guided by principles of rationality and proportionality.

The principal amount of the income replacement benefits that are subject to the special award are approximately \$18,000, exclusive of interest. I do not find it necessary to calculate the maximum permissible special award with any degree of precision. It is safe to say that, with interest (and special award interest on all amounts), the maximum award would be substantially higher than the more modest amount of \$5,000.00 that I find appropriate to award in this case.

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<sup>33</sup> Neither of the two adjusters who testified, Anne Marie Leggo and Miguel Viegas, were able to shed light on adjuster Donnelly’s log note of May 3, 2011 that states “I said that our determination still stands regardless”. The log notes indicate that a great many adjusters have been involved in Mr. Nader’s file at various points throughout.

<sup>34</sup> (FSCO P00-00041, January 31, 2003)

**EXPENSES:**

The parties made no submissions on expenses. If the parties are unable to resolve the issue of expenses between themselves, either party may request that I determine the issue in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

\_\_\_\_\_  
Robert Bujold  
Arbitrator

March 7, 2016  
\_\_\_\_\_  
Date



FSCO A13-003230

**BETWEEN:**

**JAVED TABEY NADER**

**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 to Mr. Nader a weekly income replacement benefit at the rate of \$303.62 per week from March 26, 2011 to May 16, 2012.
2. State Farm shall pay to Mr. Nader housekeeping and home maintenance benefits at the rate of \$50.00 per week from March 19, 2011 to May 16, 2012.
3. State Farm shall pay to Mr. Nader attendant care benefits at the rate of \$8.05 per month from March 19, 2011 to May 16, 2012.
4. Mr. Nader is entitled to interest on all overdue payments.
5. State Farm shall pay to Mr. Nader a special award in the amount of \$5,000.00 on account of income replacement benefits unreasonably withheld.
6. If the parties are unable to resolve the issue of expenses between themselves, either party may request that I determine the issue in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

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Robert Bujold  
Arbitrator

March 7, 2016

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Date