FSCO A97–000572

BETWEEN:

STEVAN BAJIC

Applicant

and

ZURICH INSURANCE COMPANY and PAFCO INSURANCE COMPANY LIMITED

Insurers

REASONS FOR DECISION

Before: Suesan Alves

Heard: June 14, 15, 16, 17, 25, 28 and July 16, 1999, at the offices of Cindy Jones in Hamilton, Ontario. The hearing was re-opened on February 14, 2000.

Appearances: Stevan Bajic represented himself
Jarvis A. J. Scott for Zurich Insurance Company
Eric K. Grossman for Pafco Insurance Company Limited

Issues:

Stevan Bajic was injured in motor vehicle accidents on June 8, 1995, and on July 22, 1996. Zurich Insurance Company ("Zurich") responded to Mr. Bajic's claims for statutory accident benefits arising from the first accident, while Pafco Insurance Company Limited ("Pafco"), responded to those from the second accident under the *Schedule*.[1] In this arbitration Mr. Bajic claimed various statutory accident benefits, interest on overdue benefits, a special award and his expenses of the arbitration.

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[1]The *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 and 463/96.

Mr. Bajic also wished to claim loss of earning capacity benefits ("LECBs"). Since the pre-hearing arbitrator ruled that this issue could not be adjudicated until Mr. Bajic established that he was entitled to income replacement benefits at the 104 week mark, LECBs are not an issue in this arbitration. The parties agreed that the amount of Mr. Bajic's income replacement benefit was $185 per week. Zurich and Pafco disputed all of Mr. Bajic's claims for accident benefits. Zurich also claimed a repayment of benefits.

The parties were unable to resolve their disputes through mediation, and Mr. Bajic applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

1. Is Mr. Bajic entitled to income replacement benefits from either insurer after August 1, 1996 as a result of the injuries he sustained in either motor vehicle accident under section 7 or 10(2) of the *Schedule*?

2. Is Mr. Bajic entitled to supplementary medical expenses under section 36 of the *Schedule*?

3. Is Mr. Bajic entitled to rehabilitation expenses under section 40 of the *Schedule*?

4. Is Mr. Bajic entitled to attendant care benefits under section 47 of the *Schedule*?

5. Is Mr. Bajic entitled to other pecuniary losses under section 53 of the *Schedule*?

6. Is Mr. Bajic entitled to housekeeping expenses under section 55 of the *Schedule*?

7. Is Mr. Bajic entitled to payment for items lost or damaged in the July 1996 accident under section 56 of the *Schedule*?

8. Is Mr. Bajic entitled to a special award under section 282 (10) of the *Insurance Act*?

9. Is Zurich entitled to a repayment of benefits from Mr. Bajic under section 70 of the *Schedule*.

10. Is Mr. Bajic entitled to his expenses in respect of the arbitration under section 282(11) of the *Insurance Act*?

Mr. Bajic also claimed interest on overdue benefits under section 68 of the *Schedule*.

Result:

1. Mr. Bajic is entitled to income replacement benefits from Pafco at the agreed rate of $185 per week, between July 29, 1996 and July 22, 1998.

2. Mr. Bajic is entitled to supplementary medical expenses under section 36 of the *Schedule*.

3. Mr. Bajic is not entitled to rehabilitation expenses under section 40 of the *Schedule*.

4. Mr. Bajic is entitled to attendant care benefits under section 47 of the *Schedule*.

5. Mr. Bajic is entitled to other pecuniary losses under section 53 of the *Schedule*.

6. Mr. Bajic is not entitled to housekeeping expenses under section 55 of the *Schedule*.

7. Mr. Bajic and Pafco reached an agreement at mediation with respect to his entitlement to items lost or damaged in the July 1996 accident under section 56 of the *Schedule*. I have no jurisdiction to deal with this issue under section 281(2) of the *Insurance Act*.

8. Mr. Bajic is not entitled to a special award under section 282(10) of the *Insurance Act*.

10. Zurich is entitled to a repayment of benefits from Mr. Bajic under section 70 of the *Schedule*.

11. If the parties are unable to agree, the issues of expenses may now be addressed.

EVIDENCE AND ANALYSIS

Income replacement benefits

Background

Stevan Bajic is presently 62 years of age. In 1991, he came to Canada as a refugee from Yugoslavia, as did his wife Marinka, and sons, Slobodan and Goran. Mr. Bajic had been a judge and had practised law for approximately 29 years in Yugoslavia. In June 1992, Mr. and Mrs. Bajic obtained their work permits. The following month, they began operating “B” Variety, a medium sized variety store in Hamilton.

Mr. Bajic managed the store, did the banking, ordered and picked up merchandise from suppliers, loaded the packages in his car, drove them to the store, then unloaded and carried them into the store. According to Mr. Bajic, some of these packages weighed over 50 pounds. He priced, labelled and shelved the goods, filled the coolers, served customers and operated the cash register. His work week was between 70 and 100 hours.[2] The work was shared with family members, and Mrs. Bajic testified that she cleaned the store.

Mr. and Mrs. Bajic created a living area in the store room, furnished with a couch, chair, television set, table and an electric cooker, to which they retreated during the workday. When a customer or supplier opened the door, a buzzer sounded. This prompted the family member closest to the door of the storeroom to re-enter the store to attend to the customer or supplier. Mr. Bajic estimated that he spent 90 per cent of the day indoors, 10 per cent out of the store buying merchandise, and more than 50 per cent of the day on the couch.

In this arbitration Mr. Bajic claims income replacement benefits because he alleges he is disabled from working at the variety store as a result of motor vehicle accidents in June 1995 and July 1996. Zurich paid Mr. Bajic income replacement benefits until August 1, 1996 as a result of the 1995 accident, and disputes his claims for further income replacement benefits. Zurich also claims a repayment of benefits. Pafco did not pay Mr. Bajic any income replacement benefits. Pafco disputes that Mr. Bajic is entitled to these benefits as a result of the July 1996 accident since he was already totally disabled.

Mr. Bajic's claim for income replacement benefits is based on his work at the variety store in the three years before the accident. He must establish that he sustained impairments in each of the motor vehicle accidents which cause or significantly contribute to a substantial inability to perform the essential tasks of the work he performed pre-accident. Alternatively, Mr. Bajic can succeed by establishing a partial inability to carry on a normal life within the meaning of section 2 of the

[2]Letter dated July 19, 1994 from Mr. Bajic.

Schedule.

In my view, I must determine the extent to which Mr. Bajic was able to perform the essential tasks of his employment before each accident. Given an injury he suffered in March 1994, and the closure of the variety store in July 1995, I find the pre-accident period relevant to the June 8, 1995 accident, is between March 1994 and June 8, 1995. For the July 22, 1996 accident, I find the relevant time frame is between March 1994 and July 1996. I must also determine if and when Mr. Bajic was no longer substantially disabled from performing those tasks after each motor vehicle accident.

Pre-accident condition

In March 1994, Mr. Bajic sustained a lumbar sprain when he lifted a case of Pepsi at the store, turned and fell. He complained of pain in his low back and in both legs. Medical investigations showed that Mr. Bajic had spinal stenosis, or a narrowing of his spinal column at his L3-4 and L4-5 vertebrae, a small centrally herniated disc at L3-4, and degenerative disc disease of his lumbar spine. In August 1994, Mr. Bajic developed a cough sneeze reflex — when he coughs or sneezes, he falls to the ground. This is an ongoing problem.

Dr. G. Jeremias, Mr. Bajic's treating orthopaedic surgeon, and Dr. G. Lloyd, an orthopaedic surgeon who examined Mr. Bajic at Zurich's request, agree that his symptoms suggest *cauda equina* syndrome. In this syndrome, the *cauda equina*, or the bundle of spinal nerve roots below the first lumbar vertebra is compressed, causing neurological symptoms. A person with this syndrome typically experiences a dull aching pain in the perineum, bladder and sacrum, generally radiating in a sciatic fashion associated with abnormal sensations such as burning, prickling, or of tiny insects crawling over the skin, weakness after walking short distances, and spastic lower limbs. Acute compression of the *cauda equina*, indicated by urine retention or incontinence, requires immediate surgery.

Mr. Bajic had spinal stenosis, degenerative disc disease, herniated discs and symptoms of urine retention and frequency. Dr. Jeremias, a neurologist, and a neurosurgeon recommended decompressive surgery to prevent further neurological damage and relieve his pain. However, Mr. Bajic considered the risks of the surgery unacceptable. Dr. Jeremias testified that while spinal stenosis can stabilize, it generally becomes progressively worse. Dr. Jeremias' notes reflect little improvement in Mr. Bajic's condition between March 1994 and June 1995. In November 1995, Canada Pension Plan accepted Mr. Bajic's claim for disability benefits, based on severe neurological sequelae of a herniated disc and spinal stenosis, and the orthopaedic and neurological opinions that he was incapable of work.[3] I find that Mr. Bajic had significant impairments before either of the two motor vehicle accidents in issue in this arbitration.

Mr. Bajic presented a complex medical picture. In addition to the medical problems already outlined, he also had hyperglycemia. The evidence is conflicting as to whether Mr. Bajic was able to perform his regular job during the relevant pre-accident period, and following each of the motor vehicle accidents. In the June 1995 accident, his primary injury was to his neck. Following this accident Mr. Bajic was diagnosed with diabetes and hypertension. In the July 1996 accident, Mr. Bajic's neck and back condition was aggravated and he may have had a period of unconsciousness. He sustained a laceration to his temple, a separated left shoulder, a strained left ankle, an injury to his ribs and various bruises and contusions. I find that over time, a degenerative process is at work, as well as a recovery process. Mr. Bajic had a number of medical investigations following his injuries. While these show problems, they do not always correlate with his complaints. When they do, there is often conflicting evidence about causation and disability.

