

ONTARIO INSURANCE COMMISSION

BETWEEN:

ANABELA T. HOUNSELL

Applicant

and

ZURICH INSURANCE COMPANY

Insurer

DECISION

Issues:

The Applicant, Anabela Hounsell, was injured in a motor vehicle accident on January 26, 1991. She applied for and received accident benefits from the Zurich Insurance Company ("Zurich"), payable under Ontario Regulation 672¹.

Mrs. Hounsell received weekly benefits which covered the period from one week after the accident until December 18, 1992. Zurich takes the position that by December 18, 1992, Mrs. Hounsell was no longer eligible for weekly income benefits. Mrs. Hounsell claims that she continues to be eligible.

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 Before January 1, 1994*. In this decision, the term "Schedule" will be used to refer to Regulation 672.

Zurich also paid supplementary medical and rehabilitation benefits under section 6 of the Schedule, but maintains that the expenses incurred after May 1992 were neither necessary nor reasonable. Zurich seeks repayment of these benefits.

The parties participated in mediation, but the dispute was not resolved. Mrs. Hounsell then applied for arbitration under the Insurance Act. The issues in this hearing are:

1. Is Mrs. Hounsell entitled to weekly income benefits under section 12(3) of the Schedule for any period after December 18, 1992?
2. Is Mrs. Hounsell entitled to supplementary medical and rehabilitation benefits for the cost of her treatment at the Downtown Clinic? If not, should she be required to reimburse Zurich for any amount that she has received, according to section 27 of the Schedule?
3. Should Zurich be ordered to pay a special award under section 282(10) of the Insurance Act on the basis that it unreasonably withheld or delayed the payment of accident benefits?

Mrs. Hounsell also claims interest on any outstanding amounts owing, and her expenses incurred in the hearing. Zurich claims interest on any overpayment that Mrs. Hounsell is required to repay.

Result:

1. Mrs. Hounsell is entitled to weekly income benefits under section 12(3) of the Schedule after December 18, 1992, plus interest calculated according to section 24 of the Schedule.
2. Mrs. Hounsell is entitled to benefits under section 6 of the Schedule for all of the expenses that she has claimed relating to her treatment at the Downtown Clinic, plus interest on any amounts owing, calculated according to section 24 of the Schedule.
3. Zurich unreasonably withheld or delayed the payment of benefits and, therefore, is required to pay a special award to Mrs. Hounsell of \$3,000, inclusive of interest to the date of this decision.
4. Mrs. Hounsell is entitled to her expenses related to the arbitration, calculated according to Ontario Regulation 664, Dispute Resolution Expenses.

Hearing:

The Hearing was held in London, Ontario, on November 1 and 4, 1993 and February 2, 1994, before me, David R. Draper, Arbitrator.

Present at the Hearing:

Applicant:	Anabela Hounsell
Applicant's Representative:	Peter Downs, Barrister and Solicitor

Insurer's
Representative: Ian Boundy, Barrister and Solicitor

Witnesses:

1. Anabela Hounsell, Applicant
2. Randy Hounsell, Applicant's spouse
3. Dr. John C. Clifford
4. Catherine Martin, Woolco Personnel Department
5. Joan Galbraith, Rehabilitation Specialist

The exhibits introduced at the hearing and the other documents before the arbitrator are listed in Appendix 1 to this decision.

Reasons for Decision:

1. The Background

Mrs. Hounsell is 31 years old, married and has two children, ages 8 and 3. She completed grade 13, plus one year of the general business program at Brock University. During the later part of her high school years, she had a part-time job in a department store. After her year at Brock University, Mrs. Hounsell worked from 1982 to late 1987, or early 1988, for a carpet cleaning company, where she had reception, bookkeeping and secretarial duties.

Mrs. Hounsell then moved to another carpet cleaning company where the pay was better. She left after six months, however, because she was not given a raise that she had been promised. In addition, she was moving to a new home some distance away from her workplace.

After the move, Mrs. Hounsell did some babysitting in her home. On October 31, 1988, she started a full-time job at Woolco. She worked as a sales clerk in the paint department for approximately three months, and then was transferred to the housewares department. She continued in this position for almost two years.

In the Fall of 1990, Mrs. Hounsell was working full-time as a sales clerk in the housewares department at Woolco, averaging forty hours a week. She generally worked from 10:00 a.m. to 6:00 p.m., four days a week, plus one night shift a week, and one shift every other Saturday. She was entitled to two fifteen minute breaks and an hour for lunch. She worked with one other person in the housewares department, although there was some help between departments.

