



Appeal P02-00019

OFFICE OF THE DIRECTOR OF ARBITRATIONS

L. C.

Appellant

and

PAFCO INSURANCE COMPANY LIMITED

Respondent

BEFORE: Nancy Makepeace
REPRESENTATIVES: L.C., on his own behalf
Derek E. Wilson for Pafco
HEARING DATE: March 7, 2003

APPEAL ORDER

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

1. The appeal is dismissed and the arbitration order, dated May 30, 2002, is confirmed.
2. The parties shall bear their own appeal expenses.

Nancy Makepeace
Director's Delegate

June 18, 2003

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

L.C. appeals the Arbitrator's ruling that he is not entitled to weekly benefits under s. 12 or s. 13 of the *SABS-1990*,¹ medical and rehabilitation benefits under s. 6 of the *SABS-1990*, or a special award under s. 282(10) of the *Act*. He also appeals the Arbitrator's order that he must pay Pafco's arbitration expenses. He disagrees with the Arbitrator's conclusions, and contends the Arbitrator was biased against him.

I am not persuaded the Arbitrator made an error of law or was biased against Mr. C. My reasons are explained below.

II. BACKGROUND

Mr. C was injured in an automobile accident on August 18, 1993. He was initially diagnosed with a whiplash injury and treated with analgesics, anti-inflammatories, massage and physiotherapy. He later became depressed and suffered chronic neck and back pain, sleep problems and fatigue. He was 25 years old at the time of the accident. He had completed three years of study at the University of Toronto between the fall of 1990 and the spring of 1993. He returned to school a month after the accident, and completed the 1993-1994 session. He did not return to school after that, and did not achieve a degree.

Pafco began paying weekly non-earner benefits of \$185 a week, pursuant to s. 13 of the *SABS-1990*, on August 25, 1993. No benefits were payable between September 14, 1993 and May 17, 1994, while Mr. C attended school, pursuant to s. 16(3) of the *SABS-1990*. Benefits were then reinstated until

¹ The *Statutory Accident Benefits Schedule — Accidents On or Between June 22, 1990 and December 31, 1993*, Regulation 672 of R.R.O. 1990, as amended.

January 23, 1996. Pafco terminated Mr. C's benefits on that date based on Insurer Examination reports from Dr. Michael M. Howell, a specialist in disability evaluation, dated October 3, 1994, and Dr. Adrian Upton, a neurologist, dated December 15, 1995, both of which indicated that Mr. C was able to return to university studies after the accident.

Mr. C has played the accordion since he was a child. He claims that he earned about \$20,000 a year playing the accordion at restaurants and events favoured by Serbian-Canadians. Pafco did not accept that Mr. C was employed or self-employed before the accident. This was the main factual dispute the Arbitrator had to decide. The parties also disagreed about the effect of the accident on Mr. C's academic performance and his activities of daily life.

The arbitration hearing lasted two days. Mr. C testified, and called two other witnesses: Walter Ostanek, the famous accordionist, and Dr. John P. Chong, an occupational medicine specialist who has a subspecialty in musicians' injuries. Dr. Michael S. Ross, an occupational psychiatrist who examined Mr. C at Pafco's request, testified on behalf of the Insurer.

The Arbitrator dismissed Mr. C's claims and ordered him to pay Pafco's arbitration expenses.

III. ANALYSIS

A. Transcripts and Audiotapes

In the early stages of the appeal, Mr. C asked me to order Pafco to pay for preparation of a transcript of the arbitration hearing. I declined, giving my reasons in a letter dated September 19, 2002:

Pursuant to Rule 74.3 of the *Dispute Resolution Practice Code*, the party that orders a transcript must pay the cost. Mr. C states that he is unable to obtain the transcripts because this would cost more than \$2,000.

Subsection 282(11.1) of the *Insurance Act* authorizes Commission adjudicators to order an interim award of expenses. Although this could include ordering an insurer to pay for a transcript requested by the insured person, I am not persuaded this would be appropriate in this case. Mr. C makes a number of general comments about the Arbitrator's demeanour, but his main concern seems to be the Arbitrator's ultimate conclusion that he is not entitled to benefits. Based on the materials submitted to date, I am not persuaded that the strength of the appeal justifies the order requested.

