

Appeal P16-00067

OFFICE OF THE DIRECTOR OF ARBITRATIONS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Appellant/Respondent

and

JOSEPH ASAMOAH

Respondent/Appellant

BEFORE: Delegate Jeffrey Rogers

REPRESENTATIVES: Mr. Darrell March and Mr. Paul Omeziri, solicitors for State Farm
Mr. Richard Levin, solicitor for Mr. Asamoah

HEARING DATE: On the record by written submissions, completed on March 1, 2017

APPEAL ORDER

Under section 283 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. Except for the finding that Mr. Asamoah's entitlement to income replacement benefits is limited to a three month period of post-surgery recovery, the appeal is denied as it relates to paragraph 1 of the Arbitrator's order of August 2, 2016, in which he ordered State Farm to pay Mr. Asamoah Income Replacement Benefits at the rate of \$400 per week, from November 24, 2011 to November 24, 2012.
2. The Arbitrator's order is otherwise rescinded.

3. The issues of Mr. Asamoah's entitlement to attendant care benefits, housekeeping and home maintenance benefits, Medical/Rehabilitation benefits, Assessments or Examinations, further income replacement benefits and a special award are remitted for rehearing by a different Arbitrator.

4. If the parties are unable to agree on expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers
Director's Delegate

March 21, 2017
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Both parties appeal the Arbitrator's decision of August 2, 2016. State Farm seeks reversal of the Arbitrator's decision to award Mr. Asamoah income replacement benefits (IRBs), medical and rehabilitation benefits (med/rehab), attendant care benefits (ACBs), housekeeping and home maintenance benefits (HK), and the cost of examinations or assessments. Mr. Asamoah seeks to rescind the Arbitrator's dismissal of his claim for a special award and the Arbitrator's limiting of the period of his entitlement to IRBs and ACBs.

II. BACKGROUND

Mr. Asamoah was injured in an automobile accident on August 25, 2010 and he sought accident benefits from State Farm. Disputes arose regarding some of the benefits he claimed. He applied for mediation and, when that failed to resolve the disputes, he applied for arbitration. The matter came for hearing before the Arbitrator in January 2016. After 10 days of hearing, followed by written submissions, the Arbitrator issued a decision on August 2, 2016.

The issues the Arbitrator identified to be in dispute were as follows:

- Entitlement to IRBs at \$400 per week, from November 24, 2011 to date and ongoing
- Entitlement to medical benefits as set out in two treatment plans by Malton Physiotherapy and Chronic Pain Centre
- Entitlement to ACBs in various monthly amounts from September 6, 2010 to date and ongoing
- Entitlement to HK at \$100 per week from November 24, 2011 to August 25, 2012
- Entitlement to the cost of 4 examinations or assessments, and
- Entitlement to a special award.

The Arbitrator awarded Mr. Asamoah all of the assessments or examinations and all of the medical benefits he claimed. The Arbitrator also awarded IRBs, ACBs and HK, but not for as long a period as Mr. Asamoah claimed them, and the Arbitrator dismissed Mr. Asamoah's claim for a special award.

Both parties appealed. State Farm sought a stay of the order. In a letter decision dated October 6, 2016, I stayed the Arbitrator's order relating to payment for assessments or examinations, med/rehab, ACBs and HK. I found that the Arbitrator's decision contained no reasons for making those awards. I denied State Farm's request for a stay of the order to pay IRBs.

III. ANALYSIS

ACBs, HK, Med/Rehab and Assessments or Examinations

The Arbitrator awarded payment of ACBs and HK for a limited period. However, the order included payment of ACBs for a period that was more than two years after the accident. Section 18 of the *Schedule*¹ permits recovery of ACBs for expenses incurred more than 2 years after the accident only where the insured person sustained a catastrophic impairment. Mr. Asamoah did not sustain a catastrophic impairment as a result of the accident.

The Arbitrator ordered payment of everything Mr. Asamoah claimed for med/rehab and for examinations or assessments. The award included payment of \$3,500 for an orthopaedic assessment which, according to the Arbitrator, was dated July 17, 2010², more than a month before the accident. The amount awarded also exceeds the \$2,000 limit established by s.25 of the new *SABS*.³

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

²The date could be a typographical error in the Arbitrator's decision.

