

BETWEEN:

DOMENICA FIMIANI

Applicant

and

LIBERTY MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: David Muir

Heard: April 6, 7, 8, September 7, 8, 9 and November 12, 1999, at the Offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Richard M. Bogoroch and Linda Wolanski for Mrs. Fimiani
Wayne Edwards and Michael J. Hucklack for Liberty Mutual Insurance Company

Issues:

The Applicant, Domenica Fimiani, was injured in a motor vehicle accident on August 28, 1994. She applied for and received statutory accident benefits from Liberty Mutual Insurance Company (“Liberty Mutual”), payable under the *Schedule*.¹ Liberty Mutual terminated weekly income replacement benefits on September 28, 1995. The parties were unable to resolve their disputes through mediation, and Mrs. Fimiani applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

¹The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94, 463/96 and 304/98. O.R. 776/93 was extensively modified by O.R. 781/94; accordingly, where necessary, “1994 *Schedule*” refers to the original O.R. 776/93, and “1995 *Schedule*” refers to O.R. 776/93 as amended.

The issues in this hearing are:

1. Is Mrs. Fimiani entitled to receive a weekly income replacement benefit after September 28, 1995, pursuant to section 7 of the *Schedule* on the basis that she suffers a substantial inability to perform the essential tasks of her employment?
2. Is Mrs. Fimiani entitled to rehabilitation benefits claimed pursuant to paragraph 40 of the *Schedule*?
3. Is Mrs. Fimiani entitled to payments for dependant care and housekeeping and home maintenance services claimed pursuant to sections 54 and 55 of the *Schedule*?
4. Is Liberty Mutual liable to pay a special award based on Liberty Mutual's refusal to accept her condition of ongoing pain and its reliance on a DAC assessment by a chiropractor who could not assess the pain condition, pursuant to section 282(1) of the *Insurance Act*, R.S.O. 1990, c. I.8?
5. Is Liberty Mutual liable to pay Mrs. Fimiani's expenses of this arbitration under section 282(11) of the *Insurance Act*, R.S.O. 1990, c. I.8?

Result:

1. Mrs. Fimiani is entitled to receive a weekly income replacement benefit after September 28, 1995, pursuant to section 7 of the *Schedule* to date, on the basis that she suffers a substantial inability to perform the essential tasks of her employment.

2. Mrs. Fimiani is entitled to the rehabilitation benefits claimed pursuant to paragraph 40 of the *Schedule*.
3. Mrs. Fimiani is entitled to payments for dependant care and housekeeping and home maintenance services claimed pursuant to sections 54 and 55 of the *Schedule*?
4. Liberty Mutual is liable to pay a special award based on its refusal to accept her condition of ongoing pain and its reliance on a DAC assessment by a chiropractor who could not assess the pain condition, pursuant to section 282(1) of the *Insurance Act*, R.S.O. 1990, c. I.8.

EVIDENCE AND ANALYSIS:

The Hearing:

At the outset of the hearing, Liberty Mutual requested an adjournment. The adjournment request was denied.

The concluding day of the hearing was adjourned twice to accommodate Liberty Mutual who had agreed to produce a representative for examination by counsel for Mrs. Fimiani. At the final date set peremptorily against Liberty Mutual, the representative was not present. No explanation was offered for the absence of the representative. This delayed the conclusion of the arbitration for more than two months.

Background:

Mrs. Fimiani claims weekly income replacement benefits on the basis that she is substantially unable to perform the essential tasks of her pre-accident employment as a travel consultant. She is

also seeking payment for rehabilitation expenses as well as housekeeping and home maintenance expenses. Liberty Mutual terminated Mrs. Fimiani's weekly benefits in September 1995 after an insurer's medical examination² in July and a functional abilities evaluation³ in August 1995. Liberty Mutual claims that Mrs. Fimiani was no longer suffering from any impairment as a result of the motor vehicle accident at that time. A disability DAC was conducted in January 1996⁴ and a medical rehabilitation DAC in March and April 1996.⁵ Both of these assessments supported Liberty Mutual's termination of benefits.

