1992 CarswellOnt 4889
Ontario Insurance Commission

Richardson v. Royal Insurance Co. of Canada

1992 CarswellOnt 4889

# Marcel Richardson, Applicants and Royal Insurance Company of Canada, Insurer

Palmer Arb.

Judgment: November 3, 1992
Docket: A-001141

Counsel: Marcel Richardson, for himself
Nestor Kostyniuk, for Insurer

Subject: Insurance

**Headnote**
**Insurance**

***Palmer Arb.*:**

**Issues:**

1 The Applicant was injured in a motor vehicle accident on November 12, 1990. He was insured under a standard automobile owner's policy issued by the Insurer. He applied for accident benefits, payable under the *No-Fault Benefits Schedule*, Ontario Regulation 273/90, enacted under the *Insurance Act*, R.S.O. 1990, c. I.8. Every motor vehicle liability policy provides the no-fault benefits specified in the *No-Fault Benefits Schedule*.

2 The Insurer paid weekly income benefits to the Applicant until December 22, 1991. Thereafter, the Insurer terminated the benefits on the basis that the Applicant was no longer suffering "substantial inability to perform the essential tasks" of his occupation or employment. In January 1992, the Applicant applied for mediation on the issue of his continued entitlement to benefits from December 23, 1991 forward. Mediation failed to resolve the issue and the Applicant applied for the appointment of an arbitrator in March 1992.

3 The issues to be determined in this arbitration are as follows:

1. Is the Applicant entitled to weekly income benefits from December 23, 1991 forward?

2. What is the correct amount of the weekly income benefit payable to the Applicant?

3. Did the Applicant receive any overpayment from the Insurer?

4 The Applicant also claims interest on any unpaid benefits and his expenses of the arbitration.

**Result:**

5

1. The Applicant is entitled to further weekly income benefits, from December 23, 1991 onward.

 

2. The correct amount of weekly income benefit payable to the Applicant is $590.39 per week.

3. The Applicant will repay to the Insurer, by means of a set-off, the sum of $4,555.20, which is comprised of eight weeks' benefits at the previously paid rate of $569.40.

4. The Insurer will pay interest on the overdue weekly income payments at the rate of 2 per cent per month from the date they became overdue, pursuant to section 24(4) of the *Schedule*.

5. There is no overpayment by the Insurer.

6. The Applicant is not entitled to his expenses of this proceeding.

**Hearing:**

6 An arbitration hearing was held at North York, Ontario, on June 1 and 2 and October 21, 1992, before me, K. Julaine Palmer, Arbitrator. On July 16, 1992, I requested the Director of Arbitrations to refer a question to the Chair of the Medical and Rehabilitation Advisory Panel, pursuant to section 282(5) of the *Insurance Act*. That section states as follows:

> The Director, on the recommendation of an arbitrator, shall refer to the chair of the medical and rehabilitation advisory panel any question related to the medical condition or treatment of the insured person or related to the insured person's rehabilitation.

7 The report of Dr. W. Robert Harris, dated September 21, 1992, was filed as Exhibit 27 to the hearing when it resumed on October 21, 1992.

8 Present at the hearing were:

| | |
|---|---|
| Applicant: | Marcel Richardson |
| Insurer's Representative: | Nestor Kostyniuk<br>Barrister & Solicitor |

9 The following testified, under oath or solemn affirmation:

| | |
|---|---|
| Marcel Richardson | Rick Bowers |
| William R. Sawka | Jack G. Stubbs, M.D. |
| Gwen Hughes | Mark W. Reed |
| Christine Yee | W. Robert Harris, M.D. |
| Bessie Gatchell | |

10 The parties filed 28 exhibits.

**Evidence:**

***Applicant's Evidence:***

11 The Applicant, now aged 24, testified that he was driving home from work on November 12, 1990, in his 1989 Honda Civic, when a motor vehicle went out of control, connected with the driver's side of his vehicle and spun his vehicle into a hydro pole. The Applicant was wearing his seat-belt at the time of the accident. He was taken by ambulance to hospital where he was admitted and stayed for six or seven hours. The Applicant then discharged himself; he returned to hospital a few hours later because his aunt was concerned about his condition. Bessie Gatchell, the Applicant's aunt,

  

testified that he was not talking properly after he returned home. The Applicant remained in hospital the rest of the night and all the next day.

