

BETWEEN:

MAX ELKAIM

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION

Issues:

The Applicant, Max Elkaim, was injured in a motor vehicle accident on December 21, 1991. He applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company (“State Farm”), payable under Ontario Regulation 672.¹ State Farm terminated weekly income benefits on October 14, 1995. The parties were unable to resolve their disputes through mediation, and Mr. Elkaim applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

¹Prior to January 1, 1994, Ontario Regulation 672 was called the *No-Fault Benefits Schedule*. After that date it became the *Statutory Accident Benefits Schedule — Accidents On or Between June 22, 1990 and December 31, 1993*. In this decision, the term “*Schedule*” will be used to refer to Regulation 672.

1. Is Mr. Elkaim entitled to weekly income benefits pursuant to section 12(5) of the *Schedule* from October 15, 1995 and ongoing?
2. What is the quantum of Mr. Elkaim's weekly income benefit pursuant to section 12(4) of the *Schedule*?
3. Is Mr. Elkaim entitled to medical-rehabilitation expenses pursuant to section 6 of the *Schedule*?
4. Is State Farm entitled to a repayment pursuant to section 27(1) of the *Schedule*?
5. Is State Farm entitled to interest on any amounts owing pursuant to section 27(4) of the *Schedule*?

Mr. Elkaim also claims interest on any amounts owing and his expenses incurred in the hearing.

Result:

1. Mr. Elkaim is not entitled to further weekly income benefits.
2. The amount of Mr. Elkaim's weekly income benefit is \$261.78.
3. Mr. Elkaim is not entitled to further medical-rehabilitation expenses.

4. State Farm is entitled to a repayment of \$66,967.56 together with interest from November 1994 on the amount owing pursuant to sections 27(1) and 27(4) of the *Schedule*.

6. Mr. Elkaim is not entitled to his expenses in this arbitration.

Hearing:

The hearing was held at the offices of the Ontario Insurance Commission in North York, Ontario, on September 8, 9, 10, and 11, 1997, before me, Joyce Miller, Arbitrator. Written submissions were received by October 15, 1997.

Present at the Hearing:

Applicant:	Max Elkaim
Mr. Elkaim's Representative:	Bernard B. Gasee Barrister and Solicitor
	Katherine Manherz Law Clerk
State Farm's Representative:	Eric K. Grossman Barrister and Solicitor
	Tracy Brooks Articling Student

Witnesses:

Max Elkaim
Dr. Harold Becker
Dr. David Goldstein

Exhibits: 24 exhibits were filed. The first exhibit consisted of three volumes.

Introduction

Mr. Elkaim's Position

Mr. Elkaim, who is 36 years old, was involved in a motor vehicle accident on December 21, 1991. He was driving his Ford pick-up truck, with his girlfriend as a passenger, when a car cut in front of his truck. He tried to slow down but the road was slippery and he slid into the other car.

Mr. Elkaim testified that he waited for the police for a half hour, when they did not come, he left. He stated that he did not know what he did after the accident. He may have gone home.

Mr. Elkaim testified that he did not remember seeing his family doctor, Dr. Green, after the accident. The OHIP summary does not record Mr. Elkaim seeing a doctor before January 13, 1992. (This had been a pre-arranged appointment with Dr. Kleinman, a doctor of physical medicine.) Dr. Green's clinical notes, however, indicate that Mr. Elkaim saw him on December 26, 1991, and reported that he had been in a car accident and that he had pain in his neck, shoulder area, lower back and legs.

On January 9, 1992, Mr. Elkaim applied for accident benefits. In his application, he stated that he was employed by Trusty Renovator, full time as a carpenter, and was earning \$900.00 a week. He stated that prior to the accident he was capable of wearing a tool belt all day, carry lumber and had the mobility and strength to build and install boxes in newly built homes. After the accident, he was unable to work because of pain in his upper and lower back and neck which radiated to his arms and legs. As well he had "... difficulty in basic motor functions, (i.e., walking)."²

²Exhibit 1, section A, tab 1, Application for Accident Benefits, dated January 9, 1992

In support of his application, Mr. Elkaim provided State Farm with a Form 4 medical report from Dr. Becker who stated that Mr. Elkaim "Had been working full time for almost a year prior to recent MVA"... and that ... "symptoms of neck/back pain flared up after recent MVA."³ As well Mr. Elkaim provided an Employer's Confirmation of Income form from his employer, which stated that Mr. Elkaim had worked from October 4, 1991, for 12 weeks prior to the accident and earned \$900.00 a week.⁴

Mr. Elkaim opted to have his weekly income benefits calculated as an employee of Trusty Renovator for the four weeks prior to the accident. Based on the amount stated in Mr. Elkaim's application and the Employer's Confirmation of Income form, State Farm paid Mr. Elkaim \$600.00 a week until October 14, 1995.⁵ As well, they paid Mr. Elkaim's tuition and expenses (including computer and photography equipment) at York University for two years.

Mr. Elkaim claims that the December 1991 accident caused him to have two operations for a herniated disc. He can no longer work as a carpenter and needs retraining in another area. He testified that, except for one credit, he has basically completed an undergraduate degree at York University. At the present time, he is attending Devry Institute of Technology. He hopes to graduate with a certificate in Computer Science by February 1998.

Mr. Elkaim claims continuing weekly income benefits as well as outstanding and continuing expenses for tuition and books with respect to his attendance at York University, Devry Institute

³Exhibit 1, section C, tab 2, Ontario Automobile Insurance Medical or Psychological Report dated January 22, 1992

⁴Exhibit 1, section F, tab 1, Ontario Automobile Insurance Employer's Confirmation of Income dated January 7, 1992

⁵Exhibit 1, section A, tab 9, Ontario Automobile Insurance Assessment of Claim by Insurer dated September 29, 1995

of Technology and George Brown College; fees for YMCA, Homestead Maid Service, and massage therapy.⁶

State Farm's Position

State Farm submitted that Mr. Elkaim was involved in a minor accident which resulted in minimal damage to his bumper.⁷ State Farm claims that Mr. Elkaim, with the assistance of Dr. Becker, shifted the responsibility of a significant pre-accident back problem to the minor December 1991 accident. State Farm also claims that Mr. Elkaim did not work for four weeks prior to the accident nor did he earn the amount stated in his application. State Farm disputes the quantum of Mr. Elkaim's weekly income benefits and claims a repayment for the amount that was overpaid.