Mrs. Fimiani claims a special award because of Liberty Mutual's refusal to consider the reports of her continued disability and its reliance on the disability DAC report prepared by a chiropractor who was not qualified to assess her condition. Liberty Mutual takes the position that it was not unreasonable of it to have relied upon the report of the disability DAC.

Evidence:

Liberty Mutual submitted that Mrs. Fimiani's entitlement to the housekeeping and dependant care benefits claimed flowed from any conclusions drawn respecting her ability to function in the workplace. In the circumstances of this case, I agree and accordingly, will deal with the evidence respecting these benefits together.

At the time of the accident, Mrs. Fimiani was a 31-year-old mother of two young children. She was employed as a travel consultant by Ancona Travel, a small family-owned travel agency and

²Insurer's Medical Brief (IMB), Volume 1, Tab 15, Report of Dr. Marks.

³IMB, Volume 1, Tab 18, Report of Anne Carr and Gaye Berns.

⁴IMB, Volume 1, Tab 23, Report of Dr. Makos.

⁵IMB, Volume 1, Tab 28, Summary Report of Dr. Guerriero

bookkeeping firm. Prior to the accident, Mrs. Fimiani had worked at Ancona Travel full-time for many years, with some interruptions for her child care responsibilities. Mrs. Fimiani had begun working for the employer as a teenager and had worked there part time through high school and university. Mrs. Fimiani trained to be a school teacher but after two years of supply teaching she began working full time as a travel consultant.

Mrs. Fimiani's employer served a largely ethnic customer base and had two core client groups. The largest part of the business was servicing the travel needs of commercial accounts. Mrs. Fimiani was Ancona Travel's commercial account person. In servicing a commercial account, she would first meet with the client to identify their needs: number of travellers, purpose of trip, destination, budget etc. Armed with that information, Mrs. Fimiani would then contact various travel companies and negotiate a package that met the client's requirements. In addition to the work with commercial accounts, Mrs. Fimiani also serviced retail travel customers, individuals looking for holiday travel and the like.

In addition to the travel business, Ancona also offered bookkeeping services and assisted individuals in acquiring documents. This included travel documents as well as birth certificates, health cards, marriage licenses and other government documents.

Before the accident, much of her travel consultancy work was done over the telephone. When Mrs. Fimiani returned to the workplace computers were used more often in communicating with tour operators and carriers; however, the telephone remained an important tool of the trade. Customers typically dealt with Ancona over the phone or in person.

The office was small with three or four others working in it. It was an open concept with a large reception area where a significant walk in traffic would be present. It was a busy and at times noisy work environment.

I find that the duties of Mrs. Fimiani's work at Ancona Travel, in addition to its physical demands, required that she be able to concentrate, focus on detail and handle multiple tasks simultaneously and pleasantly deal with the public in a busy, sometimes noisy, work environment.

Mrs. Fimiani was also the primary caregiver of her two children. As part of her household responsibilities she had exclusive responsibility for the indoor housekeeping tasks with minimal assistance from her husband. She was responsible for all of the cooking and indoor cleaning tasks normally associated with the care of a young family. Prior to the accident, Mrs. Fimiani had never employed a house-cleaning service.

The motor vehicle accident occurred early in the afternoon of August 20, 1995. Mrs. Fimiani was doing some last minute shopping for her childrens' birthday party. Her car was hit from behind as she attempted to make a left hand turn across oncoming lanes of traffic. Mrs. Fimiani's vehicle, a 1991 Passat, sustained significant damage and was written off. Mrs. Fimiani was thrown forward in the vehicle; her right shoulder and knees went under the dashboard and the right side of her face struck the steering wheel.

Mrs. Fimiani was taken home by her husband. She felt disorientated and nauseous and after some time with the party guests felt the need to lie down and rest. The following day, she was unable to get out of bed. The right side of her face and neck were swollen.

Mrs. Fimiani began seeking treatment immediately. She attended at the York Central Hospital and also saw Dr. Freisner, her family physician on the day after the accident. Very shortly thereafter, she began treatment with a chiropractor.

