



FSCO A13-001352

BETWEEN:

DAVID JAZEY

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Arbitrator Knox M. Henry

Heard: In person at London, Ontario on June 9, 10, 11, and 13, 2014 followed by written submissions completed on July 30, August 12, September 2, 2014; oral submissions heard on September 4, 2014; written submissions received on September 22, September 29, and October 3, 2014

Appearances: Ms. Rasha El-Tawli and James D. Virtue for David Jazey
Ms. Viktoria Anteby for State Farm Insurance Company of Canada

Issues:

The Applicant, Mr. David Jazey, was injured in a motor vehicle accident on September 9, 2008. He applied for and received some statutory accident benefits from State Farm Mutual Automobile Insurance Company of Canada ("State Farm"), payable under the *Schedule*.¹ State Farm refused to pay other benefits sought by Mr. Jazey. The parties were unable to resolve their disputes through mediation and Mr. Jazey applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The issues in this Hearing are:

1. Is Mr. Jazey entitled to attendant care benefits in the amount of \$4,027.21 for attendant care services provided by Lauralee Bushan-Jazey and Dianne Jazey from October 20, 2009 to December 31, 2009?
2. Is Mr. Jazey entitled to receive the following medical and rehabilitation benefits pursuant to the *Schedule*:
 - a. \$15,931.90 for the purchase and installation of a hot tub, pursuant to an OCF-18 prepared by Elizabeth Fox, dated January 24, 2011;
 - b. \$1,500.64 and ongoing incurred sums for massage therapy pursuant to an OCF-18 dated February 14, 2012, prepared by Amy Buffone, subject to a deduction for Mr. Jazey's wife's workplace extended health benefit plan;
 - c. \$1,008.70 representing the outstanding balance for psychological counseling, pursuant to an OCF-18 dated November 30, 2011, prepared by Dr. Jeffery McKillop; and
 - d. \$38,176.10 for occupational therapy treatment and the current cost of ergonomic equipment pursuant to an OCF-18 dated May 26, 2011, and prepared by Nancy Gowan, Occupational Therapist ("OT")?
3. Is Mr. Jazey entitled to interest for the overdue payment of benefits pursuant to s. 46(2) of the *Schedule*?
4. Is State Farm liable to pay a special award pursuant to s. 282(10) of the *Insurance Act*² because it unreasonably withheld or delayed payments to Mr. Jazey?
5. Is State Farm liable to pay Mr. Jazey's expenses in respect of this arbitration?

Result:

1. Mr. Jazey is entitled to attendant care benefits in the amount of \$4,027.21 for attendant care services provided by Lauralee Bushan-Jazey and Dianne Jazey from October 20, 2009 to December 31, 2009.

² *The Insurance Act* – Part V, R.S.O. 1990, c. I.8.

2. Mr. Jazey is entitled to receive the following medical and rehabilitation benefits pursuant to the *Schedule*:
 - a. \$15,931.90 for purchase and installation of a hot tub, pursuant to an OCF-18 prepared by Elizabeth Fox, dated January 24, 2011;
 - b. \$1,500.64 and ongoing incurred sums for massage therapy pursuant to an OCF-18 dated February 14, 2012, prepared by Amy Buffone, subject to a deduction for Mr. Jazey's wife's workplace extended health benefit plan;
 - c. \$1,008.70 representing the outstanding balance for psychological counseling, pursuant to an OCF-18 dated November 30, 2011, prepared by Dr. Jeffery McKillop; and
 - d. \$38,176.10 for occupational therapy treatment and the current cost of ergonomic equipment pursuant to an OCF-18 dated May 26, 2011, and prepared by Nancy Gowan, OT.
3. Mr. Jazey is entitled to interest for the overdue payment of benefits pursuant to s. 46(2) of the *Schedule*.
4. State Farm is liable to pay a special award in the amount of \$32,852.07, pursuant to s. 282(10) of the *Insurance Act* because it unreasonably withheld or delayed payments to Mr. Jazey.
5. State Farm is liable to pay Mr. Jazey's expenses in respect of this arbitration.

EVIDENCE AND ANALYSIS:

Factual Background

On the morning of September 9, 2008, Mr. Jazey was stopped at a red light on Commissioners Road West in London, Ontario, when his vehicle was rear-ended in a chain-reaction accident ("the accident"). The vehicle that was following two cars behind him had failed to notice and stop for the red light and subsequently collided with the rear of the vehicle ahead of it and directly behind Mr. Jazey. The force of this collision caused the vehicle that was immediately behind Mr. Jazey to collide violently with the rear of Mr. Jazey's vehicle. The at-fault vehicle suffered extensive damage and its driver was transported to hospital by ambulance.

The severity of the impact on the rear of Mr. Jazey's vehicle caused him to be thrown forward and then backwards, in spite of the fact that he was wearing his seatbelt.

The Hearing:

The following individuals appeared as witnesses on behalf of Mr. Jazey:

- David Waleed Jazey (Applicant)
- Dr. Keith Ashley John Siqueira
- Nancy Jane Gowan
- Amy Buffone
- Lauralee Bushan-Jazey
- Catharine Elizabeth Fox
- Margaret Dianne Jazey
- Dr. Christopher Stewart Bailey
- Dr. Jeffery Michael McKillop

State Farm did not present any witnesses.

The Evidence of Mr. Jazey:

Mr. Jazey's Medical Condition before the Accident:

Mr. Jazey testified that prior to this September 9, 2008 accident, he was a successful, self-employed manufacturer of custom jewelry pieces that were primarily made from gold and gems. He has operated Jazey Custom Jewellery for some 20 years and had built an excellent reputation for designing and creating custom engagement and wedding rings, wax carvings, complex stone settings as well as undertaking jewelry repair work. He thoroughly enjoyed his work and thought nothing of spending 12 hours a day or more at his workbench. He has a couple of rooms in his home that are devoted to his business.

He and his wife, Lauralee Bushan-Jazey have two children – a daughter, now age 20, and a son, now age 15. Mr. Jazey was very active with his family. As a very close-knit family they eagerly went on trips and participated in various athletic activities, including regular trips to Canada's Wonderland where they rode the large roller coasters as well as other 'thrill' rides. He testified

that he considered himself to be the primary caregiver for his children and willingly undertook at least half of the regular household chores. Their home is on a one-half acre lot with a long driveway on which 17 cars can be easily parked. He was responsible for lawn maintenance in the summer months. During the winter months, he kept the snow cleared from their driveway.

Mr. Jazey testified that prior to the accident, he had no serious medical injuries, issues, or limitations. He considered himself a very healthy 42-year-old at the time of the accident. He admitted that in April 7, 2004, he had an x-ray done on of his cervical spine that revealed, according to Dr. W. Paul Bates, his physician, degenerative spinal stenosis, which Dr. Bates opined was entirely normal degenerative arthritic changes in his spine caused by the normal aging process and which was quite common in a significant percentage of men his age.

