Appeals P12-00042A and P12-00042C

OFFICE OF THE DIRECTOR OF ARBITRATIONS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
Appellant / Cross-Respondent

and

JIULIANA MORELLI
Respondent / Cross-Appellant

BEFORE:	Delegate Lawrence Blackman
REPRESENTATIVES:	Ms. Heather L. Kawaguchi and Courtney Madison for the Appellant/Cross-Respondent, State Farm Mutual Automobile Insurance Company Ms. Samia M. Alam for the Respondent/Cross-Appellant, Ms. Jiuliana Morelli
HEARING DATE:	September 10, 2013 Additional written submissions were received by September 30, 2013

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. State Farm's appeal is allowed, in part. State Farm shall pay for the reasonable fees and expenses of Ms. Morelli's September 27, 2007 catastrophic impairment determination rebuttal report, prepared by Assessnet, in an amount to be determined at a further arbitration hearing, plus interest.

2. Ms. Morelli's cross appeal is denied.

3. My March 8, 2013 stay of the Arbitrator's November 7, 2012 order regarding interest remains, subject to any further order of an adjudicator.

4. If the parties cannot agree on the legal appeal expenses, pursuant to Rule 79 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – January 2014), an expense hearing shall be requested, as set out below, within sixty days of the date of this decision.

March 21, 2014

Lawrence Blackman
Director's Delegate

Date

REASONS FOR DECISION

I. BACKGROUND

The Respondent/Cross-Appellant, Ms. Jiuliana Morelli, was injured in a January 29, 1997 motor vehicle accident. In his November 7, 2012 decision, Arbitrator Richards (the "Arbitrator") ordered that the Appellant/Cross-Respondent, State Farm Mutual Automobile Insurance Company ("State Farm"), pay Ms. Morelli $16,896.64, plus interest, for a September 27, 2007 catastrophic impairment ("CAT") determination report ("rebuttal report") prepared by Assessnet.

Ms. Morelli's rebuttal report was prepared in response to State Farm's Explanation of Benefits (OCF-9), dated March 19, 2007, that she had not sustained a catastrophic impairment as a result of the accident. The rebuttal report, in finding a whole person impairment rating of 44%, agreed that Ms. Morelli had not sustained a catastrophic impairment as a result of the accident.

Both parties appeal the Arbitrator's decision. State Farm argues, in part, that the Arbitrator erred in finding that Ms. Morelli had a reasonable explanation in not submitting her rebuttal report within the required time period under paragraph 42.1(3)3 of the *Schedule*.[1] Ms. Morelli cross-appeals that the Arbitrator erred, in part, in finding that the time period had been triggered at all.

In his decision, the Arbitrator found:

(1) Ms. Morelli submitted to State Farm an Application for Determination of Catastrophic Impairment (OCF-19), signed October 11, 2006.

(2) Consequently, State Farm had Ms. Morelli seen at an insurer's medical examination ("IME") by three medical examiners, Dr. D. Young, psychologist, Dr. B. Clark, physiatrist and Dr. J. Richman, an occupational medicine specialist.

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

(3) Subsection 40(4) of the *Schedule* provides that within five business days after receiving the IME report, the insurer shall give a copy of the report and the insurer's determination whether the insured's impairment is catastrophic to the insured person and the health practitioner who prepared the insured person's report. The Arbitrator found that State Farm gave Ms. Morelli a copy of its entire CAT determination report within the requisite time period. More specifically, he found:

(a) State Farm received Dr. Young's report February 2, 2007 and sent it to Ms. Morelli no later than March 31, 2007. State Farm did not send Dr. Young's report to Dr. Persi, the Clinical Director of Assessnet, who signed Ms. Morelli's Application for Determination of Catastrophic Impairment.

(b) State Farm received Dr. Clark's report March 6, 2007 and sent it to Dr. Persi March 7, 2007. The Arbitrator found that Ms. Morelli received Dr. Clark's report, but made no finding as to when.

(c) State Farm received Dr. Richman's report March 16, 2007. Ms. Morelli and Dr. Persi both received the report on March 19, 2007.

(4) The Arbitrator was not persuaded that subsection 40(4) required, when the IMEs are conducted separately, that the IME reports must all be sent at the same time.

(5) State Farm's examination consisted of all three separate IME reports. The Arbitrator found that State Farm was obliged to ensure that both Ms. Morelli and Dr. Persi received all three IME reports, as well as receiving State Farm's determination whether Ms. Morelli had sustained a catastrophic impairment. Where only some of the reports are provided, or a summary of several reports and a finding, the insured's health practitioner is unable to fully examine and dissect the IMEs and determine what to rebut.

The Arbitrator found that State Farm did not comply with subsection 40(4) because it did not send all of its CAT IME reports to Dr. Persi, having provided only Dr. Clark's assessment and Dr. Richman's executive summary.

(6) Subsection 40(4), however, did not appear to the Arbitrator to impose any consequences for an insurer's failure to comply with that provision. Subsection 40(8) of the *Schedule* did impose consequences for an insurer failing to provide a copy of a report or a determination, namely, payment of benefits, as specified. However, subsection 40(8) only mentioned sending the report or determination to the insured person. Given the harsh consequences under subsection 40(8) of non-compliance on an insurer, the Arbitrator found that by providing its report and determination to Ms. Morelli herself, State Farm "seems to have avoided any consequences from not complying with subsection 40(4)."

