



Appeal P03-00007

OFFICE OF THE DIRECTOR OF ARBITRATIONS

VAN THANH TRUONG

Appellant

and

LUMBERMENS MUTUAL CASUALTY COMPANY / KEMPER CANADA

Respondent

BEFORE: Nancy Makepeace
REPRESENTATIVES: Harvey S. Consky for Mr. Truong
Derek E. Wilson for Lumbermens
HEARING DATE: November 5, 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 January 24, 2003, is confirmed.
2. The parties may contact me within 30 days of receiving this decision if they are unable to agree on appeal expenses.

Nancy Makepeace
Director's Delegate

March 9, 2004

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Mr. Truong appeals from the Arbitrator's order dismissing various claims for accident benefits under the *SABS-1996*.¹ Lumbermens argues the appeal does not raise a question of law, as required under s. 283(1) of the *Insurance Act*.² I am not satisfied the Arbitrator erred.

II. BACKGROUND

Mr. Truong was injured in an accident on August 12, 1999. The Arbitrator described Mr. Truong's accident, complaints and treatment, and there is no need to repeat the details here. Mr. Truong had been employed at an auto parts distributor for about 13 years at the time of the accident: first, as a shipping clerk, then, for about three years before the accident, as a machine operator. He has not returned to work since the accident, and claims he cannot work because of accident-related impairments: mainly neck and back pain, headaches, dizziness and temporomandibular joint ("TMJ") pain.

Lumbermens paid income replacement benefits ("IRBs") until June 1, 2000, when benefits were terminated based on the report of a disability DAC.³ Mr. Truong applied for mediation, followed by arbitration of the dispute. He claimed ongoing IRBs, including IRBs after 104 weeks, under s. 4 of the *SABS-1996*, certain medical expenses (chiropractic, psychological counselling and dental fees) under s. 14, housekeeping benefits under s. 22, and the cost of certain medical reports and assessments.

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

² R.S.O. 1990, c. I-8, as amended.

³ A Designated Assessment Centre ("DAC") designated under s. 52 of the *SABS-1996* to conduct disability assessments under s. 37 of the *SABS-1996*.

After a three day hearing, the Arbitrator dismissed all Mr. Truong's claims. The parties disagreed about the physical demands of Mr. Truong's pre-accident job, the significance of an MRI report, and the relative merit of various expert reports, amongst other issues. On all these points, the Arbitrator preferred Lumbermens' evidence and submissions over those of Mr. Truong, who submits, on appeal, that the Arbitrator erred in law in drawing these conclusions. However, the decision turned on the Arbitrator's finding that Mr. Truong was not credible. The Arbitrator's assessment of Mr. Truong's credibility was the main focus of both parties' appeal submissions. I am not satisfied the Arbitrator erred in law. There was ample evidence for his conclusions.

III. ANALYSIS

A. Preliminary Issue: the Record

This appeal was complicated by difficulty in ascertaining the arbitration record. I wrote to the parties on August 1, 2003, asking for their assistance. My letter describes the problem:

. . . as to the record, I have received five volumes of transcripts of the arbitration hearing: November 4, 2002 (one volume), November 5 (three volumes) and November 6 (one volume).

Finally, the file contains arbitration exhibits as follows: A1-A14 (Applicant's exhibits), I1-7 (Insurer's exhibits), J1-3 (Joint Briefs). Also in the file, but unmarked, is a package of thirteen documents that appears to be extracted from the Insurer's first volume of exhibits. The first document is an Application for Expenses, dated October 12, 1999, and the last is an Application for Expenses, dated August 7, 2001. Also in that package is an index of three binders, marked KEMPER ats Van Thanh TRUONG. Finally, there is a curriculum vitae for John Harold Gilman, a psychologist. As the file does not contain an exhibit list, I ask for your confirmation that all the above-referenced documents form part of the evidentiary record.

In response, Lumbermens' counsel confirmed my understanding as to the record:

. . . I believe the unmarked material that appears to be extracted from the insurer's first volume of exhibits was material that [the Arbitrator] extracted based upon the fact that it was duplicated elsewhere. However, I look to Mr. Consky for his recollection as to that specific issue.

In the absence of a response from Mr. Truong's counsel, I have decided the appeal on the assumption the unmarked material was not included in the evidentiary record. Though the transcript records only the identification of the joint briefs, I accept that Exhibits A1-14 and I1-7 also form part of the record.

