

BETWEEN:

TONY W. NELSON

Applicant

and

CANADIAN GENERAL INSURANCE COMPANY

Insurer

DECISION

Issues:

The Applicant, Tony W. Nelson, was injured in a motorcycle accident on July 29, 1990. He applied for and received statutory accident benefits from his Insurer, the Canadian General Insurance Company ("Canadian General"), payable under Ontario Regulation 672¹. Canadian General stopped paying him weekly income benefits on or about July 31, 1993. Mr. Nelson claims that he continues to be entitled to weekly income benefits. He also claims that he is entitled to some expenses related to the accident that Canadian General has refused to pay.

After an unsuccessful attempt to resolve the dispute through mediation, Mr. Nelson applied for arbitration under the Insurance Act, R.S.O. 1990, c.I.8, as amended. The issues in this hearing are:

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.

1. Is Mr. Nelson entitled to weekly income benefits under section 12(5)(b) of the Schedule for any period after July 31, 1993?
2. Is Mr. Nelson entitled to any additional supplementary medical or rehabilitation expenses under section 6 of the Schedule?
3. Should Canadian General be required to pay a special award under section 282(10) of the Insurance Act because it unreasonably withheld or delayed the payment of benefits to Mr. Nelson?

Mr. Nelson also claims interest on any amounts owing, and his expenses related to the arbitration.

Result:

1. Mr. Nelson is entitled to weekly income benefits from July 31, 1993, plus interest according to section 24 of the Schedule.
2. Mr. Nelson is entitled to:
 - (a) The cost of a king-size adjustable bed, minus any amount already paid for a new bed; and,
 - (b) Child care expenses required to allow Mr. Nelson to attend medical appointments or to participate in rehabilitation.

He is not entitled to:

- (a) A six-foot whirlpool;
- (b) An adjustable chair;
- (c) An intercom system; or,
- (d) A scooter.

3. Canadian General is not required to pay a special award.

4. Mr. Nelson is entitled to his expenses related to the hearing.

Hearing:

The hearing was held in Burlington, Ontario, on the following dates, before me, David R. Draper, arbitrator:

- January 9, 10 and 11, 1995
- February 15 and 16, 1995
- March 15, 16 and 31, 1995

Present at the Hearing:

Applicant: Tony W. Nelson

Applicant's
Representatives: H. Bruce T. Hillyer
Barrister and Solicitor

David Hayward
Barrister and Solicitor

Insurer's
Representative: James Dunn
Barrister and Solicitor

Court
reporters: Olivia Couper (February 15 and 16, 1995)
Cindy Jones (March 15, 1995)
Nicky Jane (March 16, 1995)

Witnesses:

1. Dr. Timothy John Salter - Applicant's family doctor
2. Tony W. Nelson - Applicant
3. Glenn Sprague - Applicant's physiotherapist
4. Dr. John W. Schneider - Applicant's psychologist
5. Dr. Keith Travis - Psychologist retained by Canadian General
6. Christina Churchill - Exercise therapist, Canadian Back Institute
7. Dr. Peter Welsh - Orthopaedic surgeon retained by Canadian General

Exhibits: The exhibits are set out in Appendix A.

Reasons for Decision:

At the time of his accident on July 29, 1990, Mr. Nelson was 32 years old. He was living with his wife and five year old daughter, and working for a landscaping company. His job involved the physical duties of landscaping, but he also had some supervisory responsibilities.

Mr. Nelson suffered a serious knee injury in the accident. The consequences of the accident, however, extend well beyond the physical damage to his knee. He has complained of headaches and chronic pain in various areas of his body. He has also been tested and treated for psychological problems. Despite extensive medical care and various forms of therapy, Mr.

Nelson claims that he remains seriously disabled due to pain and the instability of his knee. He has not worked since the accident, and maintains that he is unable to return to any type of employment, full-time or part-time.

1. Weekly income benefits

There was a considerable delay before Mr. Nelson received any accident benefits. I find, however, that this was not due to any lack of diligence on the part of Canadian General. Mr. Nelson or his wife reported the accident to their insurance broker, but Canadian General was not notified until May 24, 1991, nearly ten months after the accident. Shortly after Mr. Nelson submitted his application for accident benefits, Canadian General issued him a cheque for \$29,210.95, representing his weekly income benefits for the period from August 5, 1990 to August 12, 1991.

