

BETWEEN:

MILOMIR AGATONOVIC

Applicant

and

ROYAL INSURANCE COMPANY OF CANADA

Insurer

DECISION

Issues:

The Applicant, Milomir Agatonovic, was injured in a motor vehicle accident on May 22, 1992. He applied for and received statutory accident benefits from the Insurer, payable under Ontario Regulation 672.¹ Weekly income benefits were paid by the Insurer for 156 weeks pursuant to section 12(1) of the *Schedule*. The Insurer terminated benefits on May 29, 1995, relying upon the provisions of section 12(5)(b) of the *Schedule*. The parties were unable to resolve their dispute through mediation and the Applicant applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹ Prior to January 1, 1994, Ontario Regulation 672 was called the *No-Fault Benefits Schedule*. After that date it became the *Statutory Accident Benefits Schedule — Accidents Before January 1, 1994*. In this decision, the term “*Schedule*” will be used to refer to Regulation 672.

The issue in this hearing is:

1. Is the Applicant entitled to ongoing weekly income benefits beyond May 29, 1995?

The Applicant also claims interest on any amounts owing, and his expenses incurred in the hearing.

Result:

1. The Applicant is entitled to ongoing weekly income benefits beyond May 29, 1995.
2. The Applicant is entitled to interest on the benefits owing in accordance with section 24 of the *Schedule*.
3. The Applicant is entitled to his expenses.

Hearing:

The hearing was held in North York, Ontario, on February 19, 20, and 21, 1996, before me, Stewart M. McMahon.

Present at the Hearing:

Applicant: Milomir Agatonovic

Applicant's
Representative: David B. Hayward
Barrister and Solicitor

Insurer's
Representative: A. Wayne Edwards
Barrister and Solicitor

Isobel Loffredi
Student-at-Law

Reporter: M. Brennan

Translator: Dusko Sokolov
English/Serbian
Serbian/English

Witnesses:

Mr. Milomir Agatonovic, Ms. Radmila Vukoje, Dr. Ema Jakovac

Exhibits:

6 exhibits were filed. They are listed in Schedule A to this decision. Exhibit 4 is a Joint Medical Brief containing 65 reports. Only those reports specifically referred to by counsel were treated as exhibits and considered by me in my deliberations.

Evidence and Findings:

(i) The Applicant's Background

Mr. Agatonovic was born in the former Yugoslavia in 1948. He graduated from university in the early 1970s. At about the same time he embarked on a full-time career as a folk singer. He sang

throughout Yugoslavia, and toured in Europe. He appeared on radio and released a number of albums. He denied the suggestion that he was a big star, but agreed that he was well known. In 1987, Mr. Agatonovic came to Canada on a work visa. At that time, a number of large restaurants served the Yugoslavian communities in southern Ontario. The owners would arrange for Yugoslavian entertainers to come to Canada to work in their establishments. Generally the contracts would last for a few months, after which the entertainer would move on to another establishment. Sometime in 1990 or 1991 Mr. Agatonovic obtained Landed Immigrant status. He continued to work for the restaurateurs.

Mr. Agatonovic testified that he generally worked six nights per week, from 8:00 p.m. to 2:00 a.m. He would wander amongst the tables singing to the patrons. There was usually a small orchestra, and sometimes another singer.

Ms. Radmila Vukoje, the Applicant's common-law wife, testified that his job was very strenuous. She explained that Mr. Agatonovic would sing and dance amongst, and sometimes on the tables, where clients would stuff money into his clothing. She stated that due to exertion, he would have to change his shirt at least once during the night. She described him as a very proud man who took great stock in his appearance and talent.

During the summer months, Mr. Agatonovic travelled across Canada appearing at Yugoslavian festivals. These appearances were unpaid, but an integral part of his career.

The only pre-accident medical history of note, was the absence of 11 of Mr. Agatonovic's teeth, some of which had been replaced by a fixed bridge.

Mr. Agatonovic testified with the assistance of an interpreter, and he was accompanied to most of his medical appointments by an interpreter. Vocational testing done in the winter of 1996 suggests that he has at least a rudimentary knowledge of English.

