
Appeal P00-00050

OFFICE OF THE DIRECTOR OF ARBITRATIONS

STEVAN BAJIC

Appellant/Respondent

and

PAFCO INSURANCE COMPANY LIMITED

Respondent/Appellant

and

ZURICH INSURANCE COMPANY

Respondent

BEFORE: David R. Draper, Director of Arbitrations (A)

COUNSEL: Michael S. Brown (for Stevan Bajic)
Eric K. Grossman (for Pafco)
A. Jarvis Scott (for Zurich)

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that:**

1. The appeals are allowed in part and:

(a) Paragraph 1 is rescinded as replaced by the following order:

1. Pafco Insurance Company shall pay Mr. Bajic income replacement benefits at the agreed rate of \$185 per week between July 29, 1996 and October 27, 1997.

- (b) Paragraph 7 is rescinded, with the following issue to be decided by the arbitrator:

Is Mr. Bajic entitled to payment for items lost or damaged in the July 1996 accident under s.56 of the *SABS-1994*?

- (c) The other paragraphs challenged in the appeals are confirmed.

2. The question of appeal expenses is deferred. If the issue is not resolved, any party may ask, in writing and within a reasonable period, that I determine it.

June 5, 2001

David R. Draper
Director of Arbitrations (A)

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Stevan Bajic was involved in two automobile accidents — June 8, 1995 and July 22, 1996. Zurich Insurance Company (“Zurich”) is responsible for paying statutory accident benefits related to the first accident; Pafco Insurance Company (“Pafco”) is responsible for the second. Mr. Bajic’s entitlement to statutory accident benefits in respect of both accidents is governed by Ontario Regulation 776/93, as amended, the *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996* (“the SABS-1994”).

In a decision dated July 5, 2000, the arbitrator dealt with the various disputes about Mr. Bajic’s entitlement to benefits. Mr. Bajic and Pafco both appeal from this decision, raising questions about the determination of Mr. Bajic’s pre-accident employment duties, the proper test of entitlement for income replacement benefits (“IRBs”), the application of the repayment provisions, and the interest payable on the benefits found owing. For reasons that follow, I conclude that the arbitrator made errors of law that undermine some aspects of her order.

II. PRELIMINARY ISSUES

Following the release of the arbitrator’s decision, Mr. Bajic filed a *Notice of Appeal* and an *Application for Variation/Revocation*. He was represented by counsel in the appeal, but not in the variation/revocation proceeding. Pafco filed its own *Notice of Appeal*. All three proceedings were delegated to Director’s Delegate McMahon.

A telephone conference was scheduled to deal with two preliminary issues. First, the Delegate had to decide whether Mr. Bajic should be allowed to proceed with both his appeal and application for variation/revocation. This question arises under Rule 58.4 of the *Dispute Resolution Practice Code (Third Edition)*, which states the Director (or a delegate) may reject an application for variation/revocation if it is in respect of an order that is under appeal and the appeal is pending.

The second preliminary issue was raised by Pafco. Its lawyer, Mr. Grossman, advised Director's Delegate McMahon that they had informally discussed the case while the Delegate was still working in the arbitration unit. He asked the Delegate to withdraw from the case even if he did not recall the conversation, arguing that it was better to deal with the problem at the outset than have it arise during the course of the proceedings.

Both Mr. Bajic and his lawyer on the appeal, Mr. Brown, participated in the telephone conference. According to the Delegate's confirming letter dated October 18, 2000, he advised the parties that he had no recollection of discussing the case with Mr. Grossman. He also advised them that due to the present staffing demands in appeals unit, it might be some time before anyone else could deal with the first preliminary issue if he withdrew.

The parties agreed that Director's Delegate McMahon should decide whether Mr. Bajic could proceed with both an appeal and an application for variation/revocation. Not only did Mr. Bajic agree, he argued that Pafco's contention that the Delegate should not hear the full case was just an attempt to get a more sympathetic adjudicator.

After hearing submissions, Director's Delegate McMahon held that the variation/revocation duplicated the appeal and, therefore, rejected it. He gave Mr. Bajic a chance to file an amended *Notice of Appeal*

to add some issues from his application for variation/revocation, which he did approximately 10 days later.

Director's Delegate McMahon then dealt with the second preliminary issue. Having heard the ruling on the first issue, Mr. Bajic changed his position. He argued that the Delegate should withdraw and that his earlier ruling was a nullity. Although Director's Delegate McMahon was not convinced that his conversation with Mr. Grossman represented a conflict, he agreed that the wiser course was to withdraw to avoid any appearance of impropriety. He refused, however, to set aside his earlier ruling on the application for variation/revocation.