Canadian General continued to pay weekly income benefits under section 12(1) of the Schedule. These benefits were based on Mr. Nelson's inability to perform the essential tasks of his pre-accident employment as a landscaper. After 156 weeks, the eligibility test becomes stricter. Canadian General terminated Mr. Nelson's weekly income benefits on or about July 31, 1993, on the basis that he did not meet this stricter test set out in section 12(5)(b):

12.--(5) The insurer is not required to pay a weekly benefit under subsection (1),

- (b) for any period in excess of 156 weeks unless it has been 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.** [emphasis added]

The issue, therefore, is whether Mr. Nelson's injuries from the accident continuously prevent him

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

I have no hesitation in accepting that many people with Mr. Nelson's injuries would have recovered to a far greater extent than he has. The medical professionals, including those supporting his claim, are frustrated with his lack of progress. While not wanting to encourage maladaptive responses to accident-related injuries, it must be recognized that different people will respond differently. To paraphrase one of the doctors, you can repair a knee, but recovery is complicated by the fact that it is attached to a person with unique strengths and weaknesses. Unfortunately, Mr. Nelson has not responded well. I conclude, however, that his physical and psychological limitations are real, and have prevented him from returning to work. My reasons follow.

a) Background

Both parties urged me to consider Mr. Nelson's background. He claims that his employment options are restricted to manual labour due to his limited education and work experience. Canadian General focused on his pre-accident health. Its position is that a significant proportion of Mr. Nelson's ongoing problems are unrelated to the accident. Rather, they arise from conditions that predate the accident, most notably headaches and drug dependency.

Mr. Nelson prepared a résumé, setting out his education and work history². I accept the résumé as generally accurate, although some of the specific dates conflict with other more reliable evidence.

² Exhibit 1, Volume 2, Tab 50.

After completing grade 12 in 1976, Mr. Nelson spent ten years in various labouring jobs, including building shoreline break walls, assisting surveyors, working in a lumber yard and doing mill work at Stelco. He tried to paint a rather rosy picture of his employment background, but I find that he had some significant work-related problems.

Mr. Nelson's longest period of continuous employment was with Stelco, starting in 1981, as a "helper." At some point, the company became concerned about his absenteeism. The major problem was his migraine headaches, which he acknowledged have been a problem for many years. In 1984, the company doctor at Stelco referred Mr. Nelson for a multi-disciplinary assessment at St. Joseph's Hospital. Following the assessment, he received treatment at the hospital until March 1985. Despite this intervention, Stelco was not satisfied with Mr. Nelson's performance, and fired him in November 1985.

At about the same time, Mr. Nelson was charged with a drug-related offence. He was subsequently convicted and sentenced to a number of months in jail, further interrupting his employment. After he was released from jail, Mr. Nelson had some temporary jobs involving welding, construction, and delivering office furniture and equipment.

Since 1988, Mr. Nelson has worked in landscaping for a number of different companies. In the spring of 1989, he also attended an environmental horticulture course at Sheridan College, arranged through Manpower. Mr. Nelson attempted to portray this as a steady period of employment in the same field. On cross-examination, however, he acknowledged that he was "kind of fired" in June 1989 from his job at Environs Landscape-Nursery Farm. It also appears that he quit his job at Chemlawn in early 1990.

Mr. Nelson continued to have significant health problems that may well have affected his performance at work. Prior to the accident, he was seeing his chiropractor, Dr. Wingfield,

approximately twice a month, mainly for headaches. He was also being followed by a neurologist, Dr. Fawcett, for his headaches. On July 20, 1990, just nine days before the accident, Dr. Fawcett reported that she had increased Mr. Nelson's medication in response to a prolonged headache.

One of the complicating factors in Mr. Nelson's health care, both before and after the accident, is his drug dependency. Prior to the accident, his family doctor, Dr. Timothy Salter, was concerned about Mr. Nelson's addiction to codeine and his use of marijuana, and was attempting to limit his intake. At some point, Dr. Salter instructed the local hospitals not to give Mr. Nelson certain types of medication. Instead, he prescribed injectable medication for Mr. Nelson to keep with him. When he needed pain relief, Mr. Nelson took the medication to one of the local hospitals for an injection.

It is clear that prior to the accident, Mr. Nelson had some significant problems. As Dr. Salter stated, "Tony is not a saint." Despite these problems, however, he managed to maintain reasonably steady employment in landscaping. He was employed at the time of the accident, and I heard no evidence that he was not performing his duties. I find, therefore, that although Mr. Nelson may not have been functioning at a particularly high level, he was coping.

(b) The accident and its aftermath

The accident happened on July 29, 1990. According to Mr. Nelson, he was riding his motorcycle at approximately 80 kilometres per hour when a van stopped suddenly in front of him. He locked his brakes, but hit the back of the van and was thrown off his motorcycle.

Mr. Nelson was taken by ambulance to the McMaster University Medical Centre. His most serious injury was to his left knee. The diagnosis was a compound fracture of the patella. Dr.

Mah, an orthopaedic surgeon, operated on Mr. Nelson's knee the following day. He took out loose pieces of bone, secured the fractured patella with K-wires, and put on a cast. Dr. Mah indicated in his post-operative report that he did not expect a "good result," and that further surgery was likely³.

