Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

2009 ONFSCDRS 78 (CanLII)

Neutral Citation: 2009 ONFSCDRS 78

FSCO A06-002193
A08-001113

BETWEEN:

GUIDO POBLETE

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Susan Sapin

Heard: May 26, 27, 28, July 28 and September 4, 2008 at the offices of the Financial Services Commission of Ontario in Toronto.

Written submissions received September 19, 2008

Appearances: Geoffroy Pavillet for Mr. Poblete
Neil Colville-Reeves for Wawanesa Mutual Insurance Company

Issues:

The Applicant, Guido Poblete, a 50 year old plasterer, was injured on his way home from work when he was knocked to the ground by a motor vehicle on January 10, 2006. He had worked for the same company for 14 years and had changed companies a few months before the accident. He claimed he was unable to return to work in this physically demanding trade due to the injuries he sustained in the accident and a chronic pain condition that developed as a result. He further claimed that due to his limited education and lack of English and any other marketable skills, he is unable to return to any work that would pay nearly as well as plastering, an occupation in which he had built up a reputation for quality work.

2009 ONFSCDRS 78 (CanLII)

Initially, Wawanesa Mutual Insurance Company ("Wawanesa") paid weekly income replacement benefits (IRBs), payable under the *Schedule*[1], for six months. It terminated these benefits in July 2006, then reconsidered its decision and reinstated IRBs pending further medical assessments. Wawanesa finally terminated IRBs on the basis of an insurer's examination ("IE") effective July 16, 2007.

The parties were unable to resolve their disputes through mediation, and Mr. Poblete applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

1. Is Mr. Poblete entitled to IRBs of $400 per week from July 16, 2007 and ongoing under subsection 4(1) of the *Schedule*?

2. Is Mr. Poblete entitled to the following medical expenses under section 14 of the*Schedule*?

   i. $834.87 for physiotherapy treatment;
   ii. $5,000 to fund a work-hardening programme; and
   iii. $2,600 for Botox injections.

3. Is Mr. Poblete entitled to the costs of the following medical reports under s. 24 of the *Schedule?*

   i. $562 for the balance of a chronic pain assessment by Dr. Kirsh;
   ii. $3,372.22 for a psychovocational assessment by Dr. Cohen;
   iii. $1,654.25 for a psychological assessment by Dr. Pilowsky;

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

iv. $1,603.72 for a physiatry assessment by Back to Health; and
v. $310.97 for a functional assessment by Back to Health.

4. Is Mr. Poblete entitled to a special award under subsection 282(10) of the *Insurance Act,* because Wawanesa unreasonably withheld or delayed payments to him?

5. Is Mr. Poblete entitled to interest on any overdue payments in accordance with subsection 46(2) of the *Schedule*?

6. Is either party entitled to its arbitration expenses under subsection 282(11) of the *Insurance Act*?

Result:

1. Mr. Poblete is entitled to IRBs of $400 per week from July 16, 2007 and ongoing.

2. Mr. Poblete is entitled to medical expenses of $834.87 for physiotherapy treatment and $2,600 for Botox injections. Mr. Poblete is not entitled to $5,000 for the cost of a work-hardening programme.

3. Mr. Poblete is entitled to the costs of the following medical reports under s. 24 of the *Schedule*:

i. $562 for the balance of a chronic pain assessment by Dr. Kirsh;

ii. $3,372.22 for a psychovocational assessment by Dr. Cohen;

iii. $1,603.72 for a physiatry assessment by Back to Health; and

iv. $310 for a functional assessment by Back to Health.

2009 ONFSCDRS 78 (CanLII)

Mr. Poblete is not entitled to $1,654.25 for a psychological assessment by Dr. Pilowsky.

4. Mr. Poblete is entitled to a special award of $7,500.

5. Mr. Poblete is entitled to interest on all overdue payments in accordance with section 46 of the *Schedule*.

2009 ONFSCDRS 78 (CanLII)

EVIDENCE AND ANALYSIS:

Entitlement to IRBs

To be entitled to IRBs up to 104 weeks after the accident, Mr. Poblete must establish, on a balance of probabilities, that he was substantially unable to perform the essential tasks of his pre-accident employment as a plasterer, due to injuries sustained in the accident. After 104 weeks the eligibility test changes and Mr. Poblete must show that he suffers a complete inability to engage in any employment for which he is reasonably suited by education, training or experience, as a result of the accident. The accident need not be the sole cause of disability, but it must be a signficant contributing factor.

Wawanesa conceded that its first termination of IRBs in June 2006 was premature. It does not dispute that Mr. Poblete suffers from chronic pain, but maintains there is no objective medical evidence to support his claim that his chronic pain renders him unable to work. Wawanesa's position is that the psychological component of Mr. Poblete's chronic pain condition is significant, and in fact it terminated his IRBs in July 2007, solely on the basis of a psychiatric IE. Wawanesa further maintains that the motor vehicle accident is not a sigificant contributor to Mr. Poblete's inability to work, but rather that this inability is due to pre-existing psychological and financial stressors and a work-related injury that occurred two years before the accident, which he did not disclose. Finally, Wawanesa submitted that Mr. Poblete's lack of disclosure and his attempts to downplay these factors in his testimony raised doubts about his credibility.

2009 ONFSCDRS 78 (CanLII)

On the whole, however, I find the evidence supports Mr. Poblete's position that he developed a bona fide chronic pain condition as a result of the accident, and that this impairment prevents him from performing the essential tasks of his employment or engaging in any occupation for which he would be reasonably suited by education, training or experience.

Mr. Poblete testified through a Spanish-speaking interpreter. He was born in rural Chile, where he worked in agriculture with his father and drove trucks for his brother until he married at age 20 and got a better-paying job driving a bus. He went as far as grade 8 in Chile. He emigrated to Canada in 1989 and worked at unskilled labouring jobs for low wages until a friend found him a job in construction, where he learned to apply plaster and stucco to the inside walls, ceilings and exteriors of buildings. He worked for 14 years for a company called Starwest Plaster & Cement Finishing Inc ("Starwest"). In September 2005 he took a job with a smaller company, Superior Stucco and Drywall Inc ("Superior Stucco")., and in November 2005 switched to another small owner-operated company, Prostucco Plastering ("Prostucco"), where he was working at the time of the accident, earning $28 per hour.

Essential tasks

Before the accident, Mr. Poblete's job at Prostucco was to apply plaster to the 9-foot concrete ceilings of new condominium apartments. He would arrive at work between 6:00 and 6:30 a.m. and prepare drywall mud or plaster, then climb up onto a 2 - foot high bench to apply the compound to ceilings with a palette and trowel. He had to climb up and down from the bench frequently. The compound came in large barrels too heavy to lift, which Mr. Poblete would drag across the floor. He worked looking up, bending backwards with his arms raised over his head to reach the ceiling, using his "spine and back a lot."

A job site analysis conducted at Prostucco's worksite on behalf of Wawanesa in April 2006, which accords with Mr. Poblete's account of his job duties, found the following to be major job requirements (i.e. requiring maximum ability and frequent repetition for more than 3 hours daily):[2]

[2]Ergonomic Job Site Analysis report of D. Sewell, Kinesiologist, dated April 21, 2006,Book E tab 106

2009 ONFSCDRS 78 (CanLII)

- lifting and carrying building materials weighing a maximum of 50 pounds;
- holding palette of drywall mud weighing 5 pounds;
- handling building materials, applying drywall mud and holding and operating tools;
- standing on bench to access ceiling;
- reaching above shoulder to apply drywall mud to ceilings; and
- reaching at shoulder level to apply drywall mud to walls and hold and operate tools.