Mr. Elkaim's Response

In response Mr. Elkaim submitted that State Farm, having paid him for four years, was estopped from making a claim for a repayment. Moreover, Mr. Elkaim submitted that the burden of proof shifts to State Farm to show that he was not entitled to further benefits because he had been paid weekly income benefits for one year post-156 weeks of benefits.

Evidence and Findings:

⁶Exhibit 5, Expense Sheet

⁷Exhibit 1, section G, tab 2, Invoice from Northtown Ford Sales dated April 29, 1992 indicates that the repair to bumper cost \$461.99.

1. Is Mr. Elkaim Entitled to Weekly Income Benefits Pursuant to Section 12(5)⁸ of the Schedule?

The first issue I must decide is whether Mr. Elkaim's injuries from the December 1991 accident continuously prevent him from engaging in any occupation or employment for which he is reasonably suited by education, training or experience. In order to decide this issue, I must decide whether there was a causal link between the December 1991 accident and Mr. Elkaim's alleged disability that prevents him from working either as a carpenter or in any other suitable occupation.

Burden of Proof

Before discussing the substantive issue, I will first deal with Mr. Elkaim's submission that the onus rests with State Farm to show that he is no longer disabled. This issue was dealt with in the recent appeal decision of *Henriques and Motor Vehicle Accident Claims Fund*.⁹ In that case the Applicant was paid post-156 week weekly income benefits for 16 months. At his arbitration, the Applicant made the same submission as Mr. Elkaim, namely, that once the Insurer had paid benefits beyond the 156-week mark, the burden of proof shifted to the Insurer to show that the Applicant was not entitled to further payments.

⁸Section 12(5) provides that:

- (5) The insurer is not required to pay a weekly benefit under subsection (1),
 - (b) for any period in excess of 156 weeks unless it has been established that the injury continuously prevents the insured from engaging in any occupation or employment for which he or she is reasonably suited by education, training or experience.

⁹ *Henriques and Motor Vehicle Accident Claims Fund* (August 21, 1997), OIC Appeal P97-00002

The Director's Delegate Draper upheld the Arbitrator's decision that the burden of proof does not shift to the Insurer. He cited with approval the Arbitrator's conclusion that to put the onus on the Insurer once the test changed, "...would discourage insurers from making payment, because in nearly every case, evidence of payment would cast upon the insurer the burden of proving that the insured was not entitled to further payments." He went on to state that :

Entitlement to weekly benefits is an ongoing issue, with the onus on the insured person. The evidence required to meet this onus, however, will vary in each case. Where there is no contrary information, a medical form from the family doctor may be sufficient. If entitlement is less clear, however, the insurer can ask for additional information or require an examination under section 23(2) of the *Schedule*. Beyond the initial applications, however, there is no rigid formula to determine which party must present what type evidence at various points along the way.

The *Schedule* creates an obligation on insurers to pay benefits promptly, with penalties if they do not. As a result, insurers will often pay benefits where entitlement is uncertain. However, if the insurer concludes that ongoing entitlement has not been established, it can terminate the person's weekly benefits. The mere fact that it paid benefits does not shift the onus to the insurer. **It is the nature and strength of the evidence, not the payment of benefits, that shifts the evidentiary burden.** [emphasis added]

I find that the reasoning in *Henriques* is applicable to the present case. I find that the onus rests with Mr. Elkaim to establish, on a balance of probabilities, that his present disability is as a result of the December 1991 accident. He need not show that the accident was the sole cause of his continuing problems.¹⁰ The test is whether the accident "significantly" or "materially" contributed to Mr. Elkaim's disability.¹¹

¹⁰See *P. S. and Toronto Transit Commission (Markel Insurance)* (May 4, 1994), OIC A-001116

¹¹For example, *Pisani and Simcoe & Erie General Insurance Company and Canadian General Insurance Company* (December 11, 1995), OIC P-0003929 & P-005693; *Worku and Co-operators General Insurance Company* (August 29, 1996), OIC A-002172; *Aguilar and Allstate Insurance Company of Canada* (April 21, 1995), OIC A-000542 (upheld on appeal); *Edwards and State Farm Mutual Automobile Insurance Company* (July 12, 1993), OIC A-001707 (under appeal); *MacNeill and Royal Insurance Company of Canada* (January 10, 1994), OIC A-000057

For the following reasons, I find that Mr. Elkaim has not discharged his burden.

Mr. Elkaim's Medical History Pre-December 21, 1991

As part of his application for benefits, Mr. Elkaim presented a medical certificate from Dr. Becker, Form 4, where Dr. Becker stated that although Mr. Elkaim had been involved in a previous car accident in 1989, where he injured his neck and back, Mr. Elkaim had been working “[f]ull-time for almost a year prior to” the December 1991 accident. He noted that Mr. Elkaim’s symptoms of neck and back pain flared up **after** the December 1991 accident. This is not true.

A brief overview of Mr. Elkaim's medical history prior to his December 1991 accident will show that contrary to what he stated in Form 4, Dr. Becker was aware of Mr. Elkaim's medical history and his inability to work full time as a carpenter because of physical problems that preceded the 1991 accident. He was not only aware of back injuries Mr. Elkaim received in a motor vehicle accident in 1989, but also that in 1984 Mr. Elkaim injured his back at work and was off work for one to two years.¹²

Mr. Elkaim had been seeing Dr. Becker since July 18, 1989, after Mr. Elkaim was involved in a car accident on May 27, 1989. Mr. Elkaim's family doctor at that time was Dr. Green, but Mr. Elkaim's counsel referred him to Dr. Becker.¹³ Mr. Elkaim continued to see Dr. Green as his

(under appeal); *Shelley P. and Royal Insurance Company of Canada* (February 9, 1994 and June 22, 1995), OIC A-002235 and A-008498, *P.S. and Toronto Transit Commission* (May 4, 1994), OIC A-001116 (under appeal), *Tiwana and Allstate* (February 13, 1996) OIC A-950155; *Furtado and York Fire* (June 22, 1995), OIC A-008927 (under appeal) and *Mladenovic and Dominion of Canada* (September 11, 1995), OIC A-008849 (under appeal).

