

**BETWEEN:**

**ALDOUSE MILLER**

**Applicant**

**and**

**PAFCO INSURANCE COMPANY LIMITED**

**Insurer**

**DECISION**

**Issues:**

The Applicant, Aldouse Miller, was injured in a motor vehicle accident on October 18, 1994. He applied for and received statutory accident benefits from the Insurer, payable under the *Schedule*.<sup>1</sup> Income replacement benefits were terminated by the Insurer on March 29, 1995. The parties were unable to resolve their disputes through mediation and the Applicant applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

---

<sup>1</sup> The *Statutory Accident Benefits Schedule - Accidents on or after January 1, 1994*, called "the *Schedule*" in this decision. The *Schedule* is Ontario Regulation 776/93, as amended by Ontario Regulation 635/94.

1. Is Mr. Miller entitled to income replacement benefits pursuant to section 7(1) of the *Schedule* from March 30, 1995 onwards?
  
2. Is Mr. Miller entitled to reimbursement for the following supplementary medical expenses:
  - (a) physiotherapy expenses from Sun Physical Rehabilitation in the amount of \$5,875.00;
  - (b) medication expenses in the amount of \$309.37;
  - (c) acupuncture expenses in the amount of \$1,040;
  - (d) transportation expenses in the amount of \$1,226.50; and
  - (e) housekeeping expenses in the amount of \$4,360?

The Applicant also claims interest on any amounts owing, and his expenses incurred in the hearing.

**Result:**

1. Mr. Miller is entitled to income replacement benefits pursuant to section 7(1) of the *Schedule* from March 30, 1995 to February 28, 1996.
  
2. Mr. Miller is entitled to the reimbursement of the following expenses:
  - (a) physiotherapy expenses from Sun Physical Rehabilitation in the amount of \$5,875.00;
  - (b) medication expenses in the amount of \$309.37;
  - (c) acupuncture expenses in the amount of \$1,040;

- (d) transportation expenses in the amount of \$1,226.50, less the cost of four return TTC tickets; and
  - (e) housekeeping expenses in the amount of \$4,360.
3. Mr. Miller is entitled to interest on the amounts owing pursuant to section 68 of the *Schedule*.
4. Mr. Miller is entitled to his expenses incurred in respect to the arbitration pursuant to section 282(11) of the *Insurance Act*.

**Hearing:**

The hearing was held in, North York, Ontario, on June 12 and 13, 1996, before me, Joyce Miller, arbitrator.

**Present at the Hearing:**

Applicant:	Aldouse Miller
Applicant's Representative:	Brent Vickar Barrister and Solicitor
Insurer's Representative:	David Zarek Barrister and Solicitor
Insurer's Officer:	Kris Ramjattan

Witnesses: Aldouse Miller

Exhibits: The parties filed eight exhibits

## Evidence and Findings:

### 1. *Background*

Mr. Miller, who is 39 years old and married, immigrated to Canada from Jamaica in 1988. He first worked in sales and then worked as an embroidery machine operator. At the time of the accident he was working at a company which designed and embroidered logos.

The accident occurred on October 18, 1994. Mr. Miller was at the wheel of his car in the curb lane of Jarvis Street, a three lane street in Toronto. Because the curb lane was blocked, he started to move into the centre lane, when he was hit by a fast moving car that had suddenly veered from the outer lane to the centre lane. His car was struck on the driver's side. As a result of the impact, Mr. Miller hit his head, left shoulder and left knee against the door panel. He said he also felt pain in his lower back.

Mr. Miller was taken by ambulance to St. Michael's Hospital. He was examined, x-rays were taken, and he was released to go home. Mr. Miller saw his family doctor, Dr. Lam, the next day. He saw Dr. Lam several times, but decided to change to his daughter's doctor, Dr. Chaudhri, because Dr. Chaudhri's office was closer to Mr. Miller's house. Dr. Chaudhri continues to be his family doctor.

## *2. Essential Tasks*

Mr. Miller received income replacement benefits until March 29, 1995. He claims that his injuries from the accident continue to substantially disable him from performing his essential tasks at work.

