FSCO A02–001360

BETWEEN:

RUBAN THANGARASA

Applicant

and

GORE MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR INTERIM DECISION

Before: John Wilson

Heard: December 8, 9, 10 and 11, 2003, May 31 and June 1, 2004, and June 28, 29 and 30, 2004, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Linda Wolanski for Mr. Thangarasa
Anna-Marie Castrodale for Gore Mutual Insurance Company

Issues:

The Applicant, Ruban Thangarasa, was injured in a motor vehicle accident on March 31, 1998. He applied for and received statutory accident benefits from Gore Mutual Insurance Company ("Gore Mutual"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mr. Thangarasa applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The issues in this hearing are:

1. Is Mr. Thangarasa entitled to receive a weekly income replacement benefit from February 5, 2001, claimed pursuant to section 4 of the *Schedule*?

2. What is the amount of weekly income replacement benefit that Mr. Thangarasa is entitled to receive pursuant to section 6 of the *Schedule*? Mr. Thangarasa claims a weekly income replacement benefit of $340.53 per week.

3. Is Gore Mutual liable to pay a special award pursuant to subsection 282(10) of the *Insurance Act* because it unreasonably withheld or delayed payments to Mr. Thangarasa?

4. Is Gore Mutual liable to pay Mr. Thangarasa's expenses in respect of the arbitration under section 282(11) of the *Insurance Act*.

5. Is Mr. Thangarasa liable to pay Gore Mutual's expenses in respect of the arbitration under section 282(11) of the *Insurance Act*.

7. Is Mr. Thangarasa entitled to interest for the overdue payment of benefits pursuant to section 46(2) of the *Schedule*.

Result:

1. Mr. Thangarasa is entitled to receive a weekly income replacement benefit from February 5, 2001, as claimed pursuant to section 4 of the *Schedule*.

2. Mr. Thangarasa is entitled to receive $340.53 as the amount of weekly income replacement benefit pursuant to section 6 of the *Schedule*. Payment of this amount shall commence forthwith, and continue pending resolution of the outstanding issues.

   The parties shall have 30 days to resolve the issue of the quantum of all outstanding benefits and interest and to make joint submissions as to the appropriate amount, failing which I will receive further evidence and submissions on this issue.

3. Gore Mutual is liable to pay a special award pursuant to subsection 282(10) of the *Insurance Act* because it unreasonably withheld or delayed payments to Mr. Thangarasa, the amount of which remains to be determined.

4. The liability of Gore Mutual to pay Mr. Thangarasa's expenses in respect of the arbitration under section 282(11) of the *Insurance Act* remains to be determined.

5. The liability of Mr. Thangarasa to pay Gore Mutual's expenses in respect of the arbitration under section 282(11) of the *Insurance Act* remains to be determined.

EVIDENCE AND ANALYSIS:

Mr. Ruban Thangarasa was born in 1972 in Sri Lanka, the oldest of four children. Around 1995 he left Sri Lanka to join the growing Tamil diaspora, ultimately arriving in Canada. Following his arrival here he worked at a variety of jobs, finally ending up working as a general labourer at Teknion Furniture Systems, an office furniture manufacturer.

In addition to his factory work, Mr. Thangarasa began a part-time business renting out videos, principally to the Tamil community.

Mr. Thangarasa was involved in a serious motor vehicle accident on March 31, 1998. The car in which he was a back-seat passenger was hit by a tow truck. He was reported as having suffered serious injuries including a ruptured right globe of his eye, multiple liver lacerations, fractured ribs and closed head injuries. He lost consciousness.

Following the accident Mr. Thangarasa was taken to Sunnybrook Hospital and underwent surgery to repair his eye and liver, remaining in intensive care for some three days. He also underwent a CT scan of the head to investigate brain damage, and was released some 12 days later.

Mr. Thangarasa was subsequently discharged to homecare and was enrolled in a brain injury programme under the supervision of Dr. Ouchterlony.

In the meantime, friends and family helped to keep the video store operating. Ultimately, by June 2001, his brother became responsible for the business.

Mr. Thangarasa was unable to return to the heavy physical demands of his principal occupation, that of labourer at the Teknion furniture plant. He was, however, eventually able to once again attend at the video store.

This arbitration is about whether Mr. Thangarasa is suffering a complete inability to work in any employment for which he is reasonably suited by education, training or experience.

Mr. Thangarasa's ongoing involvement in the video store has been seen by the Insurer as an indication that he is not only ready to work in an occupation, but has already found a niche in the employment world. Mr. Thangarasa, however, while acknowledging his frequent presence at the video store, prefers to characterize his presence as something akin to a sheltered workshop. Although being unable to effectively perform the basic tasks of a video store clerk, he is kept on and provided an activity by his brother as an act of familial loyalty.

Education, Training or Experience

Mr. Thangarasa was brought up and educated in Sri Lanka, principally in the Tamil language. Although some reports claim that he completed the equivalent of an Ontario high school education in Sri Lanka, his own evidence is that he completed some secondary instruction over a period of years, due to the intermittent closing of the local school system. While attending school he worked part time as a clerk in a small retail establishment run by a relative.

Given the ongoing civil war and the adverse conditions in Tamil Sri Lanka, Mr. Thangarasa first became an internal exile, and then a refugee. Consequently his opportunities for further education were somewhat limited. Upon arrival in Canada he never re-entered formal education but went immediately

into the workplace. His English skills remain limited, and he spoke with the assistance of an interpreter throughout this hearing process.

His employment history in Canada consisted of work in a grocery store, restaurant work as a kitchen-helper, and finally, the labouring job with Teknion. He also was engaged in self-employment as the proprietor of a small video rental store. With the possible exception of the video store work, his employment history consisted principally of low-skilled, physically demanding jobs that did not require significant English fluency.

He was, however, by all accounts, an applied and industrious worker, who was able to hold down two jobs, and tolerate little sleep.

Post-Accident Condition

As noted earlier, Mr. Thangarasa, following discharge from Sunnybrook, was seem by Dr. D. Ouchterlony of the brain injury clinic. On May 27, 1998, she reported that:

1. He can't see out of the right eye and has severe photophobia.
2. He has pain all over particularly in the abdominal area.
3. He has weight loss. He doesn't want to eat due to abdominal pain.
4. He has difficulty standing up straight due to the pain.
5. He is excessively fatigued.
6. He has headache on the right side of the head.

She concluded:

> In summary, we have a young man who sustained a significant head injury with multiple injuries. I think he needs a full rehabilitation program. I am presently filling out a treatment plan and will rerecommend a neuro-rehab consultant become involved with him. Also Occupational Therapy and a physiotherapist will be recommended as well. It is important that he have specialized ADL providers to help him reach his pre-accident level.

In February 1999, Dr. S. McCullagh, a neuropsychiatrist at Sunnybrook, reported that "his rehabilitation has not gone well since that time" and recorded a "diagnostic impression" of Major Depression, Specific Phobia for driving, and a Postconcussional syndrome."

In February 1999, as well, Mr. Thangarasa was referred to a neuropsychological assessment performed by Dr. H. Scher. In addition to an interview, a battery of tests was administered. Dr. Scher reported:

> Taking all of the confounding variables into account, it is my opinion that Mr. Thangarasa does suffer neurocognitive sequelae secondary to the head injury sustained in the MVA. The present test results point to impairment in the areas of verbal and visual memory, as well as some aspects of attention. In particular, he demonstrated difficulty on one task requiring an alternating attention demand, that is the ability to shift one's mental focus between two ongoing activities. He did not appear to have particular difficulty on a nonverbal test of sustained attention, but my impression is that as the day wears on and he fatigues, his vigilance decreases markedly. This was certainly apparent in his overt test taking behaviour. Likely this latter factor stems primarily from sleep deprivation, but some contribution from traumatic brain injury is probably present as well.

Dr. Scher concluded:

> Overall, I find Mr. Thangarasa to be substantially disabled from a return to competitive employment at this time due to neuropsychological impairment associated with closed head injury. ...

During this period Mr. Thangarasa also saw Dr. John Oryema, his family physician.[2] In September 1999, Dr. Oryema reported that Mr. Thangarasa presented with post-concussive symptomatology, brain contusion, memory impairment, blindness in the right eye, and major depression as a result of his accident. He considered Mr. Thangarasa to be totally disabled.

