

BETWEEN:

JOSE HERNANDEZ

Applicant

and

ZURICH INSURANCE COMPANY

Insurer

DECISION

Issues:

The Applicant, Jose Hernandez, was injured in a motor vehicle accident on November 5, 1994. He applied for and received statutory accident benefits from Zurich Insurance Company (“Zurich”), payable under the *Schedule*.¹ Zurich terminated weekly income replacement benefits on February 27, 1996. The parties were unable to resolve their disputes through mediation, and Mr. Hernandez 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.

1. Is Mr. Hernandez entitled to income replacement benefits pursuant to subsection 7(1) of the *Schedule* from February 27, 1996 and ongoing?
2. Is Mr. Hernandez entitled to a special award pursuant to subsection 282(10) of the *Insurance Act*?

Mr. Hernandez also claims interest on any amounts owing and his expenses incurred in the arbitration proceeding.

Result:

1. Mr. Hernandez is entitled to income replacement benefits pursuant to subsection 7(1) of the *Schedule* from February 27, 1996 and ongoing.
2. Mr. Hernandez is entitled to a special award of \$5,000 pursuant to subsection 282(10) of the *Insurance Act*.
3. Mr. Hernandez is entitled to interest on any amounts owing and to his expenses of the arbitration.

Hearing:

The hearing was held in Ottawa, Ontario, on June 2, 3, 4, 5 and October 20, 21, 22 and 23, 1997, before me, Joyce Miller, Arbitrator. Additional experts reports and written submissions were received by March 4, 1998.

Present at the Hearing:

Applicant: Jose Hernandez

Mr. Hernandez’
Representatives: William A. Garay
Barrister and Solicitor

Carol Thomson
Law Clerk

Zurich’s
Representative: Kenneth Wright
Barrister and Solicitor

Witnesses:

For the Applicant: Jose Hernandez
Dr. Martin Gillen
Dr. Juan Escudero
Dr. Juan Tejada
Edgar Hernandez
Michael Tardif

For the Insurer: Marc Gignac
Dr. Lynn MacGregor
Robert Karas

Exhibits: Eleven exhibits were filed including two medical briefs.

A Spanish speaking interpreter, Maria Cristina Harris, interpreted the proceedings.
The proceedings were transcribed by Gillespie Reporting Services.

EVIDENCE AND FINDINGS:

Introduction

On November 15, 1994 Mr. Hernandez was riding his bike on Montreal Road in Ottawa when a car suddenly turned into him and struck his bike on the left side. On impact Mr. Hernandez “flipped” over the hood of the car, brushed the windshield and then fell onto the road, torquing and twisting his body.

Immediately after the impact Mr. Hernandez felt pain in his left leg. However, he did not think he needed any medical attention and as he lived close by and he decided to go home. The next day Mr. Hernandez still had pain in his left leg but he did not think there was anything seriously wrong, so he went to work. Within a few days after returning to work, he developed severe pain in his back, left shoulder and neck and had to stop working. He sought medical assistance and began to receive chiropractic treatment from Dr. Daniel Komesch. He attempted to return to work several times, including a work trial under the supervision of the Canadian Back Institute (“CBI”) in March 1995 but had to stop because of pain.

At the time of the accident Mr. Hernandez was working about 50 hours a week at four part-time jobs. His two principal part-time jobs were that of a dishwasher, bus boy and general cleaner at the Mayflower II Restaurant (“Mayflower”) and as a general kitchen helper, dishwasher and cleaner at a nursing home, Laurier Manor (“Laurier”). As well, three months before the accident Mr. Hernandez began to work as a bouncer\doorman at a club, Tropicana Rosie’s (“Rosie’s”), in Gatineau, Quebec on Friday and Saturday evenings from 10:00 p.m. to 3:00 a.m. He also worked from time to time as a personal trainer.