Mrs. Fimiani's most significant complaints immediately following the accident were headaches, right jaw pain, right shoulder pain, neck pain, tingling and numbness in three fingers of her right hand and back pain.

Mrs. Fimiani's complaints of face and jaw pain were significant from the start. Within a couple weeks after the accident, her jaw locked in an open position. Her family physician referred her to Dr. Tenenbaum, a Periodontist at Mt Sinai Hospital. Dr. Tenenbaum saw her on September 20, 1994 and referred her to Dr. Baker, an oral surgeon and Dr. Shandling, a neurologist, both on staff at the hospital. These specialists concluded that Mrs. Fimiani had suffered an insult to her head and jaw and was suffering post concussion syndrome and a temporomandibular joint (TMJ) dysfunction. Dr. Tenenbaum believed Mrs. Fimiani's headaches were triggered by her quite significant TMJ syndrome. He also believed that she was suffering from Chronic Pain syndrome and supported psychiatric treatment. Conservative therapies for treatment of the TMJ were prescribed by Dr. Tenenbaum; however, it was recognised that surgery might ultimately be required.⁶

In the early months of 1995, Mrs. Fimiani's TMJ problems remained significant. Chewing was difficult so Mrs. Fimiani altered her diet to include more soft foods like pasta and soups. In addition, hot and cold foods aggravated her complaints and so these were eliminated from her diet. Headaches were a daily occurrence. The painkillers, Tylenol 3, Toradol and Elavil only offered limited relief. Mrs. Fimiani also complained at this time of depression, mood swings, memory problems and an inability to concentrate or focus on things. Her children's boisterous play and noise-making would aggravate her. Dr. Freisner prescribed Amitriptyline for her depression. In addition to the TMJ disorder and the recurring headaches, Mrs. Fimiani continued to suffer neck and shoulder pain, back pain and numbness and tingling in her right hand.

⁶IMB, Volume 1, Tab 7, Letter to Dr. Tenenbaum, March 22, 1995.

Mrs. Fimiani attended at Aqua Rehabilitation on the recommendation of Dr. Freisner from January to March 1995. These treatments helped in resolving some of her complaints of pain and functional limitation related to her back injuries. She began a course of treatment at ProMotion Physiotherapy in April 1995. This included a work-hardening program as well as treatment for her TMJ disorder.

In July 1995, Liberty Mutual had Mrs. Fimiani assessed by Dr. Marks, an orthopaedic surgeon, who concluded that Mrs. Fimiani was not physically restricted from resuming her normal activities. However, in coming to this conclusion, Dr. Marks noted that Mrs. Fimiani's complaints related to her TMJ disorder were outside of his expertise and he made no comment with respect to those issues. The physiotherapist and occupational therapist who conducted the functional abilities evaluation concluded that she could not return to work at that time because she lacked the "activity, pain and stress tolerance" to be able to work on a full-time basis.⁷

Mrs. Fimiani's weekly income replacement benefits were terminated in September 1995.

In an effort to resolve her TMJ problem, Mrs. Fimiani found, as a result of her own research, the Cervical Cranial Rehabilitation Institute (CCRI). She attended there for treatment from October 1995 to the summer of 1996. Treatment at the CCRI included physiotherapy for her TMJ disorder, psychotherapy, massage therapy and cognitive remediation. In addition to these treatments, Dr. Jacobs of the CCRI sought ways to reduce Mrs. Fimiani's heavy use of Tylenol 3 for pain relief. Morphine was used for a trial period but discontinued and nerve blocks were begun. The nerve block injections did provide relief to her neck for short periods of time according to Mrs. Fimiani and she has continued to receive them periodically to date.

⁷IMB, Volume 1, Tab 18, Report of Orthopaedic and Arthritic Hospital - Functional Abilities Evaluation

Mrs. Fimiani was discharged from the CCRI in August 1996. In the view of the CCRI, Mrs. Fimiani's most significant problems at that point were her TMJ disorder and associated pain, headaches and fatigue. By the summer of 1996, her back pain was not a significant impediment to her ability to function.