Mr. Nelson left the hospital on crutches after about four days. He saw Dr. Salter for follow-up treatment. The initial treatment focused on Mr. Nelson's knee, although headaches continued to be a problem. Although he has suffered from headaches for many years, I accept that the accident contributed to some extent to his post-accident headaches.

In September 1990, Dr. Mah reported that Mr. Nelson's patella had not united, and that one of the pins was loose⁴. Dr. Mah recommended that Mr. Nelson start physiotherapy pending further surgery. The evidence about Mr. Nelson's initial physiotherapy is confusing. It appears, however, that he started physiotherapy at the Burlington Sports Clinic some time in September 1990. He also started hydrotherapy with Ms. Jan Kaiser, a physiotherapist, in November 1990⁵. Occasionally, he saw his chiropractor, Dr. Wingfield⁶.

On December 6, 1990, Dr. Mah surgically removed the K-wires⁷. As a result of his follow-up visit on January 8, 1991, Dr. Mah was concerned that Mr. Nelson's leg muscles had atrophied.

³ Exhibit 1, Volume 1, Tab 2.

⁴ Exhibit 1, Volume 1, Tab 4.

⁵ Exhibit 1, Volume 2, Tab 33.

⁶ Exhibit 14.

⁷ Exhibit 1, Volume 1, Tab 6.

He advised Dr. Salter that Mr. Nelson needed more physiotherapy.⁸

Mr. Nelson arranged to see Dr. Daniel Levy, the Medical Director of the Sports Medicine Clinic. He explained that he had met Dr. Levy as a landscaping client. Dr. Levy described Mr. Nelson's knee injury as a "significant injury" involving "the terrible Triad⁹." He recommended that Mr. Nelson wear a knee brace to allow him to exercise his knee without risking further injury. Mr. Nelson has worn a knee brace ever since, although the type of brace was changed at least once.

In April 1991, Dr. Mah performed arthroscopic surgery¹⁰. He cleaned out the knee and studied its condition to determine if reconstructive surgery was indicated. He found wear and tear on the patella, and that a portion of the patella was missing entirely. He also noted that the sheath of the anterior cruciate ligament was torn. Dr. Mah concluded, however, that surgery was not indicated at that time. Rather, he wanted to see how Mr. Nelson progressed with "vigorous physiotherapy¹¹."

Mr. Nelson continued with physiotherapy, although he changed physiotherapists in May of 1991. He testified that this was at Dr. Levy's suggestion. His new therapist was Mr. Dombrosia. Mr. Glenn Sprague took over for Mr. Dombrosia in September 1991.

In June 1991, Dr. Salter wrote to the Canada Pension Plan in support of Mr. Nelson's application for a disability pension. He stated that Mr. Nelson was "completely incapacitated from being currently employable or in the distant future. He still has a great deal of physiotherapy and

⁸ Exhibit 1, Volume 1, Tab 7.

⁹ Exhibit 1, Volume 1, Tab 9.

¹⁰ Exhibit 1, Volume 1, Tab 13.

¹¹ Exhibit 1, Volume 2, Tab 45.

possible reconstructive surgery to undergo¹².”

I find that in the year following the accident, there was little, if any, suggestion that Mr. Nelson was able to return to work. However, Canadian General submitted that his ongoing knee problems were not caused by the accident. The medical records indicate that he fell and hurt his knee a number of times in the spring and summer of 1991. These falls may have aggravated his injuries, but I do not find any convincing medical evidence that they are the primary cause of his ongoing knee problems. Even if they are, I accept Mr. Nelson’s testimony that he fell due to the weakness in his knee, making the accident the indirect cause of his injuries.

(c) Ongoing treatment and rehabilitation

As time passed, Mr. Nelson’s situation became more complex. Not only was his condition not improving, he was on a downward spiral. He became focused on his pain, leading his treating physicians to comment on his low pain threshold. He relied heavily on medication, which Dr. Salter explained may actually increase his pain perception. He began relying on a cane or crutches, as well as a knee brace. He started to complain of pain in other parts of his body, perhaps due in part to altering his gait and using mobility aids. His physical conditioning suffered and he gained weight, putting additional strain on his knee. His psychological condition also suffered. Family problems developed, leading to a lengthy separation from his wife and child. As a result of these family problems, his physiotherapy program was interrupted for approximately four months, from September 1991 to January 1992. He became convinced that he was totally disabled, and was looking for a surgical cure. However, his deteriorating physical and psychological condition made surgery an even less viable option.

¹² Exhibit 1, Volume 1, Tab 14.

Mr. Nelson's situation was also complicated by the number of people who became involved. Dr. Salter and Dr. Mah made a number of referrals, some at Mr. Nelson's request. In addition, Canadian General arranged for a number of assessments, and also retained a rehabilitation company, Medex Vocational Management Group. I have listed the various medical professionals in Appendix B.