(ii) The Motor Vehicle Accident and Injuries Sustained by Mr. Agatonovic

In the early morning hours of May 22, 1992, Mr. Agatonovic set out to drive two friends to Detroit. While on highway 401 just outside of London, he struck a deer. Mr. Agatonovic's description of the accident was very dramatic. However, other evidence suggested the impact was not as great as he related. The vehicle sustained only \$3,600 worth of damage, and his two passengers were unhurt. What is beyond doubt is that the collision was very traumatic from Mr. Agatonovic's perspective. At the time of the collision, he clamped his teeth shut with sufficient force that he broke his bridgework.

After attending at the police station in London, Mr. Agatonovic was driven home by a friend. Ms. Vukoje testified that when she returned home from work on May 23, she found him on the couch. He was glassy-eyed, his skin was pale, with black under his eyes, he was groggy and complained of a headache and sore neck. When Ms. Vukoje attempted to feed him soup later that night, he threw it up. She saw little improvement the next day and noted that his speech was slurred. That night she took him to the emergency department of the local hospital, and a day or so later to Dr. Mostrokov, his family physician. The record of the emergency department notes that he was prescribed Tylenol-3 for a whiplash type injury.

Mr. Agatonovic has had a great deal of trouble with his teeth following the accident. He saw his dentist a few days after the accident and the bridgework was replaced. He developed an infection

in his jaw and the bridgework has broken on at least one and possibly two subsequent occasions. These failures appear to be due in part to the fact that Mr. Agatonovic has become a bruxer (he grinds his teeth at night). Mr. Agatonovic is convinced that this dental work has changed the shape of his mouth and that he can no longer produce the same quality and range of sound that he could before the accident. This conviction has led him to the conclusion that he will never be able to return to professional singing.

The evidence concerning a physical impairment is equivocal. A number of doctors have noted an asymmetrical mouth opening, but an ear, nose and throat specialist has opined that there is no physical impairment that would prevent Mr. Agatonovic from producing the necessary sounds. A number of the psychologists who examined Mr. Agatonovic have queried whether there is an actual physical impairment, or whether his depression (which I will discuss in more detail shortly) has coloured his impressions.

Mr. Agatonovic was referred to a neurologist a couple of months after the accident because of complaints of headaches, numbness in his legs, twitching of his right eye, personality changes and poor sleep. The initial diagnosis was post-traumatic headaches. A second opinion, five months post-accident, attributed the majority of his ongoing symptoms to post-traumatic depression. Mr. Agatonovic continues to complain of frequent headaches, and persistent pain in his shoulders and neck. An Insurer's neurological examination by Dr. Bayer in September 1994 found that there were no concrete neurological findings that would explain these complaints.

One of the most puzzling aspects of Mr. Agatonovic's symptoms is a partial ptosis (closing) of his right eye. Early medical reports noted a twitching of the right eye with headaches. Later reports make note of a marked ptosis. None of the neurologists found any damage to the cranial nerves

that would explain the ptosis. Dr. Bayer suggested the explanation was partially due to edema and partially functional. Other doctors have also noted that the ptosis appears to have a functional component. Dr. Kuch, who conducted a psychiatric exam on behalf of the Insurer, noted that at times his right eye opened fully. Dr. Ameis, who also conducted an IME, made the same comment, noting that when the subject twisted to look at the interpreter, he would fully open the eye.

Both Mr. Agatonovic and his wife testified that since the accident he has been severely depressed, and has led a largely sedentary life. They both stated that he went out very little, that he did virtually nothing in the way of housework, and had very erratic sleeping patterns. Ms. Vukoje suggested that he is not the same man since the accident. Whereas before the accident he was extroverted, took great pleasure in social gatherings, and was receptive to her needs, now he is withdrawn, selfish and extremely irritable. Both testified that they have had no sexual relations since the accident. It was apparent that Ms. Vukoje has had considerable difficulty coping with Mr. Agatonovic's personality changes, and has herself sought the assistance of a psychiatrist. Ms. Vukoje's difficulties in coping with Mr. Agatonovic shed light on the extent of the personality changes and depression suffered by the Applicant.