Mrs. Fimiani returned to work in February 1996 on a part-time basis. For a short period of time, she worked for no wages in order to refamiliarise herself with the operation of the business and current travel information. Mrs. Fimiani worked for two to three hours, three days a week. She found it difficult to function effectively in the office and concentrated on what she described as paper work - accounting and bookkeeping, rather than dealing with customers' travel requests. Mrs. Fimiani felt able to handle tasks one at a time if she was able to do her work in a quiet space at the back of the office, but could not "multi-task" or handle the hustle and bustle of the front end of the office.

Mr. Nick Lattanzio a manager for Ancona Travel testified that Mrs. Fimiani was, prior to the accident, "a complete employee," one of the best that was in the office. After the accident and to this day, Mrs. Fimiani is not the same person or employee and added little of value to the business. The only reason that the employer paid her, according to Mr. Lattanzio, was that she had worked there since she was 14 years old and had grown up in the business. Mr. Lattanzio testified that he would not hire her to work full-time now as she was not capable of being productive for the part-time hours that she currently worked. He noted no substantial improvement in Mrs. Fimiani's ability to function from the time of her first return in early 1996 to the arbitration.

Dr. Laibovitz of the CCRI, a dentist, referred Mrs. Fimiani to Dr. Psutka, an oral surgeon. After examining Mrs. Fimiani and reviewing the relevant materials from treating physicians and others including an MRI of her head and jaw taken in May 1996, Dr. Psutka concluded that she may

have suffered a disc displacement in the right TMJ. Dr. Psutka noted severe pain in the muscles of Mrs. Fimiani's jaw over the right TMJ as well as limited range of motion with deviation of the jaw to the right. In light of her poor response to conservative therapies including physiotherapy and the use of a bite splint, Dr. Psutka recommended that she have right TMJ arthroscopic surgery.

That arthroscopic jaw surgery was conducted in May 1997. Dr. Psutka's direct observations of Mrs. Fimiani's right TMJ confirmed what her treating physicians and others had previously concluded. As a result of the accident and the blow to her jaw, Mrs. Fimiani had sustained significant damage to her TMJ. The objective findings of Dr. Psutka were entirely consistent with his previous findings regarding her level of muscular pain, her headaches, jaw locking and limited mouth opening.

Dr. Psutka was able to repair the mechanics of the joint; however, Mrs. Fimiani's complaints of pain were not significantly reduced. According to the Doctor, this was not an unusual result for patients with Mrs. Fimiani's problems. Dr. Psutka prescribed Percaset for the pain and had several follow-up visits with Mrs. Fimiani.

Mrs. Fimiani worked part time at Ancona Travel until the surgery to correct her TMJ disorder in May 1997. She returned to work on a part time basis in April 1998.

Dr. Freisner referred Mrs. Fimiani to Dr. Zelina, a psychiatrist in May 1997. Dr. Zelina offered a differential diagnosis of major depression and post-traumatic stress disorder. Dr. Zelina continues to see Mrs. Fimiani. He testified that in his view Mrs. Fimiani was functioning at or near full capacity working part-time at Ancona. He considered that she would need help in the home because of her fatigue and inadequate pain control.

At the hearing, Mrs. Fimiani testified that she still suffered severe headache, jaw pain, neck pain, fatigue, an inability to concentrate, perform multiple tasks and depression. Mrs. Fimiani testified that these complaints limited her ability to work beyond the part time hours that she currently maintained.

Analysis:

Liberty Mutual relied upon a disability DAC conducted in January 1996. The DAC was conducted by Bruce Makos, a chiropractor who concluded that Mrs. Fimiani was not “significantly physically disabled from returning to her pre-accident vocation.”⁸ In Dr. Makos’ view, her injuries were primarily soft-tissue in nature and would resolve. As regards her TMJ complaints, he concluded that she had “a self-reducing meniscal tear of the right joint.” Dr. Makos also found that Mrs. Fimiani was pain focussed and had developed chronic pain behaviours.