[2] Dr. Oryema is also accredited as a neurologist.

The June 19, 2000 report by Dr. Lawrence Freedman, psychologist, followed an Insurer's examination which took place on March 3, 2000. Dr. Freedman administered psychological tests which showed significant cognitive impairments. Dr. Freedman, however opined:

> ...The presence of the elicited cognitive impairments are quantitatively and clinically excessive, and would not be expected on the basis of only sustaining a mild, complicated cerebral trauma associated with resolving, small bi-temporal contusions that were not symptomatic at the time of the acute injury. One would clinically not expect to see the present degree of cognitive impairment <u>on a neurological basis</u> given the type of injury that was sustained by Mr. Thangarasa.
>
> [emphasis in original]

Dr. Freedman made it quite clear that he assumed that Mr. Thangarasa had "only sustained a mild head injury" and that his opinion was made on that basis. Patently, such an assumption was seriously at odds with the observations of Mr. Thangarasa's treating physicians. Consequently, his opinion that Mr. Thangarasa was "clinically not disabled from a neurocognitive perspective in returning to work at the furniture factory and video store" must be viewed with some suspicion, especially in the light of the low test scores achieved on the tests administered by Dr. Freedman himself.[3]

By July 2000, however, a follow-up note by Dr. Ouchterlony, who had followed Mr. Thangarasa since the accident, observed that he continued to have problem with pain, fatigued easily, and "still not good at self-direction." She also noted that: "he will undoubtedly have long-term deficits and may indeed not be competitively employable."

The DAC

In November 2001, a disability DAC was convened to examine Mr. Thangarasa's condition as of the 104-week mark. A chiropractor, an orthopod, a neurologist, a psychologist, a psychiatrist, an opthalmologist, an occupational therapist and a kinesiologist all participated in the assessment.

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[3] Dr. Freedman notes: "The neurocognitive assessment elicited impairments ranging from mild to severe involving verbal and visuospatial learning, constructional ability, spatial reasoning, and cognitive processing speed.

Collectively, the DAC assessors viewed Mr. Thangarasa's post-accident condition somewhat differently than his own treatment providers.

The executive summary of the report indicated that Mr. Thangarasa was not totally disabled from any occupation to which he was reasonably suited by education, training or experience.

Dr. N.E. Morris' psychological assessment forming part of the DAC concluded as follows:

> The results of the present assessment indicate a Borderline level of non-verbal intellectual ability which suggests that he is apt to function best in unskilled or semi-skilled positions that involve concrete tasks of a mostly routine or repetitive nature.

He also observed:

> The results of brief aptitude testing did not demarcate any definitive strengths or skills that could be occupationally applied, although he appears to have the capability to perform his former employment as a factory labourer and his current video sales/rental duties. His expressed interests are principally in skilled trades, technical and service occupations as well as sales/business management endeavours.

Dr. Morris then found no evidence of "salient psychological or emotional impairments as a result of the accident that would render Mr. Thangarasa <u>completely</u> disabled from engaging in any employment for which he is reasonably suited by education, training or experience." (emphasis in original) He suggested that Mr. Thangarasa could have the potential to work as a dishwasher, kitchen helper, busboy, fast food preparer, cafeteria helper/cashier, hand packager, light material handler, counter clerk (retail), video sales/rental clerk, cleaner (light duty), produce/supermarket clerk and price marker.

Dr. Morris did not rule out either his pre-accident employment at Teknion nor any alternative employment with a significant physical component, notwithstanding the comments of Dr. English, the orthopaedic assessor.

The psychiatric assessment merely concluded that he suffered from mild traumatic brain injury but was recovered, and without much analysis stated that he was not unable to perform suitable work by reason of a psychiatric impairment.

Dr. E. English, the orthopaedic assessor, noted restrictions on Mr. Thangarasa and that "he is restricted in his ability and cannot do the heavier work that is required of him to work in his shipping and receiving job at Teknion Furniture." Dr. English felt that, subject to cognitive impairments Mr. Thangarasa could do other work.

While certain of the DAC team members noted limitations on Mr. Thangarasa's abilities, they, apparently, collectively endorsed the opinion that there were potential jobs that he could do.

Current Functional Status

Mr. Thangarasa, although he is often present at the video store for several hours a day, claims to be unable to carry out this work, or any other to which he is suited in any efficient, productive manner. He points to ongoing problems arising from the accident, including difficulties lifting, pain problems, depression, fatigue, memory loss, "laziness" and the "inability to do anything useful in my life." Dr. Neville Doxey, an examining psychologist who testified for Mr. Thangarasa, framed these latter complaints as: "executive functioning type of things, managing one's life."

While, with the possible exception of Dr. Morris, there is little serious disagreement about Mr. Thangarasa's long-term suitability for heavy labouring work, there remains a lively debate as to his ability to perform more sedentary tasks such as those encompassed by work in a video store.

Much medical documentation was filed as part of this arbitration. On the one hand there were the clinical notes and records of the treating physicians and service providers. On the other hand, there were specific medical reports set up to evaluate aspects of Mr. Thangarasa's condition and function.

There was also testimony by those who had observed Mr. Thangarasa in action at the video store, including that of his brother, Mugunthan Thangarasa, and Heather Dies, an O.T. who assisted Mr. Thangarasa's rehabilitation.

From the point of view of an analysis of potential alternative employment, perhaps the most critical evidence relates to that which Dr. Doxey characterized as executive functioning, and its relationship to any potential employment situation.

There is, however, a significant disparity between the reports produced by Mr. Thangarasa's team and some of those obtained by the Insurer.

Part of the disparity may be attributed to the fairly piecemeal evidence relied upon by the Insurer. While the Applicant's treatment providers tended to look at his overall level of functioning in the context of his actual environment, the DAC assessors and many of the professionals who examined Mr. Thangarasa on behalf of the Insurer seem to have had a narrower focus. While it is important that assessors stay within the range of their own expertise, it is also important that they not ignore limiting factors, even if they stem from matters outside of their own competence.

Another factor that tended to confuse assessors on both sides of the adversarial divide is the issue of Mr. Thangarasa's ongoing work at the video store. Taken at face value, it is reasonable to assume that someone working in a video store 6 to 8 hours a day, on a regular basis, had a reasonably high level of functioning. Indeed, the assessments are replete with such assumptions.

If we accept the testimony of Heather Dies, Mugunthan Thangarasa, and the Applicant himself, that he had difficulties performing the video store work in an efficient and timely manner, and, indeed, the "work" performed by Ruban Thangarasa was either a sham or a sheltered workplace, then such assumptions are far from self evident.

The balance of credible evidence at the arbitration hearing was that Ruban Thangarasa, although attending at the worksite, was less than efficient. Indeed, his brother had assumed the management and direction of the establishment, since Ruban had trouble with administrative work, and even with arriving in time to open the store.

The occupational therapy reports from 1999[4] emphasize that important deficits needed to be addressed in organizational skills, information recall, time management, and tolerance of distractions.

By February 2000 the O.T. was reporting that Mr. Thangarasa was managing perhaps three hours of work at a time, with ongoing attention, memory and organizational difficulties. In November 2000, Heather Dies, following an IME downplaying disability and cognitive impairments, reported:

> These findings are in contrast to my observations of the client's function and his subjective complaints. Functionally I have observed (and the client complains of) problems with initiation, short-term memory, speed of processing, ability to set goals and monitor his performance and organisation and planning. Many of these areas are difficult to assess with standardised tests. These current secondary impairments and disabilities continue to affect his ability to function totally independently in the home and community. Although he has improved in his ability to complete essential tasks at home and in the community, he continues to require monitoring and re-enforcement of how to use some taught strategies.

Ms. Dies testified at the hearing that she worked extensively with brain-injured persons. In both her testimony and cross-examination she reiterated that in the time she met with Mr. Thangarasa he had ongoing memory problems, fatigue, difficulty planning and setting goals, as well as problems associated with ongoing headaches and pain complaints.

I found Ms. Dies to be a credible and disinterested witness. Her analysis of Mr. Thangarasa's post-accident functionality is also consistent with his own testimony, that of his brother and, more importantly, the low functional test scores recorded by Dr. Doxey and other assessors.

