File No.: A-009277

BETWEEN:

WILLIAM J. WHYTE

Applicant

and

METROPOLITAN INSURANCE

Insurer

DECISION

The Applicant, William J. Whyte, was injured in a motor vehicle accident on September 23, 1990. The injuries sustained by Mr. Whyte prevented him from carrying out the essential tasks of his employment as the manager of a shoe store. He applied for and received weekly income benefits payable under Ontario Regulation 672[1] at the rate of $583.19 until July 15, 1991, when his weekly income benefit was terminated. Mr. Whyte found alternate employment in September 1991, and was continuously employed until March 1993 when he left work claiming that as a result of the September 23, 1990 accident he was again disabled. He applied for further weekly income benefits which were paid from March 28, 1993 until November 30, 1993, when they were terminated by the Insurer.

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

In March 1995, Mr. Whyte underwent an anterior discectomy and fusion at the C5-6 level of his spine which successfully eliminated his symptoms. During the course of the hearing Mr. Whyte stated that although he had not yet secured employment, he felt fit to return to work. Based upon this admission, Mr. Whyte's counsel advised that the Applicant's claim would be limited to weekly income benefits from November 30, 1993 to August 31, 1995.

Issues:

The issue in this hearing is:

1. Is the Applicant entitled to weekly income benefits between December 1, 1993 and August 31, 1995?

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

The parties agree that any weekly income benefit awarded to the Applicant is to be paid at the rate of $583.19.

Result:

1. The Applicant is entitled to weekly income benefits at the rate of $583.19 from December 1, 1993 to August 31, 1995, together with interest thereon, in accordance with section 24(4) of the *Schedule*.

2. The Applicant is entitled to his expenses.

Hearing:

The hearing was held in Hamilton, Ontario, on September 26, 27, and 28, 1995, before me, Stewart M. McMahon.

Present at the Hearing:

Applicant:	William J. Whyte
Applicant's Representative:	Michael W. Kelly Barrister and Solicitor
Insurer's Representative:	J. Claude Blouin Barrister and Solicitor
Insurer's Officer:	Ken Enston

Witnesses:

Mr. W. Whyte, Dr.R. Zizzo, Mr. N. Scott, and Dr. J. Chong

Exhibits:

Five Exhibits were filed, they are listed in Schedule A to these reasons. Exhibits 1, 2, 3 and 4 are voluminous medical and document briefs. Only those specific reports referred to by counsel during the course of the hearing were treated as filed and considered by me in my deliberations.

Preliminary Legal Issues

Mr. Blouin, counsel for the Insurer, raised two preliminary issues based upon Mr. Whyte's extended return to work between September of 1991 and March of 1993. I will deal with each of Mr. Blouin's arguments in turn.

(i) Effect of Section 16(2)

The Insurer argues that because Mr. Whyte worked after the second anniversary of the accident for a period exceeding 90 days, section 16(2) operates as a complete bar to a claim for any further weekly benefits. The Applicant argues that the section does nothing more than cast an onus upon him to re-establish the connection between the renewed disability and the motor vehicle accident.

Section 16 reads as follows:

> 16(1) Subject to section 15 and subsection (3), a person receiving a benefit under this Part may attend school or accept, or return to, work at any time

> during the first two years following the accident for any period of time without affecting his or her benefits under this Part if, as a result of the accident, he or she is unable to continue at school or in the occupation or employment.
>
> (2) Subject to section 15 and subsection (3), after the two year period referred to in subsection (1), a person receiving a benefit under this Part may attend school or accept, or return to, an occupation or employment for periods of up to ninety days without affecting his or her benefits under this Part if he or she, as a result of the injury, is unable to continue at school or in the occupation or employment.
>
> (3) The insurer is not required to pay weekly benefits under section 13 for any week in which the insured person attends school.

