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December 18, 2019

Ms. Lisa Bishop, Lawyer
Rooz Law Professional Corporation
2 Sheppard Ave. East, Suite 902
Toronto ON M2N 5Y7

Mr. Darrell March
Barrister & Solicitor
Beard Winter LLP
130 Adelaide Street West, Suite 701
Toronto ON M5H 2K4

Dear Ms. Bishop and Mr. March:

Re: Mr. Louis-Jacques Michaud and State Farm Mutual Automobile Insurance Company
MVA: June 4, 2010
Commission File №: A11-004437-CLFE
File №: 10I7448-2 (Applicant) and 84811-364gs (Insurer)
Claim №: 60-C-896912

We enclose the decision of the Arbitrator in this matter.

If there is a typographical, computational or other minor error in the decision, please contact Clare Fernandes, Case Administrator, at (416) 590–7830 by **Monday January 6, 2020**.

Yours truly,

John Lobo, Project Director
Auto Services

Copies to:

Mr. Louis-Jacques Michaud
8E Blanket Herb Road
Cay Hill Sint Marteen

Mr. Brian Donaher
ADR Co-ordinator
State Farm Mutual Automobile Insurance Company
333 First Commerce Drive
Aurora ON L4G 8A4

BETWEEN:

LOUIS-JACQUES MICHAUD

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Anne Morris

Heard: By way of transcripts of the hearing which took place on December 11 and 12, 2017 at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Julia Abd Elseed for Mr. Michaud
Tricia J. McAvoy for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Louis-Jacques Michaud, was injured in a motor vehicle accident on June 4, 2010. He applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mr. Michaud 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 Mr. Michaud entitled to receive a non-earner benefit at the rate of $185.00 per week from December 4, 2010 to June 4, 2012?

2. Is Mr. Michaud entitled to receive a medical benefit for services provided by Osler Rehabilitation pursuant to the following treatment plans:

   (a) September 7, 2010 in the amount of $540.00;
   (b) September 9, 2010 in the amount of $461.00; and
   (c) September 10, 2010 in the amount of $946.00?

3. Is Mr. Michaud entitled to attendant care benefits at the rate of $505.89 per month from June 4, 2010 to June 4, 2012 (two-year mark) less amounts paid by the Insurer?

4. Is Mr. Michaud entitled to payments for housekeeping and home maintenance services at the rate of $100.00 per week from June 4, 2010 to June 4, 2012 (two-year mark) less amounts paid by the Insurer?

5. Is State Farm liable to pay a special award because it unreasonably withheld or delayed payments to Mr. Michaud?

6. Is State Farm liable to pay Mr. Michaud's expenses in respect of the arbitration?

7. Is Mr. Michaud liable to pay State Farm's expenses in respect of the arbitration?

8. Is Mr. Michaud entitled to interest for the overdue payment of benefits?

Result:

1. Mr. Michaud is not entitled to a non-earner benefit.

2. Mr. Michaud is entitled to receive a medical benefit for services provided by Osler Rehabilitation pursuant to the following treatment plans:

   (a) September 7, 2010 in the amount of $540.00;
   (b) September 9, 2010 in the amount of $461.00; and
   (c) September 10, 2010 in the amount of $946.00?

3. Mr. Michaud is entitled to attendant care benefits in the total amount of $1,487.70 from June 1, 2011 to August 29, 2011.

4. Mr. Michaud is entitled to payments for housekeeping and home maintenance services in the total amount of $1,282.50 from June 1, 2011 to August 29, 2011.

5. State Farm is not liable to pay a special award.

6. Mr. Michaud is entitled to interest for the overdue payment of benefits in accordance with the *Schedule*.

7. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

Background

Mr. Michaud was 33 years old when he was involved in a motor vehicle accident on June 4, 2010. He was the front seat passenger of a minivan. The minivan was exiting a plaza and turning left onto the adjoining road when another vehicle driving on the road struck the minivan from behind on the driver's side. Mr. Michaud hit his left knee on the dashboard and bounced his head on the backrest of the seat. He hit his head, neck and left shoulder. He sought medical attention the next day when he woke up with pain and a headache.