The discrepancies in Mr. Bajic's evidence with respect to the nature of his pre-accident abilities and his activities following each of the accidents have compounded the difficulty in sorting out the extent and duration of disability, and the extent to which each of the motor vehicle accidents

[3]Disability summary sheet from Human Resources Development Canada, dated November 16, 1995

significantly contribute to that disability.

Following his injury in the variety store in March 1994, Mr. Bajic's short-term disability carrier, North American Life, paid disability benefits on the basis that he was "unable to perform the material and substantial duties of his own occupation" until February 1995. After this date there is conflicting evidence as to whether Mr. Bajic was able to perform the essential tasks of his employment.

Mr. Bajic made conflicting statements about his abilities during this period. For example, in 1996 he stated to an accountant retained by Zurich, and in 1998 he stated to Dr. D. Goldstein, a disability evaluating physician retained by Zurich, that in March 1995 he substantially recovered from his 1994 injury in the variety store and was contributing equally to the business with his wife. Dr. Jeremias' notes in relation to that period reflect no such improvement. According to those notes, on March 7, 1995, Mr. Bajic requested a report from Dr. Jeremias to be sent to his short-term disability insurer to support his claim for further disability benefits. In October 1995, Mr. Bajic stated that he last worked on March 14, 1994, the day of his "Pepsi" injury.[4] That same month he represented to Zurich that pre-accident he worked a 16-hour day. Despite his receipt of short-term disability benefits between 1994 and 1995, Mr. Bajic has also reported that between 1992 and 1995 he worked lengthy hours as the owner and operator of a convenience store.[5]

Mr. Bajic did not deny making any of these statements. He suggested that his English language skills may have played a role, and that his English has improved over time. However, in the course of his testimony, largely given with the assistance of interpreters, he made similar conflicting statements. Mr. Bajic submitted that as the owner of the store he was able to determine his hours of work, and in this context it made little sense to speak about whether or not he was working full

[4]Application for Canada Pension Plan disability benefits

[5]To Dr. G. Lloyd, an orthopaedic surgeon who examined him on Zurich's behalf.

time. Since I must compare Mr. Bajic's pre and post accident levels of function to determine his entitlement to benefits, an accurate picture of his pre-accident level of function is highly relevant.

I find that when responding to questions concerning his pre-accident activities, Mr. Bajic has fluidly interpreted "pre-accident" as referring to his activities before his 1994 variety store injury, before his 1995 car accident in which he was a passenger, and before the 1996 accident in which he was struck while riding a bicycle. Mr. Bajic's fluid interpretation of "pre-accident" has led all of the health practitioners to believe that during the relevant period before the first motor vehicle accident, he was able to work 16 or 17 hours per day, 6 or 7 days per week. None of these practitioners knew about the rest area in the storeroom at the time of their assessments. For the reasons which follow, I find that full-time employment 16 to 17 hours a day, 6 or 7 days a week is not the standard against which Mr. Bajic's disability should be measured.

North American Life conducted surveillance at different times of the day on Mr. Bajic on March 1, 2, 3, 6, and 7, 1995. During the course of the week, Mr. Bajic is shown performing a wide range of his work-related duties at the store for up to three hours. Mr. Bajic admitted the contents of the surveillance videotape. The tape may reflect the full extent of Mr. Bajic's abilities — that he could work at many aspects of his job for up to three hours at a stretch, on an intermittent basis. It is also possible to infer that Mr. Bajic was fully capable of performing his job. Dr. Jeremias, who did not see the surveillance videotape, maintained that Mr. Bajic was not capable of such activity on a consistent, repetitive and remunerative basis, and therefore remained disabled. Based on the surveillance, Dr. G. Lloyd, an orthopaedic surgeon who examined Mr. Bajic on behalf of Zurich in 1998, and Dr. D. Goldstein, who examined him on behalf of Pafco in 1998, both opined that Mr. Bajic was fully capable of performing the essential tasks of his employment in March 1995.

In resolving the question of the extent to which Mr. Bajic was able to do his job between March

1995 and June 1995, I have placed a great deal of weight on the opinion of Dr. K. Reddy, a neurologist, who reported to Mr. Bajic's orthopaedic surgeon about two weeks before the surveillance, that Mr. Bajic was "obviously severely disabled," and recommended decompressive surgery. Dr. Reddy's opinion was based on the history, investigations, physical and neurological examinations as well as objective findings such as loss of normal lumbar lordosis and paraspinal muscle spasm.

I also found Mrs. Bajic's testimony of the physical and psychological strain from taking on the entire management and operation of the store highly persuasive. Her evidence of Mr. Bajic's limited abilities is also generally supported by that of his sister and niece. For these reasons I prefer the opinion of Dr. Jeremias on this point — that Mr. Bajic was not capable of performing such activity on a repetitive basis — to the opinions of Drs. Lloyd and Goldstein.

On a balance of probabilities, I conclude that at the time of the June 1995 motor vehicle accident, Mr. Bajic was capable of performing his job for up to three hours at a time, since he had a large measure of control over his work environment: he was able to determine his hours of work, when and if he could stand, sit, walk or rest; he had ready access to the couch in the store room, and the assistance of his wife, Marinka, and other family members. Mr. Bajic had also arranged to minimize the physical activities of the job, by having suppliers fill the coolers, while one of his sons would shelve the merchandise, particularly those items involving overhead reaching.

For the reasons which follow, I find that by March 8, 1996, Mr. Bajic's injuries from the first motor vehicle accident no longer significantly contributed to his inability to perform his essential tasks at work, and that Mr. Bajic is required to repay Zurich income replacement benefits for the period between March 9, 1996 and August 1, 1996. I also find that Pafco is required to pay Mr. Bajic income replacement benefits between July 29, 1996 and June 22, 1998 at the agreed upon rate of $185 per week.

The June 1995 accident

On June 8, 1995, Mr. Bajic was a passenger in a car which was struck by a truck. He declined medical attention at the scene. Approximately six weeks later, on July 15, 1995, the variety store closed. Approximately seven weeks post-accident, on July 25, 1995, Mr. Bajic saw Dr. Jeremias at one of his regularly scheduled appointments for his low back condition.

Low back

There is conflicting evidence as to whether Mr. Bajic sustained a low back injury in the June 1995 accident. Dr. Jeremias testified that Mr. Bajic's back symptoms were not worsened by this accident, but continued as before. Mr. Bajic told Dr. Lloyd in 1998 that his back pain was not worsened by this accident. However, when Dr. J.E. Trotter examined Mr. Bajic at Zurich's request in February 1996, he reported that his low back symptoms were more severe, had not improved with time, and that he had not seen a relationship between his increased back pain and the accident until she questioned him about it. Dr. Trotter diagnosed a possible aggravation of his pre-existing low back strain. I prefer Mr. Bajic's report of his injuries made seven weeks post-accident to Dr. Jeremias, to the report that he made to Dr. Trotter eight months later. I conclude that Mr. Bajic's low back symptoms were not aggravated by the June 1995 accident.

Neck and arm complaints

Mr. Bajic complained of headaches and neck pain which extended into his right superior trapezius, with increased symptoms on extension of his neck. On examination, Dr. Jeremias found that Mr. Bajic had Grade 1 limited neck rotation and was tender over C7. He diagnosed cervical strain which caused the pain in Mr. Bajic's shoulder. In his opinion, Mr. Bajic's neck injury was

an independent source of disability. Mr. Bajic testified that he was able to stand for a shorter period of time before developing neck or low back pain.

There is conflicting evidence as to whether Mr. Bajic also sustained a nerve root injury at the C7-C8 level. Mr. Bajic testified that he began experiencing a pinching sensation in his right arm during the week after this accident. However, the first mention of such a complaint in Dr. Jeremias' notes is on September 25, 1995, about three and a half months following the accident. Based on Mr. Bajic's symptoms, Dr. Jeremias was of the opinion that he had also sustained damage to his nerve roots at C7-8 level in the accident. Dr. Jeremias had previously ordered x-rays of Mr. Bajic's cervical spine in July 1995. Following Mr. Bajic's complaints in September 1995, Dr. Jeremias arranged for nerve conduction studies (EMG) on his right arm, and an MRI of his neck.

The nerve conduction testing performed in October 1995 was reported by Dr. D.E. Savelli as showing mild, chronic reinnervation changes at C5, and more prominently at C7-8, in keeping with mild stable chronic cervical radiculopathies and unassociated with acute denervation. Dr. Goldstein, a disability evaluating physician who assessed Mr. Bajic in 1998 at Pafco's request, opined that since there was no acute denervation, it was unlikely that these radiculopathies could be attributed to trauma, such as a motor vehicle accident. Dr. J.A. Darracott, who conducted a disability DAC, was of a similar opinion. However, Dr. J.E. Trotter, a physiatrist who performed an insurer's examination at Zurich's request, opined that the radiculopathies and consequent pain in Mr. Bajic's right arm were attributable to the motor vehicle accident, since Mr. Bajic reported no symptoms in his neck or right arm pre-accident.