¹² Mr. Elkaim’s testimony; see also the Clinical Notes and Records of Dr. Green at Exhibit 1, Section B, Tab 4, where Dr. Green indicates on March 19, 1984 that Mr. Elkaim pulled his back at work, and report of Dr. Becker dated June 11, 1991 at Exhibit 1, Section B, Tab 6.

¹³Exhibit 1, Section C, Tab 5, Letter from Dr. Becker dated July 5, 1992

family doctor and Dr. Becker regarding his accident until 1993 when, because of changes in OHIP funding, Dr. Becker became his family doctor.

A few weeks after his car accident in May 1989, Mr. Elkaim saw his family doctor. The clinical notes and records of Dr. Green for June 12, 1989, state that Mr. Elkaim had injured his upper and lower back and that he could not do any heavy work. On June 21, 1989, Dr. Green noted that Mr. Elkaim had attempted to return to work but was unable to continue because of pain.¹⁴ In February 1990, Dr. Green noted that Mr. Elkaim was not working and referred him to Dr. Shortt, an orthopaedic surgeon, and also to Dr. Gallay for depression.¹⁵

On February 26, 1991, Dr. Green states in his clinical notes that Mr. Elkaim "... has only worked 1 week in past 3 months (by end of the week he couldn't continue) ... has almost constant pain in lower back ...**thinking of quitting as a carpenter.**"¹⁶ [emphasis added]

On March 1, 1991, Dr. Shortt wrote a report to Mr. Elkaim's previous counsel where he stated in his conclusion: "My prognosis, again, is that this man will have permanent symptoms from the injury to his left shoulder and through out his spine."¹⁷

On June 11, 1991,¹⁸ Dr. Becker wrote to Mr. Elkaim's previous counsel and stated that:

[Mr. Elkaim] was seen again on May 15, 1991. He had not been seen during the intervening year but he had been attending his family physician. He said that he

¹⁴*Ibid.*

¹⁵*Supra* at footnote 12. See Clinical Notes for February 19 and 23, 1990

¹⁶*Ibid.*

¹⁷Exhibit 1, Section B, Tab 9, Letter from Dr. James Shortt dated March 1, 1991

¹⁸Exhibit 1, Section B, Tab 6, Letter from Dr. Becker dated June 11, 1991

was still having difficulty working full time and was doing only lighter duties, although occasionally doing heavier work. He said that when he performed any heavier work as a carpenter he would pay for it subsequently with increased pain in the neck and back. He said that if he rested he was fine but if he worked, he could last only about a week at a time without having to stop because of significant symptoms. **He said that a full time job was available for him as a carpenter but he was unable to take it.**[emphasis added]

...

Some time was spent discussing his future plans. He was most discouraged at his lack of improvement and **was considering going to university to further his education so that he would not have to work as a carpenter for the rest of his life.** This was a definite option for him. [emphasis added]

...

His long term prognosis is guarded. In his work as a carpenter, he requires a great deal of strength and stamina and this is lacking at the present time in spite of appropriate rehabilitation programs of exercise and strengthening that have been ongoing to the present. I am at this time awaiting the results of a CT-scan of the lumbosacral region to assess any occult discogenic injury which may be present. [emphasis added]

On August 19, 1991, Mr. Elkaim had a CT-scan. Dr. Tsui, who performed the CT-scan stated in his "Impression" that "There is evidence of focal disc herniation at both L4-L5 and L5-S1 disc spaces which in both cases presses onto the thecal sac. The one at L4-L5 is at the mid line and the one at L5-S1 is slightly off to the right of mid line."¹⁹

Dr. Becker saw Mr. Elkaim on December 17, 1991, four days before his second car accident. In a report on July 5, 1992²⁰ to Wanda Brown, a case management consultant, Dr. Becker stated:

¹⁹Exhibit 1, Section C, Tab 1, at p. 1

²⁰Exhibit 1, Section C, Tab 5, Letter from Dr. Becker dated July 5, 1992

When I last saw him on December 17, 1991, he demonstrated **30 degrees of limitation in movement in the neck with pain elicited at the extremes of movement**. No muscle spasm was noted. In the low back, I found his movements lacked about thirty per cent range in all directions and movements were generally painful and performed stiffly. Straight leg raising was full at 90 degrees.

... [on] December 17, 1991 I referred him to Dr. Max Kleinman, a specialist in physical medicine and rehabilitation, for further assessment and advised him to undergo a course of physiotherapy through Dr. Kleinman's clinic. [emphasis added]

Dr. Becker also commented on Mr. Elkaim's ability to work prior to the 1991 accident. He stated that he had seen Mr. Elkaim on two occasions in 1991, once on May 15, 1991 and again on December 17, 1991, and “[b]oth times [Mr. Elkaim] was working full-time”. Dr. Becker then went on to qualify what he meant by “full-time”:

... He was working full-time over short periods of time, that is, weeks at a time, and **then would not be working due to lack of work**. During the times he worked, he said that he felt sore and when he did not work he felt better. ...He said when he worked, his back pain would start after three or four days on the job and by the end of the week or even two weeks, **he would sometimes have to stop work due to major flare up of pain**. In December 1991, he said that this had been a steady pattern for some time. For example, in October 1991 he had worked for five to six weeks straight on a particular project and **was suffering from a great deal of pain** although was able to perform the work. **When he stopped work on November 10, 1991**, he indicated at my assessment about five weeks later that **he was still in a lot of pain**. In December 1991, **he was still using Voltaren as an anti-inflammatory and was still undergoing massage therapy two times per week**. [emphasis added]

The above report from Dr. Becker, which indicates that he saw Mr. Elkaim four days before the December 1991 car accident, clearly contradicts his Form 4 statement that Mr. Elkaim's symptoms of neck and back pain flared up after the accident. In fact, the report shows that Mr. Elkaim was in a lot of pain, was taking anti-inflammatory medication and was seeking further treatment for his pain.

