Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A13-008004

BETWEEN:

JERRY BRENTNELL

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Arbitrator Marcel D. Mongeon

Heard: In person at ADR Chambers on April 27, 28 and 29, 2015

Appearances: Mr. Jonathan Burton for Mr. Jerry Brentnell
Mr. Michael Kennedy for Wawanesa Mutual Insurance Company

Issues:

The Applicant, Mr. Jerry Brentnell, was injured in a motor vehicle accident on October 9, 2010 and sought accident benefits from Wawanesa Mutual Insurance Company ("Wawanesa"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mr. Brentnell, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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[1] *The Statutory Accident Benefits Schedule – Accidents on or after September 1, 2010*, Ontario Regulation 34/10, as amended.

The issues in this Hearing are:

1. Is Mr. Brentnell's application for accident benefits outside of the time limits provided for in the *Schedule*?
2. Is Mr. Brentnell entitled to an Income Replacement Benefit as a result of the accident and, if so, from what date and in what amounts?
3. Is Mr. Brentnell entitled to the reimbursement of $280.00 in medical and rehabilitation expenses paid to CBI Heath as a result of the accident?
4. Is Mr. Brentnell entitled to a Special Award pursuant to subsection 282(10) of the *Insurance Act* because the Insurer unreasonably withheld or delayed payments to Mr. Brentnell?
5. Is either party entitled to its expenses of the Arbitration proceeding pursuant to subsection 282(11) of the *Insurance Act*?

Result:

1. Mr. Brentnell's application for accident benefits is not outside of the time limits.
2. Mr. Brentnell is not entitled to an Income Replacement Benefit.
3. Mr. Brentnell is not entitled to reimbursement for medical and rehabilitation expenses.
4. Mr. Brentnell is not entitled to a Special Award.
5. If the parties are unable to agree on expenses, they may submit a joint brief of no more than 3 pages each in addition to any other documents they wish to submit (such as settlement offers and other relevant correspondence) and arrange a telephone conference of no more than one hour's duration with me to argue the issue.

EVIDENCE AND ANALYSIS:

I base my decision on the following facts established through the testimony and documents presented.

Facts

Mr. Jerry Brentnell, the Applicant, was in a motor vehicle accident on October 9, 2010.

While waiting for a red light to change on his way to attend the Erin Fair in Erin, Ontario, Mr. Brentnell's Dodge pick-up truck was rear-ended while he was the driver. He had no one else in the vehicle with him.

In turn, Mr. Brentnell's vehicle was forced into the rear end of the vehicle in front of him.

Mr. Brentnell acknowledged that, immediately after the impacts, he was able to exit his vehicle to check on the driver in front of him. He then asked someone to call the police and re-entered his vehicle.

Police were called to the scene.

After the accident, Mr. Brentnell continued to the Erin Fair. Because, as he testified, he was not feeling normal and needed to sit down for a while, he left after only about an hour.

The next day, a Sunday, Mr. Brentnell was not feeling well. He sought treatment at the Milton Hospital.

At the Milton Hospital, Mr. Brentnell was seen by a physician, had an X-ray administered and was advised that he had whiplash and to take extra strength Tylenol as required and apply heat or cold to his neck.

Given that it was the Thanksgiving weekend, Mr. Brentnell went back to his job the following Tuesday.

Mr. Brentnell worked on a seasonal basis as a truck driver. He was paid a salary of $1,000.00 per week. He delivered interlocking blocks and bricks. His employer was Tombro Trucking Limited of Milton. He drove a truck that had a built in crane on the back that would allow easy unloading of a skid of interlocking blocks.

In his own words, Mr. Brentnell loved his work.

The employer described the essential tasks of the position[2] as:

- Drive to GTA [Greater Toronto Area] jobsites
- Unload brick with boom
- Return to brick plant to be loaded again

Mr. Brentnell's testimony added, and I accept, one additional essential task to the job, namely ensuring the straps and tie-downs for the bricks were firmly in place. This might involve some intermittent physical activity.

Mr. Brentnell had worked for Tombro on a seasonal basis since at least April 2001[3] except for a two year period from 2003.

In 2003, Mr. Brentnell had a serious work-related accident when descending from the cab of a truck. Stepping down from the truck was the last thing he remembered. His next recollection was waking in the hospital. In addition to receiving 6 stitches in the back of his head, he had received a significant neurological injury.