In the three years prior to the accident, Mr. Jazey stated that he had no complaints of neck, shoulder, or back pain. However, under cross-examination, Dr. Bates admitted that his clinical notes indicated that prior to the accident, Mr. Jazey was taking Ibuprofen and Clonazepam. Dr. Bates' clinical notes, dated March 22, 2007, indicated that Mr. Jazey was complaining of neck stiffness and difficulties with his range of motion.³

Mr. Jazey's Medical Condition after the Accident of September 9, 2008 and Subsequent Events:

Following the accident, Mr. Jazey was able to exit his vehicle without assistance. He testified that he felt some pain in his neck and muscles in his neck and shoulder area. Within a few hours of the accident, he went to see Dr. Bates as he was suffering from stiffness and pain in the neck. Dr. Bates prescribed some anti-inflammatories and referred him for some physiotherapy. However, neither treatment was successful in reducing the pain and stiffness. Over the next few weeks and months, his condition progressively deteriorated and he was suffering from a variety of post-accident symptoms, including:

- neck and shoulder pain;
- numbness and tingling in his fingers and hands;

³ Exhibit 4A, p. 183.

- bladder dysfunction;
- bowel incontinence;
- weakness and a lack of co-ordination of his right leg with frequent tripping and a dragging right foot;
- erectile and sexual dysfunction;
- head protrusion; and
- exhaustion.

These conditions severely affected his ability to function in several areas of his life, including:

- his competence as a goldsmith and gem setter, with a resulting decrease in his income;
- the interaction with his family and friends;
- fostering his relationship with his children;
- performing household chores and outside property maintenance;
- being intimate with his wife;
- his running, exercising, sports activities; and
- travelling.

On December 11, 2008, an MRI of the cervical spine area of Mr. Jazey's neck was performed at the St. Joseph's Health Care Centre in London. This MRI revealed a large right-sided disc protrusion at C6-C7 and broad-based disc bulging at C4-C5 with spinal stenosis and significant narrowing of both foramen (nerve openings in the spinal column). While at the time, the MRI also revealed compression and interference of the spinal cord, this was not initially noticed until later observed by his orthopedic surgeon.

As a result, Mr. Jazey was referred to Dr. Christopher Bailey, an orthopedic surgeon, who specializes in spinal cord injuries.

Dr. Bailey testified that he saw Mr. Jazey on June 16, 2009 and diagnosed a spinal cord injury with disc herniation between C4-C5 and C6-C7. He determined that there was root compression and spinal cord enrichment (swelling) which was causing cervical myelopathy and radiculopathy – a condition not initially noticed on the examination of the December 11, 2008 MRI. Because of the severity of the injuries, Mr. Jazey was placed on an urgent patient list for surgery as Dr. Bailey was very concerned that Dr. Jazey's condition would continue to deteriorate very rapidly.

On October 16, 2009, Dr. Bailey operated on Mr. Jazey, performing an anterior cervical decompression at C4-C5 and C6-C7. He also performed some bone grafting and fusion, using segments of bone from Mr. Jazey's hip. The procedure was completed using various hardware, plates, and screws.

Dr. Bailey considered the surgery a success as it removed Mr. Jazey's spinal stenosis and relieved the pressure on his spinal cord, thereby reducing the progression of the myelopathy.

Post-Operative Events:

On October 20, 2009, Mr. Jazey was discharged from the hospital and returned home under the care of his wife Lauralee Bushan-Jazey and his mother, Dianne Jazey. In spite of extensive rehabilitation therapy and other modalities, Mr. Jazey has not been able to return to the level of activity both in his business and home life that he enjoyed prior to the accident. State Farm has provided some accident benefits but has not agreed to provide benefits as outlined above in the list of issues.

It was Mr. Jazey's testimony that since his recovery from the neck surgery and in spite of his vigorous rehabilitation treatments, he is still unable to work the long 12-hour days that he regularly worked before the accident.

He testified that he has been undergoing physiotherapy, an exercise regime including stretching, massage therapy, using the hot tub daily, Botox injections, psychological counselling, occupational therapy, utilization of a massaging chair, some acupuncture, Pilates and yoga, medications for his erectile dysfunction, and pain medication. In spite of these activities, he still suffers from constant pain in his arms and shoulders, tension headaches and migraines. His ability to manipulate his work instruments has been severely compromised due to the deterioration in his fine motor skills and the tingling, numbness, and reduced strength in his hands and fingers. He lacks his pre-accident stamina and energy. He suffers from disturbed sleep. He testified that his custom jewelry and goldsmith work has suffered due to his lack of dexterity and the weakness in

his hands. This has had a severe negative impact on his income and relations with his customers. Presently he is earning less than 50% of his pre-accident income.

Attendant Care Benefits:

The *Schedule* states in sections:

16. (1) The Insurer shall pay an insured person who sustains an impairment as a result of an accident an attendant care benefit.

...

(2) The attendant care benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for,

- (a) services provided by an aide or attendant;

...

(4) The monthly amount payable by the attendant care benefit shall be determined in accordance with Form 1.

(5) The amount of the attendant care benefit payable in respect of an insured person shall not exceed the amount determined under the following rules:

...

2. If the accident occurred on or after October 1, 2003 and the optional medical, rehabilitation and attendant care benefit referred to in section 27 has not been purchased and does not apply to the insured person, the amount of the attendant care benefit payable in respect of the insured person shall not exceed,

i. \$3,000 per month, if the insured person did not sustain a catastrophic impairment as a result of the accident, or

ii. \$6,000 per month, if the insured person sustained a catastrophic impairment as a result of the accident.

Mr. Jazey is seeking attendant care benefits in the amount of \$4,027.21 for attendant care services provided by his wife (Lauralee Bushan-Jazey) and his mother (Dianne Jazey) from October 20, 2009 to December 31, 2009.

The uncontested evidence of Lauralee Bushan-Jazey and Dianne Jazey stated that Mr. Jazey required constant care in the weeks following the surgery on his neck. He spent the majority of his days in a rented lift chair that had been paid for by State Farm. He required assistance in nearly all aspects of his everyday life, including:

- mobility around the home;
- the preparation and eating of his meals, the latter being a significant risk of choking on his food and thus needing constant attention;
- going to the bathroom and maintaining all personal hygiene;
- dressing and undressing;
- the installation, removal and cleaning of the cervical neck collar;
- even such seemingly simple activities such as re-adjusting himself in the lift chair;
- scheduling and driving to medical and rehabilitation appointments; and
- administering and monitoring medications.

