FSCO A97–002186

BETWEEN:

CUONG Q. TRAN

Applicant

and

PAFCO INSURANCE COMPANY LIMITED

Insurer

REASONS FOR DECISION

Before: John Wilson

Heard: February 14, 2000, at the Offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Michael Krylov, Student-at-Law for Mr. Tran
Jennifer Griffiths for Pafco Insurance Company Limited

Issues:

The Applicant, Cuong Q. Tran, was injured in a motor vehicle accident on October 3, 1996. He applied for and received statutory accident benefits from Pafco Insurance Company Limited ("Pafco"), payable under the *Schedule.* [See note 1 below.] Pafco terminated weekly income replacement benefits on March 6, 1997. The parties were unable to resolve their disputes through mediation, and Mr. Tran applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

* * * * * * * * * *
Note 1: The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94, 463/96 and 304/98.

* * * * * * * * * *

The issues in this hearing are:

1. Is Mr. Tran entitled to receive a weekly income replacement benefit pursuant to section 7 of the *Schedule* from March 6, 1997 and onwards ?

2. What is the amount of weekly income replacement benefit that Mr. Tran is eligible to receive?

3. Is Mr. Tran entitled to supplementary medical expenses for physiotherapy, medication and transportation claimed pursuant to section 10 of the *Schedule*?

4. Is Mr. Tran liable to pay an amount to Pafco that does not exceed the amount assessed against Pafco in respect of the arbitration, pursuant to subsection 282(10) of the *Insurance Act,* because he commenced an arbitration that is frivolous, vexatious or an abuse of process?

5. Is Mr Tran liable to repay Pafco the benefits he received pursuant to section 70 of the *Schedule*?

6 Is Pafco liable to pay a special award pursuant to subsection 282(10) of the *Insurance Act* because it unreasonably withheld or delayed payments to Mr. Tran?

7. Is Pafco liable to pay Mr. Tran's expenses in respect of the arbitration?

8. Is Mr. Tran liable to pay Pafco's expenses in respect of the arbitration?

Result:

1. Mr. Tran is not entitled to a weekly income replacement benefit.

2. The amount of the income replacement benefit is zero.

3. Mr. Tran is not entitled to supplementary medical expenses.

4. Mr. Tran is not liable to pay an amount to Pafco pursuant to subsection 282 (10) of the *Insurance Act*.

5. Mr. Tran is liable to repay the benefits he received subsequent to January 22, 1997, pursuant to section 70 of the *Schedule.*

6. Pafco is not liable to pay a special award.

7. The parties may make submissions about expenses if they are unable to agree.

EVIDENCE AND ANALYSIS

Mr. Tran has had an extraordinary run of bad luck. In the past nine years he has had no fewer than six motor vehicle accidents, of which at least two are directly relevant to this arbitration.

Prior to the motor vehicle accident of October 3, 1996, Mr. Tran testified that he was working at two jobs. The first, at United Window Manufacturers, he had held since September 9, 1996. The second, an after-hours employment with E.T. Marble, also began on September 9, 1999.

At the hearing, Mr. Tran testified about his involvement in the motor vehicle accident of October 3, 1996. He stated that he was a backseat passenger in a car driven by a friend when it was hit at an intersection. He stated that he hit his head during the accident.

Following the accident, Mr. Tran was taken by ambulance to the Toronto Hospital (Western Division) where he was assessed, and x-rays were taken. On October 5, 1996, he visited Dr. Ajay Varma, his family physician at the time, where he reported problems with his neck, low back and head. Dr. Varma completed a Health Practitioner's Certificate on October 17, 1996 that listed "soft tissue injuries to neck, low back and skull," and concluded that Mr. Tran could not return to work.

Credibility:

Mr. Tran's case for benefits is based primarily on his own testimony at the hearing, and his own representations to medical practitioners and others during the course of the claims procedure. Mr. Tran called no other witnesses.

Mr. Tran submitted a Health Practitioner's certificate, completed by Dr. Ajay Varma on October 17, 1996, relating to the accident which took place on October 3, 1996. Dr. Varma listed as his primary diagnosis, "soft tissue injuries to neck and low back and skull." Elsewhere on the form, he drew a line through the space following the question: "If you treated the applicant for similar conditions prior to the accident, please describe including date of onset."