12 The Applicant testified that, as a result of the motor vehicle accident, he suffered internal injuries, as well as an injury to his lumbar spine. He also had a sore head following the accident because part of the roof of his car caved in. The Applicant testified that he was in great pain at the scene. He said that he felt like "King Kong had grabbed me with one hand and squeezed". The Applicant testified that he suffered injuries to his neck, to his shoulder (from the seat-belt), and to his hips and centre back.

13 After his release from hospital, the Applicant saw Dr. R. McBroom, an orthopaedic specialist, who has since followed his case.

14 In the months following the accident, the Applicant testified he had occasional nightmares of his car moving sideways and hitting a post. The Applicant testified that he was not himself and that he would forget a lot of things. He attended physiotherapy a few times, but claimed that this treatment made him feel worse. His doctor instructed him to ride a bicycle and do home exercises. The Applicant testified that he was unable to have a test known as an MRI, because his shoulders would not fit into the machine. The Applicant recalled that at Christmas 1990 he was not feeling very good and his back hurt.

15 Since the accident, the Applicant has done a lot of walking. In February and March 1991, he was still suffering from his sides "puffing out". In the warmer spring weather of 1991, the Applicant testified he began to feel "not too too bad". Following the accident, the Applicant gained weight. He testified he weighed 175 to 180 pounds in November 1990, but by the time of the arbitration hearing his weight had increased to 250 pounds, he estimated.

16 The Applicant reported that in the early summer of 1991 any type of lifting would cause him pain. For example, when he tried to rake and bag leaves at his aunt's home, even though he was careful how he bent and lifted, he experienced pain. If he was required to lift any item over 30 pounds, he asked for help.

17 The Applicant testified that he was not knocked out in the accident but was semi-conscious or dazed. He stated he now has headaches approximately once each week, a decrease from approximately three times each week shortly after the accident. He testified that his neck now bothers him approximately once a week. He stated his kidney and liver area still ache occasionally. He suffers from low back pain daily, particularly if he sits too long or is very tired. The Applicant testified he now experiences numbness in the top of both his legs, which he first noticed in September or October of 1991. He reported this along with a swelling in both hips to his orthopaedic surgeon and to his family physician, but these specialists, reportedly, have not been able to determine the origin of this problem.

18 Mrs. Bessie Gatchell testified on behalf of the Applicant. She is a friend of the family, whom the Applicant calls his "Aunt", and has known the Applicant most of his life. The Applicant has lived in Mrs. Gatchell's home for the past one and a half years. She testified that the Applicant often is able to sleep only in a recliner chair and has, in fact, worn out one chair since the accident. She said she has noticed a great change in Marcel Richardson since the accident and feels that he is much more nervous now than prior to the accident.

**Employment Background:**

19 At the time of the accident, the Applicant was employed in the sheet-metal industry, working in high-rise construction. The Applicant had worked at this trade for three to four years prior to the accident. He also worked in the drywall trade, when there was no work available in sheet metal.

20 The Applicant described his job in the sheet-metal industry as a "sheeter-decker". A crane at the job site would unload a transport truck full of sheet-metal decking, which the material handlers and sheeter-deckers would then shift into position. The sheets of metal varied in thickness and measured three feet wide and up to thirty-five feet long. The weight of a sheet exceeded 120 pounds. The sheeter-decker had a very physically-demanding job — a sheet of metal

  

was picked up and manually hauled a distance of up to 200 feet, walking along the beams of the new construction. The job required physical strength and good balance. In order to assemble the sheets, the sheeter-decker had to bend over and position the male and female ends of the adjacent sheets together, pounding down the laps between the sheets and welding the joint.

21 When the Applicant worked in the drywall trade, he did the whole job from loading and unloading sheets of drywall board, to affixing the drywall board and taping and joining the board. The Applicant described this also as a very physically demanding job.

22 At the time of the accident, the Applicant had worked only five days for Vicwest Steel. He earned $19.71 per hour and a total of $737.99. The Applicant testified he had no other employment in the four weeks preceding the accident.

23 The Applicant presented documentary evidence that he had worked at Studcon Drywall & Acoustics Ltd., Royal Drywall Systems Inc., WRS Enterprises, ATS Erectors Inc. and Waxman Recycling Industries Ltd. in the fifty-two weeks preceding the accident. For some of these jobs, he was able to supply documentary evidence of his pay, in the form of reports of employment, pay stubs or T-4 slips. The Applicant did not file income tax returns in either 1989 or 1990, so did not have these records available to establish his income.