Physical demands requiring frequent repetition for 1-3 hours daily were listed as:

- handling building materials, moving benches, holding and operating tools below shoulder height;
- stepping up and down onto a bench to reach ceiling to apply drywall mud; and
- applying drywall mud bending, stooping, crouching and kneeling.

I find these to be the essential tasks of Mr. Poblete's employment at the time of the accident, and, with the exception of outside work on balconies, they are essentially the same tasks as he performed for 14 years at Starwest, and afterwards at Superior.

The job site analysis report states that employees "work independently as part of a crew." However, Mr. Poblete testified that he worked alone and this was confirmed by Sebastian DiMartino, the owner of Prostucco, as well as Juan Lopez, a union representative who worked alongside Mr. Poblete on many projects and has known him for many years. Both these men testified at the hearing. Mr. Lopez stated that modified duties are not available for the type of

2009 ONFSCDRS 78 (CanLII)

work performed by Mr. Poblete. They both confirmed that plastering ceilings is a very physical job. Mr. DiMartino testified that he had known Mr. Poblete since 1986, that he was not aware of any previous health issues and that he knew Mr. Poblete to be a good reliable worker.
He confirmed that in the seven weeks leading up to the accident that Mr. Poblete worked for him at Prostucco. Mr. Poblete worked the following hours:[3]

Week of November 14 – 18, 2005	49 hours
Two weeks ending: December 2	90 hours
Two weeks ending: December 16	76 hours
Two weeks ending: December 30	61 hours
Two weeks ending: January 13	53 hours

None of this evidence was contradicted at the hearing. I find that in the seven weeks before the accident, Mr. Poblete was fully capable of completing all of the tasks comprising his physically demanding job.

Accident and injuries

In the January 10, 2006 accident, Mr. Poblete was knocked to the ground by a vehicle coming out of a gas station around 4:00 p.m., as he was leaving work and heading to his car. The van hit him on the left hip, throwing him from the sidewalk onto the street, where he landed on his back. He was disoriented and unable to stand up. The driver and a passerby pulled him up. The van driver picked up the tools scattered from Mr. Poblete's toolbox and walked him to his car, where he sat for a while before driving home. His back and leg did not hurt too much at that time, but that night his neck, shoulders and low back began to hurt badly and he had pain down his left leg. His wife gave him a pill and the next day he went to see Dr. G. A. Vadasz, his family doctor.[4]

---

[3]Exhibit 31 — Letter to Carranza, Barristers and Solicitors dated May 26, 2008

[4]Dr. Vadasz has been Mr. Poblete's family doctor since 1994.

2009 ONFSCDRS 78 (CanLII)

Dr. Vadasz determined that Mr. Poblete had sustained a left hip contusion, lumbosacral strain, left leg strain and was suffering from anxiety and that he was unable return to work. He sent him for x-rays and physiotherapy and prescribed painkillers.

Dr. M. Shteynberg, a chiropractor with Vision Therapy and Rehab, examined Mr. Poblete and prepared a Treatment Plan for him dated January 26, 2006.[5] He described Mr. Poblete's injuries as a left hip contusion, shoulder sprain/strain, headaches, lumbar sprain/strain, and radiculopathy into the left leg and noted that prolonged static posture was painful, and that Mr. Poblete had difficulty going up and down stairs.

Mr. Poblete attended therapy for four months at Vision, until he moved to Hamilton in March 2006. He testified that although his neck and shoulder pain eventually improved with physiotherapy, his back and leg pain did not.

Mr. Poblete also attended therapy from May to November 2006 at the Accident Injury Management Clinic ("AIM") in Hamilton. He stopped going to AIM after Wawanesa refused to pay for a Treatment Plan for a work hardening programme recommended by AIM. He tried aquatherapy at the YMCA at his own expense between February and October 2007 but found the regular group class too difficult. Mr. Poblete then attended the North Hamilton Wellness Centre for OHIP-funded physiotherapy twice a week, beginning in November 2007. He was still attending for therapy at the time of the hearing. Among the goals prescribed were to increase physical activity and lose weight in the abdominal area.

Mr. Poblete also attended 15 sessions of psychological counselling from Dr. J. Pilowsky, a psychologist, from March to October 2007, approved and paid for by Wawanesa. A second Treatment Plan dated October 22, 2007 for further therapy was denied.

On October 22, 2006, Mr. Poblete attempted to return to work with his old employer, Starwest. He testified that he lasted about three hours and could not continue due to a sudden increase in his back and shoulder pain when he started to pull up and climb the scaffold with his materials.

---

[5] Book "E", Tab 103

2009 ONFSCDRS 78 (CanLII)

He went to the hospital the same day. He has not returned to work since. Mr. Lopez testified that low back pain was a "big obstacle" to plastering work, and that there is no accommodation possible in that type of work.

The medical evidence supports Mr. Poblete's claim.

Dr. Vadasz, who has been Mr. Poblete's family doctor for fourteen years, testified at the hearing. He readily pointed out that, as Mr. Poblete's family doctor, it was his role to advocate on behalf of his patient, but emphasized that he would not do so if he had any doubts about Mr. Poblete's genuineness, which he did not. I found Dr. Vadasz to be an objective, even-handed and helpful witness. In addition to his family practice, he has conducted insurer's examinations and designated assessements ("DACs") under the *Schedule* and acted as an assessor for the Worker's Compensation Board and Service Canada (handling Employment Insurance Claims) in the past. He was knowledgeable about medical assessments and eligibility requirements for various disability schemes, as well as the nature of chronic pain.

Dr. Vadasz'August 8, 2006 report is brief and to the point. Mr. Poblete came to see him the day following the accident, anxious and upset and complaining of pain throughout the left side of his body. Dr. Vadasz noted that he followed Mr. Poblete closely after the accident, seeing him on average every 2-3 weeks. This puts him in a far better position than other assessors to provide a reliable perspective on the progress of Mr. Poblete's condition over time. Mr. Poblete continued to complain of low back pain and left shoulder and hip pain, and "his clinical course has not been as expected and has been complicated by significant emotional distress and difficulties controlling his emotions and behaviour." Dr. Vadasz felt Mr. Poblete was disabled from his "heavy construction-type regular occupation" and that his combination of physical and emotional impairments combined translated into significant disability.

Dr. Vadasz testified that he was still of this opinion in July 2007 when Wawanesa terminated IRBs for the second time. In Disability Certificates dated June 27, 2007[6] and April 16, 2008[7] he diagnosed chronic discogenic low back pain with radiculopathy affecting the left S1 nerve root, chronic pain syndrome and major depressive illness, and noted that he had prescribed Mr. Poblete with Cipralex, an antidepressant. He referred Mr. Poblete to a number of specialists, including a psychiatrist because he felt Mr. Poblete was quite depressed and he needed therapy as well as medication for his depression. He continued to prescribe Tylenol and Gabapentin for his chronic low back pain.