Arbitrator Draper, as he then was, considered the effect of section 16(2) in *Earl Joseph Russell and Co-Operators General Insurance Company*, December 20, 1993, OIC File No. A-005417. Arbitrator Draper stated that the purpose of section 16 was to encourage people to go back to work and that it was designed to provide limited protection to those making an attempt to return to work by shielding them from the otherwise inevitable conclusion that they were no longer entitled to benefits. He went on to find that if an insured returns to work beyond the second anniversary of the accident, for a period exceeding 90 days, he or she loses the protection of the section and becomes ineligible for further weekly income benefits.

I agree that the purpose of section 16 is to encourage people to make attempts to return to work. I disagree with the conclusion that within the first three years a person could become disentitled to future benefits merely because they are able to return to work. There is no requirement in section 12(1) that the disability need be continuous. Section 12(5)(b) requires the insured to demonstrate that the disability is continuous, but that requirement is not imposed

until after a period of 156 weeks. Accordingly, in my view, section 16(2) which takes effect during the currency of the first 156 weeks, must have some effect other than to bar an insured from further benefits, merely because he returns to work for more than 90 days.

Section 16 was also considered by Senior Arbitrator Rotter in *Rene G. Lafleur and Zurich Insurance Company,* May 11 1995, OIC File No. A-004141. After reviewing the case of *Dowling v. Phoenix* (1989), 70 O.R. (2d) 311(H.C.J.), which considered a far more restrictive provision in the policy in effect prior to the amendments to the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, that created the "no-fault" system that is commonly referred to as the Ontario Motorist Protection Plan (OMPP), Senior Arbitrator Rotter found that nothing in the language of section 16 justified the conclusion that the insured would be automatically precluded from receiving further benefits if he or she returned to work. Senior Arbitrator Rotter concluded that if an insured returned to work for more than 90 days, he would lose only the presumption of ongoing eligibility. She stated

> In effect, a "rebuttable presumption" that the person does not remain disabled has been created. Nevertheless, as stated in *Dowling*, the issue of ongoing disability and entitlement to benefits remains a question of fact to be determined.

Support for Senior Arbitrator Rotter's conclusion can also be found in *Re Howe v. Economical* (1989), 70 O.R. (2d) 306 at 310, where Justice Gautreau, who was considering the same clause as reviewed in *Dowling*, stated:

> I infer that this provision involves nothing more that an evidentiary marker. If the insurer accepts that the insured is disabled by paying him a weekly benefit

> and the insured then returns to work for less than 30 days, but is unable to continue, it may be presumed that the insured is still disabled and entitled to benefits; but if he returns for more than 30 days, there will be an onus shift to the insured to establish his disability.

On the strength of the above reasoning, I conclude that because Mr. Whyte returned to work almost continuously from September of 1991 to March of 1993, the effect of section 16(2) is to place an onus upon Mr. Whyte to re-establish the causal connection between his subsequent disability and the motor vehicle accident of September 23, 1990.

I will deal with the question of whether Mr. Whyte has met that onus later in these reasons.

(ii) Section 12(5)(b) and the meaning of the phrase "for any period in excess of 156 weeks"

The second preliminary legal issue concerns the interpretation of the phrase "for any period in excess of 156 weeks" Section 12(5)(b) reads,

> (5) The insurer is not required to pay a weekly benefit under subsection (1),
>
> (b) **for any period in excess of 156 weeks** unless it has been established that the injury continuously prevents the insured from engaging in any occupation or employment for which he or she is reasonably suited by education, training or experience.

In general terms the effect of Section 12(5)(b) is to create a more stringent test for benefits beyond 156 weeks. Firstly, the disability must be continuous, and secondly, the insured must

be disabled from carrying on any occupation or employment for which he or she he is reasonably suited. On this preliminary point, I am asked to decide how to define the period of 156 weeks.

The Insurer argues that the "period" should be calculated on the basis of consecutive weeks from the date of the accident. The Applicant argues that only those weeks during which the insured is disabled ought to be included in the calculation. The Applicant further argues that the period may be interrupted if the insured's disability temporarily subsides allowing him to return to work. On the facts of this case, if the Insurer's argument is accepted, the "period" ends on September 23, 1993, being the third anniversary of the accident; if the Applicant's argument is accepted, the "period" ends on May 23, 1995.