Approximately one year post-accident, Mr. Agatonovic was referred to Dr. Jakovac, a psychiatrist who is able to converse with Mr. Agatonovic in his own language. Her initial diagnosis was post-traumatic stress and depression. Dr. Jakovac has been seeing him regularly since that time.

In the fall of 1993 Mr. Agatonovic was referred by the Insurer to Dr. Scher, a clinical psychologist. Dr. Scher concurred with Dr. Jakovac's diagnosis, and opined that the Applicant's

symptoms were severe enough to be disabling. Based upon this opinion, the Insurer funded treatment by Lacroix, Scher. Despite initial optimism that psychological counselling would assist Mr. Agatonovic, the staff of the clinic reported no appreciable improvement as of the date their services were terminated by the Insurer in the spring of 1995.

Both Dr. Jakovac and the staff at Lacroix, Scher reported that Mr. Agatonovic's depression appears to stem from two sources: (1) chronic pain, and (2) grief over the loss of his singing career. The latter has greatly exacerbated the former. Ms. Hartford, a counsellor at Lacroix, Scher, reported that because he was unable to return to singing, "he has no reason to get better." In his evidence before me, Mr. Agatonovic stated that as a singer who could no longer sing, he felt worthless.

In July 1994, Mr. Agatonovic was examined at the behest of the Insurer, by Dr. Stancer, a psychiatrist at the Clarke Institute. Dr. Stancer reported that his symptoms, which included a fear of driving, flashbacks concerning the accident, bouts of crying, loss of libido, thoughts of suicide, difficulty concentrating, withdrawal from social contact and feelings of helplessness, constituted a clinical depression and probably a post-traumatic stress disorder. Mr. Agatonovic had been on Prozac for his depression and Lorazepam for anxiety, for about a year, with little benefit. Dr. Stancer spoke to both Dr. Mostrokov, his family doctor, and Dr. Jakovac, his psychiatrist, to suggest an aggressive strategy to find a viable combination of anti-depressants. Dr. Jakovac has made a number of alterations to his medication, but it would be stretching the matter to characterize the approach as aggressive. Dr. Jakovac testified that Mr. Agatonovic usually responded positively when a new drug was prescribed, but that the benefit was transitory. Dr. Jakovac stated that in her view there has been no sustained improvement in Mr. Agatonovic's depression.

Earlier reports suggested that Mr. Agatonovic was experiencing troubles with his memory. Dr. Stancer noted these references, but stated that the subject's ability to recount his history did not suggest any memory deficits. Neuropsychological testing done by Dr. Snow in August 1994 revealed memory and concentration deficits which he attributed to pain, sleep loss, and stress. Mr. Agatonovic testified that he had trouble concentrating and his wife testified that he needed the assistance of a tutor to study for his citizenship exam. Ultimately he was given special dispensation to take the exam in his native language. Mr. Agatonovic's performance while testifying was inconsistent. At times he appeared to have difficulty concentrating and recalling events. On other occasions, he was able to recall with ease the names of a large number of drugs, and esoteric medical terms.

In October 1994, Mr. Agatonovic was subjected at the behest of the Insurer to a multidisciplinary examination at the Health Recovery Clinic. At that time, his chief physical complaint was constant right-sided headaches which radiated down to the jaw and ear area. He also reported low back pain radiating into his extremities. He advised the clinic staff that his pain was aggravated by sitting, walking, lying, standing, bending or lifting. A physical assessment noted significant loss of range of motion in the cervical and lumbar spine. The report notes that he was angry and quite pain-focused. He appeared drowsy at times, and guarded the left side of his body. A number of psychological tests were administered. The results were consistent with the earlier findings of depression.

The clinic staff suggested a regime of physiotherapy. Mr. Agatonovic advised the physiotherapy staff that he did not think the centre was the appropriate place for him to receive treatment, because he was a singer not a physical labourer, and exercises designed to prepare him for a labourer's job were inappropriate. The rehabilitation co-ordinator retained by the Insurer was

advised by Mr. Agatonovic's wife that after discussing the matter with Drs. Mostrokov and Jakovac, they did not think the program was appropriate until his depression lifted.