³*The Statutory Accident Benefits Schedule---Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

As stated earlier, I stayed the Arbitrator's order as it related to payment for Assessments or Examinations, ACBs, HK and Med/Rehab because the Arbitrator gave no reasons for making those awards.

Failure to give reasons is a breach of natural justice that mandates setting aside the decision. The Supreme Court of Canada set out this principle in *Baker v. Canada (Minister of Citizenship and Immigration)*.⁴ The Court stated:

It is now appropriate to recognize that, in certain circumstances, including when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision.

In its decision in *Kanareitsev v. TTC Insurance Company Limited*,⁵ the Divisional Court summarized the jurisprudence regarding the adequacy of reasons as follows:

- Determining adequacy of reasons is a contextual exercise. The essential question is whether reasons provide the basis for meaningful judicial review.
- The reasoning process must set out and reflect consideration of the main relevant factors.
- It is insufficient to summarize parties' positions and baldly state conclusions.
- Factors to be considered include the decision maker setting out essential findings of fact and the evidence upon which they are based. The reasons must address the major points in issue.
- Particularly when results turn on credibility and involve fact-driven analysis, appellate review must take proper account of the distinct advantage of the decision maker's assessments. Appeal officers must not try the case *de novo* or substitute his or her view.

⁴[1999] 2 S.C.R. 817

⁵[2008] O.J. No. 2132

State Farm's obligations to pay ACBs and HK are established by sections 16 and 22 of the *Schedule*. Section 16 requires State Farm to pay Mr. Asamoah ACBs for all reasonable and necessary expenses he incurred for the services of an aide or attendant, as a result of the accident. Section 22 requires payment of HK, if Mr. Asamoah sustained an accident-related impairment resulting in a substantial inability to perform his pre-accident housekeeping and home maintenance activities.

In his decision, the Arbitrator gave an account of Mr. Asamoah's accident-related impairments and he discussed how they impact his ability to work. The Arbitrator then stated:

Given the Insurer's awareness of the MRI reports and the pending surgical intervention required and received, a resumption of benefits should have occurred to assist in the Applicant's pain and physical limitations prior to surgery and subsequent recovery and as such, I find that income replacement, housekeeping and home maintenance and attendant care benefits for a fixed period of time are owing to the Applicant.⁶

The Arbitrator did not discuss the impact of the accident on Mr. Asamoah's ability to attend to his own care. There is no discussion of what assistance he needed in this regard. There is no discussion of when the need arose or why it ended when it did. There is no discussion of what housekeeping and home maintenance activities Mr. Asamoah engaged in before the accident or the impact of his injuries and his ability to engage in those activities. Therefore, although the Arbitrator's reasons might explain that Mr. Asamoah could be entitled to some award of HK and ACBs, there is no explanation for the amount he awarded.

Sections 14 and 15 of the *Schedule* require payment of certain reasonable and necessary med/rehab expenses upon properly applying for them under section 38. Section 24 requires payment for certain reasonably required examinations or assessments, subject to properly applying for them under section 38.2.

With regard to med/rehab and assessments or examinations, the Arbitrator's entire analysis was as follows:

⁶At page 6

I am satisfied by the evidence that the cost of examinations as claimed was both reasonable and necessary as a result of the accident and injuries sustained. I further concluded that the medical benefits claimed for work hardening programs and acupuncture were appropriate expenses to be paid to the Applicant.⁷

There is no discussion of the reasonableness or necessity of the med/rehab and the assessments or examinations and no discussion of whether Mr. Asamoah met the technical requirements of applying for them.

With regard to assessments of examinations, med/rehab, HK and ACBs, I find that the Arbitrator's reasons do not contain essential findings of fact and do not reflect consideration of the main relevant factors. The reasons therefore do not provide the basis of meaningful appellate review. For that reason, the Arbitrator's decision in this regard is rescinded.

IRBs

At the time of the accident Mr. Asamoah was employed full-time. He did not return to work after the accident and he claimed IRBs. State Farm paid him IRBs at the rate of \$400 per week until November 24, 2011, and then terminated them. At the arbitration, he claimed further IRBs, from the date of termination, to present and ongoing.