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[2] OCF-2 - Exhibit 20 [Vol. I/Correspondence & OCFs/Tab 9]. In this decision because most of the Exhibits introduced at the hearing are included in two large binders, where applicable, I provide both the exhibit number and the location in the binders.

[3] Exhibit 7 [Vol. II/Employment/Tab I/Record of Employment for period ending 21 Dec. 2001].

Mr. Brentnell was off of work on a WSIB claim until the spring of 2005. He returned to work with Tombro on May 30, 2005.[4]

In 2007, Mr. Brentnell began a relationship with his common law wife, Connie. She lived in New Brunswick. As a result, his routine and residence changed. He moved from Ontario to New Brunswick.

Because it was difficult to find employment in New Brunswick as good as he had with Tombro, he continued with Tombro in Ontario during the season. When the end of the season arrived (usually at the beginning of December), Mr. Brentnell would go to New Brunswick to live with his wife. Because his employment with Tombro was terminated due to a seasonal shortage of work, on arrival in New Brunswick, he would make a claim for Employment Insurance Benefits.

In the spring time, Mr. Brentnell would call Tombro and determine when they needed him on the job. He would drive back to Ontario from New Brunswick to take up his employment. When in Ontario, Mr. Brentnell lived in a trailer on the Tombro premises.

After the October 9, 2010 accident, Mr. Brentnell followed this pattern.

He worked continuously from just after the accident until December 3, 2010. He received notice that he was being laid off due to a seasonal lack of work. He returned to New Brunswick.

His residence in New Brunswick, while working in Ontario, also created a layer of complexity with respect to his claim for accident benefits.

Because Mr. Brentnell's pick-up truck was insured at his New Brunswick address, after the accident in Erin, Ontario, on October 9, he telephoned his insurance company in New Brunswick.

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[4] Record of Employment for period ending 28 Dec. 2005, Exhibit 7.

Mr. Brentnell began his insurance claim by calling his broker in New Brunswick. Eventually, Mr. Brentnell spoke with Ms. Dawn Garwood of Wawanesa. Ms. Garwood testified and we have notes that she made in the Insurer's log.[5] Ms. Garwood spoke to Mr. Brentnell as a telephone claims adjuster. Although she had no specific recollection of her dealing with this matter, her notes indicate speaking to Mr. Brentnell on October 15. She noted that "He did sustain injury to the base of his neck. He went to the Milton Hospital Emergency Room the following day. He has whiplash type injury. He is just taking Tylenol. He does have private coverage thru [*sic*] London Life thru [*sic*] work. He does have good coverage. He does not believe he will have any expenses to submit."

Mr. Brentnell faxed Ms. Garwood two pages of notes.[6] The fax clock at the top of the two pages, 10/16/2018 at 09:15, is consistent with having faxed this material to Ms. Garwood the day after their conversation on October 15, 2010.

On page 2 of those notes, Mr. Brentnell wrote: "I went to the hospital on Oct 9, 10 12:45 pm Milton Ont complaining of lower neck pain. Doctor examined me, had X-rays done of my neck. She said I had whiplash. I am taking Tylenol to control pain. I drive transport and need to work!"

Unfortunately, Ms. Garwood did not refer Mr. Brentnell to an accident benefits (or similar) adjuster. In New Brunswick – which is where Ms. Garwood was located – accident benefits are referred to as Schedule B Benefits. On cross-examination, Ms. Garwood admitted having little training in New Brunswick Schedule B Benefits and no training at all in Ontario accident benefits.

Ms. Garwood's testimony was to the effect that her normal practice when she is speaking to a claimant is to only send them the accident benefits package if the claimant indicates they are off

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[5] Exhibit 15 [Volume I/Pleadings/Tab 4].
[6] Exhibit 1 [Volume I/Index/Tab 1].

work or have medical expenses. She would also refer such claimants to the Schedule B Unit for further processing.

Ms. Garwood did not send Mr. Brentnell information about his entitlement to accident benefits under either the New Brunswick or Ontario schemes. She admitted, on cross-examination, that it was common for claimants not to know what their accident benefits entitlements are.

Ms. Garwood quickly adjusted Mr. Brentnell's property claim. She assigned an appraiser out of Hamilton to look at his vehicle and by December, Mr. Brentnell and the Insurer agreed to a cash settlement. Because his pick-up was driveable, Mr. Brentnell was able to drive his vehicle back to New Brunswick when he was laid off in December and had it fixed there.