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[4] Initially Mary Kita, and then Heather Dies

Dr. Doxey, in his testimony, commented on Mr. Thangarasa's post-accident employment.

> I did note, however, that he had, approximately a year after the accident, returned not to the job at the factory, he couldn't do that, and apparently there is compelling medical support for him not being able to do so, but he had managed to return to his job as -- running his -- or working in his video business. However, because of his fatigue, he had never been able to increase his hours beyond six per day. And this is a man who used to work two full-time jobs, including across weekends. And he had never been able to return in more than an assistive capacity. His brother had basically taken over management, not only of the business but, in a sense, management of Mr. Thangarasa himself. And I believe, when I first saw him, he still had a friend who would help out in the business. So he was working in a kind of assistive sheltered capacity in his video store, and felt at that time that this was about as good as he was going to get.

Dr. Doxey's analysis of Mr. Thangarasa's prospects in the employment field is particularly important, at least inasmuch as he attempted to integrate psychometric and vocational test results with the rest of the available information obtained about Mr. Thangarasa. As noted earlier, many assessors administered tests to Mr. Thangarasa. With the exception of the mini mental status test[5] given by Dr. Reznek, a psychiatrist, Mr. Thangarasa performed poorly. In fact he tended to perform in the very low end of the performance spectrum.

While many other assessors simply downplayed or ignored test results as aberrant or the result of deliberate underperformance, Dr. Doxey modified the standard battery of tests to isolate as much as possible factors such as language and culture.[6]

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[5] Dr. Reznek identified this test as one aimed at finding indicia of dementia. There appears to be no other reference in the medical reports to any suspicion of dementia as a factor in Mr. Thangarasa's post-accident condition.

[6] Dr. Doxey also noted that he substituted the GAMA for the Wechsler Adult Intelligence Scale to provide a "culture fair instrument." He also used the NATB rather than the GATB since the former was "better suited for people who have limited English literacy."

Dr. Doxey found:

> When I assessed him initially, his scores were extremely poor, but not inconsistent with what we found on the GAMA, or with what was found on the WRAT, or with what came out of the clinical interview. His performance on the NATB, if you look again on page 11, and you will see 5,5,5,4,5,2,5,5,5. Five is the lowest scoring category. It is at the tenth percentile and beneath. In other words, 90 per cent of people would be expected to do better, 90 per cent of the Canadian work force.

By contrast, Dr. Freedman looked at Mr. Thangarasa's poor scores on a battery of tests and concluded that the results were "quantitatively and clinically excessive, and would not be expected on the basis of only sustaining a mild, complicated cerebral trauma[7] associated with resolving, small bi-temporal contusions that were non symptomatic at the time of the acute injury." For Dr. Freedman, his assumptions about the nature and probable sequelae of the head injuries trumped the low neuro-psychological test scores.

Dr. Laurie Reznek, a psychiatrist, also examined Mr. Thangarasa on behalf of the Insurer. Dr. Reznek, who has written on topics as diverse as the nature of disease, the epistemology of mental illness, and the philosophy of psychiatry, examined Mr. Thangarasa for about an hour, including the time spent on rudimentary testing. He also reviewed two reports – those of Dr. Freedman, noted above, and a physiatrist report by Dr. John. He had no other reports to consider, apart from the referral letter from Seiden, the company brokering his services.[8]

As part of the assessment, Dr. Reznek administered the Mini Mental Status Exam, which he indicated was a screen for dementia. He also administered some simple counting, memory, and drawing tests. The total duration of testing was less than one half hour.

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[7] Dr. Freedman felt that "the acute medical history provides no basis whatsoever to conclude that a moderately severe brain injury was sustained in the accident", an opinion that was not shared by Drs. Scher, Ouchterlony and Oryema, among others.

[8] The report was written under the letterhead of Seiden Health Management Inc., a company that Dr. Reznek testified arranges such consultations for him.

On the basis of such simple screening tests and his interview with Mr. Thangarasa, Dr. Reznek found that "Mr. Thangarasa does not suffer from any accident-related impairment at the present time." He also negated any psychological impairment.

While I accept that Mr. Thangarasa may well not be demented, nor suffering from frontal lobe syndrome, I am loathe to accept the remainder of Dr. Reznek's testimony on cognitive[9] impairment, based as it is on speculative outcomes[10], and a very limited and selective review of the available reports. Although psychiatric impairments such as depression and post-traumatic stress have been identified at various stages in Mr. Thangarasa's history, they do not appear to be at the core of his dysfunction. Consequently, Dr. Reznek's finding that on August 21, 2000 Mr. Thangarasa was neither clinically depressed nor subject to post-traumatic stress, even if reliable, sheds little light on Mr. Thangarasa's ability to carry on in employment.

Like Dr. Freedman, Dr. Morris, the DAC psychologist, also felt comfortable in ignoring "mediocre performance on formal aptitude testing" based on an assumption Mr. Thangarasa "is presumably capable of a wider range of occupations that are compatible with his work history." Presumably, a key item of the work history Dr. Morris has in mind is Mr. Thangarasa's ongoing "employment" in the video store.

Only Dr. Doxey appears to integrate the compelling fact that Mr. Thangarasa is going through the motions of working with the test scores, the reports of other assessors and Mr. Thangarasa's own story. The result is the observation that "he was working in a kind of assisted sheltered capacity in his

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[9] Dr. Reznek, in testimony, conceded that his expertise was not in psychological testing or psychovocational testing and he would defer to psychologists with expertise in those areas.

[10] In his report, he relied on predictions in the literature for probable outcomes in minor brain injury cases in support of his findings of cognitive impairment, rather than specialized test data demonstrating the presence or absence of such impairments in Mr. Thangarasa.

video store" and the conclusion that "test results were incompatible with competitive employment of any kind."

I accept Dr. Doxey's analysis as the most convincing and credible explanation of the relationship of the post-accident "work" with the low level of functioning noted on Mr. Thangarasa's test scores.

In summary, I find that, after the motor vehicle accident, Mr. Thangarasa displayed ongoing cognitive impairment, pain and distress arising from the motor vehicle accident. Complicated by limited English fluency, and limitations in education, these impairments seriously affected Mr. Thangarasa's ability to engage in competitive employment in an efficient manner.

I accept the evidence of Mugunthan Thangarasa, Dr. Doxey and Heather Dies, that his post-accident employment at the video store was little more than a "sheltered workshop", and that he had difficulties meeting even the low expectations of attendance and performance that came with that "work."

I also accept that Mr. Thangarasa's raw test scores represent a reasonably consistent representation of his current abilities and his employability rather than any concerted attempt to mislead assessors as to his skill levels.

Ability to perform alternative work

Section 5(2)(b) of the *Schedule* provides that an insurer is not required to pay an income replacement benefit:

> for any period longer than 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience.

In *Terry and Wawanesa Mutual Insurance Company*,[11] Arbitrator Palmer stated:

> It is not my sense of the test of paragraph 5(2)(b) that the meaning of "complete inability" is that the applicant has to suffer an inability to do more than 50 percent of the job,...Real world jobs should not be broken down into their component parts such that if an applicant is able to do a little more than half of any suitable job, that he should be found to be disentitled from receiving income replacement benefits (and an employer should be obliged to hire him for that job.)
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> As Arbitrator Sampliner pointed out in *Lombardi*,[12] "Somehow the ability to engage in a reasonably suitable job, considered as a whole, including reasonable hours and productivity must be addressed."

The Insurer has alleged[13] that Mr. Thangarasa is able to undertake alternative employment for which he is suited by education, training or experience. Dr. Morris' DAC report, upon which the Insurer relied, put forward the suggestions of dishwasher, kitchen helper, busboy, fast food preparer, cafeteria helper/cashier, hand packager, light material handler, counter clerk (retail, video sales/rental clerk, cleaner (light duty), produce/supermarket clerk, and price marker.[14]

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[11](FSCO A00-000017, July 12, 2001)

[12] *Lombardi and State Farm Mutual Automobile Insurance Company*, (FSCO A99-000957, April 11, 2001)

[13] Brennan J. noted in *Van Allen v. London Life Insurance Co.* [1999] O.J. No. 3813, quoting *Bacon v. Saskatchewan* [1990] S.J. No. 632:

> The onus is always on the plaintiff on a balance of probabilities to establish that she is totally disabled within the definition of the Plan. Once the plaintiff has made out a prima facie case of total disability, (i.e. that her medical condition is such that she is likely incapable of substantially performing any reasonable occupation for which her training, education, or experience have fitted her), the onus shifts to the defendant to prove that there is such a specific occupation that the plaintiff is capable of substantially performing. The plaintiff is not required to prove a negative, (i.e. that she is not capable of performing each and every conceivable occupation that may be reasonable in the light of her background.)