Mr. Tran had only just begun to see Dr. Varma, having previously been treated by Dr. Rajendra Beharry, a family doctor. According to the D.N. therapy records, Dr. Beharry had referred Mr. Tran to D.N. Physiotherapy for treatment arising from the October 3, 1996 accident. D.N.'s initial report, dated November 13, 1996, written by Steven Covey, chiropractor, stated: " His past history revealed only four months of rehab at another clinic for a previous MVA, apparently in Oct of 1995."

In a statement taken down by an adjuster from Pafco on February 3, 1997, Mr. Tran noted a previous accident "... in 1994 or 1995." Later in the statement he also recalled "...I had another car accident 3 or 4 years ago and was hurt at that time as well." He went on to state: "I have had three accidents and have made three insurance claims."

During his cross-examination at the arbitration hearing, Pafco presented Mr. Tran with evidence that he has been involved in no fewer than six accidents within recent memory. Indeed, at the time he made his statement to the adjuster on February 3, 1997, Mr. Tran was seeing yet another physician, Dr. Alex Donskoy, concerning an accident that took place on January 22, 1997. During the same period Mr. Tran saw at least seven primary physicians, essentially using a different physician for each accident.

From his testimony at the arbitration and the documents filed by the Insurer, it is apparent that Mr. Tran frequently neglected to inform each physician of his complete history of accidents and

the resulting treatments. He also seems to have suffered from the same amnesia when applying for accident benefits for each accident.

When asked for details about his reporting to Pafco of the January 22, 1997, accident, Mr. Tran found that his memory failed him.

When asked at the hearing whether he told Dr. Varma about the other motor vehicle accidents, Mr. Tran testified that he did not remember. Indeed most specific questions concerning his accidents and treatment were answered in the same manner.

The Insurer obtained copies of other accident benefit files from two other insurers, Liberty Mutual, and Royal and Sun Alliance.

In a report dated December 23, 1998, Dr. D. Katz, a physiatrist, examined Mr. Tran's then current state of health. Although the report concerned injuries arising from an accident on September 19, 1998, Dr. Katz asked Mr. Tran about his past injuries. At page 3, Dr. Katz reports:

> About three years ago he had a minor car accident, but no injuries were apparently sustained at that time. He denies ever having been similarly injured. He has no history of prior orthopaedic or arthritic problems and no other significant medical or surgical problems.

On May 26, 1997, Mr. Tran also provided a selective history to his examiners. The assessor at a Functional Capacity Evaluation reported:

> Mr. Tran reports having no medical conditions and being in good health except for musculoskeletal symptomology that he has been experiencing since October 3, 1996 as a result of a motor vehicle accident (MVA). It seems that he was also involved in a MVA in 1994.

Conspicuous in its absence is the intervening January 22, 1997 motor vehicle accident. Following another motor vehicle accident on September 19, 1998, Mr Tran attended at a Work Capacity Evaluation performed by AssessMed. The Assessor wrote on December 15, 1998: "There are no pre-existing medical conditions of which I am aware."

Given the number of different motor vehicle accidents some confusion about their sequence and consequences would have been understandable. However the evidence presented by the Insurer of the pattern of Mr. Tran's conduct during his six motor vehicle accident claims leads inexorably to the conclusion that he not only failed to provide certain information, but may also have either inadvertently or actively misled insurers in support of some of his claims.

I find that Mr. Tran consistently failed to disclose his previous accident, injuries and treatments to his various insurers, and has not been a reliable historian concerning his accident. In addition, he has consistently testified that he has little or no recall of the details of his accidents and his claims. I find that Mr. Tran is an unreliable witness, whose recollection of events should not be accepted unless corroborated by other extraneous evidence.

Eligibility for weekly income replacement benefits:

In order to be entitled to Income Replacement Benefits, Mr. Tran has the burden of proving that he suffered a disability, arising from the October 3, 1996 accident, that prevented him from carrying out the essential tasks of his employment.

I find that Mr. Tran has failed to make out a case for entitlement to income replacement benefits based on the following analysis of the evidence presented at the hearing.

Employment:

Mr. Tran claimed to have been employed at two jobs, prior to the October 1996 accident. His primary work was with United Window Manufacturers Inc. of Concord, where he had worked as a machine operator since September 9, 1996.
Mr. Tran's secondary employment was claimed to be with E.T. Marble and Tiles Ltd. in Maple Ontario. He also claimed to have commenced work there on September 9, 1996.