When Mr. Brentnell returned to New Brunswick, he applied for and received, Employment Insurance Benefits on the basis of his work at Tombro.

In the springtime, as was his custom, Mr. Brentnell telephoned his contact at Tombro to ask about work for the 2011 season.

He spoke with Mr. Paul Johnson in April 2011 and, unlike previous years, was informed that because of a slowdown in work available, there was no job at Tombro to go back to. Mr. Brentnell remembers being told "we have a shortage of work for drivers here in Ontario so it doesn't make sense for us to have you come in from New Brunswick."

Mr. Brentnell then attempted to find other work in Ontario. Exhibit 9 provides the dates, names and email addresses used to apply to at least 7 other companies for similar trucking jobs in May 2011.

Eventually, Mr. Brentnell found alternative work in New Brunswick. Specifically, he was able to work part-time for a local business (MacKays), driving a dump truck in the construction of

logging roads. He was filling in for a sick leave and, when the person on leave returned to work, Mr. Brentnell was no longer required for this position. Although he was driving a different type of truck, Mr. Brentnell did not indicate any difficulty with the work.

We have the following details of Mr. Brentnell's income in 2011:

- Employment Insurance received in 2011[7] $19,229.00 gross
- MacKay's Garage Ltd., Jun. 22, 2011 to Oct. 7, 2011[8] $7,057.84 gross

These numbers are duplicated on Mr. Brentnell's 2011 income tax information[9].

Through 2011, we know from the testimony of Mr. Brentnell's family physician, Dr. Smith, that Mr. Brentnell had a great deal of turmoil in his family life. His wife, Connie, was being treated for cancer.

At some later point, Mr. Brentnell spoke to a friend of his, Ms. Lilian Wilson. She was knowledgeable about insurance matters having been an adjuster for both CUMIS and Aviva. Mr. Brentnell recalls she advised him to "… do something [about getting information about accident benefits]."

In reply to my own questions on the matter, Mr. Brentnell recalls the conversation being by telephone with Ms. Wilson, a year and some months after the accident in the spring, and that he was not working at Tombro. This means the conversation was likely in the spring of 2012.

Mr. Brentnell contacted the Insurer again on March 12, 2012. We specifically know, from the testimony of Ms. Judy Doucette, the Insurer's representative who handled this aspect of the claim, and the Insurer's log notes, that the New Brunswick Section B Benefits were explained and

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[7] Exhibit 7 [Vol. II/Employment/Tab 2/Last page].
[8] Exhibit 10 [Vol. II/Employment/Tab 3].
[9] Exhibit 27 [Vol. II/Income Tax Returns/Tab 1 at Tab 8].

appropriate forms were sent. In addition, an election between the New Brunswick and Ontario regimes was sent to Mr. Brentnell and he elected the Ontario regime.

Carriage of the file for the Insurer was transferred to ProFormance in Ontario with Ms. Shawna Gillen being assigned the file for adjustment. The OCF-1, commencing Mr. Brentnell's accident benefit claim,[10] was dated March 30, 2012, and received on April 5, 2012.

Correspondence passed between ProFormance and the Applicant or his lawyer in the period from April 5, 2012 until October 2012.[11] On October 2, 2012, ProFormance, on behalf of the Insurer, denied the claim with an "Explanation of Benefits Claimed" form.[12]

As a part of Ms. Gillen's cross-examination, she acknowledged that she would send the accident benefits package in all cases. She did not try to somehow save effort by not sending the forms. This was her practice in this case when Mr. Brentnell reactivated the claim in early 2012 and I accept it is her practice in all cases.

Was Mr. Brentnell's claim filed in accordance with the *Schedule*?

The Insurer objects to any claims for accident or medical benefits being arbitrated on the basis that Mr. Brentnell did not apply in the timely manner required by subsection 32(1) of the *Schedule* which reads:

> A person who intends to apply for one or more benefits described in this Regulation shall notify the insurer of his or her intention no later than the seventh day after the circumstances arose that give rise to the entitlement to the benefit, or as soon as practicable after that day.

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[10] Exhibit 8 [Vol. I/Correspondence/Tab 4].
[11] Exhibit 16 [Vol. I/Correspondence & OCFs].
[12] Tab 18 of Exhibit 16.

