

FSCO A95-000485 and A97-000207

BETWEEN:

JOE FALCO

Applicant

and

CONTINENTAL INSURANCE COMPANY

and

PAFCO INSURANCE COMPANY LIMITED

Insurers

REASONS FOR DECISION

Before: Beth Allen

Heard: December 6, 7, 8 and 9, 1999, in Hamilton, Ontario.
Written submissions were received from Mr. Falco on January 10, 2000 from the Continental and Pafco on January 21, 2000 and submissions in reply from Mr. Falco on January 31, 2000.

Appearances: Paul Barrafato for Mr. Falco
Albert Conforzi for the Continental Insurance Company
Derek E. Wilson for Pafco Insurance Company Limited

Issues:

The Applicant, Joe Falco, was injured in two motor vehicle accidents, on January 26, 1994 and December 4, 1995. He was insured for the first accident by the Continental Insurance Company (“the Continental”) and for the second by Pafco Insurance Company Limited (“Pafco”). He applied for and received statutory accident benefits from the Continental, payable under the

1994 Schedule.¹ The Continental paid income replacement benefits (IRBs) at \$1000 per week from February 2, 1994 until October 13, 1994 at which time the Continental reduced the benefits to \$185 per week until January 25, 1996 when it finally terminated benefits. Mr. Falco seeks reinstatement of these benefits and a special award. The parties settled the quantum of the IRB on the basis that the IRB rate is \$435 per week. However, the Continental seeks, on account of post-accident income, a deduction from the IRBs already paid and a reduction in benefits that would be payable in the event that I were to order ongoing benefits after the termination date. The Continental does not seek a repayment.

After the second accident, Mr. Falco applied to Pafco for IRBs. Pafco paid no IRBs and accordingly, Mr. Falco claims entitlement under the *1995 Schedule* to IRBs as a result of injuries sustained in the December 4, 1995 accident.

The Continental paid the outstanding claim of \$745 for medication and accordingly Mr. Falco has withdrawn this issue.

The parties were unable to resolve their disputes through mediation, and Mr. Falco applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I-8, as amended (the “*Act*”).

¹The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94, 463/96 and 304/98. O.R. 776/93 was extensively modified by O.R. 781/94; accordingly, where necessary, “*1994 Schedule*” refers to the original O.R. 776/93, and “*1995 Schedule*” refers to O.R. 776/93 as amended.

The issues in this hearing are:

1. Is Mr. Falco entitled to ongoing IRBs from the Continental after January 25, 1996 pursuant to section 7 of the *1994 Schedule*?
2. Mr. Falco and the Continental settled the IRB rate at \$435 per week.
3. Is the Continental entitled to a deduction from IRBs paid to Mr. Falco for income he earned subsequent to the accident, pursuant to subsection 10(3) of the *1994 Schedule*?
4. Is Mr. Falco entitled to a loss of earning capacity offer from the Continental pursuant to subsection 21 of the *1994 Schedule*?
5. Is the Continental liable to pay Mr. Falco a special award pursuant to subsection 282(10) of the *Act*?
6. Is Mr. Falco entitled to IRBs from Pafco from December 11, 1995 and ongoing pursuant to section 7 of the *1995 Schedule*?
7. Is Mr. Falco entitled to a loss of earning capacity offer from Pafco pursuant to section 21 of the *1995 Schedule*?
8. Is Pafco liable to pay Mr. Falco a special award pursuant to subsection 282(10) of the *Act*?
9. Is Mr. Falco entitled to his expenses incurred in respect of the arbitration hearing from the Continental and/or Pafco pursuant to subsection 282(11) of the *Act*?

Result:

1. Mr. Falco is not entitled after January 25, 1996 to further IRBs from the Continental as a result of the January 26, 1994 accident.
2. The accountants shall calculate Mr. Falco's post-accident income for the period February 2, 1994 to January 25, 1996 and apply it to IRB payments using Hrycko's approach of annualizing the income and calculating it on a weekly basis. I may be approached in the event of a dispute over this calculation.
3. Mr. Falco is not entitled to a loss of earning capacity offer from the Continental.
4. The Continental is not liable to pay Mr. Falco a special award.
5. Mr. Falco is not entitled to IRBs from Pafco as a result of the December 4, 1995 accident.
6. Mr. Falco is not entitled to a loss of earning capacity offer from Pafco.
7. Pafco is not liable to pay Mr. Falco a special award.
8. If the parties do not resolve the expense issue, I may be spoken to.

EVIDENCE AND ANALYSIS:

Entitlement:

The Law:

Mr. Falco seeks IRBs from the Continental and Pafco under subsection 7(1), paragraph 1 of the 1994 and 1995 *Schedules*. The provision is identical in both schemes and states:

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

1. The insured person was employed at the time of the accident and, as result of and within two years of the accident, suffers a *substantial inability* to perform the *essential tasks* of that employment. [emphasis added].