Mr. Michaud applied for various accident benefits in an Application for Accident Benefits, OCF-1, dated June 8, 2010.[2] He received extensive rehabilitation treatment from Osler Rehabilitation Centre Inc. until January 2011, after which time he left the country. The Insurer paid for most of this treatment but did not approve or pay for the three treatment plans in dispute in this arbitration, submitted in September 2010.

The Insurer paid attendant care benefits (ACB) at the rate of $502.89 per month in accordance with an Assessment of Attendant Care Needs (Form 1) dated June 8, 2010.[3] The Insurer also paid housekeeping benefits (HK) at the rate of $100.00 per week. The Insurer stopped both these benefits effective August 29, 2011 further to insurer examinations as set out in the Explanation of Benefits (OCF-9) dated August 24, 2011.[4]

In the meantime, a dispute had arisen over the failure by Mr. Michaud to attend an Examination under Oath (EUO) and the Insurer suspended benefits as set out in an OCF-9 dated January 12, 2012.[5] The Insurer indicated in that OCF-9 that it had stopped payment on the cheque

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[2]See Application for Accident Benefits (OCF-1) dated June 8, 2010, Tab 9, Insurer's Brief

[3]By Dr. E. Silverman, D. C., Tab 5 Applicant's Arbitration Index

[4]Tab 10, Insurer's Brief, pp 53-56

[5]Tab 10, Insurer's Brief, pp 57-60

containing the final housekeeping and attendant care payment. The Insurer therefore stopped paying ACB and HK benefits prior to the stated stoppage date of August 29, 2011.

Mr. Michaud applied for non-earner Benefits (NEB) as part of his Application for Accident Benefits.[6] The Insurer responded in an OCF-9 dated August 11, 2010[7] advising that it would assess Mr. Michaud's eligibility for this benefit at the 26-week anniversary of the accident.[8] The Insurer denied NEBs in an OCF-9 dated August 24, 2011[9] based on an insurer's orthopaedic assessment dated December 29, 2010 and an occupational therapist assessment dated January 26, 2011. The Insurer has not paid NEBs.

Arbitrator Wilson ruled on the issue of failure to attend EUOs and the suspension of benefits in a decision on a motion dated March 5, 2014. He determined that the notices of examination under oath served prior to January 15, 2013 were defective stating that in "particular, the notices and the accompanying letters lacked any reference to the right to have a legal representative attend at the examination under oath..."[10] Mr. Michaud's failure to attend the EUOs to which those notices related did not attract consequences.

Arbitrator Wilson determined, however, that Mr. Michaud, for the reasons given in his decision, was obliged to attend a EUO arranged for January 15, 2013. Mr. Michaud failed to do so and his benefits were therefore suspended effective January 15, 2013 pending attendance at the EUO. He subsequently attended a EUO but the parties did not inform the arbitrator of this fact, leading to a dismissal of Mr. Michaud's application for arbitration, reversed on appeal.[11]

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[6]See Footnote 2, *supra*

[7]Tab 10, Insurer's Brief, pp 44-49

[8]NEBs are not payable prior to 26 weeks from the date of the accident in accordance with section 12(7) (a) of the *Schedule*.

[9]Tab 10, Insurer's Brief, pp 53-55

[10]See *Michaud, Saintume and Seguin and State Farm Mutual Insurance Company* (FSCO A11-004437, A11-004496 and A11-004497, March 5, 2014)

[11]*See Michaud and State Farm Automobile Insurance Company* (FSCO P14-00030, May 3, 2016)

Mr. Michaud is not seeking benefits for any period after June 8, 2012, the two-year anniversary of the accident.

The lawyer for the Insurer advised at the outset of the hearing that whether or not the Insurer properly suspended benefits is not an issue in this hearing. The Insurer's position is that Mr. Michaud has not proven entitlement to any of the benefits in dispute in this arbitration based on the medical evidence, including during the period when the Insurer suspended benefits.

