

BETWEEN:

CESAR MOLINA

Applicant

and

PAFCO INSURANCE COMPANY LIMITED

Insurer

DECISION

Issues:

Cesar Molina claims he was injured in two motor vehicle accidents on July 17, 1995 and April 22, 1996. He received statutory accident benefits from Pafco Insurance Company Limited (“Pafco”), payable under the *Schedule*.¹ Pafco first paid weekly income replacement benefits from July 17, 1995 to August 21, 1995, when Mr. Molina returned to work. After the second accident they paid weekly benefits until December 1, 1996. After the parties were unable to resolve their disputes through mediation, Mr. Molina applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

¹The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993, and before November 1, 1996*, called “the *Schedule*” in this decision. The *Schedule* is Ontario Regulation 776/93, as amended by Ontario Regulation 635/94 and 781/94.

1. Is Mr. Molina entitled to further weekly income benefits as a result of the accident of July 17, 1995 or the accident of April 22, 1996?
2. What is the correct amount of benefit?
3. Is Mr. Molina entitled to interest on any amounts owing or his expenses incurred in the hearing?

Result:

1. Mr. Molina is not entitled to further weekly income benefits.
2. I am unable to determine the correct amount of weekly income benefits.
3. Mr. Molina is entitled to one-half his expenses, as agreed or assessed.

Hearing:

The hearing was held at the Ontario Insurance Commission in North York on June 23, 24, 25 and 26, 1997, before me, K.Julaine Palmer, Arbitrator.

Present at the Hearing:

Applicant: Cesar Molina

Mr. Molina's
Representatives: Al Pace and William Sproule
Barristers and Solicitors

Pafco's
Representative: Eric Grossman
Barrister and Solicitor

Pafco's
Officer: Dean Furzeczott

Witnesses:

Cesar Molina, Ezra Silverstein, Joel Kumove, Sooklal Sookanana, David Goldstein, Wilbert Hynes.

Mr. Molina testified with the assistance of Krystyna Wesolowska, interpreter of Spanish and English.

The parties filed 11 exhibits, including the Applicant's Brief of Documents, containing 56 sections.

Evidence and Findings:

Background

Cesar Molina, now aged 56, immigrated to Canada from South America almost 25 years ago. He testified that although he had a high school education and some accounting training in his native country, he took a job building mattresses. That is the occupation in which he has remained for most of his working life. Although Mr. Molina testified that he has been a mattress builder for 24 years, I find from reviewing the documentary evidence that his employment, at least from 1990 to 1994, has been sporadic.

In 1992 and 1993 Mr. Molina did not work as a mattress builder at all. In September 1992 he took a casual job as a heavy cleaner with a commercial cleaning company. He suffered injuries, mainly to his right hand, in a fall at that work on September 21, 1992. As a result, Mr. Molina received workers' compensation benefits until February 9, 1993, when he returned to light duty with the same company. He was injured in a motor vehicle accident on February 16, 1993, and did not work again until he returned to mattress building in January 1994. Mr. Molina maintained that employment until he was laid off in January 1995.

The first accident with which we are concerned in this arbitration took place some six months later, on July 17, 1995, while he was still laid off. Mr. Molina returned to mattress building from August 21, 1995 until October 5, 1995. Whether he stopped work then as a result of a layoff due to a shortage of work or as a result of injuries from the accident in July 1995 is in dispute.

Prior Medical History and Credibility

When asked at this hearing about his health prior to the July 1995 accident, Mr. Molina testified that he had no health problems. He answered similarly to most of the health practitioners who have examined and tested him over the past two years. When asked specifically about prior accidental injuries, Mr. Molina recalled only one incident consistently for each practitioner and at the hearing: a fractured left humerus from a motor vehicle accident when he was aged 17. This injury required at least one surgery to internally fix the bone with a metal screw, still in place almost 40 years later. According to some of the medical reports, this injury also left Mr. Molina with permanent reductions in the strength and range of movement of his left shoulder joint. However, Mr. Molina denied this at the hearing and testified that before the July 1995 accident his left arm and shoulder caused him no problems and were as strong as the right side.

Mr. Molina testified that sometimes when questioned he could remember incidents from his prior medical history and sometimes he could not. He testified that when a health practitioner asked him

a question, he would answer truthfully, to the best of his recollection. He stated that he always responded to the questions asked and did not volunteer information.

No evidence was tendered at the hearing that would indicate Mr. Molina is other than a man of average intelligence with an average memory. While any adjudicator would give him the benefit of the doubt about occasional memory lapses about significant events or conditions in his pre-accident medical history, the evidence far exceeds a reasonable level of plausible, unintentional inaccuracy. When Mr. Molina was examined after the 1995 and 1996 accidents, he had to reveal the injury from the accident when he was 17, because it was obvious. He was not under the same constraints with respect to injuries received in workplace accidents in September 1992 and August 1994 or in motor vehicle accidents in May 1990 and February 1993, after the latter of which he was off work for more than nine months.