On the one hand Mr. Bajic had pre-existing degenerative disc disease in his neck and an absence of reported symptoms at C7-8 prior to the accident. He was tender at the C7 level following the accident, and complained of arm symptoms consistent with radiculopathies at this level. On the other hand I find a three-month delay between the motor vehicle accident and the recorded onset of Mr. Bajic's arm symptoms. The EMG findings indicate that the radiculopathies are inconsistent

with trauma, and the MRI report, a more sensitive investigation than the EMG, reflects a normal examination at the C7-8 level. There is conflicting medical opinion evidence as to whether these problems were caused by the accident. I find it more likely that the radiculopathies were not caused by the accident. Whatever the cause of the radiculopathy, Dr. Trotter found that Mr. Bajic had normal strength in his right arm. I accept this finding. I also accept her opinion that Mr. Bajic would not experience a complete recovery from his neck injury, and might have ongoing intermittent symptoms with his neck.

Mr. Bajic alleges that the x-ray, EMG and MRI investigations all demonstrate that he was hurt, and has real physical problems with his neck which stem from the accident. He alleges that these investigations demonstrate that his statements about his health condition were truthful.

The x-rays taken in July 1995 show a slight loss of the normal lordotic curve in his neck, early C3-C4 disc space narrowing, significant right side C3-C4 posterior osteophytic lipping which encroached approximately 50 - 60% of the neural foramen on the right side. Elsewhere the foramina were unobstructed, and the disc spaces were normal. The problem which Dr. Jeremias found on examination was at the C7 level, while the problem shown on the x-rays is at a different level, the C3-C4 level. Dr. G. Lloyd, an orthopaedic surgeon who examined Mr. Bajic on Zurich's behalf, testified that these x-rays showed Mr. Bajic had degenerative disc disease to his neck at C3-C4. He testified that since degenerative disc disease takes a year to develop, and the x-rays were taken seven weeks after the accident, the degenerative disc disease pre-dated the accident, and was not caused by it. I accept Dr. Lloyd's opinion on these points.

The report of the MRI of Mr. Bajic's neck performed on March 19, 1996 shows similar problems to those in the July 1995 x-ray report. A further MRI of Mr. Bajic's neck performed on September 8, 1999 was a suboptimal examination because Mr. Bajic moved during the procedure. Nonetheless, the examiner reported that there had been little progression in the osteophyte at C3-

4 seen on his March 1996 MRI.[6] I find that these investigations do not support Mr. Bajic's position that these problems were attributable to the June 1996 accident.

Conclusions on disability

I have concluded that the primary injury Mr. Bajic sustained in the June 1995 accident was a soft tissue injury to his neck which caused pain in his shoulder. The medical opinions before me are conflicting as to when Mr. Bajic was able to return to full-time work as a convenience store operator. Dr. Lloyd opined he could do so by September 1995, and Dr. Trotter by about April 1996. Dr. Darracott opined that Mr. Bajic should have been off work for one week, should then have gradually returned to his duties, and was no longer disabled by May 1996. He also opined that no neurosurgeon would be prepared to operate on Mr. Bajic based on his clinical findings. Dr. Jeremias opined that Mr. Bajic remained disabled.

However, I have to determine Mr. Bajic's entitlement to income replacement benefits based on whether he was substantially unable to perform the essential tasks he was capable of performing during the March 1994 and June 1995 period, for three hours. For the reasons given below, I find, based on Mr. Bajic's reports of his function, and the clinical notes and records of his treating orthopaedic surgeon, that by March 8, 1996, Mr. Bajic was no longer substantially unable to perform those tasks.

Since the *Schedule* imposes a test of function, I have compared Mr. Bajic's own reports of his levels of function, activity and limitations in the relevant pre-accident period, with his reports to third parties between October 1995 and May 1996.

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[6]Mr. Bajic brought a motion to re-open the hearing based on new evidence which was not available at the time of the hearing. Counsel agreed that the evidence was not available at the time, and made submissions as to the weight and effect of the evidence. On this basis the hearing was re-opened by Arbitrator Joachim, subject to my further Order to permit Mr. Bajic's additional evidence, submissions, and the submissions of counsel for Zurich and Pafco to be placed before me. I have considered the additional evidence and submissions.

According to Dr. Jeremias' clinical notes and records, Mr. Bajic reported that between 1994 and 1995, he could stand for ten minutes, walk for five minutes, and walk two to three hundred metres. In October 1995, Mr. Bajic was surveilled operating a car. On two occasions he made return trips to Toronto to visit his sons. At times he would have to stop and his wife would have to take the wheel. When they reached their sons' residence, Mr. Bajic would lie down and rest. While he may have encountered some difficulty in driving long distances, I am satisfied, based on this evidence, that Mr. Bajic would be able to drive the shorter distances from his home to the variety store, to the bank, and to suppliers for the store within the Hamilton area.

In October 1995, Mr. Bajic reported to Canada Pension Plan that he could stand for an hour, walk for 15 minutes at a time, and walk a distance of one kilometre. These all meet or exceed his pre-accident levels for similar activities. He described his headaches as slightly interfering with his concentration. Despite his headaches, he was able to read daily. During physiotherapy treatment, his headaches gradually decreased in frequency and severity. I find it probable that by December 1995, he could concentrate sufficiently to place orders, deal with suppliers or engage in managerial activities for up to three hours per day.

I find Mr. Bajic's report of his physical limitations to Dr. Trotter in February 1996 roughly similar to those he reported to Canada Pension Plan in October 1995. However, his walking tolerance was a little better—between 15 and 30 minutes before his neck or back caused problems. His consumption of painkillers was markedly decreased, and he took Tylenol extra strength or Tylenol #3 once or twice a week. He could sit between half an hour to two hours. Given his sitting and standing tolerances, and his ability to change positions at will in the store, I find that he could sit, stand, operate the cash register and walk to the bank at this point for up to three hours.

Based on the pre-accident surveillance video, I find that Mr. Bajic was able to lift 35 pounds

between his knees and waist on an occasional basis and carry that weight for a short distance.[7] In October 1995, Mr. Bajic reported to CPP that he could lift three kilograms, or approximately six and a half pounds; his primary physiotherapist between October 1995 and May 1996 opined that by May 1996, he could lift between one and five pounds. In May 1996, Dr. Darracott opined that he could lift 40 pounds between his knees and waist on a repetitive basis.

Since Mr. Bajic did not injure his low back in this accident, and the strength in his right arm was normal in February 1996, I attribute any difficulty in lifting such a weight between his knees and waist on an intermittent basis to his neck injury. In January 1996, Ms. M. Wong, physiotherapist, found that Mr. Bajic had 70% of his normal range of motion in his neck. Dr. Jeremias' note of January 8, 1996 states that Mr. Bajic had improved a lot, and had a good range of motion in his neck and shoulders. At that point he had no arm symptoms, but some right neck symptoms. On March 8, 1996 Dr. Jeremias' note reflects a good range of neck motion to the right, and a full range of motion in Mr. Bajic's shoulders, and "Impression: neck, improved, back stabilized; stop physio; exercise on own, 3 months."

Dr. Jeremias and Ms. Wong were both of the opinion that Mr. Bajic could not engage in repetitive neck extension, rotation or reaching above shoulder height because such movements would cause his neck pain to increase. The evidence indicates that prior to the June 1995 accident, Mr. Bajic was not performing repetitive overhead reaching and lifting. The suppliers of the store agreed to load the coolers, and one of Mr. Bajic's sons was paid to place items on the shelves. I did not understand either Dr. Jeremias or Ms. Wong to mean that such restrictions would interfere with Mr. Bajic's ability to lift between knee and waist on an occasional basis, as he had done pre-accident. I conclude that by March 8, 1996 Mr. Bajic was no longer substantially disabled from performing his essential pre-accident tasks as a result of the injury he sustained in the June 1995 accident.

[7] One of the items Mr. Bajic lifted out of his car was a case of eight two-litre bottles of pop. Since a litre of water weighs one kilogram, a conservative estimate of the weight of the case of pop would be 16 kilograms, or approximately 35 pounds.

Since Dr. Lloyd opined that Mr. Bajic was able to return to full-time work in September 1995, about four months before I conclude that Mr. Bajic was capable of performing that work for three hours a day, I will set out my reasons for rejecting his opinion.

In November 1998, Dr. Lloyd assessed Mr. Bajic on behalf of Zurich. In his opinion Mr. Bajic sustained a soft tissue strain to his cervical spine in the presence of degenerative disc disease. On examination, Dr. Lloyd found no involuntary muscle spasm, and normal cervical lordosis. He noted a discrepancy between Mr. Bajic's range of neck movements on formal examination, and during his history taking, when Mr. Bajic moved his neck in an unrestricted manner. There was no obvious protective pattern. Mr. Bajic noted that with conscious movement he anticipates that he will experience pain; however, when he moves instinctively, he experiences pain only after he performs the movement.

After his examination, Dr. Lloyd opined that Mr. Bajic should have been disabled from full-time work as a variety store owner for a maximum of seven months, i.e. until January 1996. After he reviewed the surveillance videotape of Mr. Bajic taken in October 1995, Dr. Lloyd shortened his estimate of Mr. Bajic's period of disability to about three months, that is to say to September 1995. In his opinion, Mr. Bajic's general demeanour and the absence of any protective pattern on the videotape in October 1995 indicated that he was capable of doing the job of a convenience store operator. In Dr. Lloyd's opinion, the discrepancies between Mr. Bajic's presentation when he was being examined and on casual observation raised a credibility issue. Dr. Lloyd noted in his report that Mr. Bajic lifted his left arm without difficulty. In my view, this statement implied that in doing so Mr. Bajic impugned his credibility. However, Mr. Bajic complained of problems with his *right* shoulder and arm as a result of the 1995 accident; he sustained a separated *left* shoulder in his 1996 accident.