Mr. Miller testified that as an embroidery machine operator he was required to stand, bend and twist his body. The work also involved repetitive movement.

The embroidery machine Mr. Miller worked on embroidered caps, such as baseball caps. The machine had 15 heads with seven needles and was run by a computer.

Mr. Miller's first duty was to program the computer for the specific design ordered. Sometimes the design had already been decided upon and he would take over the work that the first shift had started. At other times he would start a new design and had to thread the machine, a task which took about two hours.

After the machine was threaded, Mr. Miller would put 15 caps on aluminum hoops to hold them steady for the machine. While these 15 caps were being embroidered, he hooped another 15 caps. His job was to continually feed the machine.

Mr. Miller stated that he worked the evening shift from 3:30 to 11:30 pm. He had two 15 minute breaks and 30 minutes for lunch. He regularly worked overtime so that he averaged 50 to 55 hours a week.

Mr. Miller testified that because he worked the evening shift and his wife worked in a day-care during the day, he was responsible for doing the household chores, including cooking and laundry. Mr. Miller claims that since the accident, he is unable to do his household chores as well as not being able to work at his job.

### *3. The Medical Evidence*

After the accident Mr. Miller was referred to physiotherapy. He did not continue with the first program that was recommended to him at Rexdale Physiotherapy and Community Clinic. However, he subsequently began to attend at the Sports Injury and Rehab Centre, where he was treated by a chiropractor, Dr. Gringmuth.

In December 1994 Mr. Miller underwent an Insurer's Medical Assessment (IME) by Dr. Houston, an orthopaedic surgeon. Dr. Houston found Mr. Miller was unable to perform his essential tasks at work. However, he opined that Mr. Miller should be able to return to work in about three weeks.<sup>2</sup>

In a report dated February 2, 1995, Dr. Chaudhri agreed with Dr. Houston's findings that Mr. Miller was substantially disabled from performing the essential tasks of his work, but disagreed with Dr. Houston's prognosis that Mr. Miller could return to work in three weeks. He noted that Mr. Miller still suffered from neck and lower back pain with obvious restricted mobility. As well, he still had shoulder pain with stress pain at the extremes of motion.<sup>3</sup>

---

<sup>2</sup> Exhibit 7, Tab 2, Report of Dr. James Houston dated December 15, 1994 at p.7

<sup>3</sup> Exhibit 1, Tab 2, Report of Dr. Chaudhri dated February 2, 1995 at pp. 3 and 4.

Dr. Chaudhri noted in his report that Dr. Houston had recommended a more active therapy program. He agreed with this and referred Mr. Miller for physiotherapy at Sun Rehabilitation. Mr. Miller continued to attend physiotherapy at Sun Rehabilitation until November 1995.<sup>4</sup> Pafco refused to pay for this treatment.

On February 9, 1995, Mr. Miller attended for an assessment at a Designated Assessment Centre (DAC), which was performed by Dr. Grossman. Dr. Grossman's conclusion was that Mr. Miller's limitations were "purely of a subjective nature" and that there was no objective reason why he could not perform his work activities.<sup>5</sup>

On March 29, 1995 Mr. Miller's income replacement benefits were terminated.

In a report dated April 26, 1995, Dr. Chaudhri noted that Dr. Grossman's physical examination indicated that Mr. Miller had diminished mobility of the cervical, lumbosacral and left shoulder region. In his view, this contradicted Dr. Grossman's opinion that there was "no objective parameter of impairment."<sup>6</sup>

Dr. Chaudhri goes on to note that when he saw Mr. Miller on April 24, 1995, he complained of neck pain, lower back pain, intermittent left knee pain, left shoulder pain, headaches, insomnia and feeling "down in the dumps," nightmares, fear of driving, fatigue and frustration with his current predicament.<sup>7</sup>

---

<sup>4</sup> Ibid., at p. 4

<sup>5</sup> Exhibit 7, Tab 3 Report of Dr. Robert Grossman dated February 13, 1995 at p. 5.