24 William R. Sawka of WRS Enterprises testified about the work that Marcel Richardson did for him. WRS Enterprises is a drywall contractor, which engaged the Applicant as a sub-contractor for labour from November 17 to December 22, 1989 and from January 15, 1990 to February 9, 1990. During that time, he earned $3,894.00.

25 Mrs. Gwen Hughes, administration manager of Vicwest Steel, testified and produced the company's records relating to Marcel Richardson's employment with that corporation. She testified that work for the company had begun to slow down in early 1991 and there had been no employment for sheet-metal workers since the end of 1991.

***Employment after the accident:***

26 The Applicant testified in June 1991 he asked a friend to determine if the friend's employer could employ him in his towing business. The Applicant claimed that he was hesitant to try to return to employment as a sheeter-decker, because he was afraid his weekly income benefits would be cut off, even if he were unable to do his former job. The Applicant stated that the job which he had with the Ray's Auto Towing was not heavy work. He was not required to lift more than 15 pounds because the tow truck mechanism was fully hydraulic. Some bending was required to pass a wire under the vehicle. He was capable of doing the work.

27 The Applicant admitted that in the summer of 1991, the Insurer confronted him with surveillance photographs of himself working at Ray's Auto Towing. At that time, he denied the pictures were of himself. The Applicant explained that he did not know that section 16 of the *No-Fault Benefits Schedule* provides for attempts to return to work. He testified, "Now I know it's okay to say I tried working...I thought if I said it was me, that would be it."

28 The Applicant testified that he earned $1,171.00 from Ray's Auto Towing during four weeks in June, July and August, 1991.

29 Christine Yee, a dispatcher with Ray's Auto Towing, testified as to the payments which had been made to the Applicant in 1991. She also testified that, in her opinion, operating a tow truck for Ray's Auto Towing was a fairly easy job, because all the trucks were automated.

30 The Applicant testified he was also employed for five weeks in December 1991 and January 1992 by Lift Com 2000 Ltd., preparing used forklift trucks to be exported to Russia. The Applicant filed documentation confirming $1,810.00 in earnings at this job.

**Insurer's Evidence:**

  

31 The Insurer was represented by Rick Bowers, an assistant claims manager. He has met the Applicant several times. Mr. Bowers testified there was considerable confusion with respect to this claim and the Applicant had never actually completed an application for weekly income benefits. Two adjusters had worked on this file before the present adjuster, Winston Cheng, became involved.

32 The assistant claims manager testified that an employee of the Insurer had determined the Applicant's gross weekly income incorrectly. He did not suggest that the Applicant had any responsibility for this error, but indicated that it resulted from a miscalculation following receipt of information from Vicwest Steel about the Applicant's rate of pay. The Insurer paid $569.40 per week to the Applicant from November 19, 1990 to June 13, 1991.

33 Mark W. Reed of King-Reed & Associates Ltd., licensed private investigator, testified as to his surveillance observations of the Applicant. His reports were filed as exhibits. Also filed were seven black and white photographs taken of the Applicant on July 5, 1991, which show him in his employment as a tow truck operator.

34 The assistant claims manager testified that he confronted the Applicant with this evidence in the summer of 1991. He stated he was prepared to give the Applicant the benefit of the doubt when he and his friend both (falsely) denied that the Applicant had been employed as a tow truck operator.

35 Weekly income payments to the Applicant were reinstated, with interest, in October 1991. The Insurer terminated payments to the Applicant as of December 23, 1991 after receiving reports from two independent medical examinations of him by Dr. J.G. Stubbs on March 19 and October 31, 1991.

***Medical Evidence:***

36 Dr. Stubbs testified at the arbitration hearing. Dr. Stubbs initially acquired his medical training at Guy's Hospital, graduating in 1941. He obtained his master of orthopaedics in Liverpool in 1952. From 1955 until 1989, he practised in the City of Brantford. Now the largest part of his practice is performing independent medical examinations and consultations. Dr. Stubbs expressed concern that he had very little information with respect to Marcel Richardson when he examined him. There were only a few sketchy notes from the treating orthopaedic surgeon, Dr. R. McBroom, and the Applicant's family doctor. After examining him on both occasions, Dr. Stubbs stated the Applicant could return to construction and sheet-metal work.