Dr. Jeremias disagreed that three months was a reasonable time for Mr. Bajic's soft tissue injuries to resolve. Ms. Wong, a physiotherapist who assessed Mr. Bajic, noted that in October 1995, he

had very severe pain and restrictions in his cervical, thoracic and lumbosacral areas, reduced sensation and very restricted movement of his right arm, and a little bit in his left hand. Based on this evidence of Dr. Jeremias and Ms. Wong, I am not persuaded that Mr. Bajic's disability was limited to three months following the June 1995 accident.

Like Dr. Lloyd, Dr. Trotter noted an obvious discrepancy in the range of motion in his neck as he presented in examination compared to the observations of the surveillance team,[8] and a mild discrepancy in relation to his back and shoulder range of motion. However, she noted that Mr. Bajic did seem somewhat anxious and under stress and the discrepancy may have been more in the line of an unconscious somatization, than a deliberate misrepresentation. She opined that he remained disabled from full-time work as a convenience store operator. Dr. Trotter had the benefit of examining Mr. Bajic four months after the surveillance, while Dr. Lloyd examined him three years later. For this reason I prefer Dr. Trotter's opinion about the reasons for the discrepancies in Mr. Bajic's presentation on formal and casual observation.

Other factors

Dr. Trotter opined that Mr. Bajic was disabled by his pain syndrome rather than a clinical impairment, involving the loss of a body part or function. She recommended a psychological assessment to determine if significant non-organic factors were interfering with his progress. I find no evidence that a psychological assessment was pursued by Mr. Bajic or by Zurich.
In a letter dated September 15, 1996, Dr. Jeremias reported to Pafco that Mr. Bajic did not have psychological problems, and had always been quite reasonable. While Dr. Jeremias is an orthopaedic surgeon and not a psychologist, he had been treating Mr. Bajic since 1994. I find it likely that such problems would have been readily apparent to Dr. Jeremias had they been present.

While Zurich's investigators were conducting surveillance on Mr. Bajic in October 1995, he

[8] I infer that Dr. Trotter was referring to the range of motion of Mr. Bajic's cervical spine, given her subsequent specific comments with respect to a mild discrepancy in his back and shoulder range of motion.

became aware that he was being followed. He testified that as a refugee, he feared for his life and those of his wife and two sons who were with him at the time. He also testified that the stress from this incident caused him to develop hypertension and diabetes about a month later. While Mr. Bajic submitted there was a causal relationship between Zurich's surveillance, and the diagnoses of hypertension and diabetes, I find no medical opinion evidence which supports this submission.

Partial inability

Mr. Bajic could also succeed in his claim for income replacement benefits by establishing that as a result of the injuries he sustained in the motor vehicle accident on June 8, 1995, he has a "partial inability to carry out a normal life," within the meaning of section 2 of the *Schedule*. That is to say he is substantially unable to carry out personal care activities, mobility activities, or household activities in which he ordinarily engaged before the accident; or he is unable to engage in activities in which he ordinarily engaged before the accident, which require the exercise of cognitive powers, the ability to control emotions or behaviour; or communication abilities.

According to a form Mr. Bajic completed with Zurich in October 1995, his duties were to go shopping with his wife; that is to say he would usually wait outside in the car while she shopped. He would then put away the groceries. He enjoyed sitting and watering the grass, and was able to perform those activities. Mr. Bajic testified that prior to the accident, he also visited relatives, but because of his pain he no longer did so post-accident. However, during surveillance carried out on Zurich's behalf on October 21, 1995, and again on October 28, 1995, Mr. Bajic travelled by car from Hamilton to Toronto, and visited with his sons who were attending U of T, and returned to Hamilton.

I accept Dr. Trotter's opinion in February 1996, that there was no functional reason Mr. Bajic

could not perform his activities of daily living. Based on Mr. Bajic's reports of his activities to Canada Pension Plan and to Dr. Trotter, the opinion of Dr. Trotter which is supported by that of Dr. Darracott, and based on the findings detailed under housekeeping expenses, below, I find that Mr. Bajic was substantially able to perform all the activities in which he ordinarily engaged prior to the accident. I conclude that Mr. Bajic did not suffer a partial inability to carry on a normal life beyond February 1996.

The July 1996 accident

Mr. Bajic was injured in a second motor vehicle accident on July 22, 1996. He submits he remains disabled from his injuries. Pafco submits that Mr. Bajic was already totally disabled and any income replacement benefits are owed by Zurich. The amount of Mr. Bajic's weekly income replacement benefit is $185. Since Pafco is entitled to a credit for Zurich's payments of $185 under section 75 of the *Schedule*, Pafco submits that it does not owe Mr. Bajic any income replacement benefits.

Mr. Bajic testified that on July 22, 1996 he rode a bicycle approximately 1.5 kilometres to the No Frills store where he bought cream, sausages and bread. While returning home he was struck by a car on his left side. He was not wearing a helmet. He was taken by ambulance to Hamilton General Hospital where x-rays were taken. He was discharged about six hours later, with a diagnosis of "bike accident multiple body injury."

Mr. Bajic saw his family physician, Dr. R. Timarac, a week later, and again on August 7, 1996. At that point, Dr. Timarac again referred Mr. Bajic to Dr. Jeremias, who examined him on August 17, 1996. Dr. Jeremias testified that Mr. Bajic's symptom pattern was entirely changed following this accident. He diagnosed a possible period of unconsciousness, a lacerated temple, a Grade 2 separated shoulder, a flare of his neck and low back symptoms, a strain to his left ankle,

contusions to his ribs, distal thigh, tenderness in his left lower leg, heel, over his left elbow, his left second finger, and a positive Tinel's sign over his left ulnar nerve. Moving his neck caused a headache, and when he changed position he experienced nausea. Mr. Bajic experienced vertigo with occasional falls, and at times complained of double vision.

Dr. Jeremias recommended daily swimming and physiotherapy to his shoulder, neck and left ankle three times a week. Pafco asked Dr. Jeremias for a certificate that the physiotherapy treatments were reasonable and necessary and required as a result of the July 1996 accident. Dr. Jeremias prepared the requisite certificate; however, Mr. Bajic countermanded his authorization to release the information. He obtained treatment at an OHIP funded clinic between November 1996 and June 27, 1997.

In September 1996, Dr. Jeremias referred Mr. Bajic to Dr. R.J. Duke, a neurologist. Dr. Duke opined Mr. Bajic's headaches were cervicogenic in nature and would gradually improve with the passage of time. By October 1996, Mr. Bajic's pain and difficulty breathing due to his rib injury resolved. By January 1997, Dr. Jeremias found Mr. Bajic had a full range of motion in his neck with pain at extremes and tenderness of his left shoulder. He injected Mr. Bajic's left shoulder with Depomedrol, but Mr. Bajic experienced little benefit. Dr. Jeremias referred Mr. Bajic to Dr. C.J. Ricci, for occipital nerve blocks and trigger point injections. In April 1997 Dr. Ricci noted that Mr. Bajic had extensive spasm of his trapezius muscles and was never entirely without headaches. In his opinion Mr. Bajic had soft tissue injuries consistent with moderate to severe ligamentous strain. In August 1997, Dr. Jeremias noted Mr. Bajic's continuing complaints of neck and headache pain and referred him to Dr. S. Harvey for pain management.

In Dr. Jeremias' opinion, Mr. Bajic's restrictions were long term. He was restricted from repetetive rotation of his neck and reaching above his shoulder with his right arm as a result of the June 1995 accident. He was also restricted from repetitive use of his left arm beyond 90 degrees of abduction as a result of the July 1996 accident. He was precluded from repetitive bending and lifting by his low back condition. In Dr. Jeremias' opinion these problems had a cumulative effect.

In his opinion, Mr. Bajic was not suited for any kind of physical job that demands strain of his neck, left shoulder, or lower back. There was a low likelihood that someone with a double insult to his neck and back would return to work. As he observed rhetorically at the hearing, “Where’s the good parts?” In his opinion, Mr. Bajic was unemployable and not going to get better.

Dr. Jeremias retired from practising medicine in 1997, and Mr. Bajic was again followed by his family physician, Dr. Timarac. According to her notes, Mr. Bajic’s symptom pattern remained largely unchanged. Before he retired, Dr. Jeremias referred Mr. Bajic to Dr. S. Harvey for pain management.

Dr. Harvey performed further nerve conduction studies and diagnosed Mr. Bajic as suffering from chronic pain syndrome with diffuse skin rolling tenderness. In Dr. Harvey’s opinion the factors which likely contributed to that diagnosis were Mr. Bajic’s pre-existing degenerative disc disease in his cervical and lumbar spine, degenerative spinal stenosis; diabetes, probable peripheral neuropathy with absent ankle jerks and decreased sensation from the knees down probably related to diabetes; the left shoulder separation and pain in his acromioclavicular joint, and injuries in the motor vehicle accidents. Dr. Harvey expressed no opinion on the relative contributions of any of the factors, on whether either motor vehicle accident significantly contributed to his development of chronic pain syndrome, or whether Mr. Bajic was disabled as a result of that syndrome.

Dr. D. Goldstein, a disability evaluating physician, assessed Mr. Bajic on behalf of Pafco in October 1998. In his opinion persons who are disabled develop a protective response to their injuries which becomes part of their body image. In his opinion, Mr. Bajic did not have such a protective response. While he acknowledged that Mr. Bajic has pain, he observed that Mr. Bajic is able to move his neck from side to side and to display a much greater range of movement when he is not being formally examined. He observed that pre-accident, Mr. Bajic was already very limited in his normal daily activities due to a combination of degenerative disease in his cervical and lumbar spine, a right upper extremity multi-level radiculopathy and symptoms suggestive of

bilateral lower extremity radiculopathies. In his opinion these may have been aggravated by his bicycle accident of July 1996. However, even without trauma, Mr. Bajic would have experienced a gradual deterioration in his status because of these conditions. In his opinion Mr. Bajic was not disabled at the time of his examination in October 1998, and could work three hours a day at the variety store.

