



FSCO A10-003813

BETWEEN:

JIULIANA MORELLI

Applicant

and

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

Insurer

REASONS FOR DECISION

Before: Lloyd (J. R.) Richards

Heard: July 18, 2012, in Hamilton, Ontario. Written submissions were received on July 30, 2012, August 7, 2012 and August 10, 2012.

Appearances: Samia Alam for Ms. Morelli
Heather Kawaguchi for State Farm Mutual Automobile Insurance Company

Overview:

The Applicant, Jiuliana Morelli, was injured in a motor vehicle accident on January 29, 1997. She submitted an Application for Determination of Catastrophic Impairment to State Farm Mutual Automobile Insurance Company, dated October 11, 2006. State Farm, in assessing Ms. Morelli after her Application, determined that she was not catastrophically impaired. In response to State Farm's assessment, Ms. Morelli had a rebuttal report completed by Assessnet Inc. - at a cost of \$16,896.64 - and submitted the report to State Farm on October 29, 2007 for payment under the *Schedule*.¹

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

State Farm refuses to pay for Ms. Morelli's rebuttal report because it claims that Ms. Morelli did not comply with the *Schedule* by submitting her rebuttal report to it not more than 80 business days after the day State Farm gave her notice of its determination that she is not catastrophically impaired. For a number of reasons, Ms. Morelli now requests I order State Farm to pay for the report, plus interest. For the reasons that follow, I find that Ms. Morelli did not submit her rebuttal report to State Farm within the limitation period under the *Schedule*. However, State Farm is liable to pay for the report, plus interest, because Ms. Morelli has a reasonable excuse for not having complied with the limitation period.

EVIDENCE AND ANALYSIS:

Section 40 of the *Schedule* deals specifically with determinations of catastrophic impairment and gives an insured person the right to apply to an insurer for a determination of whether his or her impairment is a catastrophic impairment. Once the insured person makes the application for determination of catastrophic impairment, the insurer is empowered to require that the insured person be examined. When an insurer does require an examination, subsection 40(4) addresses the insurer's obligations in providing the examination report to the insured person. It states that when an insurer requires an insured person be examined, within 5 business days after receiving the examination report of the insured person, the insurer shall give a copy of the report and the insurer's determination of whether the insured's impairment is catastrophic to the insured person and the health practitioner who prepared the report for the insured person. The determination shall specify the reasons for the insurer's determination of whether the insured person's impairment is catastrophic.

Once the insurer forwards the report and its determination to an insured person, Section 42.1 gives the insured person the right to be assessed by a health care practitioner of her choice. Subsection 42.1(3)3 requires that this "rebuttal" assessment be completed and forwarded to the insurer within 80 business days of the insurer sending the insured person its report and determination.

The legislation requires State Farm to have sent a copy of its examination report and its determination to Ms. Morelli, at which point the 80 business day timeline begins to run.

State Farm argues that Ms. Morelli submitted her rebuttal report to it, at the earliest, 68 days after the 80 business days had expired. State Farm's position is that it is not required under the *Schedule* to pay for the late report.

Ms. Morelli's position is that State Farm did not send her its report in its entirety, sent portions of its reports late and never provided her with a valid determination of whether she is catastrophically impaired. Consequently, the 80 business day timeline was never triggered.

Did State Farm forward a copy of its examination report to Ms. Morelli, which triggered the 80 business day timeline?

Subsection 40(4) of the *Schedule* requires State Farm to send a copy of any examination report of Ms. Morelli, and its determination of Ms. Morelli's condition, to Ms. Morelli and her health care practitioner within 5 business days after it receives the examination report. Ms. Morelli argues that State Farm retained three assessors to examine her, and once the examinations were concluded, did not send her its entire report, but rather sent her its catastrophic impairment examination reports in bits and pieces and has therefore contravened this section.