***Findings on Mr. Elkaim's Medical Condition After the December 21,
1991 Accident***

After the December 1991 accident, which from the evidence appears to have been a minor accident, I find that Mr. Elkaim, with the assistance of Dr. Becker, began to shift the responsibility of his pre-accident physical condition to the December 1991 accident.

As noted above, Mr. Elkaim had a CT scan in August 1991 which showed that he had disc herniations at L4-5 and L5-S1. On April 23, 1992, Mr. Elkaim underwent another CT-scan. Dr. Yee, who had reviewed the August 1991 CT scan, stated in his report that, "There is a moderate size central disc herniation at L4-5 and a small right posterolateral disc herniation at L5-S1. **No significant change is seen from the last examination.**" In fact, Dr. Yee found that at the L5-S1 the herniation was "slightly smaller."²¹ [emphasis added]

Contrary to the above findings Dr. Becker attributes Mr. Elkaim's disc problems to the December 1991 accident. In a letter to State Farm on October 20, 1992,²² Dr. Becker stated: "I have been attending Mr. Elkaim for injuries sustained in this accident. He is suffering from significant low back pain with confirmed lumbar disc prolapse at two levels."

In a letter dated April 14, 1996, to Mr. Elkaim's previous counsel Dr. Becker again attributes Mr. Elkaim's disc problems to the 1991 accident. Dr. Becker stated: "Clearly, something is wrong in Mr. Elkaim's situation that he can be left to his own devices following major surgery to **repair a disc herniation which occurred as a result of the second motor vehicle accident.**" [emphasis added]

²¹Exhibit 1, Section C, Tab 1, at p. 1

²²Exhibit 1, Section C, Tab 7, Letter from Dr. Becker dated October 20, 1992

No objective evidence was presented to show that Mr. Elkaim suffered a disc herniation as a result of the second accident. The evidence shows that after the December 1991 accident there was no significant change to his already existing disc herniation. In fact, Dr. Yee reported that there may have been some improvement to the L5-S1 disc herniation. I give no weight to Dr. Becker's testimony that there was a significant difference between the two CT-scans because Dr. Tsui referred to the disc herniation as being a "small" disc herniation, and Dr. Yee referred to it as a "moderate" disc herniation. Dr. Becker admitted that he had not seen nor was he qualified to read the CT-scans.

For all of the above reasons, I find that Mr. Elkaim had a herniated disc before the December 1991 accident and that there was no significant change to his disc problem after the December 1991 accident. I, therefore, give no weight to Dr. Becker's opinion Mr. Elkaim suffered herniated discs as a result of the December 1991 accident and was required to have surgery because of the accident.

In my view, Dr. Becker acted as an advocate for Mr. Elkaim's claim for accident benefits. Although I found a number of contradictions in Dr. Becker's reports, I especially note the contradiction in his reports of June 11, 1991, and July 5, 1992 regarding Mr. Elkaim's ability to work full-time as a carpenter in 1991.

On June 11, 1991, Dr. Becker stated that Mr. Elkaim had tried to work but had difficulty working full time. He noted that if Mr. Elkaim tried to work he suffered increased neck and back pain. He stated that Mr. Elkaim could only last about a week at a time without having to stop because of "significant symptoms". He indicated that **Mr. Elkaim had "... a full-time job available to him as a carpenter but he was unable to take it"**.

After the December 1991 accident Dr. Becker wrote another report on July 5, 1992 commenting on Mr. Elkaim's physical condition and ability to work in 1991. Although Dr. Becker acknowledges that Mr. Elkaim had pain when he worked, which sometimes caused him to stop working, he clearly contradicts the June 11, 1991 report by stating that in 1991 **Mr. Elkaim "... was working full-time over short periods of time, that is weeks at a time, and then would not be working due to lack of work."**

The above reports also clearly contradict Dr. Becker's report in Form 4 to State Farm on January 22, 1992 where he stated that Mr. Elkaim **"Had been working full-time for almost a year prior to the MVA."**²³

For all of the above reasons I find that Mr. Elkaim, with the assistance of Dr. Becker, misled State Farm regarding his physical condition and his ability to work full time prior to the December 1991 accident. I find that Dr. Becker, who was aware of Mr. Elkaim's medical history since 1984, wrote reports where he shifted the responsibility of Mr. Elkaim's disc problems and his inability to work as a carpenter to the December 1991 accident. I, therefore, give no weight to Dr. Becker's opinion that Mr. Elkaim is disabled from working as a carpenter or in any other occupation as a result of the December 1991 accident. I prefer the opinions of Dr. Langer and Dr. Goldstein.

On October 25, 1993, Dr. Fred Langer, an orthopaedic surgeon, examined Mr. Elkaim at the request of his previous counsel. In his report²⁴ he stated that:

²³Exhibit 1, Section C, Tab 2, Ontario Automobile Insurance Medical and Psychological Report dated January 22, 1992

²⁴Exhibit 21, Report of Dr. Langer dated October 25, 1993 at p. 6

Physical examination today, the 25th of October, revealed that Mr. Elkaim was a pleasant and articulate man who appeared at ease. He did at times move about in his chair as if he were having discomfort, although at other times he sat slouched over, and obviously completely comfortable. He had a normal stance and a normal gait. He could walk on his toes and he would walk on his heels. He easily went to the bent knee position without any difficulty. He had a normal contour to the cervical dorsal and lumbar spine. He had a slight decrease in low back movements. There did not appear to be any pain on movements. There was no paraspinal muscle spasm. There were no areas of tenderness, including the so-called fibrositis points. There was a full, pain free range of motion in the neck. There was no area of tenderness in the posterior triangles of the neck. The shoulders had a normal contour and a full, pain free range of motion. There was no weakness. There was no muscle atrophy. There was no neurologic deficit in the upper or lower limbs. There was no limitation of straight leg raising. The femoral nerve stretch test was normal. The hips were normal.