<sup>6</sup> Exhibit 1, Tab 2, Report of Dr. Chaudhri dated April 26, at p. 3

<sup>7</sup> Ibid., at pp. 3 and 4

From his physical examination of Mr. Miller, Dr. Chaudhri found pain and tenderness as well as diminished mobility in the injured areas. He concluded that Mr. Miller was still substantially disabled from performing his "work-type activities in a factory type setting, as well as performing any activities which involve bending, lifting, prolonged sitting and standing, such as - homemaker type activities."<sup>8</sup>

Dr. Chaudhri also noted in his report that because of Mr. Miller's psychological complaints, he had referred him to be assessed by Dr. Ramona Domander, a psychologist. As well he prescribed anti-depressant medication. Pafco refused to pay for any medication prescribed after January 1995.

In May and June 1995 Mr. Miller was assessed by Dr. Domander. In her report of June 20, 1995, Dr. Domander concluded that Mr. Miller "meets the DSM-IV criteria for a Post-Traumatic Stress Disorder of mild severity."<sup>9</sup> As well she noted that he displayed symptoms of depression, of a mild intensity. In her view, Mr. Miller appeared "partly psychologically disabled with respect to participating in and enjoying his pre-accident activities of daily living, including work." She noted that "[t]here appear to be no significant pre-existing psychological factors which might have contributed to his present condition."<sup>10</sup>

In July 1995 Dr. Chaudhri referred Mr. Miller to a psychiatrist, Dr. Butler, for assessment and treatment.

---

<sup>8</sup> Ibid at p.5

<sup>9</sup> Exhibit 1, Tab 4, Report of Dr. Ramona Domander, dated June 20, 1995 at p. 6.

<sup>10</sup> Ibid.



In fall 1995, Dr. Chaudhri referred Mr. Miller to Dr. Kachooie, a physiatrist, at the Rehab Medicine Centre. Dr. Kachooie in turn referred Mr. Miller for acupuncture treatment with Dr. Rad. Pafco refused to pay for this acupuncture treatment.

In January 1996 Mr. Miller underwent a medical and rehabilitation DAC assessment. As part of the evaluation, Mr. Miller was seen by a chiropractor, Dr. Robert Gridale, a psychologist, Dr. Michael Gadon, and a physician, Dr. Harold Becker.

The DAC report of February 28, 1996<sup>11</sup> concluded that Mr. Miller did not require any further passive treatment and recommended an active exercise program in conjunction with a swimming program to address Mr. Miller's low back and left shoulder stiffness. The report noted no other significant physical impairments.<sup>12</sup>

The psychological assessment noted that Mr. Miller had ongoing psychological difficulties such as post-traumatic stress disorder along with a pain disorder associated with psychological factors. The report, however, concluded that "[a]lthough he may benefit from psychological intervention, the assessment did not find any psychological reasons why he should not return to a physically appropriate job at this time."<sup>13</sup>

---

<sup>11</sup> Exhibit 7, Tab 4, Medical and Rehabilitation DAC Assessment report, dated February 28, 1996

<sup>12</sup> Ibid at p. 2

<sup>13</sup> Ibid. at p. 24

In a report dated May 12, 1996, Dr. Kachooie noted that Mr. Miller "... was limited to work involved in full time heavy labour work, his original job as a Machine operator, but I felt that he was able to perform light duty modified work."<sup>14</sup>

## Analysis and Findings

### 1. *Entitlement to weekly benefits*

The issue that I must decide is whether Mr. Miller is entitled to receive income replacement benefits under section 7(1) of the *Schedule*. Section 7(1) provides:

An insured person who sustains an impairment as a result of an accident is entitled to a weekly income replacement benefit if the insured person meets any of the following qualifications:

1. The insured person was employed at the time of the accident and, as a result of and within two years of the accident, suffers a substantial inability to perform the essential tasks of that employment.

"Impairment" has been defined in section 1 of the *Schedule* as "a loss or abnormality of psychological, physiological or anatomical structure or function."