Both his wife and mother testified that in the first two to three weeks following his surgery, Mr. Jazey needed everything done for him as he was heavily medicated and immobile. It was not until November 16, 2009 that Mr. Jazey began the process of gradually weaning away from the neck collar. They both testified that from October 20, 2009 until December 31, 2009, they were providing attendant care 24 hours a day, seven days a week. Dianne Jazey would arrive at her son's home at about 7:30 each morning and look after Mr. Jazey until approximately 4:30 in the afternoon, when Lauralee Bushan-Jazey returned home from her office and "handled the night shift".

Mr. Jazey testified that the Community Care Access Centre ("CCAC") also provided 30 minutes' care each day for the first two weeks after he came home, then once a week until the end of December 2009. During that time, the attendant from CCAC assisted by cleaning his wound, changing his bandages, washing the areas around his neck collar, and assisting him with bathing once per week.

On January 4, 2010, Mr. Jazey saw Dr. Bailey for a follow-up examination. Mr. Jazey testified that at that time he was still requiring attendant-care assistance.

Ms. Nancy Gowan, Occupational Therapist ("OT"), prepared and submitted a retroactive attendant care assessment report dated May 30, 2011 for the attendant care services that Lauralee Bushan-Jazey and Dianne Jazey had provided to Mr. Jazey for the period of October 20, 2009 through December 31, 2009. She testified that she had completed assessments with Mr. Jazey on May 26, 2011 and May 30, 2011; reviewed the Ontario Society of Occupational Therapists

retroactive attendant care guidelines; reviewed Mr. Jazey's medical records and his discharge reports; interviewed both Lauralee Bushan-Jazey and Dianne Jazey; reviewed the functional limitations and restrictions provided in Dr. Bailey's reports; and used her experience in attendant care in terms of what is reasonable and necessary given these kinds of functional difficulties. Ms. Gowan submitted three OCF-6 forms⁴ to State Farm for three distinct time periods between October 20, 2009 and December 31, 2009. She testified that these Form 1s were an estimation of the attendant care required by Mr. Jazey. She pointed out that she did not assess his needs after December 31, 2009 as that was the date that CCAC was discharged of their responsibilities to assist Mr. Jazey. However, she did opine that the amounts she assessed were probably an underestimation and probably should have been higher but she was not personally involved during the time immediately following his surgery and, furthermore, Mr. Jazey's wife and mother did not keep accurate records of the time during which they assisted Mr. Jazey.

The three OCF-6s were:

1. October 20 - November 10, 2009 -- \$6,466.00 per month – 10,071 minutes/week (\$3,000.00 – being the maximum monthly amount claimable in a non-catastrophic case);
2. November 11 - 17, 2009 -- \$874.92/month – 1,154 minutes/week (\$204.02);
3. November 18 - December 32, 2009 -- \$561.00/month – 753 minutes/week (\$823.09).

This represents a total claim for Attendant Care Benefits due to Mr. Jazey of \$4,021.21.

Dr. Bailey testified that Mr. Jazey would require constant attendant care for several weeks due to his severely restricted capabilities and he would not be able to manage without assistance.

Mr. Jazey's counsel brought to my attention a decision released by FSCO on August 7, 2014 (*Kelly v. Guarantee Company of North America*).⁵ This was in response to State Farm's assertion in this matter before me, that a Form 1 must be submitted to an Insurer before the Insurer is responsible for any Attendant Care Benefits.

⁴ Expense Claim Form.

⁵ *Kelly v. Guarantee Company of North America*, FSCO Decision A12-006663, August 7, 2014.

Mr. Jazey submitted that a Form 1 for Attendant Care Benefits need not be submitted to an Insurer before he incurred attendant care expenses. He submitted that the evidence submitted to State Farm prior to its receipt of the Form 1 reflected the assessment contained in the Form 1 that was prepared and issued by Ms. Gowan.

State Farm submits that a valid Form 1 is a prerequisite for the payment of Attendant Care Benefits and referred me to section 39(1) of the *Schedule*. State Farm agrees that the failure of an Applicant to forward a Form 1 to the Insurer before the attendant care services are provided is not a complete bar to retroactively claiming attendant care. The substance of the matter before me is whether Mr. Jazey has led sufficient evidence for me to make a retroactive determination in favour of Mr. Jazey's wife and mother receiving attendant care money for the services they provided and expenses incurred.

State Farm submitted that Mr. Jazey must qualify and quantify the amount sought in attendant care benefits. I was referred to the decision of Arbitrator Bayefsky in *T.N. v. The Personal*.⁶ State Farm submits that Mr. Jazey failed to lead any credible evidence or even a basic calculation to support his claim, and provided no reasonable explanation for the delay and complete non-compliance with the provisions of the *Schedule*, despite having the benefit of legal counsel. Mr. Jazey had failed to produce for State Farm the Community Care Access Centre file which had been requested of Mr. Jazey by State Farm only three weeks before this Arbitration Hearing. State Farm submitted that Mr. Jazey was in non-compliance with the production order made at the Pre-hearing Discussion. Further, Ms. Gowan had admitted that she had no specific notes, receipts or invoices that could be provided outlining the specific frequency and duration of the services provided by Mr. Jazey's wife and mother. Thus, State Farm submits that the retroactive Form 1 prepared by Ms. Gowan fails to satisfy the criteria to qualify and quantify the amount sought in Attendant Care Benefits as established in *T.N.* and upheld in *Kelly*.

Upon reading *T.N.* and *Kelly*, and section 39(1) of the *Schedule*, which states:

⁶ *T.N. v. The Personal*, (FSCO A6-0003999), July 26, 2012 at Tab 9, p. 24.

“An application for attendant care benefits for an insured person must be in the form of an assessment of attendant care needs for the insured person that is prepared and submitted to the insurer by a member of a health profession who is authorized by law to treat the person’s impairment.”

I find there is no requirement in the *Schedule* stipulating that an application for Attendant Care Benefits must be submitted to an Insurer before an insured can incur any Attendant Care Benefits. I do find a requirement that a Form 1 must be submitted to an Insurer before the Insurer is liable to pay any Attendant Care Benefits. Arbitrator Wilson stated in *Kelly*, “this is not one of those abusive cases where an unscrupulous insured attempts to maximize accident benefits with a dubious attendant care claim.” I find that statement applies in this matter as well. While there was a lack of definitive evidence by Ms. Gowan as to the specific frequency and duration of the attendant care services provided by Mr. Jazey’s wife and mother, the medical evidence supports her report to be credible and un-contradicted. I find that Mr. Jazey’s wife and mother cannot be penalized for not diarizing what care they provided to Mr. Jazey. State Farm did not provide me with any regulatory or legal requirement that detailed notes must be kept of what care was provided. Further, State Farm did not obtain and provide its own experts’ opinion to indicate that the Attendant Care Benefits sought by Mr. Jazey were unreasonable. State Farm had already paid for assistive devices which Mr. Jazey required for mobility and safety after his operation, yet it denied the requested Attendant Care Benefits. I find this contradiction in State Farm’s actions unfathomable.

