



FSCO A04-001448

**BETWEEN:**

**SABITREE JAIPRASAD**

**Applicant**

**and**

**PERSONAL INSURANCE COMPANY OF CANADA**

**Insurer**

## **REASONS FOR DECISION**

**Before:** Robert A. Kominar

**Heard:** August 22, 23, 24 and 25, 2005, and April 10, 11,  
12 and 13, 2006

**Appearances:** Carmine Tiano for Mrs. Jaiprasad  
Ryan M. Naimark for Personal Insurance Company of Canada

**Issues:**

The Applicant, Sabitree Jaiprasad, claims she was injured in a motor vehicle accident on August 11, 2002. She applied for and received statutory accident benefits from Personal Insurance Company of Canada (“Personal”), payable under the *Schedule*.<sup>1</sup> Personal terminated weekly income replacement benefits. The parties were unable to resolve their disputes through mediation, and Mrs. Jaiprasad applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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<sup>1</sup>The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

The issues in this hearing are:

1. Is Mrs. Jaiprasad entitled to receive a weekly income replacement benefit of \$191.65 from July 4, 2003 and ongoing, pursuant to section 4 of the *Schedule*?
2. Is Personal liable to pay a special award pursuant to subsection 282(10) of the *Insurance Act* because it unreasonably withheld or delayed payments to Mrs. Jaiprasad?
3. Is Personal liable to pay Mrs. Jaiprasad's expenses in respect of the arbitration under section 282(11) of the *Insurance Act*?
4. Is Mrs. Jaiprasad liable to pay Personal's expenses in respect of the arbitration under section 282(11) of the *Insurance Act*?
5. Is Mrs. Jaiprasad entitled to interest for the overdue payment of benefits pursuant to section 46(2) of the *Schedule*?

**Result:**

1. Mrs. Jaiprasad's claims for income replacement benefits, interest and a special award are dismissed.

**EVIDENCE AND ANALYSIS:**

Mrs. Jaiprasad was a passenger in a motor vehicle which was involved in an accident on August 11, 2002. As a result of that incident she, her family and her friends claim that her life was dramatically changed for the worse. Before the accident she was said to be a happy, engaged and, indeed, a joyful person, who was perpetually involved with caring for her family, working, and participating very regularly and actively in the life of her religious community. After the accident, these same people describe her as having become inactive, debilitated from constant pain, depressed and even suicidal.

The dispute in this arbitration largely comes down to an assessment of the credibility of Mrs. Jaiprasad's evidence and that of those who testified in support of her. The position taken by the Personal is that Mrs. Jaiprasad's evidence is riddled with contradictions and is so implausible that it cannot be believed. As a result, the Personal argues that Mrs. Jaiprasad did not meet her burden of proof on the requisite entitlement or disability tests under the *Schedule*, for any relevant period of time which she claimed to have been entitled to benefits after this accident.

It is necessary to summarize the testimony which was offered at the arbitration hearing, as the way all the evidence interacts is important in assessing the credibility of Mrs. Jaiprasad's claims.

### **Mr. Budnarayan Hardail's Evidence**

Mr. Hardail is Mrs. Jaiprasad's spouse. He testified that his wife immigrated to Canada from Guyana in 1992. He stated that throughout their marriage Mrs. Jaiprasad enjoyed cooking, tending to the house, raising the children and socializing with friends. However, singing, particularly Hindu sacred music, and playing the harmonium in accompaniment were really Mrs. Jaiprasad's passions in life.

Relating to her employment history, Mr. Hardail's evidence was that his wife worked regularly from the time she came to Canada, mostly in various businesses that dealt with clothing. He did not recall there having been any significant period of time where she was not working since she came to Canada.

After the automobile accident, Mr. Hardail describes his family's life as having been turned upside down. He stated that he, his children and his sister have had to constantly care for Mrs. Jaiprasad ever since. She no longer cooked, cleaned or participated in musical activities, other than occasionally trying to sing one song at an event. He says that she remains unable to

take a shower by herself. Mr. Hardail testified that he is worried because Mrs. Jaiprasad has taken to sleeping often on the balcony of their apartment. He is concerned that she may jump off when she is depressed.

### **Durmatie Jaiprasad's Evidence**

Durmatie Jaiprasad is Mrs. Jaiprasad's daughter. Her evidence was that she reluctantly moved out of the family home, sometime in 2004, due to her mother's dramatic change in character following the automobile accident. Prior to the accident, Ms Jaiprasad testified that her mother was not dependent on anyone for anything. She was constantly active and hated staying at home, especially on the weekends when she almost always participated in singing and harmonium playing. After the accident, Ms Jaiprasad stated that her mother became a very different person. She was always emotionally down. She yelled a lot and blamed her children and husband for things. She stayed at home and complained about pain constantly. The depths of despair her mother had reached were made clear to her daughter when Mrs. Jaiprasad told her that she had bought her funeral dress and hung it in her closet for use at the appropriate time.

Ms Jaiprasad testified that she recalls that her mother has performed at a few weddings after the accident. She has also played and sang at some "religious homes," which are Hindu prayer services conducted in someone's home. In addition, Ms Jaiprasad testified that she believes that her mother continued to participate in Hindu ritual prayers known as *Pooja* and funerals after the accident, but that she would typically only sing or play one or two songs. This was very different from her very full and long duration participation in such events prior to the accident.

Before the accident, Ms Jaiprasad was not aware of any health or sleeping problems from which her mother suffered.

### **Munimarine Jaiprasad's Evidence**

Munimarine Jaiprasad is Mrs. Jaiprasad's son. At the time of the hearing, he still lived at home with his parents. Like his father and sister, Mr. Jaiprasad's evidence was that his mother led an active, engaged and vibrant life before the automobile accident and that she changed dramatically afterwards. She no longer attended to the housework or cooked. He saw the "wedding dress" in her closet, which was the funeral dress Mrs. Jaiprasad had purchased and had told her daughter about. Mr. Jaiprasad stated that he typically slept in the living room of the family apartment and was responsible for monitoring his mother when she chose to sleep on the outside balcony. According to him, Mrs. Jaiprasad always seemed to be in pain after the accident and she was most often very depressed. He used to check in with her daily by telephone from work to make sure that she was properly taking her prescribed medication.

