



FSCO A11-001155

BETWEEN:

WEI CHANG

Applicant

and

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

Insurer

REASONS FOR DECISION

Before: Alan Mervin

Heard: June 28, 2012, at the offices of the Financial Services Commission of Ontario in Toronto

Appearances: Sean Bahmadi for Ms. Chang
Jonathan B. Schrieder for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Wei Chang, was injured in a motor vehicle accident on April 13, 2008. She was a pedestrian, and while walking, was struck by a motor vehicle. She applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company (“State Farm”), payable under the *Schedule*.¹ Disputes arose between the parties concerning the Applicant’s entitlement to certain accident benefits and the parties were unable to resolve their disputes through mediation. Ms. Chang then applied for arbitration of these disputes 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. Chang entitled to weekly payments of \$100.00 for housekeeping and home maintenance services from April 13, 2008 to September 9, 2008?
2. Is Ms. Chang entitled to attendant care benefits of \$815.63 per month from April 14, 2008 to August 28, 2008?
3. Is Ms. Chang entitled to receive a weekly income replacement benefit of \$184.85 from September 10, 2008 to October 15, 2009?
4. Is Ms. Chang entitled to interest for the overdue payment of benefits?
5. Is State Farm liable to pay Ms. Chang's expenses in respect of the arbitration?
6. Is Ms. Chang liable to pay State Farm's expenses in respect of the arbitration?

Result:

1. The Applicant's claim for housekeeping and home maintenance benefits is dismissed.
2. The Applicant is entitled to attendant care benefits in the amount of \$815.63 per month from April 14, 2008 to June 23, 2008 plus interest on the overdue attendant care benefits in accordance with the *Schedule*.
3. The Applicant's claim for income replacement benefits is dismissed.
4. The decision on expenses is reserved, to be resolved in accordance with Rules 75 through 79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

Overview

The facts that follow are not in dispute.

At the time of the accident (April 13, 2008), the Applicant was 29 years old. The Applicant lived in a two-storey townhouse with her husband (from whom she is now separated) and her mother-in-law. At the time of the accident, the Applicant was working as a part time manager at Hyde Lounge, a bar operated by her husband, Weng Lu (Steven) Sheng. She was also enrolled in a hairdressing course which she had partially completed prior to the accident.

On April 13, 2008, at approximately 10:00 a.m., while walking across an intersection, the Applicant was struck on the right side by a motor vehicle making a left-hand turn. She was thrown through the air and, upon striking the ground, she suffered soft tissue injuries, bruising and abrasions. She was taken by ambulance to hospital, where she was examined. Her scrapes were cleaned and bandaged and she received a tetanus shot. She was released a few hours later to the care of her family physician.

The Applicant never returned to work at Hyde Lounge. Hyde Lounge closed down some months after the accident.

She did return to, and completed, the hair dressing course. The Applicant did not return to any sort of employment, however, until October 15, 2009, when she began working at a hair salon. At the time of the hearing, she continued to be employed at this hair salon.

Issues in Dispute:

Is Ms. Chang entitled to a benefit for housekeeping and home maintenance pursuant to section 22 of the Schedule from April 14, 2008 to September 9, 2008, 2010 less amounts paid?

The Applicant's claim is for \$100.00 per week over a span of 21 weeks (April 14, 2008 through September 9, 2008), for a total housekeeping claim of \$2,100.00. State Farm paid the Applicant \$2,100.00 for housekeeping and home maintenance for this same period. I therefore find that nothing further is owing for this aspect of the claim.

Is Ms. Chang entitled to receive attendant care benefits of \$815.63 per month from April 14, 2008 to August 28, 2008?

Section 16 of the *Schedule* provides that:

the Insurer shall pay for all reasonable and necessary expenses incurred by, or on behalf of the insured person as a result of the accident, and the amount payable by the attendant care benefit payable shall be determined in accordance with Form 1.

No claim was made for Attendant Care benefits until June 23, 2008, when State Farm received a Form 1², dated June 7, 2008, prepared by Dr. Donald Shin, a chiropractor retained by the Applicant. The Insurer then commenced paying the benefit at the requested rate of \$815.63 from June 23, 2008 to August 26, 2008.