Mr. Michaud's position is that he is entitled to the various benefits claimed on both the merits of his claims and based on the Insurer's multiple breaches of the *Schedule*, including its lack of adequate notices resulting in mandatory payment for the same.

Medical History

Mr. Michaud had a benign tumour removed from his upper left jaw in 2008 prior to the subject motor vehicle accident. He testified that the surgeon used tissue from his left shoulder to do a reconstruction on the jaw. Dr. Brent Souter, a chiropractic consultant who provided a chiropractic assessment on behalf of the Insurer dated September 29, 2010, described "a history of jaw surgery, involving removal of a benign tumour of the left mandible, with the first surgery in 2008 and subsequent revision and a third surgery which involved bone grafting of the left scapula.[12]" Mr. Michaud testified that he had received assistance with various tasks such as dressing and undressing and housework following the surgery but that he was performing these tasks independently prior to the motor vehicle accident of June 4, 2010. He was not working because of the jaw surgery and was receiving ODSP payments at the time of the accident.

[12]Tab 11, Insurer's Brief, p. 65

Second Motor Vehicle Accident

Mr. Michaud was involved in a second motor vehicle on December 21, 2010. This is noted in the Insurer's orthopaedic report by Dr. Delaney dated December 29, 2010[13]. The second accident is not in issue in this arbitration.

Injuries

Mr. Michaud indicated in the Application for Accident Benefits completed on June 8, 2010, two days after the accident, that he injured his "neck, left knee, left hip, shoulders, headaches etc." Dr. Souter's report referred to above and completed prior to the second accident, described Mr. Michaud's injuries as follows:

- Cervical spine sprain/strain – WAD I/II.
- Left shoulder sprain/strain.
- Lumbar spine sprain/strain.
- Left knee sprain/strain.
- Non-specific headaches[14]

Mr. Michaud saw his family doctor shortly after the accident. The family doctor referred him for various investigations including a MRI of the left knee. The MRI report[15] shows a "Discoid-like lateral meniscus with small peripheral tear" as well as joint effusion and mild chondromalacia patella. Dr. Delaney, an orthopaedic surgeon, testified on behalf of the Insurer at the hearing.

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[13]Tab 11, Insurer's Brief, p. 70 at p. 74

[14]Tab 11, Insurer's Brief, p. 68

[15]Tab 12, Insurer's Brief

He stated that a discoid meniscus is something that you are born with. Its shape is like a hockey puck rather than the triangle shape of a normal meniscus. It has a tendency to tear a little bit more easily than a normal meniscus. Dr. Delaney opined that the tear did not have much significance clinically as these small peripheral tears are not uncommon in a discoid meniscus. He went on to testify that he was unsure as to whether or not the meniscal tear in the left knee was a result of the motor vehicle accident. He noted that Mr. Michaud's left knee had struck the dash. There was no twisting or torqueing injury, which is what he would have expected to create a tear in a discoid meniscus. As regards the left shoulder, he noted the issue with the shoulder prior to the accident in that Mr. Michaud had had a bone graft taken from the back of the shoulder. He thought that this accident actually was an aggravation of this problem. He thought that Mr. Michaud's back pain and cervical pain were the result of the accident.

My view of the evidence as a whole is that Mr. Michaud sustained strains and sprains and whiplash associated injuries as a result of the accident. He also had a pre-existing shoulder injury, and the accident aggravated this injury. He also has a discoid meniscal tear in the left knee. I am unable to agree with Dr. Delaney as to the cause of the discoid meniscal tear. Mr. Michaud was consistent from the beginning that he had hurt his left knee in the accident. He may not have twisted his knee but Dr. Delaney indicated in his evidence that a discoid meniscus is more prone to tearing than a normal meniscus. It seems likely to me that a meniscus prone to tearing could tear, and on the evidence did tear, as a result of the knee being struck in a motor vehicle accident, even without a twisting motion. Mr. Michaud's family doctor referred him for an ultrasound and MRI of the left knee following the accident. There was no evidence of a left knee injury or investigation of a left knee injury prior to the accident. The only evidence of an incident involving the knee, leading to medical investigation, is the car accident. It is more likely than not on the evidence that the motor vehicle accident caused the meniscal tear.