Subsection (2) then provides the Insurer with the following obligation:

> The insurer shall promptly provide the person with,
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> (a) the appropriate application forms;
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> (b) a written explanation of the benefits available;
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> (c) information to assist the person in applying for benefits; and
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> (d) information on the election relating to income replacement, non-earner and caregiver benefits, if applicable.

Section 34 of the *Schedule* is also instructive which states:

> A person's failure to comply with a time limit set out in this Part does not disentitle the person to a benefit if the person has a reasonable explanation.

The onus of proof is on the Insurer to show that the Applicant is out of time.

In this case, a reasonable consideration of the facts establishes that Mr. Brentnell advised the Insurer that he thought that he had some type of injury within a few days of the accident. This can be considered to have occurred either in the telephone call with his broker (which we have no document of), the telephone call with the Insurance Adjuster (which took place on October 15) or in the fax notes he sent (on October 16). Mr. Brentnell clearly advised the Insurer that he was told that he had whiplash. Although Mr. Brentnell indicated in the conversation with the Insurance Adjuster he didn't think he would have any expenses, this cannot be interpreted as meaning that he did not think he had a claim.

The most reasonable characterization of Mr. Brentnell's communication is: I was told I have whiplash. I really don't know if this entitles me to anything. I expect you (the Insurer) to tell me what I should do.

Mr. Brentnell's faxed note makes it clear about work: "I need to work!"

Mr. Brentnell did comply with subsection 32(1) by advising the Insurer within the 7 days of the relevant facts.

I have considered the cases cited by the Insurer on this issue such as *Ahmad Abbany and Pafco Insurance Company*.[13] That and the other cases are distinguishable on the facts from this case. In this case, Mr. Brentnell advised the Insurer that he had a whiplash diagnosis. It was up to the Insurer to then provide him with the accident benefits information which it finally did in 2012.

In this case, the Insurer failed Mr. Brentnell in not sending him the accident benefits information required pursuant to subsection 32(2) of the *Schedule* until he finally had the March 2012 conversation.

Because of the failure, until contacted again in 2012, to provide the accident benefits information, it cannot be considered that the Insurer acted "promptly" as required.

I find that this application was filed in a timely manner.

Medical Evidence

In order to determine if Mr. Brentnell has sustained an impairment as a result of the accident as required by section 4 and section 14 of the *Schedule*, I must consider the medical evidence. I hold the following to be the relevant medical facts.

Prior to the accident, Mr. Brentnell had a number of medical conditions that were being managed with appropriate prescriptions. He had also been investigated for sleep apnea. Although a

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[13] A10-003864 FSCO, October 18, 2012, Arbitrator Miller.

Continuous Positive Airway Pressure (CPAP) machine had been suggested, he had not acquired the funding to obtain one.

His family physician in New Brunswick, Dr. Paul Smith, knew the nature of Mr. Brentnell's employment and had, on March 8, 2010, certified him medically fit for his New Brunswick driver's licence.[14]

Although no evidence was presented to the requirements of New Brunswick's driver's licensing regime, I assume that Dr. Smith's medical certification was required because Mr. Brentnell had a truck driver's licence which requires a higher degree of care to be exerted prior to its renewal.

Mr. Brentnell went to the Milton Hospital the day after the accident. The Emergency Record was made available to me as part of Dr. Smith's notes. In his testimony, Dr. Smith confirmed that this record was dated October 10, 2010 and contained the following information (in part):

- Yesterday rear end MVC – since then headaches and at back at neck
- No air bags/no headache – neck stiffness/pain started this am
- No blurred double vision
- No weakness/paresthesia
- No nausea
- No loss of consciousness
- No amnesia
- No other injuries
- No (circled) headache
- Prescription declined

Treatment was described as supportive care. "Rest, analgesia ice or heat twice a day and to revisit if there was any change" was specifically indicated on the chart.[15] An X-Ray was also taken and

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[14] Tab 18 of Exhibit 3 [Vol. I/Medical Records/Tab C].

the report on that does not disclose any abnormalities requiring treatment. The discharge diagnosis is noted as soft tissue injury.

In the period between the accident (October 9, 2010) and his return to New Brunswick (December 3, 2010), Mr. Brentnell testified to requiring 2 extra strength Tylenol tablets on almost a daily basis. He had pain in his shoulders and at the back of his neck.

