**FSCO A04–000422**

**BETWEEN:**

**PHILIP SOOBRIAN**

**Applicant**

**and**

**BELAIR INSURANCE COMPANY INC.**

**Insurer**

## REASONS FOR DECISION

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| Before: | Lawrence Blackman |
| Heard: | March 29, 30, July 4 and 5, 2005, at the offices of the Financial Services Commission of Ontario in Toronto. |
| Appearances: | L. Craig Brown for Mr. Soobrian (on March 29 and 30, 2005)<br>Ryan M. Naimark for Belair Insurance Company Inc. |

**ISSUES:**

The Applicant, Philip Soobrian, was injured in a motor vehicle accident on September 4, 1999. He applied for and received statutory accident benefits from Belair Insurance Company Inc. ("Belair") payable under the *Schedule.*[1]

A designated assessment centre ("DAC") report was issued by the Accident Injury Management Clinic ("AIM") on August 27, 2003 regarding Mr. Soobrian's entitlement to weekly income replacement benefits ("IRBs") post 104 weeks of disability. AIM's overall interdisciplinary consensus opinion was that Mr. Soobrian was suffering a complete inability to engage in any employment for which he was reasonably suited by education, training or experience, based on the psychological report of Dr. L. Bauer. As required by subsection 37(5) of the *Schedule*, Belair continues to pay weekly income replacement benefits ("IRBs") notwithstanding its disagreement with the DAC opinion and notwithstanding Belair's claim for repayment of past benefits.

Upon mediation failing to resolve this dispute, arbitration was sought at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in dispute were confirmed at the hearing as follows:

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[1] The *Statutory Accident Benefits Schedule--Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

1. Is Belair obligated to continue paying weekly income replacement benefits pursuant to subsection 37(5) of the *Schedule*?

2. Is Belair entitled, pursuant to paragraphs 47(1)(a) and (c) of the *Schedule*, to repayment of weekly income replacement benefits of $300.76 from September 1, 2000, and is Belair entitled to interest thereon pursuant to subsection 47(2) of the *Schedule*?

3. Is Mr. Soobrian entitled to payment of $2,500 for the cost of an examination conducted by Dr. A. Hanick, claimed pursuant to section 24 of the *Schedule* ?

4. Is Belair liable to pay Mr. Soobrian's arbitration expenses pursuant to subsection 282(11) of the *Insurance Act*?

5. Is Mr. Soobrian liable to pay Belair's arbitration expenses pursuant to subsection 282(11) of the *Insurance Act*?

6. Is Mr. Soobrian entitled to interest on overdue payment of benefits pursuant to subsection 46(2) of the *Schedule*?

**RESULT:**

1. Belair is not obligated to continue to pay Mr. Soobrian weekly income replacement benefits pursuant to subsection 37(5) of the *Schedule*.

2. Belair is entitled to repayment of weekly income replacement benefits of $300.76 from December 9, 2002, together with interest thereon from July 6, 2004 at the bank rate in effect on that day in accordance with subsection 47(6) of the *Schedule*. The parties have twenty days from the date of this decision to serve and file written submissions regarding the exact amount to be repaid and the applicable rate of interest.

3. Mr. Soobrian is not entitled to payment of $2,500 for the cost of an examination conducted by Dr. A. Hanick, claimed pursuant to section 24 of the *Schedule*.

4. All payments of weekly income replacement benefits by Belair to a trust account held by Messrs. Thomson Rogers in accordance with my order confirmed by letter dated April 15, 2005 shall be repaid to Belair, together with any accrued interest thereon, and shall be applied against the repayment order herein.

5. The issue of the legal expenses claimed pursuant to subsection 282(11) of the *Insurance Act* may now be addressed, in accordance with the provisions of the *Dispute Resolution Practice Code* (Fourth Edition, Updated - October 2003).

## EVIDENCE AND ANALYSIS:

### Procedural Issues:

#### *1. Applicant's Adjournment Request*

Following Arbitrator Renahan's March 17, 2005 refusal of the Applicant's March 3, 2005 adjournment request, this arbitration hearing commenced before me on March 29, 2005, at 10:00 a.m., at the Commission's offices. Written notice of same had been given both in Arbitrator Renahan's December 10, 2004 letter and by formal Notice of Hearing dated December 13, 2005. The arbitration hearing was to continue on March 30, 2005 and then resume on July 4 and 5, 2005.

Mr. Soobrian was represented at the start of the hearing by Mr. Brown, legal counsel, assisted by Messrs. Spano and Pileggi of his office. Mr. Brown advised that his client was not in attendance. Counsel indicated that there was no question that Mr. Soobrian was aware of the hearing. Mr. Brown did not know why the Applicant was not present. Counsel indicated that his office had been endeavouring, without success, to reach the Applicant for several weeks, notwithstanding that they had been in communication with Mr. Soobrian's father.

Mr. Brown reiterated his request that the hearing be adjourned, or, in the alternative, that it either proceed solely on the issue of Mr. Soobrian's entitlement to payment of the section 24 account or that it proceed with Belair's repayment claim, and then the hearing be adjourned. Belair objected to this request. It submitted, however, that if the hearing were adjourned, costs should be imposed and an interim order rendered stopping payment of any further IRBs.