Dr. Delaney testified that he did not attach much clinical significance to the meniscal tear. He also discussed "effusion", the presence of fluid in the knee, in his testimony. In his physical assessment of Mr. Michaud in December, 2010 he had found no evidence of effusion in the left knee. He testified that a finding of effusion was evidence of an ongoing process in the knee, that the knee was producing more lubricant as a way of protecting itself. I note, however, that in the

November 2010 MRI, an objective investigative tool, there was a specific finding of effusion. This finding in my view tends to support that the meniscal tear was at least of some clinical significance.

There is a TMJ assessment in evidence dated September 11, 2010,[16] with a diagnosis of a trauma and/or whiplash-related temporomandibular joint dysfunction. I find it surprising given the nature of the assessment that there is no mention whatsoever of Mr. Michaud's surgery to remove a benign tumor prior to the accident. I therefore give no weight to this assessment and diagnosis. There is also a neurology report dated January 25, 2011[17] with diagnoses of ongoing pain and musculoskeletal problems. This assessment took place after the second accident of December 2010. It therefore has limited evidentiary value in relation to the subject motor vehicle accident.

To summarize, it appears to me that Mr. Michaud sustained various sprains and strains and whiplash associated injuries in the accident, complicated by the aggravation of a pre-existing injury to the left shoulder, and complicated by a meniscus tear in the left knee. Mr. Michaud testified that he was not fully recovered by December 2010 prior to the second motor vehicle accident but that he was much improved. According to Dr. Delaney's report, Mr. Michaud had reported 70% improvement at the time of the Insurer's orthopaedic assessment.

Attendant Care and Housekeeping Benefits

The Insurer paid ACB at the rate of $502.89 per month and HK at the rate of $100.00 per week following the accident, as noted earlier. It purported to stop those benefits effective August 29, 2011 pursuant to an OCF-9 dated August 24, 2011. The OCF-9 indicated a stoppage based on

[16]By Dr. S. L. Sigesmund, Tab 6 Applicant's Arbitration Index

[17]By Dr. Viachislav Prigozhikh, Tab 8 Applicant's Arbitration Index

the orthopaedic assessment of December 29, 2010[18] and the occupational therapist assessment of January 24, 2011.[19] The OCF-9 states that the reports are enclosed.

The OCF-9 of August 24, 2011 also requested documentation showing that Mr. Michaud had incurred the ACBs and HK. Mr. Michaud provided this documentation to the Insurer. [20]
The Insurer in fact issued a cheque based on this documentation but then stopped payment on the cheque because of the failure to attend an examination under oath on January 4, 2012. This is set out in an OCF-9 dated January 12, 2012.

The amount of the cheque in question was not clear at the hearing. Mr. Michaud, however, clarified the amount of the cheque in his submissions. The lawyer for the Insurer advised him that the Insurer issued the cheque in the total amount of $2,770.20 ($1,282.50 for housekeeping and $1,487.70 for attendant care) as payment for invoices for the period from June 1, 2011 to August 29, 2011.

Mr. Michaud's submissions

Mr. Michaud submits that the fact that the Insurer sent the cheque in the first place is proof that the Insurer had approved those expenses. The only reason the Insurer gave for stopping the cheque in the OCF-9 dated January 12, 2012 was Mr. Michaud's failure to attend an examination under oath. The Notice of Examination Under Oath dated December 28, 2011 was flawed. Arbitrator Wilson dealt with the issue of suspension of benefits in his decision of March 5, 2014, stating:

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[18]By Dr. Delaney, Insurer's Arbitration Brief, Tab 11, p.70

[19]By Nicholas Livadas, Insurer's Arbitration Brief, Tab 11, p. 79

[20]See Application for Expenses (OCF-6's), Applicant's Arbitration Index, Tab 4

> Notwithstanding that all the contact between State Farm and the claimants was between respective counsel on both sides, the requirement to include the representation clause cannot be dismissed lightly. Indeed, it is a mandatory part of the notice. Without that part of the notice, the notice is incomplete and valid. An invalid notice means that the claimants named are not required to attend that particular examination under oath.[21]

