

2000 CarswellOnt 5420
Financial Services Commission of Ontario (Arbitration Decision)

Singh v. State Farm Mutual Automobile Insurance Co.

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**Joginder Kaur Singh, Applicant and State Farm
Mutual Automobile Insurance Company, Insurer**

Renahan Member

Heard: May 23-25, 2000

Judgment: July 7, 2000

Docket: FSCO A99-000925

Counsel: *Nestor E. Kostyniuk*, for Mrs. Singh
Jeremy R. Solomon, for State Farm Mutual Automobile Insurance Co.

Subject: Insurance

Headnote
Insurance

Renahan Member:

Issues:

1 The Applicant, Joginder Kaur Singh, was injured in a motor vehicle accident on December 26, 1998. She applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.¹ State Farm refused to pay weekly income replacement benefits. The parties were unable to resolve their disputes through mediation, and Mrs. Singh applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

2 The issues in this hearing are:

1. Is Mrs. Singh entitled to income replacement benefits after January 2, 1999, and if so, in what amount?
2. Is Mrs. Singh entitled to a special award pursuant to subsection 282(10) of the *Insurance Act*?
3. Is either party entitled to expenses of the arbitration proceeding?

Result:

3

1. Mrs. Singh qualifies for a weekly income replacement benefit from January 2, 1999 to March 1, 2000, however, the amount of weekly income replacement benefit is zero.
2. Mrs. Singh is not entitled to a special award.
3. The issue of expenses is deferred.

Evidence and Analysis:

Background:

4 Mrs. Singh is now 51 years old. She suffered injuries to her back on December 26, 1998 when the vehicle in which she was a passenger was struck from the rear by another vehicle on the Queen Elizabeth Way in Toronto. She and her husband operated a retail electronics store. She did not return to work for just over a year.

5 State Farm paid for some physiotherapy. The first State Farm accident benefits adjuster, Zahid Ashraf, was content that Mrs. Singh was disabled while he handled the file up to April 1999, but was not satisfied that he had enough financial information to justify an income replacement benefit.

6 Mr. Singh claimed that he hired Zulmay Nadeem at \$400 per week to replace his wife's labour. Mrs. Singh claims that I should award her an income replacement benefit based on this amount.

Exhibits:

7 I accepted a number of documents as exhibits at the hearing and one five-minute video tape. Counsel for State Farm argued at the end of the hearing that I should also accept a one-hour surveillance video tape on the grounds that it confirmed what was in the written investigation report, which I made an exhibit. Counsel indicated that I need only watch five minutes. Counsel cross-examined Mrs. Singh briefly on a portion of a video tape which she admitted showed her bending and crouching in her garden. I did not find that portion of the cross-examination helpful to State Farm. I was not satisfied that a one-hour video tape was that significant if I had the written summary and if I only had to watch five minutes. For these reasons, I did not accept the one-hour video tape as an exhibit.

8 Counsel for State Farm also tendered a document over 300 pages long entitled "Pricewaterhouse Coopers Brief." The document does not contain an index and some pages appear numerous times throughout the document. A report from the accountant to State Farm dated April 27, 1999 appears four times. At the hearing, I made portions of the document an exhibit. Those portions were the accountant's reports to State Farm, those portions of the accountant's notes that counsel referred to in examination, cross-examination and submissions and certain source documents that counsel referred to in examination, cross-examination and submissions. Throughout the hearing, I asked counsel to remove duplicate pages and irrelevant documents from the brief. Counsel for State Farm argued that I should make the entire document an exhibit on the grounds that "it should form part of the record" and certain source documents supported the accountant's reports. I asked for written submissions as to the relevance of each part of the document. In his submissions, counsel identified the duplicate pages and requested that I read those reports which I had indicated that I would read, as well as other source documentation and notes. On the basis of his submissions, I include the resume of the accountant, pages 1 to 3, as an exhibit.

9 The accountant's reports to State Farm included all relevant information and I did not find it necessary to look behind them to determine the issues in this case. For example, where the accountant indicated in his report that he had requested certain information from the Singhs and the Singhs failed to provide it, it is not necessary that I read the letter to the Singhs asking for that information. I note that the same report and the same letter to the Singhs is reproduced a number of times throughout the brief. Similarly, it was not necessary for me to look at the source documentation when the accountant's calculations based on that source documentation were not in dispute and counsel did not refer to the source documentation in submissions.