(7) State Farm gave Ms. Morelli a valid, clear and unequivocal CAT determination on March 19, 2007 that triggered the timeline within which she was required to complete and submit a rebuttal report to State Farm. Consistent with *Carbone and State Farm Mutual Automobile Insurance Company*, (FSCO P10-00008, December 20, 2010), there was no confusion that this determination was that of State Farm itself, rather than State Farm simply communicating the opinion of its IME assessors.

(8) Section 42.1 of the *Schedule* gives the insured person the right to be assessed by a health practitioner of his or her choice. Paragraph 42.1(3)3 requires that a rebuttal assessment be completed and forwarded to the insurer within 80 business days after the day the insurer gave the insured person a copy of its examination report and its determination. Ms. Morelli submitted her rebuttal report to State Farm on October 29, 2007 for payment. The rebuttal report was not submitted within the requisite time period.

(9) However, as provided for by subsection 31(1) of the *Schedule*, Ms. Morelli had a reasonable explanation for not complying with the 80 business-day time period.

Dr. Persi testified that although he did not receive the full IME report from State Farm, he arranged rebuttal reports based on Dr. Richman's executive summary and the assumption Ms. Morelli had received the full report. While State Farm chose not to use an occupational therapist ("OT") for its IME, the Arbitrator found that it was still open to Dr. Persi to arrange the assessments he believed most appropriate.

The Arbitrator found that Dr. Persi was entitled to use the OT with whom he was most comfortable and whom he thought most qualified. The OT Dr. Persi chose to conduct the examination had family issues that precluded her doing her assessment until August 2007.

Citing *Horvath and Allstate Insurance Company of Canada*, (FSCO A02-000482, June 9, 2003), the Arbitrator found that State Farm's prejudice in the circumstances did not outweigh the prejudice to Ms. Morelli should she have to pay for the rebuttal report, and it was equitable to relieve against the consequences of Ms. Morelli's failure to comply with the time limit. The Arbitrator found that Dr. Persi's failure to apprise State Farm of the delay should not disentitle Ms. Morelli from receiving payment for the rebuttal report.

(10) State Farm did not disclose the amount it paid its IME assessors. Nor did it submit an amount that would be more reasonable than the amount in dispute. Neither party presented evidence on industry standards for an appropriate cost for the rebuttal report. "Absent any compelling evidence to the contrary," the Arbitrator found that $16,896.64 a reasonable amount for four assessors to complete a comprehensive CAT assessment.

I dismiss Ms. Morelli's cross-appeal. I find no error in law with the Arbitrator's finding that the 80 business-day time line under paragraph 42.1(3)3 for a rebuttal report began to run on March 19, 2007 and that Ms. Morelli failed to meet this deadline, providing her rebuttal report on October 29, 2007, beyond the 80 business-day time line.

I also find no error in the Arbitrator's finding that Ms. Morelli had a reasonable explanation for not meeting that time line. I do find that the Arbitrator erred in law in reversing the onus of proof as to the reasonableness of the cost of the rebuttal report. I return that issue to arbitration for re-determination. I will now address in detail the two appeals, starting with that of Ms. Morelli.

II. MS. MORELLI'S CROSS-APPEAL

Ms. Morelli submits that the Arbitrator erred in finding that the paragraph 42.1(3)3 time line for a rebuttal report ever began to run, for the following reasons:

(1) The Arbitrator erred in excusing State Farm's non-compliance with its statutory obligations under subsection 40(4) of the *Schedule*

Subsection 40(4) states that, within five days of receiving the section 42 IME report, the insurer must give a copy of the report and its determination to the insured person and to the health practitioner who prepared the CAT application. Ms. Morelli argues that the Arbitrator erred in finding that State Farm could send its IME reports separately.

Ms. Morelli cites *July et al. v. Neal*, 1986 CanLII 149 (ON CA), that in interpreting insurance policies, "if there is doubt in the legislation establishing and governing the cover, and there are two possible interpretations of any aspect of the cover, the one more favourable to the insured should govern." Ms. Morelli's interpretation of subsection 40(4) is that State Farm was required to have waited until it received all three IME reports and then have sent them to her all at once.

Ms. Morelli argues that although she had already received the IME reports of Dr. Clark and Dr. Young, State Farm was obliged, when it sent her Dr. Richman's executive summary, to resend both prior IME reports. Because State Farm did not, the paragraph 42.1(3)3 time line for a rebuttal report never began to run. In any event, State Farm sent Dr. Richman's report (as well as that of Dr. Young) after the five-day time line, which also meant the paragraph 42.1(3)3 time line never started. Further, the Arbitrator's finding that State Farm did not send Dr. Young's IME report to Dr. Persi meant that the time line for a rebuttal report did not begin.