A number of doctors have suggested that Mr. Agatonovic's symptoms may be due to a mild closed head injury. These suggestions appear to arise from the doctors' mistaken assumption that Mr. Agatonovic's dental problems were due to his striking his head during the collision. There was no evidence that he struck his head. Many of the symptoms of a mild closed head injury and post-traumatic depression are similar, and the confusion is understandable; however, on a review of all of the reports, I am satisfied that the better explanation for Mr. Agatonovic's complaints is post-traumatic depression.

After reviewing the medical reports from the time of the accident until January 1995, I am satisfied that all of the practitioners who saw Mr. Agatonovic accepted the veracity of his complaints. Some, such as Dr. Bayer, described some of his limitations as "functional" implying a self-limiting component, and Dr. Bayer described his drooping eye as a "pseudoptosis." However, all of the doctors accepted the diagnosis of post-traumatic depression, and some also ascribed his complaints to a post-traumatic stress disorder.

In January 1995, Mr. Agatonovic was examined on behalf of the Insurer, by Dr. Arthur Ameis, who took a very different view of Mr. Agatonovic's complaints. In a very strongly worded conclusion, Dr. Ameis stated that while deferring to psychiatric opinion with regard to his "aberrant behaviours," he was of the opinion that Mr. Agatonovic "did not suffer serious physical harm in the car accident in question, but that he is prone to portray impairment and pain in what appears to be a determined effort to have himself certified as disabled, without any justification to

physical injury or impairment at all.” Dr. Ameis supported his conclusion by pointing to inconsistencies in the subject’s examination.

Contrary to Dr. Ameis’ findings, x-rays done in March 1995 show severe degenerative changes in Mr. Agatonovic’s AC joint and spasm in the lumbosacral joint with limitations in the mobility of the lower lumbosacral vertebrae. While it is not clear that these changes can be attributed to the motor vehicle accident, they do, in conjunction with the findings of the Health Recovery Clinic exam in October 1994, bring into question Dr. Ameis’ conclusion that Mr. Agatonovic suffered from no physical limitations.

In the spring of 1995 Mr. Agatonovic was briefly hospitalized and came under the care of Dr. Drobac, a cardiologist. In accordance with Dr. Drobac’s directions, Mr. Agatonovic made significant lifestyle changes such as quitting a two pack a day smoking habit, cutting back on fatty foods, and taking extended walks twice per day.

In February 1996, Mr. Agatonovic was examined at the request of the Insurer by Dr. Kuch, a psychiatrist. Depression and anxiety inventories administered by Dr. Kuch suggested that Mr. Agatonovic suffered from a moderately severe depression. However, Dr. Kuch noted a number of indicators during the course of his interview that suggested the depression was not as severe as indicated by the inventories. Dr. Kuch discounted the diagnosis of post-traumatic stress disorder, pointing to such things as Mr. Agatonovic’s continued use of his car, and his ability to recount the details of the accident without apparent distress. Most significantly, Dr. Kuch opined that the level of depression was insufficient to prevent Mr. Agatonovic from working. Dr. Kuch suggested that the principal barriers to Mr. Agatonovic’s return to work were his lack of language skills and his refusal to consider anything “but the role of an outstanding performer.”

Dr. Jakovac's evidence concerning Mr. Agatonovic's capacity to return to work was somewhat confusing. At one point she indicated that when "other stressors" in his life receded he might be fit to return to work. When asked what stressors, she referred to his heart condition. When asked if the heart condition was ignored, would he be fit to return to work, she indicated that he would not. When the test set out in section 12(5) of the *Schedule* was put to Dr. Jakovac, she was definitive in her opinion that Mr. Agatonovic was disabled as a result of his depression and unfit to return to a comparable job.