In summary, I find that the Attendant Care Benefits sought by Mr. Jazey in the amount of \$4,027.21 are reasonable and necessary and should be paid by State Farm, subject to a deduction for Mr. Jazey’s wife’s workplace extended health benefit plan.

Occupational Therapy and Ergonomic Equipment:

The following sections of the *Schedule* are relevant:

2. (1) “Impairment” means a loss or abnormality of a psychological, physiological or anatomical structure or function;

- 14. (1)** The insurer shall pay an insured person who sustains an impairment as a result of an accident a medical benefit.
- (2)** The medical benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured as a result of the accident.
- 15. (1)** The insurer shall pay to an insured person who sustains an impairment as a result of an accident a rehabilitation benefit.
- (2)** The rehabilitation benefits shall pay for all reasonable and necessary measures undertaken by an insured person to reduce or eliminate the effects of any disability resulting from the impairment or to facilitate the insured person's reintegration into his or her family, the rest of society and the labour market.
- (3)** Measures to reintegrate an insured person into the labour market include measures that are reasonable and necessary to,
- (a)** engage in employment that is as similar as possible to employment in which he or she engaged in before the accident; or
 - (b)** lead as normal a work life as possible.
- (4)** In determining whether a measure is reasonable and necessary for the purpose of subsection (3), the insurer shall consider the insured person's personal and vocational characteristics.
- (5)** The rehabilitation benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of the accident for a purpose referred to in subsection (2) for . . .

Mr. Jazey seeks entitlement to \$38,176.10 for occupational therapy treatment and the current cost of ergonomic equipment pursuant to an OCF-18 dated May 26, 2011, and prepared by Ms. Nancy Gowan, OT.

Mr. Jazey testified that Ms. Kathleen Woodington, an occupational therapist, had visited his home in an effort to prepare some general recommendations regarding his office ergonomics, with the objective of enabling him to work more effectively given his limited mobility. Unfortunately, Ms. Woodington was herself suffering from some health issues and her work and recommendations were never completed.

Mr. Jazey testified that prior to the accident and his operation, he considered his work environment – his jewelry manufacturing bench and equipment, etc. – satisfactory for the past 20 years. However, since the accident and the operation, he finds that his work environment is now a “hindrance and is painful”. He admits that his work area set-up is far from optimal but, in the past, because of his physical stamina, he was able to spend extremely long hours at his workbench as a goldsmith, jewelry designer, and manufacturer.

He testified that prior to his accident, he undertook and completed all of the work that was available to him, rarely having to subcontract any work to other manufacturers. Many tasks that were previously routine are now difficult and often impossible. He now finds that he must subcontract much of the custom work that is offered to him to outside shops for completion.

Mr. Jazey testified that this subcontracting of work has severely reduced his income. He finds that the quality of the work that has been subcontracted to others is often not up to his standards or that of his clients. This is having a negative impact upon the loyalty of, and repeat business from, his clients.

Mr. Jazey testified that Ms. Elizabeth Fox had referred him to Ms. Nancy Gowan, an occupational therapist. State Farm agreed to pay for Ms. Gowan’s investigation and assessment of Mr. Jazey’s occupational needs.

Ms. Nancy Gowan is an OT and an expert in ergonomic assessments. She conducted an initial assessment of Mr. Jazey on February 17, 2011. In her first report, Ms. Gowan opined that there was enough of an ergonomic risk to Mr. Jazey to necessitate recommendations to reduce pain and allow him to increase his work capacity. State Farm appeared to accept her recommendations and subsequently agreed to fund Ms. Gowan to complete a more intensive assessment. This second assessment investigation – on which Ms. Gowan testified that she spent some 20 hours over several weeks – resulted in Ms. Gowan submitting a report to State Farm on May 26, 2011, in which Ms. Gowan made the following recommendations for Mr. Jazey’s office and workshop:

1. purchase and install a regular computer desk with a right-side return;

2. purchase a binder holder to maintain all catalogs in an upright position;
3. purchase an adjustable single microscope hanger;
4. purchase and install a new workbench with an electrically-adjustable height control;
5. purchase and install a customized modified ergonomic polishing workbench;
6. purchase and install a polishing hood;
7. purchase and install an ergonomic chair to be used at Mr. Jazey's jeweller's workbench;
8. purchase a jeweler's chair for use away from the workbench;
9. purchase a mantis elite microscope to use without bending his head forward;
10. purchase a milligrain machine;
11. purchase a double 3rd Hand Solder Station;
12. purchase a benchmate tool to be used for gripping or holding jewelry items;
13. purchase an insulated solder clamp;
14. purchase a ring-bending tool; and
15. purchase specialized jewelry pliers.

State Farm denied Ms. Gowan's treatment plan for the occupational therapy and ergonomic equipment on July 1, 2011. In its documentation, State Farm provided a report by Ms. Leslie Hisey, an occupational therapist who had conducted an Insurer's examination to determine the reasonableness of Ms. Gowan's occupational therapy and ergonomic treatment plan. The evidence indicated that that Ms. Hisey reviewed an incomplete list of medical records and apparently spent slightly over an hour undertaking her assessment.⁷ In her conclusion, she stated that there is little medical evidence to confirm the etiology (the cause) of any motor vehicle accident-related neurological impairments. She opined that she needed greater confirmation of any link between the accident and the alleged impairments. However, State Farm did not bring Ms. Hisey as a witness to elucidate about what information she felt was lacking.

Following up on Ms. Hisey's request, Dr. Andrew Kertesz, a neurologist, completed an Insurer's assessment in October 2011 for State Farm, in which he concluded:

His condition is likely related to pre-existing cervical spondylosis, which became symptomatic after the accident.

...

⁷ Exhibit 4D, Tab 11B.

The abnormalities on the MRI are related to pre-existing, documented cervical spondylosis. It is unlikely that a minor rear-end collision would produce such abnormalities. The fact that he became symptomatic after the MVA suggests some contribution but not causation by the whiplash.

...

No, from the neurological point of view the Treatment and Assessment Plan dated May 26, 2011 for \$26,628.75 is not consistent with the impairment or the severity of Jazey's injury sustained in the subject accident. It is unlikely that such an extensive purchase of equipment and occupational therapy intervention 3 years after a minor accident, and 2 years after neck fusion would be improving his neurological status and it is not required from a neurological point of view.

I find Dr. Kertesz's opinion unsubstantiated. He was not present at the Hearing to explain why he should be considered as an expert in the implications of motor vehicle accident injuries upon an individual's body.

Ms. Gowan testified that she reassessed Mr. Jazey's workplace needs in April 2014. She updated her recommendations and costings and presented a comparative chart detailing the difference in price between 2011 and the current cost of these items as assessed in 2014, which indicated that the total current cost for the denied ergonomic treatment plan recommendations is now \$38,176.10 (plus shipping and handling).⁸ At the commencement of the Arbitration Hearing, I made an order allowing Mr. Jazey to claim the increased current cost of the ergonomic equipment and interventions.