I was impressed with the evidence of Dr. David Goldstein of the special efforts he made to obtain an accurate pre-accident medical history from Mr. Molina, and his approach to attempting to jog the memory of a seemingly poor historian about prior motor vehicle and workplace injuries. I am driven to the conclusion that Mr. Molina routinely told both his own health practitioners and those examining him as a result of the accidents only what he wanted to tell them about his medical history or was compelled to tell them, because of obvious scarring. I do not accept that the accidents which had occurred from 1990 onward had completely vanished from Mr. Molina's memory on each occasion when he was examined. Mr. Molina was required by section 64(9) of the *Schedule* to cooperate with his medical assessors to give accurate information about his past history of injury. He was not entitled to weigh or dismiss the relevance of those past injuries to the condition in which he found himself in 1995 and 1996, even if he felt he had recovered from those injuries prior to the most recent accidents. The prior injuries were not trifling. I find that Mr. Molina attempted to maximize his chance of receiving ongoing weekly benefits by attributing all his problems to the 1995 and 1996 car accidents and totally denying any prior injuries or problems.

Essential Job Duties

Section 7(1)2.iv of the *Schedule* requires that we consider Mr. Molina's essential tasks as a mattress builder. No written job description or physical demands analysis has been presented. The functional abilities evaluation of August 1996 considered the demands for the job of "mattress finisher." A close reading of the duties of that position confirms that it is **not** the same job that Mr. Molina pursued. As evidence of what was required in his job we have Mr. Molina's testimony at the hearing, his explanation as recorded by various examiners, some evidence from the rehabilitation consultant, Mr. Kumove, and the testimony of Mr. Hynes and Mr. Sookanana, Mr. Molina's supervisor and co-worker, respectively, at the mattress factory.

The evidence is inconsistent regarding the maximum weight Mr. Molina would lift as a mattress builder. The evidence is consistent, however, that very few of the largest, king-size mattresses were built. Mr. Molina testified that when smaller orders of varying sizes and types of mattress were being produced, the mattress builders could choose which pieces they would build by selecting the appropriate ticket. Mr. Molina testified that he believed the largest mattresses might weigh 100 pounds, but he was not sure. He did not testify about the weight of the springs, materials or mattresses which he was most frequently required to move. On cross-examination Mr. Molina confirmed that Mr. Sookanana would help turn or lift the heaviest mattresses for the builders.

Mr. Molina's supervisor, Bert Hynes, the production manager of the mattress factory, testified that the weight of a spring and its covering would vary from 40 to 60 pounds, with queen-size weighing 60 to 70 pounds depending on the insulation. He testified that the company built many 39-inch mattresses weighing 40 pounds and many doubles weighing about 50 pounds. Sooklal Sookanana, who worked as a "feeder" of materials to the mattress builders testified that the distance a mattress builder had to move a mattress from his station to the conveyor was about three to four feet. He also testified that he would help Mr. Molina to turn mattresses and remove

the finished mattresses. He would help any of the builders, if they asked him. Mr. Sookanana confirmed that Mr. Hynes, the production manager, was frequently seen on the factory floor.

Joel Kumove, rehabilitation consultant, recorded in his report that Mr. Molina said he felt he had to lift up to 65 pounds in his work. Mr. Kumove consulted two mattress retailers and learned finished queen-size mattresses weigh 50 to 92 pounds and king-size, 70 to 125 pounds. Mr. Kumove provided no information to assist in determining if these mattresses were the brands made by Mr. Molina. He made no workplace visit, nor did he contact Mr. Molina's employer.

Mr. Molina could not say how many mattresses he built in a typical day. Mr. Hynes testified that an average mattress builder would complete 50 to 70 pieces per day. He felt Mr. Molina was an average mattress builder. I accept his evidence on that point. The pay stubs of exhibit 1.47 also confirm those numbers.

I find Mr. Molina had to lift foam mattresses or metal springs of various sizes onto a work table. He had to pick up large pieces of the appropriate felt, foam, or other covering materials and lay these on top of the spring then staple the layers to the springs with a compressed air gun. He had to turn the mattress and repeat the procedure on the other side, then move the mattress onto a nearby conveyor for transport to the next section of the plant. All these manoeuvres had to be accomplished with speed and accuracy, both since he was paid by the piece, and since he was part of a production team. If a large or heavy mattress was in production, Mr. Molina could expect assistance to turn it and move it onto the conveyor.