As far as her pre-accident employment goes, Mr. Jaiprasad recalls his mother being off work for perhaps two or three months on one occasion. Other than that he believes she was regularly employed. His evidence was that her health was generally good other than he was aware she had diabetes and, at one point, suffered from some hand pain. Mrs. Jaiprasad did not manifest any emotional problems before the accident according to her son.

Mr. Jaiprasad's evidence was that he did not personally participate in religious activities very much and so he did not know to what extent his mother may have continued to sing or play at them after the accident. He did stated, however, that her formerly very active social life declined dramatically after the accident.

In addition to her family members, Mrs. Jaiprasad called three friends to testify at the hearing.

### **June Misir's Evidence**

Ms Misir is a friend of Mrs. Jaiprasad's who testified that she was a mesmerizing singer and harmonium player. Mrs. Jaiprasad was the person who many Hindus in Toronto sought out to provide the music at their temples and other religious events. Prior to the accident, Mrs. Jaiprasad was constantly and actively involved with her religious community. Ms Misir noted that Hindu funerals can last from ten to thirteen nights and that musicians are in high demand as "no one wants to sit alone with the priest" for all that time. Prior to the accident, Mrs. Jaiprasad was described as being a very happy and energetic person. After the accident, according to Ms Misir, she could hardly walk and most often did not want to attend religious services, let alone be actively involved in them. She was a "different person" after the accident. Ms Misir recalls that Mrs. Jaiprasad declined to participate in a religious event which she had invited her to recently. According to Ms Misir, Mrs. Jaiprasad had never declined such an invitation before if she was available.

### **Paul Romotar's Evidence**

Mr. Romotar is a friend of Mrs. Jaiprasad's who has also performed regularly with her at various temples and religious services over the last five or six years. He stated, as other witnesses did, that she was upbeat and joyful before her accident. She stopped performing with him in 2002 and then he lost track of her until recently. Mr. Romotar testified that after 2002 Mrs. Jaiprasad never contacted him again about performing, something which she used to do very regularly.

### **Chandra Salamaya's Evidence**

The final lay witness Mrs. Jaiprasad called was Ms Salamaya. She is a close personal friend of Mrs. Jaiprasad's. Ms Salamaya had regular contact with Mrs. Jaiprasad hoping to learn to play the harmonium as beautifully as Mrs. Jaiprasad could. Her evidence was that Mrs. Jaiprasad never talked about health concerns before the accident, but talked about little else afterwards.

She has often had contact with Mrs. Jaiprasad, between four and five times per week, since the accident, taking her out for coffee and walks. She testified that it is not uncommon for Mrs. Jaiprasad to telephone her between five and six times daily, always to talk about her pains and personal problems. According to Ms Salamaya, Mrs. Jaiprasad was never like this before the accident. She has never seen Mrs. Jaiprasad work around the house since the accident and has no knowledge whether Mrs. Jaiprasad has continued to play music since that event.

The evidence provided in this arbitration by all of the above witnesses was essentially consistent. They all painted a picture in which, before the accident, Mrs. Jaiprasad was a healthy, happy, woman who was very actively engaged in her family life, social relationships, work and religious community. After the accident, Mrs. Jaiprasad became a very different person. She constantly presented as being seriously debilitated by pain. She was chronically depressed and even suicidal and she no longer worked or took on much of a role in maintaining her household. She needed her family to assist her with personal care. She dramatically cut back, if not eliminated, her participation in singing and playing the harmonium at temples and religious rituals which used to be the core of her life.

### **Mrs. Jaiprasad's Evidence**

Mrs. Jaiprasad testified that she was raised in Guyana. She completed the equivalent of Grade 11 in high school and completed some portion of a program in nursing before she immigrated to Canada. She was married at the age of 21 and never actually worked while in Guyana. Before she left for Canada, her life was focussed on raising her children, taking care of her house, gardening and singing. She testified that she was in very good health when she arrived in Canada in 1992.

Her employment in Canada commenced almost immediately. Her evidence was that she worked at Crazy Lee's in Woodbridge, sorting clothes, for about two years, commencing in 1992. Next she was employed in stapling air freshener fragrances into packages. After that she had various positions doing work such as cutting errant threads from clothes, particularly sweaters.

Finally she was employed at a mall retail clothing store named New Looks. She stated that she opened and closed the store, set out clothing for display on racks and shelves, and occasionally bagged clothing as necessary. Mrs. Jaiprasad testified that she really enjoyed working at New Looks because her employers were very nice people. She had been working there about 18 months prior to the accident.

After the accident, Mrs. Jaiprasad testified that she has never really been able to return to work. She stated that she tried to go back once, but her employer decided that she was not well enough to return to employment. She believed that her family doctor had cleared her to try this return to work.

Mrs. Jaiprasad's evidence was that she has received no formal training from any employer for any job while in Canada. She was simply shown what to do at each job she undertook. Her jobs were generally paid at close to the minimum wage level. They were all unskilled in nature.

Prior to the accident, Mrs. Jaiprasad testified that she played the harmonium regularly at three or four temples in the Toronto area. She often organized successful fund raising shows within the local Hindu community. She often played and sang at funerals, which in her tradition can last from two up to thirteen days. She regularly played and sang at weddings and at what were described as "religious home" rituals. She always played at Diwali celebrations at her temple. Video evidence was viewed at the hearing of Mrs. Jaiprasad performing in some of these types of venues.