10 In his written submissions, counsel referred me to accountant's notes which contradict testimony given by Mr. Singh and Mr. Nadeem. However, that contradictory evidence was never put to the witnesses for their explanations. For example, Mr. Singh and Mr. Nadeem gave consistent testimony as to how Mr. Nadeem was hired. The accountant's notes refer to inconsistent circumstances concerning the hiring. Counsel did not ask Mr. Singh or Mr. Nadeem to comment on the inconsistencies.

11 Other inconsistent notes concerned the manner in which Mr. Singh paid Mr. Nadeem. During cross-examination, counsel referred Mr. Nadeem to one note which contradicted Mr. Nadeem's testimony. I made that note an exhibit. In his written submissions, counsel referred me to a number of other notes concerning the manner of payment which contradicted Mr. Nadeem's testimony. Again, counsel did not put the notes to Mr. Nadeem for his explanation.

12 For greater certainty, these are the parts of the PricewaterhouseCoopers Brief which I included in Exhibit I-4 at the hearing: PricewaterhouseCoopers reports to State Farm dated March 25, 1999 and April 27, 1999 and pages 49, 56, 58, 61, 64 and 80 to 86. As a result of counsel's submissions, I make the resume of Daniel Edwards, pages 1 to 3, part of Exhibit I-4. Mr. Singh relied on page 31, a note made by the accountant on March 8, 1999, and that entry was made Exhibit A-4 at the hearing.

Credibility and demeanour:

13 Mrs. Singh speaks limited English. She testified through a Punjabi interpreter. She testified that she has five years education in India. She did not recognize contradictions in her own testimony. For example, counsel asked a number of questions about pain she suffered in her knees before the accident. She repeated that she did not suffer pain in her knees before the accident, but then she testified that the accident made her knee pain worse. She testified that once she returned to work, she did not take any time off. She then testified that when she took time off, her husband was left alone in the store. She did not recognize the contradictions. As well, her answers often seemed non-responsive because she seemed to misinterpret the question. For example, when asked whether she made any attempt to return to work before January 2000, she replied that she did a little bit of housework.

14 Mr. Singh testified in English, but he too seemed to misinterpret question. For example, when counsel asked him if his wife could work in the store and sit, he replied that sometimes she cleaned and that they had a chair.

15 I did not find the Singhs persuasive witnesses.

Legal qualification for entitlement to income replacement benefit:

16 Mrs. Singh is entitled to a weekly income replacement benefit if she sustained an impairment as a result of the accident and suffered a substantial inability to perform the essential tasks of her employment.

Essential tasks of employment:

17 Mrs. Singh and her husband operated an electronics store on Yonge Street in downtown Toronto. They sold consumer goods such as watches, batteries, cordless telephones, stereos, walkmans and televisions. The store was 20 feet wide and 90 feet long. Mrs. Singh stocked the shelves, priced the merchandise and operated the cash register. Her main duty was to watch the customers to prevent shop-lifting and by her presence, discourage robberies. Shop-lifting is common. As well, the Singhs call the police about five times a year after they are robbed by people Mr. Singh identified as armed drug addicts.

18 Mrs. Singh went with her husband to work six days a week, Monday to Saturday. They opened the store around 10:00 a.m. and closed between 7:00 p.m. and 8:00 p.m., depending on business. Mr. Singh worked on Sunday by himself. I find that Mrs. Singh's essential tasks were mostly sedentary. However, in order to discourage shop-lifting, she had to be vigilant and appear vigilant over a long work-day, six days a week.