This appeal highlights, once again, the importance of the arbitration record. Fairness requires that the parties and reviewing bodies be able to ascertain the evidence that was considered by the Arbitrator. Identification of the record is a legal obligation that relates to the authority for appeal and judicial review.⁴ At the very least, a contemporaneously prepared exhibit list is essential.

B. Standard of Review

Because Mr. Truong's *Notice of Appeal* appeared to dispute the Arbitrator's findings of fact, I invited the parties' submissions as to whether it raised a question of law, as required by s. 283(1) of the *Insurance Act*, reiterated in Rule 50.1 of the *Dispute Resolution Practice Code* (the "Code"). Rule 51.2(b) of the *Code* authorizes the Director or a Director's Delegate to reject an appeal that does not raise a question of law.

On March 31, 2003, I exercised my discretion to acknowledge the appeal, pursuant to Rule 51.4 of the *Code*, on the following basis:

Although s. 283(1) of the *Insurance Act* restricts appeals to questions of law, the Arbitrator's factual findings appear to be the main focus of Mr. Truong's appeal. This presents a challenge for Mr. Truong because only in a few narrow circumstances does an error of fact amount to a reviewable error of law. The Supreme Court of Canada recently

⁴ I discussed a similar problem in *Catt and Pafco Insurance Company of Canada*, (FSCO P97-00001, September 23, 1999), where the Arbitrator took a similar approach:

I heard no suggestion that Mr. Catt's counsel objected to the arbitrator's approach. It was obviously aimed at the laudable goals of focusing the hearing, minimizing unnecessary evidence, and promoting faster decision-making. However, this method of marking exhibits makes it difficult for an arbitrator or Director's Delegate to comply with section 20 of the *Statutory Powers Procedure Act*, which requires a tribunal to compile a record of a proceeding in which a hearing has been held, including "all documentary evidence filed with the tribunal." (pp. 3-4)

discussed this issue in *Housen v. Nikolaisen*, [2002] S.C.J. No. 31, and Director's Delegate McMahon considered the application of that decision in the context of FSCO arbitration proceedings in *Lombardi and State Farm Mutual Automobile Insurance Company*, (FSCO P01-00022, February 26, 2003). Based on the *Notice of Appeal* and the parties' submissions on the preliminary issue, it remains unclear to me whether the appeal raises a question of law. However, I am reluctant to reject the appeal at this early stage because of the limited materials available to me. I will defer this question to my final decision in the appeal, when I will have the benefit of the parties' full appeal submissions. Whether an appeal raised a question of law is one of the factors to be considered in deciding whether to award appeal expenses, and if so, to whom.

I agree with Lumbermens that the test for error of law "is whether the decision was based on a material finding of fact that was not supported by the evidence such that a reasonable tribunal acting judicially and properly directed in law could not have made the finding in question." As the Arbitrator's conclusions were supportable on the evidence, I am not persuaded he erred in law.

C. Grounds for Appeal

1. Credibility

The Arbitrator gave five main reasons for not believing Mr. Truong.

First, he found that "Mr. Truong presented himself to the medical examiners and at this hearing as someone who was completely disabled from work" and that "[t]his presentation was difficult to reconcile with the large amount of driving from [his home in] Cambridge to Mississauga, North York and Toronto that Mr. Truong did to get to medical appointments."⁵

Second, he did not accept Mr. Truong's claim for daily housekeeping services (seven days a week, 2-2½ hours per day). At first, Mr. Truong testified that his wife's sister helped him once or twice a week. When confronted with his signed expense forms, he said "sometimes his sister-in-law came every day

⁵ Arbitration decision, p. 13.

and that he didn't know exactly how often she came because he wasn't home when she came. Mr. Truong also testified that he spent most of his time at home."⁶

Third, the Arbitrator dismissed Mr. Truong's testimony about TMJ because it had to be prompted by his counsel and seemed to be "an afterthought," and the medical records did not reflect consistent complaints. For example, the physiotherapist at Exxel treated Mr. Truong for six months without mentioning it, and Dr. Navraj Gill, Mr. Truong's chiropractor, treated him for two years without mentioning it.