The appeal hearing took place on March 19, 2001. At the start of the hearing, Mr. Brown advised that Mr. Bajic was seeking an adjournment of the appeal to allow him to challenge Director's Delegate McMahon's decision to reject his application for variation/revocation. I denied this request. Mr. Bajic had not taken any steps in the past five months to challenge the decision. Nor had he given the other parties notice that he would be asking for an adjournment. Finally, and most importantly, he provided no real reason for questioning the decision. Mr. Bajic specifically agreed to have Director's Delegate McMahon decide the issue. The fact that the Delegate subsequently decided to withdraw to avoid any appearance of impropriety did not nullify his earlier decision.

III. BACKGROUND AND ANALYSIS

Mr. Bajic was a judge and practised law for 29 years in Yugoslavia. In 1991, he came to Canada as a refugee, along with his wife and two sons. In June 1992, Mr. and Mrs. Bajic obtained work permits and opened a variety store. Three years later, on June 8, 1995, Mr. Bajic was involved in the first automobile accident.

Mr. Bajic applied to Zurich for accident benefits, including IRBs. Zurich initially refused to pay IRBs, raising questions about his pre-accident condition and income. In April 1996, it provided formal notice of its position that he was not substantially unable to perform the essential tasks of his pre-accident employment as a result of the accident. Mr. Bajic asked to be assessed by a Designated Assessment Centre (“DAC”), as he was entitled to do. The DAC report was issued in May 1996, concluding that he did not meet the disability test. Three months later, in August 1996, Zurich made a lump sum payment to Mr. Bajic, representing IRBs at \$213.75 per week, plus interest, for the period from June 16, 1995 (one week after the accident) to August 1, 1996 — just after the second accident.

Mr. and Mrs. Bajic closed the variety store in July 1995, shortly after the first accident. Consequently, at the time of the second automobile accident on July 22, 1996, Mr. Bajic was not working. However, because he was self-employed within the 156 weeks before the second accident, he was entitled to claim IRBs, which he did. Pafco refused his claim, taking the position that he was already disabled at the time of the second accident.

The various disputes between Mr. Bajic and the two insurers went to arbitration in the summer of 1999. Although quantum had been a contentious issue, the parties agreed to \$185 per week. Mr. Bajic did not agree, however, that he should be required to repay Zurich for the difference between \$185 and the \$213.75 per week he was paid.

After the arbitration hearing was completed, but before the decision was issued, Mr. Bajic asked that the hearing be reopened to allow him to file some additional evidence — a CT scan and an MRI. His request was granted. In February 2000, the arbitrator received this evidence and heard submissions from the parties on its significance.

The arbitrator released her decision on July 5, 2000, making various orders that Mr. Bajic and Pafco challenge on appeal. In addition to challenging some of the arbitrator's substantive orders, Mr. Bajic claims the hearing was unfair for the following reasons:

- ! the translation services provided during the first two days were inadequate;
- ! his ability to concentrate was compromised by constant interruptions from counsel for Zurich and Pafco; and
- ! although the arbitrator accepted his new medical evidence, it was not given to the other medical witnesses for their further opinions.

I find little merit in these arguments. The claim that the interpretation services were inadequate is a bare assertion, unsupported by a transcript or any other evidence. Similarly, I have no basis for concluding that Mr. Bajic was unduly interrupted by counsel for the insurers. Finally, the reopening of the hearing was within the arbitrator's discretion. Mr. Bajic was allowed to file new medical evidence, with all parties then making submissions on its significance. The arbitrator was under no obligation to open the hearing more broadly. It was up to her to assess the evidence, including whether the CT scan and MRI compromised the medical opinions given earlier, which she did.

A. Income Replacement Benefits

This was the main issue at the arbitration hearing. Mr. Bajic claimed that as a result of injuries suffered in the two accident, he was entitled to ongoing weekly income benefits from August 1, 1996, the last day covered by Zurich's lump-sum payment. The arbitrator reached the following conclusions that are in issue in the appeals before me:

- ! By March 8, 1996, five months before the end of the period covered by Zurich in its lump-sum payment, Mr. Bajic was no longer substantially unable to perform the essential tasks of his pre-accident employment ("the substantial inability test") or

suffering a partial inability to carry on a normal life (“the partial inability test”) as a result of his injuries from the first accident. Therefore, Zurich was not ordered to pay any additional IRBs.