Pafco provided Dr. Goldstein with additional records and reports as they became available. Dr. Goldstein reviewed them and authored two further reports; however, his opinion that Mr. Bajic was not disabled remained unchanged.

In Dr. Goldstein's opinion, since Mr. Bajic was already restricted from overhead reaching with his right arm, any additional impairment caused by the injury to his left arm did not create a further restriction in this aspect of Mr. Bajic's work-related function. I accept Dr. Goldstein's opinion on this point. Based on a review of Dr. Jeremias' clinical notes and records, Dr. Goldstein opined that by October 27, 1997, Mr. Bajic had returned to his pre-accident level of function with respect to his neck, low back and right shoulder. I also accept Dr. Goldstein's opinion in this regard. I conclude that by October 27, 1997, Mr. Bajic was no longer substantially disabled from working three hours per week in the variety store as a result of his 1996 injuries.

Mr. Bajic was successful in a motion to re-open the hearing. I have considered the additional evidence he provided, along with his submissions and those of counsel. I find that the fresh evidence establishes surgery remains a possibility, and that Mr. Bajic's pre-accident condition has become worse. Dr. Jeremias testified that ordinarily Mr. Bajic's spinal stenosis would be expected to do so. Mr. Bajic has not provided any medical opinion evidence which links this further deterioration to either or both motor vehicle accidents.

Partial inability

Mr. Bajic could also qualify for income replacement benefits if he establishes a partial inability to carry on a normal life within the meaning of section 2 of the *Schedule*. In this case Mr. Bajic complains that he is substantially unable to engage in mobility activities in which he ordinarily engaged prior to the July 1996 motor vehicle accident.

In the case of *Gray and Zurich Insurance Company*, (OIC A95-000412, August 2, 1996), Arbitrator Palmer concluded that a subjective inquiry is required, and that all mobility activities, appropriately weighted as to their degree of significance or frequency, are to be considered. I find that the mobility activities in which Mr. Bajic ordinarily engaged prior to the motor vehicle accident were walking, bicycling, taking public transportation and driving.

Based on Mr. Bajic's evidence and that of Dr. Jeremias, I accept that following the July 1996 motor vehicle accident, Mr. Bajic was substantially unable to take public transportation. Mr. Bajic testified that since this accident he has been unable to ride a bicycle, because he cannot move. He was riding a bicycle at the time of the accident, and I accept his testimony that he is unable to do so following this accident. However, there was no clarification of what Mr. Bajic meant by being unable to move, and little evidence which specifically addressed the cause of this difficulty.

Mr. Bajic testified that he is unable to walk for longer than 500 metres because his ankle swells with walking. Ms. Wong, physiotherapist, testified that in May 1996, two months before the July 1996 accident, Mr. Bajic was able to walk two kilometres from his home to the gym, engage in pain relieving treatment with her, exercise in the gym and then walk to his home. I find that this diminution in walking, from two kilometres to 500 metres reflects a significant impairment. Walking is a fundamental and therefore highly significant mobility activity. I find that generally, a diminution in mobility takes on even greater significance to a person who already has impairments. Walking was also important to Mr. Bajic because it was a form of exercise. He was attempting to manage his diabetes through exercise and diet. To the extent that this finding conflicts with Dr. Goldstein's opinion that Mr. Bajic's mobility level was sufficient for

performing his activities of daily living, and that his clinical findings are not supportive of a functional limitation arising from this area, I reject his opinion.

There were conflicting opinions as to the cause of Mr. Bajic's decreased ability to walk: *cauda equina* claudication, diabetic peripheral neuropathy, disuse atrophy and the motor vehicle accident. In Dr. Lloyd's opinion, Mr. Bajic's ability to walk only short distances was attributable to *cauda equina* syndrome or claudication, consistent with spinal stenosis and limited difficulty walking prior to the first motor vehicle accident in June 1995. Dr. Lloyd testified that a person with this syndrome will be able to walk for a certain distance before his or her legs start feeling shaky or weak; there would be some gradual improvement with rest; however the shakiness and weakness recurs. In his opinion, given Mr. Bajic's CT-Scan in 1994, this problem would have happened in any event. Dr. Goldstein expressed a similar opinion. However, neither Dr. Lloyd nor Dr. Goldstein provided an opinion as to when this was likely to happen. This explanation does not address Mr. Bajic's specific complaint of swelling. It also ignores Mr. Bajic's increased level of function pre-accident, as reflected by his ability to walk a distance of two kilometres in May 1996.

Dr. Jeremias opined that diabetic neuropathy was not a likely cause of Mr. Bajic's difficulty walking. He noted that he had good *dorsalis pedis* pulses and the vascular component in his leg was therefore intact. In addition, the usual complaint with diabetic neuropathy would be numbness; while Mr. Bajic's complaint was pain and swelling. Dr. Harvey also noted that Mr. Bajic has maintained his sural (calf or leg) responses, which are usually lost at an early point in a diabetic peripheral neuropathy. Dr. Harvey opined that there could also be some chronic radiculopathy associated with some disuse atrophy. Dr. Goldstein rejected the possibility of disuse atrophy, because when he examined Mr. Bajic, he found a minimal and insignificant difference in the size of Mr. Bajic's left and right calves. In light of his ability to walk two kilometres prior to this accident, I find the most plausible explanation for the swelling of Mr. Bajic's left ankle to be the motor vehicle accident.

I accept that as a result of the July 1996 accident, Mr. Bajic's left ankle developed a tendency to swell, and that this was a significant factor in his difficulty walking. I also accept that the radiculopathies in his low back contributed to his problem. I conclude that Mr. Bajic suffered a partial inability to carry on a normal life up to the 104 week mark because of the limitation in his mobility activities. I also find that Mr. Bajic did not meet the test of a complete inability to carry on a normal life as a result of either or both of the motor vehicle accidents at any point between June 8, 1995 and July 22, 1998. I find that Pafco is required to pay Mr. Bajic income replacement benefits at the rate of $185 per week from July 29, 1996 to July 22, 1998.

Supplementary medical expenses

Mr. Bajic was permitted to raise these claims provided he furnished the Insurers with further particulars. Counsel advised at the beginning of the hearing that they would endeavour to sort out these expenses as the hearing proceeded. I will deal only with the disputed aspects of this claim which were presented: namely, Mr. Bajic's entitlement to a physiotherapy assessment in the amount of $20, a portion of the cost of a prescription, the amount to be paid for mileage for transportation to various medical appointments and the number of trips payable for physiotherapy treatment.

Physiotherapy

Mr. Bajic claims $20 for a physiotherapy assessment provided by Charlton Physiotherapy on November 7, 1996. He acknowledged during cross-examination that Zurich paid all his physiotherapy expenses; his claim for physiotherapy expenses is therefore against Pafco.

Dr. Jeremias initially recommended Mr. Bajic receive physiotherapy three times a week for six

weeks in a health practitioner certificate dated August 27, 1996. Pafco sought clarification from Dr. Jeremias whether these treatments were reasonable and necessary and required as a result of the July 22, 1996 accident. Dr. Jeremias opined in a letter dated September 13, 1996, that they were. However, Mr. Bajic instructed Dr. Jeremias not to send the certificate. It remained in Dr. Jeremias' file, and was produced as part of the productions for the arbitration. Mr. Bajic then sought treatment at an OHIP funded facility. Based on a photocopy of a receipt dated November 7, 1996, and a corresponding clinical note in the Charlton Physiotherapy records of the same date, I find that Mr. Bajic incurred the expense of $20 in respect of an assessment. I find that an assessment is the usual precursor for the provision of physiotherapy treatment and therefore required in order to provide the treatment.

Pafco adduced no evidence that the assessment or treatment was not required as a result of this accident, that it was unreasonable or unnecessary, that the amount charged was excessive or that the amount should have been paid by another agency. Based on Dr. Jeremias' opinion I find the physiotherapy assessment was required as a result of the July 1996 accident, that it was reasonable and necessary, and that Pafco is responsible for payment of this expense.

Transportation

Mr. Bajic claimed mileage for various medical appointments. Both Insurers submit the amount of 40 cents per kilometre claimed by Mr. Bajic is unreasonable. Mr. Bajic and his son, Goran Bajic, were respectively the listed and named insureds under the policy. The car Mr. Bajic drove belonged to Goran. The *Schedule* limits compensation for travel expenses in respect of an insured person's automobile to amounts for fuel, oil, maintenance and tires. Counsel for Pafco submitted that it would be appropriate to award the amounts permitted in the Transportation Expense Guidelines.[9] Although those Guidelines relate to a later *Schedule*, in the absence of any evidence

[9]Commissioner's Guideline No. 6/96, effective October 19, 1996. This guideline is issued pursuant to Section 268.3 of the *Insurance Act* and applies to accidents occurring on or after November 1, 1996.

from Mr. Bajic to show how he arrived at the amount of 40 cents per kilometre, I agree with the approach suggested by counsel and allow 22 cents per kilometre as compensation.