Paragraph 42.1(3)3 is not a limitation period for claiming benefits, such as the two-year limitation under section 51 of the *Schedule*. Rather, paragraph 42.1(3)3 provides a time line for an insured person to provide a rebuttal report. Paragraph 42.1(3)3 is subject to the subsection 31(1) reasonable explanation for non-compliance with the requisite time line. The section 51 limitation period, however, is specifically exempted from subsection 31(1) by subsection 31(2).

Paragraph 42.1(3)3 states, clearly and without ambiguity, that the 80 business-day time line for conducting the rebuttal examination and providing that report runs "after the day the insurer gave the insured person notice of its determination." Paragraph 42.1(3)3 does not incorporate as a prerequisite for the 80 business-day time limit running the additional subsection 40(4)

requirements that the insurer provide the IME report to the insured and the health practitioner who prepared the CAT application, as well as provide its determination to the health practitioner.

Ms. Morelli, extrapolating principles regarding the integrity of the *Schedule* from *Pintucci and Jevco Insurance Company*, (FSCO A97-000755, January 7, 1999) and *Sinnapu and Economical Mutual Insurance Company*, (FSCO A09-000900, October 16, 2009) (cases that pertain to different provisions of the *Schedule*), argues that an insurer's incomplete compliance with subsection 40(4) should be fatal to an insurer's reliance on the paragraph 42.1(3)3 time lines.

I am persuaded that an insurer's failure to comply with all of the requirements of subsection 40(4) is a criterion to be considered in determining whether an insured person has a reasonable explanation under subsection 31(1) in providing his or her rebuttal report late. State Farm argues that there was no evidence, nor was there any argument, that there was a correlation between Dr. Persi not receiving Dr. Young's report and the rebuttal report being late.

I am not persuaded that the paragraph 42.1(3)3 time line, contrary to its clear and unambiguous wording, begins to run only once an insurer has fully complied with all of its obligations under subsection 40(4).

(2) The Arbitrator erred in finding State Farm gave a clear and unequivocal determination under subsections 40(4) and (5) of the *Schedule*

Ms. Morelli argues that the paragraph 42.1(3)3 time line for a rebuttal report never began to run because the Arbitrator erred in finding that State Farm had provided a valid CAT determination under subsection 40(4) when neither Explanation of Benefits sent by State Farm enclosing Dr. Young or Dr. Clark's reports contained State Farm's determination.

This argument is contrary to Ms. Morelli's argument that State Farm could not send out any reports or make any determination until it had received all of its IME reports. In any event, I agree with State Farm that it could not make its determination until it received all three IME reports. I see no error in an insurer forwarding each IME report of a multi-disciplinary

assessment individually upon receipt accompanied, as in this case, by an Explanation of Benefits (OCF-9) stating that its determination would be made upon receipt of all of the IME reports.

Ms. Morelli also argues that the paragraph 42.1(3)3 time line for a rebuttal report never began to run because State Farm never gave a clear and unequivocal refusal, even after receiving Dr. Richman's executive summary. Ms. Morelli submits that State Farm simply rubber stamped its IME reports and restated its assessors' conclusions. Ms. Morelli argues that this is contrary to *Carbone* that noted the clear distinction between an IME report and an insurer's determination under subsection 40(4) of the *Schedule*.

I agree with State Farm that what is relevant in *Carbone* is that in that case the insurer provided the insured person only with its section 42 IME report, there being no evidence the insurer had, in addition, also provided its own determination of catastrophic impairment. For a limitation period to begin running, it must be clear that the insurer itself has made a determination.

In this case, State Farm provided its IME reports as well as providing its own separate March 19, 2007 OCF-9 determination that Ms. Morelli had not sustained a catastrophic impairment specifying as its reasons, as required by subsection 40(5), the findings of its IME reports. As stated by the Arbitrator, in this case there was no confusion that the determination was that of State Farm itself.

I am not persuaded the Arbitrator erred in law in finding that State Farm gave Ms. Morelli a valid, clear and unequivocal CAT determination on March 19, 2007 that triggered the timeline within which Ms. Morelli was required to complete and submit a rebuttal report to State Farm.

III. STATE FARM'S APPEAL

State Farm submits, at paragraph three of its initial written submissions, that it appeals the Arbitrator's order "with respect to his finding that [Ms. Morelli] provided a 'reasonable excuse' for the late submission of the rebuttal report, only." If unsuccessful in this regard, it submits that interest should not be payable as Ms. Morelli did not provide her explanation until the arbitration hearing. However, State Farm expanded its grounds of appeal, as follows.

1. The Arbitrator erred in allowing Ms. Morelli and Dr. Persi to testify

Rule 41.1 of the *Dispute Resolution Practice Code* (Fourth Edition – Updated August 2011) (the "*Code*") required that a party give thirty days' notice of the names of the witnesses it intended to call at the arbitration hearing. State Farm submits that the July 25, 2011 pre-hearing, the July 13, 2012 settlement discussion and its July 17, 2012 letter (one day before the arbitration hearing) confirmed that Ms. Morelli would not be calling any witnesses. State Farm submits that the Arbitrator erred in exercising his discretion to allow Ms. Morelli and Dr. Persi to testify, especially when Ms. Morelli gave no reason for not providing any advance notice.