Fourth, the Arbitrator found Mr. Truong's change of doctors suspicious:

Mr. Truong's explanation that he changed family doctors because it was easier to see Dr. Soon in Mississauga than it was to see Dr. Wong in his home town of Cambridge was questionable. Mr. Truong was discharged from hospital on a Friday and saw Dr. Wong on Monday. He had confidence in Dr. Wong because he continued to see him for non-accident related matters. Yet he started to see Dr. Soon a week after the accident without waiting to see whether he would recover from his injuries.

Within a few days, Dr. Soon referred Mr. Truong to Dr. Raghunan for psychological treatment which included treatment for a driving phobia. He continued to receive treatment for a driving phobia without telling Dr. Raghunan that he could drive passengers. He continued to complain of a driving phobia and receive treatment up to the disability DAC in June 2000 when surveillance taken in December 1999 showed him driving with passengers to appointments and on errands over a six-hour period.⁷

The Arbitrator concluded that Mr. Truong likely "changed family doctors to someone he thought would be more supportive of his claim."⁸

⁶ Arbitration decision, p. 15.

⁷ Arbitration decision, p. 16.

⁸ Arbitration decision, p. 17.

Finally:

On January 6, 2000, shortly after the surveillance, Mr. Truong's orthopaedic surgeon suggested that Mr. Truong return to light part-time work. On February 10, 2000, Mr. Truong's physiotherapist discharged Mr. Truong from physiotherapy with a recommendation that he start working part time and gradually increase to full-time hours. The employer was agreeable to such an arrangement. However, instead of trying part-time work, Mr. Truong found Dr. Gill and started chiropractic treatment the next week.⁹

The Arbitrator concluded that part-time work was available and that Mr. Truong could have returned to work by the time Lumbermens terminated his weekly benefits. He described Mr. Truong's efforts to return to work as "meagre."¹⁰

On appeal, Mr. Truong disputes these findings and the inferences the Arbitrator drew from them. The Arbitrator stated his conclusion very clearly:

Considering the totality of the evidence, I do not believe Mr. Truong. I find it likely that he invested his time and effort trying to benefit financially from this accident.¹¹

Even if this appeal were not restricted to questions of law, I would be disinclined to second-guess the Arbitrator's assessment of Mr. Truong's credibility. Director's Delegate Naylor explained the standard of appellate review in *Kasap and Allstate Insurance Company of Canada*, (FSCO P96-00071, March 13, 1998), a decision made before the "question of law" restriction was added to s. 283(1), at p. 3:

It is well established that my role on appeal is not to second guess the arbitrator's evaluation of the evidence or substitute my own view of the weight to be attributed to it. The arbitrator has the advantage of hearing and observing the witnesses in person. This gives an arbitrator the opportunity to assess the credibility of their testimony and to evaluate the documentary evidence in light of the evidence as a whole. For that reason,

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

factual findings, particularly those that rest on an assessment of credibility, will not generally be disturbed unless the arbitrator has made some serious error, such as ignoring material evidence, considering irrelevant factors or reaching findings that are unsupported on the evidence.

Serious problems in the fact-finding process may lead to reviewable error – for example, relying solely on the demeanour of a witness without considering other relevant factors, relying solely on insignificant discrepancies, failing to consider an innocent explanation for apparent discrepancies, drawing inappropriate conclusions about credibility based on prejudice or unsupported impression, or disregarding compelling supportive evidence because of undue reliance on credibility findings. None of these errors is found in the Arbitrator’s decision in this case. Considering the matter as a whole, there was ample evidence to support the Arbitrator’s dismissal of Mr. Truong’s claims. Essentially, Mr. Truong asks me to review the evidence he presented at arbitration and draw different factual conclusions from those of the Arbitrator. That is not my role on appeal.

I will briefly review Mr. Truong’s specific grounds of appeal and explain why they are unpersuasive.

2. Temporomandibular Joint Disorder

In November 1999, Mr. Truong’s dentist in Cambridge referred him to Dr. I. M. Furst, an oral and maxillofacial surgeon in London. Dr. Furst ordered an x-ray, which showed bilateral reduceable menisci with early degenerative changes on the right. He prescribed a bite splint.