Mrs. Hounsell's job tasks fell into three main categories:

- customer service
- ordering stock
- restocking shelves and setting up displays

Mrs. Hounsell and Ms. Martin, from the Woolco Personnel Department, testified about the specific job tasks. It was submitted on behalf of Zurich that Mrs. Hounsell exaggerated the physical demands of what was essentially a sedentary job. I found Mrs. Hounsell's evidence credible, although I have some difficulty with her estimate that she spent up to eighty to ninety percent of her time restocking shelves.

Ms. Martin described the job somewhat differently than Mrs. Hounsell, putting greater emphasis on the customer service duties. However, I did not find "awesome differences", as suggested by Mr. Boundy. Although Ms. Martin is objective in the sense that she does not have a direct interest in these proceedings, she was being asked to comment on the particulars of a job that she did not directly supervise, as it existed in September 1990. I find it significant that in cross-examination, she

agreed that Mrs. Hounsell could have done many of the tasks that she claimed she did. For example, Ms. Martin agreed that the sales clerks might have to get items from the stock room, but stated that there were buggies for them to use. She agreed, therefore, that the job involved some pushing and pulling, although the job analysis form that she helped produce states that pushing and pulling were not required.

I find that Mrs. Hounsell's primary responsibility was to serve customers. When she was not busy, however, she was expected to ensure that the shelves were stocked and in good order. I accept that restocking shelves and setting up displays occupied a significant amount of Mrs. Hounsell's time and was moderately demanding, involving carrying, lifting, opening boxes, bending, squatting, kneeling and reaching. The job was not sedentary.

I accept Mrs. Hounsell's evidence that prior to her accident, she was physically able to do this job and that she did not miss work due to headaches, or problems with her back or neck. According to Ms. Martin, she was a good worker.

Mrs. Hounsell planned to work her regular shift on September 15, 1990, but went into labour that morning and gave birth to her second child. She was scheduled to be on maternity leave until January 14, 1991, but did not return to work on that date. There was conflicting evidence about whether she had made a final decision not to return to Woolco, or was hoping to return after an extended maternity leave.

On January 26, 1991, Mrs. Hounsell was sitting behind her husband in their vehicle. Her infant daughter was beside her. Mr. Hounsell stopped at a traffic light. Mrs. Hounsell testified that she heard the screech of brakes and turned to the right to look over her shoulder just as their car was struck from behind. She described the collision as "violent". She had a lap belt on, but her seat came

up only to her shoulder blades and did not have a head rest.

The other driver did not remain at the scene of the accident. Mrs. Hounsell testified that by the time the police came to her home later in the evening, she was starting to notice stiffness in her back and neck.

On January 28, 1991, Mrs. Hounsell went to a walk-in clinic and was seen by Dr. Leung. She complained of pain from her neck down to her lower back. Dr. Leung found muscle spasms along her cervical, thoracic and upper lumbar spine, and decreased range of motion. She was diagnosed as having a "sprained back" and prescribed medication.

Mrs. Hounsell then saw her family doctor, Dr. Kratky, the following day. He prescribed Tylenol 3 and recommended rest. Because she continued to have pain, Dr. Kratky referred her for physiotherapy. Mrs. Hounsell started at St. George's Physiotherapy in March 1991.

2. Weekly Income Benefits

A. The Issue

At some point, Mrs. Hounsell applied to Zurich for accident benefits. Zurich paid her weekly benefits under section 13 of the Schedule, as a homemaker with two dependent children. The parties agree, however, that because Mrs. Hounsell had worked for more than 180 days in the fifty-two weeks preceding the accident, her eligibility should have been determined under section 12(3), which provides:

12.--(3) A person who was unemployed and who was not self-employed at the time of the accident is qualified to receive a weekly benefit under subsection (1) if he or she was

employed or self-employed for any 180 days in the twelve-month period before the accident, and if he or she as a result of and within two years of the accident has suffered a substantial inability to perform the essential tasks of the occupation or employment in which he or she spent the most time during the twelve-month period before the accident.

I find that the payment of Mrs. Hounsell under the wrong section was an honest mistake, which may have resulted from incomplete information in her application. Because section 13 provides for a caregiver benefit of \$50 per week for each dependant child, Mrs. Hounsell actually received more each week than she would have under section 12.

Mrs. Hounsell was paid weekly benefits under section 13 until May 1992, when they were terminated. She was not paid any additional weekly benefits after May 1992, but the parties agree that when her entitlement is calculated properly under section 12, and her Canada Pension Plan disability pension is taken into account, the weekly benefits that she received cover the period up to December 18, 1992.

