



FSCO A09-000213

BETWEEN:

MARCIA HENRY

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Arbitrator Denise Ashby

Heard: June 20, 21, 22, 23 and August 18, 2011 at the offices of the Financial Services Commission of Ontario in Toronto. Written submissions were concluded on October 26, 2011.

Appearances: David Schell for Ms. Henry
Todd J. McCarthy for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Marcia Henry, was injured in a motor vehicle accident on February 22, 2007. She applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.¹ State Farm refused to pay post-104 week income replacement benefits. The parties were unable to resolve their disputes through mediation, and Ms. Henry applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹ *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 Ms. Henry entitled to receive a weekly income replacement benefit from February 23, 2009, pursuant to section 5 of the *Schedule* and if entitled what is the quantum of those benefits pursuant to sections 6 and 7?
2. Is State Farm liable to pay a special award, pursuant to subsection 282(10) of the *Insurance Act*, because it unreasonably withheld or delayed payments to Ms. Henry?
3. Is State Farm liable to pay Ms. Henry's expenses in respect of the arbitration pursuant to subsection 282(11) of the *Insurance Act*?
4. Is Ms. Henry liable to pay State Farm's expenses in respect of the arbitration pursuant to subsection 282(11) of the *Insurance Act*?
5. Is Ms. Henry entitled to interest for the overdue payment of benefits pursuant to subsection 46(2) of the *Schedule*?

Result:

1. State Farm shall pay Ms. Henry a weekly income replacement benefit at the rate of \$400.00 from February 23, 2009 and ongoing.
2. State Farm shall pay Ms. Henry a special award fixed at \$23,000.00.
3. State Farm shall pay Ms. Henry interest on overdue income replacement benefits pursuant to subsection 46(2) of the *Schedule*.
4. The parties made no submissions with respect to expenses. They are encouraged to resolve the issue, failing which they may request an expense hearing within **30 days** of this decision pursuant to Rule 79 of the *Dispute Resolution Practice Code*.

EVIDENCE:

On February 22, 2007 at approximately 8:45 a.m., Ms. Henry, an emergency nurse, was driving to work in the express lane of Highway 401. The weather and road conditions were poor.

Ms. Henry did not get to work that day. A car swerved into her vehicle striking the driver's side. As a consequence of the impact, Ms. Henry felt light-headed and dazed and experienced aching pain in her left shoulder and neck.

The next day, Ms. Henry saw her then family physician. He referred her for physiotherapy and recommended icing the injured area. In March 2007, Ms. Henry became the patient of Dr. H. Boyrazian. He testified at the hearing and was qualified as an expert in family medicine.

As well, Ms. Henry and Dr. Joseph Wong, who was qualified as an expert in psychiatry, testified on behalf of Ms. Henry.

Mr. James Boden, an Accident Benefits adjuster employed by State Farm and Mr. Brian Wierdsma, who was qualified as an expert in kinesiology and Functional Abilities Evaluations testified on behalf of State Farm.

Medical Evidence:

Pre-accident Medical History:

Prior to the accident in February 2007, Ms. Henry had been diagnosed with Lupus which had been inactive for years.² She was also diagnosed with carpal tunnel syndrome. As well, Ms. Henry sustained a broken toe which kept her from work for a period of time in the summer of 2006.³ Notwithstanding these issues, Ms. Henry was a fully functioning emergency nurse at the North York General Hospital at the time of the accident.

² Exhibit 2, Book I, Tabs 2, 4 and 5, Book II, Tab 46

³ Exhibit 2, Book I, Tab 2

Post-accident Medical History:

Ms. Henry testified that as a consequence of the accident she sustained injuries to her neck, left shoulder, upper arm and lower back. As well, she injured her tooth fracturing her upper left bridge. Since the accident she has had constant pain and stiffness in her neck, left shoulder and upper arm and upper back. Pain in her lower back is intermittent. As well, she has frequent incapacitating headaches. Ms. Henry testified that her ability to concentrate has been significantly diminished since the accident.