In this matter, there was no need to rely on evidentiary onus, since the evidence in support of Mr. Thangarasa's disability was clear and convincing.

[14] Dr. Morris, in testimony, noted that his opinion on a return to the workforce was predicated on Mr. Thangarasa's apparent ability to perform all except high level tasks.

Intuitively, the restaurant and food service positions make some sense, given Mr. Thangarasa's limited work history in Canada. He did actually work in the food service industry. Likewise, given his pre- and post-accident involvement in the video business, he might be presumed to have some affinity for the work of a video sales/rental clerk.

The only concrete evidence, however, of the actual requirements of such positions and occupations were extracts from the NOC job classifications produced by Dr. Doxey and entered as exhibits by Mr. Thangarasa. Even putting aside the significant physical requirements of working in kitchens, and other occupations such as material handler that may require some level of ongoing exertion, the NOC profiles of the listed jobs consistently suggest a higher level of aptitude, learning and ability than Mr. Thangarasa displayed on his psychological and psycho-vocational testing.

It should be noted that Mr. Thangarasa scored poorly on objective testing. As Dr. Doxey noted:

> His performance on the NATB, if you look again on page 11, and you will see 5,5,5,4,5,2,5,5,5. Five is the lowest scoring category.[15]

In addition, those who worked with Mr. Thangarasa noted limited work endurance, fatigue, poor organizing and time-keeping habits. It also should be remembered that Mr. Thangarasa had limited English language skills. In this context I find Dr. Doxey's analysis and conclusions about Mr. Thangarasa's employability eminently reasonable. In his September 21, 2003 report, Dr. Doxey stated:

> With respect to issues pertaining to his employability, our opinion remains unchanged from when we last saw him. We continue to believe that he will never be able to work as a factory labourer again, nor, for that matter, ever again perform heavy physical work of any kind. His functional capacity, and hence his working capacity, has not improved, and he is still unable to work more than six hours per day in his store, and he

[15]Essentially all the raw testing data gathered by Drs. Doxey, Scher and Morris consistently shows low scores. Dr. Doxey's measures, however, are designed specifically to translate the results into occupational aptitudes.

> still is unable to assume any managerial or ownership responsibilities. He continues to be limited by his poor endurance and stamina. We continue to believe that his physical restrictions, secondary to his orthopaedic injuries, are the cause of his inability to perform his former factory job or other physically demanding work, and we continue to believe that the erosion of his employability in non-physically demanding areas, such as running his store, is more attributable to his closed head injury and to his quite severe executive functioning deficits and fatiguability.

I accept Dr. Doxey's conclusions as being representative of Mr. Thangarasa's employment-related characteristics. While Mr. Thangarasa may well have been capable of doing elements of many sedentary tasks, there is no evidence that he was capable of applying himself consistently to any occupation to which he was suited in an efficient and workmanlike manner. I accept that, in the light of the evidence of Mr. Thangarasa's low literacy and numeracy, poor time-keeping skills, poor English language skills, lack of concentration, short-term memory problems, and difficulty organizing tasks, in conjunction with limitations on heavy physical task, he should be categorized as competitively unemployable.

Consequently, I find that, at the time of the hearing, Mr. Thangarasa suffered a "a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience."

Quantum of Benefits

Having found that Mr. Thangarasa is competitively unemployable as defined by section 5(2)(b) of the *Schedule*, he is entitled to the payment of ongoing income replacement benefits.

Mr. Thangarasa claims that these benefits should be in the amount of $340.53[16] per week. The Insurer has disputed that amount.

[16] In submissions, the amount was credited as $345.00 per week. The employer's confirmation of income, which was introduced as evidence, showed a gross income for the four preceding weeks to the accident as $423.55, $707.75, $556.91 and $528.45, giving an average gross income of $443.32.

Although the quantum of the benefit was listed as an issue, neither party addressed that issue in any significant evidence. Ms. Walinsky, however, made brief submissions on the quantum of the benefit.

While the emphasis at the hearing was on the work at the video store, as noted earlier, Mr. Thangarasa's prime pre-accident employment was as a labourer at Teknion Furniture Systems.

The amount claimed was paid, based apparently on Mr. Thangarasa's employment at Teknion, until February 2001. A further lump sum of $9,621 was paid to cover a period from June to December 2001.

If Mr. Thangarasa was working and earning income from the video store, Gore Mutual would be entitled to deduct his post-accident earnings to the extent permitted by the *Schedule*. I have found, however, that I am in agreement with Dr. Doxey's characterization of the post-accident employment in the video store as a "sheltered workshop." In addition, effective control and, apparently, ownership of the video operation were transferred to the Applicant's brother, Mr. Mugunthan Thangarasa, at some time after the accident.[17]

Mugunthan stated that he paid the outstanding debts when he took over the business. He made no reference, however, to any payment to his brother for the business itself. Ruban Thangarasa, also, was unequivocal that the video business was his brother's now and not his.

While there was evidence that the Applicant received some money from his brother, as well as some of his car, phone, and other expenses,[18] Ruban Thangarasa's testimony was that he was not paid as an

[17] Mr. M. Thangarasa testified that as of April 2001, he "took over" the video store. The Applicant, in his own testimony, confirmed that his brother took over the store with his permission.

[18] Mr. R. Thangarasa testified that his brother was "paying his bills." He added that his brother also paid for room rent, food, car lease and insurance, telephone and credit card expenses.

employee, since he was "not doing a proper job." He also testified that although he received money from the store post-accident when he had "difficulties", he would pay the money back later. Any such payments were based on his need rather than store earnings, and were specifically "as a help." He also stated specifically that any funds advanced were "not payment for work at the video store."

I found that both Ruban and Mugunthan's testimony about a takeover of the video business after the accident to be credible, especially in the light of the Applicant's noted limitations in management and organizational skills after the accident, and his demonstrated problems with timeliness and fatigue.

I also find the supposition that Mugunthan, as a loyal family member, took responsibility for his brother after the accident to be both plausible and credible. In any event, the testimony characterizing the nature of the relationship between brothers was uncontradicted except by second-hand reports of what Ruban Thangarasa may have said to examiners and assessors.[19]

There were no T4s, Records of Employment, or accounting records showing that funds were provided to Ruban Thangarasa as wages or income related to employment at the video store. Nor was there any evidence that such documents had been ordered produced from the video store or Mr. Thangarasa and that they were not provided to the Insurer. Under the circumstances, it is reasonable to infer that there is no concrete evidence of Mr. Thangarasa's post-accident gainful employment other than his presence in the "sheltered workplace."

If an insurer wishes to deduct post-accident income from a benefit owing, it is incumbent upon it to demonstrate that such income existed, and that it came within the terms of the deductibility provisions of the *Schedule*.

[19] Such alleged hearsay statements should be viewed with some scepticism in the light of the linguistic challenges faced by Mr. Thangarasa in communicating with non-Tamil speakers. Even when some sort of interpretation is provided, the reliability of the information is totally dependent on the skill and the effectiveness of the interpreter, neither of which were in evidence.

In the present circumstances, the acknowledged receipt of money has been characterized as essentially an ex gratia payment by a family member made out of familial obligation. I have no reason to disbelieve this characterization. Equally, even if the payment were in some way related to the sale of the business to the brother, the payments would not necessarily constitute employment income as defined by the *Schedule*, since such payments, or a portion thereof would constitute either a repayment of capital, or a capital gain as the case may be.

Certainly the periodic and varying nature of the payments reinforce the characterization of ex gratia payments based on need, rather than employment income.

I find that Gore Mutual has not adduced sufficient credible evidence to suggest that Ruban Thangarasa enjoyed post-accident income from employment that should be deducted from his income replacement benefits.

Notwithstanding that finding, and the seemingly higher amounts included on the employer's confirmation of income form, I find that Mr. Thangarasa has only advanced a claim for income replacement benefits in the amount of $340.53 per week, and his income replacement benefit should be limited to this amount.