Accordingly, if Mr. C intends to rely on the transcript, he must order it and pay for it, and provide a copy to Mr. Wilson and me, in accordance with Rule 74.

For the same reasons, I also refused Mr. C's request for the court reporter's audiotapes of the arbitration hearing. Mr. C's oral submissions at the appeal hearing did not persuade me to change my order because even if true, his allegations about the Arbitrator's demeanour do not indicate bias or suggest the Arbitrator came to the wrong conclusion about the case.

B. The Standard of Review

Subsection 283(1) of the *Insurance Act* says that either party to an arbitration can appeal the Arbitrator's order "on a question of law." A question of law is a question about how to interpret the *Insurance Act*, the *SABS*, or other authority. Questions of fairness or jurisdiction are also questions of law. Disagreements about the Arbitrator's factual findings based on the evidence are questions of fact, not law. They are not appealable. However, in some circumstances, the Arbitrator's application of the law to the evidence, or his inferences based on the evidence, may raise questions of law, or mixed fact and law.²

Mr. C's submissions on appeal mostly concern his disagreement with the Arbitrator's conclusion that he did not earn income playing the accordion before the accident, and was not disabled as a result of the accident after his benefits were terminated in January 1996. These are factual disputes.

² The Supreme Court of Canada recently considered the standard of review from factual findings in civil matters in *Housen v. Nikolaisen*, [2002] S.C.J. No. 31. The decision was considered by Director's Delegate McMahon in *Lombardi and State Farm Mutual Automobile Insurance Company*, (FSCO P01-00022, February 26, 2003).

Nevertheless, I have reviewed the documentary evidence and the Arbitrator's findings of fact because Mr. C is representing himself, and the differences amongst questions of law, questions of fact, and questions of mixed fact and law can be technical. In doing so, I am mindful that I did not have the opportunity to observe the witnesses, as the Arbitrator did. Even if I had a transcript, it would not be appropriate for me to substitute my opinion for that of the Arbitrator, unless I were sure he had made a serious error. Otherwise, every arbitration order would be appealed by the unsuccessful party, and there would be no end to disputes.

In any event, I do not believe the Arbitrator came to the wrong conclusion. Mr. C presented evidence in support of his claim, but the Arbitrator found Pafco's evidence more convincing. Understandably, Mr. C disagrees, but he has not given me any reason to overturn the Arbitrator's decision. My reasons follow.

C. Weekly Income Benefits under Section 12

Mr. C claimed that his accordion performances earned him \$20,000 in the year before the accident. The Arbitrator accepted that Mr. C was an accomplished musician who hoped to play the accordion professionally and make his career in music. He did not accept that Mr. C earned any money from playing his accordion in the year before the accident.

Section 12 of the *SABS-1990* requires an insurer to pay weekly benefits to an insured person who is unable to work as a result of injuries suffered in an automobile accident. The benefits, which are based on 80 per cent of the insured person's gross annual income, are intended to replace the employment or self-employment income lost as a result of the accident. The Arbitrator stated the law correctly:

in order to qualify for weekly income benefits pursuant to section 12(1) of the *Schedule*, Mr. C was required to prove, on the balance of probabilities, that he was a self-employed musician, either at the time of the accident . . . or for any 180 days in the 12-month period prior to the accident . . .³

³ Arbitration decision, p. 5.

Employment and self-employment involves an exchange of services for money or money's worth. The insured person must prove, not only that he provided services, but that he received remuneration for his services. Because the benefit is a percentage of lost income, the insured person is also required to bring evidence about how much money he earned. The evidence required depends on what is realistic in the circumstances. However, at the very least, the insured person must give a coherent account of his financial affairs, supported by reasonable corroborating evidence.