Following the accident, both her previous family physician and Dr. Boyrazian sent her for x-rays. As well, Dr. Boyrazian referred Ms. Henry for an ultrasound of her neck and shoulder. All of the imaging results were normal. However, Ms. Henry continued to have problems in her left shoulder and arm. She experienced numbness and tingling in the arm. As a consequence, Ms. Henry had an MRI of her left shoulder on June 1, 2007. It showed fluid in the joint spaces as well as inflammation.⁴

In July 2007, Ms. Henry was assessed, at State Farm's request, by Dr. J. Hummel, orthopaedic surgeon,⁵ A. Phillips, O.T. who completed an In-home Assessment and Form 1, Assessment of Attendant Care Needs⁶ and D. Sewell, Certified Kinesiologist, who conducted a Functional Abilities Evaluation and a Job Site Analysis.⁷

Dr. Hummel concluded that Ms. Henry "should be restricted from lifting heavier objects with her left arm. It does not, however, prevent her from working as a registered nurse." He noted that he found no barriers to Ms. Henry's returning to work "although there are some questionable clinical findings." Dr. Hummel also concluded that there were no barriers to her performing her housekeeping and home maintenance tasks with the exception of her not lifting objects, with her left arm, greater than 5-10 pounds.⁸ On September 7, 2007 and October 10, 2008, Dr. Hummel issued addendum reports. In September 2007, he indicated that he had reviewed the Insurer's

⁴ Exhibit 2, Book I, Tab 8

⁵ Exhibit 4, Volume I, Tab 10

⁶ Exhibit 4, Volume I, Tabs 11 and 9

⁷ Exhibit 4, Volume I, Tabs 12 and 13

⁸ Exhibit 4, Volume I, Tab 10, pages 7 and 8

In-home, FAE and Job Site Analysis reports and concluded that “Ms. Henry does not suffer a substantial inability to perform her pre-accident housekeeping and home maintenance activities.” His conclusion was based on a recommendation that Ms. Henry be provided with assistive devices.⁹ On October 18, 2008, Dr. Hummel issued a further addendum to his orthopaedic opinion after having reviewed additional medical records *inter alia* the June 1, 2007 MRI report. Dr. Hummel’s opinion remained unchanged from that expressed in his July 19, 2007 examination report.¹⁰

Mr. Phillips concluded that Ms. Henry required no attendant care and was not substantially disabled from performing her housekeeping and home maintenance tasks if she used pacing and the recommended assistive devices.¹¹

Mr. Sewell was of the opinion that during the FAE Ms. Henry “contributed an inconsistent and submaximal effort.” As a consequence, it was not possible to determine her functional capacity at the date of the assessment.¹² Mr. Sewell was unable to conduct an on-site job evaluation of an emergency nurse’s duties. As a consequence, he used information gleaned from Ms. Henry in an interview and the generic demands of Registered Nurse as outlined in the National Occupational Classification and the Dictionary of Occupational Titles. The physical demands checklist completed by Mr. Sewell indicates that the position required a nurse to be able to lift, carry, push and pull weights of 10 lbs. usually and a maximum of 50 lbs. It indicates reaching above the shoulder is a minor requirement. The job was graded as a medium strength position.¹³

In the two years following the accident, Ms. Henry participated in a number of treatment modalities, was seen by various specialists and had further imaging assessments. Her symptoms did not resolve. Ms. Henry experienced increased neck pain and shoulder pain. In May and June of 2008, Ms. Henry was treated by Dr. Bushuk. He administered steroid injections in her left shoulder. Following those injections she experienced severe headaches. Ms. Henry testified that although the injections provided immediate pain relief the pain would return to the same level.

⁹ Exhibit 4, Volume I, Tab 14

¹⁰ Exhibit 4, Volume I, Tab 17

¹¹ Exhibit 4, Volume I, Tab 11, pages 15 and 16

¹² Exhibit 4, Volume I, Tab 12, pages 6 and 7

¹³ Exhibit 4, Volume I, Tab 13, pages 3 and 8

In August and September, 2008, Ms. Henry was seen by Dr. J. Su, a physiatrist, who also administered steroid injections. She testified that these injections also caused her to have severe headaches as well as neck pain and dizziness.