Mr. Michaud submits that if the notice was improper, then a suspension or stop payment of benefits based solely on the non attendance at the EUO to which that notice applied is also improper. Arbitrator Wilson ordered benefits suspended only after January 15, 2013 as the consequence of Mr. Michaud's failure to attend an examination under oath. The issue of non-attendance at the examination under oath based on the December 28, 2011 has therefore already been decided and is *res judicata.* The ACB and HK benefits in the total amount of $2,770.20 for the period from June 1, 2011 to August 29, 2011 are therefore payable.

Insurer's Submissions

The Insurer relies primarily on the Court of Appeal of Ontario decision in *Stranges v. Allstate Insurance Co. of Canada*[22] which held that a procedural breach did not automatically entitle a claimant to payment of benefits. The claimant is still required to prove entitlement to the disputed benefit. Multiple FSCO arbitration and appeal cases have followed this decision.[23] The Insurer submits that Mr. Michaud has failed to prove that he meets the tests for entitlement to the various benefits claimed, including ACB and HK.

The Insurer submits with respect to the decision of Arbitrator Wilson, that Mr. Michaud had missed several dates for an examination under oath. It would be speculative to presume that the decision considered the Notice of December 28, 2011 rather than some other date. The Notice of December 28, 2011 is not in evidence. In any event, the decision of Arbitrator Wilson does not consider the merits of the claim and does not amount to a finding of entitlement.

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[21]See footnote 10, *supra*, at pp 3-4

[22]2010 ONCA 457

[23]See for example *Bisnath and State Farm Mutual Automobile Insurance Company* (FSCO A08-000007, October 7, 2010)

Analysis and Conclusion

In my view of the decision of Arbitrator Wilson as a whole, he considered notices (plural) and not a particular notice. The notices considered by him pre-dated the examination under oath which Mr. Wilson found Mr. Michaud legally obligated to attend. Those notices most likely included the Notice of December 28, 2011, which related to the EUO of January 4, 2012 and the suspension of benefits referred to in the OCF-9 dated January 12, 2012. Arbitrator Wilson in my opinion did rule that that suspension of benefits was improper. I agree with the Insurer, however that a decision with respect to a suspension of benefits does not necessarily amount to a finding of entitlement. The issue of entitlement is not *res judicata.*

I accept that a procedural breach does not automatically entitle a claimant to benefits to which he is otherwise not entitled. In this case, however, there is evidence of entitlement to ACBs and HKs. Mr. Michaud had several surgeries on the left jaw prior to the accident. This involved a bone graft from his left shoulder. Mr. Michaud testified that he received assistance in the nature of attendant care services and housekeeping services for a period of time prior to the accident, because of those surgeries. It appears that the last of those surgeries was in September 2009.[24] The services had stopped prior to the motor vehicle accident. I have found that Mr. Michaud aggravated the left shoulder injury in the accident. He also suffered sprains and strains and whiplash associated disorders as well as a meniscus tear to the left knee. The evidence shows that Mr. Michaud was entitled to ACBs and HKs following the accident. He applied for them in accordance with the *Schedule* and the Insurer paid them in accordance with the *Schedule* until June 1, 2011. The Insurer would have paid them to August 29, 2011 if the issue of non attendance at an EUO had not arisen.

Mr. Michaud incurred attendant care and housekeeping expenses as set out in the various OCF-6s at Tab 4 of the Applicant's Brief, in accordance with the Form 1, Assessment of Attendant Care Needs.[25] The Insurer's lawyer cross-examined Mr. Michaud on these OCF-6's.

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[24]See report of Dr. Delaney, first para p. 4, p.73 of Insurer's Arbitration Brief, Tab 11

[25]June 8, 2010, by Dr. Elana Silverman, Applicant's Arbitration Index, Tab 5

She submitted that his answers at times were vague or inconsistent. The hearing in this matter, however, took place many years after these expenses were incurred. The Insurer did not question the OCF-6s at the time they were submitted other than to stop payment on expenses already approved because of a suspension of benefits which was improper. The most reliable evidence of the expenses incurred is the documentary evidence, signed by the service providers, completed closer to the time of the provision of services.