Income tax returns, as accepted by Revenue Canada, usually provide reliable evidence that the insured person earned the income reported because they are official reports, and they are statements against self-interest (since reported income is taxable). Mr. C's income tax return for 1992 only listed Canada Pension Plan income of \$1,329 and "other income" of \$7,150. His tax return for 1993 reported T4 earnings of \$1 and "other income" of \$2,050.⁴ The source of the "other income" was not identified, and no supportive documentation was provided.

Unreported income may be corroborated by other persuasive evidence. However, Mr. C did not bring any documentary evidence – by way of receipts or business or bank records, for example – to corroborate his claim. Another option would have been to call witnesses who could testify about his work – his fellow musicians, the restaurant owners or others who hired him, or audience members who attended his performances, for example. He brought no witnesses to support his evidence about his earnings.

This meant that Mr. C's claim depended entirely on his own testimony. But the Arbitrator found his evidence "vague." He specifically referred to three problems with it. First, Mr. C "did not mention a single location where his band was hired to play in the year before the accident." This was important because most people would be able to remember where they played, especially if they performed regularly at a small number of facilities within an ethnic community. Second, the Arbitrator did not accept that Mr. C would have been able to play three or four times a week, all over southwestern

⁴ Arbitration Exhibit 8, "Employment," Tab 1.

Ontario, while attending university in Toronto. He would likely have been able to work during the summer, but this brought the Arbitrator to his third point. The accident happened in August, when Mr. C was not attending classes. But when Mr. C filled out his application for accident benefits, he responded to the non-earner part of the form and left the space for employed persons blank.⁵ In my view, the evidence left the Arbitrator with little choice but to dismiss Mr. C's claim for weekly benefits.

On appeal, Mr. C asks for a new hearing that would include audiotapes of his accordion performances. Mr. C is proud of his performance skills, and feels he is unable to play because of his accident injuries. The Arbitrator accepted "that he was indeed a highly competent accordion player prior to the accident, one capable of playing at a professional level." He described the evidence that led him to this conclusion:

[Mr. C] subpoenaed Mr. Walter Ostanek, another famous and accomplished accordion player, to the hearing and then showed this witness (and everyone else at the hearing) a videotape of himself (Mr. C) playing the accordion at about age 18 or 19. It was agreed by all present, including myself and Mr. Wilson on Pafco's behalf, that the videotape showed Mr. C playing the accordion in a small band while others listened or danced. Mr. Ostanek testified that, in his opinion, Mr. C was playing at a professional level.⁶

Later, the Arbitrator made the following comment about the videotape evidence:

My finding with respect to accordion playing is based largely on the videotape evidence. I acknowledge the significant lapse in time between the recording of the videotape, when Mr. C was 18 or 19, and the happening of the accident, when he was 25. I have also taken into consideration Mr. C's failure to prove that he was pursuing performance-related university studies or that he was a self-employed musician under section 12. I nevertheless accept Mr. C's statement that it was his pre-accident ambition to become a professional accordion player and teacher. He may not have realized that ambition before the accident, and he may have never realized that ambition even without the accident.

⁵ Arbitration Exhibit 8, "OIC," Tab 1. This was consistent with Mr. C's statement given to Pafco on August 23, 1993, in which he stated, "I am not employed," and described himself as a fourth year university student (Arbitration Exhibit 8, "Investigations," Tab 2). Mr. C's subsequent statement, on June 14, 1994, 10 months after the accident, appears to be the first time he claimed to have earned income from accordion performances before the accident (*Ibid.*, Tab 3).

⁶ Arbitration decision, p. 4.

Still, the videotape clearly establishes his musical ability and supports, in a general way, his statement that it was his ambition to become a professional musician. He may not have been studying with a master teacher or making a living from music before the accident but, given his demonstrated ability, I find it unlikely that he had abandoned playing the accordion or his ambition to become a professional musician.⁷

At the appeal hearing, Mr. C contended that the Arbitrator was impatient about watching the videotape. He feels this reflected a biased attitude. Mr. Wilson contends the Arbitrator did not need to continue watching the videotape after Pafco conceded it was Mr. C who was performing. Based on the Arbitrator's findings, I expect the videotape evidence and Mr. Ostanek's testimony persuaded him of Mr. C's performance skills. Rather than being impatient, the Arbitrator likely felt he did not need to spend a great deal of time on the videotape because he had already decided to accept Mr. C's evidence about his playing, a finding he made in Mr. C's favour.