I find that State Farm forwarded to Ms. Morelli a copy of its entire catastrophic impairment determination report within the time period imposed by the *Schedule*. A purposive approach to reading section 40 assumes that an insurer is required to send a complete report when it forwards a catastrophic impairment report to an insured person and her health care practitioner. However, I am not persuaded that subsection 40(4) requires that an assessment that is conducted in several parts has to be sent to an insured person and her health care practitioner all at once.

Once in receipt of Ms. Morelli's Application for Determination of Catastrophic Impairment, State Farm retained three assessors to conduct Ms. Morelli's catastrophic impairment examinations: Dr. Donald Young, psychologist; Dr. Benjamin Clark, physiatrist; and Dr. Jack Richman, occupational medicine specialist, to do the executive summary of the examinations.

I find that Dr. Young's examination report was faxed to State Farm, and that State Farm received the report, on February 2, 2007.² State Farm completed an Explanation of Benefits, dated February 13, 2007, dealing with Dr. Young's report.³ I have no documentary evidence indicating when this document was sent to Ms. Morelli or her lawyer or that it was sent to Dr. Persi at all.⁴ Ms. Morelli gave evidence that she received Dr. Young's report and the Explanation of Benefits from State Farm as well as from her own lawyer sometime in March 2007. She could not remember the exact date, and so I find that she received Dr. Young's report from State Farm at the latest on March 31, 2007. I find that Dr. Persi never received Dr. Young's report from State Farm.

I find that March 6, 2007 is the date that State Farm received Dr. Clark's report.⁵ State Farm completed an Explanation of Benefits concerning Dr. Clark's report, dated March 7, 2007. The fax confirmation for the document indicates that it was sent to Dr. Persi on March 7, 2007. I have no documentary evidence that Ms. Morelli or her lawyer received Dr. Clark's report and its attached Explanation of Benefits. In her oral evidence, Ms. Morelli stated that she received the report but does not recall receiving the attached Explanation of Benefits. I find that Ms. Morelli received Dr. Clark's report, although I make no finding as to when. I find that Dr. Persi received Dr. Clark's report and the attached Explanation of Benefits by fax on March 7, 2007.

Dr. Jack Richman conducted a review of Dr. Clark's and Dr. Young's assessments of Ms. Morelli and provided a catastrophic impairment rating to State Farm.⁶ The fax date and time stamp at the top of the document indicates that State Farm received the report on March 16,

²Exhibit 4, Tab 3 Insurer's Arbitration Brief

³Exhibit 5, Tab 4 Insurer's Arbitration Brief

⁴Exhibit 5, Tab 4 Insurer's Arbitration Brief. This fax confirmation concerning Dr. Young's report lists Koch & Associates as its intended recipient. Both Ms. Morelli and State Farm indicated that the Bartolini, Berlingieri, Barrafoto, Fortino Law firm acted as Ms. Morelli's lawyers at the time the catastrophic impairment assessments took place. Neither party explained the relationship of Koch & Associates to the proceedings and why the fax confirmation sheet would list that entity as a recipient.

⁵Exhibit 2, Tab 1 Insurer's Arbitration Brief

⁶Exhibit 6, Tab 6 Insurer's Arbitration Brief

2007. State Farm completed an Explanation of Benefits concerning the impairment report dated March 19, 2007.⁷ State Farm faxed the impairment report and the Explanation of Benefits to Dr. Persi and Ms. Morelli's lawyer on March 19, 2007.⁸ I find that Ms. Morelli and Dr. Persi both received the impairment rating and Explanation of Benefits on March 19, 2007.

Dr. Young's and Dr. Clark's reports are parts of a whole. I find that the entire examination was concluded when Dr. Richman reviewed Dr. Clark's and Dr. Young's reports and determined that Ms. Morelli was not catastrophically impaired. The full report concerning Ms. Morelli's Application for Catastrophic Impairment Determination consists of Dr. Young's and Dr. Clark's reports and Dr. Richman's summary report. When State Farm received Dr. Richman's report it was then in receipt of the final segment of the examination and at that point had a complete report. State Farm had an obligation to ensure that Ms. Morelli and Dr. Persi had in their possession all segments of the report and State Farm's determination of whether Ms. Morelli had sustained a catastrophic impairment. State Farm sent the full report to Ms. Morelli, but it has not demonstrated that it sent the full report to Dr. Persi. Instead, State Farm sent only portions of the report to Dr. Persi, consisting of Dr. Clark's assessment and Dr. Richman's summary.