The meaning of the phrase "for a period in excess of 156 weeks" has been the subject of careful scrutiny in two decisions released by the Commission. In the first, *Pina Coles and Dominion of Canada General Insurance Company*, February 13, 1995, OIC File No. A-007416, Arbitrator Palmer concluded that the "period" should be interpreted as 156 weeks of paid benefits. In the second, *Lafleur*, Senior Arbitrator Rotter concluded that the "period" ran consecutively from the date of the accident, ending on the third anniversary, regardless of whether or not benefits were paid during the entire period.

In the former case, Arbitrator Palmer was concerned with the effect of the receipt of collateral benefits upon the "period." That situation is not before me and I make no comment upon it.

A number of factors lead me to conclude that the better interpretation of the "period" is to treat it as 156 weeks of disability, which may be interrupted by periods of return to work.

Firstly, section 12(1) defines the benefit period as the "period in which the insured person suffers substantial inability to perform the essential tasks of his or her occupation or employment." In my view it is implicit that where the term "period" is used in later subsections, unless a contrary intention is expressed, the period is to be defined by reference to section 12(1). It follows therefore that when the term "period" is used in subsection 12(5)(b), it refers to the period of disability. Taken in this context, section 12(5)(b) should be read as follows:

> for any period [in which the insured person suffers substantial inability to perform the essential tasks of his or her occupation or employment] in excess of 156 weeks unless it has been established that the injury continuously prevents the insured from engaging in any occupation or employment for which he or she is reasonably suited…

Considered in this light, the effect of section 12(5)(b), in my opinion, is to limit the benefit provided for in section 12(1) to 156 weeks of potential benefits based upon a disability with respect to his own occupation or employment. In my view, there is no need to read the section as imposing the further limitation that the benefit period is limited to the first 156 weeks immediately following the accident.

As noted by Arbitrator Palmer in *Coles* in Section 11(3)(b) of the *Schedule* which deals with death benefits, the "period" is defined as "156 weeks **from the day of the accident**…" The

inference drawn by Arbitrator Palmer was that if the drafters had intended the "period" in section 12 to be the same as that provided for in section 11, they would have used the same wording. Instead, the drafters chose the more ambiguous wording "for any period in excess of 156 weeks," without any reference to it running consecutively as was done in section 11.

Reference may also be made to section 16 of the *Schedule* which, as Senior Arbitrator Rotter notes in *Lafleur,* is closely connected to section 12. As discussed earlier in these reasons, section 16(2) defines the period within which an insured may return to work without affecting his entitlement to benefits. The period is defined as "the first two years following the accident." Here again the wording clearly defines the period as running consecutively from the date of the accident.

In my view, if the drafters had intended the "period" in section 12 to run consecutively from the date of the accident, it would have been a simple matter to have included words to that effect, as was done in the above-noted sections.

Secondly, following the Court of Appeal's decision in *Coombe v. Constitution* (1980), 29 O.R. (2d) 729, "the legislation [no-fault coverage, required by regulation to be included in all motor vehicle liability policies] was designed for the protection of the insured and should be construed in the way most favourable to him." In my view, the most favourable way of interpreting the phrase is to treat it as meaning "weeks of disability."

Thirdly, both the parties and society in general benefit if the insured is encouraged to return to work. The *Schedule* as a whole reflects this, and specific provisions ought to be read so as to

encourage an early return to work. Treating the "period" as weeks of disability is more consistent with this approach, because it ensures that the insured does not lose the possibility of recovering 156 weeks of benefits under section 12(1) merely because he or she makes an attempt to return to work.

Fourthly, Judge Gautreau in the aforementioned *Re Howe* decision considered a similar provision in the pre-OMPP policy. The wording of the present section has been simplified and the period increased from 104 weeks to 156 weeks, but with those exceptions the effect of the two sections is the same; namely, to create a more stringent test for benefits beyond a defined period.