I find that from a very early stage, Mr. Nelson's treating physicians, Dr. Salter and Dr. Mah, encouraged him to increase the use of his knee through active physiotherapy. Surgery was considered, but Dr. Mah concluded that the surgical options were too invasive and risky to try on someone so young. The orthopaedic specialists who subsequently assessed Mr. Nelson disagreed to some extent about the specifics of his injury. However, they all agreed, with the possible exception of Dr. Evans, that surgery was not medically indicated, although it might be at some point in the future.

Dr. Mah felt that, without surgery, Mr. Nelson should be able to increase his functioning to the point that he might be able to return to work in a less demanding job than landscaping¹³. He acknowledged, however, that Dr. Salter was probably in a better position to evaluate Mr. Nelson's future employability¹⁴. Dr. Salter, who knew much more about Mr. Nelson's background, was less optimistic.

It is difficult to summarize the entire course of Mr. Nelson's treatment, but the role of the Traffic Injury Rehabilitation Program is a key. By the spring of 1992, there was good reason for concern about Mr. Nelson's lack of progress. Dr. Mah felt that his knee had improved physically, but was

¹³ Exhibit 1, Volume 1, Tab 30.

¹⁴ Exhibit 1, Volume 2, Tab 45.

concerned about his psychological condition¹⁵. He was also concerned that Mr. Nelson might be developing reflex sympathetic dystrophy which, as I understand it, is another consequence of disuse of the leg.

Dr. Mah referred Mr. Nelson to the Traffic Injury Rehabilitation Program for an assessment and follow-up treatment. Dr. Salter supported this referral. In fact, his memory was that he made the referral. The clinicians at the Traffic Injury Rehabilitation Program concluded that because of the severity of Mr. Nelson's pain complaints, concerns about his drug dependency, and the possibility that he was developing reflex sympathetic dystrophy, he needed "the structured, intensive program" offered by the Neck and Back Program at the Henderson Hospital¹⁶.

This strikes me as a reasonable plan given the complexity of Mr. Nelson's rehabilitation needs. However, he was not accepted into the program because he was "looking for a cure for his knee problem, as opposed to looking for means with which to cope with his knee problem and pain¹⁷." I do not accept Mr. Nelson's assertion that he was not accepted because the staff did not think he would be physically able to cope with the program.

After he was refused admission to the Neck and Back Program, Mr. Nelson met with Dr. Ghouse to discuss his treatment options¹⁸. Dr. Ghouse is a specialist in physical medicine and rehabilitation, affiliated with the Traffic Injury Rehabilitation Program. He found that Mr. Nelson still felt that his main problem was the physical condition of his knee. Therefore, he suggested that Mr. Nelson discuss the possibility of further surgery with Dr. Mah, which he did. Dr. Mah

¹⁵ Exhibit 1, Volume 2, Tab 45.

¹⁶ Exhibit 19.

¹⁷ Exhibit 1, Volume 1, Tab 51.

¹⁸ Exhibit 1, Volume 1, Tab 51.

restated his opinion that surgery was not a viable option, and urged Mr. Nelson to work with the Traffic Injury Rehabilitation Program and his physiotherapist to increase his pain tolerance and leg strength.

Mr. Nelson returned to the Traffic Injury Rehabilitation Program and met with Dr. Ghose, Dr. Dermer, a psychiatrist, and Ms. Zambon, the clinical supervisor. The conclusion, however, was that Mr. Nelson was not appropriate for the pain program at the Traffic Injury Rehabilitation Program because he was “still unwilling to accept his present condition, and unwilling to commit to a comprehensive program which would require regular attendance and which would assist him to cope with his pain”¹⁹.

Instead, Mr. Nelson arranged to get a second opinion about surgery from Dr. David Wismer, an orthopaedic surgeon. Following his assessment, including some further clinical tests, Dr. Wismer agreed with Dr. Mah that surgery was not an appropriate option²⁰.

There is nothing wrong with seeking a second opinion. The problem is that Mr. Nelson did so at the expense of recommended treatment. By February 1993, he knew that surgery was not an option for the foreseeable future, but he did not pursue the type of structured pain program that had been recommended. This is unfortunate because two years later, virtually everyone, including Mr. Nelson, agrees that he needs a structured rehabilitation program similar to the Neck and Back Program at the Henderson Hospital.

After he was rejected by the Neck and Back Program at the Henderson Hospital, Mr. Nelson decided to continue physiotherapy with Mr. Sprague and to exercise at home. He made a number of requests to Canadian General for funding, including a Nordiflex exercise machine, a codetron

¹⁹ Exhibit 1, Volume 1, Tab 51.

²⁰ Exhibit 1, Volume 1, Tabs 48 and 53.

(a device that mimics acupuncture), a whirlpool and home renovations. Canadian General paid for the exercise machine and began investigating the cost of various home renovations, including installing a whirlpool.