In October 2008, Ms. Henry went to the Emergency department of North York General Hospital, at its Branson site. Ms. Henry testified that the emergency doctor recommended ongoing massage to deal with the swelling and cervicogenic headaches. As a consequence of the increased pain in her neck, Ms. Henry returned to Dr. Su in November 2008. On November 9, 2008, an MRI of her neck was conducted.¹⁴ This indicated that Ms. Henry had disc protrusions. Dr. Su referred Ms. Henry to the North York Centre for Pain Management. In late 2008 and early 2009, Ms. Henry was referred to a number of pain clinics. The treatment they provided was not successful.

On October 30, 2008, Ms. Henry was assessed by Brian Wierdsma, kinesiologist, for Sunlife, Ms. Henry's employer's disability insurance carrier. Mr. Wierdsma testified that he was retained to conduct a general assessment regarding Ms. Henry's functional abilities and restrictions. He did not assess Ms. Henry's capacity to work. He found Ms. Henry to be credible and honest. The assessment took 3 to 3½ hours and the tasks were performed once. Some tasks were not completed because of reports of pain. Mr. Wierdsma testified and reported that Ms. Henry complained of increased neck pain from 5 out of 10 pre-test to 9 out of 10 post-test. There was no change in the level of left shoulder pain. There was an increase in right and left wrist pain. Ms. Henry advised Mr. Wierdsma that she was fatigued at the conclusion of the testing and had a headache she rated as 10 out of 10.¹⁵

Mr. Wierdsma concluded:

Overall, based on Ms. Henry's demonstrated physical restrictions and limitations as indicated above, it is the opinion of this assessor that she demonstrates the necessary functional tolerances to perform Sedentary level work at this time. It is recommended that she avoid job tasks that require repetitive or sustained reaching with her left upper extremity, more so above shoulder level. Any job consideration should also allow Ms. Henry to alternate between a sitting and

¹⁴ Exhibit 2, Book II, Tab 24

¹⁵ Exhibit 5, Supplementary Arbitration Brief, Volume 1, Tab 10(A), page 16

standing position, and permit her to take frequent microbreaks to stretch her neck and left shoulder muscles.¹⁶

On November 7, 2008, a vocational assessment was conducted by Fred Winch. Mr. Winch accepted that Ms. Henry had significant barriers to returning to her pre-accident nursing career and was at risk of being permanently unemployable. He indicated that Ms. Henry might be able to work as either a nurse in a doctor's office or providing flu shots but these positions would not provide the salary she had enjoyed pre-accident. Mr. Winch indicated that for her to retrain for positions suited to her limitations such as MRI or pharmacy technician would require one to two years of training at a community or private vocational college following which Ms. Henry would face hardship finding employment due to her age and medical history. In his report dated November 10, 2008, he states:

Employers looking upon Ms. Henry as a perspective [sic] employee, and particularly those requiring any type of medical examination, will be cognizant of the fact that she does present as a medical risk in terms of potential absenteeism because of problems with pain, the need to attend medical appointments etc., in which case the prospects of her employability will inevitably diminish.

Mr. Winch opined:

...this accident has had a devastating impact on Marcia Henry's vocational circumstance and earning capacity. Her competitive position in the economic marketplace has been brought to any [sic] early end. In my view, she will remain off work until she reaches retirement.¹⁷

Dr. Su referred Ms. Henry to Dr. G. Faclier at Sunnybrook hospital. She was seen at his clinic in April 2009 and another injection was administered. Again, Ms. Henry experienced a negative reaction. Dr. Faclier scheduled a cervical block test. It was conducted in June 2009. The results indicated that she would not qualify for a cervical facet neurotomy and therefore the shoulder surgery should proceed.¹⁸

In May 2009, Dr. Su referred her to Dr. Lobo, an orthopaedic surgeon. He recommended surgery. On June 17, 2009, he performed an arthroscopic subacromial decompression on

¹⁶ Exhibit 5, Supplementary Arbitration Brief, Volume 1, Tab 10(A), page 6

¹⁷ Exhibit 1, Application for Arbitration Schedule "A" Document Brief, Tab 29, pages 5 and 6

¹⁸ Exhibit 2, Book II, Tabs 34 and 47

Ms. Henry's left side. On October 2, 2010, Dr. Lobo saw Ms. Henry who continued to complain of pain in the left shoulder. Dr. Lobo provided the following prognosis:

I think that she will likely have her issues with repetitive overhead motion with regards to her left upper extremity, mainly because of her ongoing myofascial peritrapezial pain. She may benefit from Botox injection through a pain clinic and we would ask her family doctor to make a referral on her behalf to a chronic multidisciplinary pain clinic to address this. As far as her left shoulder is concerned, I think she has achieved a good range of motion and negative signs for impingement at this point in time.¹⁹

In October 2009, Ms. Henry again attended the North York General Emergency Department. However, on this occasion she was experiencing severe lower back pain. A CT scan was conducted in order to rule out appendicitis. The results were normal save for a small cyst on her kidney.²⁰

On November 12, 2009, Ms. Henry was assessed by Jeff Cohen, a registered vocational professional. Mr. Cohen conducted an interview of Ms. Henry and administered various vocational tests. Mr. Cohen observed:

Throughout testing, Ms. Henry appeared to provide a full effort however her level of engagement, concentration, and work speeds varied and appeared affected by way of her apparent pain and discomfort. In particular, Ms. Henry was observed to shift frequently in her seat and presented with a general slowness to her work wherein her performance across timed measures was quite poor. Indeed, while she was willing to complete all tasks asked of her, Ms. Henry presented with a deconditioning disposition reported reduced levels of concentration, attention, and focus, as well as pain through her lower back, neck, and left shoulder wherein these factors may have served to affect her performance. In general, results obtained from this assessment are difficult to interpret as compared to her pre-accident level of function and it would appear that her pain and reduced level of functioning post-accident as reported would be largely contributory to the outcome of the testing.²¹

Mr. Cohen was of the view that if Ms. Henry were ever to return to work it would be in a sedentary position. He noted that:

¹⁹ Exhibit 2, Book II, Tab 50

²⁰ Exhibit 2, Book I, Tab 6

²¹ Exhibit 2, Book II, Tab 44, page 5

Ms. Henry appeared to struggle with the competitive demands needed to score well across measures of timed aptitude testing and nearly all of her scores fell 2-3 standard deviations below those that may have otherwise been expected from a university graduate, and at least 1-2 deviations below those that would have been expected from a Registered Nurse – as mentioned, a highly functioning occupation requiring strong reasoning abilities and decision making. Similarly, on an additional timed measure that considers one’s general reasoning, learning, and training ability, Ms. Henry also scored poorly, in the bottom quartile as compared to the Adult Working Population. As this score is at best indicative of those with the potential to operate simple processing equipment, and those who need a lot of time to learn a limited number of steps for routinized jobs, and of those who have difficulty establishing or using contingencies if deviation occurs on the job, it would seem that Ms. Henry’s performance on this measure fell well short of her pre-accident demonstrated level of function where, despite what appeared to be a reasonable effort, slower work speeds were again observed.²²

Mr. Cohen listed various barriers to Ms. Henry’s return to occupations related to nursing including a lack of graduate level education, secondary clerical skills, inadequate functional tolerances including tolerance for lighter occupations, effects of chronic pain and a potential employer’s bias with respect to age, duration of disability and gap in employment history.

Mr. Cohen concluded that:

Overall, while at this time Ms. Henry does demonstrates [sic] residual worker traits by way of her education, training, and work history it is noted that her direct worker traits remain primarily oriented to full-care (i.e., hands-on) work within the nursing sector. Without significant retraining (however unlikely) or perhaps the implementation of supportive measures by her current (or perhaps another benevolent) employer it will be very difficult for her to transition in to an alternate occupation of commensurate earning thus rendering vocationally disadvantaged.²³

On April 8, 2010, Ms. Henry was assessed by Ms. G. Gronkowska, a certified Psychological Associate, who diagnosed Ms. Henry as having a Major Depressive Disorder of moderate severity and a Posttraumatic Stress Disorder, also of moderate severity. Ms. Gronkowska recommended 10 to 12 treatment sessions of cognitive-behavioural treatment.²⁴

In March 15, 2011, Dr. Boyrazian provided an updated medical report in which he stated:

²² Exhibit 2, Book II, Tab 44, pages 21 and 22

²³ Exhibit 2, Book II, Tab 44, page 24

²⁴ Exhibit 2, Book III, Tab 51

Ms. Henry continues to have severe restrictions and limitations in her functional abilities. She has significant difficulties lifting from floor to waist and waist to shoulder. She is unable to bend, twist, push or pull. She is also unable to sit or stand for prolonged periods of time and is unable to complete repetitive motions. She is forgetful at times.²⁵

Dr. Boyrazian listed the medications she was taking at the time as: Celebrex, Arthrotee, Tylenol #3, Ralivia, Cymbalta and Imovane.