Both employers filed Employer's Confirmation of Income Forms (OCF-2). In the case of United Windows, it was completed by the accounting manager. In the case of E.T. Marble, it was completed by Mr. Neil Nguyen, the president of the company.

In addition to the Employer's Confirmation, United Windows provided its entire employment file for the duration of Mr. Tran's employment. Stamped time sheets which formed part of the employment record show that Mr. Tran worked between eight and ten hours per day, starting around 7:00 a.m. and finishing between 4:00 and 6:00 p.m. on most days. I have no doubt, based on the detailed records supplied, including the Record of Employment, that he worked at United Windows between September 9, 1996 and October 2 , 1996, which would meet the minimum period of employment required for qualification for income replacement benefits under the *Schedule*.

The case for the part-time employment at E.T. Marble is, however, somewhat more problematic. Although the company president submitted a handwritten payroll record, copies of cancelled cheques, and an undated T4 to support Mr. Tran's claim to have worked with E.T. Marble, Pafco has suggested that it was unlikely that the employment was as represented.

When asked particulars about the timing and location of the E.T. Marble work, Mr. Tran had some difficulty in replying. He did, however state that someone from E.T. Marble usually picked him up at home, after having completed his day's work at United Windows. He testified that it took him some 15 to 20 minutes to reach home from the United Windows plant.

He was unable, as well, to identify any of the worksites, although he did add that most were private homes. He was also unable to remember the names of any co-workers, other than Mr. Nguyen. Nor could he testify as to the type of work Mr. Nguyen performed.
By his testimony it took at least some 15 to 20 minutes to reach his home after leaving United Windows. Only on arrival at his home would Mr. Tran call E.T. Marble for a pick-up. Allowing for some delay if the van was to come from Maple, where Mr. Nguyen lived and where E.T. Marble had its address, Mr. Tran would have been unlikely to be available for work for at least an hour after he finished his shift at United Windows.

I note that his time sheets at United Windows show Mr. Tran not finishing work until 6:00 p.m. on many nights. Certainly the arrival at any work site must have been quite late in the day. Counsel for Pafco observed, and I accept, that it would be improbable for installation work in private homes to be done, routinely, in the small hours of the morning.

If the work sheets for the two employments are compared for the week ending September 29, Mr. Tran is shown working some 63 hours at United Windows, plus an additional 29 hours at E.T. Marble. Without allowing for any time for meals or transportation, Mr. Tran is alleged to have worked some 92 hours in total over the week.

In addition to his own testimony, Mr. Tran relied on payroll documents from his two employers as evidence. I find that the documents submitted from United Windows are, on the balance, authentic. They include stamped time cards, and the records have been created by persons apparently disinterested in Mr. Tran's claim. I accept that they are authentic copies of the records of Mr. Tran's employment with United Windows and should be admissible pursuant to subsection 15(4) of the *Statutory Powers Procedure Act*.

I find that Mr. Tran has met the onus of proving his employment with United Windows commencing September 9, 1996.

I have greater difficulty with the records produced by E.T. Marble. The records are produced by a company that has no place of business other than the principal's home. They involve employment at jobsites that the Applicant cannot remember, and hours of work that at best seem implausible.

Although there are cancelled cheques produced, made out to Tran Quang Cuong, the cheques are cashed under an indecipherable signature, and there is no notation on the cheques indicating that they are in payment for wages. Indeed, I have no evidence before me that the Tran Quang Cuong named on the cheques is the Quang Cuong Tran who is the subject of this arbitration. I am not satisfied that the photocopies of the documents produced by E.T. Marble are necessarily authentic copies of an employment file of Quang Cuon Tran with E.T. Marble. Consequently, I find that they are not admissible and should not be considered as evidence of Mr. Tran's employment with E.T. Marble.

Given Mr. Tran's evasive testimony concerning his work at E.T. Marble, the lack of testimony from Mr. Nguyen of E.T. Marble, and the questions raised by the evidence and documents submitted, I find that Mr. Tran has failed to meet the onus of establishing his employment with E.T. Marble.