I find that the already strained relationship between Mr. Nelson and Canadian General deteriorated during this period. Mr. Nelson became quite demanding, making many claims, some of which were unreasonable. For example, he wanted a whirlpool installed in his basement rather than on the main floor, even though he felt that he would also need a very expensive lift to help him up and down the stairs. In addition, he was having marital problems and was contemplating moving out of the house. Mr. Nelson also wanted Canadian General to pay to fence his backyard and for the maintenance of his automobile.

Mr. Nelson became even angrier with Canadian General during the summer of 1993. First, they sent him to the Canadian Back Institute for a functional capacity evaluation. He claims that as a result of this assessment, his knee was injured to the point that he has had to use crutches ever since. I accept that he sincerely holds this view, but find no medical evidence to support it. Second, Canadian General terminated Mr. Nelson's weekly income benefits. Not surprisingly, this created financial difficulties that upset him.

I accept the view expressed by a number of the doctors that Mr. Nelson's conflict with his Insurer is a complicating factor in his recovery. It is unfortunate, therefore, that the various attempts to resolve the dispute were unsuccessful.

More recently, the focus of Mr. Nelson's rehabilitation has shifted to his psychological condition. Dr. Schneider has been actively involved in counselling him, and also arranged for his wife and daughter to get counselling. Dr. Schneider testified forcefully and persuasively that Mr. Nelson is not able to return to work.

There have also been a number of assessments. Dr. Schneider did some psychological testing, as did Dr. Travis, a psychologist retained by Canadian General. As indicated above, Canadian General arranged for the Canadian Back Institute to do a functional capacity evaluation. In response, Mr. Nelson's lawyer had the March of Dimes do a similar assessment. The opinions resulting from these assessments differ significantly. In particular, the two psychologists disagree about whether Mr. Nelson has a mild traumatic brain injury. The problem with all the assessments, however, is that they are significantly compromised by Mr. Nelson's inability or refusal to participate fully.

(d) Conclusion

Dr. Travis presented what was probably the strongest challenge to Mr. Nelson's claim. He questioned Mr. Nelson's motivation and his willingness to give up the attention and financial compensation that has gone along with his disability. I accept that Mr. Nelson's perception of his disability is a serious problem, but am not convinced that he is malingering. Rather, I find that he is one of the small subset of patients, described by Dr. Welsh, who simply do not respond well to treatment.

The problem is what to do with patients like Mr. Nelson. He can be told that his response to his injuries is exaggerated and unnecessary, but that does not make him better. Based on the medical evidence and on my impression of Mr. Nelson, I am convinced that he continues to have significant physical and emotional problems that result, directly or indirectly, from the accident. Further, it is difficult to imagine him returning to work in his current condition.

Fortunately, it appears that there is now general agreement that Mr. Nelson needs a structured, preferably in-patient, pain program. Plans are underway to have him admitted to a program at the Chedoke-McMaster Medical Centre. It was submitted on behalf of Canadian General,

however, that Mr. Nelson's present problems are his own doing. He was offered precisely this kind of program over two years ago, but he refused to accept it.

As I have stated in an earlier decision²¹, the point may come where the person's ongoing disability is caused more by his or her failure to follow medical advice than by the accident. I have serious concerns about Mr. Nelson's efforts to rehabilitate himself, but I do not believe he has yet reached that point. Hopefully, he will be admitted to the Chedoke-McMaster program, or some similar program. I would have serious concerns to learn that he did not pursue or take full advantage of this type of assistance.

I conclude, therefore, that Mr. Nelson continues to be entitled to weekly income benefits under section 12(5)(b) of the Schedule.

2. Supplementary medical and rehabilitation benefits

Canadian General has paid for many of Mr. Nelson's expenses, including rehabilitation, physiotherapy, hydrotherapy, psychological counselling (including counselling for his wife and child), transportation and parking, a Norditrac exercise machine, certain home renovations, maid and lawn care services, and some child care²². He is claiming additional expenses that Canadian General has refused to pay.

I approach Mr. Nelson's claims with hesitation for two reasons. First, he has consistently

²¹ Sukhwant Singh Kahlon and Royal Insurance Company of Canada, June 23, 1993, OIC File No. A-001687.

²² Exhibit 25.

overestimated his limitations and his need for assistance. The doctors have consistently encouraged him to increase his activity, and have expressed concern about his reliance on mobility aids, especially crutches. Second, the evidence presented in this case, particularly Mr. Nelson's own testimony, leaves me with little faith in his ability to carry out any consistent rehabilitation program at home.