Mr. Hernandez submitted that the injuries from the accident created a global disruption in his life both on a physical and psychological level. Although his neck and shoulder injuries from the accident have basically resolved, he continues to suffer chronic pain in his lower back which

radiates across the left buttock and down the left leg. He has difficulty sitting for more than 20 minutes due to lower back pain; as well he suffers from pain and numbness in his left leg. Because of the severity of his back pain he has difficulty sleeping; he has problems engaging in sexual relations; as well, he feels depressed about his life and the fact that he cannot work.

Essential Tasks of Employment:

Zurich calculated and paid Mr. Hernandez income replacement benefits on the basis of his employment at the Mayflower and Laurier, but focused its defence on Mr. Hernandez' ability to work as a doorman. Mr. Hernandez submitted that since Zurich did not pay him benefits for his work as a bouncer\doorman and personal trainer these jobs were "irrelevant" in determining whether he is substantially disabled from performing the essential tasks of his pre-accident employment. I disagree.

For the purpose of paying accident benefits the parties may agree between themselves for which job or jobs income replacement benefits are to be paid. However, for the purpose of arbitration, where the parties are not in agreement, all of an applicant's pre-accident essential tasks of employment must be considered. In this case Mr. Hernandez did not claim income replacement benefits for his part-time jobs as a bouncer\doorman and as a personal trainer because he had been paid in cash for these jobs. This, however, does not mean that these jobs can be ignored in determining what were the essential tasks of his pre-accident employment.

In deciding what Mr. Hernandez' essential tasks of employment were for his four part-time jobs I prefer the evidence presented by Mr. Hernandez over that of Zurich. Mr. Hernandez presented thorough, detailed and credible evidence as to his pre-accident essential tasks. Zurich had an opportunity both at the hearing and in its written submissions to present evidence to challenge Mr. Hernandez' detailed description; however it failed to do so.

Findings on Essential Tasks:

The Essential Tasks of the Mayflower and Laurier Jobs

From 1990 until the time of the accident Mr. Hernandez worked at the Mayflower from 7:00 a.m. to 2:30 p.m. on Tuesday, Wednesday, Thursday and from 11:00 a.m. to 2:30 p.m. on Friday. From 1992 until the time of the accident he also worked at Laurier from 4:00 p.m. to 8:30 p.m. on Tuesday, Wednesday and Thursday. As well, he worked five or six extra days a month at Laurier to fill in for other people who were on holiday or who were sick. At the time of the accident he was working approximately 40 or more hours a week at these two part-time jobs.

I find the following were the essential tasks of Mr. Hernandez' employment at the Mayflower and Laurier.

(a) The Mayflower job

At the Mayflower, Mr. Hernandez worked as a dishwasher, kitchen helper, cleaner and bus boy. As a dishwasher he loaded and unloaded the dishwasher, stood over the sink for about two hours and washed by hand all the pots and pans and then put away the clean dishes, pots and pans on various shelves which required him to reach, bend and crouch.

As a kitchen helper, Mr. Hernandez was required to carry kitchen supplies, such as boxes of potatoes weighing 80 lbs up 20 stairs from the basement. As well, he had to unload deliveries made to the restaurant such as beer and soft drink containers and carry them down the stairs to the basement. Some of these containers weighed 80 to over 150 lbs. Sometimes he had assistance in carrying the heavier container; however, for the most part he was able to carry the deliveries on

his own. As well he assisted the cooks by fetching and carrying supplies and other foodstuff which were located on various shelves or in the freezer. He also made the toast in the morning.

As a cleaner Mr. Hernandez had to vacuum the restaurant on the second floor. He also had to clean the toilets, and stalls in the two bathrooms and mop the floors. He had to lift and carry garbage bags and throw them into the dumpster located in the alley next to the restaurant.

As a bus boy Mr. Hernandez worked on Friday continuously, without a break, from 12:00 p.m. until 2:30 p.m. The work was repetitive and multi-tasked. At all times Mr. Hernandez was required to either bend, lift, carry, or stand while holding heavy trays of food or tubs of dirty dishes weighing up to about 80 lbs. As well, he had to continuously climb up and down 20 stairs from the kitchen to the restaurant while holding the heavy trays of food and dirty dishes.