Ms. Henry testified that she takes Celebrex for pain, Imovane to assist with sleeping, Cymbalta, an anti-depressant which also relieves pain and Tylenol 2s as needed to relieve pain. Ms. Henry has engaged in various modalities of physical therapy including laser treatments and acupuncture with varying degrees of time limited pain relief. Recently she has been undergoing Platelet therapy. Ms. Henry terminated the laser treatments because Dr. Su advised her that it could interfere with the Platelet treatment.

Employment and Education:

At the time of the accident, Ms. Henry was employed as an emergency triage nurse at North York General Hospital earning approximately \$80,000.00 per annum. She had been employed with North York General since 1987.²⁶

Ms. Henry has not returned to full time work at North York General since the accident. The hospital was unable to accommodate her need for sedentary work. However, Ms. Henry worked at a flu shot clinic in the fall of 2009 and 2010. However, the repetitive nature of the work limited her to two, three hour shifts in 2009 and three, two hour shifts in 2010.

As well, Ms. Henry assisted with a research project at Ryerson University in 2008. This position lasted a few days and consisted of giving her opinion regarding nursing duties and the issues related to the nursing profession. Notwithstanding the limited nature of this work she found it tiring.

²⁵ Exhibit 3, Applicant's Supplementary Medical and Document Brief, Tab 2

²⁶ Exhibit 5, Supplementary Arbitration Brief, Volume 1I, Tab 23

Since immigrating to Canada from Jamaica in 1987, Ms. Henry qualified as a Registered Nurse in Ontario and obtained specialties in critical care and emergency nursing. As well, Ms. Henry obtained her Bachelors of Science in Nursing from York University in 2005. On June 2, 2006, Ms. Henry was conditionally admitted to a Master of Public Health program at Walden University.²⁷ In her application for admission Ms. Henry authored a “*Personal Statement of Goals and Intentions for Masters in Public Health*” in which she stated: “I seek a new challenge in keeping with many nurses planning career shifts. Since completing my “RN” at the University Hospital of the West Indies School of Nursing my expertise has centered on critical, coronary and emergency care...”²⁸

Ms. Henry graduated in 2010 with a Superior, 4 point Grade Point Average.²⁹ She testified that following the accident she obtained accommodation from the University to permit her additional time to submit papers and her sister assisted her with the inputting of her papers on computer. Ms. Henry further testified that her family urged her to continue her studies to deal with her post-accident depression. Her family also assisted with paying her tuition.

ANALYSIS:

Pursuant to subsection 5(2)(b) of the *Schedule*, Ms. Henry has the burden of establishing on a balance of probabilities that she “is suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience.”

The *Schedule* sets out three levels of impairment: substantial inability, complete inability and catastrophic impairment. The complete inability test falls between the less onerous substantial inability test and that of catastrophic impairment. The analysis of whether an applicant demonstrates a complete inability to engage in suitable employment must be fair and realistic when considering the applicant’s educational and employment background. Consideration must be given to the functional abilities of the applicant to engage in work reasonably suited to the

²⁷ Exhibit 5, Supplementary Arbitration Brief, Volume 1I, Tab 24

²⁸ Exhibit 5, Supplementary Arbitration Brief, Volume 1I, Tab 24

²⁹ Exhibit 5, Supplementary Arbitration Brief, Volume 1I, Tab 24

person's age, the nature of the work, the status it affords, level of remuneration and market considerations.³⁰

The medical evidence presented by Ms. Henry convinces me that she sustained impairments as a result of the accident which are continuing to prevent her from engaging in work. Her testimony regarding her functional impairments was consistent with the medical reports and with the updated report of her treating physician, Dr. Boyrazian. Ms. Henry's post-accident activities of daily life have been severely restricted as a consequence of the accident. I accept that she continues to require pain medication to permit her to engage in these limited activities.