An insured person is only entitled to an IRB if he can prove that his accident-related injuries *substantially disabled* him from performing the *essential tasks* of his pre-accident employment.

The Accidents:

On the morning of January 26, 1994, Mr. Joe Falco, age 45 at the time, was involved in the first automobile accident (“the 1994 accident”) material to this arbitration. In that accident Mr. Falco was a passenger in a pick-up truck driven by one of his employees when another car struck the right front bumper of the truck. Mr. Falco’s right shoulder struck the passenger side door causing pain in his neck and lower back. He did not go to the hospital or report the accident to the police on that day. The employee drove him home in the truck that was involved in the accident. Mr. Falco stated that he was in pain and remained in bed for the rest of that day. He reported the accident to the police the next day and visited his family doctor the following day.

Mr. Falco was involved in the second accident on December 4, 1995 (the 1995 accident), approximately one year after the first. He testified that his lower back pain increased after the second accident. Mr. Falco testified that in this accident he was shaken up by the impact. He was taken to hospital by ambulance where he remained for a couple of hours. He testified that while at the hospital, he had back pain and could not move his legs. In a statement dated December 21, 1995 which Mr. Falco gave to an adjuster from Pafco, he stated that he was taken to hospital by

ambulance suffering from pain “from the neck down”. He received an injection that alleviated the pain. A few days later, his family doctor prescribed pain medication.

Mr. Falco was also involved in a third accident in the summer of 1997 (not the subject matter of this arbitration) when he hit a pedestrian while driving his car. A medical report by Dr. T.O. Gyenes dated January 11, 1999 indicates that Mr. Falco sustained injuries to his upper middle back and neck in this accident.

Essential Tasks:

Mr. Falco claims that before the 1994 accident, he was involved in all aspects of his construction business — both the physical and management and supervisory tasks — and that both areas of work constituted his essential tasks. He testified that after the 1994 and 1995 accidents, he continued to perform management and supervisory functions and little or no physical work.

The Continental submits that the essential tasks of Mr. Falco’s pre-accident construction work involved principally the management and supervisory aspects of the work and only secondarily, if at all, did he undertake the physical work. The Continental further submits that because he resumed these essential tasks shortly after the accident, he has no further entitlement beyond the date benefits were terminated.

The Continental argues in the alternative that if Mr. Falco was disabled from returning to his pre-accident work, his disability was the result of his extensive pre-accident medical problems. It bases this position on medical records which reveal that in the year before the accident, Mr. Falco suffered from seizure-like episodes, severe headaches, hypertension, alcoholism, depression, borderline diabetes, heart palpitations, obesity and a sore neck. The records also note hip and knee flexion problems which produced pain in the mid-back and for which he took pain

medication. I find that these records accurately describe Mr. Falco’s pre-accident medical conditions.

Pafco argues that it is not obligated to pay Mr. Falco any IRBs since he continued after the 1995 accident to do the management and supervisory duties he was performing before that accident. Pafco argues in the alternative, that if Mr. Falco is disabled, it is the result of the 1994 accident.

Mr. Falco’s Testimony:

Mr. Falco was self-employed at and owner and president of Rilco General Construction and Paving (Rilco) before the 1994 accident. Fulton General Construction and Paving (Fulton), of which he was also the owner and president, was set up sometime in 1994. It is not entirely clear why a second company was set up. Mr. Falco was employed by Fulton before and after the 1995 accident. These companies do essentially the same type of work, that is, interior construction, paving and landscaping (site improvement), as well as snow removal in the winter. Mr. Falco’s accountants treat Rilco and Fulton as doing the same business with the same customers, Fulton being a continuation of Rilco. In the absence of evidence to the contrary, in this decision I will treat these companies in this manner. The headquarters for Rilco and Fulton is located at Mr. Falco’s home. His property has a garage where Mr. Falco would repair small equipment, and a construction yard where he stored materials, machinery, tools and vehicles and where workers loaded materials and readied equipment and vehicles to be taken to work sites (“the construction yard”).

Mr. Falco claims that at the time of the 1994 accident, he was working 90 to 95 percent of the time on-site and “did everything”. According to Mr. Falco’s testimony, he was a labourer, a machine operator, a paver, a landscaper and snowplough operator. Landscaping involves excavating and grading the land, putting in top soil, planting trees and laying sod. Paving requires excavating, putting down gravel, levelling according to blueprint specifications, putting in curbs

and sidewalks, and pouring cement and asphalt. Machine operation involves driving pavers, graders, trucks, bobcats, back hoes, snowploughs and bulldozers. Interior construction involves demolition, installing insulation, drywall and ceramics, painting, woodworking and plumbing. According to Mr. Falco, when the January 1994 accident occurred, 99 percent of the work was snowploughing. He testified that business is slow in winter and he therefore employed fewer employees than in the warmer months when he employed seven or eight in addition to himself.