For the same reason, there is no need for me to consider Mr. C's submission that the Arbitrator erred in rejecting his evidence that he studied with Mr. Joe Marcerello, a well-known accordionist. No supporting evidence was offered for that claim. In any event, Mr. C did not lose his case because the Arbitrator doubted his musical abilities. He lost because the Arbitrator was not persuaded that he earned income from performing before the accident, or that he was disabled by accident-related injuries.

Mr. C submits that he lost the ability to play the accordion at a professional level as a result of the accident. There are two problems with this argument. First, weekly income benefits compensate an insured person's *lost income* – income the insured person earned before the accident but cannot earn afterwards because of his accident-related injuries. They do not compensate for *loss of opportunity* – income the insured person would have been able to earn in the future, as his career developed, if not for the accident. Those damages are available, if at all, in a lawsuit against the person who negligently caused the loss.

⁷ *Ibid.*, p. 9.

Secondly, Mr. C did not prove that he played professionally before the accident (though the Arbitrator accepted he could have). At the appeal hearing, Mr. C submitted that he kept track of his performances on a calendar, but it was not available at the appeal hearing, and in any case should have been presented at the arbitration hearing. He asked me to order a new hearing, at which his brother, who performed with him, would testify about their performances. Pafco objected to the introduction of “fresh evidence” that could have been presented at the arbitration hearing. I do not find it appropriate to admit this evidence or order a new arbitration hearing because I am not persuaded that it would provide reliable detailed evidence of Mr. C’s earnings that might affect the outcome. Similarly, Mr. C’s question, “how could I pay my tuition without working?” is unhelpful. Without detailed evidence about his income and expenses, the answer to this question is mere speculation.

I am not persuaded the Arbitrator made an error in concluding that Mr. C was not entitled to weekly income benefits as an employed or self-employed person.

D. Weekly Non-Earner Benefits under Section 13

As a non-earner student, Mr. C was eligible for, and received, weekly non-earner benefits, at a flat rate of \$185 per week, under s. 13 of the *SABS-1990*. His benefits were terminated in January 1996, and he claimed ongoing benefits from that time. These benefits are available “during the period in which the insured person suffers substantial inability to perform the essential tasks in which he or she would normally engage.” The Arbitrator accepted Mr. C’s evidence that his essential tasks were: “taking care of his personal hygiene, driving, engaging in sexual relations and exercise, pursuing university studies and playing the accordion.”⁸

To be entitled to additional s. 13 benefits after January 23, 1996, Mr. C had to prove, on a balance of probabilities, that he was substantially unable to perform these essential tasks. The Arbitrator followed well-established principles in making his decision. He accepted that Mr. C must show “he suffered at

⁸ Arbitration decision, p. 8.

least a ‘moderate inability to perform almost every essential task . . . coupled with a complete inability to perform a few essential tasks’.⁹ To receive benefits after 156 weeks (August 18, 1996), Mr. C had to satisfy a more difficult test under s. 13(8) of the *SABS-1990*. He had to prove that his accident-related injuries “continuously prevented him from engaging in substantially all of the activities in which he normally engaged before the accident.”

The Arbitrator considered Mr. C’s testimony about his symptoms and functional limitations after the accident, Mr. C’s university transcript and the medical evidence. Mr. C does not dispute the accuracy of the Arbitrator’s account of his testimony. The transcript supports the Arbitrator’s finding that Mr. C’s grades in the year after the accident (1993-94) were “slightly better” than his performance in the three years before the accident.¹⁰ It would not be appropriate for me, on appeal, to embark on a detailed analysis of the experts’ reports, which were fully and accurately reviewed by the Arbitrator over twenty pages. In any event, the Arbitrator made three important factual findings in Mr. C’s favour. He accepted that Mr. C “developed and continues to suffer from a chronic pain syndrome and depression as a result of the motor vehicle accident of August 18, 1993,”¹¹ he rejected Dr. Ross’s opinion that Mr. C was malingering, and he criticized Pafco for failing to provide psychological or psychiatric treatment recommended by several doctors.