However, during this time, Mr. Brentnell did not seek any medical assistance for these complaints.

During the trip to New Brunswick, Mr. Brentnell's testimony was to the effect that he doesn't remember large portions of the trip. Again, he didn't seek immediate medical attention.

Mr. Brentnell's first visit with his family physician, Dr. Paul Smith, is on January 17, 2011 or some 3 months after the accident and one month after returning to New Brunswick. From the initial nurse's notes in the chart for that date,[16] Mr. Brentnell is not making complaints about anything from the accident but rather is there for a check-up, labs and prescription renewal.

There is a note on that date made by Dr. Smith of "Headaches – stable and Neck pain." There is an additional note that he was "rear-ended in October" but an arrow pointing to the additional note – "OK now and balance".

There are additional visits with Dr. Smith on February 7; March 28; and October 26, 2011. On December 21, 2011, there is a visit with Dr. Smith and the additional note that "Headaches since MVA (whiplash) ~ 2 yr." In cross-examination, Dr. Smith said that this was really the first note

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[15] The complete Emergency Chart is Tab 19 of Exhibit 3 [Vol. I/Medical Records/Tab C].

[16] Exhibit 12 – Because of an unfortunate clerical error, some pages of Dr. Smith's chart for Mr. Brentnell were not initially copied and sent. Accordingly, some charts rather than being part of Exhibit 3 are in Exhibits 12 or 13.

that suggests that Dr. Smith is connecting the accident with the headaches that Mr. Brentnell suffers from.

Dr. Smith also noted that given the type of person that Mr. Brentnell was, he might keep problems like this "bottled up" and not speak about them.

Mr. Brentnell then saw Dr. Smith on January 18, 2012 where the note suggests "post concussive syndrome". On the same date, Dr. Smith completes and sends to Ontario Workplace Safety & Insurance Board (WSIB) a document in Form 10 of the NB workers' compensation regime, "Physician's Progress Report". As Dr. Smith admitted in cross-examination, the document was 'incomplete' and was a 'ploy' in order to get WSIB to reopen Mr. Brentnell's 2003 WSIB case.

On April 11, 2012, Dr. Smith completed and signed an OCF-3 form for Mr. Brentnell. In the form, the date last worked is reported as December 3, 2010. Part 5, describing the injury, is listed as "Whiplash" (not post concussive syndrome). In Part 6, Dr. Smith confirms an opinion that Mr. Brentnell is unable to perform the essential tasks of his employment at the time of the accident. No details of those tasks or Mr. Brentnell's inability to perform them was provided.

On June 6, 2012, Dr. Smith signed the form to renew Mr. Brentnell's driver's licence for the New Brunswick Department of Public Safety, Motor Vehicle Branch. All questions were answered in the negative and an additional comment was made of "No restrictions" on the form.

On August 21, 2013, Dr. Smith makes a referral to Dr. Kuriakose, a neurologist. Dr. Kuriakose examines Mr. Brentnell on October 25, 2013 and reports (in part):[17]

> Mr. Jerry Brentnell is a 66-year old gentleman, who is having chronic headache with dizziness, which is consistent with the diagnosis of post-concussion

[17] Page 3 of Tab 34 of Exhibit 3 [Vol. I/Medical Records/Tab C].

> syndrome. In addition to that, he also has excessive daytime sleepiness and early morning headache. I feel that this is secondary to sleep apnea syndrome. Some amount of his headache could be continued by sleep apnea, so it is important to treat sleep apnea syndrome, which can in fact improve a good amount of his headache as well as concentration problem and excessive daytime sleepiness. Dizziness and unsteadiness are unlikely to improve, as they are a part of chronic post-concussion syndrome. For that, the only treatment will be physiotherapy.

A further assessment was conducted by Dr. Bosse on September 4, 2014 who reported (in part):[18]

> I saw Jerry for assessment post MVA 2010 for a second opinion on a diagnosis of post-concussion syndrome. I do believe he has a diagnosis of post concussive syndrome. Knowing that he has obstructive sleep apnea I do believe that a CPAP machine is critical to help improve his cognition and headaches. I did explain this to him today. Also I did find some upper motor neuron signs on examination and this is not in keeping with post concussive syndrome.