After hearing submissions from both parties, I declined to adjourn the hearing. Rather, I indicated that we would proceed with the Insurer's repayment claim and see whether Mr. Soobrian would attend later that day or on the next day. I asked Mr. Brown to have his office continue to make its best efforts to locate their client.

I was of the view that this matter should proceed for the following reasons:

- there was no question that the Applicant had been put on notice of this hearing, as set out above. Same was conceded by his counsel. The Notice of Hearing served on the Applicant specifically stated that:

  > If you or your representative do not attend at the hearing, the arbitrator may dispose of the case in your absence and you will not be entitled to any further notice of the arbitration proceedings.

- there was no evidence that the Applicant did not have the mental capacity to proceed with this dispute resolution process;

- there was no evidence of a valid reason, or indeed any reason given as to why the Applicant was not present;

- Arbitrator Renahan's letter of October 29, 2004 specifically added as an issue in this proceeding that Belair was seeking repayment of benefits pursuant to paragraph 47(1)(a) of the *Schedule*, which included claims of wilful misrepresentation or fraud. Belair advised that it had notified the Applicant of its request for repayment by letter dated June 14, 2004;

- the Applicant was represented at the hearing by two lawyers and an assisting paralegal;

- as I was concerned with the unexplained absence of the Applicant, I was also concerned about the serious allegations of fraud in this case; and,

- the Insurer was ready to proceed with its evidence; its first two witnesses, Mr. Brazeau (the Applicant's purported post-accident manager) and Mr. Cummings (the Insurer's senior claims adjuster) both being present.

***2. Confirming the Issues in Dispute***

This proceeding initially proceeded to arbitration essentially as a section 24 claim for payment of Dr. Hanick's report, plus interest thereon (as confirmed in the Report of Mediator issued November 26, 2003). This sole substantive issue was confirmed in Arbitrator Renahan's May 27, 2004 pre-hearing letter.

The issue of repayment of income replacement benefits was subsequently mediated on August 27, 2004. By letter dated October 29, 2004, Arbitrator Renahan ordered that the issues of IRB repayment and IRB entitlement be added to this proceeding. Nonetheless, I was advised at the commencement of the arbitration hearing that a further mediation had been scheduled regarding payment of further income replacement benefits. Upon hearing from both parties, I made the following order, confirmed by letter dated April 15, 2005:

> **ORDER**:
>
> I find that the issue of whether Belair is obligated to continue paying income replacement benefits notwithstanding subsection 37(5) of the *Schedule* flows naturally and consequentially from the repayment issue that has been mediated and which was added to this arbitration proceeding by Arbitrator Renahan. Accordingly, I find that this additional issue of the ongoing requirement to pay income replacement benefits is properly before me.

***3. Interim Order***

The arbitration hearing proceeded on March 29 and 30, 2005 with the Insurer's opening

statement and the evidence of Mr. Brazeau and Mr. Cummings. Mr. Soobrian did not attend on either day, notwithstanding the continuing efforts of his counsel to contact him. Belair wished to call the DAC specialist, Dr. L. Bauer as a witness. Dr. Bauer, however, had indicated to Belair that she would not be attending the hearing. I was advised that this might be due to certain medical concerns.

Given the absence of both the Applicant and Dr. Bauer the afternoon of March 30, 2005, Belair proposed that the arbitration hearing be adjourned to the previously scheduled resumption date of July 4, 2005, on terms that Belair not be required to pay any further IRBs, notwithstanding subsection 37(5) of the *Schedule*.

Subsection 37(5) states that where there is a DAC report in favour of an insurer, "pending the resolution of the dispute, the insurer shall pay the benefit." I was of the view that as this dispute had not yet resolved, I had no authority to order the cessation of IRB payments.

It was then proposed that weekly IRBs be ordered to be paid into a trust account. Mr. Soobrian, through his counsel of record, did not object to this proposal.

During the first two days of the hearing, I had received the following evidence, which was not repudiated or contradicted:

- that Belair has paid Mr. Soobrian weekly IRBs of $300.76 from September 11, 1999 and that these weekly payments were continuing;

- employment records from a car leasing company, New Start Leasing ("New Start"), which included:

  - an Offer of Employment from Nelson Financial Group Ltd. ("Nelson Financial," the owner of New Start) signed by "Phil Soobrian" with a sign back date of January 2, 2003. The document indicates that as Nelson Financial could not continue hiring independent contractors, Mr. Soobrian would be employed as a technical support co-ordinator at their Pickering office. His pay would include $80 for each installation or removal of a GPS (Global Positioning System) unit;

  - extensive work sheets for "Phil" or for "Phil Soobrian" for 2003 and 2004;

  - a Record of Employment for Philip Soobrian dated November 5, 2004, indicating that Mr. Soobrian had been employed with Nelson Financial Group from January 2, 2003 to November 2, 2004 and received severance pay;

  - a 2003 T4 in the name of Philip Soobrian showing employment income in the amount of $46,074.72;

  - a 2004 T4 in the name of Philip Soobrian showing employment income in the amount of $59,842.70; and,

  - a Full and Final Release from Nelson Financial, dated November 5, 2004, signed by "Phil Soobrian" in which four weeks of severance pay, totalling $1,200, was accepted in return for a release of the employer.