Zurich is not claiming any repayment of weekly income benefits. The issue to be determined, therefore, is whether Mrs. Hounsell is eligible for weekly income benefits under section 12 of the Schedule for any period after December 18, 1992. In order to be eligible, she must establish that as a result of the accident, she suffered injuries which resulted in her being substantially unable to perform the essential tasks of her employment as a sales clerk in the housewares department at Woolco. The job at Woolco remains the referent, whether or not she planned to return to work.

According to section 12(4), the eligibility test becomes stricter after three years. This arbitration is only dealing with Mrs. Hounsell's eligibility after December 18, 1992, until the stricter test comes into effect.

B. Credibility

Mrs. Hounsell's position is that her ongoing pain, particularly in her neck, low back and shoulders, prevent her from doing the more physically demanding tasks of her pre-accident job at Woolco. Due to the nature of her complaints, the various medical professionals have had to rely heavily on her description of her symptoms. This makes her credibility an essential issue in assessing her eligibility for weekly income benefits.

It was submitted on behalf of Zurich that Mrs. Hounsell did not plan to return to work after the birth of her second child and, therefore, had a strong interest in preserving her weekly income benefits. As a result, she exaggerated her symptoms and the demands of her pre-accident work, and did not diligently pursue all the rehabilitation options that were available to her.

However, I found Mrs. Hounsell's evidence quite credible. Her answers were responsive and believable. She provided a history that was clear and generally consistent with the documentary evidence. Her complaints have been consistent, and no evidence was presented to show that she has been involved in activities inconsistent with her complaints. Her husband provided convincing testimony about how the pain affected her daily activities. Although she continued to look after the children and to do as much of the housework as she could, I accept that it was a struggle. I also accept the evidence of Mr. and Mrs. Hounsell that the situation resulted in serious marital problems.

I find no indication that any of the health professionals had difficulty accepting Mrs. Hounsell's

complaints as genuine. Dr. Clifford, who examined her on behalf of Zurich, accepted her pain symptoms and presented a detailed plan to address them. A number of the health professionals recorded that Mrs. Hounsell was motivated to get better. For example, Ms. Galbraith notes that she moved from the St. George's Rehabilitation Centre to the Downtown Clinic because she wanted a more aggressive program. Based on my observations at the hearing, I accept that Mrs. Hounsell was genuinely motivated to work toward her recovery.

There were conflicts about the course of her rehabilitation, which I will address in more detail below. I am not prepared to conclude, however, that Mrs. Hounsell failed in any significant way to cooperate in her rehabilitation.

C. Dr. Clifford's Evidence

Zurich relied heavily on the evidence of Dr. Clifford in support of its position. He examined Mrs. Hounsell, at Zurich's request, on August 10, 1992. In his report, dated September 4, 1992, Dr. Clifford concluded that Mrs. Hounsell's current handicap was "moderate", and that she "may well be developing a Chronic Pain Syndrome". He suggested the following vocational restrictions:

In view of the chronic nature of complaints, modest vocational restrictions would seem appropriate, including:

- no prolonged positioning of the head and neck
- no repetitive/heavy lifting with the arms above the shoulders
- no prolonged working with the arms held out in front, unsupported

Prolonged: greater than 30 minutes continuously
Repetitive: greater than 4 repetitions per minute
Heavy: greater than 15 kgs.

The position taken by Zurich is that Mrs. Hounsell's essential tasks at Woolco fit within the vocational restrictions set out by Dr. Clifford in his report and, therefore, she was not substantially unable to perform the essential tasks of her employment. For the following reasons, I do not agree.

First, I do not accept that the test under section 12 is limited to whether the person is able to perform the component tasks of the job without causing further physical damage. That is too narrow. In my view, the phrase, "substantial inability to perform the essential tasks of his or her occupation or employment", requires a consideration of whether or not the person is reasonably able to return to his or her pre-accident work. It is clear from section 12 that in addition to physical limitations, psychological and mental factors must be considered. As Dr. Clifford testified, the psychological component of chronic pain must be addressed.

Second, Dr. Clifford did not conclude that Mrs. Hounsell was ready to return to work. Rather, he recommended that she "should become involved in a co-ordinated, integrated Functional Restoration Program", and he set out the components of such a program. Dr. Clifford emphasized the need to "redirect the rehabilitation program" in his covering letter to Zurich. He suggested that a "team meeting" be convened in order to coordinate Mrs. Hounsell's treatment, and stated:

Until the "Team Meeting" [has] been convened and a formal rehabilitation programme laid out, it would not be appropriate to discontinue funding at this time.

