

**BETWEEN:**

**NIYAZI ERMIS**

**Applicant**

**and**

**BELAIR INSURANCE COMPANY INC.**

**Insurer**

**REASONS FOR DECISION**

**Before:** Fred Sampliner

**Heard:** December 6, 7, 8, 15, and 20, 1999, at the Offices of the  
Financial Services Commission of Ontario in Toronto.

**Appearances:** Frank A. Sabetti for Mr. Ermis  
Eric K. Grossman for Belair Insurance Company Inc.

**Issues:**

The Applicant, Niyazi Ermis, was injured in a motor vehicle accident on January 28, 1997. He applied for and received statutory accident benefits from Belair Insurance Company Inc. ("Belair"), payable under the *Schedule*. [See note 1 below.] Mr. Ermis' claims for disability benefits beyond the May 7, 1998 termination date, and his expenses for treatment and a medical assessment. After the parties were unable to resolve their disputes through mediation, Mr. Ermis applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

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The issues in this hearing are:

1. Is Mr. Ermis entitled to disability benefits after May 7, 1998 under Part II of the *Schedule*?
2. Is Mr. Ermis entitled to treatment expenses for Dr. Taverniti (\$2,285.71), Dr. Bergman (\$1,966.76) and Dr. Nourali (\$2,300) under Part V of the *Schedule*?
3. Is Mr. Ermis entitled to reimbursement for Dr. Bergman's November 10, 1998 report (\$267.50) under section 24 of the *Schedule*?
4. Is Belair entitled to a repayment under section 47 of the *Schedule*?

**Result:**

1. Mr. Ermis is not entitled to further disability benefits.
2. Mr. Ermis is not entitled to his treatment claims at this time, but the matter may be re-opened.
3. Mr. Ermis is entitled to \$267.50 reimbursement for Dr. Bergman's report.
4. Belair is not entitled to a repayment.

**EVIDENCE AND ANALYSIS:**

Mr. Niyazi Ermis, 38 years old at the time the accident, drove with friends to Ottawa on January 28, 1997. During the collision, Mr. Ermis woke from sleeping in the backseat. He was transported by ambulance to hospital where his test results were normal. The examiners concluded that Mr. Ermis sustained soft tissue injuries to his chest, back and neck.

Mr. Ermis claims that continuing low back and chest pain, headaches, fatigue and confusion resulting from the accident cause him a substantial inability to perform his essential job tasks. He has not resumed work and claims ongoing weekly disability benefits under Part II of the *Schedule*.

**Mr. Ermis' work:**

There is clear evidence concerning Mr. Ermis' duties as superintendent at a six-story apartment building in Toronto. He was employed by Mr. Ronald Layton, the property manager, approximately a year and a half before the accident. Mr. Layton provided several written descriptions of Mr. Ermis' duties, and his testimony is generally consistent with Mr. Ermis' version of his duties, as well as a detailed worksite analysis.

Based on this evidence, I find that Mr. Ermis' main duties were to regularly vacuum, sweep and mop floors, elevators and stairs, wash lamps and fixtures, use a ladder to change light bulbs, cut grass, care for flowers and shrubs, shovel snow, gather garbage, move appliances using a dolly approximately once a week, occasionally wax floors, paint apartments and perform other minor repairs. Both Mr. Ermis and Mr. Layton testified that these duties were usually accomplished in four to five hours, and I accept that he worked longer when doing repairs or painting an apartment.

**Calculation of Mr. Ermis' benefit and repayment:**

Belair claims it has overpaid Mr. Ermis. His benefit was calculated on his four week pre-accident earnings as a nighttime janitor for Metro Maintenance Services (Metro). Metro's general manager submitted employment confirmation that he earned \$175 per week from December 1, 1996 until the accident.

Mr. Ermis testified that he did not receive wages from Metro until after the accident because he did not need the money. However, this creates a serious conflict between his tax records wherein he declared \$700 from Metro in 1996 and none in 1997.