- extensive surveillance evidence by RAM Investigations conducted December 2002 and April 2003 showing a person identified as Philip Soobrian at New Start's Kingston Road office in Pickering;

- a Declaration of Post-Accident Income by Philip Soobrian, dated May 13, 2003, stating that he had not received any post accident employment or self-employment income. The Insurer had sent the document to Mr. Soobrian for his completion, by letter dated January 15, 2003, followed by reminder letters;

- a written statement of Mr. Brazeau, dated March 11, 2004, as operations manager of Nelson Financial and New Start (and the person to whom Philip Soobrian reported directly), that Mr. Soobrian was employed with their company, having started about three and a half years before; and,

- Mr. Brazeau's oral evidence that Mr. Soobrian had been employed by New Start starting in January 2, 2003 and ending in 2004. For approximately three months prior to January 2003, Mr. Soobrian was paid cash by Nelson Financial as a contractor. Mr. Brazeau testified that Mr. Soobrian was employed to install and to remove GPS units in leased vehicles as well as to repossess vehicles. Mr. Brazeau confirmed Mr. Soobrian's income and the severance pay he received. Mr. Brazeau also confirmed Mr. Soobrian's identity in the surveillance evidence.

Certain sections of the *Schedule*, such as sections 4, 12, 13, 14, 15 and 16, specifically state that the insurer shall pay an insured person the specified benefit. Section 44 of the *Schedule* sets out the method of payment to the person entitled to the benefit by mailing or delivering a cheque payable to the person entitled to the benefit to the address where the person ordinarily resides.

Subsection 37(5) of the *Schedule* does not explicitly mandate to whom the benefit is payable, although it is implicit that the payment would be to the insured person. Subsection 279(4.1) of the *Insurance Act* gives arbitrators the authority to make interim orders pending the final order. Section 16.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c., S. 22 allows a tribunal to make interim decisions and orders; section 23 thereof allows a tribunal to make such orders in proceedings before it as it considers proper to prevent abuse of its processes.

Given the compelling evidence of fraud on the part of Philip Soobrian, which was not repudiated, as well as the latter's unexplained absence at this hearing notwithstanding

having been provided with proper notice, in the extraordinary circumstances of this case, I was persuaded that the following unopposed interim order was appropriate:

> **ORDER**:
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> All payments of weekly income replacement benefits to the Applicant, Mr. Soobrian, from March 21, 2005, shall be paid to Messrs. Thomson Rogers to be held in a trust account and shall not be disbursed in the absence of an order by an arbitrator.

***4. Motion to withdraw as counsel for the Applicant***

At the resumption of the arbitration hearing on July 4, 2005, Mr. Brown sought to withdraw as Mr. Soobrian's counsel. By letter dated April 11, 2005, Mr. Brown had written to Mr. Soobrian indicating that should he not hear from the Applicant by May 5, 2005, he would no longer be able to represent him. By letter dated June 27, 2005 to the Commission, copied to Mr. Soobrian, Mr. Brown indicated that having not been able to make contact with the Applicant, Messrs. Thomson Rogers would be seeking an Order removing their firm as counsel in this proceeding. The letter provided the last known address for Mr. Soobrian.

At the July 5, 2005 resumption, Mr. Brown indicated his firm has been unsuccessful in its attempts to contact the Applicant, notwithstanding having met with Mr. Soobrian's father who had confirmed his son's last known address. Counsel indicated that he was unable to receive instructions, could not take direction, was unable to call Mr. Soobrian as a witness and was unable to respond to the significant allegations of misconduct against his client. Mr. Brown asked that his firm be relieved of representing the Applicant.

Belair did not oppose Mr. Brown's request.

Rule 9.8 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated - October 2003) states that an adjudicator may permit a representative to withdraw, subject to such terms as the adjudicator considers just. In coming to my decision, I noted Rule 2.09(1) of the *New Rules of Professional Conduct* (September 2000) (the "*New Rules* ") that "[a] lawyer shall not withdraw from representation of a client except for good cause and upon notice of the client appropriate in the circumstances." The commentary further states that:

> Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

In this case, I was persuaded that notwithstanding that we were now in the midst of the arbitration hearing, counsel had justifiable cause to withdraw as representative and that he had given appropriate notice to the Applicant. I noted specifically the Applicant's failure to attend the first three days of the hearing notwithstanding the continuing efforts

of counsel to reach him, and notwithstanding the notice given by the Commission, as set out above, as well as a Notice of Resumption of Hearing, dated March 31, 2005 having been served on the Applicant at his last known address.

I further noted Rule 2.09(8) of the *New Rules*, to the effect that when a lawyer withdraws, the lawyer should try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer. In this vein, I set the following terms for the withdrawal of counsel, as provided under Rule 2.09(9) of the *New Rules*, that Thomson Rogers shall, to the extent it has not yet done so,

(a) have available for the client, all papers and property to which he is entitled related to this arbitration proceeding, without same being subject to any lawyer's lien;

(b) give the client all information that may be required in connection with this matter;

(c) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(d) promptly render an account for any outstanding fees and disbursements; and,

(e) co-operate with the successor lawyer so as to minimize expense and avoid prejudice to the client.