Like the present case, Justice Gautreau was considering the case of an insured who temporarily returned to work. Justice Gautreau defined the "period" as "weeks of benefits." On a reading of *Re Howe*, I think it is fair to say that Judge Gautreau was concerned with the effect of the cessation of benefits due to a temporary abatement in the disability, rather than on any reduction or elimination of benefits due to the receipt of collateral benefits. In that sense when he defines the period as weeks of benefits, his conclusion is consistent with my own. I have chosen to define the period solely by reference to the time of disability to avoid any conflict with the collateral benefit provisions of the *Schedule*.

As was stated by the Court of Appeal in *Meyer v. Bright* (1993), 15 O.R. (3d) 129 at 134, the OMPP represented a trade-off. Access to third party tort claims was severely curtailed, but in exchange, individuals were given access to significantly enhanced "no-fault" benefits. In light of this, it would, in my view, be incongruous if the "period" which had previously been

judicially interpreted as weeks during which benefits are paid was now more restrictively interpreted so as to be limited to consecutive weeks from the date of the accident.

In *Lafleur*, Senior Arbitrator Rotter distinguished *Re Howe* on the strength of submissions that the pre-OMPP scheme did not have a section analogous to section 15 of the *Schedule* which allows the insurer to reduce a weekly benefit to account for post-accident income. I disagree with this conclusion. The pre-OMPP scheme also had a provision for accounting for post-accident income. The applicable provision reduced the insured's gross weekly income (upon which his benefit was calculated) by an amount equal to his post-accident income. The present *Schedule* accounts for post-accident income by reducing the benefit by 80% of the post-accident income. The effect may differ in some cases, but the general intent is the same, and I would not distinguish *Re Howe* on this basis. No other grounds for distinguishing *Re Howe* were raised before me.

For these reasons, I interpret the phrase "for any period in excess of 156 weeks" as 156 weeks of disability, which period may be interrupted by periods of return to work. On the facts of this case, I find that the 156 week period ends on May 23, 1995.

Ability to perform essential tasks

(i) Background

Mr. Whyte is 43 years old. He lives with his wife and two children in Hamilton. He is a high-school graduate. With only two significant exceptions, all of his pre-accident work experience

was in the retail shoe business. For approximately three years in the early 70s he worked for Stelco, and for one year he drove a tow truck. I am satisfied that these two occurrences were brief departures from Mr. Whyte's vocation, which is shoe sales. Mr. Whyte has a history of moving from one shoe company to another fairly regularly. He generally rose to a store manager's position quickly, and on one occasion was promoted to district manager.

At the time of the accident, he had been working for Maher Shoes for 19 weeks. He was hired on the basis that he would be the manager of a new store. He was being trained for this position at the time of the accident. Mr. Whyte testified that as a manager he could expect to earn approximately $40,000 per annum based upon a salary, plus commissions on his own sales, and bonuses on the store's overall sales.

(ii) The Test

Section 12 of the *Schedule* sets out the basis for entitlement to weekly income benefits. Section 12(1) provides that during the first 156 weeks the insured is entitled to benefits "during the period in which the insured person suffers substantial inability to perform the essential tasks of his or her occupation or employment."

As manager, Mr. Whyte was responsible for the day to day operation of the store, but his most important functions were related to the store's sales and his compensation reflected this emphasis. Mr. Whyte estimated that he spent 50% of his time on sales, 25% on merchandising (stocking and displaying merchandise), and 25% on other administrative duties.

The essential tasks of Mr. Whyte's position can be divided into two main categories. The first are the physical tasks including the ability to stock shelves, to stand for extended periods, and to bend over to fit customers' shoes.

The second set of tasks is non-physical in nature, but ultimately far more important to Mr. Whyte's success. With respect to Mr. Whyte's management duties, he must be able to organize, supervise and motivate his staff. With respect to his sales responsibilities, he must be able to persuade customers to purchase the store's product. This second set of tasks is less dependent upon Mr. Whyte's physical abilities than on his ability to communicate with other individuals, be they staff or customers.

(iii) Post 156 Week Test

As noted above, at the end of the 156 week period, section 12(5)(b) provides that the insured must establish that the injury continuously prevents him from engaging in any occupation or employment for which he is suited, by education, training or experience.