Section 39 of the *Schedule* requires an insurer to pay ACBs in accordance with a Form 1 Assessment of Attendant Care Needs. An insurer may arrange its own assessment of attendant care needs pursuant to section 42 of the *Schedule.* The Insurer did so in this case and on January 24, 2011 an occupational therapist, Nicolas Livadas, conducted an in-home assessment at Mr. Michaud's home as noted in the report dated January 26, 2011.[26] The fax information at the top of each page of the report is evidence that the report was sent by fax to the Insurer on January 26, 2011. There is no evidence that the report was sent to the Insurer at a later date. There is no evidence that this report was sent to Mr. Michaud earlier than August 24, 2011, when it was enclosed with the OCF-9 of that date. Section 39(11) requires the Insurer to forward an Insurer's assessment of attendant care needs within 5 days of its receipt. Section 35(8) of the *Schedule* has a similar provision with respect to a report dealing with housekeeping benefits. In this case the report of the occupational therapist was sent six months after its receipt, during which time Mr. Michaud continued to incur attendant care expenses as well as housekeeping expenses.

The position of the Insurer is that "any alleged procedural breaches in this matter are completely irrelevant" and that an insured must meet the burden of proving his case. Mr. Michaud met the burden of proving his case in the first instance. The Insurer paid benefits. By December 2010 or January 24, 2011, Mr. Michaud's condition was less clear. He reported improvement at that time. He was also involved in a second accident in December, 2010 making it difficult to assess his injuries from the first accident. A new assessment was reasonable.

[26]Insurer's Arbitration Brief, Tab 11, p.79

The Insurer's assessment of attendant care needs found that Mr. Michaud had no attendant care needs at all, even though he had recently been involved in a second, more severe accident,[27] which makes it difficult to give full evidentiary weight to that report. The assessor appears to have considered all of Mr. Michaud's injuries including those from the second accident. He then went on to conclude that the barriers currently preventing Mr. Michaud from resuming all of his pre-accident activities were:

- Focus on pain that is out of keeping from what would typically be expected given the nature of the injuries and given the client's expected stage of recovery

- Underestimation of present abilities[28]

I do not find the assessor's dismissal of Mr. Michaud's pain to be reasonable in the circumstances.

If the Insurer had sent Mr. Michaud a copy of the report and the Insurer's determination in a timely manner, Mr. Michaud could have obtained his own assessment if he disagreed with the Insurer. Instead, Mr. Michaud received the report six months later, incurring expenses in the meantime. The Insurer's position is that the burden of proof is on Mr. Michaud to prove entitlement to the expenses in question but Mr. Michaud did not have the opportunity to obtain his own current opinion because the Insurer did not notify him that he was no longer entitled to benefits. The Insurer did not forward the reports on which that determination was based until six months later. In these circumstances, the very significant procedural breaches by the Insurer are relevant.

In my opinion, the Insurer is obligated to pay ACB and HK benefits in the total amount of $2,770.20 ($1,282.50 for housekeeping and $1,487.70 for attendant care) as payment for invoices for the period from June 1, 2011 to August 29, 2011. This is so because Mr. Michaud

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[27]See Report of Dr. Delaney, Insurer's Arbitration Brief, Tab 11, p. 70 at p. 74, 2nd paragraph

[28]Insurer's Arbitration Brief, Tab 11, p.79 at p. 102

likely continued to require ACBs and HKs during this period of time and because the Insurer failed to meet its procedural obligations under the *Schedule* to the prejudice of Mr. Michaud. There was evidence introduced by the Insurer as Exhibit 16 at the hearing of an OCF-9 dated March 28, 2011, which denied benefits effective March 31, 2011. That OCF-9 refers to the Insurer reports but does not enclose them. The Insurer appears to have considered this OCF-9 so flawed that it sent a subsequent OCF-9 dated August 24, 2011, enclosing the reports. I see no reason to consider this OCF-9.