However, the focus of the accident benefit scheme is on *function*, not symptoms or injuries. Mr. C lost his case because the Arbitrator was not satisfied that his symptoms were disabling. These are the key paragraphs in the Arbitrator’s reasons:

Mr. C presented no evidence that . . . he experienced any inability to take care of his personal hygiene, drive, engage in sexual relations or exercise or pursue university studies. I accept that Mr. C continued to suffer from chronic pain and depression

⁹ This statement of the test came from the leading s. 13 case, *Whitney and Cooperators General Insurance Company*, (OIC appeal P-001005, July 10, 1996) at p.4. An application for judicial review was dismissed on September 9, 1996.

¹⁰ Arbitration decision, p. 10; Arbitration Exhibit 8, “Employment,” Tab 2.

¹¹ Arbitration decision, p. 24.

. . . up to the date of the hearing, but this, by itself, does not support a finding that he was or is completely unable to perform these essential tasks. In fact, Mr. C's academic performance in the year after the accident was actually slightly better than his performance in the three years before the accident. Likewise, the accident of September 21, 1995 confirms that he had returned to driving by then. Mr. C must also have been capable of engaging in some form of exercise prior to the relevant period because his treating doctors (Drs. Adler, Mewa and Schaman) all recommended exercise starting in 1994. If Mr. C could engage in exercises, he was, in all likelihood, also able to resume taking care of his own personal hygiene. There is even evidence that Mr. C was "sexually active" in November 1993, a time when the adverse physical effects of the accident should have been their most severe.

. . . .

The issue of Mr. C's accordion deserves separate consideration. Reviewing the evidence as a whole, I make the following findings. Mr. C played Serbian music prior to the accident and had achieved a professional level of facility and technique. Serbian music requires a heavy accordion of the type he owned, weighing around 35 pounds. The initial whiplash injury caused by the accident made it painful for him to play this heavy accordion. In order to avoid the discomfort associated with playing the accordion, he played less. As a result of playing less, Mr. C lost the facility and technique he had acquired prior to the accident and this caused or contributed to a depression. As he became more depressed, he became less active and more deconditioned and this eventually led to a chronic pain syndrome. The combined effects of the chronic pain syndrome and depression have sharply restricted both the way Mr. C plays the accordion and the duration of his playing. He has only been able to play by removing the weight of the instrument from his neck and shoulders; the duration of his playing has been reduced to about 15 minutes. These restrictions have prevented him from reacquiring the facility and technique he had prior to accident. As a result, he remains the victim of depression and chronic pain and has done little to explore other musical or non-musical ways to spend his time or reorganize his life.

As sad as these findings are, they do not establish that Mr. C was left with a complete inability to play the accordion during the relevant seven-month period or thereafter. Indeed, there is no evidence that he has ever completely stopped playing the accordion. At most, the evidence establishes that his playing has been restricted as described above. With Dr. Chong's care and guidance, his playing may well improve. I acknowledge that he may never play well enough to study with a master teacher or to make money. However, since he failed to prove that he did these things before the accident, his inability to do them after the accident has no legal significance. Moreover, even if the evidence established that Mr. C suffered a complete inability to play the accordion during the relevant period, that would not establish his complete inability to perform "a few essential tasks." However important accordion playing was to Mr. C, it was only one of his essential tasks.

In sum, I find that Mr. C has failed to prove a complete inability to perform *any* of the essential tasks in which he normally engaged before the accident during the relevant period.

His claim for “no income” benefits under section 13(1) for the period January 23, 1996 to August 18, 1996 must, therefore, be dismissed.¹²

Mr. C has not given me any reason to doubt the Arbitrator’s conclusion. I am not persuaded the Arbitrator made an error of law.