In order to succeed in his claim, Mr. Miller has the onus to establish, on a balance of probabilities, that he suffered a substantial inability to perform the essential tasks of his occupation as a result of the motor vehicle accident.

---

<sup>14</sup> Exhibit 1, Tab 5, Report of Dr. A. Kachooie, dated May 12, 1996 at pp. 7 and 8.

*(a) Issues of Credibility*

Before discussing the medical evidence, I will first deal with the issue of credibility. Pafco submitted that Mr. Miller's evidence was not credible.

Pafco noted that it was incumbent on Mr. Miller to reveal to his medical assessors his previous medical condition. It claimed Mr. Miller was not honest. According to Pafco, Mr. Miller had failed to let the medical assessors know about his previous psychological problems. Counsel for Pafco referred to the fact that in February 1994 Mr. Miller had on one occasion seen a psychotherapist for marital problems. He noted that under cross-examination Mr. Miller denied having marital problems. As well counsel pointed out that prior to the accident, Mr. Miller saw his doctor on several occasions for tension headaches.

Pafco also noted that both Dr. Houston and Dr. Grossman found Mr. Miller's physical restrictions to be self-limited. This, Pafco submitted, was a reflection of Mr. Miller's lack of credibility.

Pafco stated that on four occasions, March 28, 29, 30, and 31, 1995, when Mr. Miller attended his treatment sessions, he submitted duplicated receipts for his transportation. That is, he submitted both taxi and subway receipts for those days. When confronted with this, Mr. Miller was vague in his response. He first stated that the subway receipts belonged to his daughter and then said they were probably his.

In my view in order for an applicant not to be found credible, the evidence must show that the lack of credibility is substantial and significant and that it affects the relevant and material elements of the applicant's claim.

Mr. Miller testified in a vague manner. In responding to questions he would often go off on long tangents. I can see why this could add to Pafco's concern that Mr. Miller was being evasive and was not a forthright witness. Nevertheless, after assessing the evidence, despite some inconsistencies and discrepancies, I do not find that Pafco's credibility concerns meet the test of being substantial and significant.

In my view, the fact that Mr. Miller attended once for a psychotherapy session in February 1994 does not mean he had such significant psychological problems that he should have informed the assessing doctors about them. I agree with counsel for Mr. Miller's submission that there was no evidence to show that Mr. Miller had suffered from any significant pre-accident health or psychological problems. Moreover, there was no evidence to show that he had missed any work for health-related reasons before the accident.

I also find that there was no conclusive evidence to show that Mr. Miller's self-limiting behaviour was deliberate. Although Dr. Houston and Dr. Grossman commented that they thought Mr. Miller's physical restrictions were self-limited, Dr. Becker, who also noted the self-limiting behaviour, characterized it as not being consciously based. Dr. Becker believed that this behaviour was "... occurring on an apprehensive basis, coupled somewhat with his Adjustment Disorder which has evolved over the time frame of his recovery from this accident."

As for the discrepancy in the transportation receipts, I view this as a minor concern. Had the evidence showed that for the most part the receipts which Mr. Miller submitted were unrelated to transportation for medical treatments or that he presented a significant number of duplicated receipts, I would view this as an indication of dishonesty. But that is not the case here.

For all of the above reasons, I find that the evidence does not support a finding that Mr. Miller was not a credible witness on the relevant and material elements of his claim.

(b) *Findings*

The medical evidence in this case is divided. On the one hand, the IME and DAC doctors, Dr. Houston and Dr. Grossman, felt that Mr. Miller could have returned to his work by the beginning of 1995. On the other hand, Dr. Chaudhri, Mr. Miller's family doctor, disagrees on the basis that Dr. Houston and Dr. Grossman's conclusions do not correspond to their physical findings. In his last report of July 18, 1995, Dr. Chaudhri, who saw Mr. Miller on a regular basis, was of the view that Mr. Miller was still substantially disabled from performing his pre-accident work.

The evaluation of the medical evidence was difficult. None of the doctors was called to testify. Given the differences in the medical opinions, in this case it would have been helpful to have heard some further explanation regarding the conclusions of Dr. Houston and Dr. Grossman. For reasons noted below, I found that Mr. Miller was still substantially disabled beyond the time period noted by Dr. Houston and Dr. Grossman in their reports.