While Mr. Ermis' job description and his 1996 tax declaration are sufficient to establish that he worked as a nighttime janitor for Metro that year, the lack of any declared earnings in 1997 make it less probable he worked during the four weeks prior to the accident. Metro's confirmation of \$175 weekly earnings conflicts both with Mr. Ermis' evidence that he did not receive any wages until after the accident and the tax declaration that all his money was earned in 1996.

For these reasons, I do not accept either Metro's or Mr. Ermis' evidence that he was employed or had earnings from Metro in the four weeks pre-accident. I find that Mr. Ermis has no income from Metro to include in his benefit calculation under Part II of the *Schedule*.

If I am not correct concerning Mr. Ermis' employment with Metro, then I accept his description of the janitorial duties. Mr. Ermis gathered garbage from the offices and cleaned one bathroom and a kitchenette. I reject Mr. Ermis' characterization of his Metro job as heavier than his superintendent's position.

Section 47 of the *Schedule* requires claimants to repay insurers for benefits received through wilful misrepresentation or fraud. While Belair overpaid Mr. Ermis' weekly disability benefit through inclusion of income from Metro, no evidence was presented that Belair quantified and gave Mr. Ermis written notice of the sum claimed, as required by section 47 of the *Schedule*. I decline to make an order on this issue.

**Mr. Ermis' background and evidence:**

Mr. Ermis testified that he endured physical beatings and electrical stimulation during his torture and confinement in Turkey. Coming to Canada in late 1993 as a refugee claimant, he worked at various odd jobs until obtaining the superintendent's position.

A short history of Mr. Ermis' persecution is contained in the 1993 and 1994 medical records of Dr. Les Richmond. He interviewed Mr. Ermis in reference to his immigration claim, and found that Mr. Ermis suffered sleep loss, nightmares, anxiety, fear, chronic fatigue and depression. Dr. Richmond concluded the symptoms demonstrate Mr. Ermis was physically and psychologically tortured. From 1994 until the accident there is no other medical evidence of Mr. Ermis' health.

Mr. Ermis testified that he had slight back pain prior to the accident, but was otherwise in good health. He maintains he was doing a good job at the apartment building, and that tenants were satisfied with his work. Since the accident he has suffered chronic back pain and fatigue, inability to concentrate, constant headaches and reduced grip strength. He did not know when his psychological symptoms began.

Mr. Ermis' testimony about his job performance sharply contrasts with his employer. Mr. Ronald Layton described Mr. Ermis as lazy, and said he received numerous complaints from his tenants about the building's cleanliness before the accident. Mr. Layton explained that Mr. Ermis' brother helped with the maintenance chores. He gave Mr. Ermis several verbal warnings before delivering a written dismissal notice immediately prior to the accident. I accept Mr. Layton's evidence.

Mr. Layton's evidence, together with Dr. Richmond's findings of chronic psychological problems, convinces me that Mr. Ermis suffered from chronic fatigue and the other psychological problems noted by Dr. Richman up to the accident.

Mr. Ermis denied any significant pre-existing psychological problems when interviewed by health practitioners after the accident. I find that Mr. Ermis's evidence is not reliable due to his failure to advise examiners of his pre-accident condition and disability.

***Evidence of psychological disability:***

Mr. Ermis claims that he suffers loss of concentration, attention and memory as a result of a head injury from the accident. Mr. Ermis was alert at the hospital and the records do not indicate he lost consciousness. A month after the accident, a neurologist found his EEG tests demonstrated depression and post-traumatic migraines, but nothing to suggest a head contusion. Although testing showed slight bilateral hearing loss, there is nothing relating this condition to the accident.

Dr. Shmuel Bergman, his family physician since the accident, initially identified that Mr. Ermis sustained a concussion. In an April 1997 disability evaluation for Belair, Dr. Lyndon Mascarenhas reported concern about Mr. Ermis' head injury, and suggested he see a neuropsychologist. Three months later, Dr. Veronica Kekosz, a psychiatrist, reported that Mr. Ermis may be suffering post-concussive syndrome or post-traumatic depression and anxiety. However, neither Dr. Kekosz or Dr. Mascarenhas knew about or considered Mr. Ermis' previous physical and psychological abuse in Turkey.