I further ordered that as Messrs. Thomson Rogers continued to act for Mr. Soobrian in his tort action, it shall continue to receive in its trust account Belair's weekly payment of IRBs, subject to any further order of an arbitrator, and that Messrs. Thomson Rogers shall provide notice to the Commission and to Belair of any motion to get off the record in the third party action.

**Substantive Issues:**

***1. Mr. Soobrian's entitlement to ongoing payment of IRBs***

To be entitled to continued payment of IRBs Mr. Soobrian must establish, on a balance of probabilities, that as a result of his accident injuries he continues to suffer a complete inability to engage in any employment for which he is reasonably suited by education, training or experience. In this regard, Mr. Soobrian was seen by five specialists in the course of attending an extensive multi-day, post 104-week DAC assessment at the AIM clinic between May and August 2003. As a result of their consensus opinion that Mr. Soobrian was suffering a complete inability to engage in any employment for which he was reasonably suited, Belair is obligated, pursuant to subsection 37(5) of the *Schedule*, to continue paying weekly IRBs pending the resolution of this dispute, in this case, by arbitration decision.

Four of the DAC assessors were of the view that from a physical perspective, Mr. Soobrian did not meet the post 104-week complete inability test. These practitioners were Dr. R. Summerfield, neurologist, Dr. F. Abuzgaya, orthopaedic surgeon, Mr. M. Drinkwater, physiotherapist and Mr. J. McComb, kinesiologist.

The fifth medical practitioner, Dr. L. Bauer, a psychologist, saw Mr. Soobrian on seven occasions. Her August 13, 2003 report opined that Mr. Soobrian had developed symptoms of a major depressive disorder to the point that he was suicidal and potentially homicidal, as well as having developed a severe post-traumatic stress disorder. She found Mr. Soobrian unable to engage in any employment for which he was reasonably suited. A DAC consensus opinion was thereupon reached that psychologically, Mr. Soobrian met the post 104-week disability test. The other practitioners did not appear to have any independent expertise in psychology or psychiatry, and appear to have simply adopted Dr. Bauer's opinion.

Dr. Bauer states in her report that Mr. Soobrian had not worked since the accident. She describes his typical day as rising and dressing in the early morning and going to Tim Horton's for coffee, and then visiting friends, many of whom had auto shops where "he sits around and passes the time." Dr. Abuzgaya also states that Mr. Soobrian had not worked since the accident. Mr. Drinkwater and Mr. McComb state that Mr. Soobrian was not working at the time of their assessments. Dr. Summerfield's report is silent regarding post-accident employment.

Dr. Bauer has a section in her eighteen-page report entitled "Objective Findings." It includes a narrative as to the Applicant's presentation. Test results showed marked fluctuations in attention and concentration as well as severe difficulties in verbal learning and memory and the endorsement of symptoms on the Beck Depression Inventory consistent with extreme clinical depression, including "fatigue from doing almost anything." The latter appears to be simply a self-reporting test and essentially subjective, as were most of the findings in this section.

Dr. Bauer was provided with surveillance tapes, which she reviewed with Mr. Soobrian on August 12, 2003. Her report states that none of the tapes provided any information useful to her neuropsychological assessment, as they merely showed the Applicant driving and visiting friends in the body shops. Dr. Bauer opined that the prolonged delay in the implementation of recommended psychotherapy had worsened Mr. Soobrian's symptoms and that without appropriate and successful psychological treatment, it would not be possible to address the existence of cognitive symptoms resulting from a possible brain injury.

I find that Dr. Bauer's opinion is based, in significant part, on the representation by Mr. Soobrian that he had not worked since the motor vehicle accident.

I find that this representation was not true and that this representation was extremely material.

Rather, based on the evidence before me, I make the following findings:

(a) Philip Soobrian accepted full-time employment with Nelson Financial on January 2, 2003. His responsibilities included installing and removing GPS units (allowing the vehicle to be located by computer) for Nelson Financial's subsidiary, New Start, providing technical support for out-of-town GPS installers, detailing and repossessing vehicles. For some undetermined period before January 2003, Mr. Soobrian worked for Nelson Financial as an independent subcontractor

(b) Philip Soobrian worked as an employee of New Start from January 2003 to November 2004. In 2003 he earned $46,074.72. In 2004 he earned $59,842.70. He worked a forty-hour week, Monday to Friday, and, in addition, did some car repossessions in off hours;

(c) Mr. Soobrian's work had a significant physical component, including having to lie on his back to remove the car dashboard to install or remove the GPS unit and involved significant driving, sometimes out of town, to repossess motor vehicles;

(d) there is no evidence of Mr. Soobrian being unable to perform the essential tasks of his employment at New Start as a result of injuries sustained in this accident; and,

(e) Mr. Soobrian's employment was terminated not as a result of injuries sustained in this accident, but rather as a result of alleged misconduct at work, including failing to follow instructions, repossessing vehicles at unauthorized times, the unauthorized use of the repossessed vehicles and complaints by customers.

I also take an adverse inference in Mr. Soobrian's failure to attend at the hearing and to give any evidence to contradict the oral or documentary evidence received in this proceeding.