2009 ONFSCDRS 78 (CanLII)

Regarding possible pre-existing medical conditions, Dr. Vadasz testified that Mr. Poblete had suffered an upper back strain at work on September 29, 2005, three months before the accident and was off work for a time, and stated that this was common in Mr. Poblete's type of work. He pointed out that Mr. Poblete's symptoms from this injury were not the same as those he complained of after the accident, and that he returned to work shortly afterwards. He was not aware of an earlier visit by Mr. Poblete to a hospital emergency department on August 12, 2005, coded in an OHIP summary as "lumbar strain, lumbago, coccydynia, sciatica," and his notes do not reflect any consultations with him, complaints from Mr. Poblete in that regard, or lost time from work. In the fourteen years he has known Mr. Poblete, Dr. Vadasz was not aware that he had ever been unable to work due to an injury, other than the September 29, 2005 workplace injury and the January 2006 motor vehicle accident.

There was no evidence that Mr. Poblete was unable to work at plastering as a result of these previous incidents. The records completed by Mr. Poblete's previous employers, Starwest and Superior Stucco, in support of the claim he filed for unemployment sickness insurance after Wawanesa terminated IRBs in July 2006, do not indicate that Mr. Poblete either lost time from work or left those jobs due to illness or injury, nor were there any claims for worker's compensation benefits.

[6] Book D, Tab 130

[7] Book B, Tab B10

Wawanesa was clearly suspicious about why Mr. Poblete left Starwest at the end of August 2005 after 14 years, and only stayed with Superior Stucco from September 15 to November 11, 2005, before starting work with Prostucco on November 14. Mr. Poblete explained that he left Starwest because he wanted inside work only, and was tired of working outside on the balconies. Mr. Lopez testified that Mr. Poblete was taken advantage of by Starwest, often working 10-hour days and weekends, and that he had often encouraged Mr. Poblete to move on because he was a good worker and could get better money and working conditions elsewhere. Mr. Poblete testified that he went to Superior Stucco because he was promised inside work. This, however, did not materialize, and furthermore, his employer at Superior did not deduct income tax, EI, or CPP contributions from his paycheques as he had requested. So he went to work for Mr. DiMartino at Prostucco, where he earned $28 per hour, which was more than he had earned at Starwest or Superior. I accept Mr. Poblete's explanations for why he switched jobs to be sensible and reasonable, and find Wawanesa's suspicions to be completely unfounded.

2009 ONFSCDRS 78 (CanLII)

Mr. Poblete was referred to a number of medical specialists and underwent numerous assessments at Wawanesa's request in the two years after the accident. In May 2006, he was examined on behalf of Wawanesa by a multidisciplinary team at Riverfront Medical Services. It was very evident from this series of assessments that Mr. Poblete was suffering from chronic pain. Ms. A. Bertolo, the occupational therapist who conducted the Functional Capacity Evaluation, determined the evaluation "was not reflective of his current functional abilities" as Mr. Poblete "put forth submaximal effort" and self-limited his strength testing and overhead reaching due to reports of low back and left shoulder pain. She deferred her opinion as to whether Mr. Poblete could return to his job as a Plasterer to Dr. G. Jaroszynski, the orthopaedic member of the team.

Mr. Poblete described his symptoms to Dr. Jaroszynski as pain across his lower back that radiated down his left leg and sometimes his right, aggravated by movement of his trunk, bending down, reaching down, lifting and carrying, and told him extended walking aggravated his pain. However, as Dr. Jaroszynski could find "no organic pathology caused by the motor vehicle accident from an orthopaedic perspective" to explain Mr. Poblete's pain complaints, he concluded that he did not suffer an impairment that caused a substantial inability to perform the

essential tasks of his employment. He ignored the effects of pain on Mr. Poblete's ability to carry out the physical tasks required in his work.

2009 ONFSCDRS 78 (CanLII)

An impairment due to a chronic pain disorder cannot be ruled out on the sole, and narrow basis, that there are no objective orthopaedic findings. I find it is not reasonable for an insurance company to rely solely on the report of an orthopaedic specialist to deny benefits on that basis. Objective orthopaedic findings of course would be helpful to support a chronic pain case where credibility is an issue. However, the reverse is not necessarily true, and the absence of findings by itself is not determinative, as the very nature of chronic pain is that it persists long after any objective orthopaedic or soft tissue injuries have, or ought to have, healed.

I find there has been no suggestion from medical professionals that Mr. Poblete's chronic pain symptoms were not genuine. Dr. D. Sheinbaum, a psychiatrist who conducted the psychiatric portion of the Riverfront assessment[8], concluded that Mr. Poblete suffered from post traumatic stress disorder, chronic pain and a major depression secondary to the motor vehicle accident; she certainly found him to be genuine, despite Wawanesa's question to her, which seems to imply a preference for an answer that identifies objective, over subjective measures:

> Is his disability related to subjective perception of pain or has it been objectively documented that he is at risk of psychological harm if he carries out his pre-accident activities. Please specify the objective means by which disability was measured.

Dr. Sheinbaum's answer to this somewhat "loaded" question is about as clear a diagnosis and explanation of the nature of genuine chronic pain as one is likely to get:

> It is really not my function to objectively interpret his pain. Mr. Poblete has worked all of his life, has every reason to want to continue to work. He is unable to work secondary to chronic pain which is a subjective perception.
>
> I have no reason to believe that he is magnifying his expression of pain. I have no reason to believe that he is malingering or is complaining of pain for any secondary gain whatsoever. His pain is genuine. His disabilities are genuine and his inability to engage in extremely heavy physical labour activity is genuine. If

[8]Book E, Tab 109

> any assessments are done to help him treat his pain or relieve his pain to enable him to return to gainful employment, his depression would lift and he would be much happier. Therefore, from a mental status point of view, he really did not display any features of Axis II amplification, manipulation, histrionics. His experiences are genuine and are limiting his ability to maintain activities which fulfilled his sense of self and helps him look after his family and gave him a great deal of satisfaction and happiness. His inability to work secondary to his pain is causing his depression, in my opinion.

2009 ONFSCDRS 78 (CanLII)

Dr. Sheinbaum felt Mr. Poblete should see a “Pain Specialist and perhaps a Rehabilitation Specialist to see if there are any physical treatments that would help him return to work or definitively explain to him whether or not he will be able to return to work and must plan his life accordingly.” She also recommended psychological counselling. Although Wawanesa terminated IRBs on the basis of the Riverfront IE’s, as noted above, it subsequently realized it was premature to do so, and reinstated the benefit several months later.

Dr. Pilowsky, Mr. Poblete’s treating psychologist, who first assessed him in January 2007, noted that he still suffered intense pain in his left leg and back a year after the accident, as well as clinically significant symptoms of posttraumatic stress disorder and moderately severe depression.[9] As noted above, she recommended therapy for which Wawanesa approved and paid.

