OIC A–004598

BETWEEN:

AJAYPAL GREWAL

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION

Issues:

The Applicant, Ajaypal Grewal, was injured in a motor vehicle accident on February 7, 1992. He applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under Ontario Regulation 672.[1] State Farm terminated weekly income benefits on December 15, 1992. The parties were unable to resolve their disputes through mediation and Mr. Grewal applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

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

1. Is the Applicant entitled to weekly income benefits under section 12 of the *Schedule* after December 15, 1992, with interest under section 24 of the *Schedule*?

2. Is the Applicant entitled to reimbursement of his arbitration expenses?

3. Is the Applicant entitled to reimbursement of the interim assessment of $2,000 paid to the Insurer further to my order of August 16, 1996?

Result:

1. The Applicant is not entitled to further weekly income benefits.

2. The Applicant is entitled to half his arbitration expenses, except for expenses in respect of his appearance on August 13, 1996.

3. The Applicant is entitled to the return of the $2,000 assessment.

Hearing:

The hearing was held on September 16 and 17, 1996 at the offices of the Ontario Insurance Commission in North York, Ontario.

Present at the hearing:

Applicant Ajaypal Grewal

Applicant's Representative	Daniel Daly Barrister & Solicitor
Insurer's Reprresentative	Eric Grossman Barrister & Solicitor
Insurer's Officer	Valerie Blakely
Arbitrator	Nancy Makepeace

The proceedings were transcribed by Shari Bakalar (first day) and Nadine Pawliw (second day), of Professional Court Reporters.

Witnesses:

Mr. Ajaypal Grewal, the Applicant
Mrs. Nina Grewal, the Applicant's wife
Dr. Harvey C. Stancer, psychiatrist
Dr. Sergio Bacal, psychologist

Exhibits:

Exhibit 1	Canada Pension Plan Notice of Entitlement, June 22, 1995
Exhibit 2	Applicant's Medical Brief
Exhibit 3	Report of Dr. A.N. Hanick, September 2, 1996
Exhibit 4	Insurer's Medical Brief
Exhibit 5	Photographs of the Applicant's car and Damage Estimate
Exhibit 6	Form 4 Medical Report prepared by Dr. Kular, February 25, 1992
Exhibit 7	Surveillance videotape

Following the hearing, Mr. Grossman filed written submissions dated September 24, 1996 with respect to interest and expenses, which were copied to Mr. Daly. The Applicant filed no submissions in response.

Other documents before the Arbitrator:

Report of Mediator dated June 9, 1993
Application for Appointment of an Arbitrator dated December 7, 1994
Response by Insurer dated May 25, 1995
Pre-hearing letters dated September 14, 1995 and February 21, 1996
Arbitrator's letter dated August 16, 1996

Reasons:

In order to receive weekly benefits under section 12 of the *Schedule* for a particular period, the Applicant must establish, on a balance of probabilities, that he was substantially unable to perform the essential tasks of his pre-accident employment as a result of injuries sustained in the motor vehicle accident.

The Applicant is in his mid-thirties and married. He has a 7-year-old son; at the time of the hearing, his wife was expecting another child. On February 7, 1992, the Applicant was driving his car, wearing a seat belt, when he was rear-ended while stopped at a light waiting to turn right. He testified that the impact pushed his car towards the right-hand curb, his head hit the steering wheel and his glasses fell off.

The Applicant had two jobs at the time of the accident - a full-time job as an assistant manager at a bookstore, and a part-time job in quality control for a videotape production company. After the accident, the Applicant never returned to the videotape job. He returned to work at the bookstore for about two weeks after the accident, but he testified that he was unable to continue because of headaches and neck and back pain. He has not worked since that time. In addition to his physical problems, he claims that he suffers from disabling depression and other psychological problems. According to the Applicant, his condition has not improved since the accident, though he has good days and bad days.

The Insurer paid weekly income benefits of $411.44 to December 15, 1992. The Applicant seeks ongoing benefits from that time, including benefits after 156 weeks.

I find his claim to have little merit.

The photographs of the Applicant's damaged vehicle show only a barely detectible scratch on the rear bumper, and the Applicant conceded that repairing the car cost less than $200. The police were not called to the accident, and the Applicant did not go to the hospital afterwards. I find that the Applicant's car was struck with very little force.[2]

Nothing in the Applicant's initial complaints to his doctors suggested that he would be disabled indefinitely. The Applicant testified that he felt pain on the right side of his lower back immediately after the impact. He saw Dr. K. Kular, his family doctor, the same day, complaining of low back pain. Lumbosacral x-rays were negative. Dr. Kular prescribed pain medication and passive physiotherapy.