Mr. Hernandez' work at the Mayflower was performed at a fast pace, on a continuous basis and always while standing.

(b) The Laurier job

At Laurier, Mr. Hernandez worked as a dishwasher, kitchen helper and general cleaner. His dishwashing duties required him to load and unload the dishwasher, wash the cooking and serving pots by hand in the sink and then put away the clean dishes and pots. As well, he had to wash down and clean the “serving carts” which carried the pots of food and trays to the dining rooms on each of the four floors of the residence.

Depending on whether he was working in the “dishroom” or the kitchen, Mr. Hernandez would either assist someone to push the food carts to the elevator across the hall from the kitchen, or he

alone would have to push the carts into the elevator and into the dining room entrance on each floor. The carts when full weighed about 150 lbs.

As a cleaner Mr. Hernandez had to sweep and mop the kitchen floor and, with the assistance of another person, he had to sweep and mop the four floors of the nursing home. As well, he had to throw out the garbage. This required him to bend down, lift up the garbage bags and throw the bags into a dumpster which was quite high up.

Mr. Hernandez' work at Laurier was continuous and without a break.

I find that the combination of both the Mayflower and Laurier jobs included the physical actions of continuous standing, bending, twisting, lifting, reaching, stooping, crouching, carrying, walking, pushing heavy carts, standing while holding heavy trays of dishes and climbing up and down stairs either carrying heavy boxes of supplies or heavy trays of food and tubs of dirty dishes.

I find that Mr. Hernandez' work at the Mayflower was a physically active and dynamic job done exclusively in the standing position. I find that his work was repetitive, multi-tasked, continuous and labour-intensive in the medium-to-heavy range. Although Mr. Hernandez worked without a break at his Laurier job, I find that his tasks at Laurier were not as fast paced, repetitive or took as long as that of the Mayflower job. Nevertheless, I find that his work at Laurier was multi-tasked and labour-intensive in the medium- to-heavy range.

The Essential Tasks of the Bouncer\Doorman and Personal Trainer Jobs

Mr. Hernandez worked as a bouncer\doorman at "Rosie's" on Friday and Saturday evenings from 10:00 p.m. to 3:00 a.m. for three months prior to the accident. As well, he worked on an intermittent basis as a personal trainer for two or three people for an hour at a time. Both the

owner of Rosie's, Edgar Hernandez (no relation to the Applicant), and Michael Tardif, a student of Mr. Hernandez, testified and corroborated Mr. Hernandez' testimony.

I find the following were Mr. Hernandez' essential tasks as a bouncer\doorman and personal trainer.

(a) Bouncer\Doorman

Mr. Hernandez' duties as a bouncer\doorman at Rosie's required him to stand at the club entrance or to walk around inside the club to surveil persons entering the club or patrons inside the club. If any of the guests behaved improperly, he had to deal with the matter either by making his presence felt and requesting the guest to behave or by asking the guest to leave. It was also part of his essential tasks to physically remove a guest if he or she would not leave peaceably. He could rarely sit down.

(b) Personal Trainer

As a personal trainer Mr. Hernandez was required to demonstrate the prescribed weight-training exercises both to teach and to correct the students in proper body mechanics. This required him to engage in all of the weight-training exercises which included bending, squatting and lifting weights. In order to do these exercise, it was necessary for him to utilize the muscles of his lower back.

I find that Mr. Hernandez' jobs as a bouncer\doorman and personal trainer required him to engage in tasks which were physically demanding on his lower back muscles.