In his initial report, Dr. Clifford specifically stated that he was unable to comment on Mrs. Hounsell's ability to return to work at Woolco because he did not have an analysis of her job tasks. Dr. Clifford

was subsequently provided with a description of Mrs. Hounsell's job at Woolco. He responded on December 14, 1992:

The physical description which you provide in your letter would seem to fall within the vocational restrictions - with one possible exception: "frequent reaching". It is not clear whether such activity would contravene the restrictions:

- no repetitive/heavy lifting with the arms above the shoulders
- no prolonged working with the arms held out in front, unsupported.

If the job requirements fall within the vocational restrictions which I defined, it would certainly be safe for the patient to return to this form of activity. However, I would draw your attention to the full range of recommendations for the Functional Restoration Program which were identified on pages 7 and 8 of the IME.

Once again, Dr. Clifford did not suggest that Mrs. Hounsell should return to work. He repeated his recommendation for a coordinated rehabilitation program to address her pain. In his testimony at the hearing, Dr. Clifford confirmed that he did not believe Mrs. Hounsell could work because her health care management, at the time, was not appropriate. However, he felt that with proper management, it would be in her best interest to work at some point.

I was impressed with Dr. Clifford's evidence. He clearly explained his views about the need for a carefully managed, functional approach to the rehabilitation of people with chronic pain. Unfortunately, no such program was organized for Mrs. Hounsell. I conclude,

therefore, that Dr. Clifford's evidence does not lead to the conclusion that Mrs. Hounsell was able to perform the essential tasks of her pre-accident job at Woolco.

D. Other Medical Evidence

In my opinion, the evidence of the other health professionals overwhelmingly supports Mrs. Hounsell's eligibility for weekly income benefits.

On March 2, 1993, Mrs. Hounsell's family doctor, Dr. Kratky, completed a medical form in support of her application for a disability pension from the Canada Pension Plan. He stated that in his opinion, her prognosis was "guarded" and that she was "unable to hold any gainful occupation."

Dr. Kratky referred Mrs. Hounsell to see Dr. Finestone, a specialist in physical medicine and rehabilitation. In his outpatient note, dated June 9, 1993, Dr. Finestone stated his opinion that Mrs. Hounsell "needs a rather urgent admission" to the fibromyalgia outpatient program at University Hospital and "psychological support as well as an exercise program to get her going again."

Mrs. Hounsell participated in the fibromyalgia outpatient program for four weeks starting in late July 1993. Dr. Bell was involved in the program and assessed Mrs. Hounsell at the time of her discharge. In his report, dated September 22, 1993, he states:

She previously worked as a floor clerk at Woolco. While it is possible that at some point in the distant future she could return to this type of work situation, in the immediate future, it seems unlikely that she could accomplish this. The actual time frame that she would require before being employable or able to go on a trial of partial employment is difficult for me to determine. It is anticipated that Mrs. Hounsell will be followed up at one, three, six and twelve month intervals following her discharge from the programme. Various members of the fibromyalgia day care team may be able to determine her functional status and a possible potential for

returning to work.

It was submitted on behalf of Zurich that I should discount Dr. Bell's opinion because he was under the impression that Mrs. Hounsell's job at Woolco involved repetitive lifting. As stated above, however, I am satisfied that Mrs. Hounsell spent a significant amount of her time at Woolco stacking shelves and arranging displays, tasks that required repetitive lifting. Dr. Bell is a specialist in the area of fibromyalgia and was in a good position to evaluate Mrs. Hounsell's condition. In my opinion, therefore, his opinion should be given considerable weight.

Dr. Finestone saw Mrs. Hounsell again on August 23, 1993, but felt that she was "in good hands with the expert care of the Fibromyalgia Program under Drs. Bell and Harth." At the hearing, Dr. Clifford reviewed the description of the program and agreed that it looked like an excellent program.

In summary, I find no medical evidence to support the conclusion that Mrs. Hounsell's rehabilitation has progressed to the point that she could perform the essential tasks of her pre-accident job at Woolco. I conclude, therefore, that Mrs. Hounsell is entitled to weekly income benefits after December 18, 1992, together with interest calculated according to section 24 of the Schedule.

F. Rehabilitation

It was submitted on behalf of Zurich that in evaluating Mrs. Hounsell's eligibility for weekly income benefits, I should take into account her alleged failure to pursue appropriate rehabilitation. Based on the evidence presented, however, that is not my view of the situation.

Mrs. Hounsell relied on her family doctor, Dr. Kratky, and followed his recommendations. It appears that Dr. Kratky does not take a particularly aggressive approach to rehabilitation. In fact, it was Mrs.