Injuries in July 1995 Accident

At the time of the accident Mr. Molina was a passenger in a rental vehicle operated by his ex-wife. Mr. Molina testified that as they drove along a city street and slowed approaching a traffic signal, a car hit their vehicle on the left rear and pushed them into a pole, damaging the passenger-side fender of the vehicle. The unidentified car left the scene at a high rate of speed.

Mr. Molina did not seek medical assistance immediately. It was late at night. The car could still be driven and he and his ex-wife attended at a collision reporting centre. A copy of the collision report was filed. Mr. Molina testified that the following day he felt pain in his right shoulder and back. He attended at Dr. Barmania's office. Dr. Barmania diagnosed a neck and back strain and completed a Health Practitioner's Certificate on which he recorded the following "physical and mental findings/limitations/restrictions:"

Neck and back sprain with tenderness. No spasm. ROM [range of movement] limited to 90% of normal.

Dr. Barmania prescribed Tylenol no. 2 and physiotherapy. He saw Mr. Molina again on August 1st and 10th. On August 10th, Mr. Molina told him he wanted to try to return to modified work as of August 21st. Dr. Barmania gave Mr. Molina a note stating he could "try a return to modified work" as of August 17, 1995.

Return to Work August 21, 1995 to October 5, 1995

Mr. Molina testified that he received a telephone call from Mr. Hynes to return to work. He denied that he told Mr. Hynes that he had been in a motor vehicle accident—he testified he said nothing about it. Mr. Molina testified that after he returned to work he asked Mr. Sookanana to give him the lighter part of the work and to help turn the mattresses. He also testified that Mr. Sookanana helped him move the mattresses from the table onto the conveyer line. Mr. Molina testified that in his last days on the job (in October 1995) Mr. Sookanana helped him more than usual because he was in pain. Mr. Molina testified that he was receiving physiotherapy after work. Those records were not produced for the hearing. Mr. Molina testified that he met with Mr. Hynes after he had been working about seven weeks and told him that he was in great pain and could not work. Mr. Molina testified that Mr. Hynes stated this was okay, since he was going to

lay him off in any case. Mr. Molina testified that he went directly to the doctor after that and the following week went to therapy every day, on the doctor's advice.

The evidence of Mr. Hynes, the production manager at the mattress factory in 1995, differed from the testimony of Mr. Molina. Mr. Hynes testified that when he called Mr. Molina in August 1995 to return to work from layoff, Mr. Molina told him he had been in a car accident. Mr. Hynes testified that Mr. Molina told him he could return to work only if Mr. Hynes would deny he was working if anyone telephoned. After Mr. Molina returned to work, Mr. Hynes saw that he was "doing his day's work like every other employee I had there." Mr. Hynes testified that there was no light duty for mattress builders. He believed that Mr. Molina could do the job, from his own observations. He testified that he was in the mattress building area fifteen to twenty times each day for five to ten minutes at a time. Mr. Molina did not tell him about any health problems before or when he was laid off in October. According to Mr. Hynes, layoffs were usually announced one day in advance. Mr. Molina's last day at work was October 5, 1995. Mr. Hynes could not recall how many people were laid off at that time. He said that more than one person was laid off at a time; for example if one builder was laid off, two sewers would be laid off.

Mr. Hynes also reviewed Mr. Molina's August and September 1995 pay stubs. He confirmed that the rates paid were as follows:

\$0.65	foam mattress
\$1.37	sofa bed mattress
\$2.00	39" or 54" multi quilt smooth top
\$2.50	queen-size

Mr. Hynes testified that Mr. Molina made none of the company's more expensive mattresses in that time period, nor any king-size mattresses, which was not surprising to him, since the company would often produce only one or two per week. Mr. Hynes testified that Mr. Molina was an average mattress builder and the cheque stubs of exhibit 1.47 represented an average builder's earnings. The pay stubs for August and September 1995 also show that, along with numerous smaller mattresses, Mr. Molina built 80 queen-size mattresses in each of the first two

weeks he was back to work, then 40 the next week, 160 the following week, and 80 the week of September 18th.

I prefer Mr. Hynes' evidence to that of Mr. Molina, where their testimony differs. Mr. Hynes impressed me as an independent witness, with nothing to gain from this proceeding, who had known Mr. Molina for many years in his capacity as a job supervisor at the mattress factory.

Mr. Sookanana, another employee of the mattress factory also testified. He stated that his job as a "feeder" is to bring the springs, panels, and borders close to the mattress builders. Mr. Sookanana still works at the mattress factory and receives an hourly wage, unlike the builders who are paid by the piece. He testified that he remembered that Mr. Molina told him he had been in a car accident, but he thought this was perhaps just a trick to get him to help do his work. Mr. Sookanana testified he helped Mr. Molina with turning the heavy mattresses, just as he helped the other builders, if they asked him. He first testified that he thought he had helped Mr. Molina a little more, but then stated he helped everyone equally. I observed that Mr. Sookanana was clearly nervous about testifying at the arbitration. He did not know why he had been called to testify and was concerned that he had done something wrong. I am unable to draw any conclusions from his testimony about Mr. Molina's abilities during this period.