Essential tasks:

Mr. Tran's work with United Windows as a machine operator was described by his employer in the Employer's Confirmation of Income as "...cleans corners of windows." The Functional Capacity Evaluation Report presented by Canada Accident Rehab Group (CARG) provided a description of his job-related tasks:

> As a machine operator, he slides plastic window frames onto a trimming machine and then rotates the frame as the machine cuts each side. Critical job demands for this task are standing, walking, twisting, and reaching. Sometimes he is required to install a sliding frame; he sits down during this task.

This description is consistent with Mr. Tran's evidence at the hearing**.** I accept the finding of the Functional Capacity Evaluation that Mr. Tran had a light-to-medium industrial job which required a capacity to stand and operate machinery over a period of time and occasionally to push or lift window units as part of the manufacturing process.

Disability:

Pafco paid Mr. Tran income replacement benefits until March 5, 1997. It alleges that his entitlement ended, at the latest, on January 22, 1997, the date of his first subsequent accident.

Mr. Tran alleges that he suffered an ongoing disability arising from the accident of October 3, 1996, that prevented him from carrying on the essential tasks of his employment. Although it is apparent from subsequent accident benefit applications that Mr. Tran may have suffered further injuries in the intervening period, his claim in this arbitration is for ongoing injuries resulting from the October 3 accident.

Dr. Varma's Health Practitioner's certificate, issued October 17, 1996, indicated that Mr. Tran suffered from soft tissue injuries to the neck and low back, as well as from headaches.

Pre-existing complaints:

Despite Dr. Varma's notation that he had not treated Mr. Tran for these conditions, Mr. Tran had a long history of similar problems, apparently arising from his involvement in motor vehicle accidents.

A November 14, 1994 Health Practitioner's certificate issued by a family doctor, Dr. Herman Ng, lists post-traumatic headache, straining of neck muscle, soft tissue injury of the lumbar spine and

strain of the shoulder as Mr. Tran's symptoms. A January 6, 1995 certificate by the same doctor lists shoulder, neck and lower back as the problem areas for Mr. Tran.

A letter directed to Dr. Safieh, dated September 15, 1995, from a rehabilitation consultant confirmed that, as of August 28, 1995, Dr. Safieh diagnosed Mr. Tran with strain to his neck and low back. An October 26 Work Capacity Evaluation performed by AssessMed Inc. reported that "...Mr. Tran perceives himself to be 'severely disabled,' relative to his neck and back pain, and it remains a main problem for him."

The admission notes from Downsview Rehabilitation Centre, dated December 27, 1995 show that Mr. Tran complained of pain in his neck and right hand, following another accident on December 27, 1995.

Dr. R. Beharry's notes from February 8, 1996, list headache and neck and back pain. These references appear in the notes consistently from July through August, 1996. A consultation by Dr. John Chin dated August 23, 1996 showed that Mr. Tran complained of pain and tenderness to the cervical spine. Dr. Chin felt that Mr. Tran was unable to work at that time, and required further physiotherapy.

The Ambulance Call Report for the motor vehicle accident of October 3, 1996, the accident that is the subject of this arbitration, lists Mr. Tran as conscious, in no distress, ambulatory, and with no obvious injury. It specifically lists the observations that there was no damage reported to either vehicle, that Mr. Tran ambulates well, and it records his complaints about neck pain. Similarly, the Toronto Hospital nursing assessment documents list a complaint of neck and head pain and comment that there is no distress.

The space for past medical history in the Toronto Hosptal nursing forms is marked with the "null" or "zero"sign, suggesting that Mr. Tran may not have informed the hospital of his previous complaints.

Mr. Tran testified that he suffered from pain, headaches, and soft tissue injuries to the neck and back after the October 3 accident. Mr. Tran's complaints are reflected in Dr. Varma's notes and his Health Practitioner's certificate relating to this accident.

Mr. Tran complained principally of pain These complaints are consistent with his testimony at the hearing. His doctor accepted this subjective complaint at face value, since he was unaware of Mr. Tran's accident history. I have found, however, that Mr. Tran is not a credible historian and his uncorroborated evidence should not be believed. I find as well, that Dr. Varma's medical opinion, where based on Mr. Tran's subjective complaints alone, is insufficient corroboration.

Mr. Tran was examined as well, by Dr. J.C. Martin del Campo, a neurologist, on December 27, 1996. Inspite of some linguistic problems, Dr. Martin del Campo examined Mr. Tran.