Both Insurers dispute that Mr. Bajic had 102 physiotherapy treatments for which he claimed transportation expenses. Zurich paid Mr. Bajic bus fares for his transportation to physiotherapy between December 27, 1995 up to and including the treatment of March 8, 1996. The clinical notes and records of Physio-Care indicate 14 further treatments in March and April 1996. During May 1996, Mr. Bajic walked to the clinic. There was a hiatus in Mr. Bajic's physiotherapy treatment until August 1996. Zurich then arranged for Physio-Care to provide further physiotherapy as a work hardening program on the recommendation of Dr. Darracott, who conducted a disability DAC. Mr. Bajic attended Physio-Care on August 12 and 19, 1996 and it appears that Zurich paid for those treatments. Although I doubt that anything more than pain relief and mobilization was provided on those two visits, since Zurich paid for the treatments, I find it should also fund the transportation expenses associated with that treatment. Zurich should therefore pay Mr. Bajic mileage expenses for a total 16 physiotherapy treatments.

On November 7, 1996 Mr. Bajic was assessed and treated at Charlton Physiotherapy. The clinical notes and records of Charlton Physiotherapy which were filed at the hearing do not reflect as many treatments as have been billed to OHIP. I heard no submissions as to how the discrepancy between the two sets of records might be reconciled. Dr. Jeremias prescribed more treatment than is detailed in the clincal notes and records, and I have therefore used the amounts shown on the OHIP summary until the end point of the summary, March 17, 1997. After that date I have used the Charlton Physiotherapy clinical notes and records. I find evidence of 44 physiotherapy treatments in the OHIP summary, between November 7, 1996 and March 17, 1997. I find evidence of five further treatments between March 20, 1997 and June 6, 1997 in the progress notes of Charlton Physiotherapy. I conclude that Pafco should pay Mr. Bajic transportation expenses in relation to these 49 treatments.

Prescription

Mr. Bajic claimed reimbursement of $9.47 for one of his prescriptions for Tylenol #3, which he submitted to Pafco. He testified that he was given the prescription by the doctor in the emergency department on the day of the accident. The medication was Tylenol #3, ordinarily prescribed for pain relief. I find that this was prescribed as a result of his injuries and consequently required as a result of the accident. At the time of the accident Mr. Bajic was receiving welfare or family benefits, and had a drug card which would cover the cost of the prescription, except for a $2.00 fee. Mr. Bajic testified that he did not have the drug card with him after he left the hospital and paid the full amount of the prescription. Neither Mr. Bajic nor Pafco tendered the prescription receipt in evidence. I accept Mr. Bajic's testimony on this point. I find Mr. Bajic has established that he incurred the expense of the full amount of the prescription, and presented the receipt to Pafco.

Subsection 75(13) of the *Schedule* provides:

> No payment is required for that portion of an expense referred to in Part VII [supplementary medical benefits] . . . that is reasonably available in respect of the insured person under any insurance plan or law or under any other plan or law.

To avoid payment, Pafco must establish that payment was reasonably available. In my view, the term "reasonably available" should be interpreted realistically and with some regard to the actual circumstances. Mr. Bajic left his home to buy cream, sausages and bread for his breakfast. He did not have the drug card with him. The accident was an unexpected event. He had spent six hours at the hospital. His sister testified that he was bloody all over. In an ideal world, Mr. Bajic would have had the drug card with him. He did not. Given his condition, I am not persuaded that the *Schedule* should be interpreted to require Mr. Bajic to return home and search for his drug card before obtaining this prescription for pain relief.

Pafco adduced no evidence which established that Mr. Bajic would be reimbursed by Social Services if he were to resubmit the prescription receipt to a caseworker, for example. In these limited circumstances I am not persuaded that Pafco has established that the payment was reasonably available to Mr. Bajic at the time he paid for the prescription.

Section 74(1) of the *Schedule* provides that "an insurer shall pay benefits under this Regulation even though the insured person is entitled to, or has received, benefits under an Act administered by the Ministry of Community and Social Services for Ontario or under similar legislation in another jurisdiction." For these reasons I conclude that Pafco should reimburse Mr. Bajic the amount of $9.47.[10]

Mr. Bajic asked for recognition of his entitlement to future supplementary medical benefits. Section 46(1) of the *Schedule* provides for a maximum entitlement of one million dollars in relation to supplementary medical and rehabilitation benefits in relation to any one accident. Should such claims arise Mr. Bajic would be required to submit them to his insurer for payment.

Rehabilitation benefits

Mr. Bajic claims the cost of leasing a car from his son in the amount of $148 per month as a rehabilitation benefit. Section 40 of the *Schedule* provides for vocational and social rehabilitation measures to remedy or diminish the effects of an impairment caused by an accident.

Mr. Bajic's car was written off following the June 1995 accident, and was not replaced. Dr. Jeremias' clinical note of August 1995 reflects Mr. Bajic's statement to Dr. Jeremias that he

[10]Section 268(6) of the *Insurance Act* provides that insurance provided under the *Statutory Accident Benefits Schedule* is excess to any other insurance not being automobile insurance of the same type indemnifying the insured person. I heard no submissions as to whether payments made to a claimant under the *General Welfare Assistance Act* or under the *Community and Social Services Act* fall within the statutory definition of insurance.

had not been to physiotherapy because he did not have a car. I do not interpret this to mean that Dr. Jeremias was of the opinion that Mr. Bajic needed a car to obtain physiotherapy.

In October 1995, Mr. Bajic indicated on his CPP application that he was having serious difficultly with public transportation. Nevertheless, based on his submission of a claim to Zurich for travel by bus on 36 occasions between October 30, 1995 and December 22, 1995, I find that Mr. Bajic was able to travel by public transit following the June 1995 accident. Dr. Jeremias also noted that Mr. Bajic was able to use public transit following the June 1995 accident. I find no medical opinion evidence which supports Mr. Bajic's claim for a leased car as a result of the June 1995 accident.

With respect to his claim from the July 1996 accident, Mr. Bajic relies on a health practitioner certificate completed by Dr. Jeremias, dated August 27, 1996. On that certificate there is a note "needs help" with transportation. Pafco's outside adjuster wrote Dr. Jeremias with respect to Mr. Bajic's claim that he was unable to use public transit and requires taxi service to and from treatment as a result of his injuries. Dr. Jeremias noted that he was able to take public transit before the July 1996 accident "but his symptom pattern has increased to the point that he does need assistance as outlined." While this suggests assistance for travel via taxi, I do not interpret Dr. Jeremias' statements as a recommendation for a leased car. Mr. Bajic acknowledged in cross-examination that he brought this claim against Pafco because he was annoyed with the manner in which it handled his claim and its refusal to pay taxi fares which he submitted following the accident. Mr. Bajic's claim for the lease of the car as a rehabilitation benefit is dismissed.

Attendant care benefits

Mr. Bajic claimed attendant care benefits under section 47 of the *Schedule* for services performed by his wife and each of his two sons. Under the provisions of the *Schedule*, an insurer may request

a certificate in relation to such claims. If one is provided and the insurer disagrees that attendant care as recommended is required, then the insurer is permitted to arrange an attendant care DAC, and such claims are determined in accordance with Form 1 and section 50(10). I find no evidence that a certificate was requested in respect of Mr. Bajic's claims for attendant care benefits, that an attendant care DAC was arranged, or that an assessment which complies with Form 1 has been performed. In these circumstances I will assess the Applicant's claim for attendant care benefits, based on the limited evidence before me.

I find no persuasive evidence that Mr. Bajic required attendant care as a result of the June 1995 accident. Goran testified that after the first accident his father was completely unable to perform simple tasks such as getting out of bed, walking, sitting down, etc., and at that point they realized that his father was seriously hurt and really needed some help in order to recover. I find it probable that Goran's recollection relates to the period after the second accident in July 1996. According to Dr. Timarac's notes and records, Mr. Bajic's complaints included vertigo, severe headaches, nausea, neck and back pain, pain in his left shoulder, subsequently diagnosed as a separated shoulder, difficulty breathing because of the injury to his ribs, a tender bruised and swollen ankle, and various contusions and bruises.[11]

Based on those notes and records for the two weeks following the July 1996 accident, I find that Mr. Bajic required some assistance in that period due to his injuries. Mr. Bajic testified that his son would carry him to the bathroom, give him baths, and that he remained flat on his back for eight to ten days post accident. Mr. Bajic claimed attendant care services on the basis that his wife and sons assisted him following this accident. Mr. Bajic, Mrs. Bajic and Goran Bajic all testified, yet provided no evidence of the amounts of time expended, and how those services could be fitted into the categories set out in Form 1. In these circumstances, I take a somewhat arbitrary

[11]Initially Mr. Bajic's shoulder injury was diagnosed as tendinitis. In October 1996 x-rays showed a separation of the acromioclavicular joint.

approach.

I find that during the two weeks following the July 1996 accident, Mr. Bajic reasonably required 15 minutes of daily assistance with dressing and one hour per day in assistance with mobility for purposes of going to the bathroom, given his frequent urination due to his spinal stenosis, at the rate of $8.75 per hour under Part 1. Under Part 2, I find one hour per day for meal assistance, at $6.85, being the minimum hourly wage under s.10(1) of Ontario Regulation 325; and under Part 3, 45 minutes per day for assistance with bathing and administering prescribed medication at the rate of $14 per hour.

Dr. Timarac again referred Mr. Bajic to Dr. Jeremias, who saw him on August 19, 1996. Dr. Jeremias testified that Mr. Bajic did not require attendant care except perhaps when his condition is bad and he has trouble putting on his socks, polishing his shoes, tying his shoelaces, or dressing, on an intermittent basis. Dr. Jeremias opined he would require such assistance because of his back and neck and also his shoulder and neck. Based on this evidence, I find one hour per week reasonable for such assistance, from five weeks following the accident until October 27, 1997, the point at which his neck and back returned to pre-accident status. This amount is to be paid at the rate of $8.75 per hour. Pafco is required to pay Mr. Bajic a total of $807.31 as attendant care benefits under section 47 of the *Schedule*.