Mr. Bajic appeals, arguing that the arbitrator erred in defining his pre-accident employment as limited to three hours per day. He claims that he continued to meet the substantial inability test.

- ! Mr. Bajic misled Zurich, particularly with respect to his pre-accident condition and employment activities. As a result, he was ordered to repay Zurich the IRBs he received for the period between March 9, 1996 and August 1, 1996.

Mr. Bajic appeals, arguing that the only repayment issue before the arbitrator was whether he should be required to repay the difference between the agreed rate of \$185 per week and the \$213.75 per week paid by Zurich. He also submits that Zurich failed to give the required notice that it was seeking repayment.

- ! By October 27, 1997, Mr. Bajic no longer met the substantial inability test. However, he continued to meet the partial inability test up to the 104-week mark. Therefore, Pafco was ordered to pay IRBs at the agreed rate of \$185 per week between July 29, 1996 and July 22, 1998.

As with the first accident, Mr. Bajic appeals, arguing that the arbitrator erred in defining his pre-accident employment as limited to three hours per day. He claims that he continued to meet the substantial inability test.

Pafco accepts the arbitrator’s conclusion that Mr. Bajic was entitled to IRBs up to October 27, 1997, based on the substantial inability test. It submits, however, that the arbitrator erred in using the “partial inability” test to extend his benefits beyond that date.

- ! Mr. Bajic did not suffer a complete inability to carry on a normal life as a result of either accident at any point between June 8, 1995 and July 22, 1998.

Mr. Bajic appeals, arguing that the arbitrator erred in determining whether he met the complete inability test, effectively negating his entitlement to loss of earning capacity benefits (“LECBs”) when that issue was not before her.

1) *The substantial inability test*

Mr. Bajic submits that the arbitrator erred in defining his pre-accident duties and, as a result, imposed an inappropriately stringent test for entitlement to IRBs. For reasons that follow, I do not agree.

At the time of his accidents, Mr. Bajic was either working or had worked within the previous 156 weeks. In either case, he qualified for IRBs under Part II of the *SABS-1994*. This is the basis on which he applied and on which Zurich and Pafco considered his application. The relevant sections provide as follows:

7. (1) An insured person who sustains an impairment as a result of an accident is entitled to a weekly income replacement benefit if the insured person meets any of the following qualifications:

1. 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.
2. The insured person,
 - i. was not employed at the time of the accident,
 - ii. was employed at some point during the 156 weeks before the accident,
 - iii. was sixteen years of age or more or was excused from attendance at school under the Education Act at the time of the accident, and
 - iv. as a result of and within two years of the accident, suffers a substantial inability to perform the essential tasks of the employment in which the insured person spent the most time during the time period designated under subsection (2).

The arbitrator found that Mr. Bajic was working at the variety store at the time of the first accident, although not nearly as many hours as he claimed. The issue, therefore, was whether he suffered a substantial inability to perform the essential tasks of that employment and, if so, for what period.

The test for the second accident was whether Mr. Bajic suffered a substantial inability to perform the essential tasks of the employment in which he spent the most time during the period designated under s.7(2). Mr. Bajic designated the 156 weeks preceding the accident, making his work at the variety store the referent. As a result, his entitlement to IRBs from this accident turned on whether he suffered injuries that left him substantially unable to perform the essential tasks of this work.

The more difficult issue was determining the essential tasks of Mr. Bajic's work at the variety store. The complication was that Mr. Bajic was less than forthcoming about various pre-accident impairments that affected his ability to work. In my view, the arbitrator appropriately considered the evidence to determine the nature and extent of Mr. Bajic's employment. She concluded that at the time of the first accident, he was "capable of performing his job for up to three hours at a time, since he had a large measure of control over his work environment."

The arbitrator then determined whether either accident substantially prevented Mr. Bajic from working at this level — three hours at a time. She concluded that by March 8, 1996, he was no longer substantially unable to perform the essential tasks of his employment as a result of the first accident. With respect to the second accident, she concluded that Mr. Bajic was substantially unable to perform the essential tasks of his employment from July 22, 1996, the date of the accident, until October 27, 1997, but not beyond.