37 Dr. Stubbs never reviewed any x-rays of the Applicant. He felt, however, that even if Mr. Richardson had experienced a fracture of L4 in the motor vehicle accident of November 19, 1990, this should have been well healed by October 31, 1991. He stated that on October 31, 1991, the Applicant had full movement of his neck; he reported some headaches; both his shoulders and abdomen were free of symptoms and findings. Dr. Stubbs' diagnosis with respect to the Applicant's lumbar spine was that he had suffered a "minor irritation of his back", a soft tissue injury leading to a "minor disability of the back", and that the Applicant was fully capable of returning to work at a heavy job.

38 Dr. Stubbs had only a sketchy knowledge of sheet-metal work as described by the Applicant. His evidence was that he knew that a sheet-metal worker "lifts heavy sheets of metal". He estimated that the sheet-metal worker would lift 60 to 80 pounds, not 120 pounds or more as reported by the Applicant. In Dr. Stubbs' opinion, the fact that a sheet-metal worker had to work bent over to weld and to pound laps into position had no influence on his finding that the Applicant was ready to return to work by April or November 1991.

39 No medical expert testified on behalf of the Applicant. Form 4 reports completed by Dr. McBroom and dated January 24, 1992, March 27, 1992 and September 18, 1992 were filed. In addition, Form 4 medical reports completed by physicians referred to by the Applicant as Dr. McBroom's residents were filed. These forms were dated January 29, 1992 and February 7, 1992. The March 27th Form 4 report of Dr. McBroom reads as follows:

**3. Examination/Objective Findings**

  

| | |
|---|---|
| Physical and Mental Findings and Limitations | Low Back Pain and Neck Pain |
| Other Limitations (psychological/psychiatric) | Nil |
| When did symptoms first appear? | Nov.12/90 |

Have you treated this patient for the same or similar condition prior to the accident (including pre-existing conditions which may be exacerbated by the current injury)?

If yes, state when and describe briefly. No

**4. Investigations / Test Results**

(include Dates) CT Scan disc bulge
Bone Scan - Negative

**5. Diagnosis or Classification**

Primary DDD lumbar

**6. Treatment Plan**

| | |
|---|---|
| Physiotherapy | Yes - Setup |
| Plan of Return Visits | |
| Further visits planned to | 92 09 |

**7. Duration of Disability**

What, after discussion, is the estimate of when the claimant will be able to return to work or normal activities? Indefinite

40 After his examination of the Applicant on September 18, 1992, Dr. McBroom wrote:

"unable to do repetitive lifting..." ..."will not return to previous heavy job — patient able to do modified work."

41 The Form 4 report of a physician, whose name appears to be Dr. P. Weiser, dated February 7, 1992, notes "to date - multiple investigations including CT Scan, Bone Scan, Plain Radiograph - only abnormality is small avulsion off superior end plate of lumbar vertebra L4." The diagnosis noted in that report is "chronic mechanical low back pain".

42 I questioned Dr. Stubbs about Dr. McBroom's diagnosis of degenerative disc disease lumbar and disc bulge and whether the degenerative disc disease was a likely result of the motor vehicle accident. Dr. Stubbs testified that, in his opinion, it was not likely a result of the accident, although he had not seen the x-rays. He believed it was more likely the result of natural wear which can occur at any age and is sometimes associated with overweight.

43 Dr. W. Robert Harris examined the Applicant, after a referral by the Director of Arbitrations on my recommendation, according to the provisions of section 282(5) of the *Insurance Act*. His report of September 21, 1992 states as follows:

  

> Examination revealed a 6 foot tall 240 pound heavily muscled man. There was no deformity or spasm in his neck and it had a full range of painless motion. Compressing the top of his head did not cause pain. There was no neurological change in the upper extremities, and each shoulder had a full range of painless active and passive motion. There was no deformity or spasm in his lower back and it had a normal range of painless motion. There was no neurological change in the lower extremities. The left calf was 2 cms. smaller in circumference than the right. Straight leg raising when supine was 90 degrees on each side and painless. The hips moved normally and peripheral pulses were easily felt.
>
> A large series of X rays were reviewed. Those made on the day of the accident of his neck are unremarkable. Those on the same day of his lumbar spine show a fracture of the upper front corner of the 4th. lumbar vertebra. Subsequent x rays showed that this fracture went on to heal in excellent position. Nuclear and computerised tomographic scans made 14 months after the accident were unremarkable.
>
> The diagnoses are: strain of his neck that has recovered, and fracture of the 4th. lumbar that has healed. The prognosis of the latter is guarded: experience shows that while these fractures heal satisfactorily, patients with them are never completely free of discomfort that interferes with their ability to do heavy work.
>
> He has reached a plateau of recovery and will not benefit from further investigation or treatment of any sort. His work is heavy involving moving sheets of metal weighing from 100 to 400 pounds on the girders of buildings under construction as well as a lot of kneeling and squatting. Thus I think his work requires permanent modification to avoid repetitive bending, lifting, kneeling and squatting. To this end he may require vocational retraining.