During the first 104 weeks of disability, section 4 of the *Schedule* requires State Farm to pay Mr. Asamoah IRBs if the accident caused a substantial inability to engage in the essential tasks of his employment at the time of the accident. After that, State Farm is required to continue to pay IRBs only if Mr. Asamoah was suffering a complete inability to engage in any employment for which he was reasonably suited by education, training or experience.

The Arbitrator ordered State Farm to pay Mr. Asamoah IRBs at the rate of \$400 per week, from November 24, 2011 to November 24, 2012. The Arbitrator noted that his order for payment of IRBs included a three month period of recovery from surgery. The initial 104 weeks of disability ended on August 24, 2012. Therefore, although not specifically noted, the Arbitrator's order

⁷At page 5

included payment during a period in which the more stringent test for entitlement to IRBs applied.

State Farm argues that the Arbitrator made the following errors in making the award of IRBs:

- Awarded at the rate of \$400 per week when Mr. Asamoah's tax returns showed that he qualified for a lower weekly amount
- Failed to address the test for entitlement
- Found that the injury to Mr. Asamoah's shoulder was caused by the accident when there was no credible evidence to support that finding, and
- Required State Farm to prove that the injury was not caused by the accident.

Mr. Asamoah submits that, although the Arbitrator did not specifically address the test for entitlement to IRBs, and engaged in no analysis of his entitlement to post-104 IRBs, there was evidence to support the conclusion that he was entitled to them. He further submits that there was no evidence to support the Arbitrator's conclusion that he only required three months to recover from surgery. He therefore submits that the Arbitrator erred in limiting his entitlement to three months post- surgery.

First, I will address the quantum issue, and then I will address the other submissions.

The Arbitrator did not deal with the question of quantum, but there is nothing in the record to suggest that he was required to do so. State Farm paid IRBs at the rate of \$400 per week. When he applied for arbitration Mr. Asamoah claimed ongoing IRBs at that rate. State Farm did not dispute the rate in its Response to the Application for Arbitration. The pre-hearing Arbitrator did not note the issue to be in dispute in the pre-hearing report. State Farm provided nothing in its submissions to show that the issue of quantum was added to the arbitration at any time. There is nothing in the record to show that the issue was added. I am therefore not satisfied that the issue of quantum of IRBs was properly before the Arbitrator. He could not have erred by not addressing it.

I now turn to the other submissions. The focus of the Arbitrator's decision was determining Mr. Asamoah's accident-related injuries and how they impacted his ability to work. The thrust of Mr. Asamoah's position was that he was unable to work because of an injury to his left shoulder and psychological impairments. An MRI in 2011 showed a large full thickness partial tear of the left supraspinatus tendon. A subsequent MRI in March 2012 showed that the condition had worsened. Mr. Asamoah underwent surgery to repair the tear on August 9, 2012, two weeks before the more stringent test for entitlement to IRBs applied.

The Arbitrator rejected State Farm's position that the accident did not cause the injury to Mr. Asamoah's shoulder. The Arbitrator noted that Mr. Asamoah complained of pain to the left shoulder immediately after the accident. He stated: "Within the next couple of days following the accident the Applicant began to experience pain in his left shoulder..."⁸ The Arbitrator noted that the first time State Farm raised the issue of causation of the shoulder injury was during the hearing. He found no evidence of any post-accident shoulder injury. He concluded that "absent anything to support the suggestion of State Farm, the Applicant satisfied me that the shoulder-tear was a direct result of the accident."⁹

I reject State Farm's submission that there was no evidence to support the Arbitrator's finding that the accident caused the injury to Mr. Asamoah's left shoulder. State Farm submits that Dr. Ogilvie-Harris, Mr. Asamoah's own orthopaedic assessor, agrees that the tendon tear disclosed in the MRIs pre-existed the accident. In a report dated August 12, 2014, Dr. Ogilvie-Harris commented on an earlier report by Dr. Boynton. He stated: "She came to the conclusion that the rotator cuff tear likely pre-existed the traumatic event. I would agree with this." However, Dr. Ogilvie-Harris did not stop there. He went on to say: "She noted it became progressive in nature increasing in size at the time. I would agree with this. However, in my opinion this would be clearly related to the trauma in that it was temporally present within a few days and became progressively worse."¹⁰ Dr. Harris then went on to reinforce his opinion by contrasting the outcome regarding Mr. Asamoah's left shoulder, with the outcome in his right

⁸At page 4

⁹At page 5

¹⁰Exhibit 1, Volume 3, Tab 4

shoulder. There was a pre-existing rotator cuff tear in the right shoulder as well, but Mr. Asamoah did not sustain an injury to his right shoulder and that shoulder remains asymptomatic.