As regards the period from August 29, 2011 to the two-year mark, Mr. Michaud has not met the burden of proving ongoing entitlement to ACBs and HKs. August 29, 2011 is a date more than one year from the date of the accident. Mr. Michaud had reported improvement about six months after the accident. This was before his involvement in a second accident in December 2010. By August 29, 2011, he was aware that the Insurer had determined he was no longer entitled to benefits and had given him a copy of the reports upon which the Insurer had based that determination. If Mr. Michaud wished to claim further benefits at that time, it was up to him to provide further medical information substantiating his claim. There is no evidence that he did so. He has not met the burden of proving entitlement to ACBs and HKs from August 29, 2011 to June 4, 2012.

Non-Earner Benefits

Mr. Michaud submits that he is entitled to non-earner benefits (NEBs) pursuant to section 12 of the *Schedule* from December 3, 2010 until June 4, 2010. NEBs are not payable prior to the 26-week anniversary of the accident of June 4, 2010. Mr. Michaud seeks NEBs until the two-year anniversary of the accident. He submits that he is entitled to those benefits because the Insurer did not comply with the procedural requirements of the *Schedule.* He also submits that he meets the test for entitlement to NEBs set out in the *Schedule.*

Mr. Michaud submits that the Insurer did not properly respond to his claim. He submitted an Application for Accident Benefits and completed a Disability Certificate addressing non-earner benefits. As noted above, the Insurer advised that it would assess the claim at the 26-week

anniversary of the accident. Mr. Michaud subsequently attended the assessments arranged by the Insurer: the orthopaedic assessment on December 23, 2010, and the in-home assessment on January 24, 2011. The Insurer, from the fax information, received these reports on December 29, 2010 and January 26, 2011 respectively. There is no evidence that the Insurer sent these reports to Mr. Michaud earlier than August 24, 2011.

Mr. Michaud relies on the Insurer's obligations set out in sections 35 and 37 of the *Schedule.* In particular, section 35(8) dealing with specified benefits where the Insurer has required an assessment under section 42 of the *Schedule*, requires an Insurer to forward a copy of that report to the Insured within 5 days of receipt of the same. Where an insurer does not provide a copy of the report or determination within 15 business days, Section 35(14) provides that the Insurer must pay the benefits to which the application for benefits relates for the period commencing on that day and ending on the day the Insurer gives the insured person the report or determination. The Insurer is obligated to pay NEBs at least until August 24, 2011 in Mr. Michaud's view, even in the absence of entitlement.

The Insurer never paid NEBs. NEBs are not payable until six months after an accident. Mr. Michaud testified that while he was not 100% better, he was much better by six months after the accident. He then had a second accident, an intervening causal event. The test for entitlement to NEBs, a complete inability to lead a normal life, is much higher than the test for entitlement to ACBs and HKs. The leading decision on NEBs, *Heath v. Macleod* ("*Heath*")[29] directs us to compare the Applicant's activities before the accident and after the accident in considering whether the test is met.

Prior to the accident, Mr. Michaud was not working. He was receiving ODSP payments because of a disability related to the surgeries on his jaw, the last surgery being in September 2009. He required assistance with self-care and housekeeping because of this but this assistance had stopped before the accident. Mr. Michaud was not precise in his evidence but it appears that the assistance stopped not too long before the accident. Mr. Michaud testified that he played soccer several times a week prior to the accident. He also liked to go dancing. Again, he was vague as to when he engaged in these