The Insurer filed before me briefs containing all of the medical documentation received in this matter. Other than the AIM DAC report, the only other medical reports which pertain to Mr. Soobrian's condition in the last two years are the following:

– Dr. A. Hanick, psychiatrist, at the request of Mr. Soobrian's counsel, interviewed and assessed the Applicant on Saturday, April 19, 2003. In his April 20, 2003 report, Dr. Hanick states that Mr. Soobrian had not been able to work since the accident in his pre-accident employment of debt collection nor had he been able to manage any type of replacement employment. On the basis of his interview, Dr. Hanick concluded that Mr. Soobrian displayed features of a cerebral insult as well as "formidable and serious

psychological/psychiatric impairment." It was the view of Dr. Hanick that it was clearly evident that Mr. Soobrian could not again work in debt collection and that it was clearly evident that Mr. Soobrian continued to suffer a full and complete disability in terms of any workplace opportunities.

- In fact, the evidence before me indicates not only had Mr. Soobrian been employed on a full-time basis for some months at the time of this assessment, but had specifically done GPS installations on April 14, 15, 16 and 17, 2003, and continued this employment for another year and a half. Given this fundamental flaw in Dr. Hanick's information, I give the report no weight.

- a functional abilities evaluation was conducted by J. McComb, kinesiologist, at the insurer's request. The August 26, 2003 report opined that based on functional testing, amongst other things, Mr. Soobrian was found not to be completely disabled from performing suitable employment.

- at the request of his counsel, Mr. Soobrian was assessed on November 16, 2004 by Jacqueline Brunshaw, a psychotherapist with the office of Dr. S. Geller, psychologist. In their November 25, 2004 report, Dr. Geller and Ms Brunshaw state that Mr. Soobrian's "physical injuries and related psychological impairment and concentration difficulties... have prevented him from being able to return to work" and that his source of income since the accident has been IRB benefits. In his interview, Mr. Soobrian endorsed a rating of 10 (on a scale from 0, being no effect, to 10, where one could not imagine a worse effect) as the effect of his accident-related injuries on his general ability to function. The report states that Mr. Soobrian "appeared to be honest and straightforward throughout the session, and there was no reason to assume that he was anything but truthful in his responses." A section entitled "Objective Findings" reviews a battery of tests. However, as stated in the body of this section of the medical report, these tests were nothing more than self-reporting questionnaires. Dr. Geller diagnosed Mr. Soobrian as having sustained a chronic post-traumatic stress disorder, a major depressive disorder (severe level) and a specific phobia regarding fear of driving as a passenger and possibly driving.

Given Mr. Soobrian's material and fundamental misrepresentations to Ms Brunshaw and Dr. Geller, I give their report no weight.

Accordingly, given,

- the fundamental flaws in the reports of Drs. Hanick and Geller;

- the lack of any other medical opinion supporting ongoing impairment;

- the absence of any testimony from the Applicant or any other witness supporting Philip Soobrian's continued disability (Mr. Brazeau testified that

Mr. Soobrian did complain about leg and back pain and problems sleeping, but there is no evidence that this interfered with his work at New Start); and,

– Philip Soobrian's significant and extensive post-accident work history;

I find that Mr. Soobrian has not met, on a balance of probabilities, the post 104-week test of continued complete inability to engage in any employment for which he is reasonably suited by education, training or experience. This resolves the dispute between the parties regarding Mr. Soobrian's ongoing IRB entitlement. Accordingly, Belair is no longer obligated to continue paying further weekly IRBs pursuant to subsection 37(5) of the *Schedule*.

Mr. Soobrian's counsel suggested at the beginning of this hearing that the onus of proof regarding payment of ongoing IRBs shifted to the insurer as a result of subsection 37(5) of the *Schedule*. I am not persuaded of same. If, however, I am wrong in this regard, I find that Belair has established, on a balance of probabilities, that Mr. Soobrian has not met the post 104-week complete inability test and that Belair is not obligated to pay the Applicant further IRB payments.

***2. Repayment of IRBs***

Belair seeks repayment from September 1, 2000 of the weekly IRB of $300.76 which it has paid to Mr. Soobrian and which it continues to pay. It seeks repayment under paragraphs 47(1)(a) and (c) of the *Schedule*, namely:

1. that the payments have been made as a result of error or as a result of wilful misrepresentation or fraud; and/or,

2. that the IRBs should be reduced to the extent post-accident income is deductible from the IRB payable.

Subsection 47(3) restricts an insurer's ability to obtain repayment to the twelve months before the requisite notice was given under subsection 47(2). Subsection 47(4) allows an insurer to obtain earlier repayment only if the benefit was paid as a result of wilful misrepresentation or fraud.

I agree with Arbitrator Alves in *Cassman and Wawanesa Mutual Insurance Company* (FSCO A96-000419, August 14, 1998) that the insurer has the onus of proof regarding repayment. Belair concedes same. I further find that the onus of proving fraud is on the insurer. The standard of proof is the civil standard of balance of probabilities.

*Insurance Law in Canada* (Volume 1, Brown and Menezes, Carswell, 2002, Scarborough, Ontario) states that in the case of fraud, there may be a higher, modified civil standard, because it involves an allegation of criminal or quasi-criminal conduct. The insurer must prove its case "with a cogency commensurate with the seriousness of

the allegation"[2] and the evidence must amount to more than suspicion and conjecture[3]. Brown and Menezes further state that the allegations must be proven with a high degree of probability[4], that "it is not enough for the insurer to prove that fraud *may* have happened" [emphasis in the original].