I find that State Farm has not complied with subsection 40(4) because it did not ensure that it sent a complete copy of its catastrophic impairment determination report to Dr. Persi. However, the *Schedule* appears to impose no consequences for an insurer's failure to comply with this requirement.

Subsection 40(4) clearly states that insurers have an obligation to send the report and the insurer's determination to the insured person and to the health practitioner who prepared the application on the insured person's behalf. When considering this requirement in its context it makes sense that the insurer's report needs to be a full report, containing all its constituent parts. Finding that the statute only requires that a health care practitioner who completed an application for catastrophic impairment determination be provided with an executive summary or portions of a complete report would lead to an absurd result. Where only parts of a report are provided, or a

⁷Exhibit 7, Tab 7 Insurer's Arbitration Brief

⁸Exhibit 7, Tab 7 Insurer's Arbitration Brief

summary of several reports and a finding, the health care practitioner is not provided the opportunity to fully examine and dissect an assessment and determine what it is he or she wishes to rebut. Considering this, I find that the *Schedule* directs that both Ms. Morelli and Dr. Persi should have received the full report.

Subsection 40(8) of the *Schedule* imposes consequences on an insurer for a failure to provide a copy of a report or a determination. Subsection 40(8)2 states that the insurer is to provide to the insured person a copy of the insurer examination report and the insurer's determination by the 15th business day after the day the insurer examination was completed or required to be completed. If the report or determination is not provided to the insured person within that timeframe, the insurer shall pay all amounts in respect of benefits, goods and services to which the insured person would be entitled if she had sustained a catastrophic impairment. The insurer is obligated to pay from the day determined under the *Schedule* until the insurer gives the insured person the report or determination.

In calculating the period for which the insurer shall pay for goods and services to which an insured would be entitled to benefits as if she had been catastrophically impaired, subsection 40(8) only mentions sending the report or determination to the insured person. In applying a purposive interpretation and considering the intent of subsection 40(4) together with 40(8), I am tempted to read the sections together as requiring State Farm to have provided the report and determination to Ms. Morelli as well as to Dr. Persi. However, the text is clear. Where such an onerous burden and harsh consequences are placed on insurers, forwarding the report and determination to the party most affected by the determination is all the *Schedule* requires. In this case Ms. Morelli was given the entire report and a determination well within the time period imposed by the *Schedule*. I find that State Farm has complied with subsection 40(8) because it provided both the insurer examination report and determination to Ms. Morelli. In complying with subsection 40(8) State Farm seems to have avoided any consequences flowing from not complying with subsection 40(4).

Did State Farm provide a valid determination to Ms. Morelli?

Ms. Morelli argues that even if I find that State Farm forwarded the entire report to her, the 80 business day timeline is not triggered because State Farm did not provide her with a valid determination of whether she is catastrophically impaired.

I find that State Farm provided to Ms. Morelli a valid determination of catastrophic impairment, triggering the 80 business day timeline within which Ms. Morelli was required to complete and submit a rebuttal report to State Farm.

Subsection 40(5) of the *Schedule* requires State Farm to specify its reasons in its determination of whether Ms. Morelli has been catastrophically impaired. Ms. Morelli argues that State Farm's March 19, 2007 Explanation of Benefits is not a valid determination and is deficient. She states that the notice is not clear and unequivocal and merely restates the conclusions of the assessor. She believes that State Farm did not read the reports critically, but instead merely forwarded its experts' conclusions to her when adjusting her claim.