An MRI conducted on October 27, 2006 found “degenerative disk disease at the level of L5/S1 as described with mild compression of exiting S1 nerve root. Mild degenerative disease is also noted at the level of L4/L5.”[10] Dr. Jaroszynski reviewed the MRI and concluded: “the accident ...did not cause any of the MRI confirmed degenerative changes, especially in view of the lack of any immediate sciatica symptoms, which would be expected with an acute accident-induced disk herniation … The accident related injuries do not contribute materially to the clinical presentation, which is due to degenerative changes in the spine.”[11]

---

[9]Psychological evaluation, January 16, 2007, Book F, Tab 124

[10]Book E, Tab 121, report of MRI

[11]Addendum report of December 12, 2006, Book E, Tab 121

Dr. H. Platnick, M.D., who conducted an IE on December 21, 2006 to determine if Botox injections recommended by Dr. J. Mathoo, a physiatrist, were reasonable and necessary (finding they were not), also concluded the disk bulge at L5/S1 was not caused by the accident, and there was no clinical correlation between the MRI findings and Mr. Poblete's complaints: "for example, he does not have radicular-like symptoms radiating down the left lower extremity."[12]

The fact that Drs. Jaroszynski and Platnick did not find objective signs of nerve root symptoms when they examined him in May and December 2006 is not a sufficient basis on which to conclude the accident did not contribute to Mr. Poblete's pain or impairment. Both Dr. Vadasz and Dr. Shteynberg in fact noted complaints of pain radiating down the left leg shortly after the accident, as noted above.

Mr. Poblete also complained to Dr. A. Gwardjian, a physiatrist, in June 2006 of on-going left-sided back pain since the accident, "with distal radiation to the left leg past the knee level [with] intermittent left leg numbness and tingling." The pain was constant and aggravated by physical activity. EMG tests revealed no neurological impairment, and by August 2 the left leg pain was resolving.[13]

Dr. Gwardjian referred Mr. Poblete to Dr. J. Mathoo, also a physiatrist, for treatment for his ongoing symptoms. Dr. Gwardjian examined Mr. Poblete in November 2006. He observed tenderness, chronic diffuse myofascial pain and mild spasm affecting the neck and back, with no clinical evidence of active cervical or lumbosacral radiculopathy.[14] He recommended a trial of Botox injections to manage pain and spasm, as conservative measures up to that point had had no effect.

2009 ONFSCDRS 78 (CanLII)

[12]Report of Dr. H. Platnick, M.D, January 3, 2007, Book E, Tab 122, at pg. 6 of his report

[13]Reports dated June 14, July 6 and August 2, 2006, Book F, Tab 143

[14]Report dated November 16, 2006, Book F, Tab 137

I find the most logical explanation of the relevance of the MRI findings is the one provided by Dr. S. O'Grady, a chiropractor who conducted a paper review of Mr. Poblete's medical condition for Wawanesa in December 2006 and stated:[15] "Mr. Poblete has a very physical job and as the MRI report dated October 27, 2006 indicates that he had pre-existing degenerative disc disease, it is reasonable to assume that the accident aggravated his condition making him symptomatic." This conclusion is consistent with the evidence of Dr. Vadasz, who felt the MRI findings were consistent with intermittent symptoms of sciatica, and the evidence of Dr. Gwardjian, who stated flare-ups were possible.

2009 ONFSCDRS 78 (CanLII)

It is also consistent with the evidence of Dr. E. Tunks, a psychiatrist to whom Dr. Vadasz referred Mr. Poblete in November 2006. Dr. Tunks practices exclusively in the area of pain management in the Department of Physical Medicine and Rehabilitation at McMaster University in Hamilton. Dr. Tunks retired from teaching in the Faculty of Medicine at McMaster and continues to teach at the Canadian Memorial Chiropractic College. He is a specialist in chronic pain who has authored many publications, reviewed what he considers the most reliable research available and was one of the advisers to the authors of the fourth edition of the *American Psychiatic Associations Diagnostical and Statistical Manual of Mental Disorders* ("DSM IV-TR"), which introduced the definition of chronic pain to that edition. His qualifications and experience in the field are considerable. Dr. Tunks testified at the hearing.

Dr. Tunks is a proponent of a multidisciplinary approach to treating chronic pain which emphasises early and aggressive physical intervention, on the basis that this strategy offers the best hope for a return to function in spite of continuing pain. The earlier the intervention, the better the chance of a recovery that could eventually permit a return to gainful employment.

Dr. Tunks examined Mr. Poblete and noted tenderness on examination of his back, but was unable to find a physical cause or basis for his pain complaints. He agreed with other medical professionals who had examined Mr. Poblete, that the MRI findings of degenerative disc disease, with a bulging disk impinging on the L5/S1 nerve, were not the cause of his chronic pain symptoms *at the time he saw him*, but were an "inactive lesion" indicating he would be more

[15]Report of Dr. S. O'Grady, Chiropractor, December 15, 2006, Book E, Tab 122, at pg. 3 of her report

prone to recurrences of an acute episode of back pain. I find this to be consistent with the opinion of Dr. O'Grady that the accident caused just such an acute episode, aggravating a condition that had been asymptomatic up to that point, and which, according to the evidence, had not prevented him from working.

Although Dr. Tunks determined the mechanism of Mr. Poblete's pain complaints to be largely psychological, he was careful to point out that this did not make his pain any the less real. Based on Mr. Poblete's reported symptoms of fatigue, poor mental function, nightmares and feelings of anxiety, depression and tearfulness, he concluded that Mr. Poblete suffered from a "pain disorder with psychological factors with significant disability arising out of the injury in January 2006, and posttraumatic anxiety and depressive features."[16] He also discovered that Mr. Poblete's sleep was disrupted by sleep apnea. Although not related to the accident, the disorder could affect the persistence of the chronic pain disorder. Dr. Tunks did not feel Mr. Poblete was able to return to his work as a plasterer, or any occupation, until he had first learned to overcome his fear of re-injury and learned what he could be physically capable of doing despite his pain.

To this end, Dr. Tunks recommended Mr. Poblete be admitted to the month-long pain management programme at Chedoke-McMaster Hospital, which he described as a very intense and specialized daily rehabilitation programme involving a multidisciplinary crew of physical and occupational therapists, dieticians, social workers, and psychological professionals, where the emphasis was on setting targets towards returning to work. He felt this programme was an essential first step that ideally would be followed by a psychovocational assessment and then a work-hardening programme specifically tailored to a job type compatible with Mr. Poblete's assessed physical abilities. Dr. Vadasz was also of the view that this course of action would offer the best chance of rehabilitating Mr. Poblete.

Dr. Tunks' evidence is consistent with that of other health practitioners such as Dr. Vadasz, Dr. Sheinbaum, Dr. O'Grady and the physiatrists, and was not seriously challenged on cross-examination. He felt Mr. Poblete was genuine. As he pointed out, although it would have been helpful to have a complete pre-accident history, one cannot know everything, and the

[16]Report dated November 28, 2006, Applicant's Brief, Volume 2, Book B, Tab B2

2009 ONFSCDRS 78 (CanLII)

2009 ONFSCDRS 78 (CanLII)

information he did have, together with Mr. Poblete's steady work history prior to the accident despite possible pre-existing anxiety and depression, would indicate that the motor vehicle accident was the most determining factor in the development of his chronic pain condition and subsequent inability to work. I agree.