Based primarily upon Dr. Ameis' conclusion that Mr. Agatonovic sought to define himself as disabled without any justification, counsel for the Insurer argued that Mr. Agatonovic was in fact capable of returning to his former career. The Insurer presented evidence that since the civil war in the former Yugoslavia, most of the large restaurants have closed down, and have been replaced by much smaller establishments serving the individual ethnic communities that made up the former country. The Insurer suggested that Mr. Agatonovic has not returned to professional singing because no work is available. I do not accept this submission. There was evidence, which I accept, that the smaller restaurants continue to employ entertainers, and the religious festivals continue to be held. From the evidence tendered, it was obvious that Mr. Agatonovic took great pride and delight in his work. I am satisfied that Mr. Agatonovic's belief that he is incapable of singing is genuine, and that if he believed himself capable of returning to professional singing, he would do so. There are numerous references in the psychological and psychiatric evidence that Mr. Agatonovic's depression is in large measure attributable to his inability to cope with the loss of that career.

(iii) *Analysis*

There were a number of contradictions in the evidence concerning Mr. Agatonovic's physical limitations. I accept that Mr. Agatonovic exaggerated these limitations to some extent. Having said that, in my view a careful examination of the evidence concerning Mr. Agatonovic's psychological health is far more critical to a determination of the question before me.

There is no doubt in my mind that Mr. Agatonovic suffered a significant psychological injury as a result of the accident. Some commentators have suggested he suffers from a post-traumatic stress disorder; all have accepted that he suffers from depression. Dr. Scher, who performed a psychological examination at the behest of the Insurer, concluded that Mr. Agatonovic's depression was severe enough to be disabling. Dr. Jakovac, who has been the Applicant's treating psychiatrist since 1993, testified that in her opinion, he is incapable of engaging in any employment for which he is reasonably suited. The lone dissenting opinion is that of Dr. Kuch. Dr. Kuch conducted a thorough exam of the Applicant and has spent much of his career treating and writing on post-traumatic disturbances. His opinion must be given careful consideration.

In my view, Dr. Kuch's ultimate conclusion that neither Mr. Agatonovic's "depression nor his anxiety symptoms would be too severe to prevent **all** work and that they may well improve with successful work adjustment"[emphasis added] does not in my opinion address squarely the question that I must consider, namely whether, in the words of section 12(5)(b) of the *Schedule*, Mr. Agatonovic has established

that the injury continuously prevents the insured from engaging in any occupation or employment for which he or she is reasonably suited by education, training or experience.

The key difference is that to remain entitled to benefits, the Applicant need only establish that he or she is incapable of engaging in suitable, rather than any or all employment.

I am satisfied that at this point in time Mr. Agatonovic is incapable of returning to his previous profession. I accept that Mr. Agatonovic's belief that he is incapable of reproducing the sounds necessary to perform traditional Yugoslavian folk songs is genuine. Whether the disability is due to a physical impairment caused by changes in the shape of his mouth and teeth, or, as seems more likely, due to the depression colouring his judgement, as long as he believes himself incapable of producing the necessary sound, he is disabled from singing professionally. In addition, Mr. Agatonovic's physical presentation and affect ranges from sullen and withdrawn to agitated and angry. He no longer portrays the sense of confidence, exuberance and *joie de vivre* so intrinsic to a professional entertainer.

With respect to suitable alternate work, Mr. Agatonovic's options are severely limited at this time. Although I accept that his English is greater than he lets on, it is at best rudimentary, and until it is upgraded, he will be restricted to jobs within the Yugoslavian community. I heard only limited evidence concerning Mr. Agatonovic's university education. It appeared to concentrate on economics and agriculture. Mr. Agatonovic has not used that education, and it is hard to imagine that 20 plus years later, it would translate into employment opportunities. Mr. Agatonovic has worked his whole adult life as a singer. I heard no evidence concerning what jobs he may have had as a student in Yugoslavia, but I am prepared to accept that his skill set is limited and specific to his particular career as a singer.

The depression, pain, and loss of sleep has also impaired his ability to study or retrain. In addition, the loss of self-esteem has meant that Mr. Agatonovic has given little, if any, thought to charting a new life for himself. In sum I am satisfied that at present Mr. Agatonovic is incapable of engaging

in any occupation or employment for which he is reasonably suited by education, training or experience.