(a) Six-foot whirlpool

Mr. Nelson's physiotherapist, Mr. Sprague, recommended a whirlpool to help increase the blood circulation in Mr. Nelson's knee. Dr. Salter and Dr. Mah supported this proposal. This led to a long period of negotiations between Mr. Nelson and Canadian General about renovations to his home, including the installation of a whirlpool. At the beginning of this negotiation, there was no indication that the length of the whirlpool was critical. I find, however, that Mr. Nelson wanted the whirlpool installed in his basement, in part because it could accommodate a six-foot tub. Canadian General felt that it made more sense to renovate the existing main floor washroom, although a six-foot tub would not fit.

I find that Mr. Nelson eventually agreed, although reluctantly, to the renovation of his main floor washroom, including the installation of a five-foot whirlpool. The renovations were done at a cost of over \$12,000. Mr. Nelson now claims that he needs a six-foot whirlpool, presumably installed in the basement, because he has difficulty bending his leg.

I am inclined toward Dr. Welsh's view that passive therapies, including the use of a whirlpool, are of questionable value at this point. Even if a whirlpool might be helpful, however, I am far from convinced that it is either "necessary" or "reasonable", within the meaning of section 6 of the Schedule, to install a six-foot whirlpool in the basement for a man who has a five-foot whirlpool in his main floor bathroom, and who claims to have significant problems going up and

down stairs.

Therefore, I am not prepared to order that Canadian General fund the cost of installing a six-foot whirlpool in Mr. Nelson's home.

(b) Steps and railings

The evidence relating to this claim was quite confusing. The Report of Mediator, dated November 18, 1993, states that Canadian General "has agreed to pay the costs associated with installing new stairs and a railing at the insured's back door and a railing at the front door." My understanding is that this work has been done, although Mr. Nelson is not satisfied that it is sufficient. Based on the information presented at the hearing, I am not persuaded that any additional renovations are required at this time.

(c) Child care services

Mr. Nelson was working at the time of the accident, and is claiming benefits on the basis that he is unable to return to work. In my opinion, Canadian General took a reasonable position in its letter to Mr. Nelson, dated April 19, 1993, which states:

... the daycare expense is an expense that you would have incurred whether or not the accident happened. However, if the babysitting expense is incurred as a result of your going to treatment or hospital, we will reimburse you for a reasonable expense accordingly²³.

The Report of Mediator indicates that the issue of child care was settled, although the terms of the

²³ Exhibit 26

settlement were not made clear to me. Based on the information presented to me, I conclude that Canadian General is required to pay only the child care expenses that are necessary to allow Mr. Nelson to go for treatment or rehabilitation.

(d) Adjustable bed and chair

Mr. Nelson claims that he needs an adjustable bed and chair to help him deal with the pain in his knee. I am not convinced that an adjustable chair is “necessary”, within the meaning of section 6 of the Schedule. In my opinion, however, the evidence is much stronger with respect to the bed. I am particularly persuaded by the evidence of Dr. Schneider that it is a problem that Mr. Nelson is unable to sleep comfortably in the couple’s king-size water bed.

My understanding is that Canadian General agreed to pay for an adjustable bed for Mr. Nelson, and issued a cheque for \$2,183.85, but refused to pay for a king-size adjustable bed²⁴. According to Mr. Nelson, a new twin bed could not fit in the bedroom along with the water bed that is there now. In the circumstances, I conclude that Canadian General should pay the additional cost of an adjustable king-size bed.

(e) Intercom system

Mr. Nelson claims that he needs an intercom because it is difficult for him to answer the door, particularly when he is in the basement. Dr. Salter supports this request. There may be some merit to this claim, but I am concerned about efforts to reduce Mr. Nelson’s activity. In my opinion, this claim should be reconsidered when he is involved in an active rehabilitation program, and his therapists are in a position to evaluate his functional abilities.

²⁴ Exhibit 26 (Letter from Canadian General to Mr. Nelson’s lawyer, dated April 22, 1994).

(f) Scooter

Mr. Nelson claims that he needs an electric scooter to help him get around. In my opinion, this claim is premature. There is no medical opinion that he needs a scooter, or even that it is a good idea. An occupational therapist has given some consideration to Mr. Nelson's need for additional mobility aids, but a full evaluation has not been done²⁵. Again, I am concerned about reducing Mr. Nelson's activities. It is also unclear to me how he would use a scooter given his present problems with sitting.

3. Special award

Mr. Nelson seeks a special award under section 282(10) of the Insurance Act:

282. - (10) If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the No-Fault Benefits Schedule, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the Schedule.

At the beginning of the hearing, Mr. Dunn objected to the inclusion of the claim for a special award. He submitted that it was not raised in Mr. Nelson's application for arbitration, or during the pre-hearing discussion. After hearing submissions from both counsel, I decided I was entitled to consider ordering a special award despite the lack of formal notice. I advised the parties that I would hear submissions at the conclusion of the hearing.

²⁵ Exhibit 1, Volume 2, Tab 40.