An additional examination by Dr. Bosse on January 8, 2015 was reported with no mention of post-concussion syndrome.

An additional neuropsychological assessment of Mr. Brentnell was conducted by Ms. JoAnne Savoie, PhD and a Psychology Intern, Carmen Lukie, MSc, on January 21, 2015. The report of that assessment reads (in part):[19]

> Simple attention, language, memory encoding and storage as well as cognitive flexibility and reasoning were largely within normal limits. The current results

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[18] Page 3 of Tab 39 of Exhibit 3 [Vol. I/Medical Records/Tab C].
[19] Exhibit 5 [Vol. II/Reports/Tab A/Tab 1].

> should be considered in the context of untreated sleep apnea and significant symptoms of emotional distress. Though brain injury may explain part of the clinical picture (e.g. attentional difficulties and slower processing) they are non-specific changes that other non-neurological factors including chronic sleep apnea and depressed mood can overlap and/or compound underlying cognitive difficulties.

The Insurer's expert, Dr. Garry Moddel, conducted a file review of Mr. Brentnell's medical information. He concluded in his report[20] that Mr. Brentnell did not suffer any neurological impairment as a result of the accident. He also questioned a diagnosis of post-concussion syndrome and suggested, in his examination before me, that post-concussion syndrome would normally be found with someone who had suffered dozens if not hundreds of concussions like a sports participant rather than in the case of someone who had only suffered two concussions over the course of several years.

Credibility of the Medical Evidence

Dr. Smith testified in this proceeding through Skype. He impressed me as a fearless advocate for his patients in general and Mr. Brentnell in particular. Unfortunately, a number of indicia suggest that Dr. Smith is overly biased in his patient's favour for me to accept his opinion expressed in the OCF-3 of Mr. Brentnell's inabilities.

First, for almost an entire year of examinations in 2011 of Mr. Brentnell, Dr. Smith did not express that there might be concerns that the accident gave rise to any physical changes in his patient. As noted above, it was only on December 21, 2011, that there is some suggestion that there may be a problem.

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[20] Exhibit 31 [Vol. II/Reports/Tab B/Tab 1].

During this time, Dr. Smith was also aware that Mr. Brentnell was working for MacKays, driving a dump truck. If Dr. Smith had any concerns that Mr. Brentnell was suffering any disability in June of 2011, he would not have signed the letter at Tab 22 of the medical record which outlined medical conditions and the medications that Mr. Brentnell was taking that was to be given to the new employer.

Another indicator relates to Dr. Smith's signing the OCF-3 (which declared that Mr. Brentnell was not capable of doing the essential tasks of the pre-accident employment) within two months of signing the certification to the New Brunswick government that his patient had no restrictions on driving. It is difficult to reconcile how these two documents with diametrically opposed conclusions could be signed.

Finally, the acknowledgment that Dr. Smith was prepared to sign letters to Ontario WSIB "as a ploy" together with the preceding inconsistencies leads to the inescapable observation that I cannot rely on his conclusions as to whether or not Mr. Brentnell suffers a medical condition as a result of the accident. Although I accept the facts and observations contained in his notes, I reject his opinion relating to the connection between the accident and any impairment that Mr. Brentnell may have.

As a participant expert, Dr. Smith has gone too far in advocating his patient's position for me to be able to accept his diagnostic opinion as to the connection between Mr. Brentnell's symptoms and the accident.

I move to a consideration of the other medical reports that were presented by the Applicant.

Dr. Kuriakose notes that the objective and subjective symptoms of Mr. Brentnell "are consistent with the diagnosis of post-concussion syndrome". However, he then goes on to suggest that the symptoms of sleepiness and early morning headache "are secondary to sleep apnea." His conclusion is that the sleep apnea should be treated.

Dr. Bosse's report is more direct. She suggests that treatment of the sleep apnea is important. She also notes objective symptoms which are not "in keeping with post concussive syndrome."

The neuropsychological assessment conducted also points more to sleep apnea than a neurological cause for Mr. Brentnell's symptoms. I note that this assessment was conducted four and a half years after the accident.

Although I accept at face value all of the reports provided by the Applicant, they do not touch on the important question: is Mr. Brentnell unable or incapable of performing any task of his pre-accident employment as a result of the accident? I also note on the important issue of being able to safely drive a vehicle, Dr. Smith certified Mr. Brentnell as capable of driving on June 6, 2012.