The physical work requires considerable heavy lifting, bending, climbing, carrying, twisting, standing, crawling (inside engines and under trucks), pushing, pulling, and prolonged sitting and walking, which Mr. Falco claimed he could no longer do after the accidents.

On his Application for Accident Benefits dated April 7, 1994, Mr. Falco restricted the description of his employment tasks to physical labour, omitting any reference to his many management and supervisory responsibilities. However in testimony, Mr. Falco described in some detail his tasks running the business.

Mr. Falco stated that before the 1994 accident, he was the president, the supervisor and a secretary of his companies and, in this capacity, he secured 100 percent of the business contracts himself. He took calls from customers, picked up tender documents, studied blueprints, costed jobs, visited sites to compare the site with blueprint specifications, instructed workers on routes to sites and supervised and inspected work for conformity with blueprint specifications. Mr. Falco also arranged the hiring of subcontractors who, he stated, did from 10 to 15 percent of the work. He testified that he would carry on with the more physical jobs between doing these management and supervisory tasks.

Mr. Falco testified that since the 1994 accident until the present, he has not been able to undertake any physical work. He stated that because of the 1994 accident, his work was limited,

from January 1994 to June 1994, to picking up job contracts, scheduling jobs, supervising jobs and communicating with customers. He attempted to get his sons to do the physical work but this did not work out. According to Mr. Falco, Fulton subcontracted out paving and grading work because he had no one else to do it. Mr. Falco testified that by 1995 and thereafter, he basically supervised and managed jobs for Fulton. He claimed he would show others how to use heavy machinery from time to time, but he could not tolerate the vibrations of the equipment.

The discrepancy between Mr. Falco's account of his employment tasks on his application and those he described in testimony, I find, has adversely affected the reliability of his evidence on his essential tasks. I do not accept his explanation that he did not include his supervisory and management functions due to space constraints on the application, particularly in view of the critical role he played for his company in these areas. I find that Mr. Falco was simply attempting to misrepresent his essential tasks.

Other Witnesses' Evidence:

Mr. Falco called three witnesses who gave evidence about the type of work he did, Mr. Paul Bourdon, Mr. Angelo Falco and Mr. Victor London.

Mr. Bourdon, who stated that he was a friend of Mr. Falco, testified that from 1987 until 1993, he was a store manager at a Zeller's department store. Mr. Falco's company was under contract with Zeller's to do general repairs at the store and snow removal and repairs on the lots. Mr. Bourdon indicated that he last observed Mr. Falco in work clothes in 1993 at which time he drove a snowplough. On cross-examination by the Continental, Mr. Bourdon admitted that he would not often stand and watch the snow removal and, under these circumstances, would not really know who was supervising and who was doing the physical work. I did not find Mr. Bourdon's testimony persuasive evidence of the scope of Mr. Falco's work before the accident.

Mr. Angelo Falco, Joe Falco's brother, testified that he worked for Rilco as an employee from about 1991 until 1994. He first stated that he observed his brother, Joe, do the same work that the other workers did. He wore work clothes, drove trucks, back hoes and machine rollers. He indicated that Joe helped with physical work at the construction yard and on snow removal sites. When cross-examined, Mr. Angelo Falco conceded that Joe would not do the physical work for as long a period as the other workers because he had to deal with customers and run around a great deal for the jobs. Mr. Angelo Falco failed to persuade me that his brother did extensive physical work before the 1994 accident. I detected that he might have been somewhat reluctant to testify against his brother by readily admitting the type of work his brother did before the 1994 accident.

Mr. London testified that from about the late 1980s until 1991, he knew Mr. Falco as a general contractor at premises where Mr. London's employer rented space. He also hired him to help renovate his house in 1991. He indicated that in 1991 he saw Mr. Falco doing demolition, driving trucks and doing carpentry. However, he stated that he never saw Mr. Falco doing construction after 1991 and for this reason, I did not find Mr. London's evidence very helpful.

The Continental called three witnesses to establish that Mr. Falco did almost exclusively the management and supervisory aspects of the work before the 1994 accident. Aston Associates Investigations Limited (Aston) prepared reports in April and June 1999 which contain information that supports this position.