Mr. Bajic submits that the arbitrator's findings are inconsistent. In support of this contention, he points to the following excerpt where the arbitrator deals with surveillance done by a disability insurer shortly before the first automobile accident:

North American Life conducted surveillance at different times of the day on Mr. Bajic on March 1, 2, 3, 6 and 7, 1995. During the course of the week, Mr. Bajic is shown performing a wide range of his work-related duties at the store for up to three hours. Mr. Bajic admitted the contents of the surveillance videotape. The tape may reflect the full

extent of Mr. Bajic's abilities — that he could work at many aspects of his job for up to three hours at a stretch, on an intermittent basis. It is also possible to infer that Mr. Bajic was fully capable of performing his job. . . (p.8)

Mr. Bajic argues that if it is possible to infer that he was fully capable to performing his job prior to the first accident, his entitlement should be evaluated based on full-time work, not three hours a day. In my opinion, however, this is not a fair reading of the decision. When the excerpt is read in context, it is clear that the arbitrator weighed this evidence along with the rest of the evidence relevant to Mr. Bajic's pre-accident condition, concluding that he was only capable of working three hours at a time. There was evidence to support this conclusion and, therefore, no basis for interfering on appeal.

2) Repayment

As noted above, Zurich made a lump sum payment to Mr. Bajic representing IRBs up to August 1, 1996, at \$213.75 per week. By the time of the hearing, the parties agreed that he was only entitled to \$185 per week. In addition, the arbitrator found that by March 9, 1996, five months before the end of the period paid by Zurich, Mr. Bajic was no longer substantially unable to perform the essential tasks of his pre-accident employment. The arbitrator did not deal with the difference between \$213.75 and \$185 per week. However, she ordered repayment of the benefits paid for the period that he was not entitled to IRBs — March 9 to August 1, 1996. This order was made under s.70 of the *SABS-1994*, the relevant portions of which provide as follows:

70. (1) A person shall repay to the insurer any benefit received under this Regulation that is paid to the person through error, wilful misrepresentation or fraud.

(2) The obligation to repay a benefit received under this Regulation that was paid to a person through error does not apply unless notice is given under subsection (5) within twelve months after the payment was made to the person.

(5) If a person is required to repay an amount to an insurer under this section, the insurer,

(a) shall give the person notice of the amount that is required to be repaid;

Mr. Bajic submits that the arbitrator erred in two respects. One is easy to address. He argues that no benefits are repayable because Zurich failed to give the notice required by s.70(5). However, this provision only applies to repayments based on error, not wilful misrepresentation or fraud. Because the arbitrator found that Zurich made the payments as a result of both error and wilful misrepresentation, formal notice was not required.

The more difficult question is the scope of the repayment issue. As Mr. Bajic points out, Zurich did not make its lump-sum payment until August 1996, after the DAC had already issued its report. He submits that in these circumstances, it was inappropriate for the arbitrator to reopen the question of his entitlement up to August 1996. This argument has some initial attraction; insured persons should generally be able to rely on voluntary payments made by insurers. However, given the arbitrator's factual findings, Mr. Bajic must bear some responsibility for the unusual manner in which this case unfolded. Based on the material before me, I am satisfied that both the period of entitlement and the amount were in issue, as was the possibility of an overpayment based on the arbitrator's findings on either issue.

The breadth of the repayment issue is reflected in Zurich's *Response to an Application for Arbitration*, and in the general wording used in the pre-hearing letter to describe the issues in dispute: "Is Mr. Bajic liable to repay benefits which have been overpaid, pursuant to section 70 of the *Schedule*?" According to the arbitrator, Zurich asserted its claim for "a repayment of any overpayment of benefits."¹ I find nothing to suggest that this is an inaccurate description of the issue. As a result, I find

¹ Arbitration decision, p.41.

no error in the arbitrator's order that Mr. Bajic must repay the IRBs paid by Zurich for the period March 9 to August 1, 1996.

3) *The partial inability test*

The arbitrator held that Mr. Bajic could also qualify for IRBs if he suffered a partial inability to carry on a normal life, as defined in s.2 of the *SABS-1994*. The basis for this interpretation is not obvious. One possible explanation is that the arbitrator was considering Mr. Bajic's entitlement to other disability benefits ("ODBs") under Part V of the *SABS-1994*. The test for ODBs for the first 104 weeks is the partial inability test, with benefits payable at \$185 per week. The problem with this analysis is that s.19(1)(a) specifically states that an insured person is not entitled to ODBs if he or she ever met the qualifications for IRBs. This clearly would prevent Mr. Bajic from receiving ODBs, subject to the possible application of s.19(1)(b).