Mrs. Jaiprasad also testified that she had no significant health problems before the accident. Afterwards, she claims that she has become almost completely immobilized by her pain. Due to her ongoing pain, Mrs. Jaiprasad believes that she is unable to engage in any kind of employment. She acknowledged that she bought the funeral dress and that she told her daughter where to find it so it could be used when she died. She stated that she feels suicidal frequently



and that she doesn't know what is wrong with her. She realizes that her family is confused, frightened, frustrated and often angry about her behaviour, but she also says that she doesn't know what to do to get better. Mrs. Jaiprasad ended her direct examination by stating that she now just leaves "everything to God."

On cross-examination, Mrs. Jaiprasad's evidence can be effectively summed up by saying that she has no recollection of numerous medical problems and conditions which the documentary evidence filed in the arbitration suggests she complained over a significant period of time to various health care practitioners.

There are multiple examples which were referenced in the arbitration. For example, Mrs. Jaiprasad testified that she did not remember having numbness in her right hand before the automobile accident. When shown the clinical records of her family physician, Dr. Hack, suggesting that she complained of this condition prior to the accident, she stated that the doctor may have told her to drink lots of water to deal with it. Right hand numbness is especially relevant in this case, given the role harmonium playing has had in Mrs. Jaiprasad's life.

She claimed not to remember that Dr. Kirwin prescribed her a hand splint to deal with diagnosed carpal tunnel syndrome before the accident. Again, this is a condition one would expect to be rather important and memorable for Mrs. Jaiprasad.

She did not remember complaining of numbness before the accident, notwithstanding that she was shown a hospital record from early 2002 where it appears she presented with that condition.

Mrs. Jaiprasad did not recall complaining to any health practitioner of headaches at any time prior to the accident. She however testified that she neither agreed nor disagreed with records that report that she complained of headaches to Dr. Hack in 1999, 2001 and 2002. She also could not remember Dr. Hack sending her for x-rays to investigate the possibility of a skull fracture being the cause of her repeated complaints of headache.

She did not recall telling Dr. Hack in 1997 that she had been experiencing recurrent bouts of dizziness. Nor did she recall telling the doctor about experiencing neck and back pain prior to the accident, despite the fact that Dr. Hack's clinical notes clearly reflect that she did.

According to Mrs. Jaiprasad, she was very healthy prior to the accident, other than for occasional bouts of the "flu" which she said she experienced from time to time.

During cross-examination, Mrs. Jaiprasad testified that she did not recall telling her social worker, Beverly Tingley, her psychiatrist, Dr. Slyfield, or the psychologist, Dr. Prendergast, that she had no health problems prior to the automobile accident. She also did not recall telling Dr. Chong, whose speciality is treating orthopaedic problems which musicians experience, that she had experienced earlier hand problems. Later in her testimony, she qualified this statement by saying that she didn't recall whether Dr. Chong ever asked her anything about her previous medical history.

Mrs. Jaiprasad attended at a Medical Rehabilitation DAC and testified that she did not recall telling the assessors there that she had no significant medical history. After Mr. Naimark showed her a statement which she ostensibly provided to the DAC assessors which records her saying "I have no other preexisting medical conditions." Mrs. Jaiprasad conceded this after being confronted with the statement that, "maybe I said this."

There is also some rather unusual evidence, in my view, that Mrs. Jaiprasad told Dr. Chong that her husband was on kidney dialysis. He was not. Also, she apparently told her family physician, Dr. Hack, in 2001 that her husband was on the waiting list for a kidney transplant. Mrs. Jaiprasad stated that she did not know how these doctors came up with such comments, and she admitted that her husband did not suffer from these medical conditions. She suggested that the doctors may have confused her husband with a friend of hers. However, both doctors, independently, noted in their records that Mrs. Jaiprasad told them that it was her spouse who had these problems, not a friend.

There are inconsistencies in Mrs. Jaiprasad's evidence relating to employment as well. She stated, and her family's evidence supported, that she has been employed quite regularly from the time she came to Canada right up to the date of the accident. The only significant gaps in her employment might have been for a period of two or three months based on her family members' recall. Mrs. Jaiprasad's own evidence was that her total period of unemployment in Canada might actually have added up to as long as five or six months.

On cross examination, Mrs. Jaiprasad could not explain why employers whom she claimed to have worked for, such as Crazy Lee's, Bloomingdales and Knitting Mills, had no records of her employment with them. Nor could she offer any explanation as to why she told a social worker, Pina Zervas, only about a month before the arbitration hearing, that she had only worked for perhaps four to five years out of the nine that had elapsed between her coming to Canada and the auto accident.

Mrs. Jaiprasad testified that the only thing she wanted was to end her constant pain and suffering. She was referred to Dr. Slyfield by her family physician for psychiatric assessment and treatment in April 2003, but she failed to return for any treatment until December 2003, notwithstanding that the doctor asked her to return much sooner. Mrs. Jaiprasad's explanation for this was that she thought she might have had other medical appointments to go to in the interim.

Mrs. Jaiprasad was referred to a chronic pain program at Sunnybrook Hospital in Toronto. She did not initially attend. Her explanation was that she didn't think she could afford to go and also that she could not arrange transportation. However, Mrs. Jaiprasad also testified that she told the contact person at the chronic pain program that she was interested in getting well and really wanted to attend. The program then offered Mrs. Jaiprasad another chance to participate in the next session of the program, but she was ultimately discharged for non-attendance. Mrs. Jaiprasad's explanation was, once again, that she may have had the flu at the time. The pain program then offered her still another opportunity to participate in what was described as a

“personal group session”, but again Mrs. Jaiprasad did not attend. Mrs. Jaiprasad stated that she ultimately bought some form of relaxation recording from the program.

Mrs. Jaiprasad testified that an occupational therapist who had seen her suggested that she start using a cane to walk. She was asked if her family doctor endorsed this decision and her answer was that she thought her doctor had told her to use it if it helped. When Dr. Hack testified, he said that he did not advise Mrs. Jaiprasad to use the cane.