Mr. Molina saw Dr. Barmania, a family practitioner, after the July 1995 accident. I find Dr. Barmania was not one of Mr. Molina's regular family doctors before the accident. No narrative report from Dr. Barmania was produced and he did not testify; only some form reports and his clinical notes up until September 30, 1996 were produced. Dr. Barmania's notes are largely legible. They record that he examined Mr. Molina on September 16 and October 2, 1995. On October 2, 1995, Dr. Barmania noted that Mr. Molina was complaining of right shoulder and right neck pain. He noted that Mr. Molina did not go to work that day because of increased pain. At the next visit on October 12, 1995 (by which time Mr. Molina had already been laid off for a week, according to the Record of Employment) Dr. Barmania recorded that he *could* not work the previous week. It further appears that Dr. Barmania advised Mr. Molina at that visit to stop

working “as he is only aggravating and prolonging his symptoms.” The Record of Employment conflicts with Mr. Molina’s testimony about the reasons and date he ceased work in October 1995. I have concerns about the reliability of Mr. Molina’s evidence. I find that Mr. Molina withheld from Dr. Barmania the information that he had been laid off work, for lack of work, in an effort to solicit the doctor’s concurrence to the view that Mr. Molina was unable to do his job due to his health condition.

Throughout the winter and early spring of 1995-96, Mr. Molina continued to be seen by Dr. Barmania, who eventually referred him to Dr. G. Conn, an orthopaedic specialist. He did not return to work.

Injuries in April 22, 1996 Accident

Mr. Molina testified that on the Friday [April 19], two days before the April 22, 1996 accident he was called by an employee named Frank to return to work as a mattress builder. Mr. Hynes was no longer with the company. Mr. Molina testified Frank told him he would have to be cleared by his doctor to return to work since Frank knew about the July 1995 car accident. Mr. Molina testified he told Frank he would go to his doctor the following Monday to get a note. He testified that he did not feel ready to return to work, but that he wanted to work, since he needed the money and when he is unemployed he feels sick. Mr. Molina testified that Dr. Barmania wrote a note that said he could not do the work. A copy of that note was produced:

18.4.96

“Mr. Molina is not able to return to full time regular duties at the mattress factory.”

Mr. Molina testified that the accident of April 22, 1996 happened just after he left the doctor’s office as he travelled along Dundas Street. He stated that he injured both his shoulders and had pain in his back and neck as well. He went by ambulance to Mt. Sinai hospital.

Dr. Barmania's notes record a prior visit on April 9, 1996 at which time he wrote "Patient does have a job but not able to return to it." He next recorded a visit on April 18, 1996 at which time he reviewed a DAC² report with Mr. Molina:

Review of DAC with patient. Confirms he does have a shoulder problem. His job is working with mattress. We have described [? unclear] this occupation and its requirements many times. He feels he is unable to sustain a full time return to this job.
..... Note given for company - unable to return to work.

Dr. Barmania's next note records a visit on April 29, 1996, which begins with a notation that Mr. Molina was in a motor vehicle accident on April 22nd. Dr. Barmania completed a Health Practitioner's Certificate that day:

Cervical and low back sprain. TMJ pain, Right shoulder pain (aggravated).
Right buttock and Left waist pain. Post traumatic headaches.

MVA 17.7.95. Patient not fully recovered on 22.4.96.

Dr. Barmania prescribed Voltaren, Tylenol no. 2 and physiotherapy, which Mr. Molina had apparently already begun the week before, according to his evidence, and attended twice. Dr. Barmania was of the opinion that Mr. Molina could not work or pursue his normal daily activities.

Mr. Molina could not recall how long he attended physiotherapy after the April 1996 accident. He thought it could have been four to six months. He testified the clinic terminated his treatment when the Insurer was no longer paying for it. Mr. Molina testified that the treatment helped him recover more movement in his arms.

Mr. Molina testified that he has not returned to work because his shoulders hurt. He testified he cannot lift his arms high. He stated he wanted to completely recover and return to work because all his life he has been working and likes working. He stated he could not go to work until the doctor tells him to. He did not know if there was a job available at the moment. He testified that

² DAC = Designated Assessment Centre established under the *Schedule*.

the injections into his shoulder give him pain relief for one or 1.5 months and that he needs to return for another one. He stated he is in constant pain. He can sleep only on his back and does not sleep through the entire night. He claimed to have improved in his ability to walk. He only takes regular Tylenol now, on Dr. Sharma's advice, and sometimes a sleeping pill. He does home exercises. He spends his days at his daughter's house, doing errands, like picking up his grandchildren from daycare. He is able to wash dishes after himself, make his bed, and eat.