Paragraph 19(1)(b) of the *SABS-1994* allows an insured person who received IRBs to switch to ODBs if the IRBs were terminated because he or she permanently withdrew from the workforce.² While it might have been arguable that Mr. Bajic permanently withdrew from the workforce when the variety store closed, there is no indication that was his position or that either insurer relied on this argument to limit his right to claim IRBs. Nor did the arbitrator make a finding that Mr. Bajic had permanently withdrawn from the workforce. As a result, there was no basis for considering whether he was entitled to ODBs under Part V.

² The section also applies where the insured person's IRBs are terminated because he or she has turned 65 years of age. However, this provision is inapplicable because Mr. Bajic has not reached that age.

The more likely explanation is that the arbitrator interpreted s.10(2) of the *SABS-1994* to mean that Mr. Bajic was entitled to continue receiving IRBs at the rate of \$185 per week even if he did not meet the substantial inability test, as long as he met the partial inability test. Subsection 10(2) provides as follows:

- 10.** (2) Subject to subsection (3) and section 75, the amount of a weekly income replacement benefit shall not be less than \$185 if, during the week in respect of which the benefit is payable,
- (a) the insured person is suffering a partial or complete inability to carry on a normal life as a result of the accident, if 104 weeks or less have elapsed since the person first qualified for weekly income replacement benefits or weekly caregiver benefits; or
 - (b) the insured person is suffering a complete inability to carry on a normal life as a result of the accident, if more than 104 weeks have elapsed since the person first qualified for weekly income replacement benefits or weekly caregiver benefits.

The problem with this interpretation is that s.10(2) deals only with the amount of IRBs, not entitlement. The minimum of \$185 only applies “in respect of a benefit that is payable.” Section 7 of the *SABS-1994* sets out the various circumstances in which an insured person can qualify for IRBs. It includes different connections to the workforce, with the relevant disability test related to that work. Section 8 defines the period for which IRBs are payable. Generally, it is the period during which the insured person continues to meet the relevant disability test. In my opinion, the role of s.10(2) is simply to establish a minimum consistent with the amount paid to those who receive ODBs. It ensures that someone who qualifies for IRBs but had minimal pre-accident income will be paid at least \$185 per week if he or she suffers a partial or complete inability to carry on a normal life for the first 104 weeks. After 104 weeks, he or she must be suffering a complete inability to carry on a normal life to qualify for the minimum.

Because the parties agreed that \$185 per week was the appropriate rate, there was no reason for the arbitrator to refer to s.10(2). This error did not affect the arbitrator’s order with respect to the first accident, as she found that by March 8, 1996, Mr. Bajic no longer met either the substantial inability or

partial inability tests. However, it did affect her conclusions about the second accident. At page 22 of her decision, the arbitrator makes a clear finding that by October 27, 1997, Mr. Bajic was no longer substantially prevented from performing the essential tasks of his pre-accident work due to the July 1996 accident. As there was no authority for extending his entitlement based on the partial inability test, Pafco's appeal must be allowed. Its obligation to pay IRBs ends on October 27, 1997.

4) *The complete inability test*

The arbitrator found that Mr. Bajic did not suffer a complete inability to carry on a normal life, as defined in s.3 of the *SABS-1994*, as a result of either accident at any point between the date of the first accident and 104 weeks after the second accident. On appeal, Mr. Bajic submits that she erred in deciding this issue. His objection is that by doing so, she effectively determined that he was not entitled to LECBs, an issue that was not before her.

While I agree that the arbitrator erred in considering the complete inability test, my reasons are different. As set out in the previous section, the appropriate issue was whether as a result of either accident, Mr. Bajic suffered a substantial inability to perform the essential tasks of his pre-accident employment and, if so, for what period. By deciding that he did not meet this test for 104 weeks as a result of either accident, the arbitrator effectively ruled out LECBs. This was a necessary implication of her findings on the issues before her. The fact that she also considered Mr. Bajic's entitlement based on the partial inability and complete inability tests, while in error, did nothing to further prejudice his position with respect to LECBs.

B. Supplementary Medical and Rehabilitation Expenses

The arbitrator ordered Zurich to pay transportation expenses for 16 physiotherapy treatments. In addition, she ordered Pafco to pay transportation expenses for 49 physiotherapy treatments, plus \$20 for a physiotherapy assessment and \$9.47 for a prescription expense. She concluded, however, that Mr. Bajic was not entitled to the cost of leasing a car from his son.