Mr. Donald Panton worked as a labourer for Rilco from October 27, 1992 until November 21, 1992. He worked on two sites but did not attend at the construction yard or participate in the snow removal jobs. Mr. Panton had general recall of his work with Rilco. He stated that he thought of Mr. Falco as the boss who assigned work, paid the workers and supervised and oversaw the work. Mr. Panton stated in testimony, as he did in his statement to Aston, that he did

not consider Mr. Falco to be part of the work team. At times, he would demonstrate how to do a certain task and then leave the site. I find the Aston report overstates Mr. Panton's testimony about Mr. Falco's participation in physical work by saying that he (Mr. Panton) "never once saw Mr. Falco doing any sort of physical work himself." I prefer Mr. Panton's sworn testimony and a similar statement he gave to Aston on May 20, 1999 over the Aston report. His oral evidence was subjected to cross-examination and Mr. Panton impressed me as a credible witness.

Mr. Tony Paulino described Mr. Falco as a "good guy" and "a friend". He worked as a labourer for Rilco from 1991/92 to 1994/95 but did not do snow removal. He stated that he saw Mr. Falco everyday on site. Mr. Falco would teach the workers how to rake asphalt or operate machines and supervise the work. He testified that in his experience, Mr. Falco rarely worked side-by-side with the work teams but would occasionally drive the back hoe and trucks, but his brother Angelo would do this more consistently. Mr. Tony Paulino indicated that if Mr. Falco did not have new workers to teach, he would drive around in his car looking for new work. He conceded under cross-examination that he would not know what Mr. Falco was doing on other sites. I find that Mr. Paulino was generally a reliable witness.

Mr. Val Paulino worked as a labourer mixing asphalt and cement and laying sod for Rilco in 1993 for three or four months. He was not involved in snow removal operations. He testified inconsistently about Mr. Falco's function at the construction yard. In chief, he testified that Mr. Falco would not load the trucks. Under cross-examination he stated that at times Mr. Falco repaired equipment and loaded materials with other workers. According to Mr. Val Paulino, Mr. Falco would generally instruct the other workers as to where they would be working and delegate the work. According to Mr. Val Paulino, at the site, Mr. Falco mainly supervised and oversaw the work and only occasionally did some of the physical work himself. Mr. Val Paulino said that he recalled that Mr. Falco would be on site for about 15 minutes and would leave to do estimates for other jobs and he never saw him work a full day on the site.

Conclusion on Entitlement:

I heard conflicting evidence as to the extent of Mr. Falco's physical work before the 1994 accident.

I find that Mr. Falco's testimony about his involvement in extensive physical work was self-serving and, accordingly, I give it limited weight. I do not accept his evidence that the more physical tasks in his construction, paving landscaping and snow removal operations were an essential part of his pre-1994 accident work. I find that he exaggerated and misrepresented his evidence in this area. I have no doubt that he did considerably more of this work in the past, since he has been in this business for many years and was able to give hands-on instruction to his employees. But the evidence does not support a finding that he engaged extensively or principally in heavy labour in the years just preceding the 1994 accident. When confronted with medical documentation of his extensive pre-accident health problems, Mr. Falco was largely evasive and non-responsive in his answers.

I find the witnesses he called did not strongly support his evidence regarding the extent of his physical work. The witnesses the Continental called, I find, provided a more realistic view of Mr. Falco's work. It was my impression that none of these witnesses bore a grudge against Mr. Falco and in fact appeared amiably disposed towards him. Based on the evidence, I find that Mr. Falco was not part of work teams on sites, that he spent the largest portion of his time off-site generating business, procuring contacts, dealing with customers and supervising and overseeing work projects. This accords with Mr. Falco's description of his management and supervisory tasks.

Regarding Mr. Falco's involvement in snowploughing and in the construction yard, I have Mr. Falco's testimony and some rather sketchy testimony from other witnesses. I have no strong or persuasive evidence that Mr. Falco did any more physical work in these operations than on construction, landscaping and paving sites. I can reasonably infer that Mr. Falco more likely than not undertook only limited physical work at the construction yard and during snow removal operations as was the case on the construction and paving sites.

I am persuaded that the poor state of Mr. Falco's health before the 1994 accident was a likely factor in limiting his physical abilities. Having said this however, I do not accept that in the years before that accident, he did absolutely no physical work. A fair assessment of the evidence brings me to the conclusion that the most significant part of his work involved the management and supervisory aspects of Rilco's construction, paving, landscaping and snow removal operations and I find these responsibilities involved, at times, brief periods of instructing employees on some of the physical tasks. I conclude from this that any physical work he might have done beyond instructing workers would have been minimal and would not be an integral or consistent part of his responsibilities.

I therefore find that Mr. Falco's pre-1994 accident essential tasks involved: generating and procuring job contracts, scheduling jobs, supervising jobs, communicating with customers studying blueprints, costing jobs, visiting sites to compare the site with blueprint specifications, instructing workers on routes to sites, supervising and inspecting the work for conformity with blueprint specifications and some hands-on instruction. I find the evidence shows that Mr. Falco continued to do a substantial number of these tasks after the January 26, 1994 accident. The evidence also reveals, and I find, that Mr. Falco also continued to perform basically the same management and supervisory tasks after the December 4, 1995 accident. He continued after both accidents to contact and communicate with customers, procure contracts, schedule jobs, supervise workers and oversee the work and instruct workers on how to do some jobs.