I conclude that there was ample evidence before the Arbitrator to support his finding that the requirement for surgery to Mr. Asamoah's shoulder was caused by the accident, whether applying the "but for" or the "material contribution" test. The Arbitrator also did not reverse the onus of proof, as State Farm submits. Rather, the Arbitrator simply stated that he accepted Mr. Asamoah's theory of causation, in the absence of any evidence to the contrary. The Arbitrator is entitled deference regarding this finding of fact. I find no error.

In assessing the impact of Mr. Asamoah's injuries on his ability to work, the Arbitrator noted that he was employed as lead hand in a supervisory role for Job Market Inc.¹¹ at the time of the loss. The Arbitrator found that his duties included driving a forklift truck and using a high pressure water gun for cleaning equipment. The Arbitrator noted the opinion of Dr. Chizen, who assessed Mr. Asamoah on behalf of State Farm and gave a report dated April 18, 2011. Dr. Chizen found that the condition of Mr. Asamoah's left shoulder precluded a return to work that required heavy lifting or repetitive or overhead lifting using the left arm. In my view, although he did not specifically invoke the test for entitlement to pre-104 IRBs, the above illustrates that the Arbitrator engaged in the analysis necessary to support his factual conclusion that the injury to Mr. Asamoah's left-shoulder caused a substantial inability to engage in the essential tasks of his employment at the time of the accident. I find no error.

As I noted above, the Arbitrator also awarded Mr. Asamoah IRBs for the period from August 25, 2012 to November 24, 2012, when the more stringent test for entitlement applied. The Arbitrator did not show an awareness of the change in the test and engaged in no analysis specific to the post-104 test. State Farm argues that the Arbitrator's order should therefore be rescinded, while Mr. Asamoah submits that the evidence supports his ongoing entitlement.

¹¹The Arbitrator might have erred in identifying the employer, but he correctly identified the requirements of the job.

Bear in mind that Mr. Asamoah had undergone surgery to his shoulder on August 9, 2012, just over two weeks before the more stringent test applied. The evidence before the Arbitrator was that Mr. Asamoah had a Grade 10 education and a work-history of jobs that required heavy physical labour. There was no evidence before the Arbitrator that Mr. Asamoah qualified for a job with light physical demands. All of the medical evidence indicated that Mr. Asamoah required a significant period of post-surgery recovery. For instance, on October 19, 2012, a follow-up report from Dr. Guido Hockmann indicated that Mr. Asamoah's range of motion in his shoulder was improving, but he was to continue physical therapy and be reviewed in three months.¹² Then, in January of 2013, Dr. Hockman noted that Mr. Asamoah had regained most of his range of motion and his pain had decreased. Dr. Hockmann viewed this as a good result.¹³ Nevertheless, five months post-surgery, there is still an indication of ongoing pain and limitations to range of motion.

In my view, although the Arbitrator did not engage in the post-104 analysis, the only available conclusion was that, at least until November 24, 2012, Mr. Asamoah's injury to his left shoulder caused a complete inability to engage in any employment for which he was reasonably suited by education, training or experience. I therefore decline to rescind the Arbitrator's order in that regard.

In determining that Mr. Asamoah was not entitled to further IRBs, the Arbitrator found that other factors, and not his accident-related injuries, prevented him from returning to work. The Arbitrator stated:

It is my impression, supported by the Applicant's own testimony, that the events of his life and not the accident in any significant way, render the Applicant unwilling, or at least not motivated to return to his regular employment **at this time** [emphasis added]. This is also supported by the findings of Dr. West who felt that the Applicant is able to return to his regular employment in some manner. The Applicant also stated that he sees psychological intervention as somewhat shameful and declared that he was not desirous of participating in same in any meaningful way.¹⁴

¹²Exhibit 1, Volume 3, Tab 6

¹³Footnote 11 above

¹⁴At page 6

The Arbitrator made the above statement in addressing Mr. Asamoah's position that he was entitled to ongoing IRBs because of psychological disability. The only finding that the Arbitrator made was that Mr. Asamoah was able to return to work "at this time". In making this finding, the Arbitrator referred to the relevant expert evidence and Mr. Asamoah's own testimony.