Mr. Molina testified that it is impossible for him to do that same work as before because part of his back is injured. He stated that he cannot lift things that weigh more than 100 pounds. He testified he could not turn over a mattress. He testified that if he tries to do something or lift something, afterwards he feels pain. He stated that after the 1995 accident he thought he could return to work, but not after the 1996 accident. He testified he believed the compressed air stapler weighed 5 to 10 pounds and that its repetitive use, including repercussion, hurt his right shoulder during the time he returned to work in 1995

In short, Mr. Molina claims that from October 5, 1995 (the date he was laid off work), he has been unable to do his job due to the injuries from the accident the previous July. From the date of the "second" accident, April 22, 1996, he claims he cannot work as a result of injuries from either or both accidents.

Medical Evidence

The medical evidence in this case is divided, both on the issue of the cause of Mr. Molina's condition and its severity. The specialists on whose reports Mr. Molina relies support his claims of disability and are of the opinion that his disability has been caused by the motor vehicle accidents. The specialists on whose reports the insurer relies are more sceptical of Mr. Molina's alleged disabilities and attribute his present symptoms to a condition he suffered from well before the accidents in question. In weighing the relative merits of each medical opinion in this case it is

particularly important to understand what information the various specialists had about Mr. Molina's previous health history, particularly from about 1990 onward.

Mr. Molina had at least two family doctors, concurrently, before the July 1995 accident. After that accident, he regularly attended a third family practitioner (Dr. Barmania) as well as one of the two whom he had seen the most often before the accident (Dr. S. Patricio). The clinical notes and records of Dr. Patricio from May 28, 1994 to December 30, 1996 were filed. He saw Mr. Molina on July 28, 1994 (*a year before* the July 1995 accident) with complaints of right shoulder and hand pain, neck and low back pain. He also saw Mr. Molina at the end of August 1994 with left upper back and neck pain, following a workplace injury two weeks earlier, which had kept him off work. He examined Mr. Molina on January 19, 1995 when Mr. Molina complained again of right shoulder pain, "the same problem as before, aggravated by work." [We know from the work records that Mr. Molina last worked building mattresses before the accidents on January 13, 1995, when he was laid off owing to a shortage of work.] Dr. Patricio's notes of February 1 and 7, 1995 reveal that Mr. Molina was sent for a bone scan and that he was complaining of right shoulder pain so severe he could not "do anything with his right shoulder...even to comb his hair." He was advised to try chiropractic treatment. Dr. Silverstein testified that the results of the bone scan are suggestive of a diagnosis of tendonitis of the right shoulder.

Dr. Patricio recorded Mr. Molina's complaint of "continuous pain to left shoulder" on December 27, 1995. [This examination occurred between the two accidents of July 1995 and April 1996, about which Dr. Patricio knew nothing, according to his notes, until much later (December 9, 1996).]

Records of Dr. V. Pinilla were also filed. He treated Mr. Molina from 1973 to 1982, then again after May 10, 1993 until March 11, 1996. Dr. Pinilla's notes of June 5, 1993 record Mr. Molina's complaint of "back pain made worse by lifting his work as orthopaedic sewing of mattresses, and only can work a few days because of back pain. L.S. sprain x-rays and referred Dr. Sehmi." [But we know that Mr. Molina did not work at all as a mattress builder in 1992 and 1993.] Mr. Molina

complained in September 1993 of pain in his thoracic spine “and worse when lifting any heavy object and he makes mattresses, now not working....is on physiotherapy for a car accident.” Again in April 1994, Dr. Pinilla records headaches and neck pain since a car accident of February 16, 1993 for which Mr. Molina was being seen by Dr. Patricio. Dr. Pinilla recorded an accident at work on August 13, 1994 (with no details) and on August 15, 1994 “very severe tenderness in cervical area.” After a further three visits, Dr. Pinilla recorded Mr. Molina was to return to work on August 29, 1994. He saw Mr. Molina again November 7, 1994 with upper thoracic spine sprain “and creeping muscles spasm” and recorded Mr. Molina was not then working. He was seen at the hospital on December 20, 1995 for “neck pain when lifting a heavy mattress and holding with his head the weight of several, severe neck stiffness.”