In his February 25, 1992 form report, Dr. Kular stated that the Applicant could return to part-time work if he avoided heavy lifting or prolonged standing or walking. However, by the time Dr. Kular prepared this report, only a little more than two weeks after the accident, the Applicant had already quit both his jobs, and Dr. Kular's opinion about the Applicant's work-readiness appears to have been based entirely on the Applicant's subjective complaints, as were his other reports about the Applicant.

Moreover, while the Applicant's initial complaints seem to have been limited to his low back, by April 1992 he was also complaining about neck pain and back pain radiating to both legs.[3]

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[2]Exhibit 5. The pictured damage to the driver's door pre-dated the accident.

[3]Dr. Kular's clinical note of April 16, 1992, and his physiotherapy referral slip, dated April 14, 1992.

Dr. Kular's narrative report of May 13, 1993 stated that the Applicant's early complaints also included headaches and general muscle soreness, and the Applicant displayed "marked limitation of lumbar flexion and extension." The Applicant's apparent deterioration after an initially minor injury was not explained.

The Applicant testified that he did not return to work at the videotape company "because of pain." His main task in this job was to check for videotape defects by watching 20 or 30 tapes at a time on monitors. The Applicant testified that he was required to lift the videotapes from a trolley, and gave no details about how the accident affected his ability to complete this task. I am not convinced that this job involved more than light lifting.

The Applicant testified that as a full-time assistant manager at a bookstore in a mall, he was involved in all the work "from the front to the back," including serving customers, supervising cashiers, making the daily bank deposit, generally assisting the manager, and shelving books. Although he testified that a new shipment came in almost every day, and that he was sometimes required to unload heavy boxes of books from trucks if no one else was available, I had the impression this evidence was rehearsed. On cross-examination, the Applicant admitted that there were two or three other employees in the store at any given time, and that while other people "in different departments" would shelve books, he was responsible for making sure this was done. I am not persuaded that this was a particularly heavy or physically demanding job. I find that the Applicant's responsibilities were the varied tasks of an employee in a small to medium-sized bookstore. The Applicant testified that he quit because of neck and back pain, but he provided no further details about the specific activities that caused him problems. I do not accept the Applicant's testimony that he spent 80-90% of his time in heavy physical tasks, or that the job involved heavy lifting or prolonged standing or walking. I doubt that the Applicant was substantially unable to perform his essential tasks as an assistant bookstore manager for more than a day or two.

On April 29, 1992, the Applicant was examined at the Insurer's request by Dr. Michael D. Hall, an orthopaedic surgeon. Dr. Hall reported that the Applicant made only "minimal movements" of the neck and back on request, but displayed more mobility on distraction. He felt that the Applicant was not cooperating in the examination. Dr. Hall recommended that the Applicant discontinue his passive physiotherapy and replace it with an exercise program. He expected the Applicant to return to work at the bookstore within one month, and the videotape job another month after that.

Dr. Hall examined the Applicant again on July 6, 1992. He now felt that the Applicant was "clearly misrepresenting" his condition and was pretending a limitation of movement he did not actually have. Dr. Hall also noted that the Applicant continued to receive passive physiotherapy and had not begun an exercise program. Dr. Hall diagnosed back sprain and reported that the Applicant could and should resume both his pre-accident jobs.

When the Applicant's symptoms persisted, Dr. Kular referred him to Dr. B.S. Sehmi, an orthopaedic surgeon. On July 30, 1992, the Applicant told Dr. Sehmi he had pain in his low back, left buttock and groin, neck and both shoulders, as well as headaches and dizzy spells. Dr. Sehmi diagnosed cervical strain with referred pain to the shoulders, and lumbosacral strain with leg pain; he felt that the Applicant's headaches and dizziness were related to his neck pain. Dr. Sehmi prescribed anti-inflammatory and muscle relaxant medication and recommended that the Applicant continue with physiotherapy for another 4-6 weeks and do exercises on his own. It was Dr. Sehmi's opinion that the Applicant was unable to work at that time.