On April 16, 2002, Mr. Truong was examined by another dentist, Dr. Miriam Grushka, on referral from his counsel. He told her the splint was not helpful, and he was still having problems. Based on her examination and the x-ray, which he had brought with him, she diagnosed TMJ disorder with osteoarthritic changes on the right. She reported that the changes were consistent with grinding during nonrestorative sleep and referral from the right neck and shoulder area as a result of the accident. She prescribed a bigger splint than the one Mr. Truong had already tried. She also ordered a bone scan and

CT scan, which were essentially negative. Mr. Truong continued to complain of TMJ pain, and went ahead and bought the splint while waiting for Lumbermens' response to his claim.

Mr. Truong submits that the Arbitrator erred in concluding his TMJ complaint was an afterthought. The medical record supports his claim that he told numerous assessors and treatment providers about his TMJ symptoms. Lumbermens notes, correctly, that the Arbitrator's reference to TMJ being an "afterthought" was a comment on Mr. Truong's testimony, not the medical reports. The point could be overstated: the fact that an insured person must be prompted for certain evidence in the stressful context of a hearing does not necessarily undermine an otherwise well-documented claim. However, in this case, there was a striking contrast at the hearing between Mr. Truong's expansive explanation of his neck pain and headaches, which he repeatedly stated were his most serious complaints, and his brief, solicited, comments about his TMJ complaints.

Mr. Truong also objects to the Arbitrator's statement that he "heard no explanation of what "reduceable" meant nor any persuasive evidence relating this condition to the motor vehicle accident."¹² This comment was in relation to the MRI ordered by Dr. Furst. The report stated, under "Impression:" "[b]ilateral reduceable menisci with early degenerate changes on the right side." Based on this report, Dr. Furst prescribed the bite plate, for which Lumbermens paid \$338 in August 2000. Mr. Truong submits the Arbitrator should have asked for an explanation of "reduceable" before rejecting the evidence of impairment. On appeal, he put forward an explanation from the Merck Manual (Home Edition, 1997):

In internal derangement, the disk inside the joint lies in front of its normal position.

In internal derangement without reduction, the disk never slips back into its normal position, and jaw movement is limited. In internal derangement with reduction, which is more common, the disk lies in front of its normal position only when the mouth is closed. As the mouth opens and the jaw slides forward, the disk slips back into its normal position, making a clicking or popping sound as it does. As the mouth closes, the disk slips forward again, often making another sound.

¹² Arbitration decision, p. 19.

I agree the Arbitrator should not have relied on Mr. Truong's failure to explain this term without giving him an opportunity to do so. But I am not persuaded an explanation would have made a difference in the outcome.

Mr. Truong submits his TMJ is so severe, he is developing arthritis in the joint, and asks why he would spend his own money to buy a bite plate if the problem were not genuine. He also asks why the fact he had a previous bite plate precludes recovery for the second one. I agree the Arbitrator's approach was rather dismissive of Mr. Truong's TMJ claims for medical benefits. Mr. Truong raises legitimate questions, but answering them was squarely within the Arbitrator's authority. Quite simply, he did not believe Mr. Truong, and the medical evidence was not strong enough to overcome that weakness in the claim. Another Arbitrator might have come to a different conclusion, but it is not my role on appeal to substitute my assessment of the evidence for his.

3. Ability to Drive

Mr. Truong submits that the Arbitrator erred in focusing on his ability to drive. He submits he never denied he could drive, he had pain while driving, he had to take breaks, he did not drive with passengers, and he drove for good reasons, mainly to get to medical appointments. In any event, driving was not part of his job. His position was that he could not meet its physical demands for strength and prolonged standing; sitting was not his problem. Finally, Mr. Truong submits that the Arbitrator erred in emphasizing Dr. Raghunan's treatment for driving anxiety; Dr. Raghunan was also treating him for other psychological impairments – adjustment disorder with depression and anxiety. The surveillance evidence also showed him carrying a bag of videotapes into a store; Mr. Truong argues this had no significance with respect to his ability to work. I am not persuaded it had much influence on the result.

The evidence about Mr. Truong's driving was not directly relevant to his ability to work at his pre-accident job, but it seriously undermined the value of his two expert witnesses – Dr. Raghunan and

Dr. Mamelak. Dr. Raghunan reported that Mr. Truong was afraid to drive, and did not drive with passengers. When confronted with the surveillance evidence showing Mr. Truong driving his nephews from Mississauga to Brampton, he admitted he did not know Mr. Truong drove passengers.¹³ Within a few months of the accident, Dr. Mamelak concluded Mr. Truong would never work again, and that remained his opinion at the time of the arbitration hearing.¹⁴ In his testimony, he repeatedly described Mr. Truong as “crippled” and “permanently crippled,” but insisted this did not prevent him from driving “short distances or for brief periods of time.”¹⁵ These implausible assessments, suggesting a partisan approach, bolstered the Arbitrator’s dismissal of both experts.