Ms. Gowan testified that she found Mr. Jazey had invested his own money to purchase the benchmate and a Fordham drill and noted that these two tools had provided a positive improvement on his posture and ergonomic set-up.

Ms. Gowan opined that the ergonomic recommendation she had made for Mr. Jazey's home and workplace were both reasonable and necessary to permit him to enjoy increased independence and

⁸ Exhibit 9, Ergonomic Cost Comparisons.

thereby enhance his feeling of well-being, to increase his workplace functioning and, all in all, to facilitate a return to as close as possible to his pre-accident level of functioning.

She testified that she had considered multiple options for each of the recommendations made for his office and workshop needs. The proposed expenses that she recommended represented the average cost of each item and all were considered moderately-priced items necessary for accommodating his needs.

Mr. Jazey testified that he was pleased with the insights and assessment contained in Ms. Gowan's Occupational Therapy Ergonomic Assessment Report dated May 26, 2011. He opined that the recommended changes to his workplace layout would undoubtedly reduce the muscle weakness that ensues as he usually worked in a bent-over position. Her recommendations would mean that he would be working in a more upright position, not required to bend over a microscope and thereby maintain more strength and endurance, and thus allowing him to return closer to his pre-accident working hours. Furthermore, the tools recommended by Ms. Gowan will provide him with a greater opportunity to complete his work independently and to subcontract out less work as he will not have to use as much sheer strength and determination to complete a task. As he stated, he will work smarter, with a less impact on his body and have less pain after a day's work. He explained that the devices recommended are meant to off-load stress and pressure on his body.

Mr. Jazey stated that he has already invested some of his own money into purchasing the benchmate tool and a Fordham drill. He has found that the benchmate tool allows him to utilize a looser grip in his left hand which has reduced the cramping in that hand. The Fordham drill has assisted by reducing the pressure required for certain tasks.

Mr. Jazey testified that since the accident and his operation, he has experienced difficulties in performing the usual maintenance chores around the home that he previously undertook. He was solely responsible for lawn maintenance and clearing the snow from their long driveway.

Since the accident, the lawn care maintenance, especially grass cutting, has been undertaken, as much is possible, by his wife and children although some of those tasks they find difficult to

perform. He has contracted out snow removal since the winter of 2009 and he testified that State Farm has paid for the snow removal expenses for 2009 through 2012.

However, in 2013, the Jazeys personally paid to have their laneway cleared of snow for the winter, but this turned out to be a source of many problems. Mr. Jazey testified that the area in which he lives is considered a snowbelt and thus snow removal on a timely basis is critical to allow his wife to leave for work; his children to get to school; and clients to come to his home business. However, the independent snow removal contractor often would not arrive until mid-afternoon; and on several occasions, was absent for days during storms; and caused significant damage to their garage and surrounding garden.

Mr. Jazey would prefer, and is eager, to return to clearing the snow himself and doing the lawn maintenance. On the recommendation of Ms. Gowan, he investigated various machines and determined that a John Deere garden tractor with a snow removal attachment and lawnmower attachment would enable him to resume grass cutting and snow removal. He stated that he finds that using his small hand mower and small snow-blower is impossible due to the painful vibration each unit causes in his arms, shoulders and neck.

In response to questions about snow removal and lawn maintenance, Dr. Siqueira testified that Mr. Jazey requires assistance in these areas and supported Ms. Gowan's recommendation included in her OCF-18 dated May 26, 2011, for a riding-tractor with snow-removal and lawn-mowing attachments.

Dr. Siqueira opined that if Ms. Gowan's recommendations are not implemented, Mr. Jazey is at a risk of quickly deteriorating.

Ms. Fox also supported Ms. Gowan's recommendations for the workplace and home maintenance ergonomic equipment.

In response to questioning, Dr. Bailey opined that he agreed with Ms. Gowan's recommendations for the ergonomic equipment for his workplace and the purchase of the John Deere garden tractor

with the grass-mowing and snow-blowing attachments. Since Mr. Jazey was only seeking the capital cost of these units and not ongoing maintenance costs, Dr. Bailey felt these were reasonable requests.

State Farm's decision not to bring any of its experts to the Hearing meant that their opinions could not be cross-examined. Thus, I find that State Farm failed to provide a reasonable challenge to Mr. Jazey's evidence respecting the proposed occupational therapy treatment plan and ergonomic equipment as recommended by Ms. Gowan.

In light of no substantiated challenging evidence provided by State Farm that refutes the opinions of Mr. Jazey's medical advisors, I find that the cost of the proposed occupational therapy treatment plan and the proposed ergonomic equipment is reasonable and necessary to assist Mr. Jazey in achieving a reasonable degree of mobility; reduction in his pain; and permitting him to lead as normal a work and home life as possible, pursuant to Ontario Regulation 403/96, sections 15(1)(.2), (3), and (5).

Thus, I order that Mr. Jazey be reimbursed by State Farm in the amount of \$38,176.10 for occupational therapy treatment and the current cost of ergonomic equipment pursuant to an OCF-18 dated May 26, 2011, and prepared by Ms. Nancy Gowan, OT.

The Hot Tub:

Mr. Jazey is seeking \$15,931.90 for the purchase and installation of a hot tub.

Mr. Jazey testified that following the accident, a friend offered him the opportunity to use their therapeutic hot tub. He found it quite effective in relieving the severity of his tension headaches and improving his sleep. This resulted in an improvement in his ability to work in his business. Travelling to his friend's home to use their hot tub was sometimes awkward and he decided to investigate the purchase and installation of a hot tub at his own home. He testified that he conducted a very thorough examination of the types of hot tubs that were available and he realized

that he needed a hot tub that provided therapeutic jets of water while at the same time allowing him enough space to both stretch out and move about in the unit.

He discussed the purchase of a hot tub with his wife and subsequently with Elizabeth Fox, his physiotherapist, and with Dr. Christopher Bailey, his orthopedic surgeon. All were supportive of his plan. Consequently, with the assistance of a cousin who was able to arrange a significant discount on the cost of the hot tub, and the assistance of another friend who did the electrical installation work, he arranged for the installation of the hot tub outside the rear of his home in November 2009. The total capital cost for the installation was \$15,931.90, which included the cost of the deck around the hot tub to enable access to the unit.

Mr. Jazey testified that he has tried to use a hot bath but finds the hot tub significantly different. With the hot tub he is able to move around to the different seats within the hot tub, and thereby using different positions while manipulating the jets to provide the impact of the hot water on different sections of his body at different times. Further, he can totally immerse himself and his neck up to his chin and move around in the hot tub; whereas, in a hot bath he is kept in a fixed position without much ability to move and with his head slightly bent forward. He also pointed out that a hot bath needs to be filled each time it is used and does not maintain the hot temperature but rather cools off over a period of a few minutes. In contrast, the hot tub maintains its high temperature due to its integrated hot water heater.