44 Dr. Harris was cross-examined by the Insurer's counsel on October 21, 1992 at the resumption of the hearing for that purpose. Dr. Harris' qualifications include practising as an orthopaedic surgeon since 1952, nearly all of that time at what is now called the Toronto Hospital. He is a Professor, Department of Surgery, Faculty of Medicine, University of Toronto.

45 Dr. Harris testified that, although the Applicant has a full, painless range of movement, in his expert opinion the fractured portion of L4 entered the disc space and damaged the disc. In Dr. Harris' view, the Applicant would have difficulty doing any heavy work, including the awkward lifting involved in drywall contracting. Dr. Harris stated, "I think he has a permanent disability that will limit his ability to bend and lift."

**Applicant's Argument:**

46 The Applicant in his argument indicated his ignorance of the temporary work provisions of section 16 of the *No-Fault Benefits Schedule*. He stated that he had great difficulty understanding the adjuster and stated that, perhaps if Mr. Bowers had explained the provision to him, "I would have been more honest with him. If they sent me a letter, it would have been simple". The Applicant also claimed that his insurance broker did not explain anything to him about his entitlement to benefits. He was in a hurry for the Applicant to sign the papers and get out. The Applicant stated that for him to pick up from here and go to a job is not going to be easy. He stated that he would have to lose some weight, re-strengthen his back, legs and torso and "it's going to take time".

47 The Applicant expressed that he felt disadvantaged at not having a detailed report from Dr. McBroom. He also felt Dr. Stubbs was likely to be influenced in his view of the Applicant's health by the fact that he was paid by the Insurer to write reports.

48 He explained his false statement to Royal Insurance about his work at Ray's Auto Towing as follows: "I felt threatened; I was going to get cut off permanently, so I said it wasn't me. If Royal Insurance had explained it to me, I would have been a lot more co-operative - I'm not a bum - I don't jump from job to job. In construction, you take work for three or four months. I like to do different things. I like to be kept busy. I came to Ontario to work; in New Brunswick, the only thing I could do was cut wood or starve."

 

**Insurer's Argument:**

49 On the first issue of the Applicant's entitlement to weekly income benefits, the Insurer conceded that there was a short-term disabling injury to the Applicant. The Insurer submitted that the Applicant did not suffer any disability after December 22, 1991. On the medical information, Dr. Stubbs says that the Applicant should be able to resume his employment. With respect to Dr. McBroom's diagnosis of degenerative disc disease, Dr. Stubbs says that this has not been traumatically induced.

50 The second issue concerns the amount of weekly income benefit payable. The Insurer conceded that from November 1990 to June 1991 the Applicant was not party to the error in calculating the weekly income benefits; the Insurer got its information from the Applicant's employer and made a mistake in calculating the amount payable. From June 1991 onward, however, the Insurer's counsel submitted, the Applicant is involved in a "misrepresentation".

51 The Insurer's counsel submitted three sets of calculations to show the Applicant is entitled only to the minimum weekly income benefit of $185.60 per week. He submitted that the appeal decision in *Vincenzo Scavuzzo v. Canadian Home Assurance Company* (O.I.C. File No. P-000626) should be confined to the facts of that particular case. He submitted in the *Scavuzzo* decision the Director's Delegate did not review the situation of seasonal or occasional workers.

52 The Insurer's counsel submitted that the Applicant had committed a fraud against the Insurer by concealing his work after the accident. After the Applicant's denial when confronted with photographs of him working, any payments made to him were made based on his misrepresentation. In June 1991, the Applicant made an attempt to return to work. His evidence after that is untrustworthy. There is no job presently available for him at Vicwest. The Applicant should be paid weekly income benefits only until he commenced work with Ray's Auto Towing. The Insurer is owed a repayment of $26,311.30, he submitted.