I prefer the views of the many other medical practitioners who treated or saw Mrs. Fimiani either before or after the Disability DAC, the majority of whom disagree with the conclusions of Dr. Makos, who is neither a dentist nor a specialist in TMJ disorders. Dr. Makos’ report fails to recognise Mrs. Fimiani’s impediments to returning to her pre-accident level of activity, which at the time of his assessment were, neck pain, TMJ pain and associated headaches, fatigue and depression. In contrast to Dr. Makos’ findings, all the dentists who examined Mrs. Fimiani have diagnosed her as suffering a significant TMJ disorder. Dr. Psutka who conducted the surgery and saw the damage to the joint found objective evidence to substantiate all of Mrs. Fimiani’s subjective complaints since the accident. In particular, he confirmed that Mrs. Fimiani had suffered a displaced disc in the right joint and not a self-reducing meniscal tear.

⁸IMB, Exhibit 1, Tab 23, report of Richmond Hill Rehabilitation Centre

Flowing from the TMJ disorder were well-documented complaints of an inability to concentrate and attend to multiple tasks. Despite the fact that Mrs. Fimiani and others involved in her care raised these issues, Dr. Makos considered the job of a travel consultant as if all that mattered to its successful performance were the physical elements such as sitting, standing, talking and keyboarding.

In light of all of the evidence summarised above, I find that Mrs. Fimiani has been limited in her ability to work by her headaches, jaw pain, fatigue, an inability to concentrate and do multiple tasks as well as depression from the date of the accident to the present. Her evidence was not challenged in any respect and was supported in a compelling way by Mr. Lattanzio, Dr. Zelina and Dr. Psutka. I find that Mrs. Fimiani has been and remains substantially unable to perform the essential tasks of her job as a travel consultant as a result of the injuries sustained in the automobile accident.

As indicated, Liberty Mutual has relied upon a subsequent medical rehabilitation DAC conducted by North York Rehabilitation which concluded, amongst other things, that further rehabilitation, physiotherapy etc. were not reasonable or necessary for Mrs. Fimiani's recovery. The DAC also concluded that further housekeeping assistance was not required.

Liberty Mutual submitted that the resolution of the issues of entitlement to housekeeping dependent care benefits would flow from my conclusions respecting Mrs. Fimiani's level of disability and her ability to function in the workplace. In addition, there are reasons to question some of the conclusions of the medical-rehabilitation DAC which I will canvass more completely below when considering the claim for a special award.

The evidence of Mrs. Fimiani, Dorothy Kamaguchi, an occupational therapist, Mr. Fimiani and Ms. Rotondi, Mrs. Fimiani's sister was essentially uncontradicted with respect to the need for

some assistance around the home. Ms. Rotondi who was employed full-time throughout the relevant time period, included a once-a-week “top to bottom” cleaning of the house, ironing each week and some babysitting of the Fimiani children as required. She was paid \$60 for the housekeeping, \$20 for the weekly ironing and \$7 per hour for babysitting. I am satisfied that the rates paid are reasonable given the services provided.

Liberty only challenged the quantum of the housekeeping and dependant care benefits claimed in two respects. The first related to a two-week period in the summer of 1999 when Mr. Fimiani was away on soccer tournaments. Ms. Rotondi moved into the Fimiani residence for the two-week period. She took over some of the cooking tasks performed by Mr. Fimiani and spent more time supervising the children. She was paid \$200 for each of the two weeks. Liberty Mutual submitted that it should not have to pay that amount because this extra work was not related to the accident. I do not agree. It is true that the soccer tournament and hence Mr. Fimiani’s absence for the two-week period was not a consequence of the accident; however, Mrs. Fimiani’s inability to fill the gap created by her husband’s absence was a consequence of the accident and therefore, compensable. In my view, the amount claimed for the two-week period are reasonable.

Liberty Mutual also questioned the amount attributed to dependant care. Ms. Rotondi testified that this included time spent watching television with the children while Mrs. Fimiani rested in the early evenings. I find that as the children were pre-school age at the relevant times, the expenses claimed are reasonable.

Accordingly and despite the views expressed in the medical rehabilitation DAC, I find that Mrs. Fimiani is entitled to the housekeeping and dependant care benefits claimed.