Dr. Langer concluded that "... it is clear that the effects of [the December 1991] accident have essentially passed." "... Mr. Elkaim has symptoms in the absence of significant physical findings".

... "... it is my opinion that Mr. Elkaim could be working at his regular job, performing the essential tasks of a carpenter, but with pain." ²⁵

Dr. David Goldstein, a Fellow of the American Academy of Disability Evaluating Physicians, has been the medical director of The Fitness Institute Medical Clinic for fifteen years. His primary job is to evaluate and design programs for people with neuromuscular disorders or who are physically impaired.

Dr. Goldstein reviewed the video surveillance²⁶ on Mr. Elkaim, wrote a report and testified at the arbitration. I was impressed with Dr. Goldstein's expertise, knowledge and objectivity.

²⁵Ibid.

²⁶Exhibit ?

In his report dated December 20, 1996 Dr. Goldstein came to the same conclusion as Dr. Langer, that Mr. Elkaim could work as a carpenter. In summarizing his opinion, after reviewing a tape of Mr. Elkaim working out in a gym on September 1 and 2, 1995, he stated:²⁷

In summary, Mr. Elkaim's abilities as depicted in this tape, suggests that he is not suffering from a substantial impairment of the neck, upper back, shoulders, lower back or lower extremities. **He has exceptional muscle strength and stamina and no signs of a residual musculoskeletal impairment arising from his past injuries or spinal surgery.** His physical abilities are compatible and exceed those required to work as a carpenter and having reviewed his abilities in a critical manner as depicted by this tape, I would conclude that he was not substantially disabled from resuming his normal occupational activities at the time of these recordings. The finding in these recordings also markedly contrast Mr. Elkaim's symptoms and reported impairments described in the medical documentation taken from the same period of time. [emphasis added]

Mr. Elkaim testified that the exercises depicted in the video tape were prescribed by physiotherapists and Dr. Becker as part of his rehabilitation.

Dr. Goldstein testified that the type of exercises performed by Mr. Elkaim in the video, especially the "isolated lumbar extensor", were not rehabilitative exercises. He stated that anyone with the type of low back problem Mr. Elkaim was complaining of would not be able to perform the "isolated lumbar extensor" exercise because it would be too painful. Moreover, this exercise would be harmful to anyone with a low back problem.

Dr Becker testified that he had approved and prescribed the exercises for Mr. Elkaim. I note, however, that two months before Mr. Elkaim was taped performing vigorous exercises at the gym, Dr. Becker had written to State Farm requesting housekeeping services for Mr. Elkaim

²⁷Exhibit 1, Section C, Tab 33, Letter from Dr. Goldstein dated December 20, 1996 at p. 6

because he was unable to do heavy housework.²⁸ Moreover, on April 14, 1996, Dr. Becker stated in a report to Mr. Elkaim's previous counsel, that Mr. Elkaim had not fully recovered from his back surgery of October 27, 1994 "... based probably on the fact that he is not undertaking an aggressive enough exercise program; at the same time, he has six years of stiffness to undo, stemming from the time of the first accident, and therefore, it may not be unreasonable that he is in the less than maximal physical condition that he is."²⁹

Despite Dr. Becker's comments of how deconditioned Mr. Elkaim was in 1995 and 1996, after viewing the 1995 surveillance tape of Mr. Elkaim exercising in the gym, Dr. Becker wrote to Mr. Elkaim's present counsel on June 25, 1997 and stated that: "... the surveillance demonstrates Mr. Elkaim undertaking the kinds of activities that I was well aware that he was able to undertake. In fact, most of the activities in question relate to fairly vigorous exercise ... that we have directed Mr. Elkaim to undertake. If anything, this demonstrated Mr. Elkaim's compliance with our instructions and his efforts to mitigate his injuries and their sequelae."³⁰

In my view, these contradictory statements by Dr. Becker are another example of his role as an advocate for Mr. Elkaim. I therefore give no weight to Dr. Becker's testimony that Mr. Elkaim was engaged in rehabilitative exercises. I prefer Dr. Goldstein's evidence that Mr. Elkaim was engaged in exercises that were not only non-rehabilitative, but would be very painful and harmful if Mr. Elkaim had the back injuries that he claimed.

For all of the above reasons I find that the minor December 1991 accident did not significantly or materially affect Mr. Elkaim's previous physical problems. I find that Mr. Elkaim has failed to provide objective, credible medical evidence that the December 1991 accident caused him any

²⁸Exhibit 1, Section C, Tab 13, Letter from Dr. Becker dated July 5, 1995 at p. 1

²⁹Exhibit 1, Section C, Tab 14, Letter from Dr. Becker dated April 14, 1996

³⁰Exhibit 1, Section C, Tab 14(A) Letter from Dr. Becker dated June 25, 1997

injuries that prevented him from working as a carpenter. Mr. Elkaim had a long history of neck and back problems going back to 1984. Prior to the December 1991 accident Mr. Elkaim considered quitting carpentry and going to university. I find that in order to collect accident benefits Mr. Elkaim, with the assistance of Dr. Becker, shifted the responsibility of his pre-accident physical problems to the minor December 1991 accident. Accordingly, I find that Mr. Elkaim is not entitled to weekly income benefits pursuant to section 12(5) of the *Schedule*.