The Arbitrator later went on to conclude that Mr. Asamoah was nevertheless entitled to some IRBs because he was unable to work at the time of his surgery and for three months after that.

The Arbitrator did not refer to any evidence supporting his conclusion that a three-month recovery period was adequate and State Farm has pointed out no evidence to that effect. Therefore, while the Arbitrator justified disentitlement to further IRBs "at this time", there was no basis for disentitlement on November 24, 2012. The Arbitrator's decision in that regard therefore appears arbitrary, and, for that reason, it must be rescinded.

Special Award

In the arbitration, Mr. Asamoah claimed a special award with regard to State Farm's failure to pay him HK, IRBs and ACBs. Section 282(10) of the *Insurance Act* requires an Arbitrator to make a special award, in addition to awarding benefits and interest found to be owing, upon determining that an insurer has unreasonably withheld or delayed payments.

In his decision, the Arbitrator found that State Farm acted unreasonably in failing to reinstate ACBs and HK prior to Mr. Asamoah's surgery. The Arbitrator stated:

State Farm did act unreasonably in failing to reinstate housekeeping and home maintenance as well as attendant care benefits in the denial of same prior to and following the surgical intervention which I am satisfied rendered the Applicant significantly impaired and unable to work for a period of time.¹⁵

The Arbitrator did not explain why delay in payment of HK and ACBs was unreasonable, while delay in payment of IRBs was not. The Arbitrator then went on to rule that Mr. Asamoah was not entitled to a special award.

¹⁵At page 4

The language of section 282(10) leaves no room for discretion when an Arbitrator finds that payment of benefits has been unreasonably withheld or delayed. The section states that an Arbitrator “shall” make a special award. The Arbitrator’s decision to deny a special award therefore cannot stand, in view of his own findings.

Result:

In his written submissions Mr. Asamoah conceded that “[T]here can be no doubt that the Arbitrator made a significant number of reviewable errors at law, any one of which could potentially justify vacating the Decision, in toto”.¹⁶ He submitted that remitting the matter for re-hearing would be unfair because of the time already invested in the arbitration and the fact that the outcome for Mr. Asamoah remains uncertain. He requested that I decide the matter, based upon the documents filed.

While I sympathize with Mr. Asamoah’s concern for economy, I am unable to accept his submission. The Arbitrator did not make the necessary findings of fact and those facts are disputed. Deciding them will require a further assessment of Mr. Asamoah’s credibility. That is the function of Arbitrators, and not Appeals Officers. I have therefore concluded that the Arbitrator’s order must be rescinded where I have found errors, and the matter remitted for re-hearing by a different Arbitrator.

To summarize:

- The Arbitrator’s award of IRBs is upheld because he did not err in his finding of causation regarding the injury to the left shoulder, he engaged in the necessary pre-104 analysis and the only available conclusion was that Mr. Asamoah was entitled to the post-104 IRBs awarded
- There was no evidence supporting the Arbitrator’s decision to limit entitlement of IRBs to 3 months post-surgery and the issue of Mr. Asamoah’s further entitlement is therefore remitted for re-hearing

¹⁶Page 34, Paragraph 241, Submissions of the Appellant, Joseph Asamoah

- The issues of entitlement to ACBs, HK, Med/Rehab and Assessments or Examinations are remitted for re-hearing because the Arbitrator did not give adequate reasons
- The issues of entitlement to a special award is remitted for re-hearing because the Arbitrator's reasons are self-contradictory

IV. EXPENSES

The parties have enjoyed mixed success in this appeal. I urge them to bear this in mind in attempting to negotiate a settlement of the issue of entitlement to expenses. If they are unable to agree, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers
Director's Delegate

March 21, 2017
Date