Ability to perform essential tasks of employment:

19 Mrs. Singh's main complaint was back and knee pain. A few days after the accident she saw her family doctor, Dr. Ahluwalia, who prescribed physiotherapy and medication. In March 1999, the physiotherapist noted Mrs. Singh's sharp mid-back pain and difficulty ascending and descending stairs and predicted that Mrs. Singh would make an excellent recovery after eight weeks of exercise. Mrs. Singh's daughter testified that Mrs. Singh had a lot of back pain for the

year after the accident and had difficulty with stairs. Dr. Ahluwalia certified that Mrs. Singh was disabled from work in April 1999. Counsel referred to a discharge report from the physiotherapist and suggested to Mrs. Singh that the physiotherapist recommended that Mrs. Singh return to work. Mrs. Singh denied the suggestion. The discharge report was not tendered as evidence.

20 Although Mrs. Singh signed a document permitting State Farm access to her medical records, State Farm did not ask for any medical records, or ask Mrs. Singh to attend a medical examination. The first adjuster, Mr. Ashraf, did not consider disability an issue up to the time he left State Farm in April 1999.

21 Mrs. Singh agreed that a surveillance video tape taken in July 1999 showed her bending in her garden and crouching. The investigator's report indicates that over a three-day period in July 1999, the investigator obtained nine minutes of video which shows Mrs. Singh in the flower garden, moving her lawn sprinkler, watering the lawn and socializing with her family.

22 Mrs. Singh followed Dr. Ahluwalia's instructions and returned to working half-days starting January 19, 2000 and full-days starting March 1, 2000.

23 Although I heard very little evidence that Mrs. Singh was disabled from work, I heard less evidence that she was not disabled. I find that Mrs. Singh's work required that she focus on the customers to minimize shop-lifting. I find that she could not focus on customers during her six-day work week until March 1, 2000 because she had back pain caused by the motor vehicle accident.

Amount of benefit:

24 Mr. and Mrs. Singh were self-employed. Mrs. Singh said it was a "joint business." Any profit from the business was used to pay the Singhs' living expenses. All sales were in cash and Mr. Singh paid his suppliers in cash. Although Mr. Singh completed an Employer's Confirmation of Income which indicated that Mrs. Singh received a salary of \$400 per week, both testified that Mrs. Singh did not receive a salary. Mr. Singh said that he gave his wife \$200 to \$400 a week cash. I find that the business was an equal partnership and that Mrs. Singh did not draw a salary.

25 Although they have an accountant, the Singhs did not file any financial statements. State Farm retained a firm of accountants, PricewaterhouseCoopers, to calculate the amount of income replacement benefit. PricewaterhouseCoopers prepared an estimate of income, mostly based on verbal information supplied by Mr. Singh. The most significant source documentation included cash register receipts, which Mr. Singh said represented all his sales. Based on sparse documentary evidence, PricewaterhouseCoopers concluded that the business lost \$18,000 in 1997 and \$22,000 in 1998. The firm did not provide an estimate for 1999, the year following the accident.

26 The Singhs purchased a house in Brampton two years ago and pay \$1,800 per month on a mortgage. The only evidence I heard that they have another source of income is a note by an investigator who thought someone leaving their house was a tenant. The Singhs have carried on a retail electronic products store for the past 13 years. Although I find it unlikely that they have continued to lose money at this business for 13 years, I have no evidence as to how much income they derived from this business before the accident, other than the accountant's report.

27 Section 8 of the *Schedule* requires that the insured designate either the 52 weeks before the accident, or the last fiscal year completed before the accident. The accountant calculated that the business lost \$18,000 in the last fiscal year completed before the accident and lost \$22,000 in the 52-week period before the accident. Mr. Singh testified that all his sales were cash and went through the cash register. The cash register receipts were \$129,000 in 1997 and \$114,000 in 1998. Mr. Singh testified that his average cash sales were \$400 to \$700 a day. I find this evidence on gross sales consistent. The accountant accepted Mr. Singh's statement that he grossed up his purchases approximately 35 per cent. Mr. Daniels testified that this was reasonable and determined cost of sales as a percentage of sales. He also accepted Mr. Singh's information as to his expenses. Mrs. Singh testified that her husband took care of all the financial matters, and Mr. Singh did not present any evidence to contradict the financial statements prepared by the accountant. I find that

the financial statement prepared by the accountant is reliable in these circumstances, and that the business lost money in the 52-week period before the accident and in the last fiscal year completed before the accident. Accordingly, Mrs. Singh's income replacement benefit based on her income from self-employment, not including any supplement due to replacement labour, is zero.