The Applicant reported no improvement when he saw Dr. Sehmi again on December 15, 1992. Dr. Sehmi now felt that the Applicant had a "considerable degree of functional overlay" and he recommended a psychiatric evaluation. He continued to believe the Applicant was indefinitely disabled. Dr. Sehmi has continued to see the Applicant regularly. In April 1994, he reported that

the Applicant was "showing features of a chronic pain syndrome in the neck and back". Dr. Sehmi's most recent report of August 28, 1996 indicated that aside from a temporary improvement noted in September 1993, the Applicant's condition had not improved since the accident, and indeed his subjective complaints were worse. He reiterated that "the major component" of the Applicant's symptoms was "psychogenic dysfunction."

The Applicant relies on Dr. Sehmi's opinion that he is disabled. However, Dr. Sehmi did not attribute the Applicant's disability to any orthopaedic or other physical problems. His opinion was that the Applicant's complaints could not be explained by the objective evidence[4] and therefore must be attributed to a psychological problem, for which Dr. Sehmi recommended a psychiatric referral. By December 1992, when the Insurer terminated benefits, Dr. Sehmi reported that psychological factors played a "considerable" role in the Applicant's problems.

Dr. Kular reported on February 12, 1993 that he was "unsure at this time" when the Applicant could return to work. Dr. Kular now diagnosed a head injury, soft tissue injuries of the lumbosacral spine, cervical spine and shoulders, and depression secondary to pain and disability. Dr. Kular's opinion was that the Applicant was totally disabled as a result of the accident, but "might be able to return to some part-time activities in two to three months time." In January 1996, Dr. Kular was still "not sure" when the Applicant could return to work. Dr. Kular reported that the Applicant was still disabled by physical and psychological problems in September 1996.

Dr. Kular gave no reasons for his diagnosis of head injury, which was not put forward by any other doctor. I am not satisfied the Applicant suffered a head injury. Moreover, despite his own and Dr. Sehmi's stated concern in late 1992 and early 1993 that the Applicant might have psychological problems, Dr. Kular did not refer the Applicant for psychiatric or psychological

[4]The Applicant's cervical and lumbar x-rays, CT scans of his head and low back, a bone scan and an EEG showed no significant problems.

treatment at that time. However, in January 1996, Dr. Kular diagnosed “post-traumatic major depression,” a diagnosis not offered by either Dr. Banik or Dr. Sood, the two psychiatrists who had assessed the Applicant to that point. Nor did Dr. Kular explain, in any of his reports, the Applicant’s apparent deterioration since his first report two and a half weeks after the accident, when Dr. Kular believed the Applicant could immediately return to modified part-time work. For these reasons, I place little weight on Dr. Kular’s reports.

At the Insurer’s request, the Applicant was examined by another orthopaedic surgeon, Dr. Reuven Lexier, on August 3, 1993. Like Dr. Hall, whose reports he reviewed, Dr. Lexier believed that the Applicant was deliberately restricting his neck and low back movements. Dr. Lexier diagnosed a mild to moderate acceleration/deceleration injury to the soft tissues of the cervical and lumbar spine. He felt that the Applicant’s headaches were related to his neck pain or to overuse of Tylenol 2 and 3, which he advised the Applicant to discontinue, along with his physiotherapy. It was Dr. Lexier’s opinion that the Applicant’s complaints were out of keeping with his injury and that there was no reason why the Applicant could not return to his regular duties at both his jobs.

The Applicant told Dr. Lexier that his neck pain was worse with lateral rotation to either side, and on examination he displayed a reduction of more than 50% in his lateral rotation. He splinted his low back continually while being examined and told Dr. Lexier that he did so frequently to help his constant low back pain. The Applicant’s claims of limited mobility are inconsistent not only with the objective medical evidence but also with the observations made by a private investigator on October 5, 1993, only two months after Dr. Lexier’s assessment. On that day, the Applicant and his wife were seen leaving their home and driving to a medical building. An hour later, they returned to the vehicle and drove home. Photographs taken as they left the parking lot show the Applicant turning his head sharply to the left. After returning home for a time, the Applicant and his wife drove to a large hardware store. The Applicant was photographed carrying a large white

plastic pail labelled “poly stipple” from his car into the store. The investigator reported that after returning this purchase, the couple examined some ceramic tiles and the Applicant placed “a number of boxes of tiles” into their shopping cart. After leaving the store, the Applicant was photographed loading boxes of tiles into the trunk of the car and turning his head sharply to the right while resting his left hand on the open trunk. On their return home, the Applicant unloaded the trunk.