**Findings:**

***Entitlement to Benefits:***

53 The first issue to be determined in this arbitration is the Applicant's entitlement to weekly income benefits from December 23, 1991 forward. The Applicant is entitled to benefits after a motor vehicle accident pursuant to the provisions of section 12(1) of the *No-Fault Benefits Schedule* during the period in which he "suffered substantial inability to perform the essential tasks of his occupation or employment".

54 What was Marcel Richardson's occupation or employment? At the time of the motor vehicle accident, the Applicant was working as a material handler or sheeter-decker in the construction industry. In the year preceding the accident, he had also worked installing drywall, and from April 30 to May 22, 1990 as a trainee crane operator with Waxman Recycling. The Applicant testified that he quit the Waxman job because it paid $11.00 an hour and he wanted an increased rate of pay.

55 I find that the Applicant's occupation or employment was as a material handler or sheeter-decker in the sheet-metal industry. I find this employment required very heavy, physical labour. I find the Applicant's alternate employment was in another branch of the construction industry — the drywall trade. Working as a drywall labourer is also a heavy, physical job.

56 I find that the essential tasks of employment as a sheeter-decker include the ability to repeatedly drag or carry heavy sheets of metal, weighing over 100 pounds, a distance up to 200 feet, place such sheets in position and bend or kneel to pound the joints of the sheets together and weld them. The employment also requires a sense of balance: the sheeter-decker must walk on the beams of a new construction while dragging sheet metal, without falling between the beams.

57 Has Marcel Richardson suffered substantial inability to perform the essential tasks of this employment since December 23, 1991 as a result of the motor vehicle accident of November 12, 1990?

  

58 I have carefully reviewed the medical evidence which has been presented by the Applicant and by the Insurer. Eight medical reports postdate December 23, 1991, all prepared by the Applicant's doctors. In contrast to this are the two reports of Dr. Stubbs from March and October 1991. Dr. Stubbs remains of the view that the Applicant can return to his previous employment.

59 The evidence from the Applicant's physicians is very limited. There is very little objective evidence of findings on examination in the reports which were filed by the Applicant. Several of the reports stress that the Applicant must exercise and begin strengthening his paraspinal muscles. Dr. Weiser noted in February 1992 that he should see his family doctor for a program of weight reduction. Dr. McBroom completed a report on March 27, 1992, which indicates that this disability is indefinite, that physiotherapy should be set up, and that the Applicant suffers from degenerative disc disease of the lumbar spine. In the section of his report which is intended to note objective findings on examination, the only findings are "low back pain and neck pain", which, in my understanding, are not objective examination results. In his latest report of September 18, 1992, Dr. McBroom notes: "Unable to do repetitive lifting..."..."Will not return to previous heavy job. Patient able to do modified work."

60 Dr. W. Robert Harris, orthopaedic surgeon, acted as an advisor in this case, pursuant to the provisions of section 282(5)-(10) of the *Insurance Act*. Dr. Harris examined the Applicant and viewed a series of x-rays and other scans made of the Applicant's body. In his report, he concluded that the Applicant's work "requires permanent modification to avoid repetitive bending, lifting, kneeling and squatting." At the hearing, Dr. Harris testified it was his opinion that the Applicant could no longer work as either a material handler/sheeter-decker or drywall labourer as a result of the injuries he received in the accident.

61 When the expert opinions of Dr. Harris and Dr. McBroom are juxtaposed with the expert opinion of Dr. Stubbs, who never viewed any x-rays of the Applicant, I find the evidence of Dr. Stubbs is less persuasive. I accept the evidence of Dr. Harris and Dr. McBroom in preference to that of Dr. Stubbs, where his evidence is contradictory.

62 I find that the Applicant suffered substantial inability to perform the essential tasks of his employment from December 23, 1991 onward.

***Amount of Weekly Income Benefit:***

63 The second issue to be decided is the correct amount of weekly income benefit.

64 The Insurer has submitted that it made an error in computing the amount of weekly income benefit paid to the Applicant during the period November 19, 1990 to December 22, 1991. The Insurer now wishes to give the language of section 12(7) a restrictive interpretation. Section 12(7) reads as follows:

**Section 12.**

(7) The following rules apply to the calculation of gross weekly income:

1. A person's gross weekly income shall be deemed to be the greatest of,

i. his or her average gross weekly income from his or her occupation or employment for the four weeks preceding the accident,

ii. his or her average gross weekly income from his or her occupation or employment for the fifty-two weeks preceding the accident,

iii. $232.