Although there was some evidence relating to the payment of benefits by the Insurer, I am unable to arrive at an exact figure for the outstanding income replacement benefits on the basis of the evidence before me at this hearing.

The parties, therefore, shall have 30 days to agree on the amount of such benefits, to be incorporated into a supplementary order, failing which the parties will be invited to make further submissions on this issue.

SPECIAL AWARD:

Subsection 282(10) of the *Insurance Act* provides for special awards against insurers.

> 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 *Statutory Accident 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*.

Although often compared to punitive damages in tort, a special award is as simple and basic as the statutory provision giving rise to it. It is specific to statutory accident benefit arbitrations and is mandatory once a finding of an unreasonable withholding or non-payment of benefits has been made by an arbitrator.[20] Once such a finding is made, the only element of discretion is as to the amount of the award that an arbitrator decides is appropriate to the conduct in question.

It is notable that neither extreme, reprehensible nor malicious behaviour is required to found an award. The provision refers merely to an "unreasonable" (déraisonnable) withholding of a benefit. Certainly an insurer is entitled to be wrong in its assessment of its obligation to pay, but it must not be unreasonably so.

Neither "Reasonable" nor "Unreasonable" is defined in the *Insurance Act*.

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[20] Given Laskin J.A.'s comments concerning the interest provisions in *Attavar v. Allstate Insurance Co. of Canada*, 63 O.R. (3d) 1999, it is questionable whether a special award can even be considered punitive in nature either. The use of the term "special award" rather than some variance of "punitive" suggests that, like interest, it is aimed at compensating an insured for unusual delay rather than punishing an insurer.

The Canadian Oxford Dictionary defines "Reasonable" as follows:

> **1** Having sound judgement; moderate; ready to listen to reason. **2** in accordance with reason; not absurd. **3 a** within the limits of reason; fair, moderate (*a reasonable request*). **b** inexpensive, not extortionate. **c** fairly good, average (*the food here is reasonable*).

"Unreasonable" is essentially defined as the contrary:

> **1** going beyond the limits of what is reasonable or equitable (*unreasonable demands*). **2** not guided by or listening to reason.

The concept of reasonableness, (and its mirror image, *unreasonableness*) although making some intuitive sense, is a minefield for precision. What is fair, moderate, or in accordance with reason is obviously open to personal, cultural and ethical variations in the eye of the beholder. Even a more detailed analysis does little to clarify the amorphous nature of reasonableness. John Gardner, Professor of Jurisprudence at Oxford, stated:

> A reasonable action is a justified action, a reasonable belief is a justified belief, a reasonable fear is a justified fear, a reasonable measure of care is a justified measure of care, and so on. By that same token, the common law's reasonable person (I fondly thought) is none other than a justified person, that is, a person who is justified in all those aspects of her life that properly call for justification. She is justified in her actions, her beliefs, her fears, the measure of care she takes, and so on. Thus to say that one's actions or beliefs or emotions or attitudes were those of a reasonable person is merely to say, in a typically roundabout lawyer's way, that one's actions or beliefs or emotions or attitudes were justified ones.[21]

As can be seen, the concept of reasonableness can, necessarily, tend to be a bit circular.

In *Arland v. Taylor*, Laidlaw J.A. attempted to outline the characteristics of the "reasonable person":

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[21] *The Mysterious Case of the Reasonable Person*, John Gardner 51 Univ. of Toronto L.J. 273

> He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not omit to do anything that a prudent man would do. He acts in accord with general and approved practice. His conduct is guided by considerations which ordinarily regulate the conduct of human affairs. His conduct is the standard "adopted in the community by persons of ordinary intelligence and prudence."[22]

Although there is little jurisprudence precisely defining the concept of reasonableness in the context of insurance adjusters, professionals of all kinds are held to a similar standard in the execution of their duties.[23]

An engineer who ignores a long line of critical information available to him (or her) because it runs counter to his predilections does so at his peril. When the bridge or the building collapses it is no defence that he selectively relied on one or two weak reports that support his actions, ignoring the bulk of available evidence or received wisdom. It is even worse for the professional, when he or she appears not to have read or evaluated the reports he or she relied upon. What is unreasonable for an engineer or an architect is also unreasonable for an insurance adjuster.

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[22] *Arland v. Taylor* [1955] O.R. 131 (C.A.)

[23] In a case dealing with the duty to investigate on the part of a physician, the court summarized: "He is not to be judged by the result, nor is he to be held liable for an error in judgement. His negligence is to be determined by reference to the pertinent facts existing at the time of his examination and treatment, of which he knew, or in the exercise of due care should have known." *Rann v. Twitchell* (1909) 82, Vt. 79, cited with approval by the Supreme Court in *Wilson v. Swanson* [1956] S.C.R. 804. While the criteria for negligence do not apply to a special award, it is useful to note that the reasonableness of a decision being taken by a professional should be judged in the context of all the other information known or capable of being known by the professional in question at the time the decision is made.

The accepted approach to be taken to special awards has been set out by Director Draper in *Persofsky*[24]: He visualizes a step by step process, culminating in the determination of the amount of the special award.

1. Determine the benefits owing to the insured person, including interest calculated under the applicable version of the *SABS*;

2. Decide whether the insurer unreasonably withheld or delayed the payment of these benefits. If so, the insurer will be ordered to pay a lump sum amount in addition to the benefits and interest calculated in #1;

3. If the insurer did not act unreasonably in respect of all the benefits owing under #1, determine the amount of the benefits that were unreasonably withheld or delayed, and the interest payable on these benefits under the applicable version of the *SABS*.

4. Determine the maximum special award that can be awarded under s. 282(10), or at least a reasonable approximation. This is done by taking the amount in #1 or #3, whichever is applicable, and adding the additional interest component in s. 282(10) — two per cent per month, compounded monthly. To be clear, this calculation includes interest on the unpaid *SABS* interest.[25]

While the above is a reasonable distillation of jurisprudence on special awards, the further gloss put on special awards by the Director of Arbitrations[26] is more controversial:

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[24] *Liberty Mutual Insurance Company and Persofsky*, (FSCO P00-00041, January 31, 2003)

[25] *Persofsky* (supra)

[26] Roderick A. Macdonald in *Legal Bilingualism*, (1997) 42 McGill L.J. 119) in an analysis of linguistic duality in a statute stated: "The reader need not ask which version is more authentic (indeed here the paternalism alternates). Nor is it possible to find a common meaning for each pair of terms. One must supplement one version with the other and recognize that the text is incomplete without both. The presence of an equally authoritative set of propositions in two languages that must be reconciled can force an analysis of the spirit, intent and objects of an enactmen – precisely those elements that are not explicit or formulaic." There does not appear to be a practice of consulting the French version of relevant legislation at the Commission, even where, as in the case of special awards, some confusion is noted in the English text.

> As discussed above, the maximum that can be ordered is based on the amount that was unreasonably withheld or delayed, including interest, plus an additional interest component that magnifies the potential consequences for an insurer that fails to meet its obligations.[27]

In the eyes of the Director, the special award is based only on the amount actually withheld unreasonably, not on the total of monies owing to the insured and outstanding at the time that the award is made.[28]

In Mr. Thangarasa's case, there is only one major benefit at issue – that of income replacement benefits, which were withheld on an ongoing basis.

Having found entitlement to income replacement benefits, there is no question that benefits have been withheld. The only question is whether I can make a finding that the Insurer "has unreasonably withheld or delayed payments."[29] Ms. Wolanski, in her submissions, claims that all benefits withheld were withheld or delayed unreasonably since information was available to the Insurer that could have substantiated ongoing benefits.

Ms. Castrodale, on behalf of Gore Mutual, was able to point to the expert reports and the opinions of DAC assessors in negating entitlement to benefits. On the face it, such an argument is compelling. If even a DAC, a group of assessors appointed under the auspices of the Financial Services Commission,

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[27] *Persofsky* (supra)

[28] An analytical reading of the French version of the legislation does not easily admit to such an interpretation. Indeed, in searching for a "shared meaning" as urged by Professor Sullivan, (see *Driedge*r 3d edition on bilingual legislation), the only conclusion can be that a special award casts its net more widely than just the specific amount unreasonably withheld. The only clear, "shared meaning" is that all amounts that were owed to an insured at the time that the award is made may be subject to a special award.