State Farm relies upon *Amato and Wawanesa Mutual Insurance Company*, (FSCO A02-000161, August 17, 2006), where Arbitrator Miller waived the thirty-day time line for a party to request an expense hearing, State Farm states that *Amato* can be distinguished. I agree, and find the decision of little assistance in the particular circumstances of this case.

Ms. Morelli cites *Calogero and The Co-operators General Insurance Company*, (February 13, 1992, OIC P-000251), that the "principle, as generally understood, is one should only interfere in the discretion exercised by the trier of fact if it is so clearly wrong as to amount to an injustice (*Elsom v. Elsom*, [1989] 1 S.C.R. 1367) … it is not the Director's function to substitute her assessment for that of the arbitrator."

I agree with State Farm's own submission that section 23.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, gives an adjudicator the duty to control the arbitration process. Rule 81 of the *Code* allows an arbitrator to set aside any time limit, on such terms as the adjudicator considers just. Rule 41.3(b) of the *Code* allows an arbitrator to make such orders regarding witnesses as the arbitrator considers just.

The Arbitrator thus had the power to waive the thirty-day notice period. The Arbitrator, before deciding whether to allow the witnesses to testify, first asked State Farm if it had any suggestions should the witnesses be allowed and it was faced with something for which it did not have an opportunity to prepare. State Farm replied that it had not yet heard the oral evidence, but there

might be a substantial amount of additional documentation it might want that would substantially lengthen the hearing.

The Arbitrator, in ultimately deciding to allow the witnesses, stated that if issues arose that State Farm wished to address by calling other witnesses or getting further documents, it should advise. The Arbitrator specifically encouraged State Farm to make submissions regarding legal expenses should the hearing be lengthened. On appeal, State Farm stated it could see nothing in the transcript indicating it had requested an adjournment, nor was that its recollection. Nor was I referred to anything in the transcript where State Farm took up the Arbitrator's offer and provided a suggestion as to how it could properly address the oral evidence provided.

What the transcript does indicate is that after Ms. Morelli's examination-in-chief, State Farm asked for a couple of moments to look at its notes to see if there were other documents it might wish to put before the witness, which occurred. After Dr. Persi's examination-in-chief, State Farm asked for "two minutes to check something." The hearing, scheduled for two days, actually concluded in one. Written submissions were received over the course of the following month.

It is not my role to substitute my discretion for that of the Arbitrator. The Arbitrator's endeavour to take suggestions from State Farm as to how to remedy any prejudice regarding Ms. Morelli's late notice was either not required or was not taken advantage of by State Farm. Following *Elsom*, I am not persuaded that the Arbitrator's exercise of discretion amounted to an injustice and, hence, an error of law that would warrant setting aside the Arbitrator's order and sending the matter back for a new arbitration hearing on all issues.

2. The Arbitrator erred in accepting Dr. Persi's testimony

State Farm submits that the Arbitrator erred in accepting Dr. Persi's evidence when his evidence was not credible, he had no first hand or independent knowledge of the matters to which he testified and his evidence was almost entirely hearsay or based on presumptions made in the absence of corroborating evidence. State Farm argues that while hearsay is allowed in arbitrations, considerations of fairness, reliability and relevance underlying the rules must still inform an arbitrator's approach.

State Farm argues further that Dr. Persi was unable to give meaningful evidence as to why, when the OT had a family emergency that would delay the rebuttal report, a different OT was not retained to do the report within the prescribed time. State Farm argues that *Pembridge Insurance Company and Lesniak*, (FSCO P06-00021, December 20, 2007) "stands for the proposition that relying on a not credible witness is an error of law."

State Farm submits that while it may be a remedial option to send this matter back to arbitration for a re-hearing, it prefers that I review and assess the transcript evidence, make a finding that Dr. Persi's evidence should be given no weight and then substitute my exercise of discretion for that of the Arbitrator and dismiss Ms. Morelli's claim.

State Farm's reference to *Lesniak* is not what the adjudicator in that case found but, rather, what the insurer had argued. Delegate Makepeace, at page 11 of *Lesniak*, states that "it is trite law that an arbitrator's finding on credibility is deserving of the greatest deference on appeal." As cited by Ms. Morelli, *Sacco and Zurich Insurance Company*, (FSCO P96-00063, September 25, 1998) held that "[a]ssessing the reliability of evidence is a central aspect of the arbitrator's job."

The Arbitrator stated why he found it reasonable for Dr. Persi to wait for the availability of the OT he chose. That the OT's unavailability delayed the rebuttal report is consistent with the notation in the report that the other rebuttal assessors did their assessments in April 2007 while the OT's assessment was done in August 2007. It is not the appellate officer's role to assume the role of an adjudicator of first instance and reassess the weight that should be given to a witness' testimony. I am not persuaded the Arbitrator erred in law regarding Dr. Persi's testimony.