Mr. Truong was not required to drive as part of his job, but his demonstrated activity to drive contrasted sharply with his testimony about the severity of his symptoms. As well, the surveillance evidence showed that about four months after the accident, he could remain active for more than six hours. Although the surveillance reflected only one day – December 23, 1999 – it was bolstered by the evidence of Mr. Truong’s regular trips from Cambridge to Mississauga and North York to see treatment-providers – Dr. Soon, Dr. Raghunan, Dr. Mamelak – who vigorously supported his claim.

The main point for the Arbitrator was that Mr. Truong’s willingness to undertake several hours of highway driving to see these doctors, despite, by his evidence, some discomfort, contrasted sharply with his negligible efforts to return to work. Though this kind of reasoning can be taken too far in a case where there is compelling evidence of impairment, Mr. Truong’s case rested heavily on his own subjective complaints, and his token efforts to return to work fell far short of any reasonable standard.

¹³ Arbitration transcript, volume 5, November 6, 2002, pp. 41-42.

¹⁴ Arbitration transcript, volume 4, November 5, 2002, pp. 22-24, 42, 55, and throughout.

¹⁵ Arbitration transcript, volume 4, November 5, 2002, p. 32.

4. Evidence of Disability

Mr. Truong argues that the Arbitrator placed too much emphasis on credibility, disregarding the evidence supporting his claim. His car was a write-off because of severe damage to both the front and rear ends from the two collisions (it was rear-ended, which caused it to rear-end the car in front of it). The ambulance and emergency reports noted Mr. Truong's complaints of momentary loss of consciousness, dizziness, neck and back pain, chest tenderness and bilateral leg weakness. He also developed urinary retention, for which he was kept in hospital overnight. After being discharged, Mr. Truong sought out treatment, including analgesic and anti-depressant medications, spinal injections and physiotherapy. His treatment-providers recorded quite consistent complaints, which they accepted as genuine.

At the arbitration hearing, Mr. Truong testified that he wanted to go back to work, and lost the opportunity to receive severance pay because he was no longer at work when the company closed down in February 2001. He claimed that in any event, his employer had no modified work available, and he would not have been able to work even part-time hours at his pre-accident job. He wants to be retrained for lighter work.

Mr. Truong relied mainly on the evidence of Dr. Roy Raghunan, a psychologist, and Dr. M. Mamelak, a psychiatrist, both of whom testified at the arbitration hearing, and on the opinions of Dr. Navraj Gill, a chiropractor, Dr. John Gilman, a neuropsychologist, and Dr. Pierre Kirwin, a physiatrist.

Dr. Raghunan diagnosed anxiety, depression, driving phobia, pain disorder, sleep disorder and cognitive problems. He gave a guarded prognosis, and concluded that Mr. Truong was disabled from work and his activities of normal life. Dr. Mamelak concluded that Mr. Truong was "seriously crippled" and would never be able to work because of chronic pain, fatigue, poor memory, vertigo and emotional lability. Dr. Gilman conducted a neuropsychological assessment, and concluded that Mr. Truong was anxious and depressed, suffered from chronic pain, and had grossly impaired cognitive functioning, likely the result of psychological difficulties and a mild brain injury. Though he felt the test results were

inconsistent with Mr. Truong's presentation, it was his opinion that Mr. Truong's cognitive, psychological and physical problems prevented him from returning to work. Dr. Kirwin reported that Mr. Truong was disabled from his old job, and could not do any job that required prolonged standing, sitting, walking, heavy lifting or bending. He diagnosed chronic pain disorder with psychological and medical condition (back pain), TMJ syndrome, depression and anxiety, and cervicogenic headache.

However, other experts questioned whether Mr. Truong suffered physical, psychological or cognitive impairments as a result of the accident. Dr. Xenia Kirkpatrick, a psychiatrist, assessed Mr. Truong for Lumbermens. It was her opinion that Mr. Truong was probably malingering, and in any event he had no clinically significant psychiatric impairment that would prevent him from working or carrying on with his activities of normal living. Lumbermens also relied on the disability DAC report, dated June 1, 2000, which concluded Mr. Truong was not substantially disabled from returning to work,¹⁶ and the two medical-rehabilitation DAC reports (March 2000 and April 2001), which did not support his claims for chiropractic treatment and psychological counselling.