[29] " Si l'arbitre conclut que l'assureur a retenu ou retardé les paiements de façon déraisonnable..."

considered it unreasonable to pay benefits, how can one find fault with an Insurer who merely follows its recommendations?

Ms. Wolanski went to great lengths to point out problems with the individual DAC assessments and the DAC protocols. Certainly I accept that individual DAC assessors had weaknesses in logic and evaluative techniques, or relied on faulty assumptions. I also accept that the DAC may not have fully carried out the spirit of consultation that should characterize such a multi-disciplinary report. A special award, however, is not made against a DAC, but against the insurer for unreasonably failing to pay the benefits owed.

Notwithstanding the difficulties in assessing a claim for a special award, it is useful to start the analysis at the very beginning. At the time the insurer first terminated benefits, what information was available to it?

According to the chronology given at the hearing, the Insurer first terminated income replacement benefits in February 2001.

A compilation of Gore's adjusters' notes was entered in evidence. Although there is no evidence as to its completeness, it gives some confirmation of the information available to the Insurer at various stages of the termination process. While it is difficult to speak of a "state of mind" of a corporation, the records, potentially, shed some light on the evaluation process, and Gore Mutual's approach to its obligations towards Mr. Thangarasa.

The earliest notes on the file dated September 21, 1998 reveal an awareness of the severity of Mr. Thangarasa's injuries, including a closed head injury, lacerated liver, decreased vision and fractured ribs, along with the notation that he was "disabled from employment, caregiving, ADL's and housekeeping." It also notes that an OT assessment was performed and filed. Further notes the same

day refer to abdominal, back, and neck pain, decreased vision right eye, headaches, nausea, weak and tired, and "cognitive function." There is also a notation that his "job is heavy, manual labour."

The notes make it clear that the Insurer was allowed to contact Mr. Thangarasa's treating physicians, and that it was able to obtain the treatment records that it needed. The author of the note, after discussions with "Renée at Crawford," concluded:

> Agree that more information is required on file to provide direction. Possible we set up neurological and neuropsychological shortly. I do not want CL # 6 in the same facility that CL # 5 got into ! !

Early on in the process, Gore was aware that key elements of Mr. Thangarasa's disability were cognitive, neuropsychological, and entailed fatigue, weakness, and headaches. They were also aware that his treating physicians considered that he had suffered a closed head injury.

By December 11, 1998, the Insurer had received the records from Sunnybrook and had complete confirmation of the nature of Mr. Thangarasa's injuries, including his stay of 4 days in critical care following surgery. It also had access to OT reports from NRC, at the recommendation of Dr. Ouchterlony, which suggested OT sessions, cognitive therapy, psycho-social assessment, neuro-psychological assessment and physical therapy. ESL[30] was dismissed as "way out of line."

By December 15, 1998, an adjuster states that she has "reservations" about 6 more weeks of (physical) therapy, but will authorize it pending an I.E. She notes, however that the "main barriers at this time are poor physical condition and excessive fatigue." She then adds:

[30] English as Second Language

> I have asked Laurel to get the neuropsych set up ASAP, we do not necessarily have to tell ins. that this appointment is being set up as Laurel does not feel that she wants to rock the boat. And this may do it. Let's not sit back and wait until Jan 6/99 after she meets with TBI to get the ball rolling lets work on this now.

A note of January 13, 1999 reveals "the first surveillance attempt was not very productive. Let's try again" and concludes that "I'm obviously not sure where we are with this clmt, and would appreciate an update soon."

The following day, the neuro-psychological examination first mentioned in September was arranged with Dr. Scher.

On February 18, 1999, the adjuster notes:

> Physiologic assessment on file. CL # 6 has not attended physio since December 18th 1998. He stated he attended once and experienced too much pain. He has no intentions of returning.

The note concludes "completed non-compliance letter to CL#6 Copy to his solicitor."

The letter referred to was in evidence and merely repeats some of the provisions of section 55 of the *Schedule*, stating that:

> as of March 10, 1999, your income replacement benefit will be reduced by 50% if you have not complied with the above requirements to attend physiotherapy at Physiologic.

The letter pointedly omits those portions of section 55 that might have exculpated Mr. Thangarasa's absence from treatment including 55 (3) which allows non-compliance if treatment "would be detrimental to the insured person's treatment or recovery."

Notes from March through May record a reiteration of Mr. Thangarasa's injuries, reports of Dr. Scher's neuro-psychological report and his conclusions, as well as references to Dr. Soric's IE,[31] in which she (a physiatrist) observes "possible but not likely" mild head injury, and that he was "medically capable of returning to his activities of normal living with the exception of Teknion Furniture."

A note the same date records that Dr. Scher, the neuro-psychologist, reported "neurocognitive sequelae secondary to a head injury sustained in the accident," and that "his clinical history is consistent with a diagnosis of moderately sever(e) (sic) traumatic brain injury." The note concludes "Dr. Scher finds CL # 6 substantially disabled from a return to competitive employment at this time due to neuropsychological impairment associated with closed head injury."

A few days later in May the adjuster commented:

> It appears that he could return to his job at the video store, but not the furniture outlet, when physical restrictions are taken into account, but the neuropsychological assessment states he should not return to work yet. We therefore cannot demand that he does return to work now, but can attempt to have him try via discussions with Laurel Smith....

By June the notes reference the continuing lack of "success" in surveillance[32] and suggest 24-hour coverage. Later notes also confirm knowledge that the Insurer was aware that an FAE had confirmed that Mr. Thangarasa did not meet the physical demands of his job.

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[31] Dr. Rajka Soric, a physiatrist whose "interest and expertise is in the area of musculo-skeletal medicine", examined Mr. Thangarasa for an IME on March 23, 1999. Dr. Soric notes that she did not have the MRI results, or the neuropsychological results. She notes that the only documentation reviewed was "your (the Insurer's) referral letter." On this basis, she diagnosed "possible, but not likely mild head injury."

[32] "Previous surveillance did not catch CL # 6 doing much"

A July note confirms that Ms. Kita, the O.T. working directly with Mr. Thangarasa, believes that he is not ready to return to "either occupation." The July 26, 1999 note concludes with:

> Hopefully we can get this clmt to return to some form of his work by 18 months - Are the reasons cited for his preference not to return possible to defeat before 18 mths? - Should we be pushing him to do so, or would this be damaging?

The August 19th notes confirm the Insurer's view:

> CL currently disabled from a Neuro-psych perspective and is obtaining the required TX. Physical aspect is conflicting - I.E. has released by (sic) treating practitioner.

An October 18, 1999 note confirmed that Mr. Thangarasa, despite earlier noted improvements was not working at the video store. However, he visited the location with the O.T. and went through many of the work-related tasks. The note continued:

> If he had to divide his attention between two customers he became frustrated and confused. After 1 ½ hours of working CL # 6 reported leg pain and difficulty concentrating on customer's requests.

Also on October 18, however, the writer remarks that "he presently demonstrates the ability to carry out his daily functions and his part-time employment at the video store."

There is no reference, however, to any further report by Ms. Kita, the O.T., or anyone observing the Applicant's "work" at the video store. Somehow however, by the end of the October 18 1999 the observation by Ms. Kita that Mr. Thangarasa could reach all shelves, make change, read and write Tamil and serve a single customer at a time, within an inability to divide his attention, frustration, and confusion, for no more that 1 1/2 hours became transformed into the judgement that:

> Based on the O/T assessment CL # 6 is capable of performing the essential tasks of his pre-mva occupation as part-time video store operator although his physical tolerance is limited to two hours.

Another note the same day recorded the sending of another "non-compliance letter" relating to occupational therapy and a gym programme with the notation "IRB to be reduced by 50% if CL #6 doesn't comply with above by November 10th."

The first notes in January 2000 reveal an updating of the notes of treating physicians and the OHIP records, as well as the intention to arrange another neuropsychological assessment with a different neuro-psychologist, and another functional abilities evaluation in preparation for the 104-week mark in March 2000. Later notes confirm the arrangements made with Dr. Friedman (sic) to set up a psychological I.E.[33]

There are remarks concerning ongoing investigations of Mr. Thangarasa's circumstances by outside investigators for which $2500 appears to have been budgeted.