In his final submissions, Mr. Hayward submitted on behalf of Mr. Nelson that a special award should be ordered for the following reasons:

- Canadian General's failure to provide Mr. Nelson with formal notice of the decision to terminate his weekly income benefits.
- Canadian General's failure to provide Mr. Nelson with a copy of the Canadian Back Institute's report.
- Canadian General's complete lack of response to some of Mr. Nelson's requests for goods and services.

Mr. Dunn repeated his objection to Mr. Nelson's claim for a special award. He stated that he was not clear on the grounds that were being advanced for the special award until the end of the hearing. He submitted that because Canadian General was not notified prior to the hearing of the claim for a special award, I have no authority to consider the claim. Mr. Dunn relied on section 8 of the Statutory Powers Procedure Act, R.S.O. 1990, c.S.22, as amended, which provides:

8.Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

I accept that fairness requires that the insurer have some notice that a special award is being considered, and be given an opportunity to respond. It is not obvious to me, however, that section 8 of the Statutory Powers Procedure Act limits the ability of an arbitrator to order a special award. In any event, it is unnecessary for me to decide this issue because I have concluded that a special award is not warranted in this case.

Section 282(10) gives the arbitrator a discretion to order the insurer to pay a special award, but only on the grounds that it has “unreasonably withheld or delayed payments”. Therefore, the

failure to provide notice that benefits are being cancelled, or to share a medical report, are not grounds for a special award, unless the effect is that benefits are unreasonably withheld or delayed. Even assuming that Canadian General acted improperly, I am not persuaded that Mr. Nelson's benefits were unreasonably withheld or delayed as a result. Therefore, I conclude that a special award is not justified on either of the first two grounds.

The more serious allegation is that Canadian General failed to respond to some of Mr. Nelson's claims for goods and services. There have been some delays in this case. In my opinion, however, Mr. Nelson must bear a considerable share of the responsibility. He has not been an easy client, and Canadian General's conduct should be evaluated with that in mind. Based on Canadian General's file notes, I find that they did not ignore Mr. Nelson's requests. The problem was that he made a large number of claims, some of which were unreasonable and inconsistent. I accept Mr. Dunn's submission that any delays related more to the difficulty of the file than to any inaction on the part of Canadian General.

4. Expenses

Mr. Nelson is claiming his expenses under section 282(11) of the Insurance Act, which provides:

282 (11) The arbitrator may award to the insured person such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations to the maximum set out in the regulations.

Mr. Nelson was partially successful in this arbitration, and should recover his expenses. Expenses are calculated according to Ontario Regulation 664, R.R.O. 1990. The parties are encouraged to reach an agreement as to the amount of the expenses. However, if an agreement cannot be reached, I remain seized of this matter and either party may apply for an assessment of the expenses.

Order:

Canadian General shall provide Mr. Nelson with:

1. Weekly income benefits from July 31, 1993, plus interest according to section 24 of the Schedule;
2. The cost of a king-size adjustable bed, minus any amount already paid for a new bed; and,
3. Child care expenses required to allow Mr. Nelson to attend medical appointments or to participate in rehabilitation;
4. Expenses related to the arbitration, calculated according to Ontario Regulation 664, R.R.O. 1990.

July 19, 1995

David R. Draper
Arbitrator

Date

APPENDIX A

- Exhibit 1 - A two volume "Arbitration Brief", containing 114 Tabs.
- Exhibit 2 - Plates 476, 479, 481, 506, 508, and 509 from "Atlas of Human Anatomy", by Frank H. Netter.
- Exhibit 3 - An addendum to the clinical notes and records of Dr. Salter.
- Exhibit 4 - A letter, dated May 24, 1991, from Mr. Culver to Canadian General, enclosing a Statement of Claim, February 5, 1991, naming Mr. Nelson as Defendant.
- Exhibit 5 - A letter, dated June 3, 1991, from Canadian General to Mr. Culver.
- Exhibit 6 - A letter, dated June 3, 1991, from Mr. Culver to Canadian General.
- Exhibit 7 - A letter, dated July 23, 1991, from Canadian General to Mr. Culver.
- Exhibit 8 - A letter, dated August 9, 1991, from Mr. Culver to Canadian General.
- Exhibit 9 - Mr. Nelson's Application for Accident Benefits, dated August 8, 1991.
- Exhibit 10 - Request for Claim/Draft, dated August 21, 1991.
- Exhibit 11 - Mr. Nelson's 1988 income tax return, together with the computerized statement from Revenue Canada.
- Exhibit 12 - Mr. Nelson's 1989 income tax return, together with the computerized statement from Revenue Canada.
- Exhibit 13 - Mr. Nelson's 1990 income tax return, together with the computerized statement from Revenue Canada.
- Exhibit 14 - The clinical notes and records of Dr. Wingfield.
- Exhibit 15 - The clinical notes of Dr. Keith Travis.
- Exhibit 16 - A letter, dated August 12, 1991, from Dr. Mah to Mr. Culver, the Applicant's previous lawyer.