In his amended *Notice of Appeal*, Mr. Bajic submits that the arbitrator “erred in not properly addressing the issues of supplementary medical benefits and rehabilitation benefits.” No further details are provided, nor was this part of the appeal explained in his written or oral submissions. As a result, I find no basis for disturbing the arbitrator’s order.

C. Attendant Care

At the arbitration hearing, Mr. Bajic claimed attendant care benefits from both insurers for services performed by his wife and two sons. The arbitrator rejected most of this claim, finding no attendant care benefits payable in relation to the first accident, and ordering Pafco to pay only \$807.31 in relation to the second.

Mr. Bajic argues that the arbitrator had no basis for rejecting his claim. In his submission, the only contrary evidence came from Dr. Goldstein, but his report, dated October 1998, only said that no **further** care was required.

According to s.283(1) of the *Insurance Act*, appeals are limited to questions of law. In my view, this ground of appeal does not raise a question of law. It simply challenges the arbitrator’s assessment of the evidence. A great deal of evidence was presented at the arbitration hearing about Mr. Bajic’s condition at various points, much of it contradictory. It was the arbitrator’s function to review this

evidence and make factual findings, including whether Mr. Bajic's injuries necessitated attendant care. I find no reason to conclude that she did otherwise.

Pafco also challenges this part of the arbitrator's order. In its submission, the onus was on Mr. Bajic to prove his claim and, therefore, the arbitrator erred in law by searching for ways to resurrect a claim that she effectively conceded was not proven. In support of its position, Pafco points to the following aspects of the decision:

- ! The arbitrator describes the evidence on this issue as "limited."
- ! The arbitrator uses the testimony of Mr. Bajic's son, Goran, that he needed attendant care in relation to the **first** accident to support her order for attendant care due to the **second** accident. The arbitrator's reasons follow:

I find no persuasive evidence that Mr. Bajic required attendant care as a result of the June 1995 accident. Goran testified that after the first accident his father was completely unable to perform simple tasks such as getting out of bed, walking, sitting down, etc., and at that point they realized that his father was seriously hurt and really needed some help in order to recover. I find it probable that Goran's recollection relates to the period after the second accident in July 1996. (p.31)

- ! The arbitrator acknowledges that she had no evidence to establish the extent or nature of the attendant care services provided. Her reasons follow:

Mr. Bajic claimed attendant care services on the basis that his wife and sons assisted him following this accident [the second accident]. Mr. Bajic, Mrs. Bajic and Goran Bajic all testified, yet provided no evidence of the amount of time expended, and how those services could be fitted into the categories set out in Form 1 [from the DAC guideline]. In the circumstances, I take a somewhat arbitrary approach. (p.32)

Arbitrators must be given broad authority to make findings based on all the evidence. They are in the best position to assess it and, therefore, appeal adjudicators should be slow to interfere. In my view, this case falls at the extreme. With respect to Goran's evidence, Pafco was placed in a difficult position;

how does it challenge evidence that apparently places responsibility for attendant care costs on Zurich, not Pafco? If this had been the only basis for the arbitrator's finding, I would be concerned. However, by linking it with Mr. Bajic's evidence and the medical records, I am satisfied there was sufficient evidence to support the arbitrator's finding that Mr. Bajic required "some assistance" following the second accident.

On the amount of the benefits, the arbitrator's choice of word "arbitrary" is unfortunate. As I read the decision, she meant to convey that the claim did not necessarily fail in its entirety because the details were not proven. I accept this proposition. In this case, the arbitrator found that although Mr. Bajic failed to establish that he required the level of attendant care claimed, the evidence established that he needed at least the care that she ordered. In my view, this was within her authority.

D. Housekeeping Expenses

The arbitrator held that Mr. Bajic failed to establish that before the accident, he did 17½ hours housekeeping per week that his wife had to assume after his accidents. In his amended *Notice of Appeal*, Mr. Bajic simply contends that the arbitrator erred in failing to find that he was entitled to reimbursement for housekeeping expenses. This issue was not pursued in either his written or oral submissions. As a result, there is no basis for questioning this part of the order.

E. Lost and Damaged Items

At the arbitration hearing, Mr. Bajic claimed reimbursement for items he says were lost or damaged in the second accident: his bicycle, shirt, shorts, sunglasses and watch. This claim was made under s.56 of the *SABS-1994*, which requires the insurer to pay the reasonable expenses incurred to repair or replace

clothing worn by the insured person at the time of the accident, prescription eyewear, dentures, hearing aids, prostheses, other medical or dental devices, and other personal items belonging to the insured person that are lost or damaged in an accident.