A note on February 29, 2000 records the date of Dr. Freedman's neuropsychological examination and the FAE. The writer mentions sending "all the medicals" and a 6 page review of treatment and condition to date created by Laurel Smith, the co-ordinator employed by Crawford.

Dr. Freedman's neuro-psychological report found no evidence of cognitive impairment related to a traumatic brain injury, since, essentially, he took issue with Dr. Scher[34] and others who found that a moderately severe brain injury was sustained in the accident. Dr. Freedman specifically relied on Dr. Soric's physiatry report for his discussion of brain injury. He also suggested the involvement of a psychiatrist.

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[33] "I will arrange for a neuropsychological assessment with either Dr. Gary Snow or Lawrence Friedman." (sic) There is no indication of any attempt to arrange a re-examination by Dr. Scher, nor why the search for psychologists was limited to only those two practitioners.

[34] Dr. Scher, in a letter dated December 8, 2003, politely corrected Dr. Freedman's criticisms of his findings on brain injury, pointing to Dr. Freedman's reliance of the Glasgow Coma Scale "which is not the only, or the best, method of rating head injury severity."

Consequently, Dr. L. Reznek, a psychiatrist, was retained for a psychiatric I.E. As noted earlier, Dr. Reznek's assessment dealt with areas both within and without his expertise as a psychiatrist. While he is well-qualified to give opinions on psychiatric conditions, he, in fact purported to measure cognitive impairment with tests that are, at best crude screening tests for dementia and frontal lobe syndrome. In addition, according to his testimony, he was not given and did not review the report of Dr. Scher which detailed both the assumption of serious head injury, and the results of cognitive testing properly administered. He was, however, given Dr. Freedman's report which demeaned Dr. Scher's credibility and his conclusions, while ignoring the consistent references in the medical documentation to the seriousness of Mr. Thangarasa's head injury.

The receipt of Dr. Reznek's report is noted October 10, 2000 and was summarized briefly. The next significant note on October 31, 2000 states:

> Rec'd Crawford report 16 - Dr. Freedman IE & Dr. Reznek IE conclude that Mr. Thangarasa does not have cognitive deficits, therefore Heather Dies, OT will be discharged.

The note on November 20, 2000 states:

> Rec'd Heather Dies, O.T. closing report.
>
> Rec'd TSA report
> - capable of light physical demand level
> - several occupations including sales clerk, gas bar attendant, mailroom clerk, data entry clerk, etc.
> - light factory work identified but limited due to problems with standing/walking

Although the adjuster took the time to identify the "TSA" report recommendations that Mr. Thangarasa was capable of light physical work and could perform a number of occupations, the Insurer merely recorded the receipt of the final OT report without mentioning that Ms. Dies stated that she disagreed

with the decision to close the file since the opinion that there were no cognitive impairments "is in contrast to my observations of the client's function."

A note on January 19, 2001 merely states: "sent letter to Mr. Thangarasa ceasing weekly benefits with OCF 17 & OCF 14." The letter referred to states:

> Our investigation indicates that you are capable of Light Physical Demand Level employment. In accordance with the Statutory Accident Benefits Schedule, Section 37, we, the Gore Mutual Insurance Company, give notice, that weekly benefits will stop effective February 5, 2001, as per the enclosed Notice of Stoppage of Weekly Benefits and Request for Assessment (OCF 17) form.

What information, then, was available to the Insurer when it made this decision? It had, of course, Dr. Reznek's psychiatric IME and Dr. Freedman's psychological IME reports that found Mr. Thangarasa not to be disabled from either a psychiatric or a psychological perspective.

It would have known that Mr. Thangarasa was in a serious accident and sustained a closed head injury. It would have known the contents of his hospital records and the opinions of Drs. Oryema and Ouchterlony, all of which accepted the seriousness of his head injury.

It would have known that Dr. Freedman's report was premised on minimising the severity of the head injury suffered by Mr. Thangarasa, and ignoring his own low test scores.

It would have also known that Dr. Reznek made his psychiatric conclusions based on limited exposure to other medical reports, since the Insurer neglected sending him many relevant, available, reports, including that of Dr. Scher.

It would have known that there was a major difference of opinion between Dr. Scher and Dr. Freedman concerning Mr. Thangarasa's disability, a fact its own adjusters had commented on in their notes.

It would have known that there was also a great divide between Mr. Thangarasa's treatment providers and Drs. Freedman and Reznek concerning the seriousness and duration of Mr. Thangarasa's disability and his employability.

It would have known that Ms. Dies, the O.T. who had worked closely with Mr. Thangarasa in trying to integrate him into work, strongly disagreed with the Insurer's opinion that there were no cognitive impairments.

It would know that despite the efforts of private investigators and much, repeated surveillance, they had been unable to catch Mr. Thangarasa out doing things inconsistent with his stated condition. Nor did it find anything "funny" about his employment or his claim.

It is striking just how much information the Insurer had, and how diligent it had been in amassing that information from all sources, up to and including the date of termination. Yet it chose to rely, to the exclusion of all others, on those few reports that favoured its position.

As early as July 26, 1999 it had described Mr. Thangarasa's inability to work as a "preference not to return" and was looking for ways to "defeat" this preference. It seems that by 2001 Gore had found what it considered to be the necessary ammunition.

An insurer owes certain obligations to its shareholders. It should not pay out money that it is not obliged to pay. On the other hand, it has an obligation to its policyholders, and those who claim under the

insurance policies to settle their claims reasonably, fairly, and promptly. Neither obligation trumps the other. However, if an insurer lets its obligation to account to its shareholders drive its relations with its policyholders, it will be in breach of its obligation to deal fairly with its policyholders.[35]

I do not accept that Gore continued to treat Mr. Thangarasa fairly throughout all his qualification period. While there are possible inferences that may be drawn from the apparent failure of Gore to send Dr. Reznek reports that were unfavourable to its position, and its puzzling refusal to retain Dr. Scher for a second IME, or the circumstances surrounding the termination of Ms. Dies' OT services, I prefer to focus on the vast, and generally consistent, range of evidence of Mr. Thangarasa's impairments and disabilities that it had collected, and had available to it at a time when it chose to rely on the few, weak opinions which flew in the face of this collective wisdom.

In the overwhelming presence of credible evidence in support of Mr. Thangarasa's ongoing cognitive impairment, I find that it was not reasonable to cease paying income replacement benefits at the time Gore gave notice.

Of course, Gore later had the benefit of a DAC report prepared following a multi-disciplinary assessment, that endorsed Gore's position on disability. The final stoppage notice to Mr. Thangarasa dated December 21, 2001, was, of course, based on that assessment.

As noted earlier, there is some logic to assuming that an insurer should not be found to be acting unreasonably if what it is doing is in accordance with the conclusions of the DAC assessors and their

[35]Cumming J. in *Bullock v. Trafalgar Insurance Co. of Canada* [1996] O.J. No. 2566 "The duty is not a fiduciary duty but includes certain elements akin thereto. A fiduciary who owes a duty of individual loyalty to his/her principal and in exercising powers of discretion arising from the fiduciary relationship must treat the principal's interest as paramount. In contrast, an insurer in fulfilling its contractual obligations may give consideration to its own interests. However, the insurer must give as much consideration to the welfare of the insured as it gives to its own interests."

report. A DAC report, however official, is just that – a report. Its conclusions are not interim orders shielding parties from all and any claims of interest, nor, indeed, claims for special awards.

As with any expert report, DAC reports must be read carefully and their recommendations weighed in the context of other knowledge about the situation reported on. I have accepted Mr. Thangarasa's assertion that there were procedural problems with the DAC assessment, and that it is apparent from the testimony of individual assessors that the consultation protocol was not adhered to prior to the issuance of the report. Even accepting such shortcomings, barring inside knowledge, deficiencies of that nature may not have been apparent to a reader of the report at the time of its issuance.

I find, however, that there were other, more evident reasons that the Insurer should have treated the DAC report with caution.

First of all, it is important to note that insurance adjusters are professionals, who see many files and can be expected to be more familiar with the assessment of disability than the man or woman on the street. They are required to make decisions on the entirety of information available to them, not just on excerpts that might favour one position or another.