To the extent necessary, I accept Dr. Moddel's opinion for the Insurer that it was highly unlikely that Mr. Brentnell suffered any neurological deficit as a result of the accident.

An alternate theory?

The Insurer, in submissions and argument, has advanced an alternate theory to explain the Applicant's claims. The theory is that the Applicant was unlucky in not having his employment with Tombro renewed as had previously happened. He was able to find alternate employment with MacKays to replace the income from Tombro through a large portion of 2011. Only when the MacKays job was complete in October 2011, one year after the accident, did the Applicant find it necessary to investigate the possibility of an accident benefits claim.

Although the alternate theory might go to the motivation of the Applicant in considering his entitlements, I need not consider it further. The regime established under the *Schedule* is clear: if someone has been injured, they are to be provided with appropriate benefits no matter what

motivation they may have had in seeking them. They are colloquially referred to as "no fault benefits" for this very reason.

Is Mr. Brentnell entitled to Income Replacement Benefits?

I have considered the Applicant's Book of Authorities and the cases on Income Replacement Benefits referred to therein. In the *Glagow and Pafco*[21] decision, the Arbitrator was provided clear medical evidence that the chronic pain being experienced was as a result of the accident.

The case of *Butina and Liberty Mutual Insurance Company*[22] was cited for the proposition that when an injured party felt compelled to work with an injury, the fact that they continued to work should not be held against them in considering if they suffered an impairment.

The other cases cited by the parties have also been considered. However, Mr. Brentnell's entitlement to Income Replacement Benefits can be determined on the regulatory provisions and the facts alone.

The onus of proof is on the Applicant to prove his entitlement to Income Replacement Benefits under the *Schedule*.

In order to qualify, subsection 5(1) of the *Schedule* requires the following for an employed person:

> The insurer shall pay an income replacement benefit to an insured person who sustains an impairment as a result of an accident if the insured person satisfies … the following condition:

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[21] A00–000835 FSCO, Arbitrator Palmer, June 27, 2001.
[22] A03 B 001148 FSCO, Arbitrator Renahan, September 29, 2004.

> The insured person … was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment …

To deconstruct this:

- First, there must be an impairment;
- Second, the impairment must be as a result of an accident;
- Third, there must be an analysis of what the essential tasks are of the employment; and
- Fourth, there must be a substantial inability to perform those essential tasks.

Impairment is defined in subsection 3(1) of the *Schedule* as:

> a loss or abnormality of a psychological, physiological or anatomical structure or function

To the first test of there being an impairment: the Applicant argues that the headaches and neck pain should be considered as an impairment either from the time of the accident, the last day of work at MacKay's Garage, or the date of Dr. Smith's signing the OCF-3.

For a moment, we will leave this and the next issue to the side. The consideration of the third and fourth issues suggests a clearer conclusion.

As noted above, the following are the essential tasks identified for Mr. Brentnell's employment at Tombro (I disregard any differences between those and the tasks that were required of him at MacKays. Subsection 5(1) makes it clear to me that only the Tombro tasks are relevant.):

- Drive to GTA [Greater Toronto Area] jobsites
- Ensure load is properly secured and adjust as necessary
- Unload brick with boom
- Return to brick plant to be loaded again

The Applicant has not presented any evidence that he is unable to perform any of these tasks. Other than the bold assertion in Dr. Smith's OCF-3 that this is the case, the Applicant has not presented specific evidence of his inability to perform any of these four tasks.

As to driving, there is no evidence of Mr. Brentnell's considering himself unfit to drive. His application to return to work in spring 2011, his applications for other trucking jobs, and his actual employment with MacKays, suggest that through 2011, he was fit to drive. When we combine this with Dr. Smith's certification of Mr. Brentnell's driver's licence in June 2012, I come to the conclusion that for the 104 weeks following the accident, Mr. Brentnell was capable of driving. Therefore, he could not be considered to be unable to perform what was probably the most essential task of the Tombro position: the ability to drive.

In passing, I have also considered the potential of applying the test in the *Butina* case, cited by the Applicant, that somehow the injured party might feel compelled to continue work. In 2011, Mr. Brentnell was receiving Employment Insurance Benefits. Although there is a requirement that he take reasonable efforts to look for work, there was certainly not a compulsion as suggested in the *Butina* case.