Later the same day, the Applicant drove his wife to a fabric store, where he looked after their son for about an hour and a half while his wife shopped. They then drove to a hotel where a sale was taking place. An hour and a half later, while the Applicant and his family remained inside the hotel, surveillance was discontinued. At no time during the Applicant’s three excursions that day did the investigator note any sign of discomfort or limitation of movement on the part of the Applicant. The photographs filed in evidence show the Applicant appearing relaxed and normal at several points over a long day of errands. There is no indication of guarded movement, splinting or pain.

The Applicant testified that he travelled to India for three months in late 1993 or early 1994, and again in early 1995. He admitted that he sought no medical treatment while he was there, although he insisted he continued his medication. I find this level of activity inconsistent with the Applicant’s claims of disability.

Surveillance conducted in October and December of 1995 is equally unsupportive of the Applicant’s claims of ongoing disability. On October 27 and 28, 1995, a private investigator videotaped the Applicant walking to and from his car, getting into and out of his car, and driving, all without any apparent discomfort or restriction of movement. Even more persuasive are the observations of the Applicant on December 28 and 29, 1995. On the first day, the Applicant was observed walking as much as 100 metres between his car and a store, turning his head fully to the

right, kicking both legs against the car's running board to shake the snow off his feet, getting into the car, twisting his upper body to the left and back to put on his seat belt, twisting to the right while reversing out of his parking spot, and running up some steps, sometimes skipping two steps at a time. He was also seen shopping inside a mall for about half an hour. The next day, the Applicant was seen walking about 120 metres between his car and a hospital entrance, repeatedly turning his head to look behind him, getting into his car and rotating his upper body to the left while putting on his seat belt, and then to the right while reversing. On both days, the Applicant was quite active, attending a dental office, another unidentified office and a mall on December 28th, and, on the 29th, a hospital, a mall, a gas station and a coffee shop.

Most recently, the Applicant testified that just before the hearing in September 1996 he had driven to New York City over an extended weekend. I find that the Applicant's ongoing level of apparently unrestricted activity since the accident is inconsistent with his claimed disability. I am not satisfied that the Applicant was substantially disabled from his pre-accident jobs by neck and back pain and headaches.

In April 1994, about two years after the accident and a year and a half after Dr. Sehmi recommended a psychiatric referral, the Applicant's focus shifted to psychological issues when Dr. Kular referred him to a psychiatrist, Dr. T.K. Banik. Dr. Banik reported that the Applicant's history of low back pain and headaches suggested chronic pain syndrome. He did not believe the Applicant had any major depressive illness and could find no significant abnormalities in the Applicant's mood, thought or perception. However, he recommended that the Applicant continue taking the anti-depressant medication prescribed by Dr. Kular, and continued to see the Applicant for follow-up through 1994. On November 21, 1994, at the Applicant's request, Dr. Banik prepared a note in support of the Applicant's application for CPP benefits, stating: "In view of the chronic nature of his problem, it is unlikely that Mr. Grewal will be able to return to any gainful

employment in the foreseeable future." I find this prognosis inconsistent with Dr. Banik's finding that the Applicant does not suffer from any disabling psychological problems.

The Applicant switched to another psychiatrist, Dr. B.D. Sood, in October 1995. He complained to Dr. Sood about low spirits, insomnia, lack of concentration, forgetfulness, and dreams and nightmares about the accident. Dr. Sood found the Applicant "slightly depressed and mildly anxious" but not "in too much discomfort." However, he reported that the Applicant was disabled by mild to moderate depression resulting from the accident. His diagnosis remained unchanged in August 1996. In his final report, Dr. Sood stated that the Applicant "seems to have put himself in a negative frame of mind and seems to be unable to become motivated to rehabilitate himself." As with Dr. Banik, I find Dr. Sood's conclusion inconsistent with his findings, which do not indicate that the Applicant has any disabling psychological problems.

On September 1, 1996, the Applicant was assessed by Dr. A.N. Hanick, another psychiatrist, at the request of the Applicant's counsel.[6] Dr. Hanick stated "it is anticipated that Mr. Grewal will long remain a pain-ridden, emotionally distressed, and fully-disabled individual on a quite protracted and indefinite and, perhaps, even permanent basis." Dr. Hanick's diagnoses included chronic pain syndrome, histrionic (hysterical) process, attentional deficits, dysthymic disorder (reactive depression), generalized anxiety disorder, mild driving phobia, and "quite severe adjustment disorder, of an unspecified type."