Compared to this evidence, the remaining medical evidence tendered by Wawanesa is not persuasive. Wawanesa based its second termination of IRB's on the medical report of Dr. R.B. Hines, a psychiatrist. However, I found his June 2007 psychiatric assessment was particularly unhelpful. Despite a long trail of medical evidence indicating that Mr. Poblete suffered varying degrees of anxiety, depression, fluctuating mood disturbances, difficulty controlling anger and emotions and chronic pain after the accident, Dr. Hines felt that Mr. Poblete's emotional difficulty adjusting to his chronic pain and decreased functional abilities were not "of the degree or to the extent to currently justify any particular psychiatric diagnosis. From a psychiatric perspective, I do not feel that Mr. Poblete currently suffers an impairment as a result of the subject accident."[17] He testified that he came to this conclusion because he did not observe any obvious signs of distress in Mr. Poblete, even though Mr. Poblete became tearful when discussing the effects of the accident.

I find this perspective to be overly narrow in the circumstances of this case, given the complex, multifactorial nature of chronic pain. The lack of a specific psychiatric diagnosis is not determinative and does not answer the question of whether Mr. Poblete's emotional or psychological difficulties and his perception of his pain, diagnosis aside, are sufficiently disabling that he would be substantially unable to engage in the essential tasks of his employment. Dr. Hines' report is at odds with those of other health practitioners, including the contemporaneous IE report of psychologist Dr. J. Shapiro, who subjected Mr. Poblete to a battery of tests and concluded he met the DSM criteria for Undifferentiated Somatoform Disorder and Dependent Personality Features, traits which would predispose him to emotional difficulties in dealing with chronic pain, and for which she found treatment was reasonable and necessary. Dr. Tunks also noted that Mr. Poblete was prone to somatization, but pointed out that

[17] Report dated July 10, 2007, Applicant's Brief, Volume 3, Book F, Tab 131, pg. 7

this was not a characteristic one could simply be "talked out of" through psychological counselling alone. I place no weight on Dr. Hines' opinion.

2009 ONFSCDRS 78 (CanLII)

On the evidence as a whole, I find, on a balance of probabilities, that Mr. Poblete is substantially unable to engage in the essential tasks of his employment as a plasterer, due to chronic pain which developed as a result of the accident, and that he continues to be disabled at this time. A psychovocational assessment undertaken by Dr. Daniel Cohen, psychologist, in November 2007 indicated that Mr. Poblete "exhibit[ed] symptoms of anxiety, depression and somatic complaints which are consistent with a clinically significant loss or abnormality of affective and behavioural control of moderate intensity." Review and testing of Mr. Poblete's work history, aptitudes, educational achievement, interests, medical restrictions and pain disorder indicated that there were no suitable and reasonable alternatives for competitive employment.

By the time of the hearing which began in May 2008, Mr. Poblete had been out of work for well over two years, living a sedentary and restricted (albeit self-restricted) lifestyle, having attempted unsuccessfully to return to work and to obtain significant improvement in his chronic pain condition through courses of physical and psychological therapy. As it stands now, given Mr. Poblete's entrenched chronic pain condition and his limited education and occupational and language skills, I find that, at the very least, until Mr. Poblete has completed the type of multidisciplinary pain programme and customized work-hardening programme tailored to his residual abilities, such as Dr. Tunks had in mind, and has been reassessed, it cannot be said that he is capable of any employment for which he is reasonably suited by education, training or experience.

In arriving at this conclusion, I considered, but did not find persuasive, Wawanesa's submission that I should not accept Mr. Poblete's claim that chronic pain resulting from the accident prevents him from working, because his testimony was not reliable, due to his selective recall of events and because he did not explain significant discrepancies in the evidence.

Wawanesa alleged that Mr. Poblete's unequivocal insistence that the motor vehicle accident caused him sufficient financial difficulty that he had to sell his house was not believable, for two principal reasons: one, Mr. Poblete first listed his house for sale on October 20, 2005, two and half months before the accident; and two, Mr. Poblete suffered stress before the January 10, 2006 accident, either because of a previous motor vehicle accident or other workplace injury.

I find the evidence put forward by Wawanesa to support its theory does not undermine Mr. Poblete's credibility.

There is no dispute that Mr. Poblete sold his house in Toronto on February 2, 2006, barely a month after the accident, for less than his original asking price, and that he bought a less expensive house in Hamilton. Wawanesa alleged that Mr. Poblete told a number of assessors that he had to sell his house in Toronto because he could not pay his mortgage due to his inability to work after the accident, when in fact he had intended to sell his house, and had listed it for sale, as early as October 2005. This, submitted Wawanesa, suggested that Mr. Poblete had financial difficulties, and stress associated with them, before the accident, which were significant contributors to his post-accident psychological difficulties driving his chronic pain condition. According to Wawanesa, it was not believable that Mr. Poblete would fall into such significant financial distress so soon after the accident.

In support of its theory, Wawanesa called Sonia Sessa, a real estate agent who listed Mr. Poblete's house, as a witness at the hearing. Ms. Sessa, whose testimony was extremely brief, testified that she listed the house on October 20, 2005 but could not remember many details, such as what the Pobletes' plans were or whether they intended to upgrade or downsize. She stated that they wanted to list the house for more than she recommended. Mr. Poblete testified that she was the one who suggested the price. Ms. Sessa stated that neither party was happy with their arrangement, and that she took down her sign and cancelled the listing on December 20, 2005. Up to that point, her evidence was irrelevant and unnecessary.

2009 ONFSCDRS 78 (CanLII)

On cross-examination by counsel for Mr. Poblete, however, Ms. Sessa volunteered that Mr. Poblete phoned her and told her he had had a car accident. At first, she said he had called her "over the holidays" (the Christmas holidays, presumably); she then said it was before she took her sign down on December 20. She said she felt sorry for him and so took him a cake, and he was very offended. Given this contradiction, Ms. Sessa's poor recollection of details, and her brief and mutually unsatisfactory relationship with the Pobletes, I do not consider her evidence either reliable or relevant, completely uncorroborated as it is, and place no weight on it.

Wawanesa further submitted that Mr. Poblete's failure to tell Wawanesa's assessors about previous injuries also undermined his credibility. It is true that Mr. Poblete's response, when asked about this, that he did not know why he failed to mention them and that perhaps he forgot, was not a very satisfactory answer. Just the same, I find the medical evidence presented, and the uncontradicted evidence of Mr. Poblete's solid and continuous work history prior to the accident, far outweigh any concerns about whether he disclosed previous injuries which appeared to be minor, and which did not affect his ability to work.

Although Mr. Poblete may have suffered from anxiety and had financial concerns before the accident, I find that the accident, and his resulting inability to work, were the major contributors to his post-accident psychological condition. Mr. Poblete, a manual labourer with very little education or English skills, has worked hard all his life, since childhood in fact, as he said himself, "like a beast." Even Juan Lopez, the union representative who has known Mr. Poblete for years, testified that he worked too hard and was always looking for overtime and extra hours, and he told Mr. Poblete many times to "get a life." Dr. Sheinbaum also emphasized the importance of his role as a hard worker and provider to Mr. Poblete's sense of himself. At the time of the accident, Mr. Poblete's wife did not work, and went to work afterwards to help make ends meet. For the first time in his life, Mr. Poblete had to accept social assistance for a time, which he found humiliating.