While I accept that Mr. Falco sustained soft tissue injuries to his neck, right shoulder and back in the 1994 accident and likely sustained some soft tissue injury to his back in the 1995 accident, the evidence establishes that these injuries did not substantially disable him from performing his essential tasks at Rilco or Fulton. For this reason, I find that Mr. Falco failed to satisfy the disability test prescribed under section 7 of the *Schedules* and, accordingly, he is entitled to no further IRBs from the Continental. He is likewise entitled to no benefits from Pafco.

Loss of Earning Capacity Offer:

Since I have decided that Mr. Falco did not continue to qualify for IRBs 104 weeks after the onset of disability pursuant to subsection 21(1), paragraph 1 of the *1994 Schedule*, the Continental is not required to deliver a loss of earning capacity offer to Mr. Falco.

Special Award:

In the hearing into a preliminary issue in this matter, Mr. Falco claimed interim benefits and a special award from the Continental for allegedly failing to comply with the benefit stoppage provisions under section 64 of the *1994 Schedule*. In my decision issued on June 29, 1999, I denied both claims. In this proceeding, Mr. Falco claims a special award from the Continental and Pafco for unreasonably withholding or delaying IRB payments. However, under subsection 282(10) of the *Act*, the grant of a special award is predicated on an award of benefits. Since Mr. Falco has not succeeded against either the Continental or Pafco, he is not entitled to a special award from either insurer.

Post-accident Income:

The Parties' Arguments:

My determination on this issue does not involve Pafco since I have decided Mr. Falco is not entitled to benefits arising from the 1995 accident. Mr. Falco and the Continental settled the quantum of pre-accident income and IRB issues, however, the post-accident income issue remains in dispute. I have decided that Mr. Falco is not entitled to ongoing IRBs, I therefore need not consider post-accident income he earned after benefit termination. I am required only to look at post-accident income earned from February 2, 1994 until January 25, 1996, the period during which the Continental paid IRBs. The parties dispute under subsection 10(3) of the *1994 Schedule*, the method by which this income should be calculated or applied as against benefits paid.

At the hearing, Mr. Falco advanced an approach to deducting post-accident income from IRBs which was not considered by the accountants he retained to prepare a report for the hearing. He submits that post-accident income should be deducted from IRB benefits by matching the post-accident income in the weeks it was earned with IRBs in the concomitant benefit week. He relies on the *Boltman*² arbitration case decided under section 15 of the *OMPP Schedule*. Like section 10(3) of the *1994 Schedule*, section 15 is silent on the method of applying post-accident income to benefits paid. Subsection 10(3) states:

10.—(3) The Insurer may deduct from the amount of the weekly income replacement benefits payable to an insured person a percentage of the net income received by the insured person in respect of any employment subsequent to the accident.

²*Boltman and Personal Insurance Company of Canada*, (OIC A-013610, August 25, 1995).

Boltman looked at the wording of the weekly income benefit provision under the *OMPP Schedule* (section 12, the parallel provision to section 7 under the *1994 Schedule*) and the remedial purpose of the accident benefits scheme in arriving at the conclusion that post-accident income should be matched in the week earned with the concomitant benefit week. Unlike the case before me, Mr. Boltman was receiving ongoing weekly income benefits at the time of the hearing.

Boltman states:

In considering the wording of section 15, it is necessary to consider the remedial purpose of the legislation...and the words used in describing the benefits. The benefits are called “weekly” and they are calculated on a weekly basis. In order to have [sic] avoid disharmony between section 12 and section 15, it is reasonable that the same criteria of “weekly” be applied when considering deductions under section 15. I find that a direct matching of the weekly income earned by Mr. Boltman to the weekly income benefits he continues to receive is consistent with the intent of the remedial aspects of the legislation and the liberal interpretation of the wording of the legislation.

The Continental argues on the other hand, that the post-accident income should not be calculated on a week-by-week basis as it is earned and applied to IRBs on a weekly basis. Rather it argues that post-accident income should be annualized and averaged over 52 weeks for the purposes of applying it to IRBs. According to the Continental, it is arguable that the *1994 Schedule* does not intend that post-accident income in a self-employment context be calculated in the week it was earned. The Continental bases its view of the intent of subsection 10(3) on the income calculation requirements provided for in subsection 7(3) and section 83 of the *1994 Schedule*.

It is the Continental’s position that subsection 7(3) (which deals with IRB entitlement for self-employed persons) intends that self-employment income not be calculated on a weekly basis because it specifically excludes self-employed persons from designating the pre-accident four week period for the purposes of calculating income, limiting persons in this category to designating only the 52 and 156-week periods.