Originally, Mrs. Jaiprasad claimed that she was receiving approximately nine hours of attendant care assistance daily from her sister-in-law since the accident. During cross-examination, Mrs. Jaiprasad admitted that she had claimed well in excess of the time that her sister-in-law actually helped her. Her revised claim was that her sister-in-law perhaps provided two to three hours of daily assistance. Her explanation for the discrepancy was that she may have “made a mistake.”

Despite the fact that singing and harmonium playing were said to be the real passions in her life, Mrs. Jaiprasad could not estimate how often she played or sang at temples, funerals, weddings, religious homes, or other functions after the accident. She did testify, however, that she could no longer sing and play the long cycles of songs which traditionally are involved in Hindu rituals. She testified that she simply did not have the energy for or the interest in doing so any longer.

### **Dr. Hack’s Evidence**

Dr. Hack is Mrs. Jaiprasad’s family physician. He has been treating her since approximately 1998 or 1999. His evidence was that, after the automobile accident, he had some concerns about Mrs. Jaiprasad returning to work because she had told him that her job involved climbing ladders at times and he did not believe that was safe. In March 2003, Dr. Hack diagnosed her with Post Traumatic Stress Disorder (PTSD). He also encouraged her to apply for Canada Pension

Disability in December 2004. Ultimately, he diagnosed her with chronic pain syndrome and he worked to get her admitted to the pain program at Sunnybrook Hospital. Dr. Hack was quite candid in acknowledging that he has not treated many patients with symptoms such as Mrs. Jaiprasad's. His opinion at the hearing was still that she was unable to engage in any sort of employment.

On cross-examination, Dr. Hack acknowledged that he did not know that Mrs. Jaiprasad had complained to her former physician, Dr. Babba, of headaches or dizziness before she came into his care. He knew that she had fallen about eight months prior to the automobile accident.

Dr. Hack was asked about how he arrived at the conclusion that Mrs. Jaiprasad needed to be referred to a psychiatrist. He acknowledged that a letter from Mrs. Jaiprasad's solicitor motivated him to inquire into possible psychological difficulties that were said to have been affecting her marriage, but he denied that he referred her to a psychiatrist because of this letter. Dr. Hack testified that the letter only caused him to meet with Mrs. Jaiprasad to personally assess whether such a referral was appropriate. He concluded that it was, and so she was referred to Dr. Slyfield. Dr. Hack stated that he did not conduct any tests on Mrs. Jaiprasad for malingering, and in fact doesn't know what they are. He stated that his conclusions are ultimately based on the assumption that Mrs. Jaiprasad was telling him the truth. He concluded his evidence by stating that he deferred to Dr. Slyfield's psychiatric diagnosis that Mrs. Jaiprasad showed some symptoms of depression but not enough for a clinical diagnosis of depression.

### **Dr. Slyfield's Evidence**

Dr. Slyfield is a psychiatrist. Mrs. Jaiprasad was referred to him in April 2003. At that time he diagnosed her with depression secondary to pain. He did not believe that she met the criteria for a separate diagnosis of depression. He asked her to come back for a follow-up session after his initial assessment, but she did not return to see him until December 2003. In a follow-up visit in

2005, Dr. Slyfield diagnosed Mrs. Jaiprasad with a pain disorder, which he clarified meant that she was experiencing pain in excess of what would be expected from her physical condition. He did not believe that she met any of the criteria for a diagnosis of PTSD.

Dr. Slyfield's conclusion was that Mrs. Jaiprasad was not a malingerer. In his professional opinion, it would be extremely difficult for anyone to consistently report and regularly manifest the debilitating symptoms which Mrs. Jaiprasad has for a period of three years. He did not detect any intention on the part of Mrs. Jaiprasad to mislead him about her condition. In his view, she is experiencing what she says she is. The relevance of this to employability is that Dr. Slyfield believes that Mrs. Jaiprasad is completely unable to work. In his professional opinion, no one who complains consistently about pain and depression and an inability to work for three years can reasonably be said to be able to work in any meaningful capacity.

Dr. Slyfield did confirm that Mrs. Jaiprasad reported to him that she was in good health before the automobile accident and that she had not had any previous mental health problems, but he also noted that memory loss problems are a common symptom of depression. He was asked whether it was possible that Mrs. Jaiprasad was acting out of a motive of secondary gain, such as wanting to collect insurance money? Dr. Slyfield's opinion was that there are many kinds of secondary gain, insurance being only one example, however he stated that he had no evidence that it played any role in Mrs. Jaiprasad's case. He stated that he had conducted no tests for malingering in coming to his conclusion that Mrs. Jaiprasad was not a malingerer.

### **Dr. Prendergast's Evidence**

Dr. Prendergast is a psychologist who first met with Mrs. Jaiprasad in early 2003 to conduct an independent psychological evaluation of her. He testified that he took a careful and full medical history from her. She told him about all of the current physical and emotional ailments she was suffering from. She also reported to him that she was in good health prior to the accident,

specifically that she had experienced no other injuries, serious illnesses, medical problems or pain difficulties.

Dr. Prendergast found Mrs. Jaiprasad's self report of her pre-accident health to be inconsistent with the medical documentation with which he had been provided. He testified that he inquired at least twice during his interview with Mrs. Jaiprasad about any prior health concerns.

Mrs. Jaiprasad only told him that she occasionally had experienced headaches associated with menses before the accident. Other than that she was healthy.

Dr. Prendergast also asked Mrs. Jaiprasad about details of her employment history. She told him that she had never been off of work for any extended period of time. He again found this information to be inconsistent with the background documentation with which he had been provided.

In addition to his clinical interview and his review of documentation, Dr. Prendergast administered a battery of four psychological tests to Mrs. Jaiprasad: the Test of Memory Malingered (TOMM), the Rey Memory test, the Pain Patient Profile (P3), and the Structured Inventory of Malingered Symptomatology (SIMS). He reassessed Mrs. Jaiprasad in 2005, at which time he administered the tests again, replacing the P3 with another instrument, the Pain Symptom Rating Scale (PSR), which he advised was a more extensive evaluation of pain symptomatology than the earlier Pain Patient Profile.