  

65 The Insurer's staff received confirmation of the Applicant's income from Vicwest on December 4, 1990. The payroll administrator confirmed that the Applicant had earned $720.89 in the 32.5 hours he worked there. In some manner, the Insurer's staff translated 80% of these earnings into $569.40 (not $576.71). The Applicant was paid at this rate until December 22, 1991. The Insurer now submits that this calculation was in error, and the gross weekly income of the Applicant for the four weeks preceding the accident should be found by dividing his total gross income in the four weeks preceding the accident by four to give the proper average gross weekly income figure contemplated by section 12(7)1.i.

66 If, however, one interprets section 12(7)1.i in the manner of the arbitrator and the director's delegate in the *Scavuzzo* decision, cited above, only the Applicant's earnings for the weeks *in which he was employed* would be averaged in the calculation. Thus, the earnings of the Applicant in the four weeks preceding the accident should be viewed is as follows:

| **Week 1** | **Week 2** | **Week 3** | **Week 4** |
|---|---|---|---|
| $0 | $0 | $0 | $737.99{*} |

**Notes:** * Subsequent information, in the form of a T-4 slip from Vicwest, shows total earnings of $737.99. I have chosen this figure as the most accurate reflection of the Applicant's gross weekly income.

(not engaged in occupation or employment during weeks 1,2,3)

AVERAGE: $737.99 DIVIDED BY 1 WEEK = $737.99

BENEFIT: 80% of $737.99 = $590.39 (as per section 12(4) of the Schedule)

67 I adopt the reasoning of the arbitrator and the director's delegate in the *Scavuzzo* decision, cited above, in finding that the correct interpretation of the ambiguous wording of section 12(7) 1.i is that the insured's deemed gross weekly income includes only those weeks during the preceding four weeks that he was actually employed.

68 An alternate calculation could be performed using the total gross earnings for the 52 weeks prior to the accident, under section 12(7)1.ii. However, in the case of the Applicant, the evidence of the exact number of weeks worked is virtually impossible to reconstruct. Accordingly, I decline to attempt that calculation because of my findings with respect to the appropriate interpretation of section 12(7)1.i, the fact that his other work was remunerated at lower hourly rates, and the fact that the Applicant virtually reaches the maximum weekly income benefit of $600 in any event.

***Earnings post-accident:***

69 Black's Law Dictionary defines fraud as "an intentional perversion of truth for the purpose of inducing another in reliance upon it; ...it consists of some deceitful practice or wilful device...as distinguished from negligence, it is always positive, intentional."

70 The general principle with respect to fraud committed by an insured person is set out in section 233(1)(b) of the *Insurance Act*, R.S.O. 1990, c. I.8:

> Where,....
>
> > (b) the insured contravenes a term of the contract or commits a fraud;...a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.

71 However, section 233(2) protects no-fault benefits by stating:

> (2) Subsection (1) does not invalidate such no-fault benefits as are set out in the *No-Fault Benefits Schedule*.

72 The protection is reiterated in section 5 of the *No-Fault Benefits Schedule* itself.

  

73 The Applicant testified that he was employed by Ray's Towing in the summer of 1991 and by Lift Com 2000 Ltd. in December 1991 and January 1992. During almost all of that time, he was receiving weekly income benefits from the Insurer. The Applicant knew that he was being paid these benefits to replace his earnings lost as a result of the injuries he received in the accident, but he failed to notify the Insurer of his resumption of any employment.

74 I find that the weekly income benefits paid to the Applicant by the Insurer during the time he was working at Ray's Auto Towing and for Lift Com 2000 Ltd. were paid to him through fraud. Such benefits must be repaid to the Insurer, pursuant to the provisions of section 27(1) of the *No-Fault Benefits Schedule*.

75 The Applicant will, thus, fully repay four weeks' benefits received during the summer of 1991 and four weeks' benefits from December 1990. The Applicant is required to repay all the benefits received during those weeks, despite the wording of section 15 of the *No-Fault Benefits Schedule*, which would have allowed an exemption for 20% of the earnings, had he acknowledged his employment earlier.

76 The Applicant stated at the hearing that in June 1991 he was afraid that his benefits would be cut off if he revealed he was working. At the same time, he felt he would also be unable to return to his previous heavy employment.