3. The Arbitrator erred regarding the limits of a rebuttal report

State Farm argues that the Arbitrator erred in failing to address whether Ms. Morelli complied with paragraph 42.1(3)(1) of the *Schedule* that limits the rebuttal report to the portions of the IMEs with which the insured does not agree. The rebuttal report consisted of reports of Mr. A. Koski, kinesiologist, Dr. A. Ghouse, physiatrist, Dr. R. Lough, psychiatrist, Ms. M. Bauer, O.T. and Dr. A. Persi, DC and clinic director. State Farm submits that the reports of Ms. Bauer and Mr. Koski did not respond to any particular IME assessment.

I find that the question of the limits of a rebuttal report go to the reasonableness of its cost rather than to the reasonableness of the explanation for it being late. I address this further below.

4. The Arbitrator erred in finding Ms. Morelli gave an explanation

State Farm argues that there is no dispute that the Arbitrator set out the correct test regarding the subsection 31(1) exception, if there was a reasonable explanation. Its dispute is that the Arbitrator incorrectly weighed the criteria and that there was insufficient evidence to make a finding that there was a reasonable explanation. More specifically, it argues:

(1) There was no evidence Ms. Morelli personally communicated an explanation to State Farm why the rebuttal report would be submitted late

State Farm concedes that it found no case law that mandates that the insured personally communicate the explanation. It relies on the general statements in *Syed and Allstate Insurance Company of Canada*, (FSCO A02-000461, February 14, 2003). In that case, Arbitrator Sapin held that the onus is on the insured person to establish a reasonable explanation for his or her delay, account for his or her behaviour and take responsibility for the advancement of his or her own case. It is insufficient that an insured person simply leaves everything to his or her agent.

State Farm argues that rather than account for her behaviour and take personal responsibility in advancing her case, Ms. Morelli testified that she left everything to her counsel. Although Ms. Morelli was aware of the time limit for a rebuttal report, the evidence was that she was not aware the OT assessment was being done late, or why. Mr. Boden, a State Farm claims representative, testified that there was no indication Ms. Morelli ever advised State Farm of her explanation why the report would be submitted after the requisite timeline.

State Farm submits that the Arbitrator erred in allowing the explanation to be from Ms. Morelli's medical assessor, Dr. Persi. This, it submits, is contrary to *Carbone* that held that a medical practitioner's opinion cannot substitute that of the insurer itself. A parallel argument, it submits, can be drawn that it was not enough for Dr. Persi to provide an explanation for the delay in submitting the report; the explanation must come from the insured herself.

I agree with Delegate Makepeace, in *Coseco Insurance Co./HB Group/Direct Protect and Novakovic*, (FSCO P05-00016, June 22, 2006), that the following principles govern the interpretation of the words "reasonable explanation" in subsection 31(1) of the *Schedule*:

- An explanation must be determined to be credible or worthy of belief before its reasonableness can be assessed.
- The onus is on the insured person to establish a "reasonable explanation."
- Ignorance of the law alone is not a "reasonable explanation."
- 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.
- The lack of prejudice to the insurer does not make an explanation automatically reasonable.
- 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.

State Farm concedes that the reasonable explanation required by subsection 31(1) of the *Schedule* is not limited to a personal failure of an insured, but can include someone upon whom the insured relied. Subsection 31(1) states that the insured must have a reasonable explanation. It does not require that the insured person personally communicate that explanation.

I find that whether the reasonable explanation is communicated by the actual insured person is a factor to be considered by the Arbitrator in determining, amongst other things, whether the explanation is credible or worthy of belief. In this particular case, the Arbitrator was not persuaded that the explanation being provided by Dr. Persi and not by Ms. Morelli herself made the explanation unreasonable or should disentitle Ms. Morelli from payment.

I am not persuaded that the insured person's personal communication of the explanation is a mandatory prerequisite under subsection 31(1). I rely on State Farm's own submission that "it is against the Rules of statutory interpretation to read into legislation words when the provision is clear and unequivocal." *Carbone* pertained to paragraph 42.1(3)3 of the *Schedule*, not subsection 31(1). Paragraph 42.1(3)3 specifically required the insurer itself to provide its determination rather than the insurer simply forwarding its IME report.

In any event, State Farm cites Delegate Makepeace in *Novakovic*:

> Coseco also challenges the arbitrator's application of these principles in this case. I agree with Mr. Novakovic that much of the insurer's argument relates to the arbitrator's assessment of the evidence, which is beyond the scope of the appeal.

I find that the same applies in this case.

(2) Ms. Morelli failed to communicate her explanation as soon as she or Dr. Persi knew of the delay or at least within a reasonable time

State Farm submits that the Arbitrator made a finding of fact that Dr. Persi never gave a reason for the delay before the arbitration hearing. State Farm concedes there is no case law directly supporting contemporaneousness as a mandatory prerequisite for section 31 to apply. However, it argues that the discoverability rule in *M. (K) v. M. (H)* [1992] 3 SCR 6, should apply. That case holds that a cause of action arises when the material facts on which it was based have been discovered or ought to have been discovered by reasonable diligence.

State Farm cites Arbitrator Ashby, in *Novakovic and Coseco Insurance Co./HB Group/Direct Protect* (FSCO A04-000733, February 22, 2005), "that the common law discoverability principle is subsumed by the reasonable explanation provisions of section 31." State Farm notes that in this case, Mr. Boden testified that State Farm first became aware of the rebuttal report on October 24, 2007 when it received an invoice. The explanation, however, was not provided to State Farm until the July 18, 2012 hearing.