Dr. Prendergast testified that the results of these tests were, in every case, except for the first time that Mrs. Jaiprasad took the TOMM test, in what he described as the "critical range." He concluded that such results can only reasonably be interpreted as meaning that the person taking the test is either not making a good effort or that they are not being forthright.

Specifically, Dr. Prendergast's evidence was that the first time Mrs. Jaiprasad took the TOMM test, she scored 47/50. Her score dropped to 14/50 in 2005. He actually administered this test to Mrs. Jaiprasad twice in 2005, because the first time she took it her score was only 10/50. To put these scores into context, Dr. Prendergast stated that the cut off for what is accepted to be a "reasonable result" on the TOMM is 45/50; and, in fact, most people score 50/50 on the test. He testified that even people who have suffered traumatic brain injuries typically score 45/50 on this test. Dr. Prendergast noted that even if she was randomly guessing, probability alone would predict that Mrs. Jaiprasad should have scored somewhere around 25/50. He concluded that there is no other plausible explanation for such low scores on the TOMM test than a failure to give a good effort or a specific intention to not perform well. Dr. Prendergast's evidence suggests that Mrs. Jaiprasad would have had to actively endeavour to perform significantly poorer than even random guesses would have produced to have achieved outcomes as low as she did.

On the Rey test, Dr. Prendergast reported that Mrs. Jaiprasad scored 5/15. The currently accepted cut off score on this test is 9/15, however he noted that some psychologists argue that it should actually be raised to 12/15. Mrs. Jaiprasad again performed significantly poorer than would be expected.

Dr. Prendergast concluded that, with such consistently low scores on these tests, no psychological diagnosis was warranted for Mrs. Jaiprasad. His view was that she was not credible and therefore there was no reason to confirm or endorse any psychological impairment or disability. Even after his reassessment of her in 2005, Dr. Prendergast still concluded that Mrs. Jaiprasad did not show any true emotional distress and thus it was impossible to conclude that, from a psychological perspective, she was disabled.

On cross-examination, Dr. Prendergast stated that he relies on his clinical impressions of individuals gained during an assessment, along with complete documentation review and psychometric testing to reach his diagnostic conclusions. The diagnosis emerges from an



integration of these three sources of information. However, in the case of Mrs. Jaiprasad, he testified that had he hypothetically been presented with only her test results, he would have been very suspicious of the degree of effort or motivation involved, because the results were all so far outside of the normal range so as to be uninterpretable. As an example to clarify his conclusions, Dr. Prendergast stated that, in his professional opinion, only someone experiencing an acute psychotic episode could be expected to score as low as Mrs. Jaiprasad did on these tests, and he noted that someone in that state of mind would be not even be able to follow instructions to take the test.

Dr. Prendergast acknowledged on cross-examination that sometimes a test score could be interpreted as a “cry for help.” However, in Mrs. Jaiprasad’s case, he testified that he had not observed any evidence of such a cry. Dr. Prendergast stated that usually he gets some sense of why the person is making a cry for help. In neither situation where he assessed Mrs. Jaiprasad did she reveal to him any reason to believe that this is what was happening. In the doctor’s clinical experience, even people crying out for help do not normally intentionally try to perform worse than they are able to on tests.

On the issue of Mrs. Jaiprasad’s passion for music, Dr. Prendergast stated that she told him that by 2005 she had returned to playing at weddings, but that she was limited to playing for only half an hour or so. He stated that she did not convey to him any concerns or distress about this situation, which the doctor found striking, given how important music was said to be in Mrs. Jaiprasad’s life. She seemed to exhibit no emotional response to the situation at all. One of the primary observations Dr Prendergast made was that Mrs. Jaiprasad never presented with any sort of emotional distress on the occasions he saw her. She talked a lot about her pain and disability, but she did not manifest any sort of affect associated with those conditions. This he found to be very unusual.

Dr. Prendergast was asked to consider the possibility that Mrs. Jaiprasad may have misinterpreted some of the questions which he asked while taking her medical history, thinking for instance that he might only have been asking about something like her health on the day immediately before the accident. He conceded that patients do make mistakes in detailing their histories. However, in his professional experience, it was not very often that people denied or forgot their complete medical histories, as Mrs. Jaiprasad appeared to him to have done.

Dr. Prendergast agreed that pain exaggeration can at times be an element of a chronic pain condition. People, he said, at times do exaggerate their pain to express some emotional problem. When he assessed Mrs. Jaiprasad in 2005 he concluded that she was presenting with excessive amounts of pain behaviour. However, when he combined his observations of this behaviour with the test results, he concluded that something different than psychological impairment was at play in Mrs. Jaiprasad's case.

At the end of his testimony, I asked Dr. Prendergast whether the tests he administered to Mrs. Jaiprasad were regarded as being interculturally valid. His answer was that both the Rey and the TOMM tests were specifically designed to control for educational levels and cultural background.

### **Dr. Massiah's Evidence**

The final witness at the arbitration was Dr. Massiah, who is an orthopaedic surgeon, and who conducted independent assessments of Mrs. Jaiprasad on two occasions after her accident. He testified that he observed her to have a slow and peculiar kind of walk and that she removed her sweater in a very odd way. On examination, he found her to demonstrate full range of motion. Her neck was normal and she exhibited no local tenderness. He stated that during his examination Mrs. Jaiprasad uttered inexplicable loud sighs and walked with a what he described as a "slow theatrical cadence." He testified that he conducted all standard orthopaedic tests and concluded that she had no signs of physical disease of the muscles.