The Continental also argues that section 83, which provides for pre-accident income to be calculated as is required under income tax legislation, should apply equally to post-accident income as to pre-accident income. That is, since income tax legislation does not provide that business income be calculated in the week it was earned, post-accident income from self-employment ought not under the *1994 Schedule* be calculated according to a weekly scheme. In the Continental's view, there is no reasonable basis for one approach to apply to pre-accident income and a different approach be used for calculating post-accident income.

The Continental makes a further evidentiary argument. It points out that under the circumstances of this case, the state of Mr. Falco's businesses' financial records would make it an overwhelming, if not impossible task to calculate Mr. Falco's earnings on a week-by-week basis. According to this view, in addition to being in a serious state of disarray, there are gaps and discrepancies in the documentation and inconsistencies in Mr. Falco's verbal representations that make relying on this information difficult and week-by-week calculations impossible. According to the Continental, further delay and expense would result from attempts to obtain the required evidence through further accountants' reports and testimonial evidence.

The Rilco/Fulton Financial Records:

The parties' accountants experienced considerable delays in obtaining and examining Rilco's financial records. In 1992 and 1993, the RCMP seized all of Rilco's financial records for the period 1988 to 1993 in connection with an investigation for unemployment insurance fraud. After numerous correspondences with Rilco's accountants and Mr. Falco's legal representative, Hrycko & Associates Inc. ("Hrycko"), the Continental's accountants, finally had access to review the books in February 1995. They were apparently in a state of considerable disarray.

Mr. Falco's counsel obtained the records from the RCMP along with more current financial records for Rilco and Fulton and retained an accounting firm, BDO Dunwoody ("Dunwoody") to prepare a report. In its report dated June 10, 1999, Dunwoody provided estimates of Mr. Falco's pre- and post-accident income for the purposes of calculating the amount of his IRB entitlement. Dunwoody's estimates were prepared using three scenarios. Both Dunwoody and Hrycko agree that the estimates in scenario 1, which used the companies' unaudited financial statements, should be employed. The discussion in this decision is based on scenario 1 of the Dunwoody report.

Since the period under consideration is February 2, 1994 to January 25, 1996, the financial statements for April 1, 1993 to March 31, 1994; from April 1, 1994 to March 31, 1995 and from April 1, 1995 to March 31, 1996 are pertinent.

I find there are considerable deficiencies in the source financial documentation the accountants used to estimate Mr. Falco's pre- and post-accident income. While the parties ultimately settled the amount of the pre-accident income and the IRB rate during the hearing, a brief look at the pre-accident period will help put the discussion about post-accident income in context and highlight some of the difficulties in applying the *Boltman* approach.

For instance, on Mr. Falco's Application for Accident Benefits dated April 7, 1994 he reported gross income for the 52 weeks before the accident that differed from that stated in the Dunwoody report. While testifying, Mr. Falco seemed uncertain but stated that he thought the figure came from his company's accountants, Wiseman & Associates. However, I find he did not satisfactorily account in testimony for the discrepancy in the amounts.

As well, I find that some of Mr. Falco's representations and documentation conflicted in some areas with Dunwoody's approach. For example, the evidence is not clear as to whether Mr. Falco's wife was actually employed by Rilco and earned an income. In his Application for

Accident Benefits, Mr. Falco reported projected earnings for his wife for the year of the accident. He also stated in that Application and his divorce application dated September 20, 1996, that his wife was actually employed by Rilco doing secretarial work. The Dunwoody report seems to indicate that wages were paid to Mrs. Mary Falco for tax planning purposes only, however source financial documents were not available to Dunwoody to confirm the extent, if any, of Mrs. Falco's involvement in the business.

Equally unclear due to deficiencies in the source documentation and inconsistencies in testimonial evidence, is Mr. Falco's son Paul's pre-accident involvement in Rilco. However, when estimating Mr. Falco's pre-accident income, Dunwoody attributed to Mr. Falco the wages paid to Paul Falco.

Regarding the calculations for post-accident income, I find the sources for Dunwoody's estimates to be similarly unreliable. Dunwoody estimated Mr. Falco's gross annual post-accident income from February 2, 1994 until June 21, 1999 to be \$37,651. (I received no calculations from either party's accountants for the period of inquiry for this decision – February 2, 1994 to January 25, 1996.) Dunwoody apparently used the unaudited statements available for the period from the year ending March 31, 1994 up to and including the statement for the year ending March 31, 1997 but did not explain how it arrived at its \$37,651 figure³. Because there were no statements for subsequent years, in arriving at its estimate, Dunwoody relied on verbal representations from Mr. Falco that his annual net income for subsequent years was \$10,000. Because Dunwoody did not disclose its calculations, it is not clear how the \$10,000 factors into its post-accident income figure. Dunwoody estimated the net weekly amount to be \$545.50. Subsection 10(4) of the *1994 Schedule* allows the insurer to deduct 90 percent of post-accident income from the weekly IRB.