When the explanation is communicated may relevant in determining whether the relief provided by subsection 31(1) should be provided. I am not persuaded that contemporaneousness is a mandatory prerequisite for subsection 31(1) to apply.

(3) Ms. Morelli failed to communicate her explanation in a clear and straightforward manner

State Farm submits that the Supreme Court's decision in *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. 129, regarding insurers' obligation to provide explanations

clearly and in a straightforward manner applies equally to insured persons.

Subsection 31(1) requires that the arbitrator be persuaded that the explanation is reasonable. The manner in which the explanation is communicated may be a factor in this determination. The Legislature has not mandated this as separate and distinct prerequisite to excuse an insured person's non-compliance with a time limit under Part X of the *Schedule*.

(4) There was insufficient evidence as to the reasonableness of the explanation

State Farm submits that Dr. Persi did not testify (a) when he first contacted the OT, (b) what was the nature of the family emergency, or (c) why the OT could not do the assessment for so long.

Subsection 283(1) of the *Insurance Act* restricts appeals from the order of an arbitrator to errors of law. *Lombardi and State Farm Mutual Automobile Insurance Company*, (FSCO P01-00022, February 26, 2003), held that a finding of fact made in the complete absence of supporting evidence is mere conjecture and amounts to an error of law. I am not persuaded the Arbitrator determined that the explanation was reasonable in the complete absence of supporting evidence.

(5) The Arbitrator erred in finding, contrary to *Horvath*, that the absence of prejudice to State Farm rendered the insured's explanation reasonable

State Farm submits that Arbitrator Evans, in *Liberty Mutual Insurance Company and Kaur*, (FSCO P99-00060, June 7, 2000), held that "[i]n the absence of a reasonable excuse, the lack of prejudice to the insurer is not a sufficient basis for extending the 30-day time limit."

In *Horvath*, Arbitrator Leitch found it would be inequitable and a hardship on Ms. Horvath not to provide her relief for not knowing something which the law did not require her to know. State Farm argues that in this case, Ms. Morelli was fully aware of the 80 business-day timeline, but took no steps to meet that time limit beyond leaving it to her lawyer. It also argues there is no hardship on Ms. Morelli because the delay was a result of her failure to advance her case.

State Farm submits that the Arbitrator's decision is contrary to *Syed*, that in the absence of a reasonable explanation, the lack of prejudice to the insurer is insufficient to extend a time limit.

Ms. Morelli agrees that the onus is on the insured person to establish a reasonable explanation for the delay. She cites Delegate Makepeace in *Novakovic* that subsection 31(1) allows some delays to be forgiven in the interest of promoting the consumer protection objectives of the *Schedule* and allowing a meritorious claim, notwithstanding it being submitted late.

Ms. Morelli notes *S.R. and State Farm Mutual Automobile Insurance Company*, (FSCO A09-002171, June 24, 2011), upheld in *State Farm Mutual Automobile Insurance Company and S.R.*, (FSCO P11-000018, February 8, 2012), application for judicial review dismissed, 2013 ONSC 2086 (CanLII). In that case, a 2-year, 5-month delay was balanced against the insured's claim for benefits. Ms. Morelli argues that the delay in this case, 68 days, was not significant enough to prejudice State Farm.

Ms. Morelli argues further that State Farm used her rebuttal report to bolster its position that she had not sustained a catastrophic impairment as a result of this accident. Ms. Morelli cites Arbitrator Leitch in *Horvath* that 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."

Dr. Persi, in examination-in-chief, at question 434 of the transcript, was asked why he did not have another OT do the assessment so that he could stay within the time lines. He answered:

> I think it's more important to have a good, valid report that was appropriate to the client and to what the client was presenting.

Dr. Persi further testified that "[t]here was a family issue that came up. She had a family member, from what I recall, that was ill or dying or something to that effect, and I think that interfered with her ability to do it, which is the reason that we let everybody know that there was going to be a delay in issuing the report."

The Arbitrator held:

> 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 …
>
> 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.

I am not persuaded that the Arbitrator simply held, contrary to *Horvath*, that the lack of prejudice to State Farm automatically made the explanation reasonable. Rather, the Arbitrator's assessment of reasonableness, consistent with *Horvath*, included a balancing of the prejudice to State Farm, hardship to Ms. Morelli and whether it was equitable to relieve against the consequences of the failure to comply with the paragraph 42.1(3)3 80 business-day time limit.

State Farm, regarding its own non-compliance with procedural requirements of the *Schedule*, cited Lederman J. in *Gray and Pilot Insurance Company* [2006] O.J. No. 2638, that errors will inevitably occur in insurers adhering to the requisite time lines. Whether they amount to mere procedural irregularities which should be relieved against, or matters of substance, must depend on the circumstances. The Arbitrator, in his determination of what was equitable, could also have considered State Farm's own non-compliance with its obligations under the *Schedule* as a factor. State Farm does not argue that the Arbitrator's failure to do so was an error of law.