Dr. Massiah commented further on Mrs. Jaiprasad's unusual gait as manifested during her second assessment. He stated that she demonstrated a "bizarre cadence" that he had never seen in thirty years of practice as an orthopaedic surgeon. However, he also observed her to leave his office walking with a "normal gait cadence." He was unable to find any orthopaedic reason to account for her symptoms and thus he concluded that she was not disabled, either substantially or completely, from a musculoskeletal perspective.

On cross examination, Dr. Massiah was asked about CT scans and an MRI which had been conducted on Mrs. Jaiprasad. His conclusion was that they revealed that she had relatively long standing degenerative spinal disease. His professional opinion was that such a degenerative condition would only marginally make a person more susceptible to trauma, noting that many older people have degenerative changes in the spine and not all of them are disabled. He further noted that 50% of the population has degenerative conditions of the spine by age of 50 and 100% of the population have those changes by the age of 60.

## **ANALYSIS**

The law in this case is not complex. Counsel, in fact, made no significant arguments on the law. The reality is that the decision in this case comes down to an assessment of the credibility of the evidence Mrs. Jaiprasad presented to support her claims, such that I can go on to find that she met her burden of proof on the balance of probabilities that she is entitled to the benefits which she has claimed.

What is evident to me is that Mrs. Jaiprasad suffers from serious problems of some form. The question is whether she has proven that it is more probable than not that they arise out of her automobile accident? No one piece of evidence which I have considered is determinative. However, when all of the evidence is considered together, I find it leads to the conclusion that Mrs. Jaiprasad has not met the required burden of proof.

I find that I have no reason to doubt that Mrs. Jaiprasad actually reported and received treatment for a long litany of pre-accident medical conditions from the multiple medical practitioners referenced in the oral evidence and the documentary exhibits. I also have no reason to doubt that she, in fact, failed to report almost all of those conditions, when asked about them, to health care practitioners and medical assessors after the accident. I find as a fact that Mrs. Jaiprasad habitually told medical professionals who assessed her after the accident that her health was good prior to the accident.

I also find as a fact that Mrs. Jaiprasad's daily life was dramatically different after the accident than it was before. Particularly, I accept the evidence which suggests that she dramatically changed the level and quality of her involvement with singing and playing the harmonium after the accident. I am persuaded that Mrs. Jaiprasad was very devoted to her Hindu community and was actively involved in many types of religious activities and rituals before the accident. I viewed examples of the type of music she played and sang in the video evidence and I accept that, in the Hindu tradition, this kind of music is repetitive and chant like and that it can continue for very long periods of time. After the accident, I have no sufficient, reliable evidence to decide exactly how much Mrs. Jaiprasad participated in temple, weddings, funerals, or religious homes, but I do conclude that her participation in these activities continued but was dramatically reduced quantitatively and qualitatively.

In relation to Mrs. Jaiprasad's employment, I find that she was working as a store clerk in a women's wear store at the time of the accident. I accept the employer's record which states that the last day she worked was September 10, 2002. Although Mrs. Jaiprasad suggested this was a mistake on the employer's part, I find that she could have presented evidence from the employer to correct that mistake and failing to have done so reasonably allows me to draw an inference that the employer's evidence would not have assisted her on this point.

Mr. Naimark's closing submissions usefully highlighted a number of areas which I agree cause serious concerns about Mrs. Jaiprasad's testimony:

- Mrs. Jaiprasad's evidence, which was supported by her family, was that she was regularly employed while in Canada except for a period of a few months. Mrs. Jaiprasad, however, told her social worker that she had, in fact, been employed for only approximately half the time she had been in Canada. When I consider the employment evidence together, the most plausible conclusion which I can draw is that Mrs. Jaiprasad was not forthright about her employment history. I find it to be important that a number of the employers which Mrs. Jaiprasad identified to the insurer had no records of her having worked for them. I reject as not based on any facts in evidence Mr. Tiano's suggestion that these employers were all small and likely didn't keep records. This may or may not be true, but there is no evidence before me to support that inference. I also draw an inference from the last employer at New Look not being called to testify at the hearing regarding what was argued to be a discrepancy on the employer's confirmation of income, suggesting that she continued to work after the accident.
- Mrs. Jaiprasad sought treatment from Dr. Chong for music-related problems she was having with her hands, but did not tell him that she had prior carpal tunnel syndrome. I doubt that anyone could reasonably forget this sort of medical problem when attending at a physician who specializes in treating musicians' injuries. Nor could Mrs. Jaiprasad have reasonably believed that this doctor would not be interested in such prior problems. I also reject as implausible that Dr. Chong would not have asked Mrs. Jaiprasad about her prior medical concerns, especially as they related to her hands.
- Mrs. Jaiprasad attended with Dr. Esmail, a neurologist, about five days prior to her first assessment with Dr. Massiah. Dr. Esmail reported that she walked with "a normal gait." As noted above, Dr. Massiah testified that Mrs. Jaiprasad walked with a very slow,

unusual, theatrical, even “bizarre” gait. Dr. Massiah’s evidence was also that he observed Mrs. Jaiprasad transform her unusual gait into a normal one when she was leaving his office. I accept Dr. Massiah’s observations as accurate, particularly because Dr. Esmail contemporaneously confirms that Mrs. Jaiprasad walked normally. I find as a result that Mrs. Jaiprasad has not satisfied me that any challenges she may have with mobility have anything to do with the auto accident.