He testified that he uses the hot tub between five and seven times per week for therapeutic aquatic massage. It has helped to soothe his sore, knotted muscles, relieved some of the tension headaches and migraines from which he suffers, and relieves his muscle tension and dizziness. As a result, he is able to work longer hours at his jewelry bench and enjoys better sleep.

He does not invite friends and neighbours to use the hot tub and his family members have rarely used it. He described it as not being a "party hot tub".

Mr. Jazey testified that State Farm denied the hot tub treatment plan on June 17, 2011. He stated that State Farm based their decision on the opinion of Dr. Garson Conn, an orthopedic surgeon, who had completed an insurer's examination on June 7, 2011, and stated in his report:⁹

He (Jazey) continues to find this (the hot tub) to be helpful. However, from a strictly orthopedic perspective, the installation of a hot tub would not, in my opinion, be considered reasonable and necessary.

That is not to say that Jazey should not use a hot tub if he finds this to be comfortable, but I would think that a warm bath would be satisfactory or very helpful in that regard as well, and I think the necessity of a hot tub, on the basis of what would appear to have been a very successful surgical procedure and given the fact that Jazey had some compromise evident prior to the accident in question, which likely aggravated the symptomatology, is not, in my opinion, an orthopedic requirement and, therefore, I would consider the Treatment Plan not to be reasonable and necessary, as I have already outlined.

Dr. Conn was not called as a witness by State Farm and thus his credentials and statements were not tested by cross-examination. I attach more weight to oral testimony than to untested written reports.

Dr. Christopher Bailey is an orthopedic surgeon specializing in spinal injuries, the Director of Spine Research at Victoria hospital, and an Associate Professor at Western University. In his testimony, Dr. Bailey respectfully pointed out that Dr. Conn, while an orthopedic surgeon, is not a specialist in spinal orthopedics and spinal rehabilitation.

When questioned about Mr. Jazey's purchase of a hot tub, Dr. Bailey testified that he fully supported this acquisition to treat Mr. Jazey's chronic pain. In a note written on May 12, 2010,¹⁰ he stated, "I have prescribed a hot tub for Mr. Jazey to improve residual symptoms and stiffness for myelopathy and post-operative neck-stiffness producing headaches."

Ms. Elizabeth Fox has 18 years of experience as a physiotherapist and has a special interest in aquatic rehabilitation along with considerable experience working with complex orthopedic

⁹ Report of Dr. Garson Conn, dated June 13, 2011 (Exhibit 4D, Tab 11A, p.1236 – 1237).

¹⁰ Exhibit 2A, Tab A13.

trauma victims. She testified that, in her expert opinion, considering all of the best available evidence about Mr. Jazey, the hot tub was a very reasonable expense and definitely beneficial for Mr. Jazey's rehabilitation, as would the use of any modality that would help Mr. Jazey return to as close to his pre-accident level of functioning as possible.

In her testimony, Ms. Fox stated:¹¹

Well I think there are a few differences between a hot tub and a bathtub or even like a Jacuzzi style bathtub and some of them I've mentioned before but one would be the strength of the jets, the number of the jets and the arrangement of the jets in a hot tub are going, there's going to be more jets in a hot tub and the arrangement, the placement, is going to be more anatomical in a hot tub. The level to which you can immerse yourself in a hot tub I would think it will be greater so getting that buoyancy effect in a hot tub I believe you can immerse yourself a little bit more deeply and so get more offloading.

And again depending upon the bathtub style there could be some head position kind of differences, so in the bathtub you can end up in a kind of forward-head posture. I believe the temperature is higher in a hot tub and also the ability of the hot tub to maintain a more constant temperature as a result of the heater compared with the bathtub I think would be helpful.

.. in a hot tub you have a little more space so there is, of course, the opportunity then to do a little bit more passive stretching or some limited resistance type exercises.

Ms. Fox opined that the hot tub provides meaningful benefit in a number of ways, including: that the immersion in the water is helpful in decreasing sensitivity of the nervous system; decreased muscle guarding and spasm; a massage-like effect of the water turbulence, while offloading 90% of the patient's body weight through buoyancy which supports and compresses tissues; and improved pain control as the high temperatures decrease the sensation or perception of pain.

Dr. Keith Siqueira is an expert in physical medicine and rehabilitation (physiatry). He testified that he disagrees with Dr. Conn and, in his opinion, the hot tub is a significant and necessary aid to assist in pain management and enhanced functionality, thereby allowing Mr. Jazey to continue to work and remain active. He testified that he has often prescribed hot tubs for his spinal cord injury patients.

¹¹ Transcript Volume 4, page 36.

When questioned about Dr. Conn's statement, Dr. Siqueira stated:¹²

So, Dr. Conn essentially notes that the hot tub is not an orthopedic requirement. He notes that from an orthopedic perspective the hot tub would not be considered reasonable and necessary. So, a hot tub is not going to fix his bones, all right. So, from an orthopedic requirement perspective, Dr. Conn is correct.

But again it misses the point of this. (It's) a treatment modality that's helping this gentleman. It's reducing his pain. It's helping him more considerably than a hot bath would or a hot shower would. He was using it consistently and it was allowing him to maintain work and function (sic).

In my opinion, the hot tub is absolutely reasonable and necessary given the severity of his injuries.

State Farm did not avail itself of the opportunity to bring any of its experts to the Hearing that would enable their opinions to be cross-examined, and thereby challenge Mr. Jazey's evidence that the cost of the hot tub is reasonable and necessary to assist him in achieving a reasonable degree of mobility and reduction in his pain.

I find the evidence convincing that the hot tub is reasonable and necessary and is providing a beneficial impact on Mr. Jazey's home and business activities. In addition, I find its cost is reasonable and should be reimbursed by State Farm to Mr. Jazey.

Massage Therapy:

Mr. Jazey is seeking \$1,500.64 and ongoing incurred sums for massage therapy pursuant to an OCF-18 dated February 14, 2012, prepared by Ms. Amy Buffone.

Mr. Jazey testified that State Farm had approved weekly massage therapy treatment sessions from January 23, 2009 until February 2, 2012 – a period of over three years. His initial massage therapist was Ms. Leonore Roozenburg who was recommended by Ms. Fox.

¹² Transcript Volume 2, page 243.

Ms. Roozenburg had submitted six consecutive treatment plans, each of which included 16 sessions of massage therapy from January 23, 2009 until January 27, 2011. Mr. Jazey testified that State Farm had approved each of these treatment plans.