Liberty Mutual made no submissions respecting the rehabilitation services claimed. Dorothy Kamaguchi gave evidence of the need for the services provided and I accept that evidence.

Mrs. Fimiani testified that she received benefit from these services; in particular, they assisted her in her return to work. Liberty Mutual offered no substantial challenge to that evidence. I find therefore that the rehabilitation services provided were reasonable and necessary.

Special Award:

Mrs. Fimiani sought a lump sum special award of 50 percent of the outstanding benefits owing to her. Section 282(10) of the *Insurance Act* provides that an arbitrator shall award a lump sum where he or she finds that an insurer has unreasonably withheld or delayed the payment of benefits. Arbitrators have consistently held that the insurer need not act in bad faith or maliciously for a special award to be made;⁹ imprudent, stubborn, inflexible or unyielding behaviour has been found to attract a special award.¹⁰ Of particular relevance to these circumstances is the view of many arbitrators that the failure of an insurer to re-evaluate its position in light of new evidence will give rise to a special award.¹¹

Mrs. Fimiani claimed that it was unreasonable to withhold benefits on the basis of the disability DAC assessment when other medical practitioners had indicated that her TMJ disorder and associated headache and pain were significantly limiting her ability to return to her pre-accident level of functioning. Mrs. Fimiani also asked that I draw an adverse inference from Liberty Mutual's failure to produce a representative to explain its handling of this claim.

Liberty Mutual submitted that it was not unreasonable to rely upon the reports of the DAC. The company is not expert in medical matters and it must rely upon the opinions of others, primarily

⁹*Erickson and The Guarantee Company of North America* (OIC A-000560, July 16, 1992)

¹⁰*Sukhwant Singh and Gore Mutual Insurance Company* (FSCO A95-000257, July 3, 1998)

¹¹*McConachie and Gan Canada Insurance Company* (FSCO P97-00069, October 28, 1998) and the cases cited therein.

medical experts, to guide its decision making. It further submitted that it did not control the selection of the DAC which conducted the assessment. The modalities of assessment were not determined by the insurer either but were determined by the DAC, according to Liberty Mutual. Liberty Mutual offered no explanation for its failure to provide a representative for examination by Mrs. Fimiani, after agreeing to do so.

I agree with Liberty Mutual that the insurer is limited in its ability to select the DAC assessors. The Guideline for Selecting the Nearest Designated Assessment Centre provides that the insured person be sent to the DAC nearest to the residence of the insured person *that is authorized to assess impairments of the type sustained by the insured person.*¹² There is no evidence whether Dr. Makos is authorised to assess TMJ disorders and I was not asked to make any findings with respect to that question.

In any event, these limits on the ability of an insurer to select the DAC assessor does not mean that it is required to follow without question the opinions of a DAC. The choice to terminate benefits or not is still open to the insurer after receiving the DAC report. If the company decides to terminate benefits and if that decision is found to be unreasonable, a special award may be made despite the company's reliance upon a DAC assessment.

A special award is merited in this case for the following reasons.

Despite the fact that there was considerable evidence that her TMJ disorder was a serious problem for Mrs. Fimiani, Liberty Mutual never appeared to take this problem seriously. The referral letter to Dr. Makos is illustrative in that it makes no reference to Dr. Tenenbaum's view of the extent of Mrs. Fimiani's TMJ disorder and its possible link to the headaches and pain of which she was complaining. Further while citing the report of Dr. Marks and the FAE assessment

¹²OIC Commissioner's Guidleine No. 3/95, effective September 2, 1995

conducted in July 1995, the referral makes no mention of the fact that both assessors noted Mrs. Fimiani's TMJ complaints but declined to comment on it as it was outside their respective areas of expertise. As well, the referral letter cites Dr. Jacobs' report of a history of migraine headache experienced by Mrs. Fimiani but does not refer to the report of Dr. Laibovitz, a dentist who treats orofacial pain and TMJ disorders, contained in the same report. In short, I find the referral letter is not a fair summary of Mrs. Fimiani's history of complaints nor the views of those other medical practitioners who had previously treated or assessed her to that point.