In Mr. Wierdsma's opinion, Ms. Henry could engage in sedentary work. However, her ability to work required that she avoid tasks that require repetitive or sustained reaching with her left upper extremity and particularly above shoulder level. As well, the job should allow her to alternate between a sitting and standing position and provide for frequent microbreaks to stretch her neck and left shoulder muscles.³¹ It is unrealistic to believe that a woman of Ms. Henry's age, disability and expected level of income would be hired over similarly educated, healthy and younger candidates who would likely have lower salary expectations.

The accident occurred in February 2007. For the majority of her studies Ms. Henry was not engaged in employment and was able to work at her own pace. Notwithstanding this flexibility, it took four years to complete her degree. While Ms. Henry's extensive experience and academic success might appear to make her an attractive candidate for employment as a nursing or public health instructor, her lack of teaching experience and accommodation requirements negate this. I accept that Ms. Henry enrolled in post-graduate studies as part of a career plan which would have seen her transition from the physically demanding role of emergency department nurse to a more sedentary role in public health. However, the injuries sustained in the accident prevented her from implementing her plan. Therefore, I find that Ms. Henry is entitled to post-104 week income replacement benefits.

³⁰ *Lombardi and State Farm Mutual Automobile Insurance Company*, (FSCO A99-000957, April 11, 2001); *Wigle and Royal Insurance Company of Canada*, (OIC A-012312, January 12, 1996); *Terry and Wawanese Mutual Insurance Company*, (FSCO A00-000017, July 12, 2001).

³¹ Exhibit 5, Supplementary Arbitration Brief, Volume 1, Tab 10(A), page 6

Quantum of Income Replacement Benefits:

Ms. Henry's pre-accident income qualified her to receive a weekly income replacement benefit of \$400.00 less her entitlement to collateral benefits pursuant to section 7 of the *Schedule*.

On February 22, 2011, Ms. Henry settled with her collateral carrier for \$130,000.00 inclusive of legal costs and signed a release on that date of all claims she might have against the carrier.³² She received \$85,000.00. Of these funds the carrier issued a T4A, *Statement of Qualifying Retroactive Lump-Sum Payment*, for \$33,800.00 attributed as follows: \$14,872.00 to the taxation year 2009; \$16,224.00 to the taxation year 2010 and \$2,704.00 to the taxation year 2011.³³ Ms. Henry testified that the \$85,000.00 represented payments in respect of income.

State Farm submits that it is entitled to a credit for the sum of \$85,000.00 pursuant to section 7 notwithstanding the attribution set out in the T4A slip issued by the carrier. Mr. Boden, a State Farm adjuster, testified that in his opinion no weekly income replacement benefit is payable due to the after tax collateral benefit of approximately \$75,000.00. In its submissions State Farm calculated the amount to be \$74,800.00 in payments for loss of income which it was entitled to deduct from any payment it might be liable to make to Ms. Henry. As a consequence, Ms. Henry's net recovery to the date of its submissions was zero. State Farm further submits that it would not be required to make any payments to Ms. Henry for another year based on its calculations.

Ms. Henry submits that the payment from her collateral carrier is not deductible as it is not a payment for loss of income as defined by section 7, rather is a settlement of her action against her collateral carrier. Ms. Henry claimed damages for breach of contract, mental distress together with punitive and aggravated damages together with pre-judgement interest. In the alternative, only those amounts attributed to income as set out in the T4A should be credited for the years 2009, 2010 and 2011.

³² Exhibit 9

³³ Exhibit 10

Subsection 7(1)1.i and ii provides:

Despite subsections 6(1) and (5), but subject to subsection 6(2), the weekly amount of an income replacement benefit payable to a person shall be the lesser of the following amounts:

1. The amount determined under subsections 6(1) and (5), reduced by,
 - i. net weekly payments for loss of income that are being received by the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, and
 - ii. net weekly payments for loss of income that are not being received by the person but are available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, unless the person has applied to receive the payments for loss of income.