Mr. Ermis failed to tell Dr. Alan Finlayson, a psychologist who conducted testing in January 1998, about the abuse he endured in Turkey. Mr. Ermis explained that the scars on his head and crooked nose resulted from an active childhood and amateur boxing.

Dr. Finlayson conducted the first psychological testing of Mr. Ermis after the accident. His findings indicate that Mr. Ermis' verbal learning and visual memory are impaired. Dr. Finlayson states that recall, processing and concentration are diminished, and found that Mr. Ermis operates in the average intelligence range. While recommending stress counselling and pain management, Dr. Finlayson did not identify whether the accident caused Mr. Ermis' psychological problems.

Mr. Ermis said he was hearing voices when interviewed during a February 1998 psychiatric assessment for Belair. Dr. Serge Shapiro noted that Mr. Ermis had not related this psychotic symptom to any other health practitioner, portraying himself as a fun-loving person who easily

adjusted to Canada before the accident. Dr. Shapiro found his memory, concentration and attention intact.

Dr. Shapiro testified that Mr. Ermis' underplay of his reasons for coming to Canada contrasted dramatically with Dr. Richmond's evidence. He stated that torture victims frequently display somatic complaints which occur throughout their lives, and opined that Mr. Ermis' symptoms result from other stressors, not the accident.

Dr. Shapiro cautiously suggested a neuropsychological assessment, which was performed by Dr. Tony Hunt in February 1998. Dr. Hunt and Dr. Shapiro agree that Mr. Ermis is not adapting well to Canadian life, and that his problems are not accident-related.

St. Michael's Hospital assessed Mr. Ermis' treatment needs in May 1998, and concluded that he suffers significant depression from a mild head injury. The examiners did not know about Mr. Ermis' pre-accident condition. In that regard, Dr. Richard Moulton remarked that the very brief loss of consciousness and impact in the accident would not explain the nature and extent of Mr. Ermis' ongoing symptomology.

Finally, Dr. Hemendra Shah, a psychologist examining for Belair in September 1998, was sceptical of Mr. Ermis' refusal to answer questions about his life in Turkey. He did not accept that Mr. Ermis' high level of psychopathology was attributable to the accident, concluding he exaggerates.

***Evidence of physical disability:***

Mr. Ermis was released from hospital after seven hours of observation, showing mild cervical tenderness. With the help of his family physician, Dr. Bergman, Mr. Ermis achieved limited improvement through massage, physiotherapy and acupuncture between February and July 1997.

Dr. Krystyna Prutis-Misterska, a physiatrist who examined Mr. Ermis in April 1997 on referral from his family physician, found significantly reduced lumbar flexion with pain. Agreeing with Dr. Bergman's initial opinion, she concluded he was not fit to resume work.

After his benefits were terminated in early May 1998, however, most of the experts did not specifically address Mr. Ermis' physical disability. Dr. R. Reynolds made a diagnosis of fibromyalgia after examining Mr. Ermis at Toronto Hospital in June 1997. Dr. Mascarenhas felt that Mr. Ermis had recovered from his musculoskeletal injuries in July 1997, which appears to be confirmed in December 1997 by Dr. Kekosz, who reported to Mr. Ermis' family doctor that his strength and mobility had improved. In July 1997, Dr. Bergman sent Mr. Ermis for a functional evaluation with Dr. Antonio Taverniti, a chiropractor at Back In Motion Diagnostic Services (BIM).

Dr. Taverniti testified that Mr. Ermis continued to be disabled. He stated that although Mr. Ermis expended maximal effort during tests, his lifting capacity was significantly limited from back pain. Dr. Taverniti emphasized that the abnormal results from the surface EMG tests confirm that Mr. Ermis suffers neck and back pain. Dr. Taverniti stated his findings are consistent with a severe disability.