After Ms. Roozenburg's retirement, Ms. Fox referred Mr. Jazey to Ms. Amy Buffone. Ms. Buffone testified that on August 15, 2011, she submitted a massage treatment plan to State Farm. State Farm approved the treatment plan and she began treating Mr. Jazey on a weekly basis, beginning on September 22, 2011.

In her testimony, she stated that she felt the massage treatments had provided a great benefit to Mr. Jazey. She stated that she noticed he was suffering less pain in his range of motion, and an apparent decrease in the numbness and tingling in his hands, and a significant reduction in the tension in his muscles, all of which meant less restriction of his activities in his daily life.

Mr. Jazey testified that he found that the weekly massages done by Ms. Buffone permitted him to be more active in his business and daily life. He was able to increase the number of hours he spent at his workbench; he found an increase in the dexterity of his hands and a decrease in the previously-experienced clumsiness in his hands. Overall, he found a marked decrease in his pain levels and numbness.

Mr. Jazey testified that he was very disappointed when State Farm denied payment for the new treatment plan submitted on February 1, 2012 by Ms. Buffone. Due to his limited income following the accident, he was only able to afford massage therapy treatment with Ms. Buffone approximately once every three weeks. Over the next short period of time, Mr. Jazey noticed a severe lessening of the benefits of the massage therapy which he attributed to fewer massage therapy treatment sessions.

Mr. Jazey testified that his current family physician, Dr. Jeff Spence, in his reports of September 3, 2013 and February 11, 2014,¹³ stated that Mr. Jazey's pain had increased after the massage

¹³ Exhibit 2A, Tabs A7 and A9.

therapy was denied by State Farm and the frequency of massage treatments had decreased. Dr. Spence recommended that Mr. Jazey receive massage therapy up to three times a week and Mr. Jazey should also be provided with a massage chair.

Following State Farm's denial of further massage therapy, Mr. Jazey testified that he has continued to receive some massage therapy treatments. His wife's workplace's extended health benefit plan provides him with benefits but only to a limit of 10 massages per year and reimburses only 80% of the cost of those massages. He has personally paid for any additional massage therapy treatments.

When questioned about State Farm's denial of Ms. Buffone's treatment plan, dated February 1, 2012, for continued massage therapy,¹⁴ Dr. Siqueira stated that he disagreed with the opinion of State Farm's examiner, Dr. Kirk Hamilton. Dr. Hamilton had stated: "... for the massage treatments will not improve the claimant's range of motion, strength or a decreased sensation of pain in the affected regions of the claimants a body. I acknowledge that these treatments initially and for a short time alleviate the claimant's various aches and pains within the claimant's affected regions of his body; however, it is my opinion that these treatments will not have any long-lasting benefit. I also do not believe that these treatments will improve residual neurological symptoms or significantly decrease the neck pain back pain or the claimant's headaches."¹⁵

Dr. Siqueira opined that Mr. Jazey should continue to receive consistent massage therapy treatment which, he felt, is reasonable and necessary given the extent of Mr. Jazey's injuries. To date, massage therapy has obviously helped Mr. Jazey with all his symptoms and he was getting consistent, meaningful benefit from its use. He explained that by Mr. Jazey using massage in lieu of medication, massage therapy is quite possibly the only substitute for a narcotic that would provide meaningful relief to a similar degree as a narcotic.

Dr. Bailey testified that he supports the use of massage therapy as an effective modality to treat pain. In his testimony, he stated:

¹⁴ Exhibit 1, Tab C6.

¹⁵ Exhibit 4A, Tab 2B.

... the bottom line is that no one modality is better than the next, that individuals respond differently to modalities and the key is to find the modalities that are best for the individual patient to improve their function and their quality of life. You can't, you don't really treat to cure chronic pain you treat so that they can function the best that is possible.¹⁶

Dr. McKillop, psychologist, testified that massage therapy has proven to be quite beneficial for Mr. Jazey in terms of the neck strain. He opined that for Mr. Jazey not to have regular massage therapy is noticeable and it negatively impacts his work considerably.¹⁷

I was quite unimpressed that State Farm felt it was not necessary to bring any of its experts to the Hearing. Presentation of these experts would have enabled their opinions to be cross-examined and thereby challenge Mr. Jazey's evidence that the cost of the massage is reasonable therapy and necessary to assist him in achieving a reasonable degree of mobility and reduction in his pain.

I found Mr. Jazey to be a very credible witness. While State Farm in its submissions suggested that Mr. Jazey's memory and recollection was sometimes inconsistent, on a balance of probabilities, I find that I prefer Mr. Jazey's evidence as opposed to the untested evidence of State Farm's "experts". I am willing to give Mr. Jazey the benefit of the doubt that some of the inconsistencies in his testimony that were pointed out by State Farm may be the direct result of the stress and frustration that he is experiencing. However, I make no finding on this latter point.

On a balance of probabilities, I find that Mr. Jazey has benefited from the massage treatment sessions, that they are reasonable and necessary pursuant to section 15 of the *Schedule*, and that he is entitled to receive the \$1,500.64 and ongoing incurred sums for massage therapy pursuant to the OCF-18 dated February 14, 2012 and prepared by Amy Buffone, less any deduction for benefits received from Mr. Jazey's wife's workplace extended health benefit plan.

Psychological Counselling:

¹⁶ Transcript Vol. 4, page 130.

¹⁷ Transcript Vol. 5, page 14.

Mr. Jazey seeks a payment of \$1,008.70 representing the outstanding balance for psychological counselling pursuant to an OCF-18 dated November 30, 2011, and prepared by Dr. Jeffrey McKillop.

Finding difficulties in coping with the changes in his life due to his impairments, Mr. Jazey was referred to Dr. Jeffery McKillop, a clinical psychologist who specializes in rehabilitation psychology.

Dr. McKillop testified that Mr. Jazey came to see him and was assessed on November 2, 2010, after which Dr. McKillop submitted a treatment plan to State Farm for 15 counselling sessions. He testified that State Farm approved this treatment plan.

Dr. McKillop testified that he diagnosed Mr. Jazey with an adjustment disorder, which he explained is “sort of like a reactive depression, almost. An event occurs and the person is having some stress and they’re struggling with coping or adapting to that event, and it’s causing many of the symptoms you would see with, say, depression.”

In his assessment, Dr. McKillop stated that Mr. Jazey’s impairment was causing him stress. He was suffering with:

1. frustration with struggling to maintain the level of energy and stamina necessary to continue to perform his job as a jeweller;
2. guilt that he could not provide the same level of care and income for his family that he had been able to provide prior to the accident; and
3. a sense of guilt that his family was required to do a lot of work for him that he had been able to do prior to the accident.

Following the conclusion of the initial psychological treatment plan, Dr. McKillop submitted a second OCF-18 for a second additional 15 sessions of psychological counselling. He testified that he felt this would help maintain a semblance of balance in Mr. Jazey’s life and continue to help reduce his overall stress and guilt.