Subsequent to oral submissions, the parties provided additional written submissions limited to the improper weighing of criteria, such as that set out in *Horvath*, as an error of law. In this

regard, State Farm cites Delegate Makepeace in *Truong and Lumbermens Mutual Casualty Company / Kemper Group*, (FSCO P03-00007, March 9, 2004), that "the test for error of law 'is whether the decision was based on a material finding of fact that was not supported by the evidence such that a reasonable tribunal acting judicially and properly directed in law could not have made the finding in question.'"

State Farm does not quote Delegate Makepeace's further comment that essentially what the appellant in *Truong* was asking her to do was "review the evidence he presented at arbitration and draw different factual conclusions from those of the Arbitrator." Delegate Makepeace's held that this "is not my role on appeal."

State Farm's additional submissions reiterate that the Arbitrator erred in not, regarding all of the applicable principles governing a "reasonable explanation," properly assessing evidence, or that there was a lack thereof. State Farm repeats that no explanation was given until the day of the arbitration hearing; Dr. Persi's evidence was not corroborated that the OT was actually not available to conduct the assessment within 80 business days; the explanation was given by the clinic director; Dr. Persi knew he only had 80 business days to conduct the assessment; there was no evidence of any hardship to Ms. Morelli should State Farm not be required to pay $16,896.64 for the rebuttal report plus interest which, at the time of my March 8, 2013 stay decision, was well over $40,000.

As stated by the Divisional Court in *State Farm Mutual Automobile Insurance Co. v. Movahedi*, [2001] O.J. No. 5099, not reciting all the evidence does not mean the arbitrator failed to consider it. The Arbitrator did specifically note it would have been best if State Farm had been apprised of the rebuttal assessments. He noted State Farm's argument that Dr. Persi did not give sufficient detail about why the OT was not available until mid-August 2007. He disagreed with State Farm, finding it would be a hardship should she be required to pay for the $16,896.64 rebuttal report.

Again, *Calogero and The Co-operators General Insurance Company*, (February 13, 1992, OIC P-000251), held that the "principle, as generally understood, is one should only interfere in the discretion exercised by the trier of fact if it is so clearly wrong as to amount to an injustice

(*Elsom v. Elsom*, [1989] 1 S.C.R. 1367) … it is not the Director's function to substitute her assessment for that of the arbitrator."

I am not persuaded that the Arbitrator's exercise of discretion in the application of whether there was a "reasonable explanation" under subsection 31(1) of the *Schedule* amounted to an injustice.

I am persuaded that my weighing *de novo* the criteria applicable to "reasonable explanation" and substituting my discretion for that of the Arbitrator is not my role on appeal and that doing so would be contrary to the Divisional Court decision in *Certas Direct Insurance Company v. Gonsalves*, 2011 ONSC 3986.

(d) The Arbitrator erred in finding the cost of the rebuttal report to be reasonable

State Farm argues that the Arbitrator erred in imposing a reverse onus on State Farm to disprove the reasonableness of the cost of the rebuttal report. It submits that the Auto Insurance Standard Invoice (OCF-21) submitted by Assessnet Inc. does not include a breakdown of time for each of its assessors. Nor did Ms. Morelli provide any details as to the time taken or fees or hourly rate charged by any of her assessors, or any other information that would assist in determining whether the amount claimed was reasonable. It was thus impossible for State Farm, or the Arbitrator, to determine whether the cost of the rebuttal report was indeed reasonable.

Ms. Morelli argues that because State Farm took the position the cost of the rebuttal report was unreasonable, it had the onus of proving its position. As the Arbitrator found that neither party provided any evidence regarding the reasonableness of the cost of the report, Ms. Morelli submits that State Farm failed to meet its onus, in:

1. Never asking for a breakdown of the rebuttal report or taking any steps to assess the reasonableness of the rebuttal report.
2. Failing to cross-examine Dr. Persi on the breakdown of the claimed expense.
3. Refusing to divulge what it paid its own assessors.

In the alternative, Ms. Morelli cites the Divisional Court in *Movahedi* that not reciting all the evidence does not mean the arbitrator failed to consider it. She also cites *Chung and Intact Insurance Company*, (FSCO A10-002750, July 11, 2012), that the "purpose of a rebuttal report then is to address any faulty logic or conclusions in an insurer's report." Ms. Morelli argues that Dr. Persi testified that four assessments were necessary in the rebuttal due to the complete disagreement with Dr. Richman's whole person impairment rating, and the fundamental differences between 1% and 44% assessed.

Paragraph 24(1)10 of the *Schedule* provides that the insurer shall pay reasonable fees and expenses in accordance with section 42.1 that are charged for an assessment or examination of the insured person and the preparation of a report of the assessment or examination. State Farm cites *Lionti and Security National Insurance Company c/o Monnex Insurance Management Inc.*, (FSCO A99-000823, December 27, 2000), that the onus of proof remains on the insured to prove the reasonableness of the fees and expenses on a balance of probabilities. I agree.