Hounsell who sought out a more aggressive physiotherapy program. She was not satisfied with her progress at St. George's Physiotherapy and discussed this with Dr. Kratky. He suggested that she try the Downtown Clinic or the Canadian Back Institute. I accept Mrs. Hounsell's evidence that she chose the Downtown Clinic because it offered afternoon hours, which she needed due to her childcare responsibilities.

In August 1991, Zurich retained International Rehabilitation Associates Inc. to consult about Mrs. Hounsell's care, although there is no indication that either Mrs. Hounsell or Dr. Kratky asked for this service. Ms. Joan Galbraith, a registered nurse, was the "rehabilitation specialist" assigned by International Rehabilitation Associates. She kept in contact with Mrs. Hounsell and the various medical professionals involved in her care, and reported regularly to Zurich.

I accept that Ms. Galbraith attempted to work in what she thought was Mrs. Hounsell's best interest. She struck me as a sincere and conscientious professional. Her position, however, was a delicate one. It may be quite appropriate for an insurer to offer the services of a rehabilitation expert, but that person must work with the insured person on a voluntary basis.

Unfortunately, Ms. Galbraith was unable to develop a good working relationship with Mr. and Mrs. Hounsell. A major source of the problem was that Mrs. Hounsell was refused copies of the reports that Ms. Galbraith sent to Zurich. It is difficult to imagine a cooperative working arrangement based on a refusal to share the reports that are being sent to the Insurer. I do not find it surprising, therefore, that Mrs. Hounsell was concerned about Ms. Galbraith's role.

Dr. Kratky supported Mrs. Hounsell's attendance at the Downtown Clinic. Her therapists at the Downtown Clinic felt that they could provide an appropriate program for her. For reasons that are not clear, however, Zurich was concerned about the Downtown Clinic. It appears that this concern

was conveyed to Ms. Galbraith, but not to Mrs. Hounsell.

In or about April 1992, the Downtown Clinic felt that Mrs. Hounsell was ready for a more strenuous exercise program, and recommended that she attend a related program at Gold's Gym. Ms. Galbraith maintained that Mrs. Hounsell preferred a program closer to her home, so she was referred to the Hayward YMCA. In light of Zurich's concerns about the Downtown Clinic, I prefer Mrs. Hounsell's evidence that she was pushed toward the "Y" program. I also accept her evidence that her use of this program was limited by an ankle injury.

Ms. Galbraith testified that her biggest concern was Mrs. Hounsell's failure to attend a fibromyalgia self-help group. In February 1992, Dr. McCain, a rheumatologist with a particular expertise in fibromyalgia, first diagnosed her as having fibromyalgia. He put her on the waiting list for the fibromyalgia outpatient program at University Hospital, but anticipated that the wait would be at least nine months. In the meantime, he suggested that she read material about fibromyalgia and attend a fibromyalgia self-help group.

Mrs. Hounsell testified that she went to the self-help group once or twice, but had difficulty, at that time, accepting that she had fibromyalgia. I found this to be an honest answer and am not prepared to be too critical of her.

Zurich was also concerned that Mrs. Hounsell was interviewed for the fibromyalgia program at University Hospital in December 1992, but decided not to enter the program. Mrs. Hounsell testified that she did not feel that she would be able to cope with an intensive program at that time because she had not been in physiotherapy for approximately six months due to lack of funding, was not sleeping through the night, and was dependant on Tylenol.

Dr. Neilson, who did the assessment, appears to have been convinced by Mrs. Hounsell's concerns. He recommended that she resume physiotherapy and "work towards an increase in her level of activity and reduction in analgesic medication, prior to participation in the fibromyalgia program." That is what happened. Mrs. Hounsell resumed physiotherapy and, as planned, she was admitted to the fibromyalgia outpatient program in July 1992.

Considering all of the circumstances, including her responsibilities at home, I find that Mrs. Hounsell made reasonable efforts to rehabilitate herself. In my view, the fragmentation in her treatment that concerned Dr. Clifford largely resulted from the number of different health professionals involved and the lack of a clear understanding of who was responsible for coordinating her care.

3. Rehabilitation Benefits

Zurich paid benefits for Mrs. Hounsell's physiotherapy expenses at the Downtown Clinic, according to section 6 of the Schedule:

6.--(1) The insurer will pay with respect to each insured person who sustains physical, psychological or mental injury as a result of an accident all reasonable expenses resulting from the accident within the benefit period set out in subsection (3) for,

...

- (c) rehabilitation, life-skills training and occupational counselling and training;
- (d) transportation for the person to and from treatment, counselling and training sessions, including transportation for an assistant.