Wawanesa was suspicious that Mr. Poblete left Starwest, his long-term employer in August 2005 and moved to Superior, where he was not happy, prior to listing his house for sale that October. Regardless of the reason Mr. Poblete originally decided to sell his house, I find it reasonable that

2009 ONFSCDRS 78 (CanLII)

2009 ONFSCDRS 78 (CanLII)

he would become anxious about his financial situation if his employment future was uncertain after he left Starwest, and that he would become even more anxious after the January 10, 2006 accident where he suffered injuries that prevented him from working at all and called into question his ability to work at plastering in the future. Although the accident may not have been the only reason for Mr. Poblete to feel he was in financial difficulty, I accept his explanation that he felt he had to sell his house sooner and for a lower price than he would have liked, because he was unable to work due to his accident injuries. I find this is what Mr. Poblete believed, and I do not find there was any attempt on his part to mislead anyone. I find that, at the very least, the accident was a significant contributing factor to his psychological difficulties and chronic pain.

Entitlement to Medical Benefits

i) Physiotherapy Expenses

Mr. Poblete claims $834.87 for physiotherapy treatment provided by the AIM Clinic, which represents the balance of a Treatment Plan dated June 14, 2006 requesting $1,934.35 worth of treatment for 18 sessions of occupational conditioning exercise at $86.33 each, 6 massage treatments at $30 per session, $63.72 to prepare the Treatment Plan, and $136.69 for a formal re-evaluation. Wawanesa asked Mr. Poblete to undergo a chiropractic assessment with Dr. O'Grady, under s. 42 of the *Schedule*, to determine if the proposed treatment was reasonable and necessary because of the accident. Dr. O'Grady found it partially reasonable and necessary. She felt that, at 8 months post accident, Mr. Poblete clearly still suffered from accident-related impairments, but that he "should be transitioned into a more independent exercise programme. Therefore it would be reasonable to decrease the number and frequency of treatment." She recommended a reduced plan of physiotherapy twice per week for 3 weeks, followed by once a week for 3 weeks for a total of 9 physiotherapy sessions; and massage once a week for 2 weeks and then once a week for a further two weeks, for a total of four massage therapy sessions. Dr. O'Grady noted that Mr. Poblete was anxious to return to work at that time but apprehensive about his physical ability to do so, and she stated he should be instructed in exercises that would enable him to return to work.

I do not find Dr. O'Grady's reasons for reducing the Treatment Plan to be reasonable, because I do not think that she fully appreciated the fact that Mr. Poblete had developed a chronic pain condition and psychological symptoms, the kind of cluster of symptoms that Dr. Tunks felt were most successfully treated with early and *aggressive* intervention. Mr. Poblete is not a young man. The records indicate that he is overweight and not very fit, and that he was far less active 8 months after the accident than before. Furthermore, he told Dr. O'Grady he wanted to go back to his old, very physical, job. I do not find that winding down his physiotherapy sessions, to replace them with independent exercises, was a reasonable proposition at that time. I find Mr. Poblete ought to have had the full plan.

2009 ONFSCDRS 78 (CanLII)

ii. Work-Hardening Programme

Mr. Poblete claims $5,000 for the cost of a work-hardening programme proposed by the AIM Clinic in a Treatment Plan dated October 4, 2006.[18] This appears to have been a six-week programme consisting of 5 sessions per week, starting at two hours of "advanced occupational conditioning" per session and gradually increasing to sessions of four hours per day, supported by massage therapy to manage pain as activity increased. This Treatment Plan was prepared two days after Mr. Poblete's failed attempt to return to his old job on October 2, 2006. Wawanesa rejected the Treatment Plan and sent Mr. Poblete for an IE on November 17, 2006, with Sheri Corriero, a physiotherapist.[19]

Ms. Corriero found the programme itself to be a good one, and the associated costs reasonable, but felt "the client is not of [the] mindset to participate in an active programme." She appears to have reached this conclusion because Mr. Poblete reported no benefit from previous physiotherapy, the exercises being too difficult, claimed he had not done any active exercise in the previous 6 months, and a physiatrist, Dr. V.E. Hajek, had advised against "resisted exercises." Ms. Corriero felt "[p]rolonging this type of treatment will increase his dependency and prolong his sense of disability," and that it had not been effective in improving his functional abilities or perception of disability. She felt Mr. Poblete needed to increase his strength and

[18]Exhibit 2, Book E, Tab 118

[19]Report dated November 17, 2006, Book C, Tab D8

2009 ONFSCDRS 78 (CanLII)

endurance and engage in an active programme, but that he should accomplish this by resuming his previous activities, continuing his own independent home exercise programme, incorporating some strengthening exercises, and participating in an aquatherapy programme recommended by Dr. Hajek.

I do not think it was reasonable under the circumstances and given Mr. Poblete's psychological make-up, difficulties and coping skills, to leave him to his own devices to increase his strength and endurance. However, I agree with Ms. Corriero that this intensive physical programme, given the information provided to her, was premature, and not appropriate for Mr. Poblete at that particular time, as there was every indication that he would not be able to manage it given his deteriorated physical condition and psychological difficulties, particularly so recently after the aggravation of his symptoms after his unsuccessful attempt to return to his own job. This is unfortunate, as it was the opinion of Dr. Tunks, the only expert specializing particularly in treating chronic pain who testified at the hearing, that an aggressive rehabilitation programme geared to returning to work was exactly the type of programme that would benefit Mr. Poblete, and sooner rather than later. Unfortunately, the timing was not right, and I do not find the AIM work hardening programme was reasonable or necessary at that time.

iii. Botox Injections

Mr. Poblete claims $2,600 for Botox injections pursuant to a Treatment Plan of Dr. Mathoo dated November 16, 2006, refused by Dr. H. Platnik.[20] In his report, Dr. Platnik found the injections were not reasonable or necessary for the following reasons:

> Mr. Poblete sustained soft tissue injuries to his neck, back and left thigh as a result of the motor vehicle accident on January 10, 2006. These uncomplicated soft tissue injuries have resolved. Currently, there is no objective evidence of musculoskeletal, orthopaedic or neurological accident-related injury. Based upon this evaluation, I conclude that the disputed Treatment Plan from Dr. Mathoo, dated November 16, 2006, is not reasonable and necessary to treat accident-related injury."[21]

---

[20] Dated January 3, 2007, Book E, Tab 122

[21] P. 6

Dr. Platnik found no evidence of hypertonicity or spasm along the spinal muscles when he examined Mr. Poblete, and it is not clear what his opinion would have been if he had; Dr. Mathoo, however, did find tenderness over the entire lumbar area and mild spasm bilaterally when he examined him on November 16, 2006. According to his report of the same date, Dr. Mathoo proposed a trial of Botox for the lumbar area only, seeing as conservative treatment up to that point apparently had not been effective in relieving Mr. Poblete's symptoms. Mr. Poblete testified that he went for the injections, but he did not know if they would have helped and in any event the effect only lasted 2 -3 days, and then the pain returned. Dr. Tunks, in his testimony was quite critical of any piece-meal approach to treatment for chronic pain other than an intensive multidisciplinary rehabilitation programme, and he felt that Botox or psychological counselling or drug or injection therapy was not a reasonable substitute for a proper integrated programme.

As the type of programme Dr. Tunks had in mind represents something of a "gold standard" for the rehabilitation of chronic pain, and as Mr. Poblete did not have access to such a programme, I find a trial of Botox on the basis of Dr. Mathoo's positive findings and for pain relief, was not an unreasonable proposal at that time, and to the extent that the $2,600 represents the full trial, I find Mr. Poblete is entitled to that amount.