E. Bias

Mr. C believes the Arbitrator was biased against him. To succeed on this ground, he does not have to prove that the Arbitrator was actually biased, but only that his conduct of the hearing created a “reasonable apprehension of bias.” Director Draper reviewed the law on bias in a recent decision, *Persofsky and Liberty Mutual Insurance Company*:

The test for reasonable apprehension of bias is based on a well-informed person viewing the matter realistically and practically — and having thought the matter through — and requires that the grounds for the apprehension of bias are substantial, not arising from a “very sensitive or scrupulous conscience.” (*Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369.¹³)

Mr. C contends the Arbitrator’s bias was reflected in his demeanour, but he did not give me any specific examples of conduct that, if true, might reflect bias and affect the outcome. Therefore, I am not persuaded it is appropriate to order Pafco to pay for production of audiotapes of the arbitration hearing or preparation of a transcript.

Apart from his contention that the Arbitrator was impatient with his evidence about his accordion playing, which I have dealt with above, Mr. C gave several other examples of alleged bias.

The Arbitrator described Mr. C’s band as “a small band,” which Mr. C feels was belittling. I asked Mr. C how many people were in the band, and he told me there were three, but added that he was the lead

¹² Arbitration decision, pp. 29-30.

¹³ (FSCO P00-00041, July 3, 2001), at p. 8.

player, and had also played in an orchestra. As I read the Arbitrator's decision, no slight was intended. The phrase, "a small band" suggests a band with a few players – more than two and probably less than ten – a performance group that is smaller than an orchestra or "a big band," and perhaps plays in clubs or restaurants. There is no suggestion of amateur status or insignificance.

Other concerns related to the witnesses. The Arbitrator required Mr. Ostanek to attend at 9:00 a.m. on the second day of the hearing, but Mr. Ostanek did not testify until 1:00 p.m. that day. He also contends that the Arbitrator "raced through" Dr. Chong's testimony. Mr. Wilson submits that the Arbitrator wanted to complete Dr. Chong's testimony before hearing from Mr. Ostanek so that Dr. Chong could return to his practice as soon as possible. Then Dr. Ross appeared early, and the Arbitrator decided to hear from him first for the same reason. Unfortunately, this meant a longer wait for Mr. Ostanek.

I have no basis for determining what was in the Arbitrator's mind, but Mr. Wilson's explanation is consistent with the way most arbitrators conduct hearings. Arbitration hearings depend on the cooperation of witnesses, many of whom take time out of busy schedules to attend, and it is not uncommon for arbitrators to revise the witness schedule in order to accommodate the personal and professional commitments of particular witnesses. For the same reason, arbitrators are typically vigilant to make sure a witness's evidence is heard in an efficient way. Of course, fairness to the parties is the overriding consideration, and all witnesses and other participants in the hearing must be treated with courtesy and respect. Mr. C has not given me any reason to believe the Arbitrator was unfair to him or Mr. Ostanek in arranging the witness schedule.

Further, Mr. C contends the Arbitrator should have heard from Dr. Upton instead of Dr. Ross. Both doctors examined him for Pafco. Pafco was entitled to choose which witnesses would appear on its behalf, just as Mr. C was entitled to choose his witnesses. Mr. C could have required Dr. Upton to attend for cross-examination, but I have no reason to believe he gave any indication he wanted to do so, and I do not believe it would have affected the outcome if Dr. Upton had testified instead of Dr. Ross. The Arbitrator rejected Dr. Ross's opinion that Mr. C was malingering. He accepted that Mr. C

was injured as a result of the accident, but did not accept that his injuries affected his functional level enough to satisfy the test for entitlement.

Finally, Mr. C submits that he should have had the four-day hearing initially scheduled, and that the Arbitrator's decision to allow only two days further reflects his impatience and bias. According to Mr. Wilson, the Arbitrator felt the hearing could be done in two days. There is no question that it was completed in that time.