State Farm stopped payment of attendant care benefits effective August 26, 2008, after receiving a report (and Form 1) from its own assessor, Lisa Tong, O.T.

The Applicant does not challenge the opinion of Ms. Tong or the stoppage on August 26, 2008. Rather, this dispute concerns whether State Farm ought to have *also* paid attendant care benefits at the monthly rate of \$815.63 from the date of the accident (April 13, 2008) to the date it received the first Form 1 (June 23, 2008). State Farm's position was that it should not have to

²Assesment of Attendant Care Needs, Joint Medical Brief, Tab 1E

pay benefits for the period preceding their receipt of the initial Form 1 from Dr. Shin (i.e., from the date of the accident until June 23, 2008).

There is nothing in the *Schedule* that directly addresses this issue. Common sense would suggest that a person who, as a result of an accident, requires attendant care three months after an accident probably required attendant care during the first two months following the accident. It is not reasonable to expect that immediately after suffering an injury, an applicant will be in a position to take the steps necessary to immediately obtain and submit a Form 1 to an insurer.

In this case, the Applicant submitted the Form 1 to the Insurer within a reasonable time and I find that she is therefore entitled to receive attendant care benefits at the assessed rate of \$815.63 per month from April 14, 2008 to June 23, 2008 plus interest on the overdue attendant care benefits in accordance with the *Schedule*.

Is Ms. Chang entitled to receive a weekly income replacement benefit of \$184.85 from September 10, 2008 to October 15, 2009?

Section 4.1 of the *Schedule* provides that:

The insurer shall pay an insured person who sustains an impairment as a result of an accident an **income replacement** benefit if the insured person meets any of the following qualifications: [Emphasis added]

The insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment.

Medical Evidence Supporting the Applicant

The Applicant applied for and received income replacement benefits (IRBs) from April 14, 2008 to September 9, 2008 at the rate of \$184.85 per week. The amount of the weekly benefit is not in dispute. What is in dispute is the duration of the benefit. The Applicant claims that State Farm ought to have continued to pay this benefit from September 10, 2008 up to October 15, 2009.

The initial Disability Certificate (dated August 4, 2008) was completed on behalf of the Applicant and submitted to State Farm by Dr. Peter Counti, a chiropractor at Optimum Health Clinic. Dr. Counti noted the Applicant's impairments/limitations as bending/lifting, squatting, kneeling and stooping. He described the Applicant's job as an "inventory assistant (lifting involved)". After examining the Applicant, Dr. Counti concluded that the Applicant was substantially unable to perform the essential tasks of her employment as a result of the accident, and noted that the anticipated duration of her incapacity would be 5-8 weeks. According to Dr. Counti's initial estimate, the Applicant was expected to be able to return to work some time in mid-to-late September 2008.

Based on this Disability Certificate, State Farm paid IRBs in the amount of \$184.85 from April 20, 2008, one week after the accident, up to the stoppage date of September 9, 2008.

In addition to the initial Disability Certificate, the medical evidence offered on behalf of Ms. Chang included a Functional Capacity Evaluation ("FCE") dated August 14, 2008, completed by Dr. Donald Shin, a chiropractor at Optimum Health Clinic. In this FCE, Dr. Shin concludes that Ms. Chang does "not completely meet her specific job demands. However, given the reported physical nature of her job, Ms. Wei Chang does demonstrate the ability to return to modified lighter duties." Dr. Shin suggests that the Applicant should not perform prolonged repetitive reaching and gripping activities, and recommends additional rehabilitation, and a work-hardening program.

It should be noted that the statement of Dr. Shin, in which he states that she does not completely meet her specific job demands, is not the same as the test set out in Section 4(1), *substantial inability to perform the essential tasks of her pre-accident employment*. In fact, nowhere in his report does Dr. Shin say that the Applicant suffers a substantial inability to perform the essential tasks of her pre-accident employment. Rather, he suggests that, at the time of the FCE (August 14, 2008), the Applicant **was** able to return to work with modification of her duties.