The Medical Evidence:

On June 21, 1995 Zurich sent Mr. Hernandez for an Insurer's Medical Examination ("IME") with Dr. M. J. Agapitos, a physiatrist. In his report of June 26, 1995, Dr. Agapitos opined that Mr. Hernandez may have sustained a disc injury in his low back. Dr. Agapitos stated that he was aware that a CT scan had been performed on June 16, 1995 and that "... if the CT scan reveals some disc pathology, it could be of significance, and could explain Mr. Hernandez' ongoing symptoms."

The CT scan of June 16, 1995 confirmed that Mr. Hernandez did have a disc problem.

On September 5, 1995, Mr. Hernandez attended another IME with Dr. M. Baxter, an orthopaedic surgeon. Dr. Baxter summarized her findings as follows:

In summary, I feel Mr. Hernandez most likely suffered a muscular injury to his low back and shoulder in November of 1994. I do not feel that the changes noted on the CT scan are a direct result of the motor vehicle accident. And finally, the changes seen on the CT scan may not be the cause of his pain. **The only further investigation I would propose is a consideration of discography by a spine surgeon.**

Mr. Hernandez is currently prevented from returning to work due to persistent pain near the end of his shift. The exact etiology of his discomfort at those times remains unclear. There is no contraindication for him to perform his duties despite the abnormal CT scan result. However, given his persistent symptomatology, further investigation via discography would be all that I would have to propose. I doubt further conditioning or physiotherapy will make any significant difference in this gentleman's discomfort. The use of a lumbar corset may. ... **Mr. Hernandez's prognosis for return to work in his previous capacity still remains guarded.** I would favour the use of a lumbo-sacral corset if he chooses another work trial. **Otherwise, I would recommend further investigation if he feels persistently disabled by his pain.** [Emphasis added]

On October 30 and 31, 1995 Mr. Hernandez underwent an Functional Capacity Evaluation ("FCE") at Action + Physiotherapy. In its report of November 7, 1995 it stated that because of

inconsistencies noted in the FCE the FCE may not be a true representation of Mr. Hernandez' actual abilities and limitations.

In his submissions Mr. Hernandez undertook an in-depth critique of this report. For example, he pointed out that the evaluation did not test for multi-tasking but merely for strength and single functions such as squatting. As well, he pointed out that the physiotherapists who carried out the FCE not only lacked the expertise to perform vocational assessments but also lacked an understanding of his job demands. For example, the suggested modifications that he elevate one foot on a step stool or that he perform his dishwashing duties while sitting on a stool, were clearly impractical in the environment of a very busy, fast-paced restaurant.

Moreover, Mr. Hernandez pointed out that the findings of Action + Physiotherapy were inconsistent. For example, its "Summary Report" noted that on the second day of the FCE Mr. Hernandez complained of increased low back pain but the "[p]hysical findings showed ... increased straight leg raise without reproduction of low back pain." However, the FCE Report which recorded Mr. Hernandez' physical assessment noted, that on day one "straight leg raise 80 degrees left lower extremity" produced mild low back pain and that on day two left "straight leg raise 90 degrees bilaterally" produced mild low back pain.

I have reviewed the Action + Physiotherapy Report and would agree that there is merit to Mr. Hernandez' critique.

On January 26 and 29, 1996 Mr. Hernandez underwent a Designated Assessment Center ("DAC") examination at Capital Vocational Specialists Inc. ("Capital"). Mr. Marc Gignac performed an FCE and Dr. Lynn MacGregor, physiatrist, performed the medical examination.

Mr. Gignac testified that although his title at Capital is "rehabilitation specialist" he is not a specialist in rehabilitation but is a "kinesthesiologist" who basically looks at body mechanics.