Lumbermens also relied on surveillance evidence, which showed Mr. Truong driving and doing various errands on December 23, 1999, and on the reports of Dr. Rajka Soric, a physiatrist. In her first report, Dr. Soric stated that while Mr. Truong had no disabling physical impairments, the accident may have caused transient soft tissue injuries. He had developed chronic pain and psychological problems. After reviewing the surveillance, Dr. Soric reaffirmed her opinion that Mr. Truong did not suffer from any neuromusculoskeletal problem that would preclude his return to work.

At the hearing, the main factual dispute was between Dr. Raghunan and Dr. Mamelak, who testified for Mr. Truong, and Dr. Kirkpatrick, who testified for Lumbermens. Mr. Truong submits that the Arbitrator erred in accepting the opinion of Dr. Kirkpatrick, who had seen neither the MRI report nor Dr. Kirwin's report, and thought the accident was minor. Mr. Truong submits, on appeal, that the

¹⁶ Mr. Truong underwent a medical/physiotherapy assessment, a psychological assessment, and a functional abilities evaluation.

Arbitrator disregarded or misinterpreted an MRI scan that demonstrated objective evidence of impairment. The report, dated February 1, 2001, stated the following, under the heading, “Impression:”

Small left posterolateral disc bulge at the C5-6 level, which does about the region of the left C5 nerve root however there is no significant associated spinal stenosis or neural foraminal narrowing. No abnormal signal is noted throughout the cervical spinal cord.

On receipt of this report, Dr. Brian V. McGooey, an orthopaedic surgeon who saw Mr. Truong on referral from Dr. Soon, concluded there was nothing to be done orthopaedically. He recommended that EMG and nerve conduction studies be done to see if there was any ongoing nerve root compression affecting the left arm; if so, a neurosurgeon should be consulted. These tests were negative.

The difficulty with Mr. Truong’s MRI report is that it did not necessarily explain his reported symptoms.¹⁷ Mr. Truong produced no expert opinion that it did, and the spinal x-rays done at the time of the accident were negative. In any event, Dr. Kirkpatrick conceded that as a psychiatrist, she did not have the expertise to assess Mr. Truong’s physical impairments.¹⁸ She admitted that malingering is a diagnosis of exclusion. Stepping back from the details, the Arbitrator was faced with a problem that is not unusual in chronic pain cases. The three experts had strongly differing views about the nature and treatment of chronic pain, and about the legitimacy of Mr. Truong’s disability claim. As Arbitrator Draper stated in *Spicer and State Farm Mutual Automobile Insurance Company*, (OIC A-010158, May 24, 1995), at p. 22, these academic debates between experts are of rather limited assistance to an adjudicator who must decide whether the insured person is substantially disabled from performing the essential tasks of his pre-accident job, including reasonable hours and productivity.

Similarly, Dr. Raghunan’s inaccurate belief that Mr. Truong worked for 13 years at the same job,¹⁹ rather than 13 years with the same employer, was indeed a minor discrepancy, but it had little, if any,

¹⁷ Dr. Mamelak also conceded this point. Arbitration transcript, volume 4, November 5, 2002, p. 46 ff.

¹⁸ Arbitration transcript, volume 3, November 5, 2002, p. 8.

¹⁹ Arbitration transcript, volume 5, November 6, 2002, pp. 69 and 82.

effect on the outcome. Mr. Truong's recovery from a serious arm injury and his positive experience in a refugee camp were the main reasons the Arbitrator rejected Dr. Raghunan's opinion that he had a rigid coping style and accepted Dr. Kirkpatrick's opinion that his history indicated he was adaptable.²⁰ The dispute between Dr. Raghunan and Dr. Kirkpatrick about Mr. Truong's personality seems to have offered little expert insight into his ability to work, but the Arbitrator's discussion of the issue reflected the evidence he heard and the submissions of the parties.