³This figure is stated in Schedule 1 to the Dunwoody report, but there is no discussion as to how it was calculated, and hence the basis for Dunwoody's weekly post-accident income figure, \$490.95.

Based on this, Dunwoody roughly estimated the weekly post-accident income figure to be \$490.95.

While also based on assumptions and estimations, I accept the Hrycko report as a more reliable reflection of Mr. Falco's post-accident income situation. Hrycko attempted to adjust its calculations to take account of some of the deficiencies in the source data. It prepared a report dated June 17, 1999 in response to Dunwoody's. It disagreed with Dunwoody's calculation of Mr. Falco's pre- and post-accident incomes. I find Hrycko's concerns with the Dunwoody report further demonstrate problems with the practicality of a week-by-week income calculation.

The most basic of Hrycko's concerns are that the Dunwoody report relies on unaudited rather than audited statements of revenues and expenses for Rilco and Fulton for both the pre- and post-accident periods which affects the reliability of the income figures, and the statements were compiled on a cash rather than an accrual basis as required by the *Income Tax Act* (Canada). Section 83 of the *1994 Schedule* provides that income from self-employment shall be determined "in the same manner as a person's profit from the business in which the person was self-employed would be determined under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario)..."

Hrycko indicated that given the state of the Rilco/Fulton records, it was problematic to adjust to the accrual basis. For instance, certain corporate and tax documentation were unavailable. As well, it was problematic to estimate depreciation, interest and professional fee expenses and to reconcile invoices with revenue deposits and cash disbursements with expense receipts. There also appeared to be deficiencies in payroll and employee records, to name only a few of the problems.⁴ According to Hrycko, despite its enquiries of Mr. Falco and his representative, most of these documentary problems were never satisfactorily resolved.

⁴Hrycko also outlined its concerns with the source documentation in its letter to Mr. Barraferato dated February 4, 1999.

Hrycko arrived at an average gross annual post-accident income from self-employment of \$38,119.15 which is based on the financial statements for the period ending March 31, 1997 and Mr. Falco's representation to Dunwoody that he averaged \$10,000 per year thereafter until June 21, 1999. This figure is not substantially greater than the Dunwoody's figure for that period. However, Hrycko noted that Dunwoody did not explain how it arrived at its figure.

Hrycko made certain further adjustments to its average annual post-accident income figure based on assumptions it made because of discrepancies and shortcomings in the Rilco/Fulton post-accident financial data, particularly in relation to company revenues, the payroll data, and expenses related to depreciation, subcontracts, rent, insurance and professional fees. With the adjustments, Hrycko estimated for the period February 1, 1994 to March 31, 1997, that Mr. Falco's average annualized income would be \$39,477. Using the "Net Weekly Income Table – Self-Employment",⁵ Hrycko concluded that Mr. Falco's post-accident income from self-employment would be \$565.85 (after claiming the Basic Personal Amount and the Spousal Amount as non-refundable tax credits). Hrycko calculated the 90 percent deduction to be \$509.27 and using its \$477.86 IRB calculation, Hrycko concludes there are "nil" IRB payments owing to Mr. Falco. There would also be "nil" IRBs owing for that period using the \$435 IRB rate agreed upon by Mr. Falco and the Continental.

Analysis:

⁵Published by the Ontario Insurance Commission (as it was then), November 25, 1993.

After considering the parties' evidence and arguments, I accept under the circumstances of this case, the Continental's approach to calculating and applying post-accident income to weekly IRBs. I arrive at this conclusion for the following reasons:

Arbitrators confronted with a different facts situations, have employed various methods to deal with the deduction of post-accident income. Arbitration decisions have held, and I agree, that with inquiries into the amount of pre- and post-accident income, an approach should be adopted based on the particularities of the financial situation under consideration. The words of the arbitrator in *Meandro and Pilot*⁶ express this principle in relation to pre-accident income which, I find, also apply to post-accident income:

In my view, the *Schedule* does not necessarily mandate a single accounting approach for all cases. In each case, the arbitrator has discretion to determine which approach most fairly, reasonably and accurately reflects the applicant's financial situation before the accident, considering all the circumstances

I find the deficiencies in Rilco's and Fulton's financial documentation and the unreliability of Mr. Falco's verbal representations to the accountants and his oral evidence makes employing the *Boltman* approach unreasonable or even impossible. I note in this regard that Mr. Falco did not himself provide me with a schedule of his week-by-week post-accident income in order that it might be applied to IRB payments. Perhaps, this reflects the difficulty involved in accomplishing this under the circumstances. Even accepting as Mr. Falco's and the Continental's accountants propose, that the unaudited financial statements provide the best tool available to assess the financial circumstances of Rilco and Fulton, there are clearly problems with using the matching approach in this case. The accountants' reports highlight, for instance, basic problems with: reliably assessing the companies' revenues; determining Mr. Falco's family members' employment status with the companies; determining the income attributable to Mr. Falco; and generally

⁶*Meandro and Pilot*, (OIC File A-004433, June 7, 1994).

reconciling various financial documents and records. To arrive at estimates, the accountants had to make numerous assumptions and adjustments to accommodate the deficiencies in the documentation.