[29][2009] ONCA 391

activities. Given, however, that he was unable to work because of problems related to the surgeries it is difficult to see him playing soccer several times a week and dancing during the period of recovery from the surgeries. The last surgery was in September 2009. I am unable to accept that soccer and dancing were so important to Mr. Michaud's life for what appears to have been a relatively short time before the accident, that his inability to participate in these activities after the accident amounted to a complete inability to lead a normal life. Mr. Michaud's condition was much better by 26 weeks after the accident. I am unable to accept on the evidence that Mr. Michaud's circumstances were such as a result of the accident of June 4, 2010 that 26 weeks later he had a complete inability to lead a normal life. I do not accept that the procedural breaches by the Insurer entitled him to a benefit to which he would never otherwise have been entitled. I am bound by Court of Appeal case in *Stranges.*[30] I am also bound by the decision of Director's Delegate, David Evans, May 27, 2015 in *Galarneau and Allstate Insurance Co. of Canada*[31] where the Director's Delegate found no entitlement to NEBs on the basis of procedural breaches alone,

Mr. Michaud is not entitled to NEBs.

Treatment Plans

Mr. Michaud received various modalities of treatment from Osler Rehabilitation Centre Inc. from June 9, 2010 to January 24, 2011 as appears from the Paperwork Summary of that clinic.[32] He testified that these treatments helped his injuries and relieved his pain. The Insurer conducted an assessment with respect to the three treatment plans in dispute.[33] The Assessors found that Mr. Michaud had reached maximum medical recovery and that these treatment plans were not reasonable and necessary. It appears from the Paperwork Summary that the Insurer nevertheless continued to approve similar treatment plans after that time, until January 24, 2011. This tends to support Mr. Michaud's evidence that the treatment plans helped his condition, relieved his

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[30]*Ibid.*

[31](FSCO P13-00031A), May 27, 2015

[32]Exhibit 14

[33]See report by Dr. Brent Souter, dated September 29, 2010, Insurer's Arbitration Brief, Tab 11, p. 61

pain and were therefore reasonable and necessary. I find that the treatment plans in dispute were reasonable and necessary and are payable.

Special Award

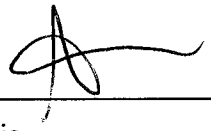
Mr. Michaud seeks a special award pursuant to section 282(10) of the *Insurance Act* which provides for a penalty against an insurer for unreasonable delay in making payments and withholding benefits. The provisions apply only to benefits awarded.

In the case of the treatment plans, the Insurer relied on an assessment in denying the treatment plans in question. I also note that the Insurer funded what appears to be a generous level of treatment for a period of more than six months. The request for a special award in relation to these benefits is denied.

As regards the ACBs and HKs awarded, I have considered that perhaps the Insurer should have paid those benefits after the decision of Arbitrator Wilson noted above. In his decision, however, Arbitrator Wilson discusses what appears to have been a lack of co-operation by Mr. Michaud in arranging the EUOs, as well as a failure to provide updated information. In my opinion, I can consider the conduct of Mr. Michaud in determining whether or not to make a special award. The request for a special award in relation to these benefits is also denied.

EXPENSES:

If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code.*



Anne Morris
Arbitrator

December 18, 2019
Date

BETWEEN:

LOUIS-JACQUES MICHAUD

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 it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. Mr. Michaud is not entitled to a non-earner benefit.

2. Mr. Michaud entitled to receive a medical benefit for services provided by Osler Rehabilitation pursuant to the following treatment plans:

   (a) September 7, 2010 in the amount of $540.00;
   (b) September 9, 2010 in the amount of $461.00; and
   (c) September 10, 2010 in the amount of $946.00?

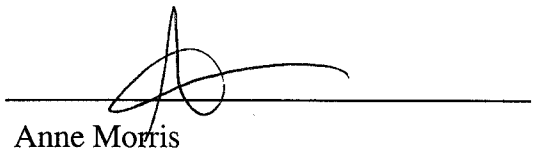
3. Mr. Michaud is entitled to attendant care benefits in the total amount of $1,487.70 from June 1, 2011 to August 29, 2011.

4. Mr. Michaud is entitled to payments for housekeeping and home maintenance services in the total amount of $1,282.50 from June 1, 2011 to August 29, 2011.

5. State Farm is not liable to pay a special award.

6. Mr. Michaud is entitled to interest for the overdue payment of benefits in accordance with the *Schedule*.

7. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same inaccordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.



December 18, 2019

Anne Morris
Arbitrator

Date