I adopt from Brown and Menezes that the fraud may be perpetuated by omission or by positive assertion. The omission or positive assertion must be wilfully made. I agree with Arbitrator Sampliner in *Adu-Poku and Kingsway General Insurance Company* (OIC A96-000443, August 20, 1997) that "wilful" means a deliberate or intentional action. I also find that the fraud must be material, which means "capable of affecting the mind of the insurer, either in the management of the claim or in deciding to pay it."[5] I agree with Arbitrator Wacyk in *Stellino and Halfax Insurance Company* (FSCO A99-000306, January 26, 2001) that since "both wilful misrepresentation and fraud involve moral blameworthiness [the insurer] must provide clear and cogent evidence in support of its position."

I find that Belair gave Mr. Soobrian written notice by letter dated June 14, 2004 that there was an overpayment in the amount of $73,084.68 for 243 weeks of IRBs at $300.76 per week. I find that this meets the notice requirements of subsections 47(2) and (3). I further find that this would allow Belair potential recovery back to June 2003.

However, I further find, based on the evidence set out on pages seven to eight above and on the evidence which follows starting on page 20, that Philip Soobrian, both by omission and by positive assertion, has obtained payment of IRBs by Belair as a result of repeated, prolonged, material and wilful (that is, deliberate and intentional) misrepresentation or fraud.

The question is, when did the wilful misrepresentation or fraud begin?

Belair seeks repayment from September 1, 2000. This is based in very large measure on the March 11, 2004 statement of Marc Brazeau, operations manager for Nelson Financial and New Start, that Mr. Soobrian had started working about three and a half years prior to the date of the statement. Mr. Brazeau, however, had only started working for these companies five months earlier in 2003. He indicated that as the prior manager had left on bad terms and had damaged the computer records, Mr. Brazeau's information as to the start of Mr. Soobrian's employment was based solely on information received from Mr. Keith Careen, the company accountant. Mr. Careen was not called to testify.

The only documentation provided for the period before October 2002 was three invoices totalling $260 found in Mr. Soobrian's employment file, all dated in January 2002, all

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[2] *Olynyk v. Advocate General Insurance of Canada* (1985), 12 C.C.L.I. 7 (Man. Q.B.), affirmed (1985) 12 C.C.L.I. 17 (Man. C.A.)

[3] *Silverwood Motel v. Dominion of Canada General Insurance Co.* (1984), 51, N.B.R. (2d) 362 (N.B. Q.B.)

[4] *Smetana v. Manitoba Public Insurance Corp.* (1986), 21 C.C.L.I. 95 (Man. Q.B.), affirmed (1986), 21 C.C.L. I. xxxv (note) (Man. C.A.)

[5] *Gilchuck v. Insurance Corp. of British Columbia* (1993), 17 C.C.L.I. 92d) 315 (B.C.C.A.)

referencing a supplier noted simply as "Phil." Mr. Brazeau testified that he could not be sure that these documents represented payments to Mr. Soobrian. Belair conceded that there was not very much evidence of fraud prior to October 31, 2002 and that Mr. Soobrian's earnings prior to that date are unknown.

While this limited documentary and largely hearsay evidence indicates that fraud may have occurred as early as September 2000, it is largely suspicion and conjecture, and does not meet the requisite onus of proof either on a simple balance of probabilities or any higher onus of proof.

At the very latest, Philip Soobrian's wilful misrepresentation began in mid May 2003, when he executed and delivered a Declaration of Post-Accident Income and Benefits. The Declaration states, amongst other things, that since the accident Mr. Soobrian had not received any income from employment or self-employment, which I find wilfully contradicts the extensive independent evidence set out above. In fact, New Start's records indicate that Mr. Soobrian was working the very day he executed the Declaration, earning $125 for two GPS removals.

However, I find that a pattern of misrepresentation by Philip Soobrian began earlier than May 2003 and continued thereafter, both in the Applicant's continuing failure to advise Belair of his return to employment and in his denial of same (confirmed by Mr. Naimark's letter of December 24, 2004), and in the following positive misstatements to the medical practitioners who assessed him:

1. Dr. Hanick, in his April 20, 2003 report to Applicant's counsel, states, based on his Saturday, April 19, 2003 assessment with the Applicant, that since the motor vehicle accident Mr. Soobrian has not been able to manage any type of replacement employment. April 18, 2003 was Good Friday. New Start's records show that on April 17, 2003, Mr. Soobrian did seven GPS removals, and was paid $500.