> On examination he is alert, cooperative, a bit uncomfortable when moving about but otherwise healthy appearing. The blood pressure is 140/110 with a pulse of 84, regular. There are no bruits in the neck or cranium and the fundi are normal. There is a slight asymmetry of his face in that the right corner of the mouth does not retract as far but his eye closure and brow elevation are normal. Likewise there is no drift and no ataxia of his limbs. The fine finger movements are executed slowly, bilaterally, but there is no evidence of pyramidal dysfunction. Reflexes are symmetrical, 2+, except at the right ankle where the reflex is difficult to obtain. The plantar responses are downgoing. Gait on toes, heels and tandem is normal. His neck range of movement is quite restricted in all directions.

Dr. Ezra Silverstein examined Mr. Tran on February 5, 1997, at the request of the Insurer. Even though Mr. Tran had undergone a further undisclosed motor vehicle accident in the interim, precipitating the same set of complaints, Dr. Silverstein found:

> On today's examination I was unable to identify any objective physical abnormality. There is significant pain magnification and inconsistencies. Mr. Tran I feel may have suffered a soft tissue strain to the neck and back and a contusion to the side of his head, but there is no residual physical examination of these injuries although he has ongoing subjective complaints.

I accept Dr. Martin Del Campo's observation of restricted movement of the neck as being consistent with both Dr. Varma's reports and Mr. Tran's evidence, as well as Dr. Silverman's. I find that for some time after the accident of October 3, 1999, Mr. Tran may have suffered some discomfort and restriction of movement in his neck.

Based on Dr. Silverman's report and testimony, I find that the discomfort and restriction of movement in Mr. Tran's neck had resolved by February 5, 1997.

Causation:

If Mr. Tran was disabled after the accident of of October 3, 1996, the onus is on him to prove that the disability arose from that accident. Arbitrator Joachim in *Turner and Economical Insurance* (FSCO A-012411, August 6, 1999) summarized the test for causation in accident benefit cases:

> It is well established in arbitral jurisprudence that the insured need not establish that the accident is the sole cause of his or her difficulties. If Ms. Turner's overall condition resulted from the cumulative effect of the injuries from the car accident, her pre-existing and her post-accident health problems, she will be entitled to weekly income benefits, provided the injuries from the car accident materially contributed to her overall disabled condition.

The evidence is that Mr. Tran reported neck and back pains consistently in the years prior to the accident. A little over a month before the accident, he complained to Dr. Chin of pain and tenderness to the cervical spine, and claimed to be disabled to the extent that he could not work. Given the duration and the persistance of the complaints, I do not find it credible that Mr. Tran's condition suddenly resolved between August 26 and October 3, 1996.

Since Mr. Tran was not forthcoming about his medical history, and changed physicians with each accident, none of the medical reports speak to the interaction between his ongoing pre-accident complaints and his condition after the October 3, 1996 accident. While it is possible that the minor collision of October 3, 1997 may have aggravated Mr. Tran's long-standing complaints about neck and back pain, I find that Mr. Tran has failed to produce any convincing evidence that the October 3, 1996 motor vehicle accident materially contributed to his complaints of pain and discomfort.

Ability to perform essential tasks:

Mr. Tran testified that because of his back and neck pain after his accident, he was unable to continue working at his factory job. This is supported by Dr. Varma's notation on his Health Practitioner's Certificate.

Mr. Tran's period of employment at United Windows commenced on September 9, 1996. Mr. Tran was evidently able to carry out the essential tasks of his employment at that date, even though Dr. Chin's report of August 26, 1996 mentions complaints of disabling pains in the lower back and headaches.

I have accepted that Mr. Tran had some restriction in the movement of his neck. However, I have found that he has failed to prove that the accident of October 3, 1996 either compounded, contributed or caused that or any other disability.

Although Mr. Tran reported to Dr. Silverstein that the pain had resolved completely "... so that by the time the 1996 accident occurred Mr. Tran tells me he was quite well and with no complaints..." I do not find Mr. Tran credible on this point. Rather, I find that the headaches and soreness that Mr. Tran complained of after the October 3 accident were likely the same pains he

complained of in July, August and September. Clearly, Mr. Tran's ability to work in September was not impaired by these same back pains and headaches.

As well, I heard no persuasive evidence from Mr. Tran establishing that a restriction in his neck movement would have prevented him from fulfilling his job requirements at United Windows.