2. Is Mr. Elkaim Entitled to Supplementary Medical and Rehabilitation Benefits Pursuant to Section 6 of the Schedule?

Pursuant to section 6 of the *Schedule*, Mr. Elkaim claims outstanding and continuing expenses for tuition and books with respect to his attendance at York University, Devry Institute of Technology and George Brown College; fees for YMCA, Homestead Maid Service, and massage therapy.³¹

In order for State Farm to be liable to pay these expenses Mr. Elkaim must show that the expenses claimed are required because of the December 1991 accident and are reasonable and necessary.³²

³¹Exhibit 5, Expense Sheet

³²*Plows and Jevco Insurance Company* (July 25, 1994), OIC A-000175, A-000588 and A-003502. In this case Senior Arbitrator Rotter set out the criteria for an Insurer's liability to pay expenses pursuant to section 6 of the *Schedule*. They are as follows:

1. it must be a *reasonable expense* resulting from the accident;
2. it must be *required* because of the accident;
3. a medical practitioner must provide a signed statement that the expense is *necessary* for the insured's treatment or rehabilitation, if the Insurer so requires.

As I have found that the December 1991 accident did not cause the injuries Mr. Elkaim claims, nor did it aggravate Mr. Elkaim's pre-accident physical condition in any significant or material way, I find that the expenses requested are not expenses that reasonably result from the December 1991 accident.

Even if I were wrong on the issue of causation, I find that Mr. Elkaim has not presented any reliable evidence to show that the expenses claimed are reasonable and necessary. For example, Mr. Elkaim requested housekeeping expenses because he allegedly was unable to do heavy housework.³³ However, shortly after he made this request, video surveillance shows Mr. Elkaim engaged in vigorous body building exercises and that he had "exceptional muscle strength and

stamina."³⁴ As well, I find that Mr. Elkaim's request for his fees for YMCA were not reasonable. I accept Dr. Goldstein's testimony that Mr. Elkaim was not engaged in rehabilitation when exercising at the YMCA, but was in fact exercising in a manner that would be counter-productive if he had the injury he claimed he had.

I do not find Mr. Elkaim's claim for expenses for his tuition and books at York University, Devry Institute of Technology and George Brown College are reasonable. State Farm paid Mr. Elkaim's expenses for two years at York University including computer and photography equipment

³³Exhibit 1, Section C, Tab T13, Letter from Dr. Becker dated July 5, 1995 at p. 1

³⁴Exhibit 1, Section C, Tab 33, Letter from Dr. Goldstein dated December 20, 1996 at p. 6

required for his courses. It did so based on Dr. Becker's recommendation that Mr. Elkaim needed vocational retraining as a result of the December 1991 accident.³⁵

Mr. Elkaim testified that he attended York University starting September 1992 as a form of rehabilitation. He stated that his pain level was so high he needed to occupy himself and get out of the house. However, in September 1992, Mr. Elkaim was discharged from a rehabilitation program at Pain Management Clinic because his attendance and compliance with its program was poor.³⁶ Mr. Elkaim was unable to explain why, if his pain level was so high, he chose not to attend a pain management program, but attend part-time at university.

At the time Mr. Elkaim chose to attend university, he was given the opportunity of training as a System Software Programmer which would take six months to a year.³⁷ This would have given him a marketable skill. Although Mr. Elkaim is presently taking a similar course at Devry Institute of Technology, he testified that he was unable to attend such a course in 1992 because he was in too much pain and the course required full-time attendance. He stated he could attend part-time

³⁵Exhibit 1, Section D, Tab 1, at p. 41, Letter to Dr. Becker from Ray Rehabilitation Consultants Inc. dated October 9, 1992 at p. 2

³⁶Exhibit 1, Section D, Tab 4, Letter from Pain Management Clinic dated September 30, 1992 at p. 3. This was not the only rehabilitation program that Mr. Elkaim did not comply with. The Canadian Back Institute (CBI) reported on December 9, 1994 that:

Mr. Elkaim is not participating in the program that has been set up for him. He is not willing to do what is asked of him. He does not want to attend for the amount of time that is required. He did not call when he was unable to attend even though he had been informed that he was to contact the clinic under such circumstances. Exhibit 1, Section D, Tab 7, Weekly Progress Report, at p. 13

On May 4, 1995, the Austin Northwest Treatment & Rehabilitation Clinic reported: "[Mr. Elkaim] has a poor attendance record and is non-compliant with his exercise program and with our education program."Exhibit 1, Section D, Tab 10, Report of Austin Northwest Treatment & Rehabilitation Clinic dated May 4, 1995 at p. 10

³⁷Exhibit 1, Section D, Tab 5, Report of The Canadian Centre for Occupational Injury Reduction, dated August 17, 1992

at York University. However, when State Farm presented a course syllabus from Devry Institute of Technology,³⁸ Mr. Elkaim admitted he would have been able to attend on a part-time basis.

I find Mr. Elkaim's attendance at York University in September 1992 was not reasonable as a result of his December 1991 accident. Dr. Becker's clinical notes and records, as well as his report of June 11, 1991³⁹ clearly indicate that in May 1991 Mr. Elkaim was considering giving up carpentry and going to university. In my view, Mr. Elkaim, with the support of Dr. Becker, used State Farm to pursue a university degree as a means to promote and broaden Mr. Elkaim's life experience. Had Mr. Elkaim taken the computer course in 1992 when it was recommended, he would by now have had a marketable skill and would be able to work. I do not find that his request for vocational retraining in computers at this time or any other vocational retraining is reasonable.

Accordingly, for all of the above reasons, I find that Mr. Elkaim is not entitled to any expenses pursuant to section 6 of the *Schedule*.

3. What is the Correct Amount of Mr. Elkaim's Weekly Income Benefits?

State Farm disputes the amount of weekly income benefits paid to Mr. Elkaim.

The following sections of the *Schedule* are relevant to determining the proper amount of Mr. Elkaim's benefits:

12(4) Subject to subsection (5), the weekly benefit under subsection (1) will be the lesser of,

(a) \$600...; and

³⁸Exhibit 22, Computer Information Course Requirement, Devry Institute of Technology, 1997

³⁹Exhibit 1, Section B, Tab 6 Letter from Dr. Becker dated June 11, 1991

(b) 80 per cent of the insured person's gross weekly income from his or her occupation or employment, less any payments for loss of income,...