2. Dr. R. Summerfield, the post 104-week DAC neurological assessor, notes in his May 5, 2003 report, based on an April 20, 2003 assessment, Mr. Soobrian's pre-accident employment. There is no mention of any post-accident employment;

3. Dr. F. Abuzgaya, the post 104-week DAC orthopaedic assessor, states in his May 2, 2003 report that Mr. Soobrian was assessed that day and that the Applicant had not been working since the motor vehicle accident;

4. Mr. M. Drinkwater, the post 104-week DAC physiotherapist assessor, states in his May 6, 2003 report that Mr. Soobrian was presently not working. New Start's records show that Mr. Soobrian did a GPS removal the prior day and was paid $75;

5. Dr. L. Bauer, the DAC psychological assessor, states in her August 13, 2003

report that Mr. Soobrian had not worked since the car accident. She saw Mr. Soobrian on the following days in 2003: May 1, May 7 (one GPS installation that day), June 5 (one GPS installation), June 20 (three GPS installations), July 11 (one GPS installation), July 17 (2 GPS installations) and August 12 (four GPS installations the prior day);

6. J. McComb, kinesiologist, notes in his August 26, 2003 insurer's FAE (functional abilities evaluation) report that Mr. Soobrian was currently not working. In fact, Mr. Soobrian did one GPS installation that day;

7. In their November 16, 2004 report prepared at the request of Mr. Soobrian's counsel, Dr. Geller and Ms Brunshaw state in their history of the accident, that Mr. Soobrian's injuries prevented him from being able to return to work.

Belair submits, in the alternative to its arguments regarding repayment back to September 2000, that fraud has been established as of October 31, 2002. This is based on New Start's accounting records showing payments to Phil Soobrian of $585 on October 31, 2002 and $1,800 on November 30, 2002. It is, however, not clear what these alleged cash payments represent in terms what services were provided or what hours or period of time are encompassed. Mr. Brazeau testified that he did not have any personal knowledge or documentation to confirm what Mr. Soobrian was paid prior to 2003.

Dr. Ogilvie-Harris, orthopaedic surgeon, assessed the Applicant on November 22, 2002. His report to Applicant's counsel states that Mr. Soobrian had not been able to work since the accident. Nonetheless, a further payment is noted by New Star for December 31, 2002 in the amount of $1,150. Again, it is not entirely clear what the payment represents. However, there is further evidence that persuades me that Mr. Soobrian obtained benefits as a result of wilful misrepresentation or fraud from December 9, 2002 onwards.

Belair arranged a neuropsychological insurer's medical examination (IME) for Mr. Soobrian with Dr. K. Zakzanis on December 9, 2002 at 9:00 a.m. Dr. Zakzanis is with AssessMed. Belair also retained RAM Investigations to conduct surveillance on Mr. Soobrian on December 9, 2002. The investigation report indicates that the investigator arrived at 8:00 a.m. outside the offices identified by AssessMed as the location for the IME, and awaited the Applicant's arrival.

I am persuaded that the investigator properly identified Philip Soobrian as the person attending upon Dr. Zakzanis based on:

- the licence plate number of the vehicle driven by the subject person to the medical appointment was registered to Philip Soobrian;

- the Applicant conceded in correspondence from his counsel, that the person in the investigator's photographs looked like him;

- the person in the video was identified as Philip Soobrian by Mr. Brazeau;

- Mr. Soobrian's counsel indicated that he did not take issue that it was Mr. Soobrian in the surveillance evidence;

- the person identified as Philip Soobrian went on later that day to New Start, as well as returning on December 10, on December 11 at 7:11 a.m., on December 12 (his car being noted as being present at 6:56 a.m.) and on December 13, 2002, at 6:59 a.m. I am persuaded that the surveillance shows that Mr. Soobrian was not simply visiting friends, but is seen at different times performing occupational tasks involving company vehicles.

Notwithstanding the above, Philip Soobrian advised Dr. Zakzanis that he had not returned to work since the September 1999 accident. Further, Mr. Soobrian generally performed very poorly on the testing provided. On the five Weschler Memory Tests, his score was at the "0.1st percentile." On the Rey-Osterrieth Complex Figure test to assess visual memory and perceptual organization, his score fell below the 1st percentile. On semantic fluency, which required him to generate as many animal names as possible without repetition, he scored at the 1.39 percentile. On the grooved pegboard test, his performance using his right dominant hand fell below the 0.001 percentile. His left hand performance was at the 2.74 percentile.

Dr. Zakzanis opined that Mr. Soobrian's results clearly fell within the possibly malingering range and were close to the range of definite malingering. Given the above surveillance and his subsequent prolonged work history, I am persuaded that Mr. Soobrian deliberately and materially exaggerated his impairments, if any impairment existed at all.

Given:

- the surveillance and New Start's records evidence supporting the conclusion that Mr. Soobrian's paid work for New Start started at least as early as December 2002;

- my finding that Mr. Soobrian contemporaneously misrepresented to Dr. Zakzanis that he was not employed;

- my finding that Mr. Soobrian consciously misrepresented his mental and physical abilities to Dr. Zakzanis on testing;

- the records confirming Mr. Soobrian's extensive subsequent employment at New Start;

- Mr. Soobrian's repeated material misrepresentations to a variety of insurer, DAC and other medical practitioners, as well as to the Insurer; and,

- Mr. Soobrian's failure to contradict in any way this extensive evidence of

wilful misrepresentation or to attend at this arbitration hearing,

I am persuaded that Belair has proven, beyond mere suspicion or conjecture, but with "a cogency commensurate with the seriousness of the allegation,"; wilful misrepresentation or fraud by Philip Soobrian ongoing from December 9, 2002, both by omission and by positive assertion. I find that the misrepresentation and fraud were deliberate and material. I find that they were capable of affecting the mind of the insurer, and in fact did lead to ongoing payment of IRBs, most recently as a result of the opinion of the DAC assessor, Dr. Bauer, in August 2003.