Section 6(4) provides that before paying rehabilitation benefits, the insurer may require the applicant to submit a statement from his or her medical practitioner stating that the expense is necessary for the

insured person's treatment or rehabilitation. Dr. Kratky provided a note, dated November 30, 1992, stating that Mrs. Hounsell "needs to continue physio at the Downtown Clinic." I also find that Dr. Neilson, who did the assessment for the fibromyalgia outpatient program at University Hospital, agreed with the resumption of physiotherapy in order to prepare her for admission to the outpatient program.

Dr. Clifford felt that Mrs. Hounsell could discontinue physiotherapy, but his opinion was based on her becoming involved in the type of rehabilitation plan that he recommended. It is difficult to criticize Mrs. Hounsell or her doctors for not following Dr. Clifford's recommendations when they were not provided with his report. In the absence of an alternative rehabilitation plan, as suggested by Dr. Clifford, I find that it was reasonable that Mrs. Hounsell returned to the Downtown Clinic, as recommended by her family doctor.

At the end of the hearing on February 2, 1994, counsel agreed to send me the invoices from the Downtown Clinic within ten days. I have not yet received the invoices, but do not feel that the decision should be delayed any longer.

4. Special Award

Mrs. Hounsell seeks a special award under section 282(10) of the Insurance Act:

282. - (10) If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the No-Fault Benefits Schedule, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the Schedule.

I accept that the handling of this file was complicated by the fact that Mrs. Hounsell was initially dealt with as a homemaker, rather than under section 12 of the Schedule. However, I find Zurich's actions difficult to understand. I was not assisted by the fact that no one from Zurich testified in this hearing.

Zurich stopped paying weekly benefits to Mrs. Hounsell in May 1992, on the basis that she was no longer substantially incapable of performing her essential tasks as a homemaker. I find, however, that by this time, there was some question as to whether her eligibility should be based, instead, on her ability to return to work.

On June 10, 1992, Ms. Ostrom, Senior Claims Representative for Zurich, wrote to Mrs. Hounsell, advising her that she had been scheduled to see Dr. Clifford on June 22, 1992. The letter also states:

Please contact the writer immediately if you are unable to attend this appointment in order that it may be rescheduled. If you fail to attend, without cancelling in advance, you may be held responsible for the cancellation fee.

I accept the evidence of Mr. and Mrs. Hounsell that they did not feel that Mrs. Hounsell could keep

the appointment on June 22, 1992, because they were preparing to move, and it was taking her a long time to pack. Mr. Hounsell phoned Zurich the day they received the letter and spoke with Ms. Ostrom. I accept his evidence that he was told that if his wife did not keep the appointment on June 22, 1992, her benefits would be cut off until Zurich received a report from Dr. Clifford.

The appointment with Dr. Clifford was rescheduled for September 10, 1992, the first available date, although Mrs. Hounsell agreed to take an earlier cancellation date. In fact, Mrs. Hounsell saw Dr. Clifford on August 10, 1992. In the meantime, Zurich did not pay any benefits. As a result of the lack of funding, Mrs. Hounsell stopped attending the Downtown Clinic. Ms. Galbraith, the rehabilitation specialist, visited Mrs. Hounsell on July 27, 1992, but not thereafter.

In my opinion, the position taken by Ms. Ostrom was unduly harsh. Applicants for weekly benefits must comply with the insurer's reasonable request for a medical examination. I am satisfied, however, that Mrs. Hounsell was cooperative. The busy schedule of specialists is a problem, but not one which should be addressed by placing unreasonable demands on applicants.

Dr. Clifford reported to Zurich on September 4, 1992, strongly recommending a team meeting involving the key players in Mrs. Hounsell's rehabilitation, including "patient, family physician, vocational rehabilitation counsellor, a representative from the insurance carrier and finally Ms. Heather Potts." Zurich did not provide a copy of Dr. Clifford's report to Mrs. Hounsell, or take any steps to organize a team meeting at this time.

Instead, Zurich wrote to Mrs. Hounsell on October 5, 1992, advising her that her weekly income benefits would not be reinstated because, based on Dr. Clifford's conclusions, she was considered "not substantially disabled from performing the essential tasks in which you would normally engage as a homemaker/mother." Zurich's letter also asked Mrs. Hounsell if she preferred to be considered

for eligibility for weekly income benefits based on her ability to return to work (section 12), rather than as a homemaker (section 13).

Ms. Galbraith was instructed by Zurich to determine if Mrs. Hounsell's pre-accident job at Woolco fit within the restrictions set out by Dr. Clifford. On September 29, 1992, she met with Ms. Martin at Woolco and completed the job analysis form. Ms. Galbraith testified that she stopped working on the file on September 30, 1992. Her report indicates that on November 1, 1992, she was instructed to close her file until further notice.