Support for Mr. Molina’s claim of disability is found in the report of Dr. Satyendra Sharma, specialist in physical medicine and rehabilitation, who examined Mr. Molina after the 1995 and 1996 car accidents at the request of Dr. Barmania. Dr. Sharma reported that Mr. Molina told him about his accident and surgery on his left arm at age 16 or 17. Dr. Sharma reported on Mr. Molina’s left shoulder and arm function before the 1995 accident as follows:

....he developed fairly good function of his left shoulder and arm and did not have any discomfort in the joint until he was involved in the motor vehicle accident. He did indicate that his left upper extremity was the weaker side, and he depended mostly on his right upper extremity for functions requiring power. He did not think that there was any limitation in his left hand function. The left shoulder was stiff and had restricted movements but was without any pain.

This description does not accord well with the description of his pre-accident left shoulder and arm function received from Mr. Molina at the hearing.

Dr. Sharma examined Mr. Molina on August 15, 1996, about four months after the “second” accident. He ordered a bone scan and an electrodiagnostic study. Dr. Sharma interpreted the electrodiagnostic study of Mr. Molina’s left arm as showing no recent injury to the brachial plexus or cervical roots. The bone scan on the right shoulder showed a moderately increased uptake. After reviewing plain x-rays which indicated a spurring in the area of the rotator cuff

attachment, Dr. Sharma concluded that the increased uptake in the right shoulder was suggestive of “a chronic tendonitis.” A minimally increased uptake was also reported in the cervical and lower lumbar spine, which Dr. Sharma reported as “consistent with a mild degree of inactive arthritis.” Dr. Sharma treated Mr. Molina for “tendonitis and also for arthritis in the right shoulder joint as well as degenerative disease in the neck and lower lumbar spine with anti-inflammatory medications.” He thought that physiotherapy was appropriate as well.

Dr. Sharma saw Mr. Molina again on March 27, 1997, when he was re-referred by Dr. Barmania. Mr. Molina reported that his right shoulder pain was much worse. Dr. Sharma injected the sub-acromial bursa of his right shoulder joint with a corticosteroid, to help control the pain so that exercises could be done in a more effective way.

After reviewing some of the documentation available in this case, Dr. Sharma concluded that Mr. Molina had “two partially disabled shoulders after the second accident on April 22, 1996. The left shoulder pain was only related to soft tissue injuries and therefore healed over the next 3-4 months; but the right shoulder pain persisted and was probably aggravated due to limitation of the left shoulder joint switching most of the activities to the right side.” It appears that Dr. Sharma knew nothing of Mr. Molina’s motor vehicle accidents in 1990 and 1993, his work injuries in 1992 and 1994, nor his right shoulder complaints in 1994 and 1995.

In June 1997, Mr. Molina was seen by Dr. Shane Fainman, a diplomate of the American Academy of Pain Management. Dr. Fainman wrote a report based on an interview with Mr. Molina and an examination of him, as well as reviewing the “Applicant’s Brief of Documents” forwarded by Mr. Molina’s solicitors. Dr. Fainman knew about motor vehicle accidents in 1993, 1995 and 1996, the fractured left humerus at age 17, and one work injury to the neck in 1994. Dr. Fainman diagnosed a “chronic whiplash syndrome,” healed fracture of the right humerus with rotator cuff injury, mechanical low back pain due to degenerative disc disease, and an old healed fracture of the left humerus with associated left arm muscle wasting. He concluded that Mr. Molina is currently unable to perform the essential tasks of a mattress builder. At the hearing Mr. Molina did not

testify that he suffered from either headaches or neck pain, although he apparently complained about this to Dr. Fainman.

Dr. Ezra A. Silverstein, orthopaedic surgeon, examined Mr. Molina on September 30, 1996 at the Insurer's request. He concluded that Mr. Molina could not do his job as a mattress builder as a result of right rotator cuff tendonitis and the limited range of motion of his left arm and shoulder. He thought Mr. Molina should continue for a month in an active exercise program with specific emphasis on the shoulders. He recommended a functional abilities examination (FAE) follow that program. On October 23, 1996 Dr. Silverstein wrote another report, following receipt of more documents, including an FAE. In this report he concluded that Mr. Molina could manage his pre-accident work. Dr. Silverstein was concerned that Mr. Molina had told him he stopped work before the end of 1995 because of shoulder pain, but he had learned through the documents that it appeared Mr. Molina was laid off because of a shortage of work. Dr. Silverstein also reviewed the report of the functional abilities evaluation dated August 13, 1996 (that he had not previously seen), which concluded that because of the inconsistencies noted, Mr. Molina had greater abilities than demonstrated during the testing.

Dr. Silverstein testified at the hearing. He reiterated his opinion that he would have expected Mr. Molina to have bouts of tendonitis even without the two motor vehicle accidents in 1995 and 1996.

Dr. David Goldstein, a Fellow of the American Academy of Disability Evaluating Physicians, examined Mr. Molina on March 4, 1997. He wrote a report and testified at the arbitration. Dr. Goldstein testified he spent 1.5 hours with Mr. Molina reviewing his medical history and 50 minutes in his clinical examination. Dr. Goldstein concluded that Mr. Molina had no objective evidence of musculoskeletal impairment involving his neck, upper or lower back.