It has been frequently stated that the test for benefits at the 156 week mark is substantially more stringent than the test during the first 156 weeks. I agree with this general comment, but it should not be forgotten that the test is not any occupation that the insured is capable of, but only one for which the individual "**is reasonably suited by education training or experience**." In *Judy Spicer and State Farm Mutual Automobile Insurance Company*, May 24, 1995, OIC File No. A-010158, Arbitrator Draper indicated that each case must be considered on its own merits but that

> the range of alternative employment that may be considered depends on the applicant's background. It may include jobs that are different from the work that he or she was doing at the time of the accident, but only if they are reasonably suitable or appropriate for the applicant. If the job is substantially different in nature, status, or remuneration it may not be an appropriate alternative.

I agree with this statement. Considering these principals, and Mr. Whyte's personal history, I find that he is reasonably suited for a sales position, with an opportunity for some managerial duties.

(iv) The Accident and its Effects

The accident occurred at 7:00 p.m. on September 23, 1990. Mr. Whyte was stopped at a red light when his vehicle was struck from the rear. Mr. Whyte was shaken up, but he was able to drive home. His 1971 Mercedes was operable but ultimately irreparable.

Mr. Whyte saw his family physician, Dr. Zizzo, the day after the accident, with complaints of pain in his right neck and shoulder, pain in his mid-and low back, and tingling in his right arm. Dr. Zizzo diagnosed whiplash. Over the course of the winter Mr. Whyte received chiropractic and physiotherapy treatments and was seen by a physiatrist. The most noteworthy aspect of Mr. Whyte's early treatment was a very heavy reliance upon medication. By January of 1991, Mr. Whyte was taking combinations of Tylenol 1,2 and 3 and Aroudis for pain control; Robaxisol as a muscle relaxant; and Prozac for depression.

By March of 1991 Dr. Zizzo was sufficiently concerned about Mr. Whyte's consumption of prescription drugs, and other signs of what he characterized as "illness behaviour," that he

referred him to Dr. Schneider, a psychiatrist. Mr. Whyte saw Dr. Schneider over the course of the summer, but stopped seeing him after a falling out over the nature of his illness. Mr. Whyte testified that Dr. Schneider sought to convince him that his physical ailments were largely resolved, and that the "pain was all in my head." Mr. Whyte was unable to accept this.

In July 1991, two significant events occurred. Firstly, the Insurer terminated Mr. Whyte's weekly benefits on the strength of an IME conducted by Dr. Jeremias, an orthopaedic surgeon. Secondly Dr. Zizzo refused to renew Mr. Whyte's analgesic prescriptions, and refused to sign a welfare form stating that Mr. Whyte continued to be disabled. Dr. Zizzo testified that at the time he felt his patient's physical complaints were insufficient to prevent him from working, and that it was essential that he attempt to break the illness cycle by making an effort to return to work. Dr. Zizzo indicated that Dr. McKnight, the physiatrist, and Dr. Schneider, the psychiatrist, concurred.

In September 1991, Mr. Whyte secured a job with Wallace and Kerry, a food wholesaler. Initially he worked in the warehouse. He was responsible for sorting and preparing customers' orders for loading onto delivery trucks. In December, Mr. Whyte began to drive one of the delivery trucks. Initially he thought this would be lighter work, but he soon found it more difficult unloading the produce off the truck and into the stores. In March 1992, he was asked to quit or be fired because he was chronically late for his early morning shift and was unable to finish his route in the allotted time.

Mr. Whyte testified that he took the job because his benefits had been cut off and it was the "first job that paid enough to feed my family." Mr. Whyte also testified that he was in

constant pain (principally pain in the lower back and headaches), and that the only way he could keep going was to ingest large amounts of Tylenol #1 tablets throughout the day, and beer at night. He estimated that he drank six pints of beer per night. In a clinical note dated December 10, 1991, a nurse in Dr. Zizzo's office calculated that between September 9 and October 21, Mr. Whyte consumed 630 Tylenol #1 tablets. I accept the evidence concerning Mr. Whyte's complaints and his consumption of analgesics and alcohol to try and cope with those complaints.