I find that Mr. Tran has not met the onus of proving that his neck discomfort and restriction, headaches, shoulder and back pain prevented him from carrying out his essential tasks as a machine operator with United Windows, after the October 3, 1996 accident.

Amount of the weekly income benefit:

If Mr. Tran had indeed suffered an impairment that prevented him from performing the essential tasks of his employment, he would have been entitled to an income replacement benefit based on his employment income from United Windows.

However, I find, based on the evidence discussed previously, that Mr. Tran has not proven his entitlement and he is entitled to a weekly income replacement benefit of zero.

Entitlement to supplementary medical expenses:

Mr. Tran has the onus of proving that any supplementary medical expenses were reasonable and necessary, and arose as a result of the accident. I have found that he may have suffered from discomfort and a restriction of movement in his neck which had resolved by February 5, 1997.

I have also found that, on the balance of probabilities, the discomfort and restriction of movement in his neck was likely due to the residue of Mr. Tran's complaints prior to the accident, and not due to the motor vehicle accident of October 3, 1996.

I find therefore, that Pafco is not obliged to pay for any treatment recommended by Mr. Tran's physicians, since Mr. Tran has not established that such treatment was either reasonable or necessary due to injuries suffered in the motor vehicle accident of October 3, 1996.

Payment of assessment pursuant to section 282(10) of the *Insurance Act*:

I find that Mr. Tran is not liable to pay an amount to Pafco that does not exceed the amount assessed against Pafco in respect of the arbitration pursuant to subsection 282(10) of the *Insurance Act.*

Following the accident, Mr. Tran did suffer from some sort of neck pain and restriction of movement. It may not have been clear to him that this was a residual impairment from a previous accident. He also claimed that he continued to suffer pain and discomfort. While I have found that he did not prove that his complaints were disabling, it may well have been a real issue to Mr. Tran.

By December 10, 1997, the date of Mr. Tran's application for arbitration, he was again involved in another intervening accident. He had, however, the opinion of Drs. Varma and Kekosz that he was disabled from the October 3, 1996 accident. He also had the opinion of Dr. Silverstein that he was not disabled.

The Insurer has presented evidence in support of its argument that Mr. Tran commenced a claim that was patently frivolous at its inception. It points to Mr. Tran's actions in not revealing his past history to his physicians, or to the Insurer. Mr. Tran should have known that the opinion of his physicians, without the necessary background information, would be meaningless. Without the opinions contained in those reports, he had no grounds to support his claim for further benefits.

Whatever the reason for Mr. Tran's non-disclosure, I note that the Insurer was not alleging that his actions formed part of any overall scheme to defraud the Insurer.

While I accept that Mr. Tran's non-disclosure of his previous injuries was counter-productive, and indeed, reprehensible in many ways, I am not convinced that his application for arbitration was totally without merit. There is no reason to suspect that the accident did not take place.
Mr. Tran has proven that he was legitimately employed. He may well have sincerely believed in the existence and the severity of his disability, and its relationship to the October 3, 1996 accident.

Had Mr. Tran been more forthcoming with his physicians and others, he might have been able to make a better case for liability.

"Frivolous" is defined in the *Concise Oxford Dictionary* as " lacking seriousness, given to trifling, or silly." Aspects of Mr. Tran's claim may have been ill-advised, but the issues in this arbitration are neither trifling nor silly.

I find that at the time of Mr. Tran's application for arbitration, there were issues that could appropriately be dealt with at arbitration. I find it inappropriate to characterize Mr. Tran's application for arbitration as "frivolous." Nor has the Insurer produced any evidence to show that Mr. Tran commenced a claim for the purpose of harassing or "vexing" the Insurer.

Mr. Tran certainly delayed the resolution of this matter, through his conduct. His ongoing non-disclosure during the arbitration process might possibly be characterized as an abuse of process, but such conduct during the arbitration process is more appropriately dealt with under a claim for expenses, than under subsection 282(10) of the *Insurance Act*.

While Mr. Tran's withholding of important information from his treating physicians and the Insurer was ill-advised, I find that the Insurer has not proven that Mr. Tran engaged in an abuse of process in commencing this arbitration

Repayment:

An insured person is required to repay to the insurer any benefit received that was paid through error, wilful misrepresentation or fraud.
I have found that Mr. Tran, through his pattern of not informing his own physicians, insurers' physicians, and the various insurers themselves of relevant pre-existing and indeed overlapping disability claims, misled his insurers, including Pafco.