Although I am convinced that Mr. Agatonovic is at present disabled, I do not believe that this disability need be indefinite. A number of doctors have suggested that he is a bright individual, and during his evidence he impressed me as such. Despite evidence of difficulties with concentration and memory, based upon Mr. Agatonovic's demonstrated abilities, I am satisfied that he is now mentally able to begin the process of retraining. While his depression will no doubt make this process more arduous, his ability to make significant lifestyle changes in the face of his heart condition satisfies me that he is capable of overcoming the depression to make the necessary effort to participate in retraining. As noted by Dr. Kuch, ultimately a successful work experience will assist in alleviating the depression.

There are also clear indications that his physical tolerances are increasing and I am satisfied that physically, he is now ready to embark on a course of rehabilitation and retraining.

The thrust of the rehabilitation and weekly income provisions found in sections 6 and 12 of the *Schedule* are designed to ensure that the insurer and its insured work together to return the individual to the workforce. During the first 156 weeks, the insured is entitled to weekly benefits for as long as he is incapable of returning to his own occupation. Thereafter, the insured is only entitled to weekly benefits for as long as he is incapable of engaging in any reasonably suitable occupation. In my view, this requires an insured to consider alternate careers, and to work toward obtaining such employment. An unreasonable, persistent refusal to consider a career change will disentitle the insured from receiving further weekly income benefits.

Both Dr. Jakovac and Dr. Mostrokov supported the decision to defer physical rehabilitation until Mr. Agatonovic's depression is brought under control. While Dr. Jakovac testified that it would be "nice" if Mr. Agatonovic could work, it is clear that neither doctor has focused on return to work strategies. Contrary to the conclusions of these doctors, I am satisfied that it is time to begin an aggressive program designed to return Mr. Agatonovic to the workforce, and I suggest that his entitlement to ongoing weekly benefits is tied to participating in *bona fide* efforts at rehabilitation and retraining.

Mr. Agatonovic was asked during cross-examination if he had considered a career as a singing instructor or some involvement in organizing the religious festivals that he previously performed at. He flatly rejected both proposals, stating that he was an entertainer not a teacher or organizer. Without suggesting that Mr. Agatonovic must opt for a career as a singing instructor or festival organizer, I note that both suggestions bear consideration. I also note that Ms. Vukoje testified that she and Mr. Agatonovic had in better times discussed setting up their own establishment. While at present that would obviously be a long-term goal, training to work in a restaurant or pub so as to gain the necessary experience to open an establishment might also bear some thought.

Vocational testing done by the Insurer in January 1996 suggests that when medically cleared to return to work, Mr. Agatonovic would be capable of working as an attendant at a lottery booth, self serve gas bar or parking lot. In my view these jobs are wholly unrelated to Mr. Agatonovic's work history and are in no sense comparable in status. In my view it is incumbent upon both the Insurer and the Applicant to work together to identify suitable employment goals for Mr. Agatonovic and to design a program designed to return him to a productive life.

Conclusion:

Mr. Agatonovic is entitled to weekly benefits beyond the cut-off date of May 29, 1995. The quantum of the benefit was not in issue before me. Mr. Agatonovic is entitled to interest on the amounts owing. I exercise my discretion to award Mr. Agatonovic his expenses.

Order:

1. The Applicant is entitled to payment of ongoing weekly income benefits beyond May 29, 1995.
2. The Applicant is entitled to interest on the outstanding payments in accordance with section 24 of the *Schedule*.
3. The Applicant is entitled to his expenses incurred in respect of the arbitration.

August 19, 1996

Stewart McMahon
Arbitrator

Date

SCHEDULE A

Exhibits:

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| Exhibit 1 | Poster - Radio Belgrade |
| Exhibit 2 | Album cover 1986 |
| Exhibit 3 | Album cover 1987 |
| Exhibit 4 | Joint Medical Brief - Tabs 1-4, 6-10, 12, 13, 14, 16, 17, 21-24, 29, 31, 35, 37, 39-42, 44-52, 54, 55, 57 and 59 |
| Exhibit 5 | Consultation reports of Dr. Drobac |
| Exhibit 6 | Clinical notes and records of Dr. Jakovac |