- Exhibit 17 - A letter, dated October 25, 1991, from Dr. Evans to Canadian General.
- Exhibit 18 - A letter, dated August 10, 1992, from the Traffic Injury Rehabilitation Program to Dr. Mah.
- Exhibit 19 - A letter, dated August 10, 1992, from the Traffic Injury Rehabilitation Program to Canadian General.
- Exhibit 20 - A letter, dated January 12, 1994, from Medex to Dr. P.W. Rowsell.
- Exhibit 21 - A letter, dated February 14, 1994, from Medex to Canadian General.
- Exhibit 22 - A medical report from Mr. Otto Gerendas, Rehabilitation Consultant, dated December 28, 1994.
- Exhibit 23 - The records of the Canadian Back Institute.
- Exhibit 24 - Records of the Ministry of Transportation.
- Exhibit 25 - A brief of Medical expenses, containing a summary and 111 tabs.
- Exhibit 26 - A brief of correspondence from the Canadian General file.
- Exhibit 27 - A brief of file notes and miscellaneous documents from the Canadian General file.
- Exhibit 28 - Photographs

APPENDIX B

Medical Professionals

- **Dr. Salter** - Mr. Nelson's family doctor since 1981. Dr. Salter has seen Mr. Nelson regularly since the accident, often more than once a month.
- **Dr. J.W. Mah** - Mr. Nelson's orthopaedic surgeon. Dr. Mah did the operations on Mr. Nelson's knee and has continued to monitor his progress.
- **Dr. Susan Fawcett** - Mr. Nelson's neurologist. Dr. Fawcett was involved prior to the accident to deal with Mr. Nelson's migraine headaches. She saw him at least once following the accident, in February 1993.
- **Dr. Wingfield** - Mr. Nelson's chiropractor. Dr. Wingfield was involved prior to the accident and provided some chiropractic services following the accident, but only until 1992.
- **Dr. David R. Levy** - A medical doctor who is the Director of the Sports Medicine Clinic. Mr. Nelson met him as a landscaping client and consulted him in March 1991 for a second opinion.
- **Ms. Jan Kaiser** - A physiotherapist who provided physiotherapy and hydrotherapy services to Mr. Nelson.
- **Sprague Physiotherapy** - Mr. Nelson started receiving physiotherapy services from Mr. Dombrosia in May 1991, but Mr. Glenn Sprague took over in September 1991. He provided physiotherapy services from September 10, 1991 to September 19, 1991; January 17, 1992 to April 1992; August 1992 and ongoing.
- **Dr. John Evans** - Canadian General arranged for Mr. Nelson to be assessed by Dr. John Evans, an orthopaedic surgeon, on September 27, 1991 and February 25, 1992.
- **Dr. David I.A. Wismer** - Dr. Wismer, an orthopaedic surgeon, assessed Mr. Nelson on January 11, 1993, in order to provide him with a second opinion about the possibility of surgery.
- **Traffic Injury Rehabilitation Program** (Ms. Jane Zambon, clinical supervisor, Dr. A.T. Ghouse, Physical Medicine and Rehabilitation, Dr. S.W. Dermer, psychiatrist)- Mr.

Nelson was referred to the Traffic Injury Rehabilitation Program by Dr. Mah in May 1992. They assessed Mr. Nelson, including arranging for an EMG. They also attempted to get Mr. Nelson involved in a an aggressive exercise program and a program for chronic pain management.

- **Dr. Nicholas Turliuk** - An otolaryngologist who assessed Mr. Nelson in February 1992 for ringing in his ears.
- **Dr. Joseph A. Korkis** - An otolaryngologist who assessed Mr. Nelson in January and March 1993 for ringing in his ears.
- **Medex Vocational Management Group** - Canadian General retained Medex to help coordinate Mr. Nelson's rehabilitation.
- **Dr. R. Peter Welsh** - An orthopaedic surgeon retained by Canadian General to do an assessment in May 1993.
- **Canadian Back Institute** - Canadian General arranged for the Canadian Back Institute to do a functional capacity evaluation in July 1993.
- **Dr. John W. Schneider** - Dr. Salter referred Mr. Nelson to a psychologist. He was given a secondary referral to Dr. Schneider, also a psychologist. Dr. Schneider has assessed Mr. Nelson and has provided ongoing counselling.
- **Mr. Otto Gerendas** - A rehabilitation consultant retained by Canadian General to review the rehabilitation reports and provide his opinion about Mr. Nelson's rehabilitation needs. Mr. Gerendas did not meet or treat Mr. Nelson.
- **March of Dimes** - Mr. Nelson's lawyer arranged for the March of Dimes to do a functional abilities evaluation of Mr. Nelson in April 1994.
- **Dr. Keith Travis** - A psychologist retained by Canadian General to assess Mr. Nelson in December 1994.