During the mediation, which continued from October 18, 1992 to January 18, 1993, Zurich refused to provide Mrs. Hounsell with a copy of Dr. Clifford's report. According to Zurich's letter, dated February 1, 1993, it agreed during mediation to pay for Mrs. Hounsell's treatment at the Downtown Clinic pending a team meeting. Because she refused to participate in a team meeting, however, this agreement was rescinded. Mrs. Hounsell's lawyer responded in a letter dated February 8, 1993:

When I spoke to Mr. Stanley on January 15, 1993, I requested that he release a copy of Dr. Clifford's reports, and the rehab reports to my clients so that they could fairly participate in the proposed team meeting. For reasons known only to Zurich you are refusing to release those reports to us.

At the pre-hearing discussion, held on July 9, 1993, Zurich still maintained that it was not required to release these reports. In my opinion, Zurich's position was unreasonable. The current system is a "first-party system", unlike the tort system. It is expected that applicants and their insurer's will work together toward the applicant's rehabilitation. It is difficult to accept that Zurich was committed to a productive team meeting if it was unwilling to make the reports of Dr. Clifford and Ms. Galbraith available to Mrs. Hounsell, her family doctor and her lawyer.

Zurich did pay, or offer to pay, a significant amount of rehabilitation benefits in this case. The problem is that it attempted to retain a degree of control over the rehabilitation that, in my view, was inappropriate. I was struck by the assessment of the occupational therapist, Ms. Heather Potts, who was retained by Ms. Galbraith to help assess Mrs. Hounsell's rehabilitation needs. She commented: "Ms. Hounsell appears to be a fairly independent woman and needs to be provided with options or suggestions but then allowed to make final decisions regarding her life." This fits with my impression of her and helps to explain some of her frustration.

I also conclude that it was unreasonable for Zurich to rely on Dr. Clifford's reports in support of its position that Mrs. Hounsell was able to perform the essential tasks of her pre-accident job at Woolco. As set out above, that is not what his reports say. Dr. Clifford made it clear in his testimony that he felt that she needed a coordinated rehabilitation program. Despite this, Zurich continued to maintain that she was ineligible for weekly income benefits.

I conclude, therefore, that Zurich has unreasonably withheld or delayed the payment of both weekly income benefits and rehabilitation benefits to Mrs. Hounsell, and must pay a special award. I order that Zurich pay a special award of \$3,000, inclusive of interest to the date of this decision.

5. Expenses

Mrs. Hounsell claims the expenses that she has incurred in this arbitration. An award for expenses may be made under section 282(11) of the Insurance Act, which provides as follows:

282 (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.

The prescribed expenses and amounts are set out in Schedule 1 of the Dispute Resolution Practice Code and in Ontario Regulation 664, R.R.O. 1990.

In view of her success in this hearing, I conclude that I should exercise my discretion to award Mrs. Hounsell her expenses. If the parties are unable to agree on the amount of the expenses, I remain seized of this matter and either party may apply for an assessment of the expenses.

Order:

1. Zurich shall pay weekly income benefits to Mrs. Hounsell after December 18, 1992.
2. Zurich shall pay benefits for the expenses that Mrs. Hounsell has submitted relating to her treatment at the Downtown Clinic.
3. Zurich shall pay Mrs. Hounsell a special award of \$3,000, inclusive of interest to the date of this decision.
4. Zurich shall pay Mrs. Hounsell's expenses related to the arbitration, calculated according to

Ontario Regulation 664, Dispute Resolution Expenses.

April 15, 1994

David R. Draper
Arbitrator

Date

APPENDIX 1

- Exhibit 1 - A photocopy of a handwritten note from Dr. A.J. Kratky, dated November 30, 1992.
- Exhibit 2 - A photocopy of a report, dated January 22, 1993, from Associative Rehabilitation Inc.
- Exhibit 3 - A photocopy of a description of the Fibromyalgia Outpatient Program at University Hospital.
- Exhibit 4 - A photocopy of a report, dated September 22, 1993, from Dr. D.A. Bell to Mrs. Hounsell's lawyers.
- Exhibit 5 - A photocopy of a letter, dated September 15, 1993, from Dr. Hillel M. Finestone to Mrs. Hounsell's lawyers, enclosing outpatient notes for August 23, 1993 and June 9, 1993.
- Exhibit 6 - A photocopy of a handwritten note from Dr. H.M. Finestone, dated June 7, 1993.
- Exhibit 7 - A photocopy of a report, dated February 1, 1993, from Associative Rehabilitation Inc.
- Exhibit 8 - A photocopy of a "Medical Report" form for Health and Welfare Canada, prepared by Dr. Kratky on March 2, 1993.
- Exhibit 9 - The curriculum vitae of Dr. Hillel M. Finestone.
- Exhibit 10 - The curriculum vitae of Dr. Glenn Alan McCain.
- Exhibit 11 - A photocopy of the medical record of the Immediate Care Walk-In Clinics, dated January 28, 1991.
- Exhibit 12 - A photocopy of "Consensus Document on Fibromyalgia, Myopain '92: The Copenhagen Declaration".
- Exhibit 13 - A photocopy of a Notice of Entitlement from the Canada Pension Plan, dated July 30, 1993.
- Exhibit 14 - A photocopy of the medical records of Dr. G. McCain.
- Exhibit 15 - A photocopy of a letter, dated December 10, 1992, from Joan Galbraith to Dr. John