An adjuster in reading the DAC recommendations should be required to consider them in the context of all the evidence available to it on Mr. Thangarasa's disability. He or she should know that the consensus of treating practitioners was that Mr. Thangarasa had suffered an important closed head injury, and was observed to have significant, long-term cognitive impairments. He or she should have been aware that cognitive impairment was and is the critical element of Mr. Thangarasa's disability. Consequently, the Insurer should have carefully read the DAC assessment, and particularly Dr. Morris' report before deciding on whether or not to rely on its conclusions.

Such an examination would include looking at the assumptions made by the examiners to see whether they are in accord with the available evidence, and checking that the conclusions and recommendations are consistent with the observations of other examiners when the conclusions straddle one or more disciplines.

The first matter that should have struck a reader was listed in Dr. Morris' report under "Educational/Vocational History." It reports that "he completed Grade 13 in Sri Lanka and subsequently worked in a grocery store." He further remarks "during a three month course at Seneca college one year ago he felt "lazy" and impatient yet had no major difficulty in learning or incorporating English language skills."

The Insurer knew from Ms. Kita and Ms. Dies, as well the documented experience of most examiners, that English language skills were not Mr. Thangarasa's forte. Despite one on one assistance in this area from Frontier College and others, he required the assistance of an interpreter at examinations.

The histories recorded to date in reports and elsewhere credit Mr. Thangarasa with secondary education in Sri Lanka, albeit disrupted by the civil war, but none suggests he might have received a Grade 13 equivalent education. Nor is the impression that he completed or was eligible to attend post-secondary courses at Seneca College consistent with fact.

Whether Mr. Thangarasa was viewing his own past and qualifications through rose-coloured lenses, or Dr. Morris did not understand the seriousness of his educational and linguistic challenges, matters little except that the end result was an inflation of Mr. Thangarasa's apparent educational and experiential qualifications.

As noted, although there are criticisms of Dr. Morris' testing, his report notes results below or substantially below expected norms. He also notes acceptable compliance and effort.

Mr. Thangarasa is noted as functionally illiterate in English, with limited numeracy skills.

Despite the abysmally low test scores, Dr. Morris blithely concluded:

> In spite of his mediocre performance on formal aptitude testing, Mr. Thangarasa is presumably capable of a wider range of occupations that are compatible with his work history and transferable skills in general labour and elementary sales.

Dr. Morris then goes on to identify proposed jobs, including; hand packager, fast food preparer, busboy, cafeteria helper/cashier, cleaner (light duty), and so on.

Even a reader without outside knowledge of Mr. Thangarasa's medical and rehabilitation history would know that Dr. Morris' assumption of capacity to do a wide range of occupations was unsupported by the information in his own report.

In addition, the suggested occupations of dishwasher, kitchen helper and busboy, among others, would seem to be contra-indicated by the restrictions on heavier work noted in the orthopaedic assessment.

Indeed, Dr. Morris remarks that "His actual functional capacities or ability to meet the physical demands of the listed occupations will be determined by our medical colleagues on the assessment team."

Unfortunately, with the exception of some very generalized comments on restrictions by Dr. English, there is no discussion of whether Mr. Thangarasa can meet the actual physical demands of the listed occupations.

If one were intending to rely on an expert report containing such a startling omission, one ought to be prompted to pause for reflection, and, at the very least consider whether the conclusions could be justified in the context of the totality of the available evidence.

Indeed, the adjuster's note of December 21, 2001 suggests that there was no pause for reflection or evaluation of the report. The adjuster notes the receipt of the DAC report, and its conclusions, and immediately sends out a letter to counsel for Mr. Thangarasa noting the "income replacement benefit will not be reinstated."

I find that there were grounds, apparent from the reading of the DAC report itself, that would have justified, at the very least, reflection upon and reconsideration of the ultimate conclusion of the report. There is no evidence that the Insurer reflected, reconsidered, or even read the balance of the report before confirming its position on eligibility for benefits.[36]

The decision to rely on the apparent conclusions of the DAC report itself, in the face of the consistent, contrary, evidence on disability given by treatment providers, and the internal inconsistencies in the DAC report itself was both "beyond the limits of what is reasonable or equitable" and "not guided by or listening to reason."[37] I find that the withholding of income replacement benefits by Gore was unreasonable in the context of both the Insurer's obligations to the Insured and the expected conduct of a prudent adjuster.

I view the unreasonable conduct of the Insurer as running from the point, prior to the first termination notice, until at least the date of the hearing. The actual unreasonable withholding of benefits began much later, but was a continuation of the same wilful blindness on the part of the Insurer to recognize any aspect of the evidence filed that disagreed with their predisposition to withdraw benefits.

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[36] As Cumming J. commented in *Bullock* (supra) "the insurer may not treat the insured as an adversary whose interests may be disregarded. This encompasses a duty to settle claims without litigation in appropriate cases: This implies a reasonable and competent investigation to determine whether a claim will be honoured."

[37] *The Canadian Oxford Dictionary* (supra)

As noted earlier, a finding that funds were unreasonably withheld will trigger a special award. The arbitrator then has the discretion to set the special award somewhere on a continuum from zero to 50% of the benefits withheld, depending on the seriousness of the matter.

While the presence of a DAC which, on the surface, validates the Insurer's actions might serve to minimize the special award given, I am not satisfied that such a response would be appropriate to this case. Given the length and breadth of the information available to the Insurer and the nature of its close involvement in the file both directly and through Crawford staff such as Laurel Smith, its actions in terminating and withholding benefits without careful consideration of the validity of the reports it purported to rely upon on could be construed as beyond unreasonable, or perhaps, even patently unreasonable.

While, on the evidence before me, I have insufficient documentation to fix the exact amount of the special award, I have no doubt that it would be in the higher end of the spectrum permissible. Subject to submissions, I would place the appropriate level at about 40% of benefits outstanding.

Since I am already requesting that the parties either agree or make submissions on the amount of benefits outstanding at the date of this decision, I make the same order with regard to the quantum of the special award.

Should the parties be unable to agree on either the amount of outstanding benefits or the special award I will hear submissions and evidence from both parties.

INTEREST:

Mr. Thangarasa is entitled to interest pursuant to the *Schedule* from the date that each payment became overdue. Should parties be unable to agree on the amount of the interest outstanding as of this date, within 30 days, they may make brief submissions as outlined previously.

EXPENSES:

I make no order as to expenses at this time. If parties are unable to agree on this issue within 30 days, each should be prepared to make submissions on expenses following any submission made on quantum and special award, as the case may be.

INTERIM ORDER:

Given my finding concerning entitlement to benefits, I order that, pending resolution of the outstanding issues, the Insurer shall commence to pay to Mr. Thangarasa ongoing weekly income benefits in the amount of $340.53 per week forthwith.

	April 1, 2005
John Wilson Arbitrator	Date

FSCO A02–001360

BETWEEN:

RUBAN THANGARASA

Applicant

and

GORE MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

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

1. Mr. Thangarasa is entitled to receive a weekly income replacement benefit from February 5, 2001, as claimed pursuant to section 4 of the *Schedule*?

2. Mr. Thangarasa is entitled to receive $340.53 as the amount of weekly income replacement benefit pursuant to section 6 of the *Schedule*. Payment of this amount shall commence forthwith, and continue pending resolution of the following outstanding issues.

   The parties shall have 30 days to resolve the issue of the quantum of all outstanding benefits and interest and to make joint submissions as to the appropriate amount, failing which I will receive further evidence and submissions on this issue.

3. Gore Mutual is liable to pay a special award pursuant to subsection 282(10) of the *Insurance Act* because it unreasonably withheld or delayed payments to Mr. Thangarasa, the amount of which remains to be determined. The parties have 30 days to resolve this issue and provide joint submissions as to the quantum, failing which I will receive further evidence and submissions on the quantum of the special award.

4. The liability of Gore Mutual to pay Mr. Thangarasa's expenses in respect of the arbitration under section 282(11) of the *Insurance Act* remains to be determined.

5. The liability of Mr. Thangarasa to pay Gore Mutual's expenses in respect of the arbitration under section 282(11) of the *Insurance Act* remains to be determined. The parties shall have 30 days to resolve the question of expenses, failing which I will hear evidence and submissions as to the appropriate order to be made.

April 1, 2005

John Wilson
Arbitrator

Date