- Mrs. Jaiprasad testified that she was focussed on, and desperately wanted to do, whatever she could to get well. She testified that she knew that her family and her religious community were distressed with how she had changed. However, inexplicably in my view, she failed to return to Dr. Slyfield for follow up when he asked her to. She also, even more inexplicably in my view, failed to attend at the chronic pain program despite being provided with multiple opportunities to participate in it. I find completely implausible Mrs. Jaiprasad’s various explanations offered for not participating in this program. I do not accept that Mrs. Jaiprasad’s purchase of a tape or a CD reflected any meaningful intention on her part to explore what this program might have done to help her recover from her problems. I also reject her evidence that transportation problems or other medical appointments were reasons for non-attendance, certainly not over the long run.
- Mrs. Jaiprasad’s results on the standardized psychometric testing conducted on two separate occasions by Dr. Prendergast were consistently so low that the only reasonable inference is that she was either failing to participate in testing properly or intentionally trying to do poorly. I found Dr. Prendergast to be a fair and reliable witness, notwithstanding that he was retained by the Insurer, and I accept his credentials for reaching the conclusions which he did. I also find that he was not simply relying on objective test results in reaching his conclusions, but that he took a thorough medical history from Mrs. Jaiprasad and made clinical observations of her as well. As a result,

I accept that Mrs. Jaiprasad's results on this testing cannot be passed off as a mere statistical anomaly.

- Mrs. Jaiprasad's common response to many of the questions put to her in her testimony was that she "did not remember." However, her treating psychiatrist Dr. Slyfield, from 2003 on, did not note any memory impairment in his observations of her. The inference which I draw is that Mrs. Jaiprasad found it convenient to forget many things during the arbitration.
- Although Dr. Hack testified that he made an independent decision to refer Mrs. Jaiprasad for a psychiatric consultation, he apparently did not have any independent "reason" to do this until he received a letter from Mr. Tiano requesting that he look into this area. I have no basis to believe that Dr. Hack's referral was anything less than professionally appropriate, but I find his needing to be prompted by a lawyer, coupled with Mrs. Jaiprasad's reluctance to return for psychiatric treatment, supports an inference that her complaints about psychological distress were not as serious as she portrayed. Added to this as an extra layer of support for my conclusion is Dr. Slyfield's reluctance to endorse the specific psychiatric diagnoses which Dr. Hack had made, and Dr. Hack's deferral to Dr. Slyfield's expertise on the matter. Dr. Hack testified that he had little if any experience in treating anyone manifesting symptoms such as Mrs. Jaiprasad's. This makes it difficult to understand why he would have not observed things that would have prompted a psychiatric referral for Mrs. Jaiprasad before being prompted by Mr. Tiano.
- The employer's confirmation of income from New Look does state, in two places, that Mrs. Jaiprasad worked until September 10, 2002. Mrs. Jaiprasad's evidence was that this was a mistake. I find that Mrs. Jaiprasad's claim to have very poor memory of many things to be inconsistent with her recalling this specific date. I also find that she could have called the employer to clarify the issue or produced employment records, especially since she testified that she had a very good relationship with the employer.

For this reason I conclude that the most reliable evidence I have is that Mrs. Jaiprasad did work until September 10, 2002 and further that there is no explanation as to what caused her to stop working on that date.

- Mrs. Jaiprasad admitted during cross-examination that her submission of claims for attendant care, at the daily rate of approximately nine hours, was not consistent with the facts. Her evidence at the hearing was that, at most, she received two to three hours per day of attendant care from her sister-in-law. I agree with Mr. Naimark that this is not a “small” discrepancy, especially when the central issue in the arbitration is credibility. Even though arbitration decisions have made it clear that insured persons are not expected to keep business-like dockets for services such as housekeeping and attendant care, the claims which Mrs. Jaiprasad submitted to the Insurer were approximately three times greater than the services she testified that she actually received. I further agree with Mr. Naimark that Mrs. Jaiprasad did not rehabilitate this testimony with her evidence that the claims as submitted “must have been mistaken.”
- I find that Mrs. Jaiprasad engaged in a pattern of inaccurately describing her prior medical history to multiple health care professionals after the accident. I agree with Dr. Prendergast’s assessment that her consistent failure to report a long history of health care concerns to multiple health care professionals challenges the reliability of her report of symptoms. I find it implausible to believe that Mrs. Jaiprasad could have so regularly “forgotten” important details of her health history, or have consistently misunderstood the questions she was being asked about that. It is the pattern that I find relevant here, not that Mrs. Jaiprasad forgot, on any specific occasion, any particular ailment she may have had.
- I find Mrs. Jaiprasad’s testimony on repeated occasions that she must have had the “flu” to be unsatisfactory as an acceptable explanation for her not attending treatment. There is a glaring inconsistency between Mrs. Jaiprasad’s claim that she would do anything



possible to recover her health and her failures to attend for treatment or take her prescribed medications. In this regard, as an example, I point to Dr. Slyfield's evidence that she did not reliably take antidepressant medications which he prescribed.

Assessment of credibility is a difficult and complex task for an arbitrator. This is even more the case when "consistency of the inconsistencies" in the evidence itself raises a concern that it may reflect some underlying psychological impairment, which in turn may be related to the accident and give rise to entitlement to benefits. I have considered this aspect of the case carefully.

I cannot, however, find that there is any evidence before me which allows me to conclude the auto accident gave rise to the collage of symptomatology which Mrs. Jaiprasad presents with.

The burden of proof is on Mrs. Jaiprasad to prove on the balance of probabilities that she meets the complete disability test for income replacement benefits after the two-year anniversary of the accident. She must prove, pursuant to section 5.1(b) of the *Schedule*, that she is "suffering a complete inability to engage in any employment for which she is reasonably suited by education, training or experience."

Mrs. Jaiprasad, throughout the hearing, which extended over multiple days over a long period of time, presented herself as being completely disabled. I observed her to always appear to be tired, to sit uncomfortably and fidget, to walk with what I believe to be the "theatrical gait" which Dr. Massiah described. She often claimed that she did not remember events or people. She often seemed to be wincing with pain while she was testifying or sitting in the hearing room. Her affect, as Dr. Prendergast described in his time with her, was almost non-existent during the hearing. Her voice was flat and she seemed to be completely unengaged in the arbitration process. She did not manifest any reaction to being confronted many times with contradictions in her testimony.

After having assessed the all of the oral and documentary evidence I find that the real basis for my decision comes down to a choice between the conclusions of Dr. Prendergast or Dr. Slyfield. I have no lingering doubts that, whatever the actual problem Mrs. Jaiprasad suffers from, it is psychological in nature. Thus, the evidence of these two experts is the most relevant to coming to a final decision.