77 The Applicant testified that he had difficulty understanding the adjuster for the Insurer. That adjuster still works for the Insurer, but he was not called as a witness in this matter. The claims manager testified that it was his understanding that this adjuster had explained the Applicant's obligations to him and the temporary return to work provisions. However, there was no documentation in the Insurer's file to support this contention. The Applicant denied that anyone had ever explained this provision.

78 I am not able to assess the ability of the adjuster to communicate clearly with the Applicant. I am of the view, however, from having seen the Applicant in three days of hearing, that he is essentially a straightforward and guileless person. The Applicant is not a sophisticated insured person. Through ignorance of the protections contained in section 16 of the *No-fault Benefits Schedule*, he feared losing his entitlement to any weekly income benefits, although he was doubtful of his ability to return to work at heavy, labouring jobs. Further, as a young man who had previously enjoyed an excellent level of physical conditioning, he was dismayed and depressed by his post-accident state of health.

79 Applicants who have been disabled from employment following an accident for a substantial period of time, and who held physically demanding jobs prior to the accident are legitimately concerned about their ability to return successfully to such work. In my view, in such cases, an insurer can improve service to its insureds by making doubly certain that it draws to an applicant's attention and fully explains, in writing, the provisions with respect to attempts to return to work, which are set out in section 16 of the *No-Fault Benefits Schedule*. It is important, for example, for an applicant to know that during the first two years following an accident, he or she has the opportunity to accept employment or return to work "for any period of time without affecting his or her benefits under this Part if, as a result of the accident, he or she is unable to continue at school or in the occupation or employment" (section 16(1).

80 In this case, the Applicant failed to disclose income he earned while receiving weekly income benefits and embarked into a spider web of untruths which I cannot condone. The evidence is clear that the Applicant intended to conceal his employment from the Insurer, and thereby deceive the Insurer, and I so find.

**Expenses:**

81 The Applicant seeks an award of the expenses he has incurred in this arbitration. An award for expenses may be made under section 282(11) of the *Insurance Act*, which provides as follows:

> 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.

  

82 The prescribed expenses and amounts are set out in Schedule 1 of the Dispute Resolution Practice Code and in Ontario Regulation 275/90 "Schedule".

83 In the *Ralph McCormick v. Economical Mutual Insurance Company* case, O.I.C. File No. A-000139, dated October 2, 1991, arbitrator Susan Naylor made the following comments about expenses, with which I agree:

> The discretion to award expenses should be exercised, having regard to the intent and purpose of the legislative scheme. The arbitration process has been established under the Insurance Act, as amended, in order to facilitate applicants' access to relatively inexpensive, speedy and informal adjudication of disputes regarding no-fault benefits. The discretion to award expenses should be exercised in accordance with this objective, having regard to the individual circumstances of each case.
>
> Accordingly, it is appropriate to award an applicant his or her expenses, unless, in the circumstances of the particular case, it is determined that the application for appointment of an arbitrator was manifestly frivolous or vexatious, or that the applicant's conduct unreasonably prolonged the proceedings.

84 In the *McCormick* case, Arbitrator Naylor did not specifically address the question of fraud by an applicant. It is certainly, however, within the spirit of the *McCormick* decision and the *No-Fault Benefits Schedule* itself to deny an applicant his expenses in such a case.

85 Although the Applicant may be basically a genuine and honest person, he attempted to perpetrate a significant fraud in the course of this insurance claim. Not only did he work at a time when he was collecting weekly income benefits from the Insurer, but when he was caught, he denied that the evidence presented by the insurance company was factual.

86 This is a case where expenses should not be awarded to an applicant. I deny the Applicant any claim for expenses based on his fraudulent activity in the course of this claim.

**Order:**

87

1. The Applicant is entitled to further weekly income benefits, from December 23, 1991 onward.

2. The correct amount of weekly income benefit payable to the Applicant is $590.39 per week.

3. The Applicant will repay to the Insurer, by means of a set-off, the sum of $4,555.20, which is comprised of eight weeks' benefits at the previously paid rate of $569.40.

4. The Insurer will pay interest on the overdue weekly income payments at the rate of 2 per cent per month from the date they became overdue, pursuant to section 24(4) of the *No-Fault Benefits Schedule*.

5. There is no overpayment by the Insurer.

6. The Applicant is not entitled to his expenses of this proceeding.

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