In point of fact, Mr. Whyte was not coping as evidenced by his employer's edict to quit or be fired.

Dr. Zizzo was asked if he believed that Mr. Whyte's addiction was the cause of his inability to keep up with the demands of the job at Wallace and Kerry. Dr. Zizzo stated that while he had concerns about the extent of Mr. Whyte's substance abuse, he did not believe that it was the cause of his disability. He characterized the substance abuse as a "mal-adaptive response" to the chronic pain that Mr. Whyte was trying to cope with. It was Dr. Zizzo's opinion that it was the chronic pain that disabled Mr. Whyte.

I accept that at the time Mr. Whyte left Wallace and Kerry, he was suffering from chronic pain, and that his ability to cope with the demands of the job had been eroded.

I disagree with Dr. Zizzo's suggestion that the substance abuse did not play a significant role in Mr. Whyte's disability. Firstly, Dr. Zizzo acknowledged that undoubtedly Mr. Whyte was under-reporting his alcohol consumption. Secondly, Dr. Chong testified that the amount of

Tylenol being taken by Mr. Whyte was far in excess of safe limits. Headaches, drowsiness, listlessness, and an inability to concentrate are all common side effects of substance abuse. I find that Mr. Whyte's substance abuse played a significant part in his ongoing disability. Having said that, there was no evidence of chronic substance abuse prior to the accident,[2] and I am satisfied that the substance abuse arose out of the chronic pain; in that sense, I agree with Dr. Zizzo's characterization of the abuse as a "mal-adaptive response" to the chronic pain.

Shortly after quitting the job at Wallace and Kerry, Mr. Whyte found a job as a salesman at a men's clothing store. In August he quit the clothing store because he found a job in shoe sales at Town Shoes. After a couple of months' training, Mr. Whyte was given a store to manage in a Hamilton shopping mall.

Mr. Whyte testified that initially the job at Town Shoes went very well, but that he soon began to have difficulties. Among his complaints were constant headaches, low back pain and increasing numbness and loss of strength in his right hand. Mr. Whyte testified that his use of Tylenol #1 remained very high. There are numerous references in the medical records to the amount of Tylenol he was ingesting during this period. The most consistent number is between 25 to 35 per day. Mr. Whyte also stated that he continued to consume on average six beers per night.

[2] There was evidence that Mr. Whyte had previously been arrested for impaired driving, but this charge was dismissed. Even had a conviction been recorded, such an isolated incident is insufficient to establish a history of substance abuse.

Mr. Nigel Scott, who worked with Mr. Whyte at Town Shoes for approximately half a year, testified that all Mr. Whyte talked about was his neck and back and that he took "pots of aspirin." He stated that Mr. Whyte frequently retired to the back room to sit down. He testified that the store did not do well under Mr. Whyte's management. Clean-up and stocking did not get done, staff morale was low, and the store's sales targets were not met. These problems were quickly rectified after Mr Whyte left the store. Mr. Scott still works for Town Shoes, and is now in a supervisory position. He has not had contact with Mr. Whyte since the spring of 1993. While it was evident that he was sympathetic to Mr. Whyte, I found him to be a credible and a largely impartial witness. I accept his evidence.

A review of Mr. Whyte's employee file also reveals that his performance soon deteriorated. In a note that is contemporaneous with his appointment as the manager, there is a reference to difficulties in supervising staff. In January there is a note concerning problems with administrative procedures that were not being followed, and in April there is a further note about Mr. Whyte's handling of the sales receipts. Finally, there is a note authored by the manager who replaced Mr. Whyte in the spring of 1993, regarding unaccounted for stock.

Mr. Whyte gave evidence that because of the constant headaches, pain in his back, and a worsening of the numbness in his right arm and hand, he was unable to apply himself to selling, and that his take home pay was down by $200 per week. No supporting documentation was filed on this point, but Mr. Whyte's testimony is consistent with other evidence, and I accept that his sales were down and that this had a significant effect on his remuneration.