Of the other essential duties, it is likely that, after driving, the most physically demanding task was that of ensuring the load was properly secured and adjusting as necessary. No evidence was presented in any of the copious documents that were presented that Mr. Brentnell could not perform physical tasks such as this. I conclude for the 104 weeks following the accident, Mr. Brentell was capable of securing loads and similar tasks.

Finally, as to the unloading bricks with boom task, during his testimony, Mr. Brentnell described this as using a hydraulic controller with some buttons to unload the skids of bricks. Again, no evidence was presented that he was incapable of such a task at any time in the 104 weeks following the accident.

Dr. Smith could have been asked to give his views during his oral examination on these essential tasks and Mr. Brentnell's capabilities in performing them. He was not. The lack of such evidence makes it clear that the Applicant has not met his onus of proof and made the case that section 5(1) of the *Schedule* has been satisfied.

Although this alone is sufficient to dispose of the matter, I return to the first two issues in my deconstruction.

There is a lack of clarity in the medical conclusions of the Applicant as to the existence of an impairment caused by the accident. This is especially the case when Dr. Smith's medical conclusions are removed from consideration and I rely solely on the other medical evidence. The lack of impairment is bolstered when I add the Insurer's expert's view to the matter. Dr. Moddel opined that Mr. Brentnell did not suffer a neurological impairment as a result of the accident.

None of the medical evidence presented by any of the Applicant's other medical reports clearly draws the conclusion that Mr. Brentnell has an impairment directly arising from the accident. Rather, the conclusions suggest that although there may be some type of impairment, sleep apnea is the more likely cause. Therefore, in my view, it is reasonable to conclude that any impairment of Mr. Brentnell is *not* caused by the accident and, again, the claim for Income Replacement Benefits fails.

Entitlement to Medical or Rehabilitation Benefits

A claim was made for a modest amount of Medical or Rehabilitation Benefits under Part III of the *Schedule*.

Section 14 of the *Schedule* provides similar threshold requirements requiring "an impairment caused by the accident" before medical benefits that are further reasonable and necessary can be paid.

My foregoing analysis applies equally here.

The Applicant has not discharged his onus of showing that he had an impairment that was directly caused by the accident. At best, the medical evidence is equivocal suggesting alternate causes for Mr. Brentnell's concerns. Accordingly, no medical benefit is payable.

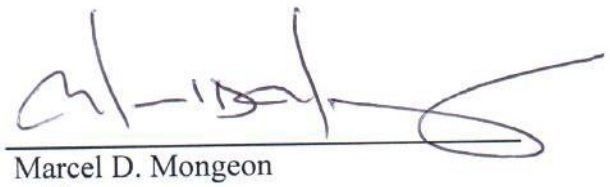
Special Award

The Applicant has not prevailed in showing his entitlement to any payments from the Insurer. Although there was a delay in being provided the appropriate accident benefits information from the Insurer, the delay of provision of such information cannot alone support a claim for a Special Award.

EXPENSES:

At the conclusion of the Hearing in this matter, the parties made a joint submission to me to allow them to make representations on the issue of costs following my decision. Accordingly, I leave it to the parties to either agree on the expenses of the Hearing or to have me decide the matter within 30 days of the date of this decision.

If the parties wish to have me decide the issue of expenses, I ask them to submit a joint brief with no more than 3 pages of submissions for each of them in addition to copies of any other documents (such as settlement offers and other relevant correspondence) and then to arrange a telephone conference of no more than one hour's duration with me to argue the issue.



30 June 2015

Marcel D. Mongeon
Arbitrator

Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A13-008004

BETWEEN:

JERRY BRENTNELL

Applicant

and

WAWANESA 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. Brentnell's application for accident benefits is not outside of the time limits.
2. Mr. Brentnell is not entitled to an Income Replacement Benefit.
3. Mr. Brentnell is not entitled to reimbursement for Medical and Rehabilitation Expenses.
4. Mr. Brentnell is not entitled to a Special Award.
5. If the parties are unable to agree on expenses, they may submit a joint brief of no more than 3 pages each in addition to any other documents they wish to submit (such as settlement offers and other relevant correspondence) and to arrange a telephone conference of no more than one hour's duration with me to argue the issue.

Marcel D. Mongeon
Arbitrator

30 June 2015
Date