However, Dr. Taverniti's tests do not indicate the level of Mr. Ermis' back and neck pain, and he admits that there is no organic basis for these complaints. Dr. Taverniti did not know that Mr. Ermis suffered chronic fatigue prior to the accident and had been discharged from his job for non-performance of his duties. He accepted Mr. Ermis' complaints at face value. I give little weight to his opinion.

Dr. Bergman testified that Mr. Ermis was disabled in 1997 and 1998, but that he had been feeling better at the time of the hearing and should be able to resume work. Dr. Bergman also accepts that Mr. Ermis' physical and psychological symptoms arise from the accident.



Dr. Bergman's error in assuming that Mr. Ermis' psychological symptoms emanate from the car accident is compounded by his unsupported testimony that he had a pinched nerve in his low back. I do not rely on Dr. Bergman's evidence.

***Disability analysis:***

At the time of the accident, Mr. Ermis was suffering the same psychological problems that plagued him since emigrating to Canada. Despite his brother's help, chronic fatigue prevented Mr. Ermis from performing his cleaning duties before the accident, and resulted in his being fired from his janitorial job..

Doubtless, Mr. Ermis had some additional pain and resulting disability after the accident. In this regard, his brother took on most of the janitorial work after the accident. But Mr. Ermis had no objective physical injuries to explain why he did not have the capacity to lift garbage bags and occasionally carry heavier items with the help of his brother. None of his medical experts knew about his pre-accident disability. I am not convinced that the accident significantly contributed to his physical disability.

While the accident was serious, Mr. Ermis sustained only a slight period of diminished consciousness. He candidly admitted he does not know when his psychological symptoms began. Dr. Richmond's unchallenged evidence from 1994 of Mr. Ermis' chronic fatigue, anxiety and depression, together with his non-performance in 1996, establish that he had a psychological disability prior to the accident. I do not accept the opinions of Drs. Kekosz and Finlayson because they did not know about Mr. Ermis' pre-accident state.

Relying on the opinions from Drs. Shah, Hunt and Shapiro, I find that the accident did not cause or significantly contribute to Mr. Ermis' work disability. He is not entitled to further benefits under Part II of the *Schedule*.

**Treatment and assessment expenses:**

The Commission's records, parties' submissions and the evidence establish that Mr. Ermis did not submit his treatment claims until shortly before the hearing. Belair objected to joining these claims at the commencement of the hearing, and I declined to consider Mr. Ermis' treatment expenses from Dr. Taverniti (\$2,285.71), Dr. Bergman (\$1,966.76) and Dr. A. Nourali (\$2,300). However, I did hear evidence concerning these expenses from both parties, and would consider re-opening the matter.

Mr. Ermis claims the cost of Dr. Bergman's November 10, 1998 report (\$267.50) under section 24 of the *Schedule*. Section 24 provides coverage for an insured person to obtain medical examinations and reports in respect of no-fault claims. This allows claimants' reimbursement for professional opinions when seeking to establish entitlement to benefits.

Dr. Bergman's report, submitted by Mr. Ermis to Belair during the course of the mediation, sets out his family physician's opinion of his disability during the continuing negotiations before he entered the arbitration process. Although I have not accepted Dr. Bergman's opinion, it is clear to me that his modest report fee is reasonable and falls within the section. I find that Mr. Ermis is entitled to \$267.50 reimbursement for Dr. Bergman's November 10, 1998 report under section 24 of the *Schedule*.

**EXPENSES:**

The parties may seek an assessment if they cannot resolve expenses,

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June 19, 2000

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Fred Sampliner  
Arbitrator

Date

**FSCO A98-001468**

**BETWEEN:**

**NIYAZI ERMIS**

**Applicant**

**and**

**BELAIR INSURANCE COMPANY INC.**

**Insurer**

**ARBITRATION ORDER**

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

1. Belair shall pay Mr. Ermis \$267.50 for the cost of Dr. Bergman's November 10, 1998 report.

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Fred Sampliner  
Arbitrator

June 19, 2000

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Date