Except for Mr. Miller's testimony, which was not contradicted, there was a paucity of medical evidence regarding Mr. Miller's physical condition in the period between Dr. Chaudhri's July 18, 1995 report, which found Mr. Miller to be substantially disabled, and the DAC report of February 28, 1996, which found him to no longer be disabled from performing his pre-accident work.

It is Mr. Miller's position that he is still substantially unable to perform his pre-accident work. However, after reviewing all of the evidence, for the following reasons, I choose to accept that on a balance of probabilities, it is more likely than not that Mr. Miller was no longer substantially disabled from performing his pre-accident work by February 28, 1996.

In my view, Dr. Houston's findings did not substantiate his conclusion. Dr. Houston found that at the time of his examination on December 15, 1994, that although Mr. Miller was unable to perform his essential tasks of his work, it was his opinion that Mr. Miller could return to work in three weeks.

However, in his report, Dr. Houston notes that Mr. Miller suffers from a pre-existing condition of his spine called spondylolysis.<sup>15</sup> He goes on to say "... that the configuration can make such a back more sensitive to various stresses and strains and slower to recover from such stresses and strain than would be [the] case of a spine without the configuration."<sup>16</sup>

Given Dr. Houston's findings that Mr. Miller's pre-existing condition can slow down the rate of his recovery, I found his prognosis that Mr. Miller would no longer be disabled within three weeks to be speculative.

Dr. Houston did not perform a follow-up examination to confirm his opinion. Dr. Chaudhri, however, examined Mr. Miller on January 31, 1995. I choose to give more weight to Dr. Chaudhri's findings in his report of February 2, 1995 than I do to Dr. Houston's findings.

---

<sup>15</sup>In his report Dr. Houston notes that "The condition of spondylolysis is one which develops after birth and has been estimated to be present in approximately 5% of the adult population of North America." Exhibit 7, Tab 2 at p. 6.

<sup>16</sup> Ibid.

In his report<sup>17</sup> Dr. Chaudhri notes that Mr. Miller's spondylolysis should be a factor to be taken into account with respect to Mr. Miller's speed of recovery. He goes on to note that although Mr. Miller no longer complained of chest pain and left knee pain, he continued to have ... "Neck pain with restricted mobility," ... "Lower back pain with obvious restricted mobility," and ... "Left shoulder pain with stress pain at the extremes of motion."<sup>18</sup>

In his view, as of January 31, 1995, Mr. Miller was still disabled from performing his essential tasks at the workplace. From the evidence presented I agree with his findings.

I was not satisfied with Dr. Grossman's report of February 1995. Dr. Grossman does not discuss nor does he even acknowledge Mr. Miller's pre-existing condition of spondylolysis. Although he concluded that Mr. Miller could return to work, it was not clear to me that his conclusions followed his very brief physical findings. I was persuaded by Dr. Chaudhri's reports of April 1995 and July 1995 that Mr. Miller was still substantially disabled as of those dates.

Unfortunately, as noted above, there are no other medical reports until the February 28, 1996 DAC report. During this period, however, Mr. Miller was undergoing a significant amount of treatment, which included physiotherapy, chiropractic treatments, acupuncture and psychotherapy. As well, he was on medication for pain and depression. From the evidence presented by Mr. Miller, as well as the DAC report, I was persuaded, on a balance of probabilities, that until February 28, 1996, he was still substantially disabled from performing the essential tasks of his work.

---

<sup>17</sup> Exhibit 1, Tab 2, Report of Dr. Chaudhri dated February 2, 1995 at p. 3

<sup>18</sup> Ibid. at pp. 3 and 4

I found the DAC report of February 1996 to be a thorough, in-depth and balanced assessment of Mr. Miller's physical and psychological condition.