Salary expenses for replacement labour:

28 The relevant provisions in section 6 of the *Schedule* for increasing an income replacement benefit on account of replacement labour are as follows:

(5) If the insured person was self-employed at the time of the accident and the person incurs losses from self-employment as a result of the accident, the insurer shall add to the amount of the income replacement benefit payable to the person 80 per cent of the losses from self-employment incurred as a result of the accident.

(6) For the purpose of subsection (5), losses from self-employment shall be determined in the same manner as losses from the business in which the person was self-employed would be determined under subsection 9(2) of the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario), without making any deductions for,

- (a) expenses that were not reasonable or necessary to prevent a loss of revenue;
- (b) salary expenses that were paid to replace the person's active participation in the business, except to the extent that those expenses were reasonable for that purpose;
- (c) non-salary expenses that were different in nature or greater than the non-salary expenses incurred before the accident, except to the extent that those expenses were necessary to prevent or reduce any losses resulting from the accident;
- (d) expenses that are eligible for capital cost allowance or an allowance on eligible capital property; or
- (e) losses deductible under section 111 of the *Income Tax Act* (Canada).

29 Mr. Singh claims that he paid \$400 a week to Mr. Nadeem to replace his wife's labour and proceeded at this hearing on the basis that he is entitled to 80 per cent of this amount pursuant to subsection 6(6). This interpretation is similar to that of Lim Lum, the accountant for PricewaterhouseCoopers who made investigations to determine the amount of income replacement benefit. Mr. Lum wrote in his notes that if Mr. Singh's information that he paid \$400 per week was reliable, the income replacement benefit was 80 per cent of this amount. At the hearing, Daniel Edwards, an accountant for PricewaterhouseCoopers, testified because Mr. Lum had left that firm. Mr. Edwards testified that 80 per cent of \$400 was the correct amount of the income replacement benefit if the store lost money and the payment of \$400 per week was a reasonable way to mitigate the loss. I believe Mr. Edwards' interpretation of the relevant provisions is more accurate than Mr. Lum's interpretation.

30 The premise for increasing the basic income replacement benefit to account for replacement labour is subsection 6(5). This subsection provides that the provisions for adding a supplement to the benefit apply if the self-employed person "incurs losses from self-employment as a result of the accident." Counsel for Mrs. Singh asked me to assume that the business lost money on account of paying a salary to Mr. Nadeem because other sales and expenses remained the same. I heard no evidence that other sales and expenses remained the same. In fact, the rent expense decreased after the accident because Mr. Singh moved to less expensive property.

31 Once the insured establishes that he has incurred losses as a result of the accident, subsection (6) applies to limit deductible expenses used in determining the loss. For example, under paragraph (b), salary expenses that are paid to replace the insured person's labour are deductible only to the extent that they are reasonable.

32 The difficulty with these provisions is that they require the insured to demonstrate a business loss on account of the accident. This requires the passage of time. To minimize the loss and to assist its insured promptly, an insurer may pay for replacement labour without proof of an income loss on the basis that it can assume that the insured will incur losses after the accident. However, if the self-employed insured does not incur losses as a result of the accident, the insurer need not supplement the income replacement benefit under subsection (5).

33 A business incurs expenses to make a profit. Counsel for State Farm used as an example the case where a self-employed insured hires a replacement worker who, because of his ability, increases the profit of the business. In such a case, the insured has incurred additional expenses but has not incurred a loss and is not, therefore, entitled to have a portion of the replacement labour cost added to his income replacement benefit.

34 Subsection 6(5) requires State Farm to add to the income replacement benefit 80 per cent of the losses incurred as a result of the accident. I heard no evidence that the business incurred losses as a result of the accident. Accordingly, I find nothing to add to the income replacement benefit.

35 In view of this finding, it is not necessary to deal with State Farm's allegation that Mr. Singh did not hire Mr. Nadeem at \$400 per week. However, since I heard evidence on the issue, I will deal with it.