Mr. Gignac used a method of assessment called Ergos to test Mr. Hernandez over a continuous period of four hours. In his report of January 26, 1996, Mr. Gignac concluded that:

Mr. Hernandez met all the physical demands for medium level work and demonstrated the ability to work at the higher end of the heavy level. Upon examination of the job analysis of Mr. Hernandez's previous employment, the heaviest item to be lifted was dishwasher detergent at 80 lbs. on an occasional basis. **Since Mr. Hernandez demonstrated the ability to lift this weight during the evaluation it is believed he is not substantially disable(sic) from resuming his previous employment.** [Emphasis added]

Under cross examination Mr. Gignac made a number of admissions regarding his assessment and testing procedure. He stated that he did not recall discussing with Mr. Hernandez what his essential tasks of employment were at the time of the accident, instead he relied on Interact's Job Analysis of the Mayflower job. Mr. Gignac also stated the he only tested Mr. Hernandez for individual tasks but not for a multi-task situation which his work entailed. As well, Mr. Gignac admitted that the Ergos system only gave a base line of the physical demands of a "typical job." He stated that one would have to go into the work site to obtain a better and more complete analysis.

Mr. Gignac testified that when he referred to the word "discomfort" in his report, it was really the term used for "pain" under the Ergos" method of assessment. He acknowledged that Mr. Hernandez complained of lower back pain, especially to the left side, for every activity which involved the use of the lower back muscles that required forward flexion and forward reaching. As well, the heavier the lifting and carrying activities and the more tasks that Mr. Hernandez did, there was a corresponding increase in his lower back pain. After four hours of continuous testing, Mr. Hernandez' pain level went from two to eight.

Mr. Gignac testified that he had no reason to disbelieve the level of pain reported by Mr. Hernandez. As well, he admitted that he pushed Mr. Hernandez to continue the tests even though Mr. Hernandez complained of increasing pain and fatigue.

Although Mr. Gignac admitted that Mr. Hernandez had experienced rather “intense” levels of pain, he stated that the Ergos system of evaluation is based on performance regardless of pain. He admitted that if a person worked in continuous and intense pain over a period of several days his/her body would “give out” and the person would have to stop the activity.

Mr. Gignac testified that he did not arrive at his final conclusion that Mr. Hernandez was not substantially disabled from resuming his previous employment solely on his evaluation. He stated that his conclusion was reached in consultation with Dr. MacGregor whose medical evaluation was an integral part of his conclusion.

Mr. Gignac testified that it was his understanding from Dr. MacGregor that there were no medical restrictions preventing Mr. Hernandez from returning to work and this helped him to arrive at his conclusion.

Dr. MacGregor, a physiatrist, examined Mr. Hernandez on January 29, 1996. Dr. MacGregor testified that she spent one hour with Mr. Hernandez, but did not discuss his job duties with him. In her report Dr. MacGregor concluded that:

This 33 year old gentleman presents 1 year and 2 months post MVA with chronic mechanical low back pain, with no evidence of any neurological or articular disorder. His current FCE report as well as his physical exam indicate that he meets all medium and well within the heavy range of safe work capacity.

...

We would state that Mr. Hernandez does not suffer a substantial inability to perform the essential tasks of busboy and dishwasher at this time, based on all of the above information presented and reviewed.

Dr. MacGregor first testified that in her opinion Mr. Hernandez did not have any discogenic problems. However, under cross-examination Dr. MacGregor admitted that she agreed with the diagnosis of Dr. Dennery (a neurosurgeon who had examined Mr. Hernandez on February 20, 1996) that Mr. Hernandez had “lumber disc disease” at L4-L5 and L5-S1 and that the latter disc bulge was clinically significant as it was causing left sciatica. Dr. MacGregor stated that, nevertheless, she disagreed with Dr. Dennery’s opinion that Mr. Hernandez should not do heavy lifting while standing or bending and that he should be retrained in a non-physical job.

On the basis of Dr. MacGregor’s report Mr. Hernandez’ weekly income replacement benefits were terminated on February 26, 1996. Mr. Hernandez testified that after his benefits were terminated he could not go back his pre-accident jobs because of the severity of the pain he experienced and the fear of further harming himself. As a result he had to go on welfare which was very depressing to him.