Dr. Makos' opinion of the extent of Mrs. Fimiani's disability should have been viewed with some caution, not as suggested by Mrs. Fimiani, because it was made by a young and inexperienced chiropractor but because it was the opinion of someone with relatively little expertise with TMJ disorders. Liberty Mutual knew that Mrs. Fimiani's major complaints were TMJ disorder, face pain, headache and depression. It knew that Dr. Laibovitz and Dr. Tenenbaum both believed that Mrs. Fimiani's TMJ disorder was significant. It knew that Dr. Tenenbaum believed that there was a connection between the TMJ disorder and Mrs. Fimiani's headaches. Dr. Makos' report did not deal with any of these issues. Dr. Makos is not a dentist and had no significant training in dealing with TMJ.

Shortly after Dr. Makos provided his advice to Liberty Mutual, the CCRI advised that Mrs. Fimiani was working to capacity and was limited from doing more by her stress, fatigue and headaches which limited her ability to concentrate.¹³

The significance of the TMJ disorder to Mrs. Fimiani's disability becomes even more clear after Dr. Makos' assessment. Despite this, Liberty Mutual continued to make no effort to investigate

¹³ Exhibit 1, Tab 26, report of the CCRI March 29, 1996.

those concerns. Instead it relied upon a subsequent medical rehabilitation DAC assessment and an IME conducted by Dr. Roussev, a neurologist.

The medical rehabilitation DAC was conducted, in part, over three days in March 1996. The conclusions of the DAC are set out in summary report authored by Dr. Guerriero, who also conducted a physical examination of Mrs. Fimiani. The report is dated April 7, 1996 although that date does not mean anything in particular, as Dr. Guerriero conceded that he did not know when he completed the report. The date of the report is significant because important parts of the DAC assessment were conducted after April 7, 1996.

Dr. Guerriero's opinion was that Mrs. Fimiani had suffered no permanent physical injuries in the accident, subject to confirmation by a dentist. Dr. Guerriero's report notes on several occasions that there ought to be a dental examination of Mrs. Fimiani to consider her complaints of TMJ dysfunction and pain. Dr. Guerreiro does provide his own diagnosis of Mrs. Fimiani's TMJ complaints. His conclusions are in marked contrast with the views of the dentist who did examine her, Dr. Cox.¹⁴

Dr. Guerriero thought that Mrs. Fimiani was self-limiting and would not open her jaw fully. In contrast Dr. Cox found Mrs. Fimiani to be "polite, cooperative".... truthful and honest and whose responses did not exhibit any exaggerated pain reflexes." Dr. Guerriero found that Mrs. Fimiani was able to fit three finger breadths in her mouth (50 mm). Dr. Cox found a maximal mouth opening of 20 mm. Dr. Guerriero found no crepitus or grinding palpated over the TMJ. Dr. Cox found bilateral clicks in both left and right TMJ and fine crepitus in the left TMJ.

¹⁴IMB, Volume 1, Tab 29, Report of Dr. Cox, April 30, 1996.

In short, Dr. Cox came to entirely different conclusions about Mrs. Fimiani's TMJ condition. Despite the references in the summary report to the need for an expert dental examination of that issue, Dr. Cox's opinions were not referred to in the DAC assessment.

As part of the assessment but well after the date of the summary report, Mrs. Fimiani was seen by Dr. Gladstone, a neurologist.¹⁵ The fact that Dr. Gladstone was part of the assessment team is not apparent from the summary report. Dr. Gladstone, like Dr. Cox, is not included in the list of individuals who participated in the DAC assessment and his neurological findings and recommendations are not referred to anywhere in Dr. Guerriero's report.

Dr. Gladstone also noted Mrs. Fimiani's TMJ complaints and came to different conclusions than Dr. Guerriero about them. Dr. Gladstone also recommended an EEG and metabolic perfusion brain spect scan to further evaluate her "pervasive hemicrania." These recommendations do not find their way into Dr. Guerriero's report.