Even if I were inclined toward Mr. Falco's position, I do not think there would be any benefit to considering reconvening the hearing for further evidence. I suspect, in the absence of having heard otherwise, the documentation presented to the accountants and at the hearing to date represents all, or the best of, what is available from the Rilco and Fulton records.

In view of this, I find that more precise and complete source documentation would be required to arrive at reasonably reliable estimates of Mr. Falco's weekly post-accident income so that these might be matched in the weeks earned with weekly IRB payments. The words of the arbitrator in *Boltman* are appropriate here:

I recognize that there may well be other fact situations where it might not be possible to match post-accident income to a very specific event or a specifically defined period, and in those situations other approaches may be adopted.

There may be circumstances such as in the *Boltman* case, where it is possible and appropriate to employ the matching method, but I find the facts of Mr. Falco's case do not lend themselves to this approach.

I therefore find the approach the Continental proposed to arrive at estimated weekly post-accident earnings by annualizing income and averaging it over 52 weeks, although also providing only approximations, is more reasonably suited to the limitations in the available documentation and verbal information. I also find persuasive the Continental's submission that there is support in subsection 7(3) and section 83 the *1994 Schedule* for calculating post-accident income in a self-employment context on an annual basis.

The Continental's approach is in keeping with Commission cases which have established it is not essential that an applicant establish with absolute precision the amount of his income.⁷ Cases have also recognized that smaller businesses frequently do not maintain sophisticated accounting and financial records and have held, and I agree, that such businesses should not be held to the same standards as larger, more sophisticated companies. Cases have also held, and I agree, that applicants employed in less sophisticated, small businesses still have the burden to prove their income on a reasonable basis with reliable documentation.⁸

Hrycko's post-accident income figures were calculated on an average annualized basis from the net income for Rilco for the period February 1 to September 30, 1994, and for Fulton for the three years ending March 31, 1995, March 31, 1996 and March 31, 1997. I will leave it to the accountants to do the appropriate calculations of post-accident income for the period of February 2, 1994 to January 25, 1996 and apply them to the agreed upon weekly IRB of \$435. In the event of a dispute over this calculation, I invite the parties to approach the Commission to reconvene the hearing. I remain seized of the matter.

EXPENSES:

I invite the parties to attempt to resolve the expense issue. Failing this I may be approached.

⁷*Mills and Canadian General Insurance Company*, (OIC File No. A-005599, July 6, 1995), varied on appeal by appeal decision, Ont. Insurance Commission, (P-006699, October 8, 1996); *Agha and General Accident Assurance Company of Canada*, (OIC File No. A-009703, May 31, 1995), confirmed on appeal by appeal decision (P-009703, February 27, 1997) and *Moore and Motor Vehicle Accident Claims Fund*, Ont. Insurance Commission (FSCO A96-000362, March 12, 1999).

⁸ For instance, *Mills*, *supra*, footnote 7.

Beth Allen
Arbitrator

June 13, 2000

Date

FSCO A95-000485 and A97-000207

BETWEEN:

JOE FALCO

Applicant

and

**CONTINENTAL INSURANCE COMPANY
and
PAFCO INSURANCE COMPANY LIMITED**

Insurers

ARBITRATION ORDER

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

1. Mr. Falco is not entitled to further IRBs from the Continental as a result of the January 26, 1994 accident.
2. The accountants shall calculate Mr. Falco's post-accident income for the period February 2, 1994 to January 25, 1996 and apply it to IRB payments using Hrycko's approach of annualizing the income and calculating it on a weekly basis. I may be approached in the event of a dispute over this calculation.
3. Mr. Falco is not entitled to a loss of earning capacity offer from the Continental.
4. The Continental is not liable to pay Mr. Falco a special award.
5. Mr. Falco is not entitled to any IRBs payments from Pafco as a result of the December 4, 1995 accident.
6. Mr. Falco is not entitled to a loss of earning capacity benefit from Pafco.
7. Pafco is not liable to pay Mr. Falco a special award.
8. If the parties do not resolve the expense issue, I may be spoken to.

June 13, 2000

Beth Allen
Arbitrator

Date

**FALCO and CONTINENTAL and PAFCO
FSCO A95-000485 and A97-000207**