(5) The insurer is not required to pay a weekly benefit under subsection (1),

(a) for the first week of the disability;

(7) The following rules apply to the calculation of gross weekly income:

1. A person's gross weekly income shall be deemed to be the greatest of,
 - I. his or her average gross weekly income from his or her occupation or employment for the four weeks preceding the accident,
 - ii. his or her average gross weekly income from his or her occupation or employment for the fifty-two weeks preceding the accident,
 - iii. \$232...
3. Business expenses which cease as a result of the accident shall be deducted from a person's income from self-employment before calculating his or her gross weekly income.

Under the provisions of section 12 of the *Schedule*, Mr. Elkaim is entitled to be paid a weekly income benefit which is 80% of the greatest of his income in either the four weeks or in the 52 weeks before the accident, or a deemed minimum amount of \$185.60.

The onus of establishing the amount of his pre-accident income rests with Mr. Elkaim. He must do so by providing credible and reliable documentation that can be objectively verified. Oral evidence and documentation which is self-generated is not sufficient.⁴⁰

Mr. Elkaim's claim for weekly income benefits is based on his pre-accident income for the four weeks before the accident.

Mr. Elkaim testified that he was employed full-time as a carpenter by Trusty Renovators for 12 weeks preceding the accident and was paid \$900.00 a week net. The only evidence that Mr. Elkaim provided to support this claim was his oral evidence, his Application for Accident Benefits⁴¹ and an Employer's Confirmation of Income⁴² from Trusty Renovators. Mr. Elkaim did not present any other objective corroborating evidence, such as business records, bank statements, invoices or cancelled cheques, to support his claim.

Mr. Elkaim testified that he did not have any supporting documents because State Farm had waited too long before asking for his documents. He stated that some of his business records were lost and that others were disposed of by his accountant three years after Mr. Elkaim had given them to him.

I do not accept Mr. Elkaim's excuse that State Farm waited too long before it requested supporting documentation. In a letter to State Farm, dated January 20, 1992, Mr. Elkaim's accountant stated that, in 1991, Mr. Elkaim was employed by Murphy Construction from May 7,

⁴⁰See *Singh and Kingsway General Insurance Company*, January 29, 1993, OIC A-000890, and *Stoll and Kingsway General Insurance* (October 18, 1991), OIC File No A-000386

⁴¹Exhibit 1, Section A, Tab 1, Application for Accident Benefits dated January 9, 1991

⁴²Exhibit 1, Section F, Tab 1, Employer's Confirmation of Income dated January 6, 1991

1991 to June 19, 1991 and he earned \$5,367. His other earnings in 1991 (\$29, 673) were “self-employed earnings.”

Mr. Elkaim testified that all his earnings from self-employment were paid to his company, Manor Haven. He stated that the “year-end” for his company’s earnings in 1991 was January 31, 1992. That being the case, the income tax return for Manor Haven’s earnings in 1991 would have been filed at least by April 30, 1993.

I note, however, that Mr. Elkaim’s accountant wrote to him on December 17, 1993, asking him to sign his 1992 tax return and forward the original to Revenue Canada and keep a copy for himself.⁴³ On July 27, 1994, State Farm wrote to Mr. Elkaim’s former lawyers and asked for his tax return to confirm Max’s actual weekly earnings in 1991.⁴⁴

From this I conclude that Mr. Elkaim knew, at least seven months after he filed his tax return that State Farm was looking for supporting documentation regarding the quantum of his weekly income benefits. I therefore do not accept Mr. Elkaim’s excuse that State Farm had waited such a long time to verify his income, that all his business records were either lost or destroyed.

⁴³Exhibit 1, Section F, Tab 10 Letter from David Good, C.A. dated December 17, 1993

⁴⁴Exhibit 12, Letter from State Farm dated July 27, 1994. Once State Farm received the tax return it became clearer that an overpayment may have been made. On November 15, 1994 State Farm wrote to Mr. Elkaim’s former counsel and stated:

We have been paying Mr. Elkain (sic) based upon his earnings as stated on his Accident Benefit Claim Forms, but we certainly did not realize the numerous expenses that would have to be deducted from that income in order to find out his actual earnings.

No doubt, an overpayment has been made at the amount of \$600.00 per week and we would like to come to an agreement as to what the appropriate amount should be. Exhibit 13, Letter from State Farm dated November 15, 1994

While Mr. Elkaim was unable to provide any supporting documentation for his work with Trusty Renovator, State Farm was able to track down the owner, Mr. Morneau, and was provided with two invoices from Manor Haven to Trusty Renovator. One was dated October 15, 1991, for the sum of \$1,475.00 and the other was dated November 5, 1991 for the sum of \$1,537.00.⁴⁵ I find these invoices to be significant for three reasons. One, they indicate, that contrary to Mr. Elkaim's claim that he was an employee of Trusty Renovator, his company, Manor Haven, was paid for the work done; two, Mr. Elkaim did not earn \$900.00 net a week; and, three, that Mr. Elkaim had not worked for Trusty Renovator for 12 weeks or even four weeks prior to the accident.

I find it significant that although Mr. Elkaim stated he had no business records to objectively corroborate his earnings from Trusty Renovator, he chose not to call Mr. Morneau as a witness to support his claim that he was an employee of Trusty Renovator for 12 weeks prior to the accident and earned \$900.00 net a week.

I find that Dr. Becker's clinical notes confirm that Mr. Elkaim was not working continuously for either 12 or four weeks prior to the accident. Dr. Becker's clinical notes for December 17, 1991, four days before the accident, state that Mr. Elkaim had worked for six weeks and had stopped working on November 10, 1991. Dr. Becker's notes also indicate that Mr. Elkaim had "started work few weeks ago."⁴⁶ A "few weeks," in my view, may amount to two or even three weeks, but does not amount to four weeks.