The Canada Revenue Agency requires an employer to issue a T4A in various circumstances.

The two which are relevant to this matter are:

- income from an office or employment received under:
 - ...
 - a lawsuit settlement agreement (including damages for loss of office or employment);
 - ...
- benefits from a wage-loss replacement plan.³⁴

I find that the T4A issued in this matter relates to a settlement of a lawsuit in respect of a wage-loss replacement plan. The collateral carrier attributed lump sums to each of the taxation years in 2009, 2010 and 2011. Therefore, those payments do not fall within the meaning of “net weekly payments for loss of income” as provided for in subsection 7(1)1.i and cannot be used to reduce the payments owed by State Farm to Ms. Henry. As a consequence, Ms. Henry is entitled to a weekly income replacement benefit of \$400.00 commencing on February 23, 2009.

INTEREST:

Ms. Henry is entitled to interest on the overdue payment of Income Replacement Benefits pursuant to subsection 46(2) of the *Schedule*.

³⁴ Exhibit 10

SPECIAL AWARD:

Having found that Ms. Henry is entitled to post-104 week accident benefits, I will now consider whether State Farm's failure to pay those benefits was unreasonable within the meaning of subsection 282(10) and therefore warrants a special award.

Mr. James Boden, an adjuster employed by State Farm for more than 12 years, testified on behalf of his employer. He had carriage of Ms. Henry's claim from September 2009. State Farm did not conduct further assessments of Ms. Henry's impairments, in respect of her entitlement to an income replacement benefit, after July 2007. At hearing it relied on Mr. Wierdsma who assessed Ms. Henry on behalf of her collateral carrier.

Subsection 282(10) of the *Insurance Act* provides:

If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of 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*.

In *Gan Canada and McConachie*, the Director's Delegate applied *Erickson and The Guarantee Company of North America* in holding that an insurer's conduct need not be egregious to be unreasonable and cited the caution in *Cripps and Axa Insurance Canada*, that arbitrators should not judge an insurer's actions on the basis of hindsight or hold an insurer to a standard of perfection having scrutinized its conduct as if under a microscope.³⁵

On February 23, 2009, Ms. Henry became entitled to post-104 week income replacement benefits. State Farm had previously terminated her benefits on the basis that Ms. Henry was not substantially disabled from engaging in her pre-accident employment. State Farm settled the pre-104 week income replacement benefit issue on the eve of hearing in June 2010.

³⁵ (FSCO P97-00069, October 28, 1998), page 3

State Farm stubbornly held to the opinion of its medical assessments of 2007 that Ms. Henry was not substantially disabled. Notwithstanding there was compelling evidence that Ms. Henry continued to require significant medical intervention including shoulder surgery in June 2009.

An insurer has a continuing obligation to adjust a claim. State Farm failed to meaningfully revisit its opinion as the 104 week period elapsed and Ms. Henry had not returned to work.

I find that State Farm unreasonably withheld income replacement benefits from Ms. Henry and as a consequence she is entitled to a special award. As State Farm essentially abdicated its responsibility to adjust the file in respect of the post-104 week period, the award should be at the higher end of that available.

On March 1, 2012, there was a principal sum of \$42,000.00 outstanding, calculated as a weekly benefit of \$400 x 105 weeks. Compound interest, as calculated pursuant to subsection 46(2), is also to be considered when making an award. I fix the award at \$23,000.00 taking into consideration the principal and interest owed by State Farm to Ms. Henry.

EXPENSES:

The parties made no submissions with respect to expenses. I encourage them to resolve the issue, failing which they may request an expense hearing within **30 days** of this decision pursuant to Rule 79 of the *Dispute Resolution Practice Code*.

Denise Ashby
Arbitrator

March 1, 2012

Date



FSCO A09-000213

BETWEEN:

MARCIA HENRY

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. Henry a weekly income replacement benefit at the rate of \$400.00 from February 23, 2009 and ongoing.
2. State Farm shall pay Ms. Henry a special award fixed at \$23,000.00.
3. State Farm shall pay Ms. Henry interest for the overdue payment of benefits pursuant to subsection 46(2) of the *Schedule*.

Denise Ashby
Arbitrator

March 1, 2012

Date