Accordingly, I find that Belair is entitled, pursuant to paragraph 47(1)(a) of the *Schedule*, to repayment of all IRB payments made to Philip Soobrian from December 9, 2002. I find that Belair paid directly to Mr. Soobrian a weekly IRB of $300.76 from December 9, 2002 until March 21, 2005. I calculate this to be 119 weeks of benefits, which would amount to $35,790.44. However, I will allow the parties twenty days from the date of this decision to serve and file written submissions regarding the exact amount to be repaid for this period. Pursuant to my order, all further weekly IRB payments by Belair were to be paid to a trust account held by Messrs. Thomson Rogers. These payments shall be repaid to Belair, together with any accrued interest thereon.

Pursuant to subsection 47(6) of the *Schedule*, Belair is entitled to interest on the amount ordered repaid from the fifteenth day after notice is given under subsection 47(2), at the bank rate in effect on that day. Unlike subsection 47(3), there is no earlier date available in the case of wilful misrepresentation or fraud. On a balance of probabilities, I find that the notice letter of June 14, 2004 would have been received on the fifth business day thereafter. The fifteenth day thereafter is July 6, 2004. Interest will run from that date.

I did not receive submissions regarding the applicable rate of interest on July 6, 2004. The parties have twenty days from the date of this decision to serve and file written submissions regarding the applicable rate of interest on that date.

I further find, in addition to or in the alternative to the fraud provisions of paragraph 47(1)(a) of the *Schedule*, that Belair is entitled, pursuant to subsection 6(2), paragraph 47(1)(c) and subsection 47(3) of the *Schedule*, to repayment of 80% of the net income received by Mr. Soobrian in respect of post-accident employment from June 21, 2003, being twelve months prior to the date of deemed receipt of the Insurer's June 14, 2004 notice letter. As I was not provided with a week-by-week breakdown of Mr. Soobrian's net post-accident income, I am unable to determine the precise amount of the repayment to which Belair is entitled pursuant to paragraph 47(1)(c).

***3. Payment of Dr. Hanick's account***

Payment of Dr. Hanick's report is sought pursuant to section 24 of the *Schedule*. Section 24 allows for payment of all reasonable expenses incurred by or on behalf of an insured person for the purpose of the Regulation in obtaining and attending an examination or assessment or in obtaining a report.

Dr. Hanick prepared a report for Mr. Soobrian's counsel as to the sequella of the September 4, 1999 car accident. Mr. Soobrian represented to Dr. Hanick that he had been unable to manage any type of employment since the accident because of accident related psychological and physical problems. I find that Mr. Soobrian lied to Dr. Hanick about his inability to work. I find that this misrepresentation was intentional and material. I find that as a result of this misrepresentation, Dr. Hanick recommended a broad range of psychological and physical therapies, testing, counselling and retraining. I find that as a result of Philip Soobrian's intentional and material representation, it is highly questionable whether any part of the report is of any use.

Dr. Hanick is owed $2,500 by Philip Soobrian. Given that Philip Soobrian's misrepresentation resulted in an essentially useless report, I find that the Applicant has not met his onus of establishing that this is a reasonable expense requiring payment by Belair. Accordingly, this claim against Belair is dismissed. This finding is, of course, without prejudice to Dr. Hanick's remedies against Philip Soobrian personally.

**EXPENSES:**

The issue of the legal expenses of this arbitration proceeding may now be addressed in accordance with the provisions of the *Dispute Resolution Practice Code* (Fourth Edition, Updated - October 2003).

September 20, 2005

_____ _____

Lawrence Blackman
Arbitrator

Date

**FSCO A04–000422**

**BETWEEN:**

**PHILIP SOOBRIAN**

**Applicant**

**and**

**BELAIR INSURANCE COMPANY INC.**

**Insurer**

## ARBITRATION ORDER

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

1. Belair is not obligated to continue to pay Mr. Soobrian weekly income replacement benefits pursuant to subsection 37(5) of the *Schedule*.

2. Belair is entitled to repayment of weekly income replacement benefits of $300.76 from December 9, 2002, together with interest thereon from July 6, 2004 at the bank rate in effect on that day, in accordance with subsection 47(6) of the *Schedule*. The parties have twenty days from the date of this decision to serve and file written submissions regarding the exact amount to be repaid and the applicable rate of interest.

3. Mr. Soobrian is not entitled to payment of $2,500 for the cost of an examination conducted by Dr. A. Hanick, claimed pursuant to section 24 of the *Schedule*.

4. All payments of weekly income replacement benefits by Belair to a trust account held by Messrs. Thomson Rogers in accordance with my order confirmed by letter dated April 15, 2005 shall be repaid to Belair, together with any accrued interest thereon, and shall be applied against the repayment order herein.

5. The issue of the legal expenses claimed pursuant to subsection 282(11) of the

*Insurance Act*, R.S.O. 1990, c. I.8, may now be addressed, in accordance with the provisions of the *Dispute Resolution Practice Code* (Fourth Edition, Updated - October 2003).

September 20, 2005

Lawrence Blackman
Arbitrator

Date