Contract for replacement labour:

36 Mr. Singh and Mr. Nadeem were consistent in their testimony that Mr. Nadeem had stopped by Mr. Singh's store a month or two before the accident and inquired about employment. Mr. Nadeem left his telephone number. The accident occurred on Boxing Day and Mr. Singh knew that his wife could not work. He contacted Mr. Nadeem on January 1 and asked him to come in the next day. Mr. Singh told Mr. Nadeem that he did not know how long he would need his services. After the accident, State Farm's adjuster and accountant saw Mr. Nadeem at the store. I accept this consistent and plausible evidence and find that Mr. Singh hired Mr. Nadeem to replace his wife's labour.

37 The terms of employment are less clear. I find the following evidence relevant to the terms of employment:

- Both men testified that Mr. Singh agreed to pay Mr. Nadeem \$800 in cash every two weeks. Mr. Lum interviewed Mr. Nadeem on April 15, 1999 and recorded that Mr. Nadeem received \$400 every Saturday. I heard no satisfactory explanation for this contradiction.
- Joe Giannini was State Farm's second adjuster on the file after Mr. Ashraf. He attended at the Yonge Street store on three occasions in the summer of 1999. On one occasion, he arrived at 1:30 p.m. and recorded that Mr. Nadeem was not there and that Mr. Singh did not know when he would return. Forty-five minutes later, Mr. Giannini returned to the store and Mr. Singh said he did not know if Mr. Nadeem would return that day.
- The parties kept no records of wages paid or the amount of time Mr. Nadeem spent at the store except that Mr. Singh signed his own receipts for payment of \$800 every two weeks.
- On two occasions after Mrs. Singh returned to work, investigators watched the store all day and Mrs. Singh did not appear.
- Mr. Singh submitted six suppliers' invoices from 1998, ranging from \$132 to \$428. Mr. Singh paid each invoice in cash instalments.
- If the cash register sales represent all sales, the Singhs had total annual sales of approximately \$130,000. The business was relatively small, and after cost of sales and rent, replacement labour was the largest expense.

38 I find that Mr. Singh did not need an assistant in the store all day long. Mrs. Singh was with him all day before the accident because she travelled to and from work with him. However, on one of three occasions after the accident,

Mr. Giannini found Mr. Singh working alone with no idea when Mr. Nadeem would return. As well, after Mrs. Singh returned to work, Mr. Singh worked by himself. I find, that Mr. Nadeem did not work a full six days a week as Mrs. Singh normally did.

39 Mr. Singh paid as little as he could on his supplier invoices. Mr. Singh did not keep a record of how much Mr. Nadeem worked. Replacement labour at \$400 per week was his largest expense after rent. I find it likely in these circumstances that Mr. Singh paid Mr. Nadeem the same way he paid his suppliers, that is, in small installments, not two weeks at a time, for the hours Mr. Nadeem actually spent in the store. Those hours were probably when the store was busiest and most likely to be robbed. I find that Mr. Nadeem did not work full-time hours.

40 I do not accept that Mr. Singh paid Mr. Nadeem \$400 a week. I cannot determine how much or what the arrangement was for Mr. Nadeem's remuneration.

Estoppel:

41 Mrs. Singh claimed that State Farm is estopped from arguing that it would pay \$400 a week for replacement labour. No one from State Farm represented that State Farm would pay \$400 a week for replacement labour. I find that both adjusters told Mr. Singh that State Farm would pay a maximum of \$400 a week if Mrs. Singh qualified.

42 Mr. Ashraf communicated to Mr. Singh in Urdu, Hindi and English. I find that he communicated clearly with Mr. Singh. Mr. Singh first reported the accident to the insurance agent who sold him the insurance. If State Farm's sales agent mistakenly told Mr. Singh that State Farm would pay \$400 a week for replacement labour, Mr. Singh should have realized that he could not rely on this statement because Mr. Ashraf and Mr. Giannini advised him otherwise.

Expenses:

43 If the parties cannot agree on the issue of entitlement of expenses of the arbitration proceeding, either party may apply for me to determine the issue.

Renahan Member:

Arbitration Order

44 Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The application for arbitration is dismissed.
2. The issue of entitlement of expenses of the arbitration proceedings is deferred.

Footnotes

1 The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96 and 303/98.