The medical evidence tendered by the Applicant in support of her IRB claim comes from her own chiropractors who both suggest that the Applicant should be able to return to work (in the case of Dr. Shin, perhaps with modified duties) around mid-to-late September 2008. There is no further relevant medical evidence that the Applicant submitted subsequent to Dr. Shin's FCE that would support her entitlement to IRBs after the stoppage date.

Medical Evidence Supporting the Insurer

The Insurer submitted a report from Dr. Garson Conn, orthopedic surgeon, who performed an examination of the Applicant on August 5, 2008. Dr. Conn, after assessing the Applicant, states that in his opinion, "[the Applicant] has the physical capabilities of returning to the essential tasks of her pre-accident employment as an Assistant Manager at the Hyde Lounge Nightclub". He further states that in his opinion that, at the time of the examination, the Applicant had reached maximum medical improvement in regard to physiological healing of her soft tissue injuries, and that he would expect that her symptoms would resolve in the next month. He concluded that he found no impairment or disability due to the accident.

The Applicant was also assessed by a psychologist, Dr. Marc Mandel, at the request of the Insurer, on August 13, 2008. Dr. Mandel concluded that the Applicant had no residual psychological problems as a result of the subject accident, that she had reached maximum medical recovery at the time of the assessment, and that "based on the documentation, testing and interview, it is clear that Mrs. Chang is not suffering from any psychological condition as a result of her accident on April 13, 2008".³

An In-Home Assessment conducted by Lisa Tong, OT, at the request of the Insurer, on August 11, 2008, was done to assess the Applicant's Attendant Care and Housekeeping needs. In her report, while Ms. Tong does not directly address the Applicant's employment capabilities, she noted that she found evidence of full muscle strength, and further, that the Applicant expressed to her that she was independent with her personal care and housekeeping, and noted that the Applicant demonstrated full ranges of motion in upper and lower extremities, functional manual muscle

³Psychological Assessment, Joint Medical Brief, Tab 2F, Page 11

strength and functional grip strength, and functional abilities for reaching, bending, walking, sitting and standing.

The Insurer also submitted that the reports of Dr. Conn, Dr. Mandel, and Ms. Tong all noted that the Applicant self-reported 70-80% improvement at the time of their assessments, and further, that her own chiropractor, Dr. Counti, in his report of November 10, 2008, reported that she told him that she was 70% improved. While the Applicant either did not recall reporting this to the various doctors or suggested that the doctors were mistaken, it is unlikely that all of the various doctors were mistaken on this issue, given the consistency of their remarks regarding her self-reporting of her improvement at around the same time.

The Applicant's Testimony

In addition to the medical evidence submitted at the hearing, I must consider the testimony of the Applicant's witnesses at the hearing. Even in cases where there is little medical evidence to support the Applicant's claim, an Arbitrator can rely on the Applicant's testimony and the witnesses called on behalf of the Applicant, and that evidence, if accepted, can be sufficient to prove the claim of the Applicant on a balance of probabilities.

Only two witnesses testified in this case. Ms. Chang, the Applicant, gave evidence on her own behalf. Joan Wakeling, a State Farm adjuster, was also called as a witness by Applicant's counsel. In my view, the evidence of Ms. Wakeling essentially dealt with the handling of the file and added nothing significant to the Applicant's case.

The Applicant chose not to call her husband/employer/service provider, or any other service provider or family member to corroborate her testimony.

Ms. Chang testified that, as a result of the accident, she sustained injuries to her neck, back, left hip and left arm. She testified that, because of her injuries, she could not return to work and was unable to perform her pre-accident employment, as well as being unable to perform some

housekeeping and attendant care duties for some time. However, her testimony presented many inconsistencies, and was not corroborated by any additional witnesses.