Ms. Morelli and State Farm agree that the 80 business day time limit imposed by subsection 42.1(3)3 begins to run from the day notice is given by the insurer under subsection 40(5). In *Carbone and State Farm Mutual Automobile Insurance Company* the Director's Delegate held that notice must have been given to the insured person and the notice must have been of the insurer's determination.⁹ I find that State Farm gave notice to Ms. Morelli on March 19, 2007, which is the day State Farm provided to her the final component of its catastrophic impairment examination and its determination.

The determination that State Farm sent to Ms. Morelli complies with the principles articulated in *Carbone*. The insurer's medical examiners are to render their professional opinions, but the insurer itself is compelled to make a determination. Further, an insurer's determination should not allow for equivocation.¹⁰

⁹(FSCO P10-000008, December 8, 2010) Appeal, p. 6

¹⁰*Carbone* Pg. 7, 8

The Explanation of Benefits that State Farm provided to Ms. Morelli on March 19, 2007 states, in the section titled Catastrophic Impairment Determination — “State Farms [sic] determination is that you have not sustained a catastrophic impairment as a result of the accident.” I find that the document is clear, unequivocal and provides State Farm’s determination to Ms. Morelli.

The *Schedule*’s purposes in requiring a determination are partly to assure that the insurer, and not just assessors, make decisions concerning insured persons and that an insured person does not become confused about the outcome of the applications she has made. The determination given to Ms. Morelli does not state that the assessors have given their opinion. Rather, it states that State Farm has made a determination. There is no confusion resulting from the correspondence. In fact, Ms. Morelli testified that she clearly understood State Farm’s decision and immediately took steps to address it.

State Farm’s provision to Ms. Morelli of a valid determination started the 80 business day time limit running from March 19, 2007. Ms. Morelli was well outside of the 80 business day time limit when she delivered the rebuttal report to State Farm on October 29, 2007.

Reasonable excuse for non-compliance

Ms. Morelli submits that, in the event that she was out of time in submitting the rebuttal report on October 29, 2007, she has a reasonable explanation for her failure to comply with the time limit. I find that even though Ms. Morelli was markedly late in submitting her rebuttal report to State Farm, she has a reasonable excuse for doing so.

Mr. James Boden, an adjuster at State Farm, testified that State Farm received the rebuttal report from Ms. Morelli’s lawyer on October 29, 2007 and I find that State Farm received it on that date.

Subsection 31(1) of the *Schedule* states that a person’s failure to comply with a time limit does not disentitle the person to a benefit if the person has a reasonable explanation. The following principles have been established concerning the interpretation of a reasonable excuse:

- i. An explanation must be determined to be credible or worthy of belief before its reasonableness can be assessed.
- ii. The onus is on the insured to establish a “reasonable explanation”.
- iii. Ignorance of the law alone is not a “reasonable explanation”.
- iv. The test of “reasonable explanation” is both a subjective and objective test that should take account of both personal characteristics and a “reasonable person” standard.
- v. The lack of prejudice to the insurer does not make an explanation automatically reasonable.
- vi. An assessment of reasonableness includes a balancing of prejudice to the insurer, hardship to the claimant and whether it is equitable to relieve against the consequences of the failure to comply with the time limit.¹¹

Ms. Morelli’s excuse for submitting her rebuttal to State Farm late is that the occupational therapist that Dr. Persi chose to conduct a portion of her examination had family issues that precluded her from conducting the assessment until August 2007. The excuse appears credible and is worth considering.

Insured people and insurance companies arrange to have experts conduct examinations and it is often difficult to coordinate schedules in order to get work completed and reports filed within the timelines set out in the *Schedule*. Dr. Persi testified that he did not receive a full report from State Farm, but proceeded to arrange rebuttals based on Dr. Richman’s summary and on the assumption that Ms. Morelli had received the full report. He believed that an occupational therapy assessment was necessary and he chose the occupational therapist he thought most appropriate to conduct the assessment. He further gave evidence that his chosen occupational therapist had family issues that precluded her from conducting the assessment until August 2007. He admitted that he could have had another occupational therapist conduct the assessment in order to remain within the limitation period outlined in the *Schedule*, but he instead decided to

¹¹*Horvath and Allstate Insurance Company of Canada* (FSCO A02-00482, June 9, 2003)

use the professional he thought most appropriate. Dr. Persi did not inform State Farm that the rebuttal would be delayed.