Is Mr. Poblete entitled to the costs of medical assessments under s. 24 of the *Schedule?*

i. $562 for Dr. Kirsh's chronic pain assessment — April 30, 2007

This was a request for an assessment with a social worker or an occupational therapist "to determine whether an admission is indicated to a cognitive behavioural multidisciplinary pain program" – in fact, the programme at Chedoke Hospital recommended by Dr. Tunks. Wawanesa refused to pay for this assessment on the basis of a paper review by Dr. Platnik on May 9, 2007. Dr. Platnik had examined Mr. Poblete on December 21, 2006. That report is discussed above. Despite extensive medical evidence to the contrary, Dr. Platnik was still of the view that Mr. Poblete's case was one of uncomplicated soft tissue injuries with no objective evidence to support ongoing musculoskeletal, neurological or orthopaedic accident-related injury, and, as

2009 ONFSCDRS 78 (CanLII)

there had been numerous assessments and long-term passive and active physiotherapy and psychological therapy, an assessment to determine if Mr. Poblete should be admitted to a multidisciplinary pain programme was not reasonably required. There is no indication that he at any time, ever considered the possibility that Mr. Poblete was suffering from a chronic pain condition, despite the opinions of Dr. Sheinbaum, Dr. Tunks and Dr. Vadasz, which is completely unreasonable given the medical evidence available to him and even considering that he is a general medical practitioner and not a specialist in chronic pain. As submitted by counsel for Mr. Poblete, this chronic pain assessment by Dr. B. Kirsh, a physician, and potential admission to the Chedoke programme, could have made all the difference to Mr. Poblete. I find it was unreasonable for Wawanesa to rely on Dr. Platnik's opinion to refuse to pay for this assessment.

2009 ONFSCDRS 78 (CanLII)

ii. $3,372.22 for a Psychovocational Assessment by Dr. Cohen

Dr. Cohen submitted a Request for Approval of Assessment ("OCF-22") dated March 22, 2007, asking Wawanesa to approve and pay for a psychovocational assessment. Wawanesa asked Dr. Shapiro, who had previously examined Mr. Poblete on February 20, 2007, to conduct a paper review of the assessment. Dr. Shapiro concluded that: "Mr. Poblete has been assessed from a psychological perspective on several occasions and the need for another such assessment is not warranted . . . As Mr. Poblete is currently undergoing psychotherapy [with Dr. Pilowsky] to address issues that are preventing him from returning to his pre-accident employment, I feel it is precipitous to provide a Vocational Assessment pending the outcome of his current therapy. As such, the OCF-22 submitted by Dr. Cohen is not seen to be reasonably required at this time."[22]

Mr. Poblete went ahead with the assessment anyway and incurred the expense for an assessment and report by Dr. Cohen.[23]

---

[22]Report dated March 30, 2007, Book F, Tab 128

[23]Report dated November 1, 2007 Book D, Tab 134

Ideally, the preferred approach to assessment and treatment for someone suffering from chronic pain, according to Dr. Tunks and Dr. Vadasz, would be: 1) participation in an integrated multidisciplinary pain management programme; 2) a vocational assessment to determine residual abilities; and 3) a work-hardening programme tailored to those remaining abilities, in that order. I find this to be an eminently reasonable course of action in the right circumstances, and, based on the totality of the evidence before me, such a course of action would have been of particular benefit to Mr. Poblete. However, that is not what happened. Instead, Mr. Poblete was subjected to numerous uncoordinated assessments and treatment schemes which, although well-meaning, do not appear to have helped much and which clearly left him frustrated, disappointed and unable to move forward with his life. His efforts on his own behalf also do not appear to have been very successful.

I find the assessment was reasonable despite Dr. Shapiro's concerns that it was premature. It was reasonable to conclude from the medical evidence available at that time and his attempt to return to work, that Mr. Poblete might not be able to return to his previous or similar physical employment; and, considering the importance of work to him, his despondency over his inability to work, and Wawanesa's denial of the AIM work-hardening programme, I find a psychovocational assessment at that time was a reasonable proposition. I do not see why it would be necessary to await the outcome of psychotherapy before going ahead with such an assessment.

At some point closer to the two-year mark (January 2008, in this case), when the disability test under the *Schedule* changes, the issue of whether Mr. Poblete was able to work at his own job or any reasonably suitable job would have been in dispute, and a vocational assessment would have become necessary. The fact that one took place earlier, under the circumstances, is not unreasonable. I find Mr. Poblete is entitled to the cost of this assessment under s 24 of the *Schedule*.

2009 ONFSCDRS 78 (CanLII)

iii. $1,654.25 for a Psychological Assessment by Dr. Pilowsky

Wawanesa refused to pay for this assessment by way of an OCF-9 dated December 12, 2006, which states, "The recent insurer's examination addendum states that the above assessment is not reasonably required." The IE noted was not included in the briefs provided. In any event, as Wawanesa paid for a psychological assessment by Dr. G. Ilacqua in June 2006 after Mr. Poblete moved to Hamilton[24], Wawanesa should not be required to pay for Dr. Pilowsky's assessment as well.

2009 ONFSCDRS 78 (CanLII)

iv. $1,603.72 for a Physiatry Assessment by Dr. S. W. J. Wong dated January 24, 2008

On February 8, 2008, an invoice on behalf of Mr. Poblete was submitted to Wawanesa for a report prepared by Dr. S. W. Joseph Wong, a physiatrist.[25] There does not appear to be a related OCF-22 or OCF-9 in the exhibits provided. It is not clear whether approval was requested for this assessment under s. 24 of the *Schedule.* I was provided with no basis to award Mr. Poblete the cost of this report under that provision. It might more appropriately be claimed as an arbitration expense.

v. $310 for a Functional Assessment by Back to Health dated December 12, 2007

Wawanesa paid $1,000 for this assessment, declining to pay the balance of $310 on the basis that the cost was unreasonable. I heard no evidence to the contrary. I find Wawanesa is not required to pay the balance of $310.

[24]Book D, Tabs 32 and 33

[25]Book C, Tab C3

2009 ONFSCDRS 78 (CanLII)

Special Award

Subsection 282(10) of the *Insurance Act* provides that:

> 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*.

A useful summary of the general principles and criteria developed over the years by arbitrators in deciding whether an insurer's conduct warrants a special award is to be found in the recent decision of Arbitrator Bujold in *Brazier and RBC General Insurance Company*[26] and need not be repeated here.

Briefly, a special award will be made where an insurer has acted unreasonably, i.e. not necessarily in bad faith or to the extent of wilful misconduct, but in a manner that is "excessive, imprudent, stubborn, inflexible, unyielding or immoderate."[27] Insurers can be wrong – an incorrect interpretation or failure to comply with a provision of the *Schedule* will not attract a special award, and claims handling should be evaluated on the basis of the information available at the time, not judged from hindsight nor held to a standard of perfection.[28] As well, the conduct of both parties needs to be considered.[29]

[26](FSCO A07-001290, May 28, 2009)

[27]*Plowright and Wellington Insurance Company* (OIC A-003985, October 29, 1993)

[28]*Aviva Canada Inc. and Peters* (FSCO P06-00013, March 15, 2007) Appeal

[29]See, for example, *Garcia and Liberty Mutual Insurance Company* (FSCO A98-001471, January 27, 2000)

Mr. Poblete claims a special award on the basis that Wawanesa failed to see and respond to his chronic pain condition for what it was and did nothing more than the bare minimum to rehabilitate him, and that its persistent denials of his claims for IRBs, treatment and assessments, and its numerous demands for its own assessments, resulted in delayed payments and significant financial hardship to him.