In November 1996, Mr. Hernandez began to see Dr. Juan Escudero, a family physician, on a regular basis, at least twice a month. Dr. Escudero, who speaks Spanish, has an extensive curriculum vitae which includes working as doctor-in-chief of medical services for the Canadian federal government employees in South America and Mexico, as well as, assessing the employability of immigrant applicants to Canada.

After assessing Mr. Hernandez, Dr. Escudero’s concluded that there was a strong psychological component to Mr. Hernandez’ physical pain and he referred him to a psychiatrist, Dr. Juan Tejada.

Dr. Tejada, who also speaks Spanish, saw Mr. Hernandez on February 18, 1997. Dr. Tejada's provisional diagnosis was that Mr. Hernandez was suffering from reactive depression, chronic pain syndrome and acute stress disorder.

In his report of April 13, 1997, Dr. Tejada stated that:

... it is my opinion that this patient has been and will probably continue to be disabled for a period of time. It is very difficult at this time to determine how long his period of disability will last. It will depend mainly on what response if any can be achieved in the future with pain management, psychotherapy or physiotherapy, or the use of medications like tricyclic antidepressants to help him deal with his pain and his depression. ...

Both Dr. Escudero and Dr. Tejada testified at the hearing at great length. From their reports and testimony, they both showed a detailed knowledge of Mr. Hernandez' pre-accident background, as well as the essential tasks of his four part-time jobs.

Dr. Escudero testified that although there was a physical basis to Mr. Hernandez' pain, there was also a strong psychological component to his pain. It was Dr. Escudero's opinion that this joint psycho-physical perspective prevented Mr. Hernandez from carrying out the essential tasks of his pre-accident employment.

Dr. Tejada testified that since the accident the pain and physical limitation to Mr. Hernandez' back and leg had rendered him incapable of functioning at his previous level. This had deeply affected Mr. Hernandez' self esteem. Moreover, the loss of Mr. Hernandez' pre-accident functioning had turned his "dream" of building a career as a body builder and professional trainer into a "nightmare" and had resulted in a reactive depression characterized by symptoms of lack of energy, lack of interest, insomnia, hopelessness and helplessness. As well, it was his opinion that

Mr. Hernandez manifested the symptoms of a chronic pain syndrome which included anxiety, depression, panic, fears and mental blocking.

Dr. Tejada testified that in his view, Mr. Hernandez' mental blocking was related to his fear of performing the essential tasks of his pre-accident employments because of the severe pain that developed and which he feared would cause him further physical damage. Like Dr. Escudero, Dr. Tejada believed there was an overlap between the physical factors (of pain in Mr. Hernandez' back and his leg) and the psychological factors (fear of further harm) which affected Mr. Hernandez' ability to perform the essential tasks of his pre-accident employment.

Dr. Tejada concluded that as a result of the car accident, Mr. Hernandez suffered an injury which rendered and continues to render him incapable of carrying out the essential tasks of his pre-accident employment.

Dr. Martin Gillen, a physiatrist, who also testified at the hearing, had examined Mr. Hernandez on March 27, 1997. Dr. Gillen demonstrated that he had a good understanding of Mr. Hernandez' background and essential tasks of employment at the time of the accident and that he had reviewed all of the medical documentation. Dr. Gillen testified that there were two components to Mr. Hernandez' physical pain: one was central back soft tissue pain and the other was pain resulting from the disc changes at two levels which accounted for Mr. Hernandez' complaints regarding the symptoms in his left leg.

Dr. Gillen testified that the torquing of Mr. Hernandez' body when the car struck his bike contributed to the disc bulging which is revealed in the CT scan. Dr. Gillen pointed out that prior to the accident Mr. Hernandez did not have a history of back pain with symptoms radiating down his left leg. In his view the disc bulging was an "acute" finding as a result of the accident, as opposed to being solely the result of a degenerative nature.

Dr. Gillen testified that Mr. Hernandez' discogenic problem could be made worse by repetitive lifting, bending and twisting over a period of time. It was his view that if Mr. Hernandez continued to work in his pre-accident employment, he would increase the risk of further harming himself so that he encouraged Mr. Hernandez to seek alternative employment.