Other pecuniary losses

Mr. Bajic claims reimbursement from Pafco for weekend trips by his sons, Slobodan and Goran, between September 1, 1996 and November 15, 1996, who travelled between Toronto and Hamilton to visit him following the July 1996 accident. Section 53 of the *Schedule* provides for the payment of an amount that is reasonable in all the circumstances to specified family members, including children, who visit an insured person during his or her treatment and recovery.

The evidence which supported this claim was a Form 1 in the Social Services file, which Mr. Bajic

signed in September 1996, that both sons came home on weekends and during summers. Mr. Bajic testified that his sons also travelled to Hamilton to take him for various medical appointments. There is a reference in Dr. Goldstein's report that Mr. Bajic's son accompanied him on that insurer's examination. Goran testified at the hearing. Slobodan sat with his father at the hearing on several days. He was on vacation and had travelled in from Banff. It was evident that both sons have a close relationship with Mr. Bajic. This evidence suggests that it was more likely than not that his sons visited him during the period claimed.

Section 53 of the *Schedule* requires a consideration of whether the expense is reasonable having regard to all of the circumstances. In determining whether those visits were reasonable, I have considered the nature of Mr. Bajic's injuries, the medical advice he received and the extent of his recovery. Mr. Bajic sustained a head laceration, separated shoulder, strained ankle, various bruises and contusions, and had difficulty breathing. He was suffering from vertigo and awaiting an appointment with a specialist to diagnose the cause of his severe headaches. That appointment with Dr. Duke took place on September 29, 1996. At that time Mr. Bajic had clarification and perhaps reassurance that his headaches were cervicogenic and would gradually decrease with time. In all the circumstances, I find it reasonable to allow one visit per week for each son during each of four weekends in September 1996.

I do not agree with the submission that the fact that someone would ordinarily incur an expense to visit a relative, should in and of itself preclude reimbursement. If the section were read this narrowly, then few if any relatives would obtain reimbursement under section 53 of the *Schedule*. By definition, the persons entitled to reimbursement are relatives who would ordinarily have some degree of contact with the injured person and would ordinarily incur some expense in visiting the injured person even if he or she were not involved in an accident.

Slobodan and Goran travelled by public transit, and I find the amounts for each of four return trips per son reasonable. That is to say, eight return trips from their residence in Toronto to the bus station via TTC at $4.00, eight return bus fares between Hamilton and Toronto at $13.00, and

eight return Hamilton Street Railway Fares at $3.80, for a total of $166.40.

I agree with the submission of counsel that Mr. Bajic's claims for transportation to visit his insurance broker and insurer, etc. are more properly addressed as expenses of the arbitration.

Housekeeping expenses

Mr. Bajic claimed housekeeping services under section 55 of the *Schedule*. Zurich and Pafco dispute that those services were incurred. I agree with Arbitrator Palmer, that section 55 of the *Schedule* does not require a comparison between an individual's pre-accident and post-accident activities, in order for compensation to be provided for post-accident housekeeping services.[12]

Mr. Bajic did not frame his claim as one for housekeeping services he required as a result of his injuries. He claims reimbursement for the value of services which he alleges he performed prior to the motor vehicle accidents, and which his wife is now forced to perform as a result of the injuries he sustained in those accidents. Mr. and Mrs. Bajic rent their town home and the landlord is responsible for maintenance. Mr. Bajic testified that pre-accident, since he and his wife had the same occupation and were equal in social status, they split the housework equally. Mr. Bajic alleges that the housework takes at least five hours daily or 35 hours per week.

I do not accept that while spending 17 hours a day at the variety store, Mr. Bajic also spent two and a half hours a day performing housekeeping duties prior to the accident. There are only 24 hours in a day. Mrs. Bajic does not share her husband's perception that they split the household duties equally. When asked, she stated that "sometimes he would help with the vacuuming," and that since the June 1995 accident, he had not done so. Dr. Jeremias' note of July 25, 1995 reflects Mr. Bajic's complaint of back symptoms while vacuuming, presumably before the first motor vehicle accident in June 1995. Mr. Bajic testified that sometimes he dusted; at

[12] *Kats and Axa Insurance (Canada)*, (OIC A97-000194, December 22, 1997)

other times he did not.

Mr. Bajic's sister testified that he could not do anything around the house since March 1994, when he injured his low back at the variety store. Goran testified that he couldn't remember if his father was able to do any work around the house after the 1994 injury. At that time he would either have been working or out with friends, and was seldom at home during the day. He really couldn't say what housework his father did. Ms. Wong, one of Mr. Bajic's physiotherapists, testified that she did not "think he was much into housework."

In my view, most of the evidence does not support Mr. Bajic's position that he performed significant amounts of housekeeping pre-accident. I find no persuasive evidence of the number of hours, or of the frequency of housekeeping duties, and am unable to quantify the amount of time which Mr. Bajic may have spent on such chores pre-accident. I conclude that Mr. Bajic has failed to establish on a balance of probabilities that pre-accident he performed housekeeping services 17 1/2 hours per week which were replaced by his wife post-accident. Mr. Bajic's claim for housekeeping services is dismissed.

Reimbursement for lost or damaged items

Mr. Bajic claims reimbursement from Pafco for various items lost or damaged in the July 1996 accident. He claims the cost of replacing the bicycle he was riding, the shirt and shorts he was wearing, the sunglasses which were lost, and his watch which was damaged in the accident. Section 56 of the *Schedule* provides for the payment of all reasonable expenses incurred by an insured person in repairing or replacing various items which are lost or damaged in an accident.

Mr. Bajic testified that since he was unable "to move around," his wife and son went to The Bay and Sears, obtained price tags for items of comparable quality, and he submitted them to Pafco's outside adjusters, along with his Application for Accident Benefits in August 1996. Pafco denied all of Mr. Bajic's claims. According to the Explanation of Assessment, Pafco requested an

estimate for the repair of the bicycle, production of the damaged items for verification, and an estimate for the repair of his watch. Mr. Globe, Pafco's representative, testified that the outside adjuster took photographs of Mr. Bajic's watch; however they were not filed as exhibits. The original file handler no longer worked for Pafco, and it is unclear what transpired between the outside adjuster and the file handler at Pafco.

According to the Report of Mediator dated December 20, 1996, "Pafco agreed to pay for clothing, a watch and a bicycle lost or damaged in the accident, upon receipt of estimates from Mr. Bajic of the cost of repair or replacement of these items." At the hearing neither Mr. Bajic nor Pafco referred to this agreement. I heard no evidence that the Report was inaccurate or that the agreement was at an end. Mr. Bajic relied on the price tags, etc. provided by his wife and son as his estimates. He testified that he probably did replace some of the items claimed but refused to provide receipts to Pafco because of its denial of his claim. When counsel attempted to put further questions to Mr. Bajic concerning this issue, he responded: "No, gentlemen, we cannot discuss." Pafco asserted that the bicycle was not an accident benefit and that Mr. Bajic failed to establish that a loss was incurred.

In light of the agreement in the Report of Mediator and absent evidence which establishes that the Report was in error, or that the agreement was at an end, I find that neither party is free to assert the position it took in this arbitration. My authority is limited to dealing with issues in dispute. If the issue is settled, I have no jurisdiction to deal with the question by virtue of section 281(2) of the *Insurance Act*. I would encourage the parties to comply with their respective obligations under the agreement within 30 days.

Interest

Mr. Bajic claimed interest on overdue benefits. Section 68 of the *Schedule* provides "If payment

of a benefit under this Regulation is overdue, the insurer shall pay interest on the overdue amount for each day the amount is overdue from the date the amount became overdue at the rate of 2 per cent per month compounded monthly." I make the following findings as to when the various benefits became overdue, given the circumstances of this case.

Supplementary medical benefits become overdue if they are not paid within 14 days after an insurer has received a completed application for the benefit. I agree with Arbitrator Palmer in *Pintucci and Jevco Insurance Company*,[13] that by seeking a certificate under section 37 of the *Schedule* in relation to physiotherapy and medication, Pafco prevented those benefits from becoming overdue until the requisite certificate was provided. The certificate in relation to the physiotherapy expense was produced in the course of the exchange of productions; interest is payable 14 days from the date on which Pafco or its counsel received Dr. Jeremias' certificate. Since Mr. Bajic provided no certificate in relation to the prescription expense, the additional amounts which I have found are owed to Mr. Bajic never became overdue and no interest is payable on that amount.

Pafco did not seek a certificate in relation to the ambulance fee. Interest on this fee is payable to Mr. Bajic from 14 days from the date on which Pafco received the account, until the date of payment. Interest on attendant care, mileage, and other pecuniary losses, is payable from 14 days after Mr. Bajic's claim dated November 20, 1998 was received.

Under section 60 of the *Schedule*, an insurer may require a person who has applied for weekly income replacement benefits to provide a certificate from a health practitioner of the insured person's choice as to the cause and nature of the impairment, an estimate of the duration of the disability caused by the accident, and a treatment plan. Mr. Bajic sent Pafco a disability certificate from his treating orthopaedic surgeon, Dr. Jeremias, with respect to his claim for income

[13] (FSCO A97-000755, January 7, 1999)

replacement benefits. That certificate indicated that Mr. Bajic was unable to perform his normal daily activities, and could not work. However, it also indicated that Mr. Bajic was totally disabled prior to the accident. Pafco sought clarification to determine Mr. Bajic's entitlement to income replacement benefits. I find that such an inquiry was reasonable on its face. However, Pafco directed its inquiry to Mr. Bajic's family physician, Dr. Timarac.