There is some discrepancy about how and why Mr. Whyte terminated his employment with Town Shoes. Just prior to leaving, Mr. Whyte saw Dr. Chong, who operates a multidisciplinary rehabilitation clinic in Hamilton. Dr. Zizzo's clinical notes suggest that Mr. Whyte left work at Dr. Chong's suggestion. Dr. Chong denied that he suggested Mr. Whyte leave work. Dr. Chong referred to his own initial consultation note which states that based on Mr. Whyte's physical status, he would have great difficulty at work, but that despite this, he was continuing because of his family, and that the clinic would try to arrange a rehabilitation program around Mr. Whyte's work schedule. I note that Mr. Whyte left work on March 17, 1993, within two weeks of seeing Dr. Chong, and thereafter enrolled in a full-time program at Dr. Chong's clinic.

Whatever the role that Dr. Chong played in Mr. Whyte's decision to leave work, I am satisfied that by the spring of 1993, while he may have been showing up at the store, he was not substantially able to complete the essential tasks of his employment. His ability to handle his own sales assignments and to supervise the staff and manage the store was substantially impaired by his condition.

I heard evidence of an increase in Mr. Whyte's physical limitations over the winter of 1993, principally a worsening of the numbness, and loss of strength and dexterity in Mr. Whyte's right hand, but I find that it was principally Mr. Whyte's poor psychological health that rendered him disabled. Initially, at least, it did not appear that the injury sustained by Mr. Whyte was very severe, and one would have hoped that he would have made a quick and uneventful recovery. Unfortunately, Mr. Whyte quickly spiralled down into a pattern of

"illness behaviour" characterized by a fixation on his physical complaints, and reliance on heavy doses of analgesics and alcohol.

As a result of Mr. Whyte's fixation on his physical complaints, and his substance abuse, he was unable to focus on the tasks at hand. Mr. Whyte was unable to organize and supervise his staff to ensure that basic requirements such as the stocking and displaying of merchandise was done properly. He was incapable of motivating and reprimanding staff. Finally he was incapable of applying himself to his own sales responsibilities.

After leaving work, Mr. Whyte applied for weekly income benefits which were paid by the Insurer commencing March 28, 1993.

It would appear that by the spring of 1993, Mr. Whyte's substance abuse had reached a critical stage. In June, Mr. Whyte was admitted to the St. Joseph's Hospital on an emergency basis with acute gastro-enteritis. The diagnosis was drug and alcohol abuse.

In August 1993 Mr. Whyte was examined on behalf of the Insurer by Dr. Arthur Ameis. It is difficult to reconcile the different parts of Dr. Ameis' report of November 2, 1993. In one paragraph he states that there is a degree of magnification of pain experience and perhaps some degree of exaggeration, but later he acknowledges that the patient demonstrated no guile nor did he feign illness. He concluded that Mr. Whyte's complaints were psycho-emotional and that it was appropriate that he enter a pain clinic, but later suggests that he was fit to return to work. His conclusion regarding Mr. Whyte's capacity for full-time work is carefully worded and avoids any reference to his psychological health, and suggests only that he shows no

incapacity based upon his "fitness level and general health." On the whole, Dr. Ameis' report was of little assistance to me in my deliberations.

In early September 1993, Mr. Whyte was admitted to the inpatient pain clinic at the Chedoke-McMaster Hospital. It was expected that Mr. Whyte would remain in the hospital for about a month. As a condition of admittance, the patients are expected to abstain from any chemical use. Apparently, because of a statement made by Mr. Whyte to another patient that he might still be drinking excessively, the clinic staff wished to do a general blood workup. Mr. Whyte refused and discharged himself from the program after only a few days.

Mr. Whyte continued to see Dr. Zizzo and the staff at Dr. Chong's clinic over the balance of the fall and winter of 1993. He continued to complain of headaches, loss of strength in his right arm, upper back pain and lower back pain. He continued to consume excessive amounts of analgesics and alcohol.

Mr. Whyte's weekly benefits were terminated by the Insurer in November 1993 after the receipt of Dr. Ameis' report.