Dr. Slyfeld concludes that Mrs. Jaiprasad is completely disabled from working in any occupation. His evidence was that no one would hire her, or keep her employed, in her current condition. His view was that her consistency of behaviour over the three years he knew her was supportive of his diagnosis that she suffers from a pain disorder, which he advised used to be described as hysteria in earlier times. His opinion was that she was clearly manifesting significantly more pain behaviour than could be accounted for by anything in her physical condition.

Dr. Slyfield's evidence was that he was treating Mrs. Jaiprasad for depression and psychological distress and he presumed that she was getting treatment for her pain from other practitioners. In his report dated July 8, 2005, he states that he has treated Mrs. Jaiprasad "at approximately monthly intervals" since December 2003. I reviewed Dr. Slyfield's clinical notes and I find that it would be more accurate to say he has seen Mrs. Jaiprasad every two or three months during that period. I draw the inference that Dr. Slyfield's choice of vague language to describe the frequency of his interactions with Mrs. Jaiprasad is likely connected with his desire to advocate on her behalf. As a treating physician, this is understandable.

Dr. Slyfield admitted that Mrs. Jaiprasad did not tell him about many of her pre-existing medical conditions. He believed, however, that her three years of consistent pain behaviour made her unemployable. I agree with Dr. Slyfeld that it is highly unlikely that Mrs. Jaiprasad could maintain any form of employment if she showed up for work with what I can only describe as the "presence" she had at the hearing.

Dr. Prendergast does not explicitly disagree with Dr. Slyfield. His perspective encompasses the broader possibility that Mrs. Jaiprasad's testing results are strong evidence that she is not credible. He declined to use the term "malingering," which he described as a legal term of art, not a medical one. However, he did conclude that, overall, he was completely satisfied that Mrs. Jaiprasad did not suffer from any psychological disability. It follows by necessary implication from this that the auto accident did not give rise to any psychological impairment or disability.

After considering the evidence of these two mental health professionals, I prefer the evidence of Dr. Prendergast. I find that his assessment and observations of Mrs. Jaiprasad were noted carefully. I also find that his explanation of the "critical" nature of the test results are strongly persuasive of possibilities other than psychological impairment. I also find that Dr. Slyfield was primarily treating Mrs. Jaiprasad's depression symptoms. As a treating psychiatrist, this was what he should have been doing. However, I do not find that Dr. Slyfield's oral testimony or his reports help me in understanding how Mrs. Jaiprasad's behaviour could have arisen from the automobile accident. I find that he would have needed to know more about Mrs. Jaiprasad's pre-accident medical history to make informed conclusions about causality, and Mrs. Jaiprasad did not reveal this information to him. Dr. Slyfield's 2005 report indicates that he had read Dr. Prendergast's report. Dr. Slyfield baldly states in that report that he does not think Mrs. Jaiprasad is a malingerer, however he says nothing further about the matter which would explain how he would account for Mrs. Jaiprasad's presentation or test results. In my view, Dr. Slyfield intentionally declined to comment on this issue, preferring just to conclude that she was incapable of working no matter what the cause. This lack of assistance of Dr. Slyfield's evidence on the real issue in dispute in this case has to be weighed when it comes to assessing whether Mrs. Jaiprasad has met her burden of proof in this arbitration.

As a final matter, I wish to comment on an issue I dealt with in *Shubrook and Lombard*.<sup>2</sup> In that case, I discussed the Supreme Court of Canada's directive to adjudicators and those who administer statutory benefits not to stereotype people who present with complaints of "chronic pain." In *Shubrook*, my finding was that the insurer had in fact adopted a dismissive and stereotyped view of the applicant and, as a result, had rejected his claims as being exaggerated and unfounded. Mr. Shubrook was, in fact, being accused of being a "malingerer."

I do not find any reason to believe that the Personal engaged in stereotyping Mrs. Jaiprasad. Treating complaints of pain-related disability – which by definition is largely a subjective experience but no less real for that – respectfully and fairly does not require the abandonment of critical thinking and judgment on an insurer's part. In this case, the whole web of inconsistencies running through their interactions with Mrs. Jaiprasad rationally warranted the Insurer's serious consideration of the possibility that something other than an impairment related to the auto accident gave rise to it. In *Shubrook*, the situation was just the opposite; the consistency of the information which Lombard had pointed inexorably to a conclusion which they irrationally rejected as even being a possibility. When the evidence reasonably calls for a consideration of uncomfortable possibilities such as malingering, or secondary gain, then it is completely appropriate for the insurer to investigate those options. This was a very complex and challenging situation for the Insurer to assess, and I find that the dispute that arose with Mrs. Jaiprasad was a reasonably understandable one, and not one based on any insensitivity to how complex and problematic chronic pain cases often can be.

In conclusion, Mrs. Jaiprasad's claims for income replacement benefits, interest, expenses and a special award are dismissed.

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<sup>2</sup> *Shubrook and Lombard General Insurance Company of Canada* (FSCO A03-000361, November 26, 2004)

**EXPENSES:**

The parties did not make submissions on expenses. If they cannot agree on the issue within 30 days of the date of this decision, an expense hearing can be arranged, as provided for in Rule 79 of the *Dispute Resolution Practice Code (4<sup>th</sup> Edition – Updated October 2003)*.

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Robert A. Kominar  
Arbitrator

February 15, 2007

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Date



FSCO A04-001448

**BETWEEN:**

**SABITREE JAIPRASAD**

**Applicant**

**and**

**PERSONAL INSURANCE COMPANY OF CANADA**

**Insurer**

## **ARBITRATION ORDER**

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

1. Mrs. Jaiprasad's claims for income replacement benefits, interest and a special award are dismissed.

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Robert A. Kominar  
Arbitrator

February 15, 2007

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Date