These contradictions and inconsistencies raise suspicions about the veracity of the Applicant's claims. Examples of these include (but are not limited to) the following:

1. Despite being under the care of a family doctor for some time prior to this accident, after the accident the Applicant did not see that doctor for several months, instead going to a clinic that the lawyer recommended. However, when the Applicant attended at her family doctor a few months after the accident, she did not mention the accident to him, and his notes only indicated that she had low blood pressure; in fact, she did not go to see her regular family physician and never consulted her family physician concerning any accident-related symptoms.
2. The Applicant contends that she did virtually all of the housekeeping in this household prior to the accident, even while working; however, she told one of the Insurer's assessors, Dr. Mandel, that prior to the accident her mother-in-law did most of the housework and that she "helped with the chores".
3. The Applicant testified that housekeeping and attendant care help was provided by her mother-in-law, Zhi Yong Ge, but the written submissions sent to the insurer and submitted in evidence stated that she was receiving attendant care from her husband, Shen Lu Feng.
4. The Applicant did not remember many important details, such as when Hyde Lounge closed and when she graduated from hairdressing school. She did not remember whether Dr. Shin spoke her language and she disagreed with several statements attributed to her which were in various clinical notes, such as whether she told Dr. Shin that she had not lost consciousness at the time of the accident, or whether she was bleeding; she testified that the clinical notes of several doctors contained similar errors.

5. The Applicant apparently reported to several professionals, within a few months of the accident, that she was 70-80% improved. Although she now denies making such statements, it seems unlikely that both the Insurer's assessors and her own assessors misquoted the Applicant in exactly the same manner.⁴
6. In addition, although Dr. Shin, in the FCE of August 14, 2008, reflected that, according to Ms. Chang, she had trouble remembering and concentrating, Dr. Conn's report of August 5, 2008, reflects that the Applicant reported to him that her symptoms did not affect her memory.
7. It is unclear from the Applicant's testimony whether she stopped working because of functional impairments related to this accident, due to the closure of her husband's business or so that she could pursue her training for a new occupation.

Assessment of Credibility

In many soft tissue injury cases, there is a lack of objective medical evidence, or conflicting medical evidence as to the extent of the injuries sustained by an applicant. In such cases, the treating practitioners, medical assessors and Arbitrators at the Commission must assess the reliability of the Applicant's subjective reports of (amongst other things): (1) the amount of pain he or she is experiencing; (2) the degree to which that pain limits his or her ability to function; and (3) the amount of relief provided by various forms of treatment. The credibility of the applicant is therefore of particular importance in assessing the evidence. It is also to be noted that in all cases, the burden of proof of the claim lies with the applicant.

I find that Ms. Chang's evidence is unreliable. Her evidence, taken as a whole, contained many internal contradictions, inconsistencies with self-reports given to the medical assessors, and was vague. I therefore give her testimony little weight.

⁴Dr. Conn's report of August 5, 2008 reflects her report to him of 70-80% improvement; Dr. Counti, in in an OCF-22 dated November 10, 2008 and his subsequent report of January 6, 2009, both reflect her report of 70% improvement, and Lisa Tong, Occupational Therapist, 3 months post-accident, after completing an in home assessment, finds no impairment. She comments on Ms. Chang's self-report of not requiring assistance, and a 70 percent improvement.

IRBs - Conclusion

Given the findings of the Insurer's assessors as noted above, and taking into consideration the evidence submitted by the Applicant's medical professionals and the Applicant's own testimony (to which I attach little weight), I find that the Applicant has failed to prove on a balance of probabilities that she suffered a substantial inability to perform the essential tasks of her pre-accident employment beyond mid-to-late September 2008. I therefore find that the Applicant is not entitled to any additional income replacement benefits.

EXPENSES:

If either party wishes to make any submissions with respect to the issue of expenses, they may do so in accordance with Rules 75-79 of the *Dispute Resolution Practice Code*.

Alan Mervin
Arbitrator

April 26, 2013
Date



FSCO A11-001155

BETWEEN:

WEI CHANG

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. The Applicant's claim for housekeeping and home maintenance benefits is dismissed.
2. The Applicant is entitled to attendant care benefits in the amount of \$815.63 monthly from April 14, 2008 to June 23, 2008 plus interest on the overdue attendant care benefits in accordance with the *Schedule*.
3. The Applicant's claim for income replacement benefits is dismissed.
4. The decision on expenses is reserved, to be resolved in accordance with Rules 75 through 79 of the *Dispute Resolution Practice Code*.

Alan Mervin
Arbitrator

April 26, 2013
Date