According to the arbitrator, Mr. Bajic testified that he submitted price tags from comparable items to Pafco. In its *Explanation of Assessment*, Pafco asked for an estimate for the repair of the bicycle, production of the damaged items for verification and an estimate for the repair of the watch. This information apparently was not provided. At the arbitration hearing, Mr. Bajic relied on the same price tags to establish his claims. He testified that he probably replaced some of the items, but refused to provide receipts because Pafco had rejected his claim. In turn, Pafco argued that the bicycle was not covered by s.56, and that Mr. Bajic had failed to prove any of the losses claimed.

In her decision, the arbitrator refers to the Report of Mediator, which neither Mr. Bajic nor Pafco raised during the hearing. It states that “Pafco agreed to pay for clothing, a watch and a bicycle lost or damaged in the accident, upon receipt of estimates from Mr. Bajic of the cost of repair or replacement of these items.” The arbitrator held that in light of this agreement and the absence of any evidence that the report misstates what happened during mediation, there was no dispute and, therefore, she had no jurisdiction to decide the issue. As a result, she encouraged the parties to comply with their respective obligations under this agreement within 30 days.

Both Mr. Bajic and Pafco submit that the arbitrator erred in refusing to decide this issue. I agree. At a minimum, she should not have declined jurisdiction without giving the parties a chance to address that issue. However, I see no reason the arbitrator could not have done what the parties asked — decide whether Pafco was obliged to pay Mr. Bajic’s claim for lost and damaged items.

Mandatory mediation is meant to ensure that disputes do not go to arbitration or court without an initial effort to resolve them by agreement. It is not intended to impede legitimate actions. In this case, there is no suggestion that either party attempted to avoid mediation. The issues in dispute were mediated, with most of them remaining unresolved. Although an agreement was reached with respect to the lost or damaged items, it was contingent on Mr. Bajic providing some additional information. A final resolution was never achieved. This left a dispute about entitlement that had been mediated. In these circumstances, there was no legal impediment to including it among the disputed issues that Mr. Bajic chose to pursue through arbitration. As a practical matter, there was every reason to do so.

The question is how to proceed at this point. My understanding is that arbitration expenses are still in issue, although the parties agreed to wait for the appeal decision before returning to the arbitrator for a decision. Given that, the most sensible approach is to refer Mr. Bajic's claim for lost and damaged items back to the arbitrator. As both parties expected her to decide the issue following the hearing, there should be no need for further evidence. However, I will leave that to the arbitrator's discretion. She can also determine whether any further written or oral submissions are needed.

F. Interest

Pafco challenges the arbitrator's order that it pay interest on the IRBs from 30 days after it received the health practitioner's certificate dated August 25, 1996. The relevant section of the *SABS-1994* provides as follows:

68. If payment of a benefit under this Regulation is **overdue**, the insurer shall pay interest on the overdue amount for each day the amount is overdue from the date the amount became overdue at the rate of 2 per cent per month compounded monthly. [emphasis added]

In Pafco's submission, benefits cannot be “overdue” unless they are “due.” In turn, benefits cannot be due until the insured person establishes that they are owing. Because interest under s.68 is payable at the “punitive” rate of 2 per cent per month, Pafco argues that it cannot have been intended to apply until the insured person has proven his or her claim, and the benefits are found owing and “due.” In this case, Pafco claims that its obligation to pay IRBs could not be determined without weighing the evidence and testimony through the dispute resolution process. As a result, it submits that interest should not run until the dispute resolution process is concluded, including this appeal.

In my opinion, Pafco's interpretation goes too far. It suggests that interest rate is only payable if the insurer fails in its duties — a test similar to s.282(10) of the *Insurance Act* for special awards. While "overdue" must be given meaning, I find no indication that the legislative intention is to relieve insurers from paying interest whenever the insured person's entitlement is questionable. On the contrary, the high rate of interest imposed by s.68 is clearly meant to encourage insurers to pay benefits in a timely fashion.