Section 60 of the *Schedule* contemplates the provision of a certificate by a person of the insured person's choice. Mr. Bajic chose Dr. Jeremias, who had seen him in regular follow-up since 1994, and who was therefore in a position to respond to further queries concerning any exacerbation of Mr. Bajic's pre-accident condition. I find that Mr. Bajic complied with the requirements of section 60 of the *Schedule* in producing the health practitioner's certificate from Dr. Jeremias. In the first instance Pafco's request for clarification should therefore have been directed to Dr. Jeremias. Pafco's request for a further report and/or clarification of the original health practitioner's certificate did not prevent Mr. Bajic's income replacement benefits from becoming overdue. Pafco should pay interest on Mr. Bajic's income replacement benefits 30 days after Pafco received Dr. Jeremias' health practitioner's certificate dated August 25, 1996, for the reasons given by Director's Delegate Naylor in the case of *Canadian Surety Company and Sebastian*.[14]

Special Award

Mr. Bajic claimed a special award at the beginning of the hearing under section 282(10) of the *Insurance Act*. Section 282(10) provides:

> (10) If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month,

[14] (FSCO P96-00032, July 28, 1998)

> compounded monthly, from the time the benefits first became payable under the *Schedule*.

I have ordered Mr. Bajic to repay Zurich some of the income replacement benefits he received. My findings on supplementary medical expenses result in Zurich paying some further benefits. Mr. Bajic was permitted to assert these claims in this arbitration provided he furnished particulars by December 1998. While he provided a listing of expenses on November 20, 1998, it was not always clear whether he was asserting the claims against Zurich or Pafco. In these circumstances I do not find Zurich unreasonably withheld supplementary medical expenses. I conclude that Zurich is not required to pay a special award.

I have concluded that Mr. Bajic is entitled to income replacement benefits, supplementary medical expenses, attendant care benefits and other pecuniary losses from Pafco. It is evident that relations got off to a rocky start between Pafco and Mr. Bajic. Mr. Bajic complained to Pafco about the way he was treated by their outside adjuster. He requested a copy of the provisions of the policy and the *Insurance Act*. His requests were relayed to Pafco, and noted by the inside adjuster as "the insured is being difficult...wants all his rights." That Mr. Bajic's request would be the subject of comment is surprising, given the Insurer's obligation under section 92 of the *Schedule* to provide him with a copy of the policy, but not the *Act*, upon request. It is also evident from the testimony that the relationship continued to be a difficult one.

The *Schedule* imposes obligations on both the insured person and the insurer. The Commissioner's Guideline for Statutory Accident Benefits Applications, the Claims Process and the Mediation Process, issued pursuant to section 268.3 of the *Insurance Act*, states that "the full and timely exchange of information by both insurers and claimants is critical. Claimants must give an insurer the information that the company needs to establish the nature, extent and continuing validity of a claim. Claimants must not withhold any information, delay, make more difficult or impossible the insurer's evaluation of the claim. This Guideline applies equally to all insurers, claimants and their representatives and is to be considered in any decision involving the interpretation of the *Statutory Accident Benefits Schedule*. Claimants should realize that

unreasonable actions will delay payments and can lead to denial of benefits without access to court or arbitration."[15]

Pafco was not provided with sufficient information to assess Mr. Bajic's claims for income replacement benefits, attendant care benefits, and most of his supplementary medical benefits, on a timely basis. I conclude that Pafco did not unreasonably withhold or delay payment of those benefits. Although Pafco's own examiner, Dr. Goldstein, concluded that by October 27, 1997 Mr. Bajic had returned to his pre-accident status, a dispute remained with respect to causation. While Mr. Bajic particularized the dollar amounts of his claim for attendant care from his family members, he did not particularize the nature of the services for which he claimed payment. I find no unreasonable withholding or delay with respect to attendant care benefits.

Mr. Bajic submitted the ambulance bill to Pafco towards the end of August 1996. Pafco paid this towards the end of October 1996. Clearly there was a delay in payment of this bill, and Mr. Bajic received collection notices, even after the date on which Pafco stated it had paid the amount directly to the hospital. Ordinarily delay is compensated by interest at the rate of 2% per month. There may be cases where a short period of delay is unreasonable; however, I do not find that to be the case here. For these reasons, I conclude that Pafco is not required to pay a special award.

Repayment

Zurich paid Mr. Bajic income replacement benefits in respect of the period from June 16, 1995 through August 8, 1996. Zurich asserted its claim for a repayment of any overpayment of benefits under section 70 of the *Schedule* in its Response by Insurer to an Application for Arbitration. There was no suggestion of fraud. Zurich has the onus of establishing error or wilful misrepresentation. Since wilful misrepresentation involves moral blameworthiness, Zurich must provide clear and cogent evidence in this regard. In this case I find both error and wilful

[15]Commissioner's Guideline No. 2/95 Ontario Insurance Commission, effective May 20, 1995

misrepresentation.

Mr. Bajic applied for income replacement benefits on October 2, 1995, based on self-employment in the last three years. The application for statutory accident benefits contained a question: "During the past three years did you have any other income from your own or an employee benefit plan for short or long-term disability?" Mr. Bajic responded "No." Mr. Bajic testified that he believed the answer was correct at the time he completed the form due to his English language skills. Whether or not Mr. Bajic's language skills contributed to his giving this answer, it was wrong because he received short-term disability benefits between April 13, 1994 and March 1, 1995 at the rate of $250 per week from North American Life, and therefore an answer made in error.

I have found that Mr. Bajic has fluidly interpreted "pre-accident" to refer to his activities before his 1994 injury in the variety store, before the 1995 motor vehicle accident in which he was a passenger and before the 1996 accident, and that he made conflicting statements about his pre-accident abilities. I find that Mr. Bajic's statements were deliberate. I do not accept that this was due to a lack of facility in English. He made similar statements during the course of his testimony and submissions, with the assistance of interpreters.

To be repayable, Mr. Bajic's misstatements must be material. That is to say they must be relevant and have contributed in some manner to an overpayment.[16] I find that this misstatement in relation to short-term disability benefits, coupled with Mr. Bajic's fluid interpretation of "pre-accident" led all of the health practitioners to assess his entitlement to income replacement benefits based on pre-accident self-employment of a 16 to 17 hour workday, 6 or 7 days a week, instead of three hours a day.

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[16] *Dana B. Levenson and The General Accident Assurance Company of Canada* (OIC A-000260, February 18, 1992)

For these reasons, I conclude that Mr. Bajic is required to repay Zurich the income replacement benefits he received in relation to the period between March 9, 1996 and August 1, 1996. I find no evidence of overpayment with respect to other benefits which Zurich paid Mr. Bajic.

Expenses:

I encourage the parties to resolve the question of expenses. If this is not possible, that issue may now be addressed. Mr. Bajic's claims set out in Exhibit 1, as Items 3/10 and 3/11, 7/ 1-16, and 8 will be dealt with as part of his claim for expenses.

	July 5, 2000
Suesan Alves Arbitrator	Date

FSCO A97–000572

BETWEEN:

STEVAN BAJIC

Applicant

and

ZURICH INSURANCE COMPANY and
PAFCO INSURANCE COMPANY LIMITED

Insurers

ARBITRATION ORDER

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

1. Pafco Insurance Company shall pay Mr. Bajic income replacement benefits at the agreed rate of $185 per week between July 29, 1996 and July 22, 1998.

2. Zurich Insurance Company shall pay Mr. Bajic transportation expenses for 16 physiotherapy treatments. Pafco Insurance Company shall pay transportation expenses for 49 physiotherapy treatments. Mr. Bajic's transportation expenses shall be paid at the rate of 22 cents per kilometre. Pafco Insurance Company shall pay Mr. Bajic $20 for a physiotherapy assessment, and $9.47 for the cost of a prescription under section 36 of the *Schedule*.

3. Mr. Bajic's claim for rehabilitation expenses under section 40 of the *Schedule* is dismissed.

4. Pafco Insurance Company shall pay Mr. Bajic attendant care benefits in the total amount of $807.31 under section 47 of the *Schedule*

5. Pafco Insurance Company shall pay Mr. Bajic $166.40 for other pecuniary losses under section 53 of the *Schedule*.

6. Mr. Bajic's claim for housekeeping expenses under section 55 of the *Schedule* is dismissed.

7. Pafco Insurance Company and Mr. Bajic shall comply with their agreement as set out in the Report of Mediator with respect to items lost or damaged in the July 1996 accident.

8. Mr. Bajic's claim for a special award under section 282(10) of the *Insurance Act* is dismissed.

9. Zurich Insurance Company shall pay Mr. Bajic interest on mileage expenses from 14 days from the date Zurich or its counsel received Mr. Bajic's claim dated November 20, 1998.

   Pafco Insurance Company shall pay Mr. Bajic interest on income replacement benefits from 30 days after it received the health practitioner's certificate dated August 25, 1996, interest on physiotherapy expenses from 14 days from the date Pafco or its counsel received Dr. Jeremias' certificate; interest on the ambulance fee from 14 days after the date Pafco received the account until the date of payment; interest on attendant care, transportation expenses and other pecuniary losses from 14 days after the claim dated November 20, 1998 was received.

10. Mr. Bajic shall repay Zurich Insurance Company income replacement benefits for the period between March 9, 1996 and August 1, 1996 under section 70 of the *Schedule*.

July 5, 2000

Suesan Alves
Arbitrator

Date