State Farm submits that Dr. Persi had another professional at his disposal he could have used to conduct the assessment. Further, that Dr. Persi admitted that he did not know the qualifications of the other assessor and so his assertion that his chosen occupational therapist was the most qualified is not a reasonable position. In State Farm's view, Dr. Persi also did not give sufficient detail about why the occupational therapist was not available until mid-August 2007. In addition, State Farm contends that its own examination did not involve an occupational therapist and therefore Ms. Morelli did not need to retain one to complete a rebuttal report.

I find that Ms. Morelli's excuse is reasonable. In his responsibilities as Ms. Morelli's health care practitioner, Dr. Persi was entitled to make the decision to use a particular occupational therapist to conduct an assessment of her. I also find it reasonable that in this particular case Dr. Persi chose to use an occupational therapist with whom he was most comfortable and who he thought was most qualified. While State Farm chose not to use an occupational therapist in its own assessments, it was still open to Dr. Persi to arrange the assessments he believed most appropriate. I am not persuaded that allowing health care professionals to choose the assessors they believe most appropriate to assess their clients is the valve that will open the floodgates to insured persons "doctor shopping" for sympathetic assessors.

It would have been best if Ms. Morelli or Dr. Persi would have kept State Farm apprised of the timelines concerning the assessments. However, I do not find that their failure to do so should disentitle Ms. Morelli from receiving payment for the rebuttal assessment. I find that State Farm has not suffered prejudice under the circumstances that would outweigh the hardship faced by Ms. Morelli if she should be compelled to pay for the rebuttal report. Ms. Morelli's rebuttal report determined that she is not catastrophically impaired. She has not submitted a late report to State Farm in an attempt to use that report to access benefits available to someone who is catastrophically impaired. She merely commissioned a report to challenge her insurer's conclusions and now requests the payment to which she is entitled under the *Schedule*. State Farm has not adequately explained how it has been prejudiced under these circumstances and

I find that it is equitable to relieve against the consequences of Ms. Morelli's failure to comply with the time limit.

Reasonableness of the Rebuttal report cost

State Farm submits that the rebuttal report cost is unreasonable because the invoice for the report does not explain: the time the assessors spent assessing Ms. Morelli; the time the assessors spent preparing their portions of the report; the rate the assessors charged; and the qualifications of the assessors. Ms. Morelli argues that the cost is reasonable considering the number and extent of the assessments conducted.

State Farm retained three assessors to complete Ms. Morelli's catastrophic impairment assessment. Although there is no requirement under the *Schedule* to do so, State Farm did not disclose the amount it paid its assessors. In addition, State Farm did not present an amount at the hearing that they believed would be more reasonable than the amount in dispute. Neither side presented evidence on industry standards for an appropriate cost for the rebuttal report.

The *Schedule* does not prescribe costs for catastrophic assessment reports and only requires that the costs be reasonable. Absent any compelling evidence to the contrary, I find that \$16,896.64 is a reasonable amount for four assessors to complete a comprehensive assessment determining catastrophic impairment.

EXPENSES:

The parties made no submissions on expenses. They are encouraged to resolve the issue. If they are unable to do so, they may schedule an expense hearing before me according to the provisions of Rule 79 of the *Dispute Resolution Practice Code*.

Lloyd (J.R.) Richards
Arbitrator

November 7, 2012
Date



FSCO A10-003813

BETWEEN:

JIULIANA MORELLI

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 Ms. Morelli \$16,896.64, plus interest, for the catastrophic impairment determination rebuttal report prepared by Assessnet, dated September 27, 2007.

Lloyd (J.R.) Richards
Arbitrator

November 7, 2012

Date