Dr. Gillen's view that Mr. Hernandez required retraining in a sedentary type of job was in keeping with the medical opinions expressed by Drs. Komesch, Escudero, Tejada, Dennery and Da Silva, a neurosurgeon, who examined Mr. Hernandez on April 29, 1997.

Analysis:

In order to succeed in his claim, Mr. Hernandez must prove, on a balance of probabilities, that he continues to be substantially disabled from performing the essential tasks of his pre-accident employment, pursuant to subsection 7(1) of the *Schedule*.²

For the following reasons I find that Mr. Hernandez has discharged his burden.

Credibility

One of the main thrusts of Zurich's case both in the presentation of its evidence and in its submissions was that Mr. Hernandez was not a credible witness.

In my view, in order for an applicant's credibility to be impugned, the lack of credibility must be significant and substantial and related to the relevant and material elements of the applicant's claim. I find in this case that Zurich did not present any relevant or material evidence that would

²Section 7(1) of the *Schedule* provides that an insured person who sustains an impairment is entitled to a weekly income replacement benefit if: The insured person was employed at the time of the accident and, as a result of and within two years of the accident, suffers a substantial inability to perform the essential tasks of that employment.

impugn Mr. Hernandez' credibility. In fact I found that the evidence presented by Zurich was irrelevant.

For example, Zurich submitted that Mr. Hernandez was not a credible person because he had testified that he sent money to support this sons in the Dominican Republic, however, his tax return showed that he did not claim a deduction for these payments. Aside from the fact that I find this submission irrelevant, if not spurious, I accept, as plausible, Mr. Hernandez' testimony that he was advised that he could not make this deduction because his children did not live in Canada.

I give very little weight to the surveillance evidence which shows Mr. Hernandez exercising in a park in October 1995 over a period of three days as evidence of Mr. Hernandez' lack of credibility. In fact the surveillance report of October 31, 1995 confirmed that Mr. Hernandez was not engaging in his pre-accident workouts and that he was concerned about conditioning his back which he had injured in the car accident.³ I accept Mr. Hernandez' evidence that he was performing exercises which had been recommended by the CBI and Action + Physiotherapy, to strengthen and condition his back.

In assessing the evidence in its totality, I find that Mr. Hernandez presented very detailed, comprehensive, thorough, objective evidence in support of his claim. I find that his evidence was credible and consistent and was not materially contradicted by Zurich with any relevant or probative evidence.

³The report states: The following was learned under pretext:

1. The subject works out 4 or 5 times per week, at the park and 3 times per week, between 3 and 5 p.m. at the YMCA on Catherine Street. He stated that he does not work out with weights; but rather, swims and does stationary biking. He further stated that he does not do weights any more because of a car accident, which resulted in a hurt back. He stated that they wanted his (sic) to have an operation but he does not want to...3. Subject seems very concerned about his back and reconditioning. (Exhibit 3, Tab 30, Report of Mitchell Perreault Inc. dated October 31, 1995)

Findings on the Medical Evidence

In evaluating the medical evidence I prefer the evidence of Mr. Hernandez over that of Zurich's. I give very little weight to the conclusion of the DAC report and to the testimony and evidence of Dr. MacGregor that Mr. Hernandez was not substantially disabled from performing the essential tasks of his pre-accident employment. I find that Mr. Hernandez' doctors had a more thorough and detailed understanding of the essential tasks of his pre-accident employment than the DAC assessors. As well, I find that his doctors had engaged in a more comprehensive examination and analysis of his medical condition both from a physical and psychological perspective.

The evidence presented by Mr. Hernandez showed that the injuries he received as a result of the accident created a global disruption to his life. I find that from the beginning the medical evidence has been consistent that the injuries Mr. Hernandez received as a result of the accident were the cause of his severe and debilitating pain.