In its conclusion, the report notes that Mr. Miller was still experiencing ongoing psychological difficulties, which had been "... identified as Post-traumatic Stress Disorder along with a Pain Disorder associated with psychological factors" and that he would benefit from psychological intervention.<sup>19</sup> Despite this conclusion, the report's overall findings lead me to conclude that there was no physical or psychological reason why Mr. Miller should not have been able to return to work by February 28, 1996.

I note that Dr. Kachooie, in his report of May 12, 1996, states that although Mr. Miller can return to light duty modified work, he cannot perform the heavy labour work of his previous job as a machine operator.<sup>20</sup> I find that Dr. Kachooie's description of Mr. Miller's work as "heavy labour" is not accurate. Dr. Kachooie made no mention of any job details in any of his reports and simply assumed Mr. Miller was engaged in heavy labour work.

The evidence shows that for the most part, Mr. Miller's job required him to put on and take off caps from aluminum hoops. While this job required repetitive action, there was no evidence presented to show that Mr. Miller was involved in any heavy lifting or carrying or any other tasks involving "heavy labour."

For all of the above reasons, I find that Mr. Miller can now return to his pre-accident activities.

---

<sup>19</sup> *Supra* Note 11 at p. 2

<sup>20</sup> Exhibit 1, Tab 5, Report of Dr. Kachooie dated May 12, 1996 at pp. 7 and 8.



Accordingly, I find that Mr. Miller is entitled to income replacement benefits pursuant to section 7 of the *Schedule* from March 30, 1995 to February 28, 1996.

## 2. *Supplementary Expenses*

Counsel for Pafco conceded that the amount of the expenses Mr. Miller was claiming was reasonable. Nevertheless, Pafco submitted that these expenses, which included, physiotherapy, acupuncture, medication, transportation and housekeeping, were neither reasonable nor necessary expenses as a result of the accident. Pafco, however, could present no evidence, nor could it give any explanation as to why these were not reasonable or necessary expenses as a result of the accident.

Section 37(1) of the *Schedule* provides:

The insurer may require a person claiming payment of an expense under section 36 to furnish a certificate from the person's health practitioner stating that the expense is reasonable and is necessary for the person's treatment.

No evidence was presented to show that Pafco had requested such a certificate. If Pafco wished to question the reasonableness or the necessity of the expenses claimed by Mr. Miller, they could have done so by utilizing section 37.

Mr. Miller's counsel pointed out that the expenses incurred were as a result of the recommendations made by Mr. Miller's doctors. There was no evidence to show that these were not reasonable expenses incurred as a result of the accident. I agree with this submission.

Accordingly, I find that pursuant to sections 36 and 55 of the *Schedule*, Mr. Miller is entitled to the reimbursement of the following expenses:

- (a) physiotherapy expenses from Sun Physical Rehabilitation in the amount of \$5,875.00;
- (b) medication expenses in the amount of \$309.37;
- (c) acupuncture expenses in the amount of \$1,040;
- (d) transportation expenses in the amount of \$1,226.50 less the cost of four return TTC tickets; and
- (e) housekeeping expenses in the amount of \$4,360.

## Expenses

Pursuant to section 282(11) of the *Insurance Act* and in accordance with the case law that has evolved, I exercise my discretion to award Mr. Miller his expenses.

## Order:

1. Pafco shall pay Mr. Miller income replacement benefits of \$265.89 per week from March 30, 1995 to February 28, 1996.
2. Pafco shall reimburse Mr. Miller the following supplementary expenses:
  - (a) physiotherapy expenses from Sun Physical Rehabilitation in the amount of \$5,875.00;
  - (b) medication expenses in the amount of \$309.37;

- (c) acupuncture expenses in the amount of \$1,040;
  - (d) transportation expenses in the amount of \$1,226.50, less the cost of four return TTC tickets; and
  - (e) housekeeping expenses in the amount of \$4,360.
3. Pafco shall pay Mr. Miller interest on the amounts owing pursuant to section 68 of the *Schedule*.
4. Pafco shall pay Mr. Miller his expenses incurred in respect to the arbitration pursuant to section 282(11) of the *Insurance Act*.

July 8, 1996

---

Joyce Miller  
Arbitrator

---

Date