In response to that report, on June 17, 1996 the CCRI wrote to Liberty Mutual questioning its conclusions.¹⁶ That critique goes far beyond my comments. Whether or not Liberty Mutual ought to have entirely accepted CCRI's opinions at that stage, it was on notice that substantial questions had been raised about the North York Rehabilitation DAC assessment. Despite the opinions of Dr. Cox in particular as well as Dr. Gladstone which indicated that the TMJ disorder was a serious problem, Liberty Mutual again took no steps to investigate Mrs. Fimiani's TMJ disorder.

Liberty Mutual subsequently sent Mrs. Fimiani to an insurer's medical examination conducted by Dr. Roussev, a neurologist. Dr. Roussev testified that he was not provided with the reports of the medical-rehabilitation DAC including the report of Dr. Gladstone. He was not provided with the

¹⁵IMB, Volume 1, Tab 33, Report of Dr. Gladstone.

¹⁶IMB, Volume 1, Tab 34.

reports of many of Mrs Fimiani's treating physicians. In his report to Liberty Mutual, Dr. Roussev expressed the view that Mrs. Fimiani could safely return to her pre-accident activities.

When asked why he had made no comment on Mrs. Fimiani's TMJ disorder, Dr. Roussev responded that it was beyond his area of expertise. He also indicated that he would defer to experts in that field but that would not include a chiropractor. He further testified that his report should only be read as indicating that he could not detect any neurological impediments to her returning to a more active life. He did question whether the kind of headache pain described by Mrs. Fimiani could persist for days on end.

The arthroscopic surgery on Mrs. Fimiani's jaw was conducted in May 1997 by Dr. Psutka. As I found above, Dr. Psutka discovered objective evidence that validated Mrs. Fimiani's complaints. Despite the objective findings of Dr. Psutka which confirmed the conclusions of Dr. Cox, Dr. Baker, Dr. Tenenbaum and others, Liberty Mutual refused to reassess its position.

In my view the conduct of Liberty Mutual is not the worst case and therefore does not merit a 50 percent award. However its handling of this claim requires more than the 5 to 10 percent award suggested by Liberty Mutual. The evidence compels the conclusion that once Liberty Mutual received an opinion supporting a termination of benefits it chose to remain indifferent to whatever further evidence it received. In contrast with Liberty Mutual's indifference, by almost all accounts, Mrs. Fimiani was making every effort at rehabilitation. Mrs. Fimiani wanted to get better. Moreover the failure of Liberty Mutual to offer any explanation for its handling of this matter compels the inference that there is no reasonable explanation for its conduct.

Mrs Fimiani provided calculations of the benefits outstanding as of the last day of hearing; however, these were subject to certain adjustments. Based upon that material the quantum of

benefits, with interest, to which Mrs. Fimiani is entitled, is subject to adjustments in excess of \$140,000. On the basis of the evidence before me, I award a lump sum of \$30,000 inclusive of interest to date, as a special award.

EXPENSES:

The parties did not speak to the issue of expenses and may do so now if unable to resolve the matter themselves.

David Muir
Arbitrator

January 11, 2000

Date

BETWEEN:

DOMENICA FIMIANI

Applicant

and

LIBERTY MUTUAL 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. Mrs. Fimiani is entitled to receive weekly income benefits from Liberty Mutual pursuant to section 8(1) of the *Schedule* from September 1, 1995 in the amount of \$394.39 and continuing for such period during which she suffers a substantial inability to perform the essential tasks of her pre-accident employment.
2. Mrs. Fimiani is entitled to receive dependant care and housekeeping expenses pursuant to sections 54 and 55 of the *Schedule* from Liberty Mutual .
3. Mrs. Fimiani is entitled to receive rehabilitation expenses pursuant to section 40 of the *Schedule* from Liberty Mutual.
4. Mrs. Fimiani is entitled to receive interest on overdue payments calculated in accordance with section 68 of the *Schedule* from Liberty Mutual.
5. Mrs. Fimiani is entitled to receive a lump sum special award of \$30,000 pursuant to section 282(10) of the *Insurance Act* from Liberty Mutual.

David Muir
Arbitrator

January 11, 2000

Date