Dr. Goldstein believed the atrophy of Mr. Molina's left arm and shoulder girdle predated the 1995 accident and that he had essentially a "frozen left shoulder." This impairment would likely have

led to compensatory overuse of the right shoulder resulting in tendonitis. Dr. Goldstein indicated that he would have liked to examine Mr. Molina's medical records predating the 1995 accident to confirm if the right shoulder was symptomatic. (The records of Dr. Patricio and Dr. Pinilla were not available to him at the time of his examination and report.) Dr. Goldstein found no difference in the clinical findings on his examination of Mr. Molina in March 1997 from those reported just prior to the April 1996 accident. This led him to conclude that Mr. Molina's functional status had not appreciably changed as a result of the April 1996 accident and that although he was experiencing residual symptoms, Mr. Molina was not substantially disabled from his work.

In cross-examination Dr. Goldstein was asked to comment on how the functional abilities evaluation (FAE) and its conclusions would change if Mr. Molina's job was classified as "heavy" as opposed to "medium." Dr. Goldstein testified that from the FAE he would conclude that Mr. Molina has not demonstrated his true ability in that setting. The validity of the results is, however, the same. Dr. Goldstein testified that Mr. Molina's true strength is unknown, because the effort he put forth on testing does not demonstrate his maximum ability. He testified that a review of Mr. Molina's earnings in August and September 1995 clearly contradicts Mr. Molina's statements about his level of earnings and the type of work he was doing during that time.

Submissions of Applicant and Conclusion

Mr. Molina says that at the time of the April 22, 1996 accident, he was not yet fully recovered from the July 1995 accident. He had injured his right shoulder, neck and back in the "first" accident and in the "second" accident, he suffered an exacerbation of the left shoulder problem he had since age 17. Mr. Molina submitted that his job as a mattress builder was an "extremely heavy" job—heavier than the FAE³ suggests his job requirements are. I agree that the FAE did not take into account Mr. Molina's actual job duties and looked at "medium" work. However, the

³ FAE = Functional Abilities' Evaluation

assessors concluded that Mr. Molina could do more than he would demonstrate. Accordingly, it is impossible to determine from the FAE whether Mr. Molina could do his actual job; it is only possible to conclude that he would not give a true indication of his abilities when asked to do so.

I agree with the applicant that, in order to gain a good perspective on a person's health history, in general, it is likely that more information will be elicited the more an examiner prompts for specific injuries, conditions, or time frames. However, I do not accept that Mr. Molina gave his best, truthful responses when examined by any of the health practitioners who submitted reports filed at the arbitration. No practitioner can be said to have been playing with a full deck so far as Mr. Molina's health history is concerned. Although Mr. Molina testified that he had no shoulder problems or pain before the 1995 accident, from Dr. Patricio's records we know that he was treated for severe right shoulder problems in 1994 and the early months of 1995. This evidence supports the theory of Dr. Silverstein and Dr. Goldstein that Mr. Molina had developed a chronic right shoulder tendonitis prior to the accidents.

I do not accept that Mr. Molina returned to "modified" work in August 1995 and was laid off in October because he could not perform the work. I find Mr. Molina returned to regular duties and was laid off due to a shortage of work. I do not find he is entitled to further weekly income replacement benefits after his return to work in August 1995.

Throughout the winter and early spring of 1995-96, Mr. Molina continued attending his "new" family doctor, Dr. Barmania, who referred him to an orthopaedic specialist, Dr. G. Conn. It is doubtful Dr. Conn knew anything about Mr. Molina's pre-accident right shoulder problems, because all that is mentioned in his consultation reports is the 1995 accident. It certainly appears Dr. Barmania did not know about Mr. Molina's right shoulder problems and treatment by Dr. Patricio in 1994 and 1995. Neither Dr. Barmania nor Dr. Conn testified.

Mr. Molina received income replacement benefits after the "second" accident for more than seven months, until December 3, 1996. I find that, by that date, any injury received in either accident no

longer made a significant or material contribution to his condition. I also conclude that he could have returned to work as a mattress builder by then. I do not conclude that Mr. Molina is a “thin-skulled” applicant, whose pre-disposition to shoulder problems was accelerated or brought on by the accidents about which we are concerned here. On the contrary, I conclude that Mr. Molina had developed chronic, recurrent back, neck and shoulder problems before these accidents, which, for a time, may have been exacerbated or aggravated by the effects of the car accidents. Because of my serious concerns about Mr. Molina’s unreliability in describing his health history and in testifying truthfully, I place more weight on the objective medical evidence at this hearing, particularly as reported by Dr. Silverstein, Dr. Goldstein and the FAE assessors. I do not find Mr. Molina is as physically disabled, from whatever cause, as his testimony would lead one to believe.