The Arbitrator considered the conflicting expert opinions, and gave reasonable, coherent explanations for rejecting the opinions of Mr. Truong's experts. He discounted the evidence of Dr. Soon because he rejected Mr. Truong's explanation about how he came to be treated by him. Implicitly, the Arbitrator concluded that Dr. Soon was an "accident doctor," a doctor who could be relied upon to support a disability claim. He found that Mr. Truong began seeing Dr. Gill to avoid returning to work, and for that reason, he rejected Dr. Gill's opinion. Dr. Gilman's opinion that Mr. Truong displayed "severely impaired cognitive functioning" was rejected, in the absence of objective evidence of brain injury, because of test results suggesting that Mr. Truong exaggerated his symptoms. Dr. Kirwin's diagnosis also relied on Mr. Truong's description of his problems.

Dr. Raghunan's opinion was rejected because, amongst other grounds, Dr. Soon was the source of the referral, and Dr. Raghunan persisted in accepting Mr. Truong's claim of driving anxiety, a claim the Arbitrator found was inconsistent with the amount of driving Mr. Truong was doing. Dr. Raghunan's evidence was also damaged by the discrepancy between his testimony that he felt relieved he had kept Mr. Truong alive,²¹ and his report, which stated he observed no suicidal tendencies.

The driving issue also undermined Dr. Mamelak's opinion that Mr. Truong was completely disabled, and Dr. Mamelak's insistence that Mr. Truong is permanently crippled also damaged his evidence. Though the Arbitrator did not address the issue explicitly, the arbitration transcript suggests he had good reason to discount the opinions of Drs. Raghunan and Mamelak as partisan. For example,

²⁰ Arbitration decision, pp. 11-2.

²¹ Arbitration transcript, volume 5, November 6, 2002, p. 75 ff.

Dr. Raghunan refused to accept the implications of Mr. Truong's decision to quit his correspondence course despite earning 93 percent on the first module,²² and Dr. Mamelak testified that he would recommend a work trial only to prove the Insurer's experts wrong, and thought the Insurer should offer a settlement.²³

In short, the underlying weakness of all Mr. Truong's experts is that their opinions relied on his description of his problems because there was no objective evidence to explain his complaints of disabling impairment. Therefore, as is typical in chronic pain cases, Mr. Truong's truthfulness became an important issue in the hearing. That is why supportive expert evidence did not overcome Mr. Truong's devastating credibility problems. For that reason, too, the factual dispute about the strength demands of Mr. Truong's pre-accident job had little, if any, bearing on the outcome. In any event, the Arbitrator was well within his discretion to reject Mr. Truong's evidence, which was supported by neither of the worksite assessors.

Decisions that rest so strongly on an adverse credibility finding run the risk of appearing overly dismissive of supportive evidence. This is a danger because an insured person who exaggerates symptoms (unconsciously or consciously) may nonetheless be disabled from working and entitled to benefits. Further, an insured person may be entitled to medical and rehabilitation benefits, though not entitled to weekly income benefits. This is the concern underlying Mr. Truong's appeal. It is a legitimate concern, but I am satisfied the Arbitrator made his decision after considering all the evidence, and that his conclusion was supportable on the evidence.

²² *Ibid.*, pp. 35 and 54-59.

²³ Arbitration transcript, volume 4, November 5, 2002, for example, question 75 (p. 36) and question 91 (p. 42), question 123 (p. 56).

Given my finding that the Arbitrator did not err in dismissing Mr. Truong's claim for income replacement benefits after about the ten-month mark (benefits were terminated on June 1, 2000), I need not consider his argument that the Arbitrator erred by not dealing with the more stringent "post-104 week" disability test.

D. Medical Benefits

The Arbitrator also dismissed Mr. Truong's claims for various medical benefits: Dr. Grushka's fee of \$923, the balance of \$11,764.40 from Dr. Gill's account (Lumbermens had paid \$13,463.29 on the account before the hearing), and Dr. Raghunan's account for \$2,700. These claims were brought under s. 14 of the *SABS-1996*, which provides for payment of "all reasonable and necessary [medical] expenses incurred by or on behalf of the insured person as a result of the accident." Entitlement is contingent on impairment, and does not require disability. For the reasons given above, I find the Arbitrator's reasoning on Mr. Truong's medical claims rather dismissive. However, his decision was based on clear factual findings. In particular, he found that Mr. Truong sought treatment from Dr. Gill in order to substantiate his claim and that Dr. Raghunan's treatment was based in part on Mr. Truong's misrepresentation about his ability to drive.²⁴ There is no basis for me to interfere.