For all of the above reasons, I find that in his application for accident benefits Mr. Elkaim deliberately misled State Farm regarding his weekly income prior to the accident. I find that Mr. Elkaim failed to provide any reliable, objective, credible evidence to establish his pre-accident

⁴⁵Exhibit 2, Report form Investigative Research Group dated November 13, 1995 at p. 41 and 42

⁴⁶Exhibit 1, Section C, Tab 15, Clinical Notes and Records of Dr. Becker dated December 17, 1991

income for the four weeks preceding the accident. Accordingly, Mr. Elkaim's weekly income must be determined by averaging his earnings over the 52 week period prior to the accident as provided by section 12(7)1 of the *Schedule*.

As I noted above, the onus lies with Mr. Elkaim to prove his income in 1991. From the evidence presented, except for his tax returns, it is difficult to determine the amount and kind of income Mr. Elkaim earned in 1991. Mr. Elkaim did not provide any objective, credible evidence regarding what his income was in 1991.

Mr. Elkaim denied that he was self-employed at the time of the accident. He testified that the only expenses he had in 1991 were for nails. A "log note" dated December 9, 1994, regarding a conversation between State Farm's adjuster and Mr. Elkaim, stated that "Max feels that he did not have any expenses to pay that would have effected his income [in 1991]."⁴⁷ These statements, however, are contradicted by Mr. Elkaim's tax return for his company in 1991 which indicates that he had business income of \$21,403.00 and business expenses of \$12,532.50.

Mr. Elkaim testified that, although he was an employee of Trusty Renovators at the time of the accident, his salary was paid to his company, Manor Haven. Mr. Elkaim, however, did not present any objective corroborating evidence, such as Manor Haven's business records, T-4 slips, bank statements, invoices, cancelled cheques, or a tax return, to support his claim that he was an employee of Trusty Renovators at the time of the accident.

From the above, I could conclude that Mr. Elkaim did not provide any credible or objectively verifiable evidence regarding his income for the 52 weeks prior to the accident, and determine that he is only entitled to the minimum of \$185.60 a week. However, Mr. Elkaim produced two tax

⁴⁷Exhibit 15, Claim Activity Log , Dated December 1, 1994

returns⁴⁸ regarding his 1991 earnings which were not disputed by State Farm. From these tax returns, I have calculated Mr. Elkaim's weekly income to be \$261.77. I reached this figure as follows:

Gross Income from employment (for the period of May to June 1991)	\$ 5,367.00
Gross Income from self-employment	\$11,648.80 ⁴⁹
Total:	\$17,015.80

\$17,015.80 divided by 52 weeks = \$327.23 x .80 = \$261.78

Accordingly, for all of the above reasons I find that the correct amount of Mr. Elkaim's weekly income benefits pursuant to section 12 of the *Schedule* is \$261.78.

4. Is State Farm Entitled to a Repayment Pursuant to Section 27 of the Schedule?

State Farm claims a repayment on the amount of weekly income benefits that was overpaid to Mr. Elkaim.

Section 27(1) of the *Schedule* provides that:

A person must repay to the insurer any benefit received under this Regulation that is paid to the person through error or fraud.

⁴⁸Exhibit 1, Section F, Tab 10, Tax Return for 1992, which included his income from business in 1991, at p.3, and Exhibit 11, Tax Return for 1991

⁴⁹Gross income from employment, \$21,403.00, less \$6,983.00 inventory, less \$2,771.00 ceasing expenses. The ceasing expenses included : Accounting, Legal, collection, consulting, \$401.00; Insurance, \$1,100.00; Meals and Entertainment, \$695.20; and Office Expenses, \$575.00. Exhibit 1, Section F, Tab 10, Tax Return for 1992

In order for an Insurer to recover an overpayment, the responsibility for the overpayment must be attributed in some material way to the actions of the applicant.⁵⁰ Mr. Elkaim submitted that State Farm is estopped from recovering any overpayment because it did not raise the issue of quantum until the July 1994. I disagree.

As I found above, Mr. Elkaim misled State Farm regarding his weekly earnings when he applied for accident benefits. He was unable to provide any credible evidence to prove that at the time of the accident he was working, full time, as an employee of Trusty Renovators and was earning \$900.00 a week. The fact that Mr. Elkaim may have been lulled into a false sense of security because State Farm did not request supporting documentation earlier than 1994 does not, in my view, diminish Mr. Elkaim's responsibility in having misled State Farm.

I agree with Arbitrator Draper comments in *Morin and Lumbermans Mutual Casualty Company*,⁵¹ where he states:

One of the purposes of the no-fault system is to ensure that benefits are paid in a timely fashion. In my opinion, section 27(1) should not be interpreted in a manner that would discourage the early payment of claims. I do not believe that an insurer's decision to pay benefits pending further evidence or pending mediation and arbitration should preclude its right to recover an overpayment under section 27(1).

For all of the above reasons, I conclude that Mr. Elkaim is responsible for the miscalculation of his benefits and that State Farm is not estopped from recovering the overpayment. Pursuant to section 27(1) of the *Schedule*, I find that Mr. Elkaim is obligated to repay State Farm the sum of \$66,967.56 ($\$600.00 - \$261.78 = \338.22×198 weeks).

⁵⁰*Levenson and General Accident Assurance Company of Canada* (February 18, 1993), OIC A-000260

⁵¹*Morin and Lumbermans Mutual Casualty Company* (June 16, 1993), OIC A-001311

Pursuant to Section 27(4) of the *Schedule*, I find that Mr. Elkaim must pay State Farm interest on the amount owing. State Farm agreed that the interest on the overpayment should commence in November 1994.

Expenses:

I exercise my discretion not to award Mr. Elkaim his expenses. I find that Mr. Elkaim deliberately misled State Farm regarding his pre-accident physical condition, as well as the amount of his earnings in 1991 and, therefore, should not be entitled to his expenses in this arbitration.

Order:

1. Mr. Elkaim shall pay State Farm \$66,967.56 pursuant to section 27(1) of the *Schedule*.
- 2.. Mr. Elkaim shall pay interest on the amount owing from November 1994 pursuant to section 27(4) of the *Schedule*.
3. Mr. Elkaim is not entitled to his expenses in respect of the arbitration.

Joyce Miller
Arbitrator

November 17, 1997

Date