The Arbitrator found that neither side presented any evidence on industry standards for an appropriate cost for the rebuttal report and that, absent any compelling evidence to the contrary, the $16,896.64 was reasonable.

Respectfully, I find that the Arbitrator erred in law in reversing the onus of proof, finding $16,896.64 to be reasonable in the absence not of reciting all of the evidence, but in the absence of citing any evidence.

Accordingly, State Farm's appeal is allowed and the Arbitrator's order is rescinded, in part. State Farm shall pay for the reasonable fees and expenses of Ms. Morelli's September 27, 2007 catastrophic impairment determination rebuttal report, prepared by Assessnet, but in an amount to be determined at a further arbitration hearing. In addition, interest will be payable on the amount to be determined. My reasons for rejecting State Farm's submissions regarding interest are set out below.

My March 8, 2013 preliminary appeal order stayed the Arbitrator's November 7, 2012 interest order pending the resolution of these appeals, subject to any further or other order of an appellate

officer. I did not stay the Arbitrator's order that State Farm pay Ms. Morelli the principle amount of $16,896.64. The *status quo* shall remain pending the further arbitration determination of the reasonable fees and expenses of Ms. Morelli's September 27, 2007 catastrophic impairment determination rebuttal report that are to be paid. I specifically order, for clarification should it be necessary, that my March 8, 2013 stay of the Arbitrator's November 7, 2012 order regarding interest remains, subject to any further order of an adjudicator.

At this time, it is unknown what the ultimate arbitration award including interest may be, if any. Accordingly, I am not making any repayment order at this time regarding the principle amount of $16,896.64.

(e) The Arbitrator erred in awarding Ms. Morelli pre-judgment interest

State Farm cites Director Draper in *Economical Mutual Insurance Company and Trendle*, (OIC P96-000009, July 11, 1996), following his decision in *Bajic and Pafco Insurance Company Limited*, (P00-00050, June 5, 2001), that if the "insured person acts in a manner that effectively prevents the insurer from assessing her entitlement, interest may not run."

State Farm submits that the interest payable in this case now greatly exceeds the cost of the report itself. It argues that this is partly due to Ms. Morelli's delay in submitting her rebuttal report. State Farm submits that having to pay interest in the circumstances of this case is punitive, when the payment of interest is meant to be compensatory. In the alternative, State Farm argues that interest should only be payable from the date of the arbitration hearing or the date of the Arbitrator's decision.

Ms. Morelli cites Delegate Naylor in *Canadian Surety Company and Sebastian*, (FSCO P96-00032, July 28, 1998):

> In my view, the interest component in the benefits scheme should be seen as remedial. It is designed not only to compensate applicants for the value of money withheld but to further the system's fundamental goal of ensuring prompt payment of benefits for an injured person's medical and vocational rehabilitation, their care or their day-to-day financial support.

Ms. Morelli further argues that this case is distinguishable from *Trendle* where the insured submitted false invoices and incomplete or misleading information. She submits that interest is payable as of the date the OCF-21 invoice was submitted to State Farm, being October 24, 2007, because she provided a reasonable explanation for the delay in submitting her rebuttal report.

Both parties now agree that interest under the *Schedule* is payable to the insured and to not the service provider. I concur.

Subsection 46(1) of the *Schedule* provides that "[a]n amount payable in respect of a benefit is overdue if the insurer fails to pay the benefit within the time required under this Part." Subsection 41.1(9) states that "[a]mounts payable under this section shall be paid by the insurer within 30 days after receipt of an invoice for the amounts." The Arbitrator found that Ms. Morelli provided her rebuttal report to State Farm on October 29, 2007. If the invoice was provided that day, the rebuttal report would be payable by November 28, 2007.

Subsection 46(2) provides that "[i]f payment of a benefit under this Regulation is overdue, the insurer shall pay interest on the overdue amount for each day the amount is overdue from the date the amount became overdue at the rate of 2 per cent per month compounded monthly."
I find this provision clear and unequivocal. I again agree with State Farm's submission that "it is against the Rules of statutory interpretation to read into legislation words when the provision is clear and unequivocal."

This is consistent, as argued by Ms. Morelli, with the Court of Appeal decisions in *Attavar and Allstate Insurance Company of Canada*, 2003 CanLII 7430, and *Sorokin and The Wawanesa Mutual Insurance Company*, 2009 ONCA 152, that it is the insurer, not the insured, who must bear the consequences of its decision not to pay benefits later found to be owing.

It is also consistent with Ms. Morelli's argument that even when an insurer did not know the correct amount of the payment to be made until the court decision, it has been held, as in *Grigoroff v. Wawanesa Mutual Insurance Company*, 2012 ONSC 5313, that the insurer must still pay interest from the time the payment first became due.

Accordingly, this aspect of State Farm's appeal is rejected.

II. EXPENSES

If the parties cannot agree on legal appeal expenses, pursuant to Rule 79 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – January 2014), an expense hearing shall be requested within sixty days of the date of this decision. The request shall be accompanied by a Bill of Costs describing the expenses claimed, the services received and the costs, as well as submissions on such entitlement or quantum expense issues as are in dispute.

Lawrence Blackman Director's Delegate	March 21, 2014 Date