I find the diagnosis of driving phobia completely inconsistent with the surveillance evidence, which shows the Applicant driving frequently and in a relaxed manner, and with the Applicant's own testimony about the lengthy drives involved in his trips to India and New York City. Dr. Hanick's diagnosis of "chronic pain syndrome" indicates only that the Applicant reports ongoing complaints unexplained by the objective evidence, and does not indicate whether the pain is

[6]Exhibit 3.

disabling or whether it resulted from the accident. Dr. Hanick also suggested a diagnosis of "histrionic (hysterical) process" without offering any evidence for that speculation. He appears to have done no testing in reaching his conclusion that the Applicant suffered from attentional deficits. In general, Dr. Hanick appears to have relied uncritically on the Applicant's subjective complaints in generating a "shopping list" of diagnoses. I have the impression that Dr. Hanick was acting as an advocate, and I find his report unhelpful.

The Insurer relied on an assessment conducted at its request by Dr. Sergio Bacal, a psychologist, on December 6, 1995. Although the Applicant did not complete the psychological questionnaires as requested, Dr. Bacal concluded that he suffered from chronic moderate depression secondary to his accident-related physical symptoms. He stated that the Applicant's physical symptoms were being magnified by his depression, pain-focus and pre-morbid personality factors. Dr. Bacal did not believe the Applicant's depression was disabling. Nor did he find evidence of disabling post-traumatic stress disorder, or any other psychological problem.

In July 1996, Dr. Harvey C. Stancer, a psychiatrist who examined the Applicant at the Insurer's request, could find no evidence of any psychiatric disorder and concluded that the Applicant "is clearly not psychiatrically disabled."

The reports of the experts who assessed the Applicant indicate that the Applicant has reported, without prompting, only one emotional problem - worrying about the future. Even on direct questioning, his complaints did not indicate significant cognitive or emotional distress. At the hearing, the Applicant explained the chronic pain cycle as follows: first, he has pain, which leads to functional problems, then he gets depressed, and he cries and can't sleep, which leads to more pain. When asked to identify his functional problems, he said he could not explain but he had a lot of pain. The Applicant repeated his testimony about the pain cycle in almost identical words a

number of times. I have the impression it was well rehearsed. I do not accept that the Applicant suffers from disabling depression or any other psychological problem resulting from the accident.

Given my finding that the Applicant was not substantially unable to return to his pre-accident jobs after December 15, 1992, I also find that he is not entitled to benefits after 156 weeks because the accident does not continuously prevent him from engaging in at least two jobs for which he is reasonably suited by education, training or experience - assistant manager in a bookstore, and quality control person in a videotape production company.

Applicant's Expenses and Insurer's Assessment:

I find that the Applicant's claim has little merit. However, I am not persuaded that his reported complaints are fraudulent. I accept Dr. Bacal's view that the Applicant's complaints reflect his chronic low-grade depression, excessive somatic focus and other personality traits, as well as, possibly, "expected secondary gains." Accordingly, I find this an appropriate case for the exercise of my discretion to award the Applicant half his arbitration expenses.

This matter was initially set down for hearing on January 22-25, 1996. On January 12, the Applicant's former counsel requested an adjournment. The request was denied. On January 21, the parties settled all issues, subject to the terms of the Settlement Regulation; no release was signed.[7] Two days later, the Applicant's then counsel advised that the Applicant was rescinding the settlement within the two-day cooling off period set out in the settlement regulation.

At a second pre-hearing, the hearing was rescheduled for August 13 and 14, 1996. On August 7, the parties reached a tentative settlement of all issues, and the Applicant signed a release on

[7]Section 9.1 of Regulation 664, as amended by Regulation 780/93.

August 8. The next day, the Applicant advised the Insurer's counsel that he was rescinding the settlement.

The Applicant requested an adjournment of the hearing, and his counsel moved to withdraw from the record. On August 13, after hearing from both counsel, I granted both motions. I rescheduled the hearing for September 16 and 17, 1996, these dates being peremptory to the Applicant. I ordered the Applicant to pay the Insurer $2,000, the amount of its arbitration assessment, by September 9, as a precondition to his proceeding on September 16.

At the conclusion of the hearing on September 17, 1996, Mr. Daly, the Applicant's new counsel, submitted that the Applicant should be reimbursed the $2,000 paid pursuant to my order. Mr. Daly submitted that the Applicant had had legitimate problems with his former counsel and that my order had caused him financial hardship. On behalf of the Insurer, Mr. Grossman submitted that I should reaffirm my earlier order for all the reasons he gave on August 13, and because the Applicant's claim had little merit.