No evidence was presented that prior to the accident Mr. Hernandez had any significant back pain which was disabling. What is clear from the evidence is that prior to the accident Mr. Hernandez was a hardworking, ambitious man who worked at several part-time jobs which were quite labour-intensive. While there was some evidence that indicated Mr. Hernandez may have had some pre-accident disc degeneration that was attributed to his weight lifting, it was only after the accident that he suffered the severe pain which disabled him from working. I, therefore, conclude that it is more likely than not that the accident caused Mr. Hernandez' back pain and his resulting depression.

I accept the evidence, in the form of reports and testimony of Drs. Komesch, Escudero, Tejada, Dennery, Da Silva and Gillen, which are all consistent in their conclusions, that Mr. Hernandez cannot return to his pre-accident employment and should be retrained in a "non-physical" job.

For all of the above reasons I find, that on a balance of probabilities, Mr. Hernandez is substantially disabled from performing the essential tasks of his pre-accident employment. Accordingly, I find that Mr. Hernandez is entitled to income replacement benefits pursuant to section 7(1) of the *Schedule* from February 27, 1996 and ongoing.

Special Award:

Mr. Hernandez submitted that Zurich should be ordered to pay a special award because after it had terminated his income replacement benefits it ignored relevant medical evidence which favoured his position.

Pursuant to subsection 282(10) of the *Insurance Act*⁴ an arbitrator must grant a special award, up to 50 percent of the benefit awarded, once she finds that an insurer has acted unreasonably in withholding or delaying payment. In *Plowright and Wellington Insurance Company*⁵ Arbitrator Palmer made the following comments, which I agree with, on what can be considered to be unreasonable behaviour on the part of an insurer:

“Unreasonable” behaviour by an Insurer in withholding or delaying payments can be seen as behaviour which was excessive, imprudent, stubborn, inflexible, unyielding or immoderate.

⁴Section 282(10) provides that:

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

⁵(OIC A-003985, October 29, 1993)

Terminating an applicant's income replacement benefits is a very serious matter with potentially serious consequences. An insurer contemplating the termination of income replacement benefits, or maintaining a denial, must act reasonably and consider all of the documentation before it. An insurer cannot pick and choose information that favours its own position while ignoring relevant information that favours the applicant.

In this case I find that after Zurich terminated Mr. Hernandez' income replacement benefits it turned a blind eye to any additional medical reports presented by Mr. Hernandez (for example, the medical reports of Dr. Escudero, Dr. Tejada and Dr. Da Silva) that favoured his position. I heard no evidence, nor did I receive any submissions from Zurich as to why it chose not to re-consider its position.

I find that the preponderance of the medical evidence taken as a whole should have led Zurich to re-evaluate its position. I find that by not doing so Zurich's conduct was inflexible and unreasonable. I agree with Mr. Hernandez' submissions that had Zurich considered the additional medical evidence, it might have avoided an eight-day arbitration with its attendant legal costs.

Accordingly, I find that pursuant to subsection 282(10) of the *Insurance Act* Mr. Hernandez is entitled to a special award of \$5,000 plus interest.

Expenses:

Pursuant to section 282(11) of the *Insurance Act* I exercise my discretion to award Mr. Hernandez his expenses in this arbitration.

Order:

1. Zurich shall pay Mr. Hernandez income replacement benefits pursuant to subsection 7(1) of the *Schedule* from February 27, 1996 and ongoing.
2. Zurich shall pay Mr. Hernandez a special award of \$5,000 pursuant to subsection 282(10) of the *Insurance Act*.
3. Zurich shall pay Mr. Hernandez interest on all outstanding amounts owed pursuant to section 68 of the *Schedule* and subsection 282(10) of the *Insurance Act*.
4. Zurich shall pay Mr. Hernandez' expenses incurred in this arbitration pursuant to subsection 282(11) of the *Insurance Act*.

Joyce Miller
Arbitrator

August 28, 1998

Date