In the spring of 1994, an MRI of Mr. Whyte's cervical spine was conducted. The radiology report records findings of a moderate narrowing of the spinal canal at the C5-6 level from a posteriorly bulging disc and ligamentum flavum hypertrophy.

On May 30, 1995, Mr. Whyte underwent surgery to decompress the C6 nerve roots and fuse the discs.

Considerable evidence was tendered by the parties concerning Mr. Whyte's disc ailment. The Insurer took the position that the trouble was unrelated to the injuries sustained in the accident. The Insurer further argued that if Mr. Whyte remained disabled after the fall of 1993, it was because of this unrelated ailment, and that, accordingly, no further benefits were owing. The Applicant took the position that the accident either caused the ailment, or alternatively aggravated a pre-existing condition, resulting in pre-mature symptomatology. Each side presented compelling arguments. In the final analysis, because I am satisfied that in the spring of 1993 Mr. Whyte was disabled because of his poor psychological state of health, which I attribute to the motor vehicle accident, I need not decide this point.

Dr. Hansebout, the neurosurgeon who performed the surgery, saw Mr. Whyte post-operatively in August 1995, at which time he observed that he had regained full use of the right arm, and recorded that Mr. Whyte reported that he was no longer suffering headaches, neck pain, or low back pain. It is worth noting that a decompression of nerve roots in the cervical spine would not ordinarily affect complaints in the low back. The doctor opined that Mr. Whyte would be fit to start looking for work within a few weeks. As noted above, Mr. Whyte testified that since the operation, virtually all of his symptoms have resolved, that he was taking little or no medication, and he felt fit to return to work. Regardless of the cause of the disc ailment, it is apparent that the surgery in the spring of 1995 was the catharsis that was necessary to break the cycle of Mr. Whyte's illness behaviour and to return him to health.

Conclusion

I am satisfied that Mr. Whyte has demonstrated that from December 1, 1993 through to May 23, 1995, he was, as a result of the accident, substantially unable to perform the essential tasks of his occupation or profession, and that thereafter, until August 31, 1995, he was continuously prevented from engaging in any occupation or employment for which he was reasonably suited by education, training or experience. Accordingly, Mr. Whyte is entitled to a weekly income benefit at the rate of $583.19 from December 1, 1993, to August 31, 1995.

Costs

The Applicant seeks his expenses of the arbitration. I exercise my discretion and award these expenses. In the event that the parties are unable to agree on the expenses, I may be spoken to.

Order:

1. The Insurer shall pay to the Applicant weekly income benefits at the rate of $583.19 from December 1, 1993 to August 31, 1995, together with interest thereon in accordance with section 24(4) of the *Schedule*.

2. The Applicant is entitled to his expenses incurred in respect to the arbitration.

April 30, 1996

_____ _____

Stewart M. McMahon
Arbitrator

Date

SCHEDULE A

Exhibit 1 Applicant's Exhibit Brief:

Tab 4:	Pages 1 and 8
Tab 6:	Pages 5, 6, 8, 16, 17 and 18

Exhibit 2 Applicant's Medical Brief - Volumes 1 and 2:

Tab 1:	All pages
Tab 2:	Pages 1, 2, 3, 4, 5, 47 and 48
Tab 3:	Page 2
Tab 5:	Pages 9, 10, 11, 14, 15, 26 and 27
Tab 7:	Page 1
Tab 8:	Pages 2, 3, 17 and 18
Tab 9:	Pages 4 and 5
Tab 10:	Pages 1 - 11

Exhibit 3 Dr. Zizzo: Consultation Notes:
Pages 39, 71, 84, 117 and 118

Exhibit 4 Insurer's Medical Brief:

Tab 1	All pages
Tab 2	All pages
Tab 3	All pages
Tab 4	All pages
Tab 5	All pages
Tab 8	All pages

Exhibit 5 North American Life: Initial Claimant's Statement of Disability - STD Application Form

Exhibit 6 Dr. Robert R. Hansebout: Report dated August 29, 1995

Exhibit 7 Letter of Laura Ormesher to J.Claude Blouin: dated September 27, 1995