Arbitrator Blackman in *Michalowski and St. Paul Fire and Marine Insurance Company* (FSCO A98-001492, July 9, 1999) examined the effect of section 48 of the *Schedule*.

> The Applicant submits, and I agree, that the onus is on St. Paul to prove that this provision applies to Mr. Michalowski in the factual situation herein, and if so, that he has indeed made a misrepresentation, that the misrepresentation was wilful, and that what was misrepresented were material facts respecting his application for income replacement benefits. I also find that the onus is also on the Insurer to establish that it has complied with subsection 48(2) of the *Schedule*.

The Insurer has not alleged fraud on the part of Mr. Tran. It paid some benefits based on its evaluation of information supplied by Mr. Tran, which, although incomplete, was not without foundation. Payment was not a function of inadvertence or oversight. I find that the Insurer did not pay Mr. Tran "in error," however much they may have regretted their decision, with hindsight and more complete information.

I accept, however, that, in the absence of misrepresentation, Pafco would have been unlikely to have paid the benefits received by Mr. Tran. Whether or not this was an intentional omission, and constituted "wilful misrepresentation" is another matter. To prove a wilful misrepresentation, the Insurer must adduce evidence of Mr. Tran's intent in producing or withholding the information in question.

Pafco introduced evidence of Mr. Tran’s activities in previous motor vehicle accidents. While I accept that this evidence is relevant for the purposes of impeaching Mr. Tran’s credibility as a witness, such collateral evidence is patently inadmissible as evidence of Mr. Tran’s intent to misrepresent his October 3, 1996 motor vehicle accident claim.
I heard no other evidence from Pafco to convince me that Mr. Tran wilfully engaged in a plan to obtain benefits by misrepresentation prior to his further motor vehicle accident on January 22, 1997.

Although Mr. Tran’s memory lapses at times appear to have verged on amnesia, he apparently did not misrepresent the original accident, nor his perception of the consequences. Even Dr. Silverman agreed that he had likely suffered from some sort of soft tissue injury at the time of the October accident. I find that Pafco has not discharged the onus of producing evidence that points convincingly to an intentional misrepresentation at the inception of Mr. Tran’s claim.

As the claim progressed however, Mr. Tran’s actions lead more clearly to the inference that he was actively withholding information that might not benefit his claim.

In dealing with Pafco, Mr. Tran at first omitted, and then downplayed the importance of his January 22, 1997, motor vehicle accident. He ascribed all his symptoms to the October 3, 1996 accident and did not report the intervening event to the Insurer or its medical examiners.

It would be ingenuous to accept Mr. Tran’s assertion that this was mere inadvertence or forgetfulness. The January accident took place just before his examination by Dr. Silverstein. I find that he made a concious decision not to mention the intervening accident to Dr. Silverstein or to Pafco.

At this point it was clear that he knew or ought to have known that he was involved in “wilful” misrepresentation. Based on the evidence before me at the hearing this would be an appropriate

dividing point since this is the time frame raised by the Insurer in its notice of termination dated March 5.

I find that Mr. Tran is liable to repay all the benefits he received from Pafco, subsequent to the January 22, 1997 motor vehicle accident on the grounds that he engaged in “wilful misrepresentation.”

I make no order regarding the repayment of any undeclared employment income that Mr. Tran may have received prior to the January 22, 1997 accident, since I find that Pafco has provided insufficient particulars of such income, and has not met the onus of proof.

Special Award:

I have found there are no benefits withheld or outstanding from Pafco to Mr. Tran. Consequently, there is no basis for a special award.

EXPENSES

No submissions were made as to expenses at the arbitration hearing. If the parties are unable to agree on expenses, I remain seised of this matter and may be spoken to on the issue of expenses.

______________________	June 15, 2000
John Wilson Arbitrator	Date

FSCO A97–002186

BETWEEN:

CUONG Q. TRAN

Applicant

and

PAFCO INSURANCE COMPANY LIMITED

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. Tran's application is dismissed.

2. Mr. Tran shall repay to Pafco all benefits received after January 22, 1997.

______________________________	June 15, 2000
John Wilson Arbitrator	Date