I agree. I find Wawanesa ought to have been aware that Mr. Poblete was suffering from chronic pain and significant psychological sequelae of the accident at least from its own IE report (Dr. Sheinbaum) in May 2006, and, in the face of considerable evidence to the contrary it was not reasonable for it to rely selectively on the IEs of health practitioners who ignored or downplayed Mr. Poblete's pain complaints, to deny benefits. When it became clear that Mr. Poblete was deriving limited benefit from physiotherapy and his psychological difficulties were not resolving despite psychotherapy, Wawanesa should have been more open to considering more appropriate options, in particular the month-long comprehensive multidisciplinary Chedoke chronic pain programme recommended by Dr. Tunks.[30] I find Wawanesa's refusal to even consider Mr. Poblete's request to be assessed for this programme, at the very reasonable cost of $562, after he had attempted a return to work and had been denied the AIM work-hardening programme, was completely unreasonable, and supports Mr. Poblete's assertion that Wawanesa simply did not want to acknowledge that he had developed a chronic pain condition and that it was unwilling to rehabilitate him on that basis.

Mr. Poblete's case was not a straightforward one by any means. Mr. Poblete underwent an inordinate number of assessments at the behest of Wawanesa, his own doctors, and no doubt on the advice of his counsel. Many of his requests were initially denied by Wawanesa, only to be subsequently approved by IEs. The clear impression left is that Wawanesa was more interested in minimizing its exposure and papering its file than it was in attempting to see Mr. Poblete's case for what it was – a chronic pain condition – and properly funding appropriate treatment. I find this conduct was inflexible and imprudent, and resulted in denial of timely and appropriate treatment which could have made all the difference to Mr. Poblete.

[30] I note that Dr. Vadasz, who referred Mr. Poblete to Dr. Tunks, also agreed that this type of multidisciplinary programme was the best approach to treating chronic pain.

2009 ONFSCDRS 78 (CanLII)

I further find that Wawanesa's initial denial of IRBs, although later acknowledged to be premature and eventually reversed, left Mr. Poblete without income for a period of time and imposed unnecessary financial uncertainty and hardship on him, which Wawanesa had sufficient information to have foreseen.

2009 ONFSCDRS 78 (CanLII)

Considering the complexity of this case as a mitigating factor, however, I find the conduct warrants a moderate special award in the mid-range of the scale between 0 and 50%. The "overdue" benefits on which the special award is payable are the IRBs from July 16, 2007; $834.87 for physiotherapy; $3,372.22 for Dr. Cohen's psychovocational assessment; and $2,600 for the Botox injections.[31]

According to the decision of Director's Delegate Draper in *Liberty Mutual Insurance Company and Persofsky*[32], one cannot arrive at a realistic or appropriate figure for a special award without first determining what the maximum interest payable would be, under subsection 282(10). Although one may want to locate the gravity of the insurer's conduct along a continuum, it is not sufficient to assign a percentage without determining whether the amount calculated is appropriate, and proportionate.

The maximum special award payable in this case, 50% of the dollar amount of benefits found owing including interest calculated as per subsection 282(10), is unlikely to exceed $50,000. I find a lump sum of $7,500 represents a special award that is moderate, appropriate and proportionate, given all the circumstances.

EXPENSES:

Subsection 282(11) of the *Insurance Act* provides that an arbitrator may award, according to criteria prescribed by the regulations, to the insured person or the insurer, all or part of such

---

[31]Expenses for treatment are considered "overdue" in accordance with the timelines set out in subsection 38(8.2)2; assessment costs are "overdue" 30 days after the insurer received the invoice.

[32](FSCO P00-00041, January 31, 2003) Appeal

expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations, to the maximum set out in the regulations.

2009 ONFSCDRS 78 (CanLII)

The criteria that an arbitrator must consider when deciding which party, if any, should be entitled to have its arbitration expenses paid by the other, are set out in the "Expense Regulation" and are as follows:

> 12(2) An arbitrator shall, under subsection 282(11) of the Act, consider only the following criteria for the purposes of awarding all or part of the expenses incurred in respect of an arbitration proceeding:
>
> 1. Each party's degree of success in the outcome of the proceeding.
> 2. Any written offers to settle made in accordance with subsection (3).
> 3. Whether novel issues are raised in the proceeding.
> 4. The conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders.
> 5. Whether any aspect of the proceeding was improper, vexatious or unnecessary.
> 6. Whether the insured person refused or failed to submit to an examination as required under section 42 of Ontario Regulation 403/96 (*Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*) made under the Act or refused or failed to provide any material required to be provided by subsection 42 (10) of that regulation.
>
> (3) Upon the request of the insurer or the insured person, the arbitrator shall, for the purposes of awarding expenses, take into account all written offers to settle, if any,
>
> (a) that were made after the conclusion of mediation and before the conclusion of the arbitration; and
>
> (b) that were made in accordance with the rules of practice and procedure applicable to the proceeding.

> (4) If the arbitrator is requested to take into account a written offer under subsection (3), the arbitrator shall have regard to the terms of the offer, the timing of the offer, the response to the offer and the result of the proceeding.

2009 ONFSCDRS 78 (CanLII)

Counsel conducted themselves professionally throughout the hearing, there were no novel issues and, as far as I know, no offers to settle under Rule 76 of the *Dispute Resolution Practice Code*. This leaves each party's success in the proceeding as the remaining relevant criteria, I should consider. Although Mr. Poblete was not 100% successful, he was entirely successful on the most significant issue for him, his ongoing entitlement to an IRB, and he was required to bring this arbitration proceeding in order to obtain this benefit. He has also been successful in obtaining a special award. For these reasons, I find that Mr. Poblete is entitled to his expenses of the arbitration proceeding.

If the parties are unable to agree on the amount of expenses, either party may request a hearing in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

______________________________	June 18, 2009
Susan Sapin Arbitrator	Date

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario

Neutral Citation: 2009 ONFSCDRS 78

FSCO A06-002193

BETWEEN:

GUIDO POBLETE

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. Wawanesa shall pay to Guido Poblete Income Replacement Benefits of $400 per week from July 16, 2007 and ongoing, under subsection 4(1) of the *Schedule*.

2. Wawanesa shall pay to Mr. Poblete medical expenses under s.14 of the *Schedule* of:

   i. $834.87 for physiotherapy treatment;

   ii. $2,600 for Botox injections.

3. Wawanesa shall pay to Mr. Poblete $5,847.94 for the cost of medical assessments under s. 24 of the *Schedule*.

4. Wawanesa shall pay to Mr. Poblete a special award of $7,500 under subsection 282(10) of the *Schedule*.

2009 ONFSCDRS 78 (CanLII)

5. Wawanesa shall pay to Mr. Poblete interest on the above payments under section 46 of the *Schedule*.

6. Wawanesa shall pay to Mr. Poblete his expenses of the arbitration proceeding as agreed or assessed, under subsection 282(11) of the *Insurance Act*.

___________________________	June 18, 2009
Susan Sapin Arbitrator	Date

2009 ONFSCDRS 78 (CanLII)