E. Housekeeping Expenses

The inconsistency between Mr. Truong's claims for housekeeping expenses and his testimony about the housekeeping services he received was fatal to this claim. In any event, the Arbitrator did not accept that Mr. Truong needed a housekeeper. There is no reason to interfere with these factual conclusions.

²⁴ Arbitration decision, p. 18.

F. Cost of Medical Reports

Mr. Truong submits that the Arbitrator erred by denying reimbursement for the cost of a number of medical reports pursuant to s. 24 of the *SABS-1996*, or alternatively, as arbitration expenses.

The Arbitrator dismissed the claim for the \$80 cost of a disability certificate from Dr. Soon because he found he had no evidence that the account was submitted to Lumbermens. He dismissed the claims with respect to reports from Drs. Raghunan, Mamelak, Gilman and Kirwin with the following explanation:

In view of my finding that Mr. Truong exaggerated or made up his complaints to support his claim for benefits, it is not reasonable that I should order Lumbermens to pay for reports in support of such a claim.

Section 24 required insurers to pay for “all reasonable expenses incurred by or on behalf of an insured person for the purpose of this Regulation in obtaining and attending an examination or assessment or in obtaining a certificate, report or treatment plan.”²⁵ The claimant must establish that the expense was incurred for the purpose of the regulation (the *SABS-1996*) and that the expense must be reasonable. The latter enquiry involves a two-part test: (i) was it reasonable to conduct the assessments? and (ii) was the cost reasonable? Delegate McMahon outlined the correct approach in *Tsimidis and Liberty Mutual Insurance Company*:

When the arbitrator is scrutinizing a report in the context of a demand for weekly or medical and rehabilitation benefits, she is assessing its usefulness in determining the individual’s entitlement to benefits. The quality of the process is only significant to the extent that it assists the trier of fact [to] determine how much weight should be given to the opinion. Conversely, when the arbitrator is scrutinizing the report in the context of a demand for payment of the assessor’s account, the opposite is true. The arbitrator should be primarily concerned with the process. The correctness of the opinion is principally important to the extent that it sheds light on whether sufficient time, care, and expertise, went into the conduct of the assessment and preparation of the report.²⁶

²⁵ Section 24 was substantially amended by Ontario Regulations 281/03 and 458/03, but it was not suggested the amendments affect this case.

²⁶ (FSCO P99-00013, August 28, 2000), at p. 8. Subsequent decisions have followed the same approach. See, for example, *Aleman and State Farm Mutual Automobile Insurance Company*, (FSCO P01-00014, September 21, 2001), *Smith and Citadel General Assurance Company*, (FSCO P01-00034, August 20, 2002).

In *Salvaggio and Simcoe & Erie*, Director's Delegate Naylor reversed the arbitration order and ordered the insurer to pay the psychologist's account because she concluded that the Arbitrator "may have been overly influenced by his view of the value of the end-result, without giving sufficient consideration to whether the assessment was a reasonable measure in the circumstances at the time it was arranged."²⁷ That is not what happened in this case. I am satisfied that the Arbitrator rejected the s. 24 claims because he found that Mr. Truong incurred these expenses for the purpose of bolstering a meritless and essentially fraudulent claim, not "for the purpose of [the] Regulation." I find no error.

Mr. Truong also submits, on appeal, that the Arbitrator should have considered whether these fees were recoverable as arbitration expenses, pursuant to s. 282(11) of the *Insurance Act*, and the expense regulation.²⁸ As the arbitration expenses decision was deferred, and it appears there has been no decision on that point, it would be inappropriate for me to decide that issue. It will be for the parties to pursue any further remedies in the arbitration proceeding.

Finally, the Arbitrator's dismissal of the claim for interpretation services at certain medical appointments was based on his assessment of Mr. Truong's facility in English. This was clearly a factual finding within his authority and there is no basis for me to intervene.

IV. EXPENSES

I make no ruling as to appeal expenses at this time. The matter is deferred. The parties may contact me within 30 days of receiving this decision if they are unable to agree.

Nancy Makepeace
Director's Delegate

March 9, 2004

Date

²⁷ (FSCO P97-00062, January 21, 1999), at p. 15.

²⁸ Ontario Regulation 664, as amended, Schedule F to the *Dispute Resolution Practice Code*.