Mr. C's complaints illustrate how important it is for both parties to feel they have "had their day in court," that they received a fair and respectful hearing, and their positions were taken seriously. However, I have no reason to believe this hearing fell short of that ideal. Contrary to Mr. C's perception that he has been treated unfairly, the arbitration record reveals that he was granted numerous adjournments to retain new counsel (three different lawyers represented him at various points in the arbitration) amongst other reasons. The last of these was granted by Arbitrator Leitch on December 17, 2001, when he attended in Kitchener for the scheduled four-day hearing. Another four-day hearing was rescheduled for April 15-18, 2002. On February 13, 2002, the Arbitrator wrote to the parties to advise that he could not be available on April 17 and 18th. He continued:

In the event the hearing is not completed by the end of the day on April 16, 2002, additional dates will be arranged for a date soon after April 16, 2002.

Although Mr. C now requests a new hearing at which his brother would testify, he does not claim that he requested further dates or asked to call any additional witnesses at the arbitration hearing. I am not persuaded Mr. C was denied a full and fair hearing. The Arbitrator assessed the evidence carefully in a 33-page decision. He applied the law correctly and his conclusions were amply supported by the evidence. Unfortunately for Mr. C, this was not a close call. I am not satisfied the Arbitrator erred.

Mr. C also referred to the *Canadian Charter of Rights and Freedoms* and talked about an injustice he witnessed in Serbia. He feels that his former lawyer, Pafco, and the Arbitrator treated him unfairly. If

I agreed, I would have no hesitation ordering a new hearing. But I am not persuaded. Mr. C's hearing did not achieve the outcome he wanted, but the process was fair.

F. Arbitration Expenses

In the leading case on the standard of review of arbitration expenses orders, Director's Delegate Naylor described the law as follows:

An award of expenses is a matter within the discretion of the arbitrator, although the discretion must be exercised reasonably. Because the discretion is given to the arbitrator, it should not be interfered with lightly on appeal. The arbitrator is able to consider the evidence in totality, including observing and hearing any witnesses, and usually is in the best position to assess the merits of the case and the way it was handled by the parties. Generally, his or her determination should not be disturbed unless the party appealing the order can point to a serious error in the exercise of the discretion: for example, the arbitrator adopted a wrong approach, based the decision on irrelevant considerations or inadequate evidence, or failed to look at the merits of the individual case by inappropriately fettering his or her discretion.¹⁴

The Arbitrator ordered Mr. C to pay Pafco's arbitration expenses, as agreed or assessed, on the basis that:

Mr. C was more than simply unsuccessful in this proceeding. In terms of the evidence presented at the hearing, all but one of his claims [except for the claim for the cervical pillow] was, in my view, "manifestly unfounded."¹⁵

The factors cited by the Arbitrator are factors the Expense Regulation required him to consider in deciding whether to make an expenses order. The outcome of the proceeding is an important consideration, and another factor is "whether the proceeding or any position taken by the insurer or the insured person during the proceeding was manifestly unfounded, frivolous, vexatious, fraudulent, or an abuse of process." It is not my role, on appeal, to substitute my decision for that of the Arbitrator,

¹⁴ *Allison and Markel Insurance Company of Canada*, (FSCO P-001231, August 21, 1996), at p. 4.

¹⁵ Arbitration decision, p. 33.

without good reason. In this case, I am not persuaded the Arbitrator erred in exercising his discretion under s. 282(11) of the *Act*.

At several points during the course of the appeal hearing, Mr. C referred to Pafco having presented him with an arbitration expenses assessment for \$27,000. As this seemed high, I asked Pafco's counsel for details. Mr. Wilson advised that Pafco's legal fees were in the \$2-3,000 range, but Pafco had incurred significant disbursements to Dr. Ross, including cancellation fees. I understand that the Arbitrator deferred the assessment hearing pending my decision in this matter. I expect the assessment can now be scheduled if the parties cannot agree on the amount owing.

IV. EXPENSES

Mr. C's appeal had little or no merit, but I do not find this an appropriate case for an expenses order. Mr. C was unrepresented. He has a genuine, albeit misguided, belief that he has been treated unfairly, and he has a poor understanding of legal principles and procedures. I expect Pafco's appeal expenses were relatively nominal, and I do not find it appropriate to add to the expenses Mr. C has already been ordered to pay.

Nancy Makepeace
Director's Delegate

June 18, 2003

Date