In August 1996, I gave the following reasons for my order that the Applicant pay the Insurer's assessment:

> An insured person should not be penalized for exercising his right to rescind a settlement within the two-day cooling off period. However, having done so, he is expected to be ready to proceed on the scheduled hearing date. The cooling-off period was not intended to provide a way to circumvent the Commission's adjournment policy.

The Applicant had requested that I adjourn the August 13 and 14 hearing *sine die*, in order to allow him to retain new counsel and enquire as to available dates. In setting September 16 and 17 as the date for the resumed hearing on a peremptory basis, I said, "the Applicant's conduct of this matter to date leaves me with little confidence that he will act on this matter if it is adjourned

without strict terms." My order was "subject to the ultimate order of the hearing arbitrator, who will have made findings as to the Applicant's entitlement to benefits, and will be able to consider the Applicant's conduct of the proceeding from this point onward."

Following the August 13, 1996 adjournment, the Applicant promptly retained new counsel and proceeded with the resumed hearing on September 16 and 17 without further delay. The Applicant and his counsel conducted themselves appropriately and expeditiously throughout the hearing.

Considering all the circumstances, including my findings as to the merits of the Applicant's case, I am not satisfied that the Applicant's application for arbitration was frivolous, vexatious or an abuse of process. Accordingly, the Insurer shall reimburse the Applicant for the $2,000 he paid as a precondition to proceeding with the hearing.

However, the Applicant is not entitled to be reimbursed his expenses incurred in respect of his appearance on August 13, 1996.

In his post-hearing submissions, Mr. Grossman took the position that I should consider the particulars of the two settlements rescinded by the Applicant in determining whether the Applicant should be awarded his expenses. On November 1, 1996, the expenses regulation was amended by the addition of the following new provision[8]:

> (2) An arbitrator may award expenses to an insurer or insured person under subsection 282(11) of the *Act* if the arbitrator is satisfied that the award is justified, having regard to the following criteria:
>
> 1. Each party's degree of success in the outcome of the proceeding.

[8]The regulation governing expenses prior to November 1, 1996 is section 12 of Regulation 664. The amending regulation is Ontario Regulation 464/96, section 4.

2. Conduct of the insurer or the insured person that tended to shorten or facilitate the proceeding or that tended to prolong, obstruct or hinder the proceeding, including failure to comply with undertakings or orders.

3. Whether the proceeding or any position taken by the insurer or the insured person during the proceeding was manifestly unfounded, frivolous, vexatious, fraudulent or an abuse of process.

4. The degree of complexity, novelty or significance of the factual or legal issues raised in the proceeding.

5. If the insurer or the insured person requests, any written offers to settle made after the conclusion of mediation and before the conclusion of the arbitration in accordance with the rules of practice and procedure applicable to the proceeding, including the terms of the offers, the timing of the offers and the responses to the offers, having regard to the result of the proceeding.

6. Any other matter related to the proceeding that the arbitrator considers relevant to the issue of whether an award of expenses is justified.

I find that the word "may" in the first line of the new provision indicates that an arbitrator has discretion to decide whether to award expenses to an applicant or an insurer having regard to the listed criteria. The amending regulation was filed (October 10, 1996) and came into effect (November 1, 1996) after the hearing in this matter was completed. The expenses regulation in effect when the Applicant applied for arbitration (on December 7, 1994), and rescinded two settlement agreements (in January and August of 1996) did not authorize an arbitrator to consider offers to settle in considering an expenses award. In my view, it would be unfair to penalize the Applicant for conduct which carried no penalty at the time of the conduct.[9]

[9]I am reassured in this conclusion by the decision of Arbitrator Renahan in *Paulo Pinto and General Accident Assurance Co. 0f Canada* (April 10, 1997), OIC A96-001246, in which he held that these amendments do not apply retrospectively to applications for arbitration commenced before November 1, 1996.

Order:

1. The Insurer shall pay the Applicant $2,000.

2. The Insurer shall reimburse the Applicant for half his arbitration expenses incurred, except for expenses incurred in respect of the Applicant's appearance on August 13, 1996. Any dispute about the amount payable may be referred to an Arbitrator.

	May 13, 1997
Nancy Makepeace Arbitrator	Date