Pafco's interpretation would be far more attractive if the legislation included an option to order interest at a lower rate. However, it does not. Pafco suggests this is an oversight, but I find no basis for this assertion. As Director's Delegate Naylor stated in *Sebastian and Canadian Surety Company*, (FSCO P96-00032, July 28, 1998), the interest provisions are remedial, not punitive. They are “designed not only to compensate applicants for the value of money withheld but to further the system's fundamental goal of ensuring prompt payment of benefits for an injured person's medical and vocational rehabilitation, their care or their day-to-day financial support.”³ I agree with this analysis, although as I held in *Trendle and Economical Mutual Insurance Company*, (OIC P96-000009), there are limits. If the insured person acts in a manner that effectively prevents the insurer from assessing his or her entitlement, interest may not run.

³ Sebastian was decided under similar provisions in the predecessor to the *SABS-1994*, O.Reg. 672, as amended, the *Statutory Accident Benefits Schedule— Accidents before January 1, 1994*.

In this case, Mr. Bajic applied for accident benefits, including IRBs. Pafco asked for a health practitioner's certificate, as it was entitled to do under s.60 of the *SABS-1994*. According to that section, the certificate is to be completed by a health practitioner of the insured person's choosing and must set out the cause and nature of the impairment, an estimate of the duration of the disability caused by the accident and a treatment plan. Mr. Bajic provided a certificate dated November 20, 1998, from Dr. G. Jeremias, an orthopaedic surgeon who had been treating him since 1994.

Pafco's obligations at this point in the process are found in s.62 of the *SABS-1994*. According to s.62(1), it was obliged to mail or deliver "a weekly benefit that is payable" to the insured within 14 days of receiving the application, and at least once every second week "while the insured person remains entitled to receive the benefits." Subsection 62(4) specifically states that "an amount payable under Part II . . . is overdue if the insurer fails to comply with subsection (1) or (2)." The only exception is found in s.62(5), which states that "a payment is not overdue if the insurer required that a certificate be furnished under section 60 in respect of payment and more than six weeks have elapsed without the certificate being furnished." As Mr. Bajic provided a certificate, the application of this section is far from obvious.

The other relevant provision is s.62(8), where the insurer refuses to pay weekly benefits. It states:

- 62. (8)** If the insurer refuses to pay weekly benefits under Part II, section 14 or Part IV or V, it shall give the insured person notice of the reasons for the refusal,
- (a) within 14 days after receiving an application for the benefits, if the refusal occurs before the application is approved;
 - (b) by the day on which it would have paid the next weekly benefit, if the refusal occurs after the application is approved.

The certificate completed by Dr. Jeremias indicated that Mr. Bajic was unable to perform his normal daily activities and could not work. However, it also indicated that he was totally disabled prior to the

accident. Pafco sought clarification from Dr. R. Timarac, Mr. Bajic's family doctor, and ultimately refused to pay IRBs. The arbitrator found it reasonable for Pafco to ask for clarification, but held that it should have dealt with Dr. Jeremias, the health practitioner chosen by Mr. Bajic to complete the form, not Dr. Timarac. As a result, she concluded that Pafco's request for clarification did not prevent the benefits from becoming overdue. In effect, she found that Mr. Bajic did not prevent Pafco from responding to his claim. This was within her authority and, therefore, I have no basis for interfering.

Before leaving this issue, I note that Pafco specifically objected to the arbitrator's criticism that it should have contacted Dr. Jeremias, not Dr. Timarac. It contends that this flies in the face of her finding that Dr. Jeremias retired. However, the arbitrator states that Dr. Jeremias retired in 1997, well after he completed the health certificate in August 1996. As a result, I find no inconsistency.

G. Special Award

The arbitrator concluded that neither Zurich nor Pafco unreasonably withheld or delayed the payment of benefits and, therefore, were not ordered to pay a special award under s.282(10) of the *Insurance Act*. Mr. Bajic appeals, claiming the arbitrator erred in refusing to order a special award, particularly against Pafco which paid virtually no benefits up to the date of the arbitration. Again, however, I am not persuaded this ground of appeal raises any question of law. The arbitrator's decision turned on her assessment of the evidence. I find no basis for concluding that she failed in her duty to consider the evidence, or applied the wrong test under s.282(10) of the *Insurance Act*.

IV. APPEAL EXPENSES

Given that arbitration expenses are still in issue, I am deferring my decision on appeal expenses. I encourage the parties to attempt to resolve expenses as a total package. If that proves impossible, any

party may ask in writing for a decision on appeal expenses, including the amount. This should be done in a timely fashion. If a decision is needed, it likely will be based on written submissions.

June 5, 2001

David R. Draper
Director of Arbitrations (A)