Dr. McKillop was advised that State Farm submitted this second treatment plan to a Dr. Peter Cobrin, psychologist, to conduct an insurer's assessment of the plan. Based on Dr. Cobrin's review and assessment, State Farm only approved 50% of Dr. McKillop's recommended treatment plan. State Farm provided no reasons for their decision.

Dr. McKillop testified that in September 2012, at the end of the eight psychological treatment sessions, Mr. Jazey suspended treatment for a period of time to allow him to concentrate on work for the Christmas season.

In early 2014, Mr. Jazey approached Dr. McKillop, and as a result of the assessment by Dr. McKillop at that time, a new treatment plan for 15 psychological treatment sessions was submitted to State Farm. State Farm did approve these 15 sessions on April 7, 2014 and shortly thereafter Dr. McKillop resumed psychological counselling of Mr. Jazey.

Dr. McKillop testified that he noticed that Mr. Jazey had regressed in the period between September 2012 and early 2014. He found that Mr. Jazey's functioning was less; he was clearly a bit more stressed, and a little confused about what was happening due to the pending Arbitration.

Mr. Jazey testified that he found the psychological counselling sessions with Dr. McKillop to be of benefit. His initial sessions began in September 2012 and ended just before Christmas 2012. He purposely stopped the sessions at that point to allow him some time to put all his efforts towards Christmas jewelry orders.

The psychological counselling sessions have, in Mr. Jazey's opinion, helped him deal with the main sources of his stress being:

1. his inability to earn the same amount of income he was earning prior to the accident;
2. his inability to do housework and other activities around the home and have quality time with his family both inside and outside the home to the level that he had prior to the accident; and,

3. overriding concerns about his future since he feels he is only suited to continue as goldsmith and a designer and manufacturer of custom jewelry and repair of jewelry.

Mr. Jazey testified that he is continuing to require and receive psychological treatment sessions with Dr. McKillop.

I find that the psychological counselling treatment sessions are proving beneficial to Mr. Jazey and thus I find that they are reasonable and necessary pursuant to section 15 of the *Schedule*. Accordingly, I order a payment of \$1,008.70, representing the outstanding balance for psychological counselling pursuant to an OCF-18 dated November 30, 2011, and prepared by Dr. Jeffrey McKillop.

Mr. Jazey's Request for Interest for the Overdue Payment of Benefits:

Mr. Jazey seeks entitlement to interest for the overdue payment of benefits pursuant to s. 46(2) of the *Schedule*. In light of my findings that State Farm is responsible for undue delay and refusal to pay accident benefits to Mr. Jazey, I find that State Farm must pay interest at the rate of 2% per month on all outstanding benefit payments.

Mr. Jazey's Request for a Special Award:

Mr. Jazey requests that State Farm be liable to pay a special award pursuant to section 282(10) of the *Insurance Act* because State Farm unreasonably withheld or delayed payments to Mr. Jazey.

Section 282(10) of the *Insurance Act* states:

Special Award

If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50% of the amount to which the person was entitled at the time of the

award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

Pursuant to section 282(10) of the *Insurance Act*, I find that State Farm has unreasonably withheld or delayed payments to Mr. Jazey in denying treatments and withholding payments; State Farm accepted the opinions of its medical advisors to support its routine denials of benefits; and it should have been aware that these denials would cause Mr. Jazey undue stress and financial hardship and reduce the opportunity for him to recover from his injuries.

In paragraphs 203 to 221 and Schedules C and D of Mr. Jazey's closing submissions, Mr. Jazey has detailed the particulars of his claim for a special award in the amount of \$131,408.27, representing 50% of the benefits and interest to which he claims entitlement.

State Farm vigorously opposes Mr. Jazey's entitlement to a special award. State Farm submits that Mr. Jazey "has failed to provide any records or evidence outlining the professional attendant care services provided by the CCAC for the period that the Applicant (Mr. Jazey) required attendant care. This information would provide a professional perspective in detail what attendant care was required, the specified period for which attendant care was required, and what ongoing attendant care may be required."

State Farm also "submits that the evidence led by the Applicant provides no definitive insight into what services, if any, were required in addition to those professional services provided by the CCAC."

Considering all the relevant factors in this matter, I agree with Mr. Jazey's contention that State Farm has acted unreasonably and Mr. Jazey is entitled to a special award.

The *Insurance Act* states that an Arbitrator shall award a lump sum of up to 50% of the amount to which the person was entitled, etc. It does not set a quantum but leaves it to the Arbitrator to determine whether that amount should be one dollar or the maximum of 50%. In this matter, because State Farm has provided some benefits to Mr. Jazey and Mr. Jazey has been able to return

to his self-employment, albeit to a limited degree compared to his pre-accident ability, and Mr. Jazey has failed to provide some specific documentation to State Farm, I am fixing the special award at 25% of the amount to which he claims entitlement.

I hereby order that State Farm shall pay a lump sum to Mr. Jazey of 25% of the amount to which he is entitled, which amount shall be \$32,852.07.

EXPENSES:

I find that Mr. Jazey is entitled to his expenses in respect of this Arbitration. If the parties are unable to agree on the quantum they may make submissions to me within 30 days of the release of this decision.

Knox M. Henry
Arbitrator

December 9, 2014
Date



FSCO A13-001352

BETWEEN:

DAVID JAZEY

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. Mr. Jazey is entitled to Attendant Care Benefits in the amount of \$4,027.21 for attendant care services provided by Lauralee Bushan-Jazey and Dianne Jazey from October 20, 2009 to December 31, 2009.
2. Mr. Jazey is entitled to receive the following medical and rehabilitation benefits pursuant to the *Schedule*:
 - a. \$15,931.90 for purchase and installation of a hot tub, pursuant to an OCF-18 prepared by Elizabeth Fox, dated January 24, 2011;
 - b. \$1,500.64 and ongoing incurred sums for massage therapy pursuant to an OCF-18 dated February 14, 2012, prepared by Amy Buffone, subject to a deduction for Mr. Jazey's wife's workplace extended health benefit plan;
 - c. \$1,008.70 representing the outstanding balance for psychological counseling, pursuant to an OCF-18 dated November 30, 2011, prepared by Dr. Jeffery McKillop;

- d. \$38,176.10 for occupational therapy treatment and the current cost of ergonomic equipment pursuant to an OCF-18 dated May 26, 2011, and prepared by Nancy Gowan, OT.
3. Mr. Jazey is entitled to interest for the overdue payment of benefits pursuant to s. 46(2) of the *Schedule*.
4. State Farm is liable to pay a special award in the amount of \$32,852.07, pursuant to s. 282(10) of the *Insurance Act* because it unreasonably withheld or delayed payments to Mr. Jazey.
5. State Farm is liable to pay Mr. Jazey's expenses in respect of this arbitration.

Knox M. Henry
Arbitrator

December 9, 2014
Date