Amount of Benefit

Mr. Molina received an income replacement benefit of \$280.35 per week from July 24, 1995 to August 21, 1995 when he returned to work. He claims entitlement to income replacement benefits from October 7, 1995, ongoing at the same rate. He admits that Pafco would be entitled to a credit of \$5,735.00 for the benefits already paid between April 29, 1996 and December 3, 1996. Alternatively, Mr. Molina claims entitlement to income replacement benefits following the April 22, 1996 accident, from April 29, 1996 ongoing, at the rate of \$237.10, based on three-year pre-accident earnings of \$41,097.02.

Pafco says that Mr. Molina is not entitled to any further income replacement benefits arising out of the July 17, 1995 accident. Pafco also calculates that Mr. Molina’s three-year pre-accident earnings before the 1996 accident were \$40,895.40, which it says would mean an income replacement benefit of \$170.00 payable after that accident. It says, instead, it paid him \$185.00 per week. Pafco is not requesting any repayment.

In order to calculate the correct amount of Mr. Molina's income replacement benefits after the April 22, 1996 accident, I must know his income for the preceding 156 weeks, calculated according to the provisions of the *Schedule*. Unfortunately, I heard no testimony on this issue. A calculation was presented to me at the close of the hearing by Mr. Molina's counsel and I received submissions, with different numbers, from Pafco's counsel. Income tax returns for the three years prior to the 1996 accident were filed, but, particularly in the case of 1993, I have no evidence linking the income reported to the period after April 22, 1993. Further, the calculation of Mr. Molina's benefit is complicated by his payment of alimony or maintenance payments during some periods, but not others, according to his Applications for Accident Benefits. However, I heard no testimony to clarify this aspect of the calculation. To the extent, then, that Mr. Molina wished to persuade me that he is entitled to additional benefits from April 29 to December 1, 1996, I am unable to express any view, because of the gaps in the evidence before me.

Expenses

I was advised at the conclusion of the hearing that no written offers to settle this proceeding had been made by either party.⁴ The applicant submitted that he should receive his expenses of the arbitration, whatever the result, since no evidence showed his claim to be frivolous, vexatious, or totally without merit. The insurer submitted that since the arbitration occurred after November 1, 1996 (when amendments to the *Insurance Act*, R.S.O. 1990, c. I.8 replaced section 282(11) of the *Act*), if I found against the applicant, the insurer should receive its expenses.⁵ The insurer

⁴ See section 75 of the Dispute Resolution Practice Code (Third Edition), April 15, 1997.

⁵ The former section 282(11) of the *Act* provided as follows:

(11) The arbitrator may award to the insured person such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations to the maximum set out in the regulations.

Section 282(11) was repealed by the *Automobile Insurance Rate Stability Act, 1996*, S.O. 1996, c. 21 effective November 1, 1996, and replaced by a new section 282(11) which provides:

submitted that the applicant had been warned of this potential outcome in the prehearing arbitrator's letter dated December 18, 1996.

Although I am concerned about Mr. Molina's lack of candour, both at this hearing and in his attendance before various health practitioners, I do not feel that this is an appropriate case to

(11) The arbitrator may award, according to criteria prescribed by the regulations, to the insured person or the insurer, all or part of such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations, to the maximum set out in the regulations.

These criteria are set out in section 12 of Ontario Regulation 464/96 which also came into force on November 1, 1996.

12. (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.
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.

exercise my discretion to entirely deprive him of expenses, since he did suffer some injury in both accidents. In addition, although I have not found in his favour, Mr. Molina may sincerely hold the belief that he is more disabled from his work as a result of the accidents than I have found. Nor do I believe this to be a proper case to award the Insurer its expenses, given the date of receipt of the Application for Arbitration. I concur with the reasoning on this issue expressed by Arbitrator William J. Renahan in *Paulo Pinto and General Accident Assurance Co. Of Canada* (OIC A96-001246), April 10, 1997, at pp. 10-14. I order that Pafco pay Mr. Molina one-half his expenses as allowed under Schedule F of the *Dispute Resolution Practice Code (Third Edition)*—April 15, 1997 and Ontario Regulation 464/96, including one counsel fee only. In the event of disagreement, a party may apply to the Registrar for assessment of the expenses.

Order:

1. Mr. Molina is not entitled to further weekly income benefits.
2. Pafco Insurance Company Limited shall pay Cesar Molina one-half his arbitration expenses, as agreed or assessed, including one counsel fee only.

K. Julaine Palmer
Arbitrator

August 28, 1997

Date