Clifford.

- Exhibit 16 - A photocopy of a job analysis, signed by C. Martin and J. Galbraith.
- Exhibit 17 - A photocopy of a letter, dated June 10, 1992, from Becky Ostrom, Senior Claims Representative, Zurich Canada to Mrs. Hounsell.
- Exhibit 18 - A photocopy of a letter, dated October 5, 1992, from Becky Ostrom, Senior Claims Representative, Zurich Canada to Mrs. Hounsell.
- Exhibit 19 - A photocopy of a letter, dated February 1, 1993, from Becky Ostrom, Senior Claims Representative, Zurich Canada to Mrs. Hounsell's lawyers.
- Exhibit 20 - A photocopy of a letter, dated February 8, 1993, from Mrs. Hounsell's lawyers to Ms. Ostrum [sic].
- Exhibit 21 - A photocopy of a letter, dated November 23, 1992, from Dr. W. Harvey Bailey to Dr. A. Kratky.
- Exhibit 22 - A photocopy of the consultation note of Dr. John C. Clifford, dated August 10, 1992.
- Exhibit 23 - A photocopy of a letter, dated September 4, 1992, from Dr. John C. Clifford to Becky Ostrom, Senior Claims Representative, Zurich Canada.
- Exhibit 24 - A photocopy of Dr. Clifford's report, dated September 4, 1992.
- Exhibit 25 - A photocopy of a letter, dated December 14, 1992, from Dr. John C. Clifford to Ms. Joan Galbraith of International Rehabilitation Associates Inc.
- Exhibit 26 - A photocopy of a letter, dated April 6, 1993, from Dr. John C. Clifford to Becky Ostrom, Senior Claims Representative, Zurich Canada, enclosing an article by Dr. Clifford, entitled, "Successful Management of Chronic Pain Syndrome".

- Exhibit 27 - A photocopy of an article by Carl P. DeRosa and James A. Porterfield, "A Physical Therapy Model for the Treatment of Low Back Pain", Physical Therapy, Vol. 72, Number 4, April 1992.
- Exhibit 28 - A photocopy of a "Job Analysis for Homemaker" form, dated September 23, 1991.
- Exhibit 29 - A photocopy of a report, dated March 10, 1992, from Ms. Heather Potts, Occupational Therapist, of Maintaining Independence to Ms. Joan Galbraith of Rehabilitation Services of Canada.
- Exhibit 30 - A photocopy of a report, dated April 6, 1992, from Ms. Heather Potts, Occupational Therapist, of Maintaining Independence to Ms. Joan Galbraith of Rehabilitation Services of Canada.
- Exhibit 31 - A photocopy of a letter, dated June 1, 1992, from the Downtown Clinic to Dr. A. Kratky.
- Exhibit 32 - The curriculum vitae of Dr. John Charles Clifford.
- Exhibit 33 - "Rehabilitation Brief - Anabela Hounsell" containing 16 reports.
- Exhibit 34 - The curriculum vitae of Joan Galbraith.
- Exhibit 35 - A photocopy of a letter, dated June 30, 1992, from Joan Galbraith to Dr. A.J. Kratky.
- Exhibit 36 - A document from Ms. Galbraith's file was marked as Exhibit 36 at the request of the applicant. My notes do not set out a full description of this document, but indicate that it was left for counsel to photocopy. Unfortunately, the document could not be located.

In addition, the following documents were before the arbitrator from the Ontario Insurance Commission file:

- Report of Mediator, dated January 18, 1993
- Application for Appointment of an Arbitrator, dated February 11, 1993.
- Response by Insurer, dated March 9, 1993.

- A letter, dated July 15